

(1942) 02 MAD CK 0005

Madras High Court

Case No: None

The Official Receiver

APPELLANT

Vs

K. Sambasiva Ayyar and Others

RESPONDENT

Date of Decision: Feb. 18, 1942

Acts Referred:

- Provincial Insolvency Act, 1920 - Section 51(1)

Citation: AIR 1943 Mad 118 : (1942) ILR (Mad) 757 : (1942) 55 LW 436 : (1942) 2 MLJ 178

Hon'ble Judges: Alfred Henry Lionel Leach, C.J

Bench: Division Bench

Judgement

Alfred Henry Lionel Leach, C.J.

In these appeals the Court is concerned largely with the effect of Section 51(1) of the Provincial

Insolvency Act and several interesting questions of law are involved.

2. In O.S. No. 4 of 1933 on the file of the Court of the Subordinate Judge of West Tanjore the 4th respondent in L.P.A. No. 38 of 1940 obtained

a money decree against one Kasinatha Aiyar, who in that year was adjudicated insolvent. In execution of the decree he attached immovable

properties belonging to the judgment-debtor. There were three lots of properties, two of them being situate in the village of Anakkudi and the third

in the village of Manikandi. The Court ordered all the properties to be sold on the same date, but in separate lots. The sales took place on the 30th

June, 1933. The two lots in Anakkudi village were sold for an aggregate sum of Rs. 7,500, which was paid into Court by the purchasers on the

day of the sale. The lot in Manikandi village was sold for Rs. 4,520, of which 25 per cent, was paid into Court immediately and the balance on the

4th July, 1933. On the 3rd July, 1933 a petition was filed in the Subordinate Judge's Court asking for the adjudication of Kasinatha Aiyar and in

due course he was adjudicated on this petition. The proceeds of the sale of the insolvent's properties in the -execution proceedings were rateably

distributed between the decree-holder and five other creditors, who had also obtained decrees against Kasinatha Aiyar. On the 7th October, 1936

the Official Receiver of West Tanjore filed an application asking the Court to direct the six creditors who had participated in the sale proceeds to

refund the sums which they had received, but the Subordinate Judge dismissed it on the ground that the properties had been sold before the

admission of the insolvency petition. The Official Receiver appealed to the District Judge of West Tanjore, who reversed the decision of the

Subordinate Judge. The District Judge considered that the properties had been sold after the admission of the petition.

3. Against the order of the District Judge allowing the Official Receiver's application two appeals were filed, one by respondents 1, 2, 4 and 6 in

L.P.A. No. 38 of 1940 and the other by the third respondent in that appeal. The appeals were heard by King, J., who held that the insolvency

petition had been admitted on the 3rd July, 1933, that is, three days after the Rs. 7,500 had been paid into Court and one day before the balance

of the Rs. 4,250 realized for the Manikandi property was paid into Court and that by reason of Section 51 of the Provincial Insolvency Act the

creditors were entitled to keep the Rs. 7,500, but they were bound to refund the Rs. 4,520, although the decree-holder was entitled to deduct

from what he had received out of the Rs. 4,250 the costs incurred by him in the execution proceedings. The learned Judge also held that the

Official Receiver was entitled to interest on the moneys which the creditors had wrongly withdrawn from the Court. These Letters Patent Appeals

have been filed by the Official Receiver. The respondents have filed . memoranda of cross objections. So far as the Official Receiver is concerned,

he only challenges the finding of King, J., that the creditors were entitled to retain the Rs. 7,500. Read together, the memoranda of cross-

objections raise all the questions decided against the creditors by the learned judge.

4. Section 51(1) of the Provincial Insolvency Act reads as follows:

Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the

receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of the admission Of the petition.

Whether the creditors are to be allowed to retain the Rs. 7,500 depends on whether King, J., was right in holding that the petition had been

admitted on the 3rd July, 1933 and that the money had been "realized" within the meaning of the section before that date. The claim to the refund

of the Rs. 4,520 stands on a different footing because three-fourths of this sum was not paid into Court until the 4th July, 1933, and by reason of

the decision of this Court in K.M.K.R.K.R. Ramanadhan Chettiar by his Agent, Rama Aiyar Vs. P.L.V.V.R. Subramania Chettiar and Another, ,

the sum of Rs. 4,250 could not be deemed to have been realized until the balance had been paid.

5. Admittedly the insolvency petition was presented to the Subordinate Judge on the 3rd July, 1933 and on that date the Subordinate Judge wrote

on the petition these words: ""Check and file emergently"". The petition was checked and taken on the file on the same day, whereupon the Court

ordered that the charges for publishing the notice of the petition should be deposited by the petitioner by the 7th July. The costs were deposited on

that date and accordingly publication was ordered.

6. It is contended for the respondents that the petition must be deemed to have been admitted when the costs of the publication were paid on the

7th July; but this contention ignores the fact that the petition was taken on the file on the day on which it was presented, and that means that this

was done after it had been checked and found to be in order. The fact that the Court ordered the costs to be paid by the 7th July in itself showed

that the Court had already admitted the petition. It has been said that the decisions of this Court in Sri Sri Narasimha Pattamahadevi alias

Padmavathi Pattamahadevi Garu Vs. Seemala Annan Naidu and Others, , and Chidambaram Pandaram Vs. Lakshminarayana Chettiar, , indicate

that the petition could not be regarded as being admitted until the notice requiring payment of the costs of publication was issued. Both those cases were, however, concerned with the first proviso to Rule 90 of Order 21, Civil Procedure Code, in which it is provided that where an application is made for an order setting aside a sale on the ground of irregularity or fraud the Court may call upon the applicant before admitting the application, either to furnish security to the satisfaction of the Court for an amount equal to that mentioned in the sale warrant or that realized by the sale, whichever is less, or to deposit the amount into Court. There is here provision for what the Court may do before admitting the application in the particular circumstances. In admitting an insolvency petition all that the Court is concerned with is seeing whether the petition itself complies with the requirements, of the law. If it does, then it admits it; and this is what happened on the date on which the petition against Kasinatha Aiyar was presented.

7. In support of the plea of the Official Receiver that the creditors were not entitled to retain the Rs. 7,500, Mr. Sitarama Rao relies on the judgment of White, C.J., in Ramanathan Chettiar Vs. Subramania Sastrial and Others, , which was accepted as embodying a correct statement of the law by Beasley, C.J., in the unreported case of V.E.R.M.K. Krishnan Chettiar v. Perianna, Chettiar C.R.P. No. 1030 of 1930. In Ramanathan Chettiar Vs. Subramania Sastrial and Others, , the properties of the judgment-debtor were attached and brought to sale. They consisted of two lots of immovable properties. The proceeds of the sale of the first lot were paid into Court, but before the proceeds of the sale of the second lot had been paid in, another execution creditor applied u/s 295 of the Code of Civil Procedure, 1882, for rateable distribution. It was held by White, C.J., who was sitting alone, that the other execution creditor was entitled to participate in a rateable distribution in the sale proceeds of the two parcels as the assets had not been realized within the meaning of the section until the whole of the proceeds of the properties sold in execution had been paid into Court, and the other execution creditor had applied before the price of the second parcel had been realized. Mr. Sitarama Rao,

says that the same principle must be applied here and inasmuch as the Rs. 4,520 which represented the sale proceeds of the Manikandi lot, was

not paid in until after the insolvency petition had been admitted, there was no realization of any of the assets in the course of execution before the

date of admission of the petition. The judgment in Ramanathan Chettiar Vs. Subramania Sastrial and Others, , was quoted in the judgment of the

Bench which decided K.M.K.R.K.R. Ramanadhan Chettiar by his Agent, Rama Aiyar Vs. P.L.V.V.R. Subramania Chettiar and Another, ,

although it is conceded that the question raised in that appeal was not the same as that raised in Ramanathan Chettiar Vs. Subramania Sastrial and

Others, . The judgment in Ramanathan Chettiar Vs. Subramania Sastrial and Others, , was also accepted by the Calcutta High Court in Barendra

v. Martin & Co. (1920) 33 C.L.J. 7 but there is a later decision in Girindranath Ray v. Kedar Nath Bidyanta (1924) 29 C.W.N. 575. In that case

different lots of properties were sold in execution under the same proclamation, but, as here, each lot was offered separately. Although the

decisions in Ramanathan Chettiar Vs. Subramania Sastrial and Others, , and Barendra v. Martin & Co. (1920) 33 C.L.J. 7 were not quoted, it

was contended that the assets could not be deemed to be received by the Court until the purchase consideration for all the lots had actually been

deposited into Court. In rejecting this contention the Court pointed out that the properties were sold separately, the sale proceeds were realized

separately, and the sale of each lot was completed when the whole of the balance of the purchase-money was deposited in Court.

8. In discussing the judgment in Ramanathan Chettiar Vs. Subramania Sastrial and Others, King, J., clearly indicated that he considered that the

case had been wrongly decided and there is much to be said in support of this opinion. In this case, however, we are not considering Section 295

of the Code of 1882 or Section 73 of the present Code. The Court is concerned with the interpretation of Section 51 (1) of the Provincial

Insolvency Act and if the words used here are to be given their ordinary meaning, the argument advanced on behalf of the Official Receiver is

unsustainable. The section says that no person shall be entitled to the benefit of the execution against the receiver except in respect of assets

realized" in the course of the execution before the date of the admission of the insolvency petition. Where property is sold in execution and the money is paid into Court, that money represents assets realized in the course of the execution. When there are several properties sold separately and the moneys are paid into Court separately the position is exactly the same. When the Rs. 7.500 was paid into Court by the purchasers of the Anakkudi properties, the money represented assets realized in the course of the execution.

9. In *Ramachandra Aiyar v. Primathi Ammal* 1910 M.W.N. 834, *Abdur Rahim, J.*, expressly held that where property is sold in lots there are separate sales, notwithstanding that all of them had taken place under one proclamation, and this principle was recognised and applied by a Bench of this Court in *Narasimhamurthi v. Official Receiver, West Godavari* ILR (1935) Mad. 438. In that case some vacant land and a house were sold separately in execution proceedings. There was material irregularity in the publication of the sale notice. The Court set aside the sale of the vacant land, but refused to set aside the sale of the house because no substantial loss had been suffered. The judgments in these cases run counter to the judgment in *Ramanathan Chettiar Vs. Subramania Sastrial and Others*, , and lend strong support for the interpretation given by *King, J.*, of Section 51 of the Provincial Insolvency Act which we accept.

10. In the memoranda of cross-objections filed by the respondents objection is taken to the judgment of the learned Judge in that it directed the respondents to refund the Rs. 4,520, but in view of the decision of this Court in *K.M.K.R.K.R. Ramanadhan Chettiar* by his Agent, *Rama Aiyar Vs. P.L.V.V.R. Subramania Chettiar and Another*, , this objection very properly was not pressed.

11. The two questions which remain for decision are (1) whether in refunding the Rs. 4,520 the sixth respondent is entitled to an allowance in respect of the costs of the suit instituted by him as well as the costs of the execution proceedings and (2) whether the learned Judge was right in directing the respondents to pay interest on the Rs. 4,520 which they withdrew from Court unlawfully. With regard to the right to deduct the costs

incurred in the suit and execution proceedings three decisions of this Court have been quoted to us, namely that of Pakenham Walsh, J., in T.L.

Swaminatha Aiyar Vs. The Official Receiver, , that of Abdur Rahman, J., in Somavarapu Balarami Reddi Vs. The Official Receiver, and that of

Wadsworth, J., in the unreported case of Nune Krishnamurthi v. Mothey Narayana Rao A.A.O. No. 175 of 1937. In T.L. Swaminatha Aiyar Vs.

The Official Receiver, , Pakenham Walsh, J., held that a creditor was entitled u/s 51 of the Provincial Insolvency Act to a charge on the sale

proceeds for the expenses incurred by him in bringing the property attached to sale and he considered that the word "benefit" in Section 51 meant

the nett realization in execution after payment of the costs. It is not clear from the judgment whether the learned Judge intended to include the costs

of the suit, but as he made reference to the provisions of Section 52 this might have been his intention. The decision of Abdur Rahman, J., in

Somavarapu Balarami Reddi Vs. The Official Receiver, , is to the effect that a decree-holder who has been required to make a refund as the result

of the adjudication of the judgment-debtor is not entitled to retain anything for costs out of the money realized by him in execution. The opinion

expressed by Wadsworth, J., in Nune Krishnamurthi v. Mothey Narayana Rao A.A.O. No. 175 of 1937, is in agreement with that of Pakenham

Walsh, J. In arriving at his decision, Wadsworth, J., considered both the judgments of Pakenham Walsh, J., and of Abdur Rahman, J. King, J.,

preferred the opinion expressed by Pakenham Walsh, J., and Wadsworth, J., but he only allowed the creditors to deduct the costs of the

execution proceedings, not the costs of the suit.

12. As we have seen, Section 51, precludes a person from retaining any benefit of the execution against the Official Receiver except assets realized

before the date of the admission of the petition. Section 52 states that where execution of a decree has issued against the property of a debtor

which is saleable in execution, and before the sale takes place notice is given to the Court executing the decree that an insolvency petition by or

against the debtor has been admitted, the Court shall direct the property, if in the possession of the Court, to be delivered to the receiver; but the

section proceeds to direct that the costs of the suit in which the decree was made and of the execution shall be a first charge on the property so delivered. The receiver is then empowered to sell the property for the purpose of satisfying the charge. The argument advanced on behalf of the creditors is this. Section 52 clearly recognises a right to a charge on the property attached in respect of the costs of the suit, if before the sale takes place notice of the insolvency is given to the Court which ordered the attachment. Therefore a decree-holder should not be in any worse position because the sale has in fact taken place.

13. This argument would be sound if Sections 51 and 52 could be read together, but in our opinion the wording of Section 51 precludes this. The sale here has taken place and the creditors are by Section 51 required to refund any benefit received by them from the assets realized in the course of the execution. We accept the argument of the creditors that they are entitled to take into account the costs incurred in the execution proceedings, as the benefit of the execution is what remains after such costs have been paid; but whether they are entitled to the costs of the suit seems to us to be quite another matter. The property was sold in execution for the purpose of realizing the decretal amount and the costs awarded. Therefore, if the decree-holder is given the costs of the suit put of the assets realized he is getting a benefit out of the execution, and Section 51 says he is not entitled to this. It may very well be that the effect of Section 51 was not fully realized when it was incorporated in the statute. It is certainly remarkable that the decree-holder is in far better position if notice of insolvency is given to the Court before the sale than afterwards, but the Court can only construe Section 51 according to its wording. We consider, having regard, as we must, to its wording, that King, J., took the correct course in allowing the creditors to deduct merely the costs of the execution proceedings and not the costs of the suit out of which those proceedings arose. It follows that in our opinion the decision of Abdur Rahman, J., in *Somavarapu Balarami Reddi Vs. The Official Receiver*, , so

far as the costs of the execution proceedings are concerned, should not be followed.

14. Coming now to the question of interest, there is no provision in the Insolvency Act conferring upon the Official Receiver the right to recover

from the respondents the Rs. 4,520 with interest, but the learned Judge allowed interest as he agreed with the District Judge that the situation was analogous to one in which restitution is ordered u/s 144 of the Code of Civil Procedure. Admittedly the provisions of that section do not apply here and interest can only be ordered on the ground that it is just and equitable to do so. Order 21, Rule 93 of the CPC states that, where a sale of immovable property is set aside under Rule 92, the purchaser shall be entitled to an order for re-payment of his purchase-money, with or without interest, as the Court may direct. We have no doubt that under its inherent powers the Court can in a case of this nature direct a refund to be made with interest, if it considers that it is just to do so. Mr. Viswanatha Sastri for the respondent says however, that the Official Receiver should not be allowed interest from any date anterior to the 7th October, 1936, when he demanded refund of the money. The sale of the property was confirmed on the 15th January, 1934, but the judgment-debtor applied for an order directing the sale to be set aside under Order 21, Rule 90. The Court refused the application and an appeal was filed. This appeal was supported by the Official Receiver and he continued to support the application until the 16th October, 1935. In these circumstances, there is substance in the contention of the respondents that interest should not be allowed from any date anterior to the date of demand and we alter the decree passed by the learned Judge to this extent.

15. The result is that both the appeals fail and will be dismissed with costs. The memoranda of cross-objections also fail, except in so far as interest has been disallowed to the receiver for the period between the date of the withdrawal of the money from the Court and the date of demand by him for payment. The parties will pay and receive proportionate costs in respect of the memoranda of cross objections.