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Suresh Chandra Roy Choudhury Vs Prakash Krishna Deb and Others

Court: Calcutta High Court

Date of Decision: March 21, 1940

Judgement

McNair, J.
This is an application by a decree-holder for appointment of the Official Receiver as a Receiver in execution and for an order

that the Official Receiver do pay to the Sheriff the sum of Rs. 885-4-3 in his hands and belonging to the judgment-debtors. The decree-holder

sued the Defendants who carried on business in the name of Basudeb & Co. for goods sold and money lent and on December 22nd, he obtained

an order for attachment before judgment of money payable by the Official Receiver to Basudeb & Co. It appears that the Official Receiver had

from time to time employed Basudeb & Co. to carry out work for some of the estates over which he had been appointed Receiver, and those

estates owed Basudeb & Co. over Rs. 6,000. The actual sum now in the hands of the Official Receiver is Rs. 885-4-3 which the Petitioner now

seeks to have paid to him.

2. The decree-holder obtained his decree on January 19th, 1940, for Rs. 4,170-9-6 and costs, and on the 23rd January, he attached a sum of Rs.

4,170 in the hands of the Official Receiver and payable to the judgment-debtors and obtained a payment order on January 24th.

3. The Official Receiver on January 29th wrote to the decree-holder to say that Mr. Pal had been appointed the Receiver of the assets of Basudeb

& Co. in a suit brought by one of the partners in that firm for dissolution of partnership.

4. The Official Receiver also informed the decree-holder that there were other attachments and that he had made payments before he was

informed of Mr. Pal''s appointment. There are numerous creditors of Basudeb & Co. and about the time when this suit was instituted the first

Defendant, one of the partners in the firm, disposed of immovable property alleged to be standing benami in his wife''s name; it is alleged that the

partnership suit is a collusive suit and that the partners have obtained the appointment of Mr. Pal as Receiver in order to deprive their creditors of

the assets. Such a device is frequently adopted by debtors who apprehend execution and the creditors'' remedy is either to apply to the Court

which appointed the Receiver for leave to attach some specific property or for an order charging the assets in the hands of the Receiver on giving

an undertaking to deal with the charge according to the orders of the Court.

5. There is no doubt that the application for a charging order must be made to the Court by which the Receiver was appointed. In the present

instance this Court appointed the Receiver in the partnership suit and passed the decree in the present suit but an objection is raised that a charging

order can only be made in the partnership suit. Technically the application should be made in the partnership suit, but all the parties in both suits are

present, including the Receivers, and the same difficulties do not arise in this Court which might arise in England where the creditors'' suit would in

all probability be in the King''s Bench Division, and the partnership suit in the Chancery Division of the High Court. In the present instance I see no

objection to a charging order being made on this application and the cause title can be formally amended.

6. The decree-holder took out this application by Tabular Statement on January 19th, 1940, to attach (1) the money payable by the Official

Receiver, (2) money payable by the Bhatpara College and (3) the immovable properties of Kamal Chand Bose, one of the partners, and

attachment was ordered under Or. 21, rr. 52, 46 and 54. Thereafter he was informed by the Official Receiver of the appointment of Pal as

Receiver in the partnership suit over not only the partnership assets but also over the immovable property of Kamal Chand. Thereupon the relief

sought was amended by adding a prayer for a Receiver in execution.

7. The application before me is now confined to the money due from the Official Receiver. The applicant seeks payment of the Rs. 885 in the

Official Receiver''s hands to be rateably distributed between him and other decree-holders who have attachments, and for the Official Receiver to

be appointed Receiver in execution of the balance that comes into his hands.

8. The judgment-debtor objects to the payment on the ground that, although the sum of Rs. 885 is in fact in the Official Receiver''s hands, it should

be in the hands of the Receiver Pal who has applied to the Official Receiver for possession. The fact remains that the Receiver Pal has not actually

taken possession and it is a well-established rule which was declared by this Court in Kanailal v. Manoo Bibi 23 C.W.N. 1952 s.c. 29 C.L.J. 424

(1919) that until a Receiver''s appointment has been perfected and the Receiver is actually in possession a creditor is not debarred from

proceeding to execution. The funds in question would no doubt be partnership assets but they are not in Mr. Pal''s possession and they have not

been brought into Court to the credit of the suit.

9. If payment is considered undesirable at this stage the applicant seeks a charging order in the form of the order in Kewney v. Attrile L.R. 34 Ch.

Div. 345 (1886).

10. It appears that the Official Receiver has employed the judgment-debtors to carry out work for some 20 different estates of which he has

charge and he is unable to say when those estates will place funds in his hands to pay their debts.

11. The Official Receiver made certain payments to the Sheriff prior to receiving notice on January 24th of the appointment of Mr. Pal, but

although the validity of these payments was called in question, I hold on the facts that no blame attaches to the Official Receiver and that he was

justified in making the payments. I am further of opinion that payment should not be made as prayed by the applicant, but that he should be given a

charging order on the funds in the hands of the Official Receiver or which may hereafter come into his hands for discharge of his debts to the

judgment-debtors, provided that such charge shall be dealt with under the orders of this Court.

12. Creditors of the Defendant firm, who have obtained decrees in the Small Cause Court and orders for attachment in execution of their decrees,

have appeared on this application and while they support the prayer for a charging order they oppose the payment to the Petitioner which may

prejudice their rights.

13. The effect of a charging order will be to give the judgment-creditors priority over creditors who have not proceeded to judgment and inasmuch

as distribution will only be made under the further orders of the Court, the rights of all the judgment-creditors and of the Official Receiver will be

safeguarded.

14. It is argued that the Official Receiver is in the position of a garnishee and that attachment could only be made on notice to him under the

garnishee rules. Those rules contemplate attachment under Or. 21, r. 46 or 51 but the attachment in the present instance was under Or. 21, r. 52.

In either event the Official Receiver would require notice either as garnishee or as a public officer and as no formal leave to attach was obtained on

the 23rd January, the decree-holder asks that this formality be now rectified. Formal leave is now given to attach the property in the hands of the

Official Receiver. With regard to the appointment of the Official Receiver as Receiver in execution it is argued that this is an exceptional form of

relief and not justified by the facts. Undoubtedly relief by the appointment of a Receiver in execution is a form of relief which is only granted in

exceptional circumstances, but in my opinion the principles which have been applied to this form of equitable relief by the decisions of the English

Courts are not equally applicable to Courts in India where no hard and fast line can be drawn between legal and equitable remedies. The same law

is administered by the Courts which are both Courts of Equity and Common Law. Execution by appointment of a Receiver is one of the methods

of execution provided by sec. 51 of the Code and so long as in the circumstances of the case it is the best means of securing the rights of the

judgment-creditor without causing undue hardship to the judgment-debtor there does not appear to me to be any valid reason for avoiding this

method of execution.

15. To appoint the Official Receiver as Receiver of the balance of the sum of Rs. 6.161-2-9 when it comes into his hands would be not only just

and convenient but it should lessen the costs of execution. There will be an order accordingly. That balance will form a first charge rateably with the

other judgment-creditors in respect of the applicant''s claim and costs in this suit.

16. The Official Receiver is entitled to retain his costs as between attorney and client out of the monies in his hands.

17. The judgment-creditors who have appeared may add their costs to their respective claims. Costs of all parties as of a motion.

Panckridge, J.

06.05.1941

18. (Subsequently, by an order of this Court made on August 20, 1940, by the Hon''ble Mr. Justice Lort-Williams, the partners of Messrs.

(Basudeb & Co., were adjudicated insolvents at the instance of a creditor, Ramzan Mistry. Thereafter by a letter dated August 23, 1940, Messrs.

Bhattacharjee & Sil, Attorneys for the adjudicating creditor, intimated to the Official Receiver (who had been appointed Receiver in execution) of

the said adjudication order and after stating that the assets of the said Messrs. Basudeb & Co., including the debts due to them had vested in the

Official Assignee of Calcutta requested the Official Receiver not to make payment to any one other than the said Official Assignee.

19. Thereupon on the 8th of February, 1941, the Receiver applied for direction as to how the funds in his hands should be distributed.

20. Notice of such application was served on the Official Assignee and the creditors in whose presence the charging order had been made.

21. The application was opposed by one Girindra Nath Bhattacharjee, a decree-holder who claimed to participate in the distribution on the ground

that he had applied for execution of his decree prior to the date of the charging order and as such, although he was not a party to the charging

order, he was entitled to the benefit thereof.

22. The rights of some of the creditors in whose presence the charging order had been made were disputed on the ground that on the date of the

said order they had merely obtained orders for attachment before judgment and in any event had not made any application for execution. Another

creditor Benarashi Lal Shaw who had not even obtained a decree also opposed the application and challenged the validity of the charging order.

23. Thereupon direction was obtained from the Court for distribution of the funds rateably amongst the judgment-creditors who had applied for

execution of the decree before the charging order had been made; and it appearing that only 3 creditors, viz. Suresh Ch. Chawdhury, N.N. Paul

Bros, and Girindra Nath Bhattacharjee, had applied for execution before the date of the said order the Court gave, inter-alia, the following

directions:--

I.P. Mukherji for the Official Receiver.

R. Chaudhuri for Suresh Ch. Roy Chowdhury Sanker Banerji for Nagendra Nath Paul Bros.

B.C. Mitter for Girindra Nath Bhattacharjee.

S.K. Basu for Benerasi Lal Shah.

Panckridge, J.-

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24. That regarding the sums payable by the said Official Receiver to Basudeb and Company to the extent of Rupees Six thousand one hundred

and Sixty one, annas two and pies nine for which he admits liability the said Official Receiver do after deducting his own costs, commission and

expenses as hereinafter mentioned-rateably pay the balance thereof to the said judgment-creditors, Suresh Chandra Roy Chawdhury, Nagendra

Nath Paul and Brothers and Girindra Nath Bhattacharjee towards their respective claims under the decrees made in their favour and their

respective costs awarded under the said decrees taxed or to be taxed by the Taxing Officer of tills Court in respect of their respective suits and

respective costs of and incidental to the application which resulted in the Order made herein and dated the twenty-first day of March One

thousand nine hundred and forty as well as their respective costs of and incidental to this application including fees to Counsel, all such eosts to be,

if necessary, taxed by the said Taxing Officer. ****