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Bombay High Court

Case No: O.C.J. Suit No. 3163 of 1920

Kesserbai	APPELLANT
Vs	
Kaku Vallabhdas Ravji Bilasrai Laxminarayan Vs Karsondas Damodar and Co.	RESPONDENT

Date of Decision: Aug. 11, 1926

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 52, 73

Citation: AIR 1927 Bom 394 : (1927) 29 BOMLR 665

Hon'ble Judges: Mirza, J

Bench: Single Bench

Judgement

Mirza, J.

This is a summons taken out by the plaintiff in Suit No. 3163 of 1920 for directions, as to whether the plaintiff in Suit No. 1664 of 1918 is entitled to priority over the other creditors of the firm of Messrs. Karsondas Darnodar & Co. by reason of the charging order dated October 7, 1925, and for costs. [His Lordship after setting out the facts as above continued :]

2. I made the charging order on October 7, 1925, as Chamber Judge following a long-standing practice of this Court whereby such charging orders are made whenever execution is sought against assets in the hands of a receiver appointed by the Court. The practice was started by Macleod J. as Chamber Judge, and has been followed by succeeding Chamber Judges. The older practice of issuing in such cases a notice to the officer concerned in the manner provided by Order XXI, Rule 52, was abrogated and the party seeking execution was required instead to obtain a charging order from the Judge. The practice of this Court in such cases has, since the institution of these charging orders, been to order pro rata distribution of the net assets in the hands of the receiver among all the creditors of the partnership notwithstanding the charging orders so granted.

3. Our charging orders are taken from the one formulated by Kay J. in Kewney v. Attrill (1886) 34 Ch. D. 345. In that case after judgment had been pronounced in a Chancery action for dissolution of a partnership, and a receiver had been appointed, a creditor obtained judgment in the Queen''s Bench Division against the firm for the amount of his debt and costs. He applied in the Chancery action for leave to execute his decree against the assets in the hands of the receiver. Kay J. made an order giving the judgment-creditor a charge for his debt and costs on all the partnership monies come or coming to the receiver; he, the creditor, undertaking to deal with the charge according to the order of the Court, In making the charging order Kay J. made his intention clear as follows (p. 846):-

...If there is a bankruptcy the trustee in bankruptcy will take subject to prior equities and therefore subject to a charge. I give the Applicants, the judgment creditors, a charge now on the moneys which are in the hands of or may be taken possession of by the receiver, and they must undertake to deal with the charge according to the order of the Court. The charge will be for the judgment debt and costs and interest at four per cent., and the costs in Chambers and here. The intention of the Court is to preserve to the Applicants all the rights which they would have had if they had issued execution and the sheriff had seized and sold the assets to-day.

4. It is clear from the judgment of Kay J. that it was not his intention to deprive the execution creditor of the benefit of his execution owing to the accident that the assets against which execution was sought to be levied were in the hands of an officer of the Court. By his charging order he effectively preserved to the execution creditor the benefit to which he would in law be entitled but postponed the payment until further orders. In the course of arguments from the bar Kay J., however, is reported to have made the following remark (p. 346):-

By the appointment of a receiver the Court aims at equality amongst the creditors. If I give you leave it must be on your undertaking to hold the proceeds and deal with them in accordance with any order the Court may make.

5. Those remarks form no part of the judgment of Kay J., and the judgment makes it clear that it was not the intention of Kay J. by the charging order to deprive the execution creditor of any fruit of his execution, The form of the charging order adopted in English practice is set out in Seton on Judgments and Orders, 7th Edn., Vol. I, p. 471, as follows:-

Upon motion &c., by counsel for A.B., and upon hearing counsel for the Plt and the Deft, This Court doth declare that the said A.B. is entitled to a charge for the amount of his judgment debt, interest, and costs recovered against the Deft by judgment dated &c., in an action in the K.B. Div. of C. v. D., and for coats of the said order dated &c., and of this application to be taxed &c., upon the assets which now are in or hereafter come to the hands of the receiver in this action, the said A.B. by his counsel submitting that such charge shall be dealt with in such manner as the Judge

shall direct, the intention of this Court being to preserve to the said A.B. such legal rights as he would have had if the sheriff had seized under the execution and sold on this day.

6. In Shidlingappa v. Shankarappa I.L.R (1903) 28 Bom. 176 our Appeal Court has referred to and commented on Kewney v. Attrill. In the case before the Appeal Court the plaintiff and defendants traded in partnership and in a suit for dissolution of partnership a decree was passed appointing a receiver with the usual directions for accounts and enquiry. In the meanwhile, a creditor of the partnership had sued the plaintiff and the defendants for the debt due to him, but the Court had passed a decree against the plaintiff alone, leaving his rights against the defendants to be settled in the accounts under the decree dissolving the partnership and appointing the receiver. The plaintiff had satisfied the decree and had instituted a suit to recover from the defendants their share of the decretal debt. The Subordinate Judge had awarded the plaintiff''s claim. The Appeal Court upheld the Subordinate Judge''s judgment to the extent that the plaintiff was entitled to call upon the defendants to meet their share of the liability which had been discharged. The Appeal Court, however, proceeded to discuss the ratio decidendi in Kewney v. Attrill. Chandavarkar J. remarks as follows (p. 179):-

As between the parties to the present suit, however, there has been already a decree dissolving the partnership, ordering accounts to be taken and the debts of the partnership to be paid. The mutual rights and liabilities of the parties to this action for contribution must, therefore, be decided with reference to that decree. By it not only was the partnership declared dissolved and accounts directed to be taken, but a Receiver was appointed to recover outstandings, pay debts, and do all that might be necessary. By the appointment of a Receiver the Court must be taken to have aimed at equality among the creditors. It was open, of course, to any creditor of the partnership to sue the partners and obtain a decree for the recovery of his debt; but no creditor, after the appointment of a Receiver, could execute any decree, obtained after that appointment, to the prejudice of other creditors of the partnership. To obtain satisfaction of it he was bound to go to the Court which appointed the Receiver and take its directions. That was recognized as the law in such cases in Kewney v. Attrill.

7. The above remarks of the Appeal Court appear to me to be obiter dicta. With great respect I am unable to agree with this statement of the effect of Kewney v. Attrill. There is no reason adduced why in the case of the dissolution of a partnership the judgment creditors of the partnership seeking execution should be put on a level of equality with all other creditors of the partnership, both ascertained and unascertained. There is no analogy in the case of a partnership with that of the insolvency of an individual or the winding up of a limited liability company. The creditors of a partnership have their remedy not only against the partnership assets, but against the private property of the partners. Where an individual is adjudicated

bankrupt or a company has gone into liquidation it may be equitable to hold that as the Court is administering the affairs of the bankrupt or of the company by means of its Official Assignee or the liquidator as the case may be that all creditors, whether judgment-creditors or ordinary creditors, should rank equally. Indeed the Insolvency Act and the Companies'' Act provide that on adjudication of a person or liquidation of a company all executions then pending against the property of the insolvent or the assets of the company cease. In the case of an administration suit the suit is primarily for the benefit of the creditors of the deceased, and where the assets are in the hands of the Court through its receiver, equity requires that all creditors should rank equally and there should be no scramble among them for priority as the liability of the legal representative is to the extent of the estate only. But in the case of a partnership, the liability of the partners is unlimited. I am unable to appreciate why the Court should aim at equality among the creditors of a partnership firm. A suit for the dissolution of a partnership cannot be said to be for the benefit of the creditors; it is primarily for the benefit of the partners themselves. If the debts of the partnership are to be ascertained by the Court that is because the rights of the partners inter se in respect of the assets cannot be determined until such debts are ascertained and provided for. Ordinarily there is no reference to the Commissioner in a partnership suit requiring him to pay off the debts of the partnership or to invite creditors'' claims. In an administration suit the Commissioner has to invite creditors'' claims which on being proved may be paid off from the assets in the hands of the Court.

8. In A. Haji Ismail & Co. v. Rabiabai ILR (1909) 34 Bom. 484 an attorney claimed a lien for his costs against certain partnership assets. The plaintiffs had obtained a decree against the defendants and were granted leave to levy execution against the assets of the partnership in the hands of the receiver. They took out a garnishee notice against the receiver to pay the monies to the plaintiffs, Macleod J. held that the moneys in the hands of the receiver were subject to the lien of the solicitor in the partnership suit for his costs. With regard to the procedure adopted in execution, however, he remarked as follows (p. 485):-

...the procedure adopted by the plaintiffs in this suit is, in my opinion, wrong. They should not have issued execution against the assets in the hands of the receiver. The proper course was to ask the Court for a charging order in the form granted by Kay J. in Kewney v. Attrill. The assets of the partnership can then be dealt with by the Court by giving directions to the receiver and it is desirable that this procedure should be followed in future.

9. By this judgment Macleod J. instituted the practice of charging orders on assets the hands of receivers. There is nothing in Macleod J.''s judgment, however, to warrant the conclusion that by giving the charging order the Court aims at equality among the creditors irrespective of their rights as attaching creditors.

10. Pratt J. had a similar point before him which he has dealt with in an unreported judgment in Kakubhai Bhimji v. Hargovan Kanji (1920) O.C.J. Suit No. 1934 of 1919, decided on December 23, 1920 (Unrep.). The applicant before the learned Judge had obtained a decree against the partnership firm. He obtained a Judge''s order giving him leave to attach in execution of his decree the moneys of the partnership in the hands of the receiver. The applicant thereafter applied to the Judge for an order on the receiver to pay to him the amount of his decree. The learned Judge held that the procedure adopted by the applicant was altogether wrong and misconceived, He should not have issued execution against the assets in the hands of the receiver, but should have applied for a charging order in the form granted in Kewny v. Attrill. The learned Judge proceeds: "The effect of the judgment in that case is well stated by Chandavarkar J. in Shidingappa v. Shankarappa," and cites with approval the passage from the judgment of Chandavarkar J. which I have above set out and from which I respectfully dissent. The learned Judge further proceeds:-

The procedure adopted by the plaintiff in this case was condemned by the present Chief Justice in A. Haji Ismail & Co. v. Rabiabai. His Lordship in that judgment said it was desirable that the procedure laid down in Kewney v. Attrill should be followed in future. But unfortunately, it does not appear that much attention has been paid to that direction. It should be clearly understood that the appointment of a Receiver of partnership assets operates as an injunction not only to partners, but also to creditors : and that no creditor is entitled to payment except under the directions of the Court and the Court will not direct payment until all the assets have been realised. A creditor who has obtained a decree may obtain priority by obtaining the ''charging order'' in the form prescribed in Kewney v. Attrill. But even that order is given on an undertaking to deal with the charge according to the orders of the Court.

11. Pratt J. recognized in his judgment that by obtaining a charging order the creditor would prima facie obtain priority, but that priority would be subject to the further orders of the Court.

12. With great respect, I am of opinion that there was no need for our Courts to complicate the procedure in execution by inventing a form of charging order for which there is no warrant under the Code of Civil Procedure. Order XXI, Rule 52, of the CPC is applicable to such cases. It provides:-

Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued:

Provided that, where such property is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any

assignment, attachment or otherwise, shall be determined by such Court.

13. The provisions of Order XXI, Rule 52, appear to me to be wide enough to protect the receiver as well as the interests of which he is the custodian.

14. Order XXI, Rule 52, has now been construed in the recent Full Bench decision of the Madras High Court in the case of Visvanadhan Chetty v. Arunachelam Chetti ILR (1920) Mad. 100.. That case decides that:-

Where the property attached is in the custody of a Court it is the duty of such Court to hold it at the disposal of the attaching Court and it is the duty of the attaching Court, if the property attached is money, to call upon the custody Court to pay it into the attaching Court and in other cases, to provide for the realization of the property, and to divide the money or proceeds rateably between the attaching decree-holder and the other decree-holders who are entitled to distribution u/s 73, Civil Procedure Code, viz., those who have applied to it for execution before the receipt of such assets.

Where the property in the custody Court is the subject of several attachments in execution of several decrees the custody Court must award priority to the first in point of time. If the other decree-holders want to share in the rateable distribution they must apply in time to the first attaching Court. The power conferred on the custody Court by the proviso to Order XXI, Rule 52, CPC to determine claims to priority, etc. does not entitle the custody Court itself to distribute his assets rateably among the attaching decree-holders...

When the attaching Court and the custody Court are the same, there is a receipt of assets within the meaning of Section 73, Civil Procedure Code, only when so much of the money standing to the credit of the judgment-debtor as is necessary to satisfy the decree-holders who have applied to it for execution, is ordered to be transferred to the credit of the first attaching creditor''s suit.

15. It has been urged on behalf of the applicants that the charging order obtained by the plaintiff in Suit No. 1664 of 1918 is irregular, inasmuch as the assets being in the custody of a receiver he should have obtained leave to proceed against that officer in the suit in which he was appointed receiver. The irregularity, if at all, is due to the confusion which has resulted in the office by the adoption of the form of charging order to which I have referred. It appears to have been the intention of the plaintiff in Suit No. 1664 of 1918 by his application for execution to apply for leave to execute against the receiver. If owing to a misunderstanding of the situation created by the practice of this office, the plaintiff in Suit No. 1664 of 1918 has been misled, it is open to the Court to rectify the error at any moment by granting him the leave required. In my opinion he is entitled to receive the balance of his decretal amount subject to the receiver''s costs, charges and expenses and further subject to the solicitors'' lien for the costs of the partnership action in the partnership suit. His claim should be satisfied before any further distribution of the assets takes place

among those who are not attaching creditors.

16. I direct, therefore, that subject to the costs, charges and expenses of the receiver and of the solicitors'' costs in the partnership action the receiver do pay over to the plaintiff in Suit No. 1664 of 1918 the balance of the decretal amount and he will rank in priority to all other creditors who have not obtained charging orders or who are not otherwise attaching creditors. The costs of the summons will be tacked on to his claim. The plaintiffs in Suit No. 3163 of 1920 to get their costs of this summons out of the assets in the hands of the receiver : the defendant Kaku Vallabhdas to get his costs out of the partnership assets after the claims of all creditors are satisfied.

17. Counsel certified.