

ANDHRA PRADESH HIGH COURT

D. Heerabai

Vs

Official Receiver

(Munikanniah, J.)

12.06.1962

ORDER

Munikanniah, J.

1. This revision petition is directed against the orders in I. A. No. 1900 of 1960 in I. P.No. 29 of 1955 on the file of the Court of the Subordinate Judge, Vijayawada, which as the insolvency Court it had to deal with the Game.

2. The short question, which arose for decision by the lower Court, is whether this application, namely, I. A. No. 1900 of 1960, is exclusively an appeal under Section 68 of the Provincial Insolvency Act and as such cannot be filed beyond the period of 21 days, after the sale by the Official Receiver of certain properties as conditioned by the proviso to that section.

3. The determination of this question, it should be observed, is mainly dependent upon the factors which have to be taken into consideration by any insolvency Court whether the act complained of had been a matter which the Official Receiver had power to decide upon and which act could therefore be legitimately complained of and taken to the Court for further adjudication. This question would indeed be one of fact depending upon not only points raised in the application filed before the insolvency Court, but also the steps taken by the person who complains to the Court about the act of the Official Receiver; and also the further question whether in doing so that petition could be said to be an appeal by the aggrieved party so as to fall under Section 68. The approach, therefore, in deciding a question of this kind by the lower Court should have been by its application to these cardinal questions before arriving at any conclusion, That a particular petition or application is an appeal under Section 68 or merely a petition under Section 4 of the Provincial Insolvency Act. The Importance to be attached to the kind of approach in all these cases assumes greater prominence especially because of the significance to be given to the mandatory provision relating to the period of limitation contained in the proviso to Section 68.

But it is unfortunate that the Insolvency Court, namely, the learned Subordinate Judge, Vijayawada, had omitted to bear in mind the points of difference or distinction obtaining between the various applications falling under the two different sections, namely Section 4 and Section 68, but went on to decide the case under revision rather on hazy notions. On a perusal of the orders of the learned Subordinate Judge, It is clear, that while passing orders in I. A. No. 1639 of 1960, which was filed for condoning the delay in filing I. A. No. 1900 of 1960, a certain assumption has been made that I. A. No. 1900 of 1960 falls under Section 68 and therefore the ruling in Rajagopalam v. Official Receiver, AIR 1958 Andh Pra 426, Is applicable. In this view, the Insolvency Court held that there is no power in the Court to condone the delay by application of the provisions of Section 5 of the Limitation Act. Thereafter, while dealing with I. A. No. 1899 of 1960, the obsession that the petition for condonation has been dismissed should necessitate the dismissal of this application also prevailed with him. This, in my view, has led the Insolvency Court to deal with matters In an unsatisfactory manner; and thereby that Court has put the cart before the horse and landed itself in a vicious circle.

4. But even though the method of approach is wrong. If still it is possible to find that the conclusion is right, I would not easily interfere. On the other hand, in my view, the assumption made by the lower Court that I. A. No. 1900 of 1960 is an appeal falling under Section 68 of the Provincial Insolvency Act has not been made out to be justified either with reference to the nature of the application or the setting in which that application itself came to be made.

5. The facts of the case are simple. The petitioner, who is the mother of the two insolvents, lays a claim to a 1/3rd share in the properties which the Official Receiver sold on 16-4-1960, purporting to be those of the insolvents. The petitioner filed I. A. No. 1900 of 1960 on 28-6-1960 purporting to be under Sections 4 and 68 of the Provincial Insolvency-Act. She prayed to set aside the sale by the Official Receiver and to declare that the respondents have no right to interfere with the possession and enjoyment of the properties sold by the Official Receiver on 16-4-1960. She also filed I. A. No. 1899 of 1960 for condoning the delay in filing this application as ordinarily the appeal under Section 68 should have been filed by her on or before 7-5-1960. As-already pointed out, the Insolvency Court held that in the case of an appeal under Section 68, there could be no condonation of delay by invoking the powers under Section 5 of the Limitation Act as the same is specifically prohibited by the mandatory language of the proviso to that section. But, as already observed, it failed to ascertain with reference to the nature of I. A. No. 1900 of 1960 whether It fell under S. 4 of the Provincial Insolvency Act. I therefore propose to examine its nature.

6. Now having regard to what has been said above, it is clear that the petitioner has not made any claim before the Official Receiver; and even if she chose to make any such claim in respect of her interest or right to the properties sold by the Official Receiver, it is well settled by decided

authorities that the Official Receiver has no power whatsoever to decide upon such claim petitions. Therefore, an application such as I. A. NO. 1900 of 1960 cannot be taken in any sense to be an appeal against the act of the Official Receiver as such. On the other hand, when the petitioner herein wanted that her share should be untouched, it is certainly a case where the petitioner approached the Court to determine the question of her title, which it is competent to do only under Section 4 of the Provincial Insolvency Act. Therefore, in my view, it is idle to contend that I. A. No. 1900 of 1960 fails within the purview of Section 68, and that it should be taken to be an appeal and not an application which is contemplated and competent under Section 4 of the Provincial Insolvency Act. That such is the legal position, is also adumbrated by the decision in *Vellayappa Chettiar v. Ramanatham Chettiar*, ILR 47 Mad 446 : (AIR 1924 Mad 529). It is therein laid down that the Official Receiver has no jurisdiction to determine a claim petition. A fortiori it would mean that the present petitioner could not therefore have appealed against any act as an aggrieved party.

7. As against this, Mr. Venkatappalah, the learned counsel for the 2nd respondent who is the auction-purchaser, argued that as the 1st petitioner was a party to the Insolvency petition and the vesting order was made by the Court and that related to the entire property which was sold, the 1st petitioner, who raised no voice against the action of the Court or the Receiver, cannot question the same, and that in any case I. A. No. 1900 of 1960 cannot be taken to be an Independent application under Section 4, as the same is not concerned with the determination of the title as contemplated in that section. But this contention overlooks the fact that if the vesting order is taken to authorise the Official Receiver to make the sale held by him unimpeachable, it cannot then be said that any act of the official Receiver is the subject-matter of a question before the insolvency Court. It is also clear, as already pointed out, that the Official Receiver did not adjudicate upon any claim of the mother and therefore could at best be taken to only carry out the orders of the Court. Construed this way also, I. A. No. 1900 of 1960 cannot be taken to be incompetent as one falling under Section 4. The learned counsel for the 2nd respondent also relied upon the decision in *Ma Sein Nu v. U Mg Mg*, AIR 1934 Rang 97, and further contended that as laid down therein if the Insolvency Court is approached to revise the act of the Receiver, that could be done only under Section 68. I do not demur to the proposition as laid down in that decision: but a careful examination of the facts of that case clearly brings out the limits within which the proposition as laid down in that decision becomes applicable. There, a Receiver seized certain property alleged to be the property of the insolvent. The appellant therein laid claim to that property and applied to the District Court for an order directing that the property should be returned to her. The Official Receiver set up the defence that that application was time-barred by reason of the provisions contained in the proviso to Section 68 of the Provincial Insolvency Act. Against the order of the District Judge upholding that contention, the appeal which is attacked as time barred has been preferred. The Division Bench of the Rangoon High Court repelled the

contention that the application before the District Court was one under Section 4. For this, the Rangoon High Court relied upon the fact that the seizing of the property by the Official Receiver is an act or decision against which an appeal will lie under Section 68. That Court also made it clear that the proposition laid down in ILR 47 Mad 446 : (AIR 1924 Mad 529) is unexceptionable and that what was held in that case viz., that the Official Receiver had no power to make any order on a claim petition, would not affect their decision. Similarly, it was also pointed out that the case in *Venkatarama Chetty V. Angathayammal*¹, tracks the line of the class of decisions in ILR 47 Mad 446 : (AIR 1924 Mad 529). The distinction that obtained between the questioned of an act of a Receiver and that of a Court as pointed out in that discussion was also brought out by the case in *Nathu Ram v. Madan Gopal*², Therefore, even as pointed out by that Division Bench, the class of cases where no act of the Receiver is questioned, such as is found in *Pullayya v. Official Receiver of Kistna*, AIR 1933 Mad 271, stands on a different footing. For this reason, in my view, the decision in AIR 1934 Rang 97, is clearly distinguishable and also inapplicable to the present case. I, therefore, accept the contention of Mr. Subbareddy for the petitioner herein that I. A. No. 1900 of 1960 is not an appeal under S. 68 and no question of the bar of limitation will therefore arise.

8. Mr. Venkatappaiah tried to argue about the effect of the proviso to Section 68 and the inapplicability of the proviso to Section 68 to appeals under Section 68. But I considered it not necessary to have to decide this point in this case as I have taken the view that Section 68 is inapplicable to I.A. No. 1300 of 1960.

9. The result is this revision petition is allowed. I.A. No. 1900 of 1960 will be taken on file by the lower Court and considered on merits. In view of the fact that it is the mention of Section 68 in I.A. No. 1900 of 1960 itself that has led to the confusion, I am not prepared to award costs to the petitioner.

Cases Referred.

1AIR 1933 Mad 471

2AIR 1932 All 408