

PETITIONER:
ARORA ENTERPRISES LTD. & ORS.

Vs.

RESPONDENT:
INDUBHUSHAN OBHAN & ORS.

DATE OF JUDGMENT: 10/03/1997

BENCH:
B.P. JEEVAN REDDY, K.S. PARIPOORNAN

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

PARIPOORNAN, J.

Special leave granted I.A. Nos. 5 and 6 of 1997 to implead M/s Kamal Construction Co. (a partnership firm) as additional respondent in the appeals, are allowed.

2. There are three appellants in these appeals. Appellant No. 1 is a firm wherein appellant No. 2 and 3 are partners. Appellants were original plaintiffs in Suit No. 133/89 in the High Court of Bombay. These two appeals are preferred against the judgment and orders dated 10.7.1996 passed by a Division Bench of the Bombay High Court in Civil Appeal Nos. 464/96 and 513/96, dismissing the appeals. The first respondent was originally the first defendant. Respondent Nos. 1(a) to 1(d) are his legal heirs. Respondent Nos. 2 and 3 are co-owners of the property in question. Respondent No.4 is M/s Kamal Construction Co. (a firm).

3. Original defendant No.1, Indubhushan M. Obhan, died pending the suit. He owned and possessed 1/3rd undivided share in the property measuring 20569.51 sq. mts. situate in Kanjur village, Kurla Taluk, Bombay. The other two co-owners are his brothers. Indubhushan was adjudicated as an insolvent on 29.7.1971. Evidently, this aspect seems to have been published in the Gazette and also in the Newspapers. PM 9.5.1988, while Indubhushan was still an undischarged insolvent, an agreement for sale of the suit property was entered into between the plaintiffs in the suit and the said Indubhushan. Under the said agreement, the plaintiffs seem to have been deposited a sum of Rs.7 lacs with Indubhushan, towards the sale of the share in the property owned by Indubhushan. Stating that Indubhushan, the first defendant committed breach of the said agreement and has also started construction work on the land agreed to be sold to the plaintiffs, suit No. 133/89 was laid in the High Court of Bombay by the appellants herein claiming the following reliefs:

(a) to declare that there is a valid, subsisting and binding agreement between the appellants and the first defendant, as contained in the agreement dated

9.5.1988;

(b) that the properties be properly partitioned by metes and bounds in three separate parts and one plot marked in red colour be allotted to the appellants;

(c) that the defendants in the suit (Indubhushan and his two brothers) be ordered to specifically perform the said agreement;

(d) in the alternative, the defendants be ordered to pay a sum of Rs. 2 crores;

(e) in the alternative, a decree may be passed against the first defendant for recovery of a sum of Rs. 7 lacs with 18% interest per annum;

(f) that upon failure of the defendants to pay the said amount, the property may be sold to the appellants to the extent of the share owners the first defendant; etc.

(It may be mentioned that defendant Nos. 2 and 3 are the brothers of Indubhushan -- the first defendant). It appears that Indubhushan had initiated proceeding by taking notice of motion for annulment of this insolvency. While so, the first defendant -- Indubhushan died on 22.4.1989. The proceeding initiated for annulment of insolvency proceeding was withdrawn by his counsel. The appellants took out chamber summons 769/89 in the suit to bring on record respondent Nos. 1 to 4 therein, as defendant No. 1 as his legal heirs and also to appoint guardian for the minors respondents 2 to 4 and add respondent No.5 - the official assignee of the High Court of Bombay as party defendant No.4 in the suit. Prayer to amend the plaint in terms of the draft amendment mentioned in the schedule containing the above prayer was also specified. The Chamber summons is dated 21.7.1989. The above chamber summons came up for hearing and disposal before Variava, J. on 2.2.1990. It seems the suit was not posted to the day. After hearing Counsel for the parties, the learned Judge passed the following order on 2.2.1990:

"Suit to enforce Agreement entered into by Defendant No. 1, who was an Insolvent. Till date leave of Insolvency court not obtained. Clear that Agreement is void and unenforceable and suit not maintainable.

Amendments seek to convert this suit. In my view, cannot be allowed to this.

Chamber summons dismissed.

No order as to costs."

(emphasis supplied)

The appellants (plaintiffs in the suit) filed Appeal No. 413/91 against the aforesaid order of the learned single Judge of the High Court of Bombay dated 2.2.1990, before a Division Bench. The Division Bench summarily dismissed the appeal by its judgment and order dated 9.7.1991. The result of the above proceedings is that the suit (No. 133/89) stood abated against Indubhushan's (estate) legal heirs.

4. It appears that the legal heirs of the original first defendant entered into an agreement with M/s. Kamal Construction Co. (a firm) for sale of the suit property. M/s Kamal Construction Co. have filed I.A. Nos. 5 and 3 of 1997 to implead them as a party respondent in the appeals. (We have allowed the same). On 3.5.1994, the insolvency of Indubhushan to sell the property was entered into between the legal heirs of Indubhushan and M/s Kamal Construction Co. on 2.9.1995. On 20.11.1995, the appellants took out fresh chamber summons No. 1123/95 (in suit No. 133/89), praying to amend the plaint by deleting the name of defendant No.1 - Indubhushan - from the title of the suit and in his place to add the names of defendant Nos. 1(a) to 1(d) -- respondents herein, as the legal heirs of deceased defendant No. 1. According to the appellants, as a result of annulment of insolvency stands wiped out and the agreement entered into by the appellants with the original first defendant dated 9.5.1988 revived and binding on his estate, and the dismissal of the earlier chamber summons declining to implead the legal heirs and the consequent abatement of the suit are of no consequence, as they are non est and ineffective, that the appellants are entitled to have the said heirs on record of the suit and to have the abatement, if any set aside as a matter of law and so, the proposed amendments to implead the legal heirs of defendant No. 1 should be allowed. The legal heirs of the first defendant (respondent herein) (as also M/s. Kamal Construction Co. opposed the above motion and contended inter alia that the earlier order passed in chamber summons No. 769/89, declining to implead the legal heirs and to implead the official assignee has become final and conclusive and the suit (No.133/1989) stood dismissed by a learned single Judge and affirmed by a Division Bench. It was further stated that the above suit itself has abated by non-impleadment of the legal heirs within the time allowed by law and, so the present notice of motion should be rejected. Similarly, the appellants took out another chamber summons No. 14 of 1996 in the said suit to implead M/s Kamal Construction Co. and also praying to declare that the agreements entered into the legal heirs of defendant No. 1 and M/s Kamal Construction Co. dated 13.4.1994 and 20.9.1995 are invalid. The above two chamber summons i.e. No.1123/95 and 14/96 were dismissed by a learned single Judge of the Bombay High Court by his order dated 8.3.1996. While passing the order in chamber summons no. 1123/95, the learned single Judge adverted to the earlier proceeding which resulted in the dismissal the earlier proceedings which resulted in the dismissal of chamber summons NO. 769/89 by Variava, J., and held that there was no change in the circumstances for the appellant to take fresh chamber summons No. 1123/95 that the order passed on 2.2.1990 holding (a) that the agreement between the appellants and the first defendant is void and the suit is not maintainable, has become final, and (b) that no case has been made out by the appellant for setting aside the abatement of the suit, as against the estate of the first defendant. As a sequel thereto, Chamber summons No. 14/96 to implead M/s Kamal Construction Co. as 5th respondent was also dismissed. The appeals filed by the appellants from the aforesaid common judgment and order as Appeal No.513/96 and Appeal No.464/96 were dismissed by a Division Bench of the High Court of Bombay by its judgments and order dated 10.7.1996. The original plaintiff have come up in appeals against the aforesaid judgments and orders so rendered by the High Court in Civil Appeal Nos. 464/96 and 513/96 dated 10.7.1996.

5. We heard Shri Soli J. Sorabjee, Senior Counsel who appeared for the appellants, and M/s Dr. Dhanuka and Shri K.K. Venugopal, Senior Advocates who appeared for the respondents. The arguments advanced before us covered a wide range. It may not be necessary to adjudicate the rival contentions urged before us in detail, in the light of our conclusion regarding the scope of the order passed in chamber summons No.769/89 dated 2.2.1990. We shall only indicate in brief the rival pleas urged before us and our conclusion thereon.

6. At this juncture, we should bear in mind a crucial aspect in these cases. The appellants filed the suit against Indubhushan (defendant No. 1) on 13.1.1989. Indubhushan died on 22.4.1989. On that day he was an undischarged insolvent. The appellants took out chamber summons No. 769/89 in suit No.133/89. After hearing the parties, a learned single Judge of the Bombay High Court by order dated 2.2.1990, rejected the chamber summons on two distinct and different grounds. They are - (1) the agreement dated 9.5.1988 between the appellants and Indubhushan is void and unenforceable and so, the suit for specific performance of the said agreement is not maintainable; (2) the amendments sought by the appellants to delete the name of the first defendant and to implead defendant Nos. 1(a) to 1(d) (as respondents 1 to 4) in place of the deceased defendant No.1 and to add the official assignee as a party defendant, were disallowed.

Though, the motion to implead the legal heirs seems to have been made in time, the prayer to amend the plaint to bring the legal heirs of defendant No. 1 on record was declined after hearing the parties, by passing a judicial order as early as 2.2.1990. Thereby, the suit (No.133/89) stood abated against defendant No. 1 and his legal heirs. It is long thereafter, after a lapse of five years, the appellants initiated proceedings for the issue of another chamber summons No. 1123/95 (in the suit -- which has abated against the estate of the first defendant), making a fresh attempt to bring the legal heirs of the first defendant on record and prayed for appropriate amendment of the pleading in that regard. According to the appellants, the abatement of the suit as against defendant No.1 by reason of the non-impleadment of the heirs of the original defendant No. 1, is non est and ineffective and the abate of the suit, if any require to the set aside, as matter of law, in view of the annulment of insolvency by order dated 30.5.1994. We shall advert to these aspects, later in our judgment.

7. Shri Soli J. Sorabjee, Senior Counsel for the appellants, urged the following points:

The adjudication of Indubhushan as insolvent on 29.7.1971 stood wiped out by the order of the annulment of the same on 30.5.1994. The legal effect of annulment is to wipe out the insolvency and to restore the state of affairs as on the date of adjudication. In this perspective, the order dated 2.2.1990 passed in chamber summons No. 769/89 declining to implead or bring on record the legal heirs of Indubhushan is of no effect. There is no prohibition in law to enter into an agreement with an undischarged insolvent. In view of the annulment of the insolvency, the property reverted in the insolvent and the original agreement to sell dated 9.5.1988 entered into by the appellants with Indubhushan, is alive and enforceable. In this view, the High Court was in error in holding that the earlier order passed in Chamber summons No. 769/89 is a bar for the present motion by way of chamber summon NO.1123/95 to bring on record the legal representative of Indubhushan and for grant of appropriate reliefs. The agreement entered into by the

legal heirs of Indubhshan with respondent No. 4 was also before the annulment of the insolvency proceeding and so it also vitiated. According to counsel, the entire matter requires a fresh look in view of the legal effect of annulment of insolvency proceedings which is to restore the state of affairs as on the date of adjudication and to ignore all subsequent events. To substantiate the above points counsel brought to our notice the following decisions:-

Rup Narain Singh and another vs. Har Gopal Tewari and others [AIR 1933 Allahabad 449]; Subbaiah Goundan v. Ramasami Goundan and others [AIR 1954 Mad. 604 (FB)] at page 613 para 28 and Page 618 para 40]; Bhyradevanhalli Lingappa v. Official Receiver, Bellary [AIR 1937 Mad. 717-718; Ratnavelu Chettiar v. Franciscu Udayar and Others [AIR 1945 Mad. 388; Ps.Ar.Ar. Arunachalam Chettiar v. Narayanaswami Goundar [AIR 1951 Mad. 63(FB) at page 62 par 7; Gamoji Venkata Ramakrishnarao v. Gullapalli Sambamurti [AIR 1951 Mad. 581]; C. Jabbarchand and other v. Mrs. c. Oliver and another [AIR 1965 Mysore 117]; Kumari Rangappa v. Reddi Govinda Reddy and Other [AIR 1963 Andhra Pradesh 228]; Gunupudi Subba Rao & Co. v. Boggarapu Gurusmany [AIR 1966 Andhra Pradesh 25(26)], Passages from Mulla on The Law of Insolvency in India (Third Edition) para 343 and 344.

8. On the other hand Mr. Dhanuka and Mr. Venugopal, Senior Counsel, who appeared for the respondents submitted thus:

The effect of the order passed in chamber summons No. 769/89 dated 2.2.1990 is a dismissal of suit No. 133/89 and that is the end of the matter. There is no pending suit in which the proceedings by way of chamber summons No. 1123/95 could be filed. The suit had abated long ago and the abatement has not been set aside. There is inordinate delay in the matter. Even in the present chamber summons No.1123/95 there is no prayer factually, as such, to set aside the abatement of the suit. The only plea is that the abatement of the suit, if any, requires to be set aside, as a matter of law. This plea is untenable. The suit stated to pending, is against a dead person. No proceeding will lie in the said suit. Suit No. 133/89 itself was filed without obtaining leave, which is a condition precedent. The defect is fatal. It has no existence in law. In any view of the matter, since the earlier order dated 2.2.1990 refusing to implead or bring on record the legal heirs of Indubhshan, has become final and conclusive, the suit has abate. By initiating the present chamber summons No. 1123/95 in a non-existent suit, the attempt is (to bring on record) to implead the legal heirs of Indubhshan; such indirect attempt to implead the legal heirs of Indubhshan, after the suit has abated and after inordinate delay, is patently unsustainable. The legal heirs of Indubhshan had entered into a valid contract with 4th respondent after the annulment of the insolvency on 20.9.1995. In pursuance thereto, 4th respondent took possession of the property, made vast improvement therein and has built 12 flats and has sold the same. Even though insolvency was annulled on 30.5.1994, the proceeding by way of chamber summons No.1123/95 was initiated only on 20.11.1995, more than 18 months after the annulment of insolvency. There is inordinate delay in the matter and the rights of third parties have intervened; and the court below was justified in dismissing chamber summons No.1123/95 taking into account the earlier proceeding. Our attention was invited to the following decisions :-

Kisan Sitaram Ambekar and others v. Sitaram Tulsiram and others [AIR 1951 Nagpur 241]; Jehangir Gursetji Mistri

v. Kastur Pannaji Oswal [AIR 1939 Bom. 344]; Davood Mohideen Rowther v. Sahabdeen Sahib [AIR 1937 Mad. 667]; Katragadda Sreeramamma v. Official Receiver, Guntur & anr. [AIR 1955 Andhra Pradesh 115]; Bai Pani Vankar v.; Madhabhai Galabhai Patel [AIR 1953 Bom. 356]; Firm Sarju Prasad-Bhagwati Prasad Sah v. Rajendra Prasad and others [AIR 1937 Allahabad 271]; Satyadhyan Ghosal and others v. Smt. Deorajin Debi another [AIR 1960 SC 941]; and passages from Mulla on the law of Insolvency in India (Third Edition) para 238.

9. Though the arguments addressed before us covered a wide range, we are of the view that it is unnecessary to pronounce in detail on the various aspects involved in the matter at this stage. Suffice it to say that pre-ponderance of judicial opinion is in favour of the view that the effect of annulling the adjudication in insolvency proceeding, is to wipe out the effect of insolvency and to vest the property retrospectively in the insolvent. The consequence of annulling an order of adjudication is to wipe out altogether the insolvency and its effect. The property will revert in the insolvent retrospectively from the date of the vesting order. We hold that the law is fairly clear to above extent. But this does not solve the problem arising in this case. The effect of the suit (independently) filed by the appellants and the order passed therein have to be considered. That is a distinct and different matter, which has its own existence and legal impact, unimpaired by the annulment of the insolvency. In other words, by the annulment of the insolvency and wiping out its effect retroactively, in law, the suit and the judicial orders passed thereon are not wiped out, or rendered void or a nullity, automatically. The order passed in the suit is not non est or ineffective. In the suit laid by the appellants (suit No.133/89), praying for declaration that the agreement between the appellants and Indubhushan dated 9.5.1988 is valid and subsisting, that the property should be properly partitioned and that a decree may be passed against Indubhushan-first defendant for recovery of a sum of Rs. 7 Lacs etc; on the demise of Indubhushan on 22.4.1989, the appellant took out chamber summons No.769/89 in the suit (No.133/1989). The court rejected the chamber summons by a composite order on two different and distinct points -- (1) the agreement dated 9.5.1988 entered between the appellants and Indubhushan is void and unenforceable and so, the suit is not maintainable; (2) the amendments sought by the appellants to implead defendants 1(a) to 1(d) as respondents 1 to 4 in place of deceased defendant No.1 and to add the official assignee as a party defendant, were disallowed. The legal effect of the said order is that Suit No.113/89 stood abated against the legal heirs of the first defendant, Indubhushan and the order passed on 2.2.1990 reached finality. It so happened, as a result of the judicial order passed by the court in a proceeding between the parties to this proceeding as early as 2.2.1990. This order is valid until set aside or annulled, in appropriate proceedings. It cannot be ignored. It will have legal effect of its own, until appropriate proceeding are taken to establish its invalidity and to get it annulled by a person entitled to avoid it. The said order stand even today; it has not been set aside. So long as the said order stands the abatement of the suit has become unassailable in these proceedings. Nearly five years thereafter, the appellants filed fresh chamber summons No. 1123/95 in a non-existent suit. No factual plea as such was made to set aside the abatement. The plea in that regard is that by the annulment of insolvency, the abatement of the suit, if any, requires to

be set aside as a matter of law. For reasons stated earlier, the abatement of the suit (an independent proceeding), that ensued, cannot be ignored or the proceedings in the suit revived, by the annulment of insolvency, as a matter of law. Moreover, there is inordinate delay, even if such prayer was made in the application. The attempt made in chamber summons No.1123/95 to bring the legal heirs of the first defendant on record, is a futile attempt to bring back to life a suit which no longer existed. The legal effect of the order passed in chamber summons No. 769/89 dated 2.2.1990 has resulted in the abatement of the suit against the legal heirs of the first defendant- Indubhushan. In such state of affairs, the fresh chamber summons taken (No.1123/95) in a nonexistent suit, is patently barred, unsustainable in law and merits no consideration. In this view of the matter, we affirm the judgments and order passed by the High Court and no interference is called for in these appeals. The appeals are without merit and are dismissed. There will be no order as to costs.