Rajasthan High Court
Dharamveer Agarwal vs Kailash Chand on 11 November, 1987
Equivalent citations: AIR 1989 Raj 17
Author: M Jain
Bench: M Jain
JUDGMENT M.C. Jain, J.

1. This appeal under Section 75 of the Provincial Insolvency Act, 1920 hereinafter referred to as the Act arises out of the order dated 17th of March, 1977 passed by the District Judge, Alwar whereby objections filed by the present appellant were rejected.

2. A few facts may be relevant for the disposal of this appeal.

An Insolvency petition, by the creditors respondents No. 1 to 8 in the appeal was presented on 21-3-72 and was ordered to be registered on 25-3-72 and the court further ordered issuance of notice to the non- petitioner debtors. An interim Receiver was appointed by the Insolvency Court on 11-4-72. The appellant Shri Dharamveer Agarwal had filed a suit for recovery of money in Feb. 1972 and that suit was decreed by the Civil Judge, Alwar. The decree was put into execution. Some immovable property was put to auction and sale proceeds were realised. That sale was confirmed on 4-3-74. Thereafter the Executing Court passed an order for rateable distribution on 17-4-74. The creditors who have submitted the insolvency petition made an application before the Insolvency Court on 11-3-74 praying therein that the Executing Court be restrained from distributing the sale proceeds amongst the creditors. Thereupon the insolvency court passed a restraint order. It may also be stated that the applications on behalf of the judgment-debtor and by interim receiver were filed before the executing court but those applications filed on 9-10-73 were rejected by the Executing Court on 2-11-73 and thereafter the Executing Court passed order for rateable distribution. After the restraint order passed by the Insolvency Court, Shri Dharamveer Agarwal submitted some objections before the Insolvency Court which were heard and disposed of by the impugned order of the District Judge, Alwar.

3. Mr. Dharamveer Agarwal who is an advocate argued this appeal in person. I have heard him and Shri H.C. Rastogi for the respondent debtors. One of the creditors Sri Govind Ram had submitted an application for impleading him as a party. Thereupon he was impleaded as a party, who is represented by Shri P.C. Jain advocate who has supported the contentions advanced by Shri Dharamveer Agarwal.

4. Shri Agarwal first of all submitted that the learned Insolvency Court erred in not rejecting the insolvency petition even when the insolvency petition was not prosecuted with due diligence in as much as compliance of Section 19 of the Act was not made by the creditor petitioners and there had been unnecessary dragging on of the petition. Mr. Rastogi also supported this contention of Shri Agarwal and submitted that the insolvency petition continues to remain pending against the debtors since 1972 and till 1977 steps were not taken by the creditor petitioners for effecting service of notices and service of the order passed under Sub-section (1) of Section 19 of the Act. It has been pointed out that threre were as may as 47 creditors out of whom 5 creditors have put in appearance.

42 credtiros were required to be served and the provision contained in Section 19 Sub-section (2) is a mandatory provision. It has been so found by the learned Insolvency Court but further opportunity has been granted by the insolvency court for service of order and notices on the 42 credtiros.

5. It is true that the provision in Sub-section (2) of Section 19 is mandatory, notices of the order under Sub-section (1) of Section 19 of the Act is required to be given to creditors in such manner as may be prescribed. The learned Insolvency Court also took into consideration the relevant rule provided under General Rules (Civil). Under Rule 423 notices are required to be served on the creditors by registered post. The Insolvency Court therefore directed the creditor petitioners to submit the necessary registration charges so that services of notices can be effected on the remaining 42 creditors. I do not find that the Insolvency Court exercised the discretion in an unjudicious manner. When the matter came to the notice of the Insolvency Court, the Court passed the order for effecting the service as required under the rules and in compliance of the order of the court it appears, that necessary registration charges and envelopes were submitted for issuance of notice as is evident from the order sheet dated 6-4-1977.

6. It has also been submitted before me that despite clear direction and order of the court, the matter has not been prosecuted diligently by the creditors. That shows that the creditors simply want to drag on the petition affecting the rights of those who got the decrees against the debtors and the rights of the debtors as well against whom the petition still continues to remain pending. I need not enter into this question. The appellant and the counsel for the debtors may bring to the notice of the Insolvency Court the conduct of the creditor petitioners in prosecuting the petition. So far as the view taken by the Insolvency Court is concerned, I find no illegality or irregularity in the exercise of discretion and I hold that the view taken by the Insolvency Court cannot be said to be wrong and unjustified.

7. It is next contended by Shri Agarwal that the Insolvency petition was liable to be dismissed as the same was not admitted by the Insolvency Court. No specific order was passed admitting the petition and it can be taken that the petition has not so far been admitted. Admission of the petition is a very important step after presentation of the petition as admission of the petition affects the rights of the judgment-creditors and the entire proceedings in the Insolvency Court, as such there should be a specific order for admission.

8. Section 18 lays down procedure, for admission of the petition. An order under Section 19 is required to be passed only after admission of the petition. Under Section 28 the order of adjudication relates back to and takes effect from the date of the presentation of the petition, So admission is an important step after presentation of the petition and a specific order needs to be passed. It is true that no specific order has been passed regarding the admission of the insolvency petition. Some procedure is required to be followed for admission of the insolvency petition as is required to be followed for admission of a plaint. As provided in Section 18 no specific form of order is provided as to how the order of admission is to be passed. Plaints are normally admitted by passing an order of registration. On 25-3-1972 the Insolvency Court ordered for registration of the petition and simultaneously ordered issuance of notices to the non-petitioner debtors. There is no

specific order of admission as such but the manner in which the order has been passed on 25-3-72 shows application of mind. The Insolvency Court thought it proper to register the petition and order for issuance of notice and subsequently the Insolvency Court passed an order for appointment of Interim Receiver on 11-4-72. So the manner in which the proceedings have taken place after presentation of the Insolvency petition shows the mind of the Insolvency Court that it intended to admit the petition, else the order would have been of rejection. So I find no force in this submission of Shri Agarwal that the petition has not been admitted so this petition is liable to be dismissed on that ground alone. The above contention is therefore negatived.

9. It has been vehemently urged by Shri Agarwal assisted by Shri P.C. Jain that the property which was attached in execution of his decree was put to auction and the sale proceeds were realised and thereafter order of rateable distribution was passed by the Executing Court. When once the order of rateable distribution is passed, from that very date, the money belongs to those creditors in whose favour order of rateable distribution has been passed. The interim receiver or any other creditor or the debtor can have no claim over any part of the money. It has already been ordered to be distributed by the Executing Court. Reliance has been placed by Shri Agarwal on a Supreme Court decision in Katak and Co. v. State of U.P., AIR 1987 SC 738 in which reference has also been made to a decision of the Madras High Court in Official Receiver of Tanjore v. M.R. Ventakarama Iyer, AIR 1922 Mad 31. Their Lordships of the Supreme Court noticed the view of the Calcutta High Court and the Bombay Court and observed that : --

"By necessary implication it means that as soon as an order for rateable distribution is made, the amount ordered to be distributed will cease to be the property of the judgment-debtor. We are of the same opinion as that of the High Courts of Madras, Calcutta and Bombay. As soon as the question of rateable distribution between the decree-holders and the State having statutory priority is determined, and the Court passes an order as to how to appropriate the assets of the judgment-debtor, the rights of the parties become crystallized. What then remains is to give effect to the determination made by the Court by officials in charge of concerned departments dealing with Accounts and Cash which is a ministerial act. The rights of the respective decree-holders or claimants are governed by the order for rateable distribution passed by the Court as a result of the adjudication and determination made by the Court. Nothing further remains to be done by the Court in the judicial sphere thereafter. The order partakes of a judgment and decree passed by the Court. What the officials of the Accounts and Cash departments are required to do thereafter is to carry out the command of the Court by implementing or giving effect to the order. The test which can be usefully applied is to pose the question whether the said officials can refuse to implement the order by refusing to make payment once the Court has passed the order. Obviously and undoubtedly they cannot. Therefore it is evident that nothing turns on whether or not actual payment pursuant to the order of the Court is made. And when the Court officials make payment to the decree-holder, they make payment because the property in the said monies has vested into them by virtue of the order of distribution passed by the Court. What is being paid by the officials of Accounts and Cash Sections will be the decree-holder's money, it having ceased to belong to the judgment-debtor the moment the order for distribution was made, even though actual disbursement was made later. If the State lays its claim after the order for distribution is made by the Court, it will be of no avail as the property would have gone beyond the reach of the State, it having ceased to be the property of

the debtor against whom the State had a claim. No question of priority can arise in that siutation -- the State having missed the bus. In the present case, the amount had ceased to be the property of the judgment-debtor from the point of time that the order for rateable distribution was passed by the executing court. There was no question therefore of the State being entitled to claim priority in respect of the claims lodged by it subsequently to the order for rateable distribution. The High Court was thus in error in reversing the order passed by the executing court."

10. In that case the State had not made any claim before the order of rateable distribution, so it was observed that there is no question therefore of the State being entitled to claim priority in respect of the claims lodged by it subsequent to the order for rateable distribution. It may be stated that their Lordships were concerned with the provision contained in S, 73(3) of the Civil P.C. The matter did not come up for consideration before their Lordships in the light of the provision contained in the Insolvency Act. So far as the present case is concerned, the matter requires to be considered having regard to the provision contained in Section 51 of the Act Section 51 reads as under: --

Section 51 : Restriction of rights of creditor under execution : --

(1) Where execution of a decree has been issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the Receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of admission of the petition.

(2) Nothing in this section shall affect the rights of a secured creditor in respect or the Property against which the decree is executed.

(3) A person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the Receiver.

11. Section 51 falls in Part III, Sections 51 to 55 are under the heading "Effect of Insolvency on Antecedent Transactions". A bare reading of Section 51 would make it clear as its marginal note suggests that it places restrictions over the rights of creditors under execution. With some exceptions it categorically provides that no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of admission of the petition. If assets are realised before the admission of the petition, then in that situation the realising creditor would reap the benefit of the assets realised by him in the course of execution but in case assets are realised after the date of the admission of the petition, then no person would be entitled to the benefit of the execution. Sub-section (2) of Section 51 makes a provision for secured creditor and Sub-section (1) of Section 51 would not come into play as regards the rights of the secured creditors and Sub-section (3) of Section 51 saves rights of the auction-purchaser who has purchased the property in good faith.

12. It has been submitted by Shri Dharamveer Agrawal that Sections 51 and 52 would not at all be attracted in the present case as these provisions make reference to the receiver and that stage has not been reached. Only interim receiver has been appointed. That stage would reach only after adjudication. When Sections 51 and 52 would not come into play, then, the decree-holder creditors

are entitled to the benefit of the order of rateable distribution under Section 51. The expression used with regard to the execution is "against the receiver." There is no execution against the receiver.

13. I have given my serious consideration to the contentions of the appellant but I find no merit in them. The expression "against the receiver" does not mean levying execution against the receiver. It simply means that where benefit is sought to be availed against the receiver then no benefit can be availed against the receiver if assets have been realised after the date of the admission of the petition. The expression 'receiver' has been used in Sections 51 and 52 in this sense, not in the sense of levying execution against the receiver. Ultimately if an order in execution is passed, the benefit has to be availed against the receiver and in case assets.have been realised after the date of the admission, then the judgment-creditors would not be entitled to any benefit against the receiver; The provision is couched in a negative language. It clearly provides that "no person shall be entitled to the benefit of the execution," this would mean that the judgment-creditors even would not be entitled to the benefit of realising of assets by them in execution of the decree.

In Nand Lal v. Reoti Lal, AIR 1979 All 365 it was observed as under : --

"All that Section 51(1) of the Provincial Insolvency Act declares is that where execution of a decree is issued against the property of judgment-debtor no person shall be entitled to the benefit of the execution against the receiver, except in respect of assets realised in the course of execution by sale or otherwise before the date of the admission of the petition."

In Rangappa Ganappa v. Ghanshyam Madhao Tapi, AIR 1937 Nagpur 193, it has been held as under : --

"Where the decree-holder brings to sale the property of the judgment-debtor in execution of his decree and the sale is held after the admission of the insolvency petition against him at the instance of another creditor and no intimation of the insolvency proceedings is sent to the execution court and the court in ignorance of the insolvency proceedings holds the sale, the sale will not be void unless the purchaser purchases it with the knowledge of the insolvency proceedings."

"Where property of an insolvency is sold in execution of a decree against him by another decree-holder, after the admission of an insolvency petition against him, the insolvent's property or the sale proceeds so realised by sale vest in the insolvency Court under Section 28, Provincial Insolvency Act; in the absence of a receiver being appointed in the insolvency proceedings. The receiver is only an officer of the Court and until he is appointed the court is entitled to represent the insolvent's estate for administration."

Thus on a bare reading of the provision of Section 51 supported by the above case law, the contention advanced by Shri Agarwal has no substance and the same is overruled.

14. It is next contended that when the application of the receiver and judgment-debtor were rejected by the executing court on 2-11-73, the order passed by the executing court became final. The order of the executing court was not appealed against. Now it is not open to the creditors to agitate the same

question before the Insolvency Court and the same is barred by principle of res judicata. It was submitted that the principle of Section 11, C.P.C. is applicable to all proceedings including the insolvency and execution proceedings. Reference was made to a decision of the Supreme Court in Satyadhyan Ghosal v. Smt. Deorajin Debi, AIR 1960 SC 941. It was observed as under : --

"The principle of res judicata applies also as between two stages in the same litigation to this extent that a Court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings. Does this however mean that because at an earlier stage of the litigation a court has decided an interlocutory matter in one way and no appeal has been taken therefrom or no appeal did lie, a higher court cannot at a later stage of the same litigation consider the matter again"?

15. Now the whole question is whether the principle enunciated by the Supreme Court in the above decision is applicable to the present case. The Supreme Court has ruled that the principle of res judieata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings. In my humble opinion, the principle enunciated by their Lordships of the Supreme Court has no application to the facts of the present case. In the present case two proceedings were going on, one before the executing court and the other before the Insolvency Court. An application moved by the judgment-debtor or by the interim receiver would not in any way affect the jurisdiction and the powers of the Insolvency court. When no benefit can be availed under Section 51 by any person as considered above, the executing court would not in any way affect the proceedings of the Insolvency Court. All rights over the properties of the debtors vest in the Insolvency Court after the admission of the insolvency petition and so the question of applicability of principle of res judicata does not arise in the present state of facts.

16. Mr. Agarwal then ultimately submitted that, by the order of this court, he has withdrawn the decretal amount by furnishing bank guarantee. This court passed the order on 28-3-78. He submitted that in case money would be ordered to be returned, the creditors would suffer a great loss of interest if the insolvency petition is allowed and order of adjudication is passed and in case the petition is dismissed, in that situation also, the appellant would suffer loss of interest if money is ordered to be returned and deposited in the Court. The appellant has already furnished bank guarantee and as and when the court would order the return of money, the appellant will return the amount. In the above submission of the appellant 1 find some force but some further conditions are required to be laid down.

17. It is, therefore, ordered that the appellant shall deposit the amount received by him together with interest thereon at the rate of 12% per annum from the date of withdrawal of the decretal amount till the date of the deposit as and when the Insolvency Court so ordered. The appellant shall also furnish a bank guarantee to the effect that as and when the Insolvency Court directs him to deposit the amount as above, the amount shall be deposited in that court. It is further ordered that the amount which the appellant would ultimately be entitled to in the decree, shall be determined by the Insolvency Court. One month's time is allowed for furnishing bank guarantee to be submitted in the

terms mentioned above.

18. The appeal is disposed of accordingly, with no order as to costs. Parties state that some money is lying with the Insolvency Court as well as with the Execution Court. The Insolvency Court shall see that interest may accrue on money and steps may be taken in that regard and necessary order may be passed.