

PETITIONER:  
P. VEERASAMY.

Vs.

RESPONDENT:  
THE OFFICIAL ASSIGNEE HIGH COURT, MADRAS.

DATE OF JUDGMENT: 12/01/1999

BENCH:  
S.B. MAJMUDAR. & M JAGANNADHA RAO.

JUDGMENT:

M. JAGANNADHA RAO, J  
Leave granted.

Lord Mansfield said, over two hundred years ago, that you cannot 'let out the bankrupt'. He is not a slave of the Assignee. The point in this appeal is as to what extent the insolvent can be allowed to run his business to sustain himself and his dependents and as to what rights the official Assignee and creditors have, as against the insolvent?

The modern concept appears to be rehabilitation of an honest insolvent and a more humane treatment to be meted out to the insolvent and his family. At the same time, it must be seen that a benevolent view towards the honest insolvent is not abused by one who is dishonest.

"It has to be admitted that both in our past and also in our present insolvency law, the punitive and deterrent aspects of legal policy have seemed hard to reconcile with the rehabilitative philosophy with which they are supposed to co-exist. It would certainly appear to be the case that it is not very widely appreciated that bankruptcy law is also designed in part to protect the honest but unfortunate debtor, as well to discipline and if necessary punish one who has been incompetent or even dishonest." While those who are not aware of the beneficial provisions of insolvency law may suffer oppression at the hands of creditors, conversely, "there are certain opportunities for those who are closely familiar with the insolvency law to exploit its provisions to their advantage, and at the expense of their less knowledgeable creditors. In this area of the law, the aphorism that knowledge is power has an especially truthful ring in it. (The Law of Insolvency by Ian Fletcher, 1990, pp.33-34). The law must, therefore, achieve a just balance.

This appeal is preferred against the Judgment of the Madras High Court in O.S.A No. 17 of 1998 dated 18.02.98, rejecting the O.S.A. in limine. By that Judgment, the Division Bench affirmed the order of the learned Single Judge dated 4.8.1997 in

Application No. 89 of 1997 in Insolvency Petition No. 33 of 1996. The result of the dismissal of the interlocutory application was that the appellant who was declared an insolvent on his own petition on 25.4.96, was not permitted to conduct his retail business of selling Kerosene under Licence No. 173 of 1974 as an agent of the Civil Supplies Department of the Tamil Nadu Government.

The following are the facts in brief: The appellant filed a Petition I.P. No. 33 of 1996 for being adjudicated as an insolvent under Sections 14 & 15 of the Presidency Town's Insolvency Act, 1909(Act 3 of 1909) (hereinafter called the 'Act'). The said application was allowed on 25.4.96 by the learned Single Judge. Thereafter, the appellant filed I.A. No. 89 of 1997 on 10.5.97 seeking permission to restart his Kerosene business under Licence No. 173 of 1974 as agent of the Tamil Nadu Civil Supplies Department which, according to him, would fetch him Rs. 920/- per month and out of which the appellant would be willing to allocate Rs. 150/- p.m. towards his liability to the general body of creditors. He stated that he was earlier supplying 5000 litres every month at the rate of 200 litres per day for 25 days in a month. He had to supply 10 litres to each card holder per month. The licence was renewable every two years. His first licence was obtained in 1974 and the same was renewed upto 31.12.1998. The Insolvency Petition was filed as he incurred loss in Cement business. Prior to the filing of the Insolvency Petition, the supply was temporarily suspended and 500 card holders were allotted to another shop. The appellant stated that due to unavoidable circumstances, he could not reside in Madras and was forced to go back to his native place. If he has to come back to Madras city either for continuing the education of his children or to attend at the office of the Official Assignee, he must be allowed to do his Kerosene business. The Official Assignee is now in charge of his immovable properties. Unless the Court gives the insolvent permission, the Civil Supply Department will not allow him to receive Kerosene supplies. He states that no capital is involved in this business. Only a sum of Rs. 496/- is required to be paid to the Civil Supplies Department to start with, for the supply of 200 litres. He has rented a shop at No. 354, N.S.K. Road, Madras -106, on a monthly rent of Rs. 150/-. He states that there is no need for him to borrow any money for running this business. The Civil Supplies Department has given him a commission of 0.32 paise per litre and in a month for 500 litres, he will get a total commission of Rs. 1600/-. His expenses for the cart - charges will be Rs. 680/- p.m. for lifting the kerosene, Rs. 30/- for electricity and Rs. 150/- for rent. Balance will be Rs. 920/- p.m. He is willing to pay Rs. 150/- to his creditors out of the said income. He is prepared to abide by any other conditions that may be imposed by the Court. This application is dated 10.3.97.

The Official Assignee submitted a report to the Court on 17.4.97 stating that the appellant had disclosed assets worth Rs. 34,000/- and liabilities of Rs. 39.21 lakhs, Book liabilities were Rs. 12,02,660 but had not disclosed his Kerosene business nor did he submit accounts regarding the said business. The creditors complained that the appellant had omitted to refer to the kerosene business and that he had also suppressed information regarding some other assets. If he were to be allowed to do this business, he might incur further debts. The application was, therefore not bona fide and should be dismissed.

The learned Single Judge dismissed the application by order dated 4.8.97, accepting the contentions of the Official Assignee. On appeal, the Division Bench dismissed the appeal stating that in the light of what was stated in the report of the Official Assignee, the discretion exercised by the learned Single Judge was not liable to be interfered with.

It is contended in this appeal that the Act in sub-clause(1) of Section 75 gives a statutory right to move the Official Assignee for permission to manage his property or to carry on his trade for the benefit of his creditors, subject to conditions and that under sub-clause (2) of Section 75 the Court may, from time to time, make such allowance as it thinks just out of the property of the insolvent, for the support of the insolvent and his family or in consideration of his services. Such an allowance can also be varied from time to time. Learned counsel has also relied upon Article 19(1)(g) and Article 21 of the Constitution of India. He has contended that inasmuch as the appellant has stopped the kerosene business before the filing the insolvency petition, the said business was not disclosed. The books of account in regard to this business were produced before the Official Assignee at the time the inquiry of the application seeking permission to renew the business was taken up. The business does not involve any capital. The appellant has two children and they are presently admitted into an orphanage. If the insolvent is allowed to continue the kerosene business, he will be able to sustain himself and his family members who are totally dependent on him.

In spite of notice, the official Assignee has not chosen to appear before us. We, therefore, requested learned senior counsel, Shri Arun Jaitley to help us in the matter and he has made his submissions. We are grateful to him.

Learned counsel for the appellant Sri P.B.Suresh relied upon Section 75 of the Act but, in our view, three other sections, namely Sections 17, 52 and 60 are also relevant. As already stated, learned counsel for the appellant had also referred to Article 19(1)(g) and Article 21 of the Constitution of India.

The appeal relates to release of income from Kerosene business to the appellant for the purpose of the survival of the appellant and his family members. Such income will be 'after acquired property'. On that question, the points that arise for consideration are as follows:

(1) In the context of section 17 and section 52(2) of the Presidency Towns Insolvency Act, 1909, does the after-acquired property of the insolvent automatically vest in the official Assignee?

(2) In the context of section 60(2) of the Act, does 'salary or income' of the insolvent earned by him after adjudication automatically vest in the official Assignee; and is the official Assignee's right to receive these monies, even to the extent they would otherwise have been attachable, subject to orders of the Court?

(3) Is the word 'income' in the expression 'salary or income' in section 60(2) to be construed ejusdem generis like salary or can it be construed so as to include other types of income such as income from trade or business of the insolvent conducted after adjudication?

(4) Are 'personal earnings' of the insolvent earned after adjudication exempt from vesting under the common law relating to insolvency?

(5) In what manner the provisions of section 75 of the Act are to be construed for allowing the insolvent to run his business and for allowing him an allowance out of the property, to support him and his family?

(6) To what relief?

Point 1:

This point concerns the vesting of the 'after acquired' property of the insolvent, and the question is whether it vests automatically in the insolvent under the Presidency Towns Insolvency Act, 1909.

Under section 17 of the Act, on the making of an order of adjudication, the 'property' of the insolvent, wherever situate, shall vest in the official Assignee and shall become divisible among his creditors. Section 2(e) of the Act states that 'property' includes any property over which or the profits of which any person has a disposing power which he may exercise for his benefit. Obviously, therefore, in the normal course, the 'salary or income' accruing to the insolvent, after adjudication, would vest in the Assignee unless there is anything in the Act inconsistent with such vesting. It is here that section 52(2)(a) and section 60 gain importance. Under this point, we shall refer to the effect of section 52(2)(a).

Section 52(2)(a) deals with the 'after-

acquired' property of the insolvent which is divisible among creditors. It reads as follows:

"Section 52(2)(a): Subject as aforesaid, the property of the insolvent shall comprise the following particulars, namely;

(a) all such property as may belong to or be vested in the insolvent at the commencement of the insolvency or maybe acquired by or declare on him before his discharge."

This corresponds to section 38 of the English Bankruptcy Act, 1914. The corresponding provision in the Provincial Insolvency Act, 1920 which is differently worded but which deals with 'after acquired property' is section 28(4) and that section uses the words 'forthwith vest' while such words are absent in section 52(2)(a) of the Act. That section 28(4) of the Provincial Insolvency Act, 1920 reads as follows:

"Section 28(4): All property which is acquired by or devolves on the insolvent after the date of an order of adjudication and before his discharge shall forthwith vest in the Court or receive, and the provisions of sub-section (2) shall apply in respect thereof."

In the English law, according to the rule in Cohen vs. Mitchell [(1890) 25 Q.B.0 262], the after acquired property of the insolvent does not automatically vest in the trustee or Assignee unless the trustee intervenes. But once he intervenes, the property vests in him absolutely as stated in Hill vs. Settle [1917 (1) Ch 319]. As to what is intervention by the Assignee in relation to insolvent's dealings with after-acquired property, depends on the nature of the property, - immovable, movable etc.

In India, the above principle in Cohen vs. Mitchell has been followed by various High Courts in regard to bonafide transactions entered into with the insolvent by strangers without notice of insolvency but as stated in Mulla (p.431, Tagore Law Lectures) (Mulla Law of Insolvency, 1977, 3rd Ed.), the Madras High Court alone has taken the view that the rule in Cohen vs. Mitchell does not apply to after-acquired immovable property.

As we are here not concerned with immovable property but with 'income' that may be received after adjudication by the insolvent from his business - and that question is covered by a specific provision in Section 60(2) of the Act conferring certain powers on the Court, - we do not think it necessary in the present case to go into the question as to what extent the rule in Cohen vs. Mitchell is applicable in India in relation to intervention by the Assignee. We, therefore, do not think it necessary to answer Point No.1. However, we shall again refer to section 52(2)(a) while dealing with 'personal earnings' of the insolvent under Point 4.

## Point 2:

As stated earlier, the question is whether 'income' that may be received by the insolvent after adjudication from his business will vest automatically in the Assignee or whether the Court has power to pass orders in regard to the said income. In this context, we have to refer to section 60(2) of the Act. It reads as follows:

"Section 60(2): Where an insolvent is in the receipt of a salary or income other than aforesaid, the Court may, at any time after adjudication and from time to time, make such orders as it thinks just for the payment to the official assignee, for distribution among the creditors of so much of such salary or income as may be liable to attachment in executing a decree or any portion thereof".

This Section corresponds to Section 51 of the English Bankruptcy Act, 1914.

It will be noticed from section 60(2) that the after-acquired 'salary or income' of the insolvent does not automatically vest in the Assignee as otherwise permitted by Section 17 of the Act but it continues to be the property vested in the insolvent and out of the said 'salary or income', whatever is not attachable if the same were to be proceeded against in execution of a decree, that amount will not vest and cannot be directed, even by the Court, to be made over to the Assignee. So far as the attachable part of such 'salary or income' is concerned, the same too does not automatically vest in the Assignee because of Section 60(2) but only such part of it can be made over to the Assignee as the Court may think just for payment to the assignee, for distribution among creditors. In other words, the Court can allow the insolvent to retain not only the non attachable part of the 'salary or income' but also that part of the attachable 'salary or income' to the extent the Court thinks just.

A provision like Section 60 requiring the Court to pass orders regarding after acquired 'salary or income' is not there in the Provincial Insolvency Act, 1920. (See Mulla Tagore Law Lectures, 1929 (Law of Insolvency, 1977 3rd Ed.)(p.439) and sub-clauses (4) and (5) of Section 28 of that Act deal with automatic vesting of after-acquired property under the Provincial Insolvency Act, 1920.

In this context, Mulla also says (p.438) that under Section 60 of the Presidency Towns Insolvency Act, 1909, the "official assignee cannot, without an order of the Court, recover any portion of the salary or income. Until the order is made, the whole of the salary or income belongs to the insolvent and he is entitled to vary agreements entered into by him with the employers in respect of his personal services. (Re Shine 1892 (1) Q.B.

522) In determining whether the whole of the attachable salary or income is to pass to the official Assignee or only a portion thereof, the Court will have regard to what is reasonably necessary for the maintenance of the insolvent, his wife and family (Ex parte Official Receiver: [1896(1) Q.B. 417]; Re Rogers 1894(1) Q.B. 425)".

We are of the view that the above statement of law in Mulla represents the correct legal position. Point 2 is decided accordingly.

Point 3:

Inasmuch as in the present case we are concerned not with 'salary' but with the 'income' that may be derived by the insolvent from trade or business, it becomes necessary to find out whether the word 'income' in section 60(2) is restricted in its meaning to income which is similar to 'salary' or can mean other income also, such as income from trade or business. In case, income from business or trade can be brought within Section 60(2), then the advantage is that such income will not automatically vest in the Assignee and even if it is entirely attachable, no part of it can be received by the Assignee except by an order of the Court and until the Court has considered what amount is to be treated just in the circumstances of the case, to be distributed to the creditors.

Question is whether the income from 'trade or business' can be brought within section 60(2).

The meaning of 'salary or income' has not been defined in the Act but it has been held in England, while dealing with the corresponding provision in Section 51 of the English Act, 1914 that the word 'income' 'is a larger word than salary' (Per Lord Hanworth in Re Landau 1934 Ch.549 (554, 556). Earlier, Sir George Jessel, MR said in Ex parte Huggins (1882) 21 Ch. 85 that the said word 'is as large a word as can be used'.

But even so, English Courts initially took the view that the word 'income' was to be construed 'ejusdem generis' like salary. That was the view of Lord Esher in Ex parte Benwell (1884) 14 Q.B. D 301 (307-308). That was also the view of the Rangoon High Court in Official Assignee of Rangoon vs. Maung Nyun Maung (AIR 1931 Rangoon 79). A similar view was expressed by Mulla in his Tagore Law Lectures of 1929 (see Mulla, Law of Insolvency, 3rd Ed., 1977 p.459) wherein he stated that 'income' means income in the nature of salary and it has reference to a particular period such as a year or some part of a year. Obviously, in 1929 that was the state of the law.

But, in later years, a more humanistic and pragmatic view has been taken in England in regard to 'income' which is not of the nature as 'salary' - for even if the insolvent is to earn income from other sources such as from business, some amount

must be allowed to be retained by him for the support of himself and his family. The insolvent has to live. In *Re Landau* 1934 Ch.549 (560), *Romer LJ* therefore held that the earlier view in *Benwell's* case that the word 'income' had to be construed 'ejusdem generis' was not correct in as much as it had not been stated there as to what genus the salary payment belonged. In *Landau's* case, maintenance ordered to be paid by the Divorce Division to a bankrupt-wife during the joint-lives of herself and her former husband, was held to be 'income'. That view was followed in *Re Tennant's Application* 1956(2) All E.R.753 (CA). In that case, it was held monthly sums paid by a husband to his wife (who was adjudicated bankrupt) - under a covenant in a deed executed during the pendency of the wife's application for an order for maintenance on dissolution of their marriage, constituted 'income' within Section 51(2) of the English Bankruptcy Act, 1914.

In fact, a wide definition appears to have now been incorporated statutorily in Section 310 of the British Insolvency Act, 1986 which Act is the result of the Cork Report. Section 310 of that Act deals with 'Income payment orders' and sub-clause (7) thereof which defines 'income' reads as follows:

"Section 310 (7): For the purpose of this Section, the income of the bankrupt comprises every payment in the nature of income which is from time to time made to him or to which he, from time to time becomes entitled, including any payment in respect of the carrying on of any business or in respect of any office or employment"

In *Halsbury's Law of England* (Vol.3(2), Bankruptcy & Insolvency) (4th Ed., para 437 f.n 2) it is stated as follows, in regard to the definition of 'income' in the English statute of 1986 in section 310(7). "This definition of 'income' suggests an intention of the legislature to enact a wider definition of income than that which the Courts developed under the Bankruptcy Act, 1914 Section 51 (repealed). In Section 51(2) (repealed), 'salary or income' was used and income was construed ejusdem generis: *Ex P. Benwell* (1884) 14 Q.B.D.301 (CA); *Re Cohen* 1961 Ch. 246 (CA), but see *Re Tenants Application* 1956 (2) All E.R. 753 (CA); *Re Landau*, 1934 Ch.549".

We are of the view that though our legislature has not defined 'income' as widely as in Section 310(7) of the English Act, 1986, the word 'income' is not to be construed ejusdem generis and that it includes income from business or trade conducted by the insolvent after his adjudication.

So construed, the said business income would then fall under Section 60(2) of the Act and would not become receivable by the Assignee automatically but only upon an order to be passed by the Court, to the extent the Court would deem it just for

payment to the official Assignee, for distribution among creditors. Till such an order is passed by the Court, the business income will continue to vest in the insolvent, even if the whole of it would otherwise have been attachable in execution of a decree. We hold accordingly under Point 3.

Point 4:

This point deals with the common law principle applicable to the 'personal earnings' of the insolvent earned by his personal labour, to be allowed to be retained by him to the extent necessary for his support and support of his family.

According to Williams and Muir Hunter on Bankruptcy (19th Ed.) (1979) (p.290), one of the categories of property excluded from vesting in the assignee is the amount covered by the 'personal earnings' of the insolvent. This principle, the author says, is based on the 'common law of Bankruptcy'.

Section 38 of the 1914 English Act is similar to Section 52 of the Presidency Towns Insolvency Act, 1909 and deals with distribution of the property of the insolvent. In the context of Section 38 as to whether 'personal earnings' will be distributable among creditors, the above authors say as follows:

"By virtue of this Section, the personal earnings of a bankrupt pass like any other property to the trustee, except such part of them as is necessary for the maintenance of the bankrupt and his family. In *Re Roberts* (1900) (1) Q.B. 122 (CA). The Court of Appeal, after reviewing previous decisions, which had suggested that personal earnings did not vest in the trustee at all, stated that there is 'no authority for the proposition that property of a bankrupt acquired by his personal exertions since his bankruptcy, and not wanted for his present support, does not belong to his trustee. No such doctrine can be maintained in the face of Section 44 (now Section 38)." After bankruptcy and before his discharge, whatever property a bankrupt acquires belongs to his trustee, save only what is necessary for his support. He may sue for his earnings if his trustee does not interfere (As he did in *Affleck vs. Hammond* 1912 (3) K.B.162". But, "the language of (that Section)... must not be taken too literally as to deprive those fruits of his personal exertions which are necessary to enable him to live. On the other hand, the necessity is the limit of the exception."

As mentioned earlier, Lord Mansfield stated in *Chippendale vs. Tomlinson* (1785) Doug 318 = 99 E.R.318) that 'the assignee cannot let out the bankrupt, they cannot contract for his labour'. But according to the notes of Mr.Douglas in that case *Butler, J.* and *Mansfield, J.* both said that the bankrupt had an undoubted right to sue for such

profits of his labour but supposing a person in his situation should have a large sum of money or considerable effects, then such money and effects would undoubtedly be liable to be made over to his assignee. In *Re Jones* (1891) 2 Q.B. 213, it has been stated that an insolvent cannot be compelled to work and earn for his creditor. Lord Denman CJ in *Williams vs. Chambers* (1847) 10 Q.B. 337 and Lush LJ in *Eaden vs. Carte* (1881) 17 Ch. D 768 stated that the earnings beyond what is needed for the support of the insolvent and his family, are to be made over to the assignee. These principles were laid down under the common law.

In our view, the above common law principles relating to earnings from personal labour of the insolvent are equally applicable in our country and in spite of Section 52(2)(a), the said earnings of the insolvent from his labour to the extent necessary for the support of the insolvent and his family, do not vest in the assignee. There is a further rider to be added to the common law principles namely that the balance of the personal earnings, - after deducting what is necessary for the support of the insolvent and his family, does not automatically vest in the assignee but is subject to the orders that may be passed by the Court under Section 60(2). Point 4 is decided accordingly.

Point 5:

We finally come to Section 75 of the Act which is the statutory provision dealing with the Assignee granting permission to the insolvent to carry on trade. That Section also deals with the Court allowing the insolvent an allowance for the support of himself and his family or in consideration of his services, if he is engaged in winding up his estate. Section 75 reads as follows:

"Section 75(1) & (2):(1) Subject to such conditions and limitations as may be prescribed, the official assignee may appoint the insolvent himself to superintend the management of the property of the insolvent or of any part thereof, or to carry on trade (if any) of the insolvent for the benefit of his creditors, and in any other respect to aid in administering the property in such manner and on such terms as the official assignee may direct.

(2) Subject as aforesaid, the Court may, from time to time, make such allowance as it thinks just to the insolvent out of his property, for the support of the insolvent and his family, or in consideration of his services, if he is engaged in winding up his estate, but any such allowance may at any time be varied or determined by the Court."

In our view, the above provision in Section 75 is based on a humane consideration of the condition of the insolvent and his family. In the book, *The Law of Insolvency* by Ian Fletcher (1990), referred

to earlier, it is stated in the introductory chapter, (at p.3) that

"After a time, a position is reached in which some effort is made to treat individual cases on their merits and to explore the possibilities for rehabilitation of the debtor under a controlled and more humane legal process".

After referring to the Cork Report which led to the passing of the English Act, 1986, the author says (p.188) that the principle of releasing monies for the support of the insolvent and his family is based on a policy

"both as an aspect of the device to preserve the dignity and self-respect of the bankrupt and his dependents, and in the interests of avoiding the creation of a further burden on the resources of the State if the bankrupt's family are rendered destitute. A rule has therefore been adopted whereby the bankrupt is allowed to retain a proportion of his income to the extent deemed necessary to maintain him and his family in reasonable circumstances".

As to what is a reasonable provision for support of the insolvent and his family, the author says (p.190) : "It will be a question of fact in each case to establish what are to be considered as the reasonable domestic needs of the bankrupt and his family and what proportion of his income he should be allowed to meet them". After the Cork Report and Section 310 of the English Act, 1986, "the Court would be acting within a spirit expressed in the Cork Report in advocating the adoption of a more humane and realistic attitude towards the position of the debtor and his family, and the more imaginative utilisation of the bankrupt's surplus future income" (Comnd & 558, paras 591-598, 1158- 1163). "In respect of that portion of his earnings or income which he is allowed to retain in consequence of an order under Section 310, the bankrupt enjoys full freedom and disposition." We may add that if over a period, out of the amounts allowed by the Court for the support of the insolvent and his family, there is a surplus or excess, then the creditors or the Assignee can apply to the Court for a review of previous orders. The above procedure will, in our opinion, be clearly consistent with Article 19(1)(g) and Article 21 of the Constitution of India.

Before parting with this aspect of the matter, we might add that while the Court has to take a humanistic view towards honest insolvents, the Court must also guard against undue exploitation of the above principles and provisions of law, by unscrupulous persons who get adjudicated as insolvents. Point 5 is decided accordingly.

Point 6:

In the present case, the application filed by

the appellant has been dismissed by the learned Single Judge and by the Division Bench without noticing the above provisions of law. We have already set out the plea of the insolvent in his application and also his version of facts and that his two children have been put in an orphanage.

In the light of the legal principles stated by us and the facts as may be proved, it will be necessary for the Court to decide the application of the insolvent afresh and determine whether the insolvent can be permitted to do business and if so, subject to what conditions. The Court will also then have to determine the extent of income he is likely to derive and the part he should be allowed to retain for the support of himself, his wife and family and then as to what amount, if any, could be made over to the Assignee.

As none of these aspects have been gone into, we set aside the judgments passed by the Division Bench and the learned Single Judge. We remit the matter to the learned Single Judge for disposal in accordance with law, after hearing the official Assignee or any other aggrieved person, and considering such evidence as the parties may adduce. It is requested that the application may be disposed of within a period of 2 months from the receipt of this order. The appeal is accordingly allowed and matter is remitted to the learned Single Judge of the High Court. There will be no order as to costs.