

(1936) 05 CAL CK 0022

Calcutta High Court

Case No: Suit No. 339 of 1930

Grahams Trading Co. (India), Ltd.

APPELLANT

Vs

Narrottamdas Harjeebandas and
Others

RESPONDENT

Date of Decision: May 28, 1936

Final Decision: Dismissed

Judgement

McNair, J.

This is an application by the Sheriff for payment of poundage in the following circumstances:--

On February 26th, 1936, a suit was filed on three promissory notes and an order was made for attachment before judgment of the goods and stock-in-trade of the Defendant.

That interim order was made absolute on March 2nd, 1936.

2. On March 20th, 1936, the suit was heard and the Plaintiff obtained a decree for the amount claimed with interest and costs and an order was made that the attachment should continue.

3. On March 30th, 1936, the Plaintiff applied for the sale of the attached goods, and it is clear that that application was made under Or. 39, r. 6 on the ground that the goods were perishable.

4. In the meantime on March 2nd, an application had been filed by a creditor of the Defendant for his adjudication as an insolvent and an order was made on that date appointing the Official Assignee receiver of the Defendant's goods and stock-in-trade, pending the hearing of the application.

5. On March 30th, the Plaintiff made the application which I have already mentioned for sale of the attached goods, and on the following day an order was made, on the representation of the Official Assignee, that the Sheriff should make an inventory of

the goods and stock-in-trade and deliver the same to the Official Assignee on payment of the Sheriff's charges; the Official Assignee being directed to sell the goods and to hold the sale-proceeds subject to the further orders of the Court. There was a further direction that the decree-holder should pay the Sheriff's poundage in the first instance.

6. On April 9th, 1936, the matter was again mentioned to me when I directed that the Sheriff should give up possession and expressed the view that he was not entitled to poundage.

7. On April 21st, the Defendant was adjudicated an insolvent. On the same day the Sheriff applied to the Registrar for a direction that the receiver should pay to the Sheriff his poundage as directed by my order. The Registrar directed the Sheriff to make a substantive application on notice to the parties concerned and this application is the result.

8. The fees allowable to the Sheriff and his officers are provided under Chap. XXXVI, r. 77 and the sub-rule applicable here is sub-rule 22 which provides :

The Sheriff is entitled to poundage on sums levied by him in execution, or in the event of the claim being satisfied, compromised, or settled, upon the amount of such satisfaction, compromise, or settlement.

9. The Sheriff admits, as he is bound to admit, after the decision of this Court in *Pickford v. Roy* 26 C. W.N. 673 (1921), that he is not entitled to any poundage on an attachment before judgment, but he contends that on March 20th, when the decree was passed in favour of the Plaintiff and an order was made that the attachment should continue, that that order was an order in execution which entitled him to poundage. He urges that although the goods may now be handed over to the Official Assignee for sale under the orders of this Court that he was in fact the instrument by which the attachment was made and that he is entitled to poundage if the money is obtained either directly or indirectly by reason of the seizure.

10. There was in fact no order for execution. The goods had been attached before judgment and at the time when the judgment was delivered an order was made that the attachment should continue.

11. Or. 21 of the CPC lays down the method by which applications for execution shall be made. Rule 11 of that order provides in sub-r. (1) for execution by arrest and sub-r. (2) provides:

Save as otherwise provided by sub-rule (1) every application for execution of the decree shall be in writing and shall contain in a tabular form the particulars there enumerated.

12. Chap. XXVII, r. 10 of the Original Side Rules and Orders of this Court further provides:--

An application for execution shall be in a certain form and that it shall be accompanied by a duly certified copy of the decree.

13. There is no doubt that these formalities had not been complied with and they had not been complied with because they were unnecessary and there was no application for execution.

14. Similarly the application for sale was not an application for sale in execution but merely on the ground that the property was perishable.

15. The learned Counsel on behalf of the Sheriff has admitted that if there has not been execution the Sheriff is not entitled to any poundage.

16. It is further argued by the learned Counsel for the decree-holder that the Sheriff has not in any event earned his poundage.

17. Assuming there has been execution, there has been no "levy" in the manner in which "levy" has been defined by the Courts in England, namely, as being "the turning of the goods into money." Furthermore, it is contended that the Sheriff is not entitled to poundage after notice of an adjudication order, and reliance is placed on the case of *In re Harrison* [1893] 2 Q. B. 111 and on the case of *In re Thomas* [1899] 1 Q. B. 66 at p. 69 (1898) which followed the case of *In re Harrison* [1893] 2 Q. B. 111 and on appeal at page 460 of the same volume. [[Reference is to [1899] 1 Q. B. p. 460--Reporter]]

18. The learned Judge of first instance, Wright, J., quoted at page 69 the judgment of Vaughan-Williams, J., in the earlier case of *In re Harrison* [1893] 2 Q. B. 111 where that learned Judge says:

It is the duty of the Sheriff, when served with notice of a receiving order, to hand over the goods or their proceeds to the Official Receiver. He is then entitled under the sub-section to the costs of the execution up to the date of such notice. The costs of the execution up to that date do not include poundage.

19. In discussing the English provisions with regard to the Sheriff's poundage the Master of the Rolls in the same case on appeal says, at page 463 [Reference is to [1899] 1 Q. B. p. 460 --Reporter] of the report:

There is not a word here that the Sheriff shall be entitled to poundage if he does not sell : it is rather the other way. The right of the Sheriff to poundage was given to him by a Statute of Elizabeth the poundage being payable to him on sale or on realisation of the money without sale.

20. Vaughan Williams, L. J., on page 464 says:

Poundage is a fee which is given by the Statute of Elizabeth. Now the language of the Statute left it an open question whether the Sheriff was entitled to poundage, the word was simply "levy". It was decided.....that the word "levy" in the Statute

meant turning the goods into money.

21. It is noteworthy that at the time when the decree was passed the Official Assignee was only receiver of the goods but on the Defendant being adjudicated insolvent on April 21st, the adjudication would date back to March 2nd, a date prior to the date of the decree.

22. The relevant section of the Indian Law is sec. 54 of the Presidency Towns Insolvency Act which similarly provides, that:

Where execution of a decree has issued against any property of a debtor which is saleable in execution, and before sale a notice is given to the Court executing the decree that an order of adjudication has been made against the debtor, the Court shall direct the property to be delivered to the Official Assignee but the costs of the execution shall be a first charge.

23. It was in compliance with the principles here set out that, when the Official Assignee made known to the Court that he was the receiver appointed under the Court in its Insolvency Jurisdiction, an order was made that the property should be delivered to the Official Assignee; but the order should have stated that the Sheriff's charges or costs should first be paid and not that the applicant should pay the Sheriff's poundage in the first instance. The order of March 20th was not an order deciding that poundage had been earned. It was merely an order deciding that any poundage which the Sheriff claimed should, if legally payable, be paid in the first instance by the decree-holder.

24. In my view there has been no and no poundage had been earned.

25. The principle seems to me perfectly clear that when the bankruptcy of a judgment-debtor supervenes after seizure but before sale by the Sheriff, the Sheriff must hand over the property to the Official Assignee and he is not entitled to poundage. The application must be dismissed with costs.