

(1958) 03 BOM CK 0011
In the Bombay High Court
Case No : A.F.A.D. No. 436 of 1954

Dinanath Shaligram Marvadi

APPELLANT

Vs

Maroti Totaram Shimpi and Others

RESPONDENT

Date of Decision : 13-03-1958

Acts Referred:

Bankruptcy Act, 1883 — Section 46
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 63, 9
Provincial Insolvency Act, 1920 — Section 28(2), 28(7), 4, 4(2), 51

Citation : AIR 1959 Bom 10 : (1958) 60 BOMLR 1017 : (1959) ILR (Bom) 249

Hon'ble Judges : Mudholkar, J

Bench : Single Bench

Advocate : C.P. Kalele, for the Appellant; Y.V. Jakatdar, for the Respondent

Judgement

1. This is the first defendants' appeal from a decree passed in a suit instituted by the respondents 1 and 2 for a declaration that the property purchased by them in execution of a decree against the respondent No. 3 was not liable to attachment and sale in insolvency proceedings pending against him.

2. The relevant facts are as follows: One Goverdhandas, the brother of the appellant obtained a decree against the respondent No. 3 for a sum of Rs. 1174-4-0 on 2-4-1949. In execution of that decree, he attached that field in suit on 10-4-49. This field was sold at an auction held in execution and was purchased by the appellant on 25-11-49. He entered into possession of this field on 2-4-1951 or so.

3. The respondents 1 and 2 who are creditors of the respondent No. 3, filed an application for adjudication of the respondent NO. 3 as insolvent. This was sometime in September 1949. The application was admitted on 3-10-1949 and necessary notices and proclamation were directed to issue. Eventually, the respondent, No. 3 was adjudicated insolvent on 18-1-1950.

4. On 18-10-1950 the field in question was attached by the order of the

Insolvency Court. Thereupon the appellant preferred an objection before the Insolvency Court to the effect that he had acquired title prior to the date of adjudication and that consequently it was not liable to be attached and sold by the Insolvency Court.

5. During the pendency of the proceedings before the Insolvency Court, a statement was made on behalf of the respondents 1 and 2 to the effect that the objection of the appellant be allowed subject to their right to file separate suit. The objection was accordingly allowed and thereafter the respondents 1 and 2 instituted the suit out of which this second appeal arises.

6. It is contend before me that a suit of this kind is barred by the provisions of Section 4 of the Provincial Insolvency Act inasmuch as ti is the Insolvency Court and that Court alone which can decide questions of this kind. A bare reading of the provision would show that what it purports to do is to confer power on the Insolvency Court to decide certain questions including one of the kind raised in this suit, and where a question is decided by it then under Sub-section (2) of Section 4 its decisions shall be final and binding and can no longer be challenged in any other proceeding. It does not confer exclusive jurisdiction on the Court to deal with a mater of this kind. There fore, in my opinion the first contention fails.

7. The second contention is that the Insolvency Court having admitted the appellant's objection the respondent 1 and 2 were precluded from instituting this suit. What actual language was used by the respondents 1 and 2 on the date on which the matter was dealt with by the Insolvency Court we do not know; but from a perusal of the order-sheet dated 20-3-51 it would be clear that the respondent 1 and 2 did not admit the appellant's right to he property in question. The relevant portion of the order-sheet reads thus:

"At this stage the N.A. states that he admits the objection subject to his right to file a suit. No such final permission in necessary as Rule 63, C.P.C. Order 21 contemplates such a suit. In view of the admission of the N.A. the objection is thus allowed. Property is released from attachment."

It there had been an admission of title by the respondents 1 and 2, would have been no question of even seeking permission to file a separate suit, the very object of which was to challenge his title. There is no provision in the Act by virtue of which a suit of this kind is barred. I therefore negative the second contention raised by the appellant.

8. The third and probably the most important contention is that the sale having taken place before the order of adjudication the appellant got a good title to the property. In support of this contention two arguments were advanced by Shri Kalele. The first argument is that no notice having been sent to the Court executing the decree u/s 52 of the Provincial Insolvency Act, the jurisdiction of the executing Court remained unaffected, and that therefore it was competent to sell the property. Since the executing Court was competent to sell the property the purchaser who purchased the property at the sale held by it got a good title.

In support of this contention Shri Kalele refers to the decisions in Ralla Ram v. Ram Labhaya mal AIR 1925 Lah 158; Mutham Chettiar v. Venkituswami Naciken ILR 59 Mad 928 : AIR 1936 Mad 819 ; Dhori Ahir and Others Vs. Parmeshor Missir and Others, ;(C) Chandulal v. Bhiamchand ILR (1936) Nag 41 : AIR 1936 Nag 117; AIR 1937 193 (Nagpur) ; Ramgopal v. Gulva Mal AIR 1930 Lah 851, and Venkata Sivayya v. Suryanarayana AIR 1938 Mad 906 .

9. I shall deal with these cases seriatim. In the first mentioned case Martineau, J. held purporting to follow the decision in Woolford's Estate Trustee v. Levy, (1892) 1 QB 772 that where the executing Court sells the property of an insolvent even after notice of the fact of admission of the insolvency petition he purchaser at the execution sale will get a good title against the receiver unless an application is made by the latter to the executing Court u/s 52 of the Provincial Insolvency Act for delivery of possession of that property. This decision has been expressly dissented from by the Calcutta High Court in Mahendrakumar Baishya Shaha Vs. Deeneshchandra Ray Chaudhuri, on the grounds stated by Mulla in his Law of a insolvency in India, at page 597 (Second Edition) which are as follows:

"In support of its judgment the Court relied upon (1892) 1 QB 772 , a case u/s 46 of the Bankruptcy Act, 1888. In that case it was held that a sale by the sheriff after receiving order in execution of a decree against the debtor, though made with notice of the order, was valid as against the trustee in bankruptcy appointed after adjudication if no application was made by the Official Receiver under that section for delivery of the property to him. The distinguishing features of that case are, first that the sheriff after he came to know of the receiving order communicated with the Official Receiver and the Official Receiver wrote to the sheriff asking him to realise the goods and to account to him for the sale proceeds, and , secondly, that a receiving order under the English Law does not vest the debtor's property in the Official Receiver as an adjudication order vests it in the trustee in bankruptcy. The Lahore decision it is submitted is erroneous."

I respectfully agree with the view.

10. In the next case it was held by the Madras High Court that even where a sale is held by an executing Court the provisions of Section 51(3) would apply to such a sale and the person who in good faith purchases the property of the debtor thereunder shall acquire a good title to it against the receiver. Thus according to the Madras High Court although the sale had been held after the admission of the petition the decree-holder got no right to the proceeds and that the purchaser in good faith acquired a good title to the property against the receiver.

11. In the third case it was held that the property attached in execution of a decree was the property in possession of the Court and the only order which the Court could make on an application u/s 52 was that such property be delivered to the receiver if such receiver had been already appointed and that if no such receiver had been appointed the Court should proceed with the execution but hold the sale proceeds subject to such orders as the Insolvency Court may pass

in the matter.

12. In the fourth case it was held by Pollock J. that where the property was sold before the order of adjudication and before the executing Court learnt of the insolvency proceedings, there is no good ground for holding that the Insolvency Court had no jurisdiction to continue the execution proceedings. No reference however was made by him to Section 51(3) of the Provincial Insolvency Act in this case.

13. In AIR 1937 193 (Nagpur) , Niyogi, J. held that if an executing Court held an auction sale in ignorance of insolvency proceedings the sale would not be void unless the purchaser purchased the property with knowledge of the insolvency proceedings. This decision goes against the contention of the appellant. It may be mentioned that in this case, Niyogi, J., who decided the case considered not only Section 52 of the Provincial Insolvency Act but also considered Section 51(3) thereof.

14. AIR 1930 Lah 851 , lays down that before an executing Court can stay the sale of the judgment-debtor's property, u/s 52, two condition must be satisfied. They are, firstly, that notice should have been given to the executing Court of the admission of the insolvency petition and secondly that the application should have been made to that Court for delivery of the property to the receiver. No reference is made here to S. 51 of the Provincial Insolvency Act.

15. The last of the cases relied upon AIR 1938 Mad 906 , takes into consideration Section 51(3) of the Provincial Insolvency Act and supports the contention of Shri Kalele. Some of the other cases lend some support to the contention of the counsel.

16. On the other hand, it was held in Brij Behari v. Budh Sen ILR 1942 All 421 : AIR 1942 All 263 , that the effect of Sub-sections (2) and (7), of Section 28, read together, is that the whole of the property of the insolvent vests in the receiver with effect from the date of the presentation of the petition in insolvency. It was also held there that the only adverse effects which Section 51 of the Act has on the rights of the receiver -- in whom the property vests with effect from the date of the presentation of the petition -- are, firstly, that if any assets have been realised in execution of a decree before the date of the admission of the petition, the receiver will have no right to prevent the decree-holder from getting the benefit of these assets even if such assets are in the hands of the Court and have not been paid over to the decree-holder before the date of the admission purchaser who made his purchase after the admission of the petition case establish good faith and acquire a good title to the property against the receiver. This decision was followed by a Division Bench of the Nagpur High Court in Misc. Second Appeal No. 263 of 39, D/- 12-4-1945. A short note of that case appears at page 44 of the 1946 NLJ under Note 124 (K). I will reproduce the entire note;

"Section 51(3) qualifies Section 28, Sub-sections (2) and (7). The title of the auction purchaser who purchases the property of a debtor after the admission of

his insolvency petition by before the order of adjudication is not absolute but contingent on the insolvency petition being dismissed. If the petition is dismissed had gets an indefeasible title, but if the order of adjudication is made, he cannot claim any title against the receiver of the insolvent's property.

An exception however has been made by the legislature is Section 51(3) in favour of persons who purchase the property of a debtor under a sale in execution in good faith in all cases and they acquire a good title to it against the receiver."

It will thus be clear that there is a conflict of authority on the point as to whether a person purchasing at an execution sale held by the executing Court after the admission of the insolvency petition but before the order of adjudication and without knowledge of the pendency of the insolvency proceedings gets a good title against the receiver or whether he gets a defeasible title only unless he was a purchaser in good faith. It seems to me that considering the provisions of Sub-sections (20 and (7) of Section 28 of the Provincial Insolvency Act along with the provisions of Sections 51 and 52 thereof, the title of the receiver to the property of the insolvent would relate back from the date of adjudication to the date of the petition and the auction purchaser at the sale held in execution of the decree against the insolvent would only get a title defeasible by the receiver unless he was a purchaser in good faith. Apart from the last mentioned Madras case the provisions of Sub-section (3) of Section 51 were not considered in those cases which take the view that if the executing Court sold the property without knowledge of the insolvency proceedings, the purchaser at that sale always got good title against the receiver. To my mind, the provisions of Sub-section (3) of Section 51 would apply whether notice of the insolvency proceedings is given to the executing Court or not because no reference to notice of the insolvency proceedings to the executing Court is at all made in Sub-section (3) of Section 51. It may be argued that if such interpretation is placed upon the provisions of Sub-section (3) of Section 51, Section 52 need not at all be availed of by the Insolvency Court. Section 52 has got its specific purpose and that is to enable the receiver to obtain possession of the property which is in the custody of the executing Court. Where notice of the admission of the insolvency petition is given to the executing Court that Courts is bound to direct delivery of the property to the receiver provided at that date the property is still in its possession that is to say, that property is not sold. Section 51, however, applies to cases both before and after the sale of the property. It makes no reference to the powers of the executing Court to sell the property at all, and Sub-section (3) thereof can be resorted to even for obtaining a good title under the sale held by the executing Court. The matters dealt with by these provisions are quite different from those dealt with by Section 52. These provisions can be availed of only where sale has been held whether before or after adjudication while the provisions of Section 52 available only where notice of the admission of the insolvency petition is given to the executing Court and while it is still in possession of the property of the insolvent, that is where sale has not been held at all.

17. It seems to me that there is no justification for holding that the effect of Section 52 of the Act is to validate a sale held subsequent to the admission of the insolvency petition but prior to the order of adjudication even though the auction purchaser was not a bona fide purchaser, merely because no notice of the admission of the insolvency petition was given to the executing Court. It may be that since no notice was given to the executing Court it could not be said to be acting without jurisdiction in proceeding to sell the property; but it does not necessarily follow therefrom that the person who purchased the property at such a sale must in all circumstances get a good title to that property. The nature of the title that he will get will depend on whether he fulfils the condition laid down in Sub-section (3) of Section 51 or does not fulfil it.

18. The next question is whether the appellant could be said to have been a purchaser in good faith of the property. Now, as has been observed by Niyogi J. in AIR 1937 193 (Nagpur), knowledge of insolvency proceedings by the purchaser is sufficient to disprove his contention that he was a bona fide purchaser. In the instant case, there is evidence to show that the appellant was aware of the attachment of the field by the insolvency Court. Of course the attachment was not effected till 18-10-1950, whereas the purchase is of an earlier date. It has however to be borne in mind that the appellant, who is the brother of the decree-holder Goverdhandas, had knowledge of the insolvency proceedings even during the month of November 1949. It would therefore not be unreasonable to hold that the appellant also shared that knowledge. I therefore uphold the finding of the lower appellate Court to the effect that the appellant was not a bona fide purchaser for value of the field.

19. For these reasons, I uphold the decree of the lower appellate Court and dismiss the appeal with costs.

20. Appeal dismissed.