(1941) 08 MAD CK 0050

Madras High Court

Case No: None

In Re: T.A. Balakrishna Odayar (Deceased) — APPELLANT

Vs

RESPONDENT

Date of Decision: Aug. 29, 1941

Acts Referred:

- Presidency Towns Insolvency Act, 1909 - Section 68

Citation: AIR 1942 Mad 586 : (1942) ILR (Mad) 189 : (1943) 56 LW 268 : (1943) 1 MLJ 214

Hon'ble Judges: Krishnaswamy Ayyangar, J; Krishnaswamy Aiyangar, J

Bench: Division Bench

Judgement

Krishnaswamy Ayyangar, J.

This is an application taken out by the Official Assignee with respect to a settlement made by his predecessor-in-office of a claim to preferential payment made by the respondent. By that settlement the then Official Assignee had agreed to pay to the respondent a sum of Rs. 12,000 against a claim of Rs. 24,000 or thereabouts. In pursuance of the settlement, he paid a sum of Rs. 6,000 and there still remains a balance of Rs. 6,000 to be paid on foot of the settlement. The Official Assignee who entered into this settlement did so without applying for and obtaining leave of the Court u/s 68 of the Presidency Towns Insolvency Act (III of 1909). The present Official Assignee has very properly placed the matter before the Court with the request that the Court may either give its approval to the settlement or give such other directions as the Court may consider it proper. The question thus raised by the present application is one of considerable importance likely to recur frequently and it is desirable that I should take this opportunity to lay down the correct rule for guidance in future.

2. Section 68 of the Presidency Towns Insolvency Act enacts as follows:

(1) Subject to the provisions of this Act, the Official Assignee shall, with all convenient speed, realise the property of the insolvent, and for that purpose may:

(a) sell all or any part of the property of the insolvent;

(b) give receipts for any money received by him; and may, by leave of the Court, do all or any of the following things, namely:

(c) carry on the business of the insolvent so far as may be necessary for the beneficial winding up of the same;

(d) institute, defend or continue any suit or other legal proceeding relating to the property of the insolvent;

(e) employ a legal practitioner or other agent to take any proceedings or do any business which may be sanctioned by the Court;

(f) accept as the consideration for the sale of any property of the insolvent a sum of money payable at a future time or fully paid shares, debentures or debenture stock in any limited company subject to such stipulations as to security and otherwise as the Court thinks fit;

(g) mortgage or pledge any part of the property of the insolvent for the purpose of raising money for the payment of his debts or for the purpose of carrying on the business;

(h) refer any dispute to arbitration, and compromise all debts, claims and liabilities, on such terms as may be agreed upon;

(i) divide in its existing form amongst the creditors according to its estimated value, any property which, from its peculiar nature or other special circumstances, cannot readily or advantageously be sold.

(2) The Official Assignee shall account to the Court and pay over all moneys and deal with all securities in such manner as is prescribed or as the Court directs.

3. The powers and duties of the Official Assignee fall into two categories. Those in sub-section 1, Clauses (a) and (b), can be exercised without the Official Assignee ". seeking the leave of the Court. But in regard to the others described in Clauses (e) to (i) the section says that he may do all or any of them by leave of the Court. The point that arises for consideration is whether and how far the omission of the Official Assignee to seek and obtain the leave of the Court affects the validity of acts done by the Official Assignee under Clauses (c) to (i) aforesaid, more particularly the question of the validity of compromises entered into by him without leave of Court. It may at once be mentioned that Clause (h) does not make any distinction between compromises of claims in suits already instituted and those in respect of claims not brought before the Court. The contention of the respondent is that the absence of leave does not render the act of the Official Assignee invalid or inoperative; only the

Official Assignee will lose the benefit of a protection he would have got for himself had he obtained the leave. At first sight the proposition may seem, as it did seem to me, to run counter to the language of the section. But a consideration of the history of this section and of the principle underlying it, as explained by the Bankruptcy Court in England in cases which have come before it on similar provisions in the English Bankruptcy Acts, has convinced me that the respondent is right.

4. In Lee v. Songster (1857)2 C.B. 1 : 140 E.R. 310 the Court had to consider the effect of Section 153 of the Bankruptcy Act, 1849--12 and 13 Victoria, Chapter 106, which enacted that the Assignees with the leave of the Court upon application to such Court, but not otherwise, may commence, prosecute or defend any action at law or any suit in equity which the bankrupt might have commenced, prosecuted or defended and in such cases the costs to which they may be put in respect of such suit or action shall be allowed out of the proceeds of the estate of the bankrupt. The action was one brought in the name of the Official Assignee for the recovery of a debt due from the defendants to the bankrupt and had been commenced without obtaining the leave of the Court. The defendants moved for a rule calling upon the plaintiff to show cause why all proceedings in the case should not be stayed on the ground that the action had been brought without first obtaining the leave of the Court pursuant to Section 153 of the Bankruptcy Act aforesaid. It was urged that the object of the section manifestly was to prevent the estate of the bankrupt from being squandered by bringing reckless actions. For the plaintiff it was answered that the section merely enacted a provision for the internal management of the bankruptcy and the only persons who could complain of a breach were the creditors and such breach could not be made the ground of objection by the defendants. The point being a new one, the Court took time to consider it but in the end pronounced its judgment discharging the rule. Williams, J., who delivered the judgment of the Court, conceded that the language of the section at first sight appeared strongly to support the rule. But on consideration the learned Judge was of opinion:
...that the statute intended to make the obtaining of the requisite leave a matter only between the assignees and the Court of bankruptcy, and not at all between the assignees and the other party to the suit. The enactment, it must be observed, extends to the defence by the assignees of actions which the bankrupt might have defended, as well as to the commencement and prosecution of actions which he might have commenced and prosecuted. And, if the assignees were to defend such an action without having obtained the leave of the Court of bankruptcy, it is difficult, if not impossible to suggest how the Court of Common Law in which the action was pending could interfere with the defendant''s proceedings.

5. The learned Judge also explained that the neglect of the Official Assignee to obtain the requisite leave would only result in his not being allowed his costs out of the bankrupt''s estate and might also subject him to the disciplinary jurisdiction of the Court.

6. Learning v. Lady Murray (1879) 13 Ch.D.123 is a case in which the Court had to construe the effect of Section 27 of the Bankruptcy Act of 1869--32 and 33, Victoria, Chapter 71 which ran as follows:

The trustee may, with the sanction of the committee of inspection, do all or any of the following things:

(1) Mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts;

(2) Refer any dispute to arbitration, compromise'' all debts, claims and liabilities, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist between the bankrupt and any debtor or person who may have incurred any liability to the bankrupt, upon the receipt of such sums, payable at such times, and generally upon such terms as may be agreed upon;

(3) Make such compromise or other agreement as may be thought expedient with creditors, or persons claiming to be creditors in respect of any debts provable under the bankruptcy;

(4) Make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the bankrupt, made or capable of being made on the trustee by any person or by the trustee on any person;

(5) To divide in its existing form amongst the creditors, according to its estimated value, any property which from its peculiar nature or other special circumstances cannot advantageously be realised by the sale.

The sanction given for the purposes of this section may be a general permission to do all or any of the above-mentioned things, or a permission to do all or any of them in any specified case or cases.

7. In this case the trustee in bankruptcy brought an action for the recovery of a sum of money due on a policy of insurance effected on the life of the bankrupt. The defendants to the action Were the insurance company and also another person who claimed a portion of the insurance amount on a mortgage alleged to have been executed by the bankrupt. The action was settled on a compromise by which the trustee agreed to the payment of a part of the policy amount to the claimant. The trustee having resigned his office, was succeeded by another trustee who refused to be bound by the settlement on the ground that neither the consent of the committee of inspection nor of the Court of bankruptcy had been obtained for the arrangement, and accordingly commenced the action for the recovery of the money paid to the claimant. The defendant having demurred, Jessel, M.R., upheld the demurrer on the ground that the power conferred by the section was a power for the trustee to do certain things so as to bind the creditors of the bankrupt and the creditors only, and that the case was not dissimilar to a compromise made by him

out of Court in which case a person taking under the compromise would not be entitled to say that the trustee made it without the consent of the committee. To some extent the decision is complicated by a reference to Section 83 of the Act of 1869 which conferred a power on the trustee to sue and be sued without the consent of the committee and by the further circumstance that there was an order of Court made on consent in the way. But I do not think that this affects the correctness of the principle which underlies the decision. This is made clear by the decision in In re Branson : Ex parte The Trustee (1914)2 K.B. 701 in which the Court had before it "an application by the trustee for an order that the debtor''s solicitors should deliver up to him all books, papers, and documents in their possession belonging to the bankrupt together with a full cash account showing the dealings " with him. The sanction of the committee of inspection had not been obtained at the time when the motion was commenced, indeed no committee of inspection had been appointed at the time, but the defect was made good later, and the question resolved itself into a question of costs as the defendants expressed their readiness to comply with the motion. Section 57 of the Bankruptcy Act of 1883--46 and 47 Victoria, Chapter 52--contained the following provision:
The trustee may, with the permission of the committee of inspection, do all or any of the following things:

(1) Carry on the business of the bankrupt, so far as may be necessary for the beneficial winding up of the same;

(2) Bring, institute, or defend any action or other legal proceeding relating to the property of the bankrupt.

8. Horridge, J., stated the point for decision in the following words:

The question is whether the obtaining of that sanction is a matter for the protection of the estate so that the trustee may not incur solicitors'' costs without getting the sanction of the committee, or whether the section creates a condition precedent to the right of the trustee to take proceedings against any third parties.

9. The learned Judge''s decision was

that the obtaining of the consent of the committee of inspection to the taking of proceedings is merely a provision for the protection of the estate and is not one which the respondent or the defendant in any proceedings by the trustee is entitled to avail himself of in answer to those proceedings.

10. The effect of these cases is, in my opinion, to lay down the proposition that the want of leave does not vitiate the act of the Official Assignee or render it null and void as between him and third parties, whatever its consequence may he in relation to his right to get his costs, charges and expenses out of the estate.

11. There are also a few Indian decisions to which reference may be made. In Laduram Nathmull v. Nandalal Karuri ILR (1919 Cal. 555 the facts were these : The mortgagee under certain mortgages executed by an insolvent brought suits to enforce them, impleading the Official Assignee as a party. The subject-matter of the suits was referred to arbitration with the consent of the Official Assignee and an award came to be passed. The award was attacked on the ground that the Official Assignee had not obtained the leave of the Court before consenting to the reference. Rankin, J., as he then was, accepted the principle of the English decisions referred to above and observed:

The Official Assignee is a person in whom there is vested by law all the property of the bankrupt; it is his property, of course not that he may deal with it for himself, but that he may deal with it as a trustee for the benefit of the creditors, but in law it is his property; and it seems to me to be settled now by the authorities, that those provisions which have come into our Insolvency Act from the English Act, and which require the leave of the Court, are administrative provisions only; they are matters between the Court and the trustee; they are matters which may give creditors personal rights of action against the trustee; they are not matters which can be set up when the trustee as the person in whom the bankrupt''s property is vested is meeting his enemy in the gate and is at arm''s length with the third party outside the bankruptcy altogether. That seems to be the result of Lee v. Songster (1857)2 C.B. 1 ; 140 E.R. 310 the other case which was decided by Sir George Jessel, Learning v. Lady Murray (1879) 13 Ch.D. 123, and the last case before Horridge, J., In re Branson : Ex parte The Trustee (1914) 2 K.B. 701 ". I do not think it is a matter with which the other party to an action has any concern at all, whether the trustee has behaved himself vis-a-vis his Court, vis-a-vis his constituents the creditors, or whether he has done that which he is not strictly entitled to do. They are entitled to look to the trustee just as they would be entitled to look to the insolvent had he never been adjudicated, and I am, therefore, against Mr. Sircar''s contention that the Official Assignee having assented to this submission on his own authority the award is invalidated by reason of that fact.

12. The learned Judge, however, felt bound to set aside the award upon other grounds. An appeal was preferred against the decision of Rankin, J., but the point did not arise in the appellate Court and there is therefore nothing said in its judgment on it. In The Official Receiver, Coimbatore District v. Kanga (1921) 42 M.L.J. 53 ; ILR Mad. 167 which was a case which proceeded on the language of Section 20 of the Provincial Insolvency Act III of 1907, Spencer and Ramesam, JJ., held, following the English decisions referred to above that, where an Official Receiver institutes a suit without the leave of the Insolvency Court, it is not a valid defence to the suit to say that such leave had not been obtained. The obtaining of the leave was held to be a matter between the Receiver and the Court whose officer he was, and the want of leave could not be relied on by defendants in a suit, the only result being that the Official Receiver would be prosecuting the suit at his own risk in the matter of costs

and cannot charge them on the insolvent''s estate if he loses.

13. A contrary note appears to be struck in C. E. Grey v. Lamond Walker & Co. 17 C.W.N. 578 which was decided by Fletcher, J., sitting on the original side. The suit was one by the Official Assignee to recover damages from the defendant company for failure to deliver goods in pursuance of certain forward contracts. entered into by the insolvent. After holding that the Official Assignee was in fact carrying on the business of the insolvent in respect of these contracts, the learned Judge doubted whether the Official Assignee had the power to do so without the sanction of the Court. He observed, ,

that the only two powers that he (the Official Assignee) has got in acting of his own motion are, first of all, to sell the property and, secondly, to give receipts

14. But the expression of this opinion was not only obiter, but made without reference to the decided cases on the point.

15. In the light of the decisions referred to above, I am convinced that the settlement arrived at between the Official Assignee and the respondent is valid and binding on the parties and that effect must be given to it. My direction to the Official'' Assignee is that he is bound to fulfil the terms of the settlement. The Official Assignee will pay the costs of the respondent out of the estate in his hands.