

(1948) 04 CAL CK 0016
In the Calcutta High Court

Chittaranjan Sen Gupta

APPELLANT

Vs

Samarendra Nath Roy

RESPONDENT

Date of Decision : 07-04-1948

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115

Citation : (1948) 04 CAL CK 0016

Hon'ble Judges : Chakravartti, J

Bench : Division Bench

Judgement

Chakravartti, J.—This appeal has been before this Court on a previous occasion, but if the appellant's contention is right, the proceedings so far had by respondent 1 have all been misconceived and he must begin anew in another forum.

2. The facts have now been finally found by the Courts below and are as follows: On 17th November 1944, one Sarat Chandra Sen, residing as a tenant at 6 Rajabagan Lane, Cossipore, Calcutta, applied for adjudication of himself as an insolvent. He had experience in the line, for it appears from the application that he had been adjudged an insolvent once before, when too he had applied himself. The present application was allowed on 6th April 1945. In his application Sarat did not mention his tenancy of 6 Rajabagan Lane as one of his assets. Shortly after his adjudication, however, three of his creditors pointed out the property to the Official Receiver and asked him to bring it to sale. The Receiver complied and a sale was held on 18th May 1945, when the tenancy was purchased by one Samarendra Mohan Roy who is respondent 1, in this appeal. When, thereafter, Sarat was asked by the Receiver to deliver possession of the premises to Samarendra, both he and his son Chittaranjan Sen, who is the appellant before me, put forward a case that the old tenancy of Sarat had been terminated long ago and that the present tenant was Chittaranjan, who was in possession of the premises in his own right. Thereupon, Samarendra made an application to the Insolvency Court against both father and son for a direction to

them to deliver possession of the premises to him. It is out of that application that the present appeal has arisen.

3. The trial Court held that no question as to whether Chittaranjan was in possession of the house arose, that the real question was whether Sarat was in possession and on the finding that he was, it held that the purchaser was entitled to obtain delivery of possession through Court after evicting Sarat. Against that order, Chittaranjan appealed and the appellate Court pointed out that the purchaser's application for possession was against both Sarat and Chittaranjan, but by its order the trial Court had not disposed of the latter. The question at issue between him and the purchaser, it was further pointed out, was whether he and not Sarat was in possession, and that in his independent right, and the case was remanded to the trial Court for decision of this issue. There was next a further appeal to this Court by Samarendra and in that appeal it was held by Biswas J. that although Chittaranjan had not adduced proper evidence in support of his claim, he had raised a question of title which he might yet be given an opportunity to establish as a measure of indulgence. The learned Judge would not, however, uphold the order of remand to the trial Court and made what he called "a limited order of remand" to the lower appellate Court, directing that Court to admit some further evidence of a specified kind and then decide the question of title, i.e., the question:

Whether the disputed property did vest in the Official Receiver in due course of law at the date of the gale as being the property of the insolvent or after the application for insolvency, the leasehold came to be bold by the respondent on determination of the insolvent's lease.

No order was passed on an application in the alternative u/s 115, Civil P.C.

4. At the hearing before the lower appellate Court after remand, it was sought to be argued on behalf of the appellant that an application for possession could only be made by the Receiver, but the learned Judge refused to entertain this contention in the view that it was outside the scope of the enquiry directed by the order of remand. It was next contended that neither the insolvent, nor the Receiver was entitled u/s 56, Provincial Insolvency Act to remove the appellant from possession of the premises, in view of his claim to an independent title. The learned Judge held that this question would not arise unless the appellant proved his; title, as claimed, Proceeding next to consider the evidence, the learned Judge held that the alleged settlement of the premises with the appellant was a "myth" and that "the lease was never determined and it never came to be held by Chittaranjan Sen before or after the application for insolvency by his father" In the result the learned Judge upheld the order for delivery of possession passed by the trial Court and dismissed the appeal. Thereupon, the present second appeal was filed.

5. Mr. Lahiri. who appeared for the purchaser, first took a preliminary objection as to the maintainability of the appeal but ultimately withdrew it by conceding

that since a question of title had been directed to be tried and had been tried, a second appeal lay under the second proviso to Section 75 (1) of the Act. Mr. Chakravarti, for the appellant, besides pointing out that on the previous occasion the purchaser himself had preferred an appeal, met the objection by promptly filing an application u/s 115 of the Code, for which there was yet time, subsequently changing into an application u/s 75, Insolvency Act. The preliminary objection need not therefore detain me further.

6. On the merits, the argument was limited to a pure question of law. It was contended on behalf of the appellant whether at the instance of the Official Receiver or a purchaser from him, the Insolvency Court could not make an order for possession u/s 56(3) of the Act against a third party who set up a title in himself, however flimsy such title might be, It was contended on behalf of the purchaser that the Insolvency Court had power to make such an order Under Sections 4, 5 and 56 (3) of the Act. Both parties supported their respective contentions by reference to decisions of the Madras High Court. The appellant relied on Chittumal v. Ponnuswami Naicker 13 AIR 1926 Mad. 363 and Venkatarama v. N.S. Chokkiar 15 AIR 1928 Mad. 531 Respondent 1, the purchaser, relied on Ramaswami Chettiar v. Rangaswami Iyengar 9 AIR 1922 Mad. 147 and S.A. RM. A. Vandarguzhal Achi and Others Vs. South India Corporation (Madras) Ltd. and Others, , a decision of a Pull Bench.

7. In view of the conclusion I have arrived at as to the scope of this appeal, it is not necessary for me to decide the question of law raised but it is necessary to make some reference to it in order that my conclusion may be understood. It will be convenient to refer first to the relevant sections of the Act. Section 4 gives the widest powers to the insolvency Court to decide question of title and, sitting singly, I am bound to take the section as embracing questions of title as between the Official Receiver and a stranger, as held by a Division Bench of this Court in Fool Kumari Dasi Vs. Khirad Chandra Das Gupta, Section 5 gives the insolvency Court the same powers as a civil Court to give effect to its orders, "subject to the provisions of this Act." Section 56 (3) empowers the insolvency Court, in cases where it appoints a Receiver, to remove persons from the possession or custody of the property of the insolvent, but qualifies the power by providing that the section will not authorize the Court to remove any person whom the insolvent has not a present right to remove. In Ramaswami Chettiar v. Rangaswami Iyengar 9 AIR 1922 Mad. 147 the resistance to the purchaser from the Receiver was by the insolvent's son who contended that his interest had not vested in the Receiver and that, further, the purchase was a benami purchase on his behalf. The application to the Court was made by both the Receiver and the purchaser, a fact which. seems to have been overlooked in the course of the judgment, and it was held that even a third party could make an application u/s 56(3), that the insolvency Court could decide a question of title as between him and the insolvent u/s 4 and that the Court could make an order for possession in favour of the third party u/s 5. In Chittumal v. Ponnuswami Naicker 13 AIR 1926 Mad. 363 there was not a sale but a lease by the Receiver and the property was

claimed by certain relatives of the insolvent under a family arrangement. There too the application was, as the statement of facts in the report shows, by both the Receiver and the lessee and it was held that by reason of its proviso, Section 56(3) was subject to same limitation as contained in Order 40, Rule 1(2), Civil P.C. and that it did not apply where a third party in possession claimed adversely to the insolvent, however flimsy his claim might be. It was, however, added that u/s 4, the insolvency Court could decide whether the insolvent was entitled to the property, but that could be done only on a proper application made for the purpose and the enquiry which had taken place could not be said to have been an enquiry u/s 4 or to have made a further enquiry unnecessary. The implication of this part of the judgment is that if it is first held on a proper enquiry u/s 4 that the claimant has no title, an order u/s 56(3) can then be made.

8. In *Venkatarama v. N.S. Chokkiar* 15 AIR 1928 Mad. 531 the obstruction to the purchaser was caused by the insolvents themselves as trustees for the shares of their minor sons under a deed of trust by which the sons' shares had been settled for the conduct of a charity. The applications to the Court, which were made by the purchasers, were u/s 56(3), but subsequently Section 4 was added in one of them and the Court treated all of them as applications u/s 4. The sales purported to be of the entirety of the properties. It was held that the Receiver was entitled to sell the sons' shares in the joint family property in exercise of the powers of their father, but the purchaser could not apply u/s 4 for possession of the sons' shares, although he could be given joint possession u/s 4 so far as the insolvent's own share was concerned. A distinction was thus made between what was unquestionably the insolvent's property and property which did not belong to him, nor was claimed adversely to him, but which he, and the Receiver standing in his shoes, had nevertheless power to sell. It was stated further that after the Receiver had sold a property to a stranger and converted the insolvent's estate into money, delivery of possession to the purchaser was hardly his concern, but an exception was made in respect of cases where a claim was made against the insolvent himself as respects only his share or against a rival purchaser. The case in *Chittumal v. Ponnuswami Naicker* 13 AIR 1926 Mad. 363 was approved of and that in *Ramaswami Chettiar v. Rangaswami Iyengar* 9 AIR 1922 Mad. 147 was distinguished on the ground that it had been given at a time when the Receiver's powers of sale as to the shares of the sons of a Hindu insolvent in joint family property had not yet been clarified, as also on the further ground that in that case the son was claiming not merely his own share but the whole property, on the allegation that the purchase from the Receiver had been benami purchase on his behalf.

9. In *S.A. RM. A. Vandarguzhal Achi and Others Vs. South India Corporation (Madras) Ltd. and Others*, the reference to the Full Bench was made on account of the conflict that was thought to exist between the decision in *S.R.M.S.T.R.M. Ramaswami Chettiar* through his authorizes Agent *Kuppan Ayyangar Vs. T.S. Ramaswami Iyengar, Official Receiver, Madura and Another*, and that in *K.L. Venkataram and Another Vs. N.S. Chockkier*, No notice was taken either in the

letter of reference or in the judgment of the Full Bench of the grounds on which the earlier case had been distinguished in the latter. On the other hand, the judgment in the later case was criticized as self-contradictory in that it was first observed that delivery of possession to the purchaser was no part of the work, of distribution and no concern of the Receiver and then an, order for joint possession was made in respect of the insolvent's share. This criticism does not appear to me to be justified, and could have been made only because the distinction made in the earlier case between the insolvent's own property and property which he had merely power to sell was overlooked. But it must be added that, to a certain extent, the learned Judges who had decided the earlier case, invited this criticism by using too wide an expression in the proposition stated by them and by speaking of "the insolvent's estate," whereas they appear to have had in mind, as the exceptions made by them would show, only property which the insolvent had merely power to sell. Such property is not the property of the insolvent and questions relating to it could not obviously come either u/s & or Section 56(3). However, to return to the decision of the Full Bench, it is a singularly unhelpful pronouncement. The facts were that the adult members of a certain Hindu joint family were adjudicated insolvents by the Rangoon High Court under the Presidency Towns Insolvency Act and the aid of the District Court of Ramnad in Madras was asked for u/s 126 of that Act and Section 77, Provincial Insolvency Act. Such aid was extended and the Official Receiver of the Ramnad Court sold a house belonging to the joint family, situate in Ramnad, to a stranger. Previously, on taking possession of the house, the Receiver had let it out to the wives of the insolvents on an undertaking given by them to give up possession whenever required. Two of the insolvents had minor sons and obstruction was offered on their behalf on the ground that the sale was not binding on them. On an application by the purchaser, the District Judge made an order for possession in his favour, leaving the claim of the minors to be decided in separate proceedings. The Full Bench did not enter into any discussion at all, but merely said that Sections 4, 5 and 56, Provincial Insolvency Act, were very widely worded and the learned Judges had no hesitation in holding that they empowered the Court to give possession of a property sold in insolvency proceedings at the instance of an Official Receiver. The implication of the decision seems to be that enquiries u/s 4 and 56 can be combined in one proceeding.

10. I have referred to these decisions simply for the purpose of pointing out what questions arise in a case of the present type and why those questions need not be gone into in the present case. The questions, it seems to me are, can a purchaser from a Receiver apply for possession to the insolvency Court u/s 56(3)? Even if he can, is it the law that the Court must stay its hands and refer the applicant to a regular suit, the moment it finds that the person in possession is setting up a title in himself, adversely to the insolvent? Or, can the Court make an order u/s 56(3), after it has found on an application made u/s is that the claimant has no title but only after it has so found? Or, can the Court go over the whole matter in a single enquiry, although such enquiry may be initiated by an

application u/s 56(3)?.

11. Speaking for myself and as at present advised, I think an application u/s 56(3) can be made not merely by the Receiver, but by a purchaser from him as well. There is nothing in the section to limit its provisions to the receiver. I think further that on an application being made to it u/s 56(3), the Court must be able to consider whether the person in possession is one whom the insolvent has a present right to remove and cannot be bound to throw out the application merely on finding that such person is claiming a title in himself. Unless the Court had such power, the section would be meaningless and anyone in possession would be able to defeat the receiver's or the purchaser's claim for possession by merely putting forward some kind of claim. The true position, it seems to me, is that if the Court, finds that the claimant has a plausible case, it will not be entitled to proceed straightway to make an order for possession u/s 56(3), but must direct that there must first be a proper enquiry u/s 4. Such enquiry should preferably be made on a separate application to which the receiver ought to be made a party, if the application is not by him. If in such enquiry the Court finds that the claimant has no title, it will be entitled to hold that he is a person whom the insolvent has a present right to remove and it can then make against him an order for possession u/s 56(3). It can by no means be said that if the person in possession puts forward some kind of right, the insolvent cannot in the ordinary course remove him without obtaining a decree for ejectment and that, therefore, he has no present right to remove him. In that sense, nobody has present right to remove another person, found in possession of his property. It is to be noticed that in this respect, the position of the insolvency Court is stronger than that of an ordinary civil Court. For, if a receiver appointed by a civil Court finds a stranger to the suit in possession of some property comprised in the suit, the Court cannot adjudicate on such stranger's claim of title in that suit, but must direct the receiver to bring a separate suit, because the claimant is not a party; by virtue of Section 4, Provincial Insolvency Act, the insolvency Court can go into such stranger's claim and decide the question of title as between him and the insolvent.

12. These questions, however, do not call for a final decision in the present case, in view of the course which the proceedings have taken. Since I reserved judgment, I have gone through the record and I am of opinion that it is no longer Open to the appellant to raise the question mooted by Mr. Chakravarti. It appears that the question was raised at the very first stage as a preliminary point and argument was heard on it on 21-9-1915. Since, on the conclusion of the argument the Court recorded an order, adjourning the hearing to a future date on the ground that no witnesses were present, the appellant thought that his preliminary point had been overruled and accordingly, he preferred an appeal against the learned Judge's order. That appeal was disposed of on 10-12-1941 and it was held that the preliminary point had not yet been overruled, but remained to be decided and that the trial Court would have to decide it. At the final hearing the point was again canvassed and it was disposed of by the trial

Court in the following words:

The ruling reported in S.A. RM. A. Vandarguzhal Achi and Others Vs. South India Corporation (Madras) Ltd. and Others, , lays down that Sections 4, 5 and 56 are very widely worded and empower the Court to give possession to the purchaser of a property sold in insolvency proceedings at the instance of the Official Receiver. This ruling sets at rest the whole controversy and I find that the A.P. is entitled to take delivery of possession through Court of the house in question after evicting Sarat Babu.

13. The proposition of law is a quotation from the judgment of the Full Bench in S.A. RM. A. Vandarguzhal Achi and Others Vs. South India Corporation (Madras) Ltd. and Others, It is true that the learned Subordinate Judge did not include the appellant in this order, but it was he who appealed against it on the ground that his case had not been considered and it was on that appeal that the appellate Court directed the learned Judge to decide whether he was in possession and if so, whether he was in possession in an independent right of his own. The appellant thus himself asked for and obtained an order for a consideration of his claim by the insolvency Court, far from persisting in his original contention that the insolvency Court could not go into the question of a third party's title. When the purchaser preferred a second appeal against the remand order the present appellant strongly supported that order and ultimately obtained from this Court an order for a consideration of his claim by the lower appellate Court. As already stated, although the appellant had not adduced sufficient evidence in support of his case, this Court at his request and as an indulgence to him, gave him an opportunity to prove his case by further evidence before the lower appellate court and directed that Court to decide the question of title. The insistence before this Court, as before the lower appellate Court, was thus not that the question of the appellant's title could not be gone into by the insolvency Court but that it had not been gone into and ought to be. In those circumstances, it is certainly not open to the appellant to contend now that the question of his title cannot be gone into by the insolvency Court and that that Court has no power to make an order for possession against him.

14. Apart from the previous decision of this Court and the lower appellate Court being binding on the appellant or estopping him from challenging a course of procedure he had himself invoked, it appears that he has had a fair and lawful consideration of his claim. The purchaser, the receiver and the insolvent were all parties before the lower appellate Court, as also before this Court, on both occasions and what took place under the express directions of this Court was obviously an enquiry u/s 4. On the finding of fact, the appellant is not even in possession of the premises, but merely lives there with his father who still holds the tenancy. The material in support of that finding is overwhelming and one has only to refer to the case made by the appellant in his petition of objection and that sought to be made at the trial in order to see how he simply covered himself with untruth. The order for delivery of possession was a right order and one

properly made. Indeed, it is warranted by the case K.L. Venkataram and Another Vs. N.S. Chockkier, relied on by the appellant, where an exception is made in respect of cases where a stranger claims against the insolvent.

15. The fact that the tenancy was not mentioned in the petition for insolvency is immaterial. u/s 28 of the Act, on the making of an order of adjudication, the whole of the property of the insolvent vests in the Court or in the receiver.

16. On behalf of the appellant, Mr. Chakravarti pointed out that the purchaser was a nephew of the present landlord and he suggested that the device of a sale of the tenancy in the hands of the receiver was adopted for the purpose of evading the provisions of the Calcutta House Rent Control Order. He made an impassioned reference to the difficulty of finding suitable or any accommodation at the present time. The present landlord acquired the house on 17th July 1944, but on the finding that the tenancy of the insolvent continued, what happened was that the law simply took its course and no question of any device arises. It may be pointed out further that the tenancy was brought to sale at the instance not of the landlord but of certain creditors of the insolvent, no collusion between whom and the purchaser was suggested. On the other hand, the tenancy is an exceedingly covetable one-seeing that over 16 cottahs of land within the municipal limits of Calcutta, together with a two-storied building thereon, is being held at a monthly rental of Rs. 15 and it is not in the least surprising that the insolvent and his son should try every means in their power to retain it as long as they can. They have succeeded long enough but this state of things must end sometime.

17. In the result, the appeal fails, but having regard to the acute housing difficulty prevailing at the present time, I am prepared to give the appellant and his father, respondent 2, some little time to vacate the premises. I allow them time till 30th June 1948, but the appellant must in the meantime deposit all arrears of rent, if any, in the trial Court within 15 days from today, together with the rent for April, and thereafter deposit the rent for each month within the 7th day of that month. If the rent is so deposited, the Court will make suitable orders for its withdrawal by the person entitled thereto.

18. The appeal is accordingly dismissed with costs, but the order for delivery of possession will remain in abeyance till the expiry of 30th June 1948, provided the current rent and arrears, if any, are deposited as directed above. In case of default with respect to any payment, the order for possession will become immediately executable. The application u/s 75, Provincial Insolvency Act is also dismissed, but without costs. Let the records be sent down as early as possible. Leave to appeal refused.