

(1935) 06 CAL CK 0021

In the Calcutta High Court

Case No : Appeal from Original Order No. 317 of 1933

Jogendra Nath Kundu and Others

APPELLANT

Vs

Jogneswar Mandal and Others

RESPONDENT

Date of Decision : 08-06-1935

Acts Referred:

Citation : (1935) 06 CAL CK 0021

Final Decision : Dismissed

Judgement

Nasim Ali, J.—This is an appeal against an order under sec. 4 of the Provincial Insolvency Act. The Appellants obtained a decree for money against one Jagat. On the 6th January, 1928, Jagat applied to the District Judge of Pabna for being adjudged an insolvent. On the 11th January, 1928, the Appellants applied to execute their decree against Jagat in the Court of the Munsif at Pabna. On the 16th January, 1928, they received notice of Jagat's application for insolvency. On the 11th February, 1928, certain huts belonging to the debtor were attached by the executing Court. On the 18th March, 1928, the Appellants appeared before the Insolvency Court and filed objections to the application for insolvency. On the 19th May, 1928, the debtor informed the executing Court that his application for insolvency was admitted and prayed for stay of sale of the properties attached. This application, however, was dismissed for non-prosecution. The attached huts were sold on the 23rd May, 1928, and were purchased by the Appellants for Rs. 200 paid in cash. Jagat was adjudged insolvent on the 23rd August, 1929. The Nazir of the Court who was thereafter appointed receiver sold the huts already purchased by the Appellants at the auction sale for Rs. 200 to Respondent No. 4, the son of Respondent No. 3, another creditor of the insolvent. The Nazir receiver was subsequently discharged and Respondent No. 2, a pleader, was appointed receiver. He applied to the Insolvency Court under sec. 4 for a declaration that the Appellants acquired no title to the huts on the basis of the auction-purchase as against him and the purchaser to whom he had sold the huts. The learned Judge has given judgment for him. Hence the present appeal by the auction-purchaser. The point for determination in this appeal is whether the Appellants

have acquired any title to the disputed huts by the auction-purchase.

2. Now, the mere admission of an insolvency petition does not debar a creditor from executing his decree against the debtor. But where execution of a decree has issued against any property of a debtor and before sale thereof notice is given to the executing Court that an insolvency petition has been admitted, the executing Court is bound under sec. 52 of the Provincial Insolvency Act, on application, to direct the property attached to be delivered to the receiver and the receiver can sell the property for satisfying the charge on the property for the costs incurred by the attaching creditor. There is divergence of opinion on the question whether the section contemplates an interim receiver. In some cases it has been held that as the section contemplates delivery of property to the receiver after the admission of the Insolvency petition and not after the order of adjudication as laid down in sec. 35 of the Provincial Insolvency Act of 1907 and sec. 54 of the Presidency Towns Insolvency Act, the legislature must have contemplated an interim receiver in sec. 52 of the present Provincial Insolvency Act. On the other hand it has been held that the section cannot contemplate an interim receiver as an interim receiver has no power to sell and the section authorises the receiver to sell the property for satisfaction of the charge on the property for costs of the attaching creditor. Again, the opinion on the question whether an application for delivery of the property to the receiver (if a receiver has already been appointed) is necessary, does not appear to be uniform. The following observations were made by Mitter, J., in *Mahendra v. Dinesh* 37 C. W. N. 392 (1933) : "It has been argued that if this view (i.e., application to the executing Court is not necessary) is taken, the words "on application" become superfluous and redundant. There is no force in that contention. The underlying principle of the Provincial Insolvency Act as can be gathered from the provisions of sec. 52 is that when the Court is apprised of the pendency of an application for insolvency in another Court and of the further fact that such application has been admitted, it should stay its hands so far as the execution of the decree by the creditor of the Insolvent is concerned." In the case of *Mathuresh v. S.R. Mills, Ltd.* 38 C. W. N. 1128 (1834), *Mukerjee and S.K. Ghosh, JJ.*, have observed: "On reading sec. 52, Provincial Insolvency Act it seems to us to be perfectly clear that an application has got to be made to the Court which was executing the decree and it is that Court which, on such an application being made, can direct the property to be delivered to the Receiver in order that the sale may be held."

3. In the two cases cited above a receiver was appointed before the sale. If the executing Court comes to know that the application for insolvency has been admitted and that there is a receiver, the attached properties can be made over to him. In the present case, however, no receiver was appointed before the sale in question. "The only order which the Court can pass under sec. 52 is that the property be delivered to the receiver, so that it follows that the order can only be made if the receiver has already been appointed and clothed by the Insolvency Court with power to take possession of the insolvent's property"--per Das, J., in *Tirpit Thakur v. Ramperkash Das* A. I. R. [1930] Pat. 406 (1929): "It cannot be

denied that the Court executing the decree is to deliver possession to the receiver and to no one else so far at any rate as the provisions of sec. 52 are concerned. Having regard to the finding that there was no receiver in existence till after the sale in execution, the Court executing the decree could not have acted under sec. 52." *Sahu Durga Saran v. Beni Pershad* [1933] All. L. J. 1342. On reading the section I am of opinion that the executing Court is not bound to stay its hands if no receiver to whom the attached property can be made over is in existence at the time of the sale.

4. But the difficulty of the Appellants does not end here. I have already pointed out that the auction-sale in the present case took place on the 23rd May, 1928, and the order of adjudication was made on the 23rd August, 1929. The order of adjudication, therefore, related back to the date of the presentation of the insolvency petition by sec. 28 (7) of the Act. Now, what is the effect of the operation of this doctrine of relation back on the auction-purchaser's title vis-a-vis the title of the receiver appointed after the order of adjudication in whom the property of the insolvent vests by legal fiction from the date of the presentation of the insolvency petition ? This point was raised in the Allahabad case cited above. But the learned Judges did not express any opinion on that question as it was not raised before the lower Court. In the present case, however, the decision of the learned Judge is mainly based upon the doctrine of relation back. It seems to me that by the operation of sec. 28 (7) the title of the auction-purchaser who purchases the property of the debtor after the admission of the insolvency petition but before the order of adjudication is not absolute but contingent on the insolvency application being dismissed. If the insolvency application is dismissed, he gets an indefeasible title. But if the order of adjudication is made, he cannot claim any title as against the receiver. An exception, however, has been made by the legislature in favour of purchasers in good faith in all cases (sec. 51, cl. 3). In the present case the learned Judge has found that the Appellants are not purchasers in good faith. In view of the facts and circumstances of this case, I find no reason to differ from the finding of the learned Judge on this point. I am, therefore, of opinion that the learned Judge was right in holding that the Appellants have acquired no title to the disputed huts on the basis of the auction-purchase. The appeal is accordingly dismissed with costs. Hearing-fee, two gold mohurs. Henderson, J.

I agree. It was strenuously argued before us that the decision of Mitter and M.C. Ghose, JJ., to which my learned brother has referred in his judgment, is not correct and we were pressed to refer the question to a Full Bench. But in the present case no receiver was appointed. Sec. 52 has no application and this point does not require to be decided.