Bala Venkatarama Chetty Vs Angathayammal and Another

Court: Madras High Court

Date of Decision: Jan. 18, 1933

Citation: 146 Ind. Cas. 204

Hon'ble Judges: Pakenham Walsh, J

Bench: Single Bench

Judgement

Pakenham Walsh, J.
The appellant is a creditor of an insolvent. The Official Receiver brought the property of the insolvent to sale and the

insolvent"s wife (1st respondent) claimed a certain share in the house. The documents relating to this house show that the insolvent"s father Krishna

Chetty sold it under Ex. F on February 26, 1912, to one Tirumalamma his sister. Krishna Chetty had three sons one of whom was the insolvent.

The others were Ramaswamy Chetty and Kandaswami Chetty. These latter two sons distinctly state in the sale deed that the house was the self-

acquired property of their father in which they had been jointly living and which they had been enjoying. On November 29, 1913, there was a

deed of partition, Ex. E between the father Krishna Chetty and the two brothers of the insolvent Rama-swami Chetty and Kandaswami Chetty.

The insolvent does not appear there. There is a statement in the deed that the persons dividing possess no immovable property. On the same day

Tirumalammal re-conveyed under Ex. G the house to Krishna Chetty and on June 9, 1916, the latter sold a portion of it under Ex. H to his son

Kandaswami Chetty, who under Ex. B on March 22, 1917, mortgaged his portion to Tirumalammal usufructuary and by Ex. A he sold it to the

insolvent"s wife (1st respondent) to clear off Tirumalammal"s mortgage. The father Krishna Chetty having died, Kandaswami Chetty succeeded to

another portion of the house which he sold under Ex. C on October 27, 1919, to the insolvent"s wife. When the insolvent"s wife made her claim,

the Official Receiver proceeded to determine the same and her claim was allowed by him. On appeal, preferred u/s 68 of the Insolvency Act, the

matter was by consent of parties remanded to the Official Receiver who on further enquiry found in favour of the insolvent"s possession. His order

was dated April 20, 1927. On July 16, 1927, the insolvent''s wife (1st respondent) put in a petition u/s 4 and on this petition her claim was

admitted by the learned District Munsif and on appeal his order was confirmed by the learned District Judge. Against this order the second appeal

is perferred.

2. The question of fact involved in the case was whether a portion of the house sold to the insolvent''s wife under Exs. A and C by Kandaswami

Chetty belonged to him or to the insolvent. The allegation for the insolvent''s wife was that the insolvent had been separated from the family before

the partition of his brothers with his father under Ex. E, that the house had been built by Krishna Chetty, the insolvent''s father with his own funds

and that the insolvent''s wife had purchased it with funds provided by her mother. In the trial before the learned District Munsif the 1st respondent

(insolvents wife) called certain witnesses and filed certain documents but the appellant (the insolvent''s creditor) contented himself with marking

certain depositions given before the Official Receiver in his enquiry. It is sought to attack the finding of fact in second appeal by saying that both the

courts ignored the evidence (Exs. IV-VIII) given for the appellant and said that he had adduced no evidence. That is not, however, correct. What

the District Munsif says is:

There is no evidence, on behalf of the counter-petitioner to show that the insolvent advanced money to the petitioner to purchase under Exs. A and

C.

This was the counter-petitioner''s case and it is correct that the counter-petitioner did not adduce any evidence on this point. The statement relied

on in the order of the District Judge is as follows:

As the learned District Munsif has properly pointed Out, the burden lay upon the Official Receiver to prove that the property to which the

respondent laid claim was the property of the insolvent. He did not let in any evidence to prove that.

He"" here evidently refers to the Official Receiver. The statement is perfectly correct and it is a matter of some importance. The Official Receiver

had himself come to the conclusion that the property belonged to the insolvent. He might, therefore, quite easily have himself put in a petition to

annul the sale deeds in favour of the insolvent''s wife if he had been strongly convinced of the falsity of her claim. But he neither did this nor did he

give or produce any evidence leaving the whole matter to the present appellant. There is, therefore, nothing is show that the trial and Appellate

Courts did not consider Exs. IV to VIII which were filed as evidence by the present appellant. They had ample evidence for the finding of fact

based on documents, one of which goes back to 1912 long anterior to the insolvency proceedings. The documents bear out the respondent''s

case. It is not open to me in second appeal to disturb this finding of fact.

3. As regards the question of onus the whole evidence was before the court and as observed above while the 1st respondent put in cogent

documentary evidence the appellant contended himself merely by filing statements given by the witnesses before the Official Receiver.

4. The next point argued is that the 1st Respondent having failed to appeal against the order of the Official Receiver could not bring a suit u/s 4. It

is further argued that the consent of the parties to the matter being remanded to the Official Receiver validates the proceedings and that at the best

it is merely an irregular procedure on the part of the Official Receiver to have adjudicated the matter. It is not denied that the Official Receiver had

no jurisdiction-to determine a claim of this sort. Veliappa Chettiar v. Ramanathan Chettiar 78 Ind. Cas.1017 : 47 M. 446 : 46 M.L.J. 80 : 19

L.W. 251 : (1924) M.W.N. 163 : AIR 1924 Mad.529 is clear authority on that Point. That case also indicates that the remedy against an order on

a claim petition passed by the Official Receiver without jurisdiction is not by way of appeal u/s 68 of the Provincial Insolvency Act, but by moving

u/s 4. It is true that in that case it was held that the party who appealed u/s 68 was not really affected by the Official Receiver''s order. At the same

time it was held that if he had been aggrieved the remedy was by way of an application u/s 4. If that view is correct it follows that the argument that

no appeal having been filed u/s 68, Section 4 cannot be invoked entirely vanishes. The meaning of the words in Section 4 ""subject to the provisions

of this Act"" has been considered in several cases, but none has been quoted in which it has been held that Section 4 would not be applicable

because an appeal had not been preferred u/s 68 against an order which the Official Receiver had no jurisdiction to pass. It is to be noted that the

relief which the respondent wanted u/s 4 was much larger than anything she could have got by an appeal u/s 68. An order in her favour u/s 68

would only have set aside the Official Receiver''s order, but what she wanted was to have her claim to possession of the property recognized. It

would seem, prima facie, unreasonable that she should be barred from seeking the chief remedy she wanted u/s 4, because she had not sought a

lesser one by an appeal u/s 68.

5. Taking the cases quoted for the appellant as to the meaning of the words ""subject to the provisions of this Act"" Radha Krishna Thakur v. Official

Receiver, Dinesh Chandra Roy C. 32, 642 does not help us on the point. It merely lays down that the words restrict the power conferred by the

section only to this extent that it may not be exercised in any such manner as would be in conflict with any provision in the Act. The-decision there

was, that u/s 4 the Insolvency Court can deal with and decide questions of title as between the Official Receiver and a stranger to property which

is claimed on the one hand as the insolvent"s; and on the other as the stranger"s. Alagiri-subba Naik v. Official Receiver of Tinnevelly 132 Ind.

Cas. 641 : 61 M.L.J. 820 : Ind. Rul (1931) Mad. 673 : 34 L.W. 105 : AIR 1931 Mad. 745 : 54 M. 989, held that Section 4 was subject to

Section 53. For instance, while the Insolvency Court must dispose of a matter falling u/s 53. it cannot by taking the same matter up u/s 4 refuse to

deal with it. In that case it was held that a decision u/s 53 is not one u/s 4 and so no second appeal lies against it.

6. For the appellant is quoted Chittammal v. Ponnusami Naicker 92 Ind. Cas, 573 : 50 M.L.J. 180 : 23 L.W. 91 : (1926) M.W.N. 121 and 172 :

AIR 1926 Mad 363 : 49 M.762 There a lessee under the Official Receiver applied to be, given possession and the District Judge, made an order

u/s 56 (3). It was held that this was hot an order passed u/s 4 and did not finally determine the rights of the parties. None of the cases quoted by

either side are in my opinion of assistance except Veliappa Chettiar, v. Ramanathan Chettiar 78 Ind. Cas. 1017 : 47 M. 446 : 46 M.L.J. 80 : 19

L.W. 251 : (1924) M.W. N 163 : AIR 1924 Mad.529 where the implication would seem to be that, so jar from the failure to appeal u/s 68

against an order of this sort made by the Official Receiver being a bar to an application u/s 4, the correct procedure is u/s 4 and not by appeal u/s

68. Charu Chandra Bhattacharjee v. Hern Chandra Mukerj 47 Ind. Cas. 62 47 Ind. Cas. 62 quoted for the appellant was before Section 4 had

been introduced and so is not an authority on the present Act.

7. The next argument is that the respondent having acquiesced in the order remanding the matter for enquiry to the Official Receiver is barred from

questioning his orders.

8. This is connected with the question whether consent of parties can give jurisdiction to a court which it has not got. The law seems to be well-

settled that it cannot. If Vishnu Sakharam Nagarkar v. Krishna Rao 11 B. 153 at p.171, means otherwise, it must be taken to have been overruled

by Legard v. Bull 9 A. 191 the leading case on the subject. The Same thing was laid down t gain by the Privy Council in Meenakshi v.

Subramanaya Iyer 11 M. 26 where their Lordships say that when a Judge has no jurisdiction over the subject-matter of a suit, parties cannot by

their mutual consent convert it into a proper judicial process. See also remarks, in Kidri Prasad v. Khosal 75 Ind. Cas. 590 75 Ind. Cas. 590.

9. In this connection it may be noted that the Official Receiver is not even a court but a mere Executive Officer: Nilmony Chowdhury v. Durga

Charan 46 Ind. Cas 377: 22 C.W.N. 704. He is not entitled to take evidence in an enquiry u/s 53 though ordered to do so by the District Judge:

Krishna Iyer v. Official Receiver Tinnevelly 75 Ind. Cas. 445 75 Ind. Cas. 445. It was held in that case that as the parties had consented to his

taking evidence the irregularity was cured. That is quite different from saying that an order by him in an enquiry which he has no power to make,

such as the present, will be validated by consent of parties.

10. So limited is the power of the Official Receiver and so subject to interference that any person can ask the court to modify or reverse a decision

of the Official Receiver: Datta Ram v. Deoki Nandan 58 Ind. Cas. 6 : 1 Lah. 307 : 3 P.L.R. 1921, followed in Haveli Shah v. Zohrajan 133 Ind.

Cas. 876 : AIR 1932 Lah.84 : 32 P.L.R 689 : Ind. Rul. (1931) Lah. 844.

11. The appellant relies on Ramchandra Rao v. Gurzaju 76 Ind. Cas. 977 : 18 L.W. 282 : AIR 1924 Mad. 147. There a father of a Hindu family

with a son was adjudicated insolvent on his own application. The Official Receiver proceeded to sell the family properties in spite of a protest by

the son that he was not liable. The Official Receiver did not decide the claim of the son but simply ordered that the son''s objection should be

notified to the bidders at the time of the sale. In appeal it was held that the Official Receiver should have investigated the son''s liability before

ordering sale but that the son having failed to appeal u/s 68 the objection could not be gone into.

12. That case is clearly distinguishable from the present. The question of the power of the Official Receiver to sell an undivided son''s property for

the insolvent''s debts is a difficult one. According to that case the learned Judges held that he could have gone into the question of the son''s liability

and had he found him liable could have sold his share but that he should not have sold it without first determining the question. His failure to

determine this point first was clearly a mere irregularity in procedure and not a case of acting without jurisdiction. Consequently the son, having

failed to appeal u/s 68 could not raise the point afterwards.

13. It was attempted to be argued before me that in the present case there was a mere irregularity in procedure. This cannot possibly be

maintained. We have to deal, not with the order of remand by the court which was competent to decide the matter, but with the decision of the

Official Receiver who had no jurisdiction to decide the matter at all. Even as regards the remand order, to remand a matter for decision to a person

who has no jurisdiction at all to decide it, is not in my opinion a mere irregularity. However, it is not necessary to determine that point.

14. A faint suggestion was made before me that the parties are to be regarded as having made the Official Receiver an arbitrator, and a remark in

Legard v. Bull 9 A. 191 is quoted where their Lordships after the sentence quoted above that when the Judge has no inherent jurisdiction over the

subject-matter of the suit the parties cannot by their mutual consent convert it into a proper judicial process say:

although they may constitute the Judge their arbitrator and be bound by his decision on the merits when these are submitted to him.

15. This is not the case here for the court whose decision was sought u/s 4 was not the Official Receiver. Arbitration outside a suit is a fact to be

established like anything else and presumably if proved in a case like the present is then only useful if estoppel could be pleaded and there is no

estoppel unless the other party has changed his position on the faith of the representation. It is much too late to go into any question of that sort

now.

16. It was the jurisdiction of the District Munsif that was challenged in the proceedings, and, in first appeal, to judge from the appellate order, none

of the present legal points raised as to want of jurisdiction to try the case u/s 4 on account of the failure to appeal u/s 68 were even urged in arguing

the appeal, let alone any theory of arbitration apart from court. The appeal fails and is dismissed with costs.