

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 1ST DAY OF APRIL 2015/11TH CHAITHRA, 1937

OP(C).No. 1594 of 2014 (O)

E.A.105/2014 IN EP.70/2010 IN O.S.117/2006 OF SUB COURT, ATTINGAL.

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PETITIONER/IST RESPONDENT:

**R.HAREENDRA BABU, S/O RAGHAVAN,
AGED 62 YEARS, PONRAG, SREENIVASAPURAM P.O.,
VARKALA VILLAGE, NOW RESIDING AT 'PRASANTH',
4TH CROSS ROAD, BEENA ACHUMANA ROAD,
EDAPPALLY SOUTH, KOCHI-682024.**

**BY ADVS.SMT.K.KUSUMAM
SRI.BASANT BALAJI
SMT.S.S.MEERA
SMT.RENY ANTO**

RESPONDENT(S):

- 1. K.R.VASANTHAKUMAR (DIED), S/O RAGHAVAN,
K.R. GARDENS, KATTUPUTHUSSERY,
KUDAVOOR VILLAGE, NAVAIKULAM,
THIRUVANANTHAPURAM, PIN:695 603.**
- 2. ANEESH V.KUMAR (DIED),
S/O VASANTHAKUMAR, K.R. GARDENS,
KATTUPUTHUSSERY, KUDAVOOR VILLAGE,
NAVAIKULAM, THIRUVANANTHAPURAM, PIN:695 603.**
- 3. VIJAYAKANTH, S/O VELAYUDHAN,
THANAKKYAVIL VEEDU, MANAMPUR,
THIRUVANANTHAPURAM, PIN:695144.**
- 4. K.R.FINANCIERS, K.R. GARDENS,
KATTUPUTHUSSERY, KUDAVOOR VILLAGE,
NAVAIKULAM, THIRUVANANTHAPURAM, PIN:695 603.**
- 5. MANIYANPILLAI, KUNJU VEEDU,
VELLIVILAKOM, VAKKOM P.O.,
THIRUVANANTHAPURAM, PIN:695308.**

OP(C).No. 1594 of 2014 (O)

6. AJEESH V.KUMAR, S/O VASANTHAKUMAR,
K.R. GARDENS, KATTUPUTHUSSERY,
KUDAVOOR VILLAGE, NAVAIKULAM,
THIRUVANANTHAPURAM, PIN:695 603.
7. HEMA, W/O VASANTHAKUMAR, K.R. GARDENS,
KATTUPUTHUSSERY, KUDAVOOR VILLAGE,
NAVAIKULAM, THIRUVANANTHAPURAM, PIN:695 603.
8. AMESH V.KUMAR, S/O VASANTHAKUMAR,
K.R. GARDENS, KATTUPUTHUSSERY,
KUDAVOOR VILLAGE, NAVAIKULAM,
THIRUVANANTHAPURAM, PIN:695 603.

R5 BY ADV. SRI.M.DINESH

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 01-04-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

mbr/

APPENDIX

PETITIONER(S)' EXHIBITS:

- EXHIBIT P1: TRUE COPY OF THE PLAINT IN O.S.NO.117/2006 ON THE FILE OF THE SUB COURT, ATTINGAL.
- EXHIBIT P2: TRUE COPY OF THE I.A.NO.895/2006 PETITION FOR ATTACHMENT BEFORE JUDGMENT.
- EXHIBIT P3: TRUE COPY OF THE ORDER OF ATTACHMENT BEFORE JUDGMENT, IN O.S.117/2006 DATED 23.6.2006 OF THE SUB COURT, ATTINGAL WITH REPORT OF AMIN.
- EXHIBIT P4: TRUE COPY OF THE JUDGMENT IN O.S.NO.117/06 DATED 23.1.2010 ON THE FILE OF THE SUB COUT, ATTINGAL.
- EXHIBIT P5: TRUE COPY OF THE DECREE IN O.S.NO.117/2006 ON THE FILE OF THE SUB COURT, ATTINGAL.
- EXHIBIT P6: TRUE COPY OF THE EXECUTION PETITION IN E.P.70/2010 ON THE FILE OF THE SUB COURT, ATTINGAL.
- EXHIBIT P7: TRUE COPY OF THE JUDGMENT IN O.P(C)NO.441 OF 2014, ON THE FILE OF HON'BLE HIGH COURT OF KERALA.
- EXHIBIT P8: TRUE COPY OF E.A.NO.105/2014 ON THE FILE OF THE SUB COURT, ATTINGAL.
- EXHIBIT P9: TRUE COPY OF THE OBJECTION FILED BY THE PETITIONER IN E.A.NO.105/2014.
- EXHIBIT P10: TRUE COPY OF THE INSOLVENCY PETITION FILED IN I.P.1/2007, DATED 28.2.2007 OF THE SUB COURT, ATTINGAL.
- EXHIBIT P11: TRUE COPY OF THE ORDER IN I.P.NO.1/2007 OF THE SUB COURT, ATTINGAL DATED 20.10.2010.
- EXHIBIT P12: TRUE COPY OF THE ORDER IN E.A.NO.105/2014 IN E.P.70/2010 IN O.S.NO.117/2006, ON THE FILE OF THE SUB COURT ATTINGAL, DATED 12.6.2014.

RESPONDENT(S)' EXHIBITS:

- NIL

/TRUE COPY/

P.S. TO JUDGE

mbr/

P. BHAVADASAN, J.

O.P.(C). No. 1594 of 2014

Dated this the 1st day of April, 2015.

JUDGMENT

Aggrieved by order dated 12.6.2014 in E.A. 105 of 2014 in E.P. 70 of 2010 in O.S. 117 of 2006, the first respondent before the court below has come up with this Original Petition under Article 227 of the Constitution of India.

2. Respondents 6, 7 and 8, who were judgment debtors 3, 7 and 8, filed the above E.A. under Section 151 of the Code of Civil Procedure to have the execution petition filed for executing the decree in favour of the petitioner herein dismissed as not maintainable.

3. The petitioner claims to have obtained a money decree against the judgment debtors.

4. The claim of the petitioners before the court below was that some of the creditors had filed an insolvency petition in which an adjudication order was passed and

therefore, the entire assets belonging to the judgment debtor came to vest with the Insolvency Court. The properties involved in this proceedings are scheduled in the insolvency petition in respect of which the court below ordered for the ratable distribution of the assets. Contending that the petitioner before this Court cannot proceed with the execution petition, the petition was laid.

5. The petitioner, who is the decree holder, resisted the petition. According to him, the entire insolvency proceedings were collusive and as a result of material suppression of fact. He claims that he was not made a party to the proceedings and the proceedings are not binding on him. It is also contended that much prior to the adjudication order in the insolvency petition, the property had been attached and a charge decree has been given in favour of the petitioner and if that be so, he qualifies as a secured creditor who falls outside the ambit of

insolvency proceedings. On these grounds, he filed a petition.

6. The court below, even though found that adjudication order was passed after the decree in the suit, held that an adjudication of a person as insolvent relates back to the date of petition. Accordingly, the petition was allowed and the E.P. was dismissed.

7. Learned counsel appearing for the petitioner contended that the court below was not justified in dismissing the execution petition. The attachment of the property was made long before the insolvency proceedings were initiated and ultimately the suit came to be decreed making the property involved in the suit liable for a debt due to the petitioner before this Court. The petitioner was qualified to be a secured creditor as defined under Section 2 (f) of the Insolvency Act, 1995 and if that be so, under Section 28(6) of the Act, he can stand outside the

insolvency proceedings. It is, accordingly, contended that the order cannot stand.

8. Even though the respondents were served with notice, they have not entered appearance.

9. It appears that there was considerable controversy before the court below as to whether the decree obtained by the petitioner before this Court was a charged decree or not. The decree as it now stands only enables the petitioner before this Court to proceed against the property involved in the proceedings. Whether that amounts to a charged decree is a much debated point by the court below.

10. Even though the court below did not enter a positive finding in that regard, the court was carried away by the fact that since adjudication order was made and it related back to the date of the petition, and since as on the date of the petition the petitioner did not have a charged decree, it could not be said that he is entitled to benefit

under Section 28(6) of the Act.

11. The question is how far the court below was justified in its conclusion. There can be no manner of doubt that by the mere process of attachment, a charge is not created over the property nor can it be said that when subsequently charge is created, it relates back to the date of attachment. This is evident from the decision reported in **State of Kerala v. Mani** (1995(2) K.L.T. 568) wherein it was held as follows:

“Only if the amount claimed is arrears of public revenue on land, a charge will be created on the land and not otherwise. Plaintiff-State is therefore not a secured creditor when the insolvency proceeding was initiated. Attachment of land does not create any charge on the property.”

But as could be seen from the order of the lower court, it is seen that the order of adjudication was after the decree was passed in the suit in favour of the petitioner before this Court. How far the subsequent order or adjudication under

the Insolvency Act can affect a charged decree which has already passed is the real question to be considered by the court below. In this regard even though it could appear from the provisions of the Act, once an adjudication order is passed, it relates back to the date of the petition, how far it can affect the secured creditor's right where charge was created before the order of adjudication is a debatable question. It is felt that this aspect has not been properly addressed by the court below and it needs reconsideration.

In the result, this Original Petition is allowed and the impugned order is set aside and the matter is remanded to the court below for fresh consideration in accordance with law and in the light of what has been stated above.

sb.

P. BHAVADASAN,
JUDGE