
(1961) 08 AHC CK 0023
In the Allahabad High Court
Case No : First Appeal No. 265 of 1950

Kripa Nath and Another

APPELLANT

Vs

Ganga Prasad and Others

RESPONDENT

Date of Decision : 23-08-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 1
Constitution of India, 1950 — Article 31
Limitation Act, 1908 — Article 132, 10
Provincial Insolvency Act, 1920 — Section 28(2), 28(6)

Citation : AIR 1962 All 256

Hon'ble Judges : B.D. Gupta, J;A.P. Srivastava, J

Bench : Division Bench

Advocate : S.N. Varma, for the Appellant; Krishna Shankar, for the Respondent

Final Decision : Dismissed

Judgement

Srivastava, J.—This is a plaintiffs' appeal that arises out of a suit to recover Rs. 17,800/- by the enforcement of a sample mortgage bond executed on the 1st February 1933 by Ganga Prasad defendant No. 1 in favour of firm Kirpa Nath Sri Nath, which belonged to the plaintiffs Kirpa Nath and Sri Nath. The consideration of the mortgage was Rs. 10,000/- and the property mortgaged was a house situated in Mohalla Naughara in the city of Kanpur. The suit was filed on the 31st January 1946 and besides Ganga Prasad the mortgagor, the other persons impleaded in the suit were Smt. Mahmooda Khatoon, Badri Das, Noor Elahi and Mohammad Rafiq who were alleged to be subsequent transferees of the property.

It appears that Ganga Prasad was a partner of a firm Harduti Rai Bilas Rai. His father and brothers were also partners of that firm. The creditors of that firm made an application to the Insolvency Court praying that the firm as well as its partners be adjudged insolvents. The application was allowed and an order adjudging Ganga Prasad and the other partners of the firm insolvents was passed on the 9th October 1944. Along with the order of adjudication no order

appointing a receiver was passed. By a subsequent order dated the 31st July 1940 Sri P.K. Banerji, Official Receiver of Kanpur was appointed receiver of the estate of the insolvents. Along with the other properties of the insolvents he took possession of the house that had been mortgaged with the plaintiffs also and subsequently sold it to Ganga Narain Maheshwari who has now been impleaded in the present appeal as respondent No. 7.

Though Ganga Prasad, the mortgagor, had been adjudged insolvent prior to the institution of the suit, when the suit was filed the plaintiffs did not implead the Insolvency Court as a defendant in the suit. When, however, Sri P.K. Banerji the Official Liquidator, was appointed receiver they made an application that he be impleaded as defendant No. 6 in the suit. As a result the receiver was made a party to the suit. The suit was at one stage decreed ex parte but the ex parte decree was subsequently set aside and the suit was contested mainly by the defendant No. 1 and the receiver defendant No. 8. The defendant No. 1 admitted the execution of the mortgage bond but denied that any consideration had passed in respect of it. The receiver defendant No. 6 did not admit the execution and consideration of the bond as he had no knowledge about the transaction and said that the report he had received was that the bond was without consideration. He also pleaded limitation and the bar of Section 69 of the Indian Partnership Act. He pleaded further that the suit was bad because permission from the Insolvency Court had not been obtained, that it was defective against the defendants Nos. 1 to 5 in view of Sections 28 and 58 of the Insolvency Act and that as against the receiver it was bad because notice u/s 80 C.P.C. had not been served upon him.

2. The trial Court framed the following issues:--

- (1) Was the mortgage deed in suit properly executed and duly attested? What consideration, if any, did the defendant No. 1 receive?
- (2) Is the suit barred by Section 69 of the Partnership Act?
- (3) Is the suit barred by time as against the defendant No. 1 as well as file defendant No. 6?
- (4) Is the suit bad for want of permission before filing of the suit of the Insolvency Court?
- (5) Is the suit against the defendants Nos. 1 to 5 nullity under Sections 28 and 58 of the Insolvency Act?
- (6) Is the suit against the defendant No. 6 bad for want of notice u/s 80 of the C.P.C.?
- (7) What is the effect, if any, of not arraying the official receiver before 27-4-48 as a defendant?
- (8) Did the house in suit belong solely to Ganga Prasad on 1-2-33 or did it belong to him jointly with others as asserted by the contesting defendants? If the

latter, what is its effect?

3. The findings it recorded were that the suit was not barred by Section 69 of the Partnership Act or by Section 28 or 58 of the Insolvency Act, that no notice u/s 80 of the C.P.C. was necessary, that the mortgaged property belonged solely to defendant No. 1, that the execution of the mortgage deed was proved but the only consideration that was established as having been paid consisted of two items of Rs. 3,078/2/- and Rs. 506/10/-. the rest of the consideration had not been proved to have been paid, and that the suit was barred so far as the receiver was concerned by limitation. As a result of these findings the suit was dismissed,

4. The plaintiffs have come up in appeal. During the pendency of the appeal Sri P.K. Banerji, the Official Receiver, died and another official receiver was appointed. He was impleaded as respondent and is Sri Har Prasad Nigam. The property having been sold by the receiver to Sri Ganga Narain Maheshwari he too had been impleaded as a respondent in the appeal.

5. Though at one stage an attempt was made by the learned counsel for the appellants to raise the question that Ganga Prasad in his personal capacity had not been adjudged insolvent, the stand was given up and it was conceded that Ganga Prasad too had been adjudged insolvents in 1944 and the receiver had taken, possession of his properties too including the mortgaged property.

6. The two points which have been urged by the learned counsel for the appellants in support of the appeal are:

(1) That the finding of the learned Civil Judge that the full consideration of the mortgage bond had not been paid was incorrect; and

(2) that the suit should not have been thrown out on the ground of limitation.

7. These are the only points that arise for consideration in this appeal.

8. On the question of consideration as we have said, Ganga Prasad, the mortgagor, did not deny the execution of the mortgage.

(After discussing the evidence (paras 8-12) the judgment proceeded :)

13. We are, therefore, of opinion that all the items which constituted the consideration of the mortgage deed were proved to have been duly paid and the mortgage deed must, therefore, be held to have been executed for the full consideration of RS. 10,000/-.

14. The more important question is, however, the question of limitation. The mortgage bond was executed on the 1st February 1933. The period of promise was one year and the amount, therefore, became due on the 1st February 1934. Under Article 132 of the 1st Schedule of the Limitation Act the period for the enforcement of the mortgage was twelve years and started to run from the date when the amount became payable. The twelve years" period of limitation,

therefore, expired on the 1st Feb. 1946. The suit was filed one day before the expiry of limitation, i.e. on the 31st January 1946. As against the persons who had been impleaded as the defendants, therefore. It was clearly within time. Unfortunately for the plaintiffs, however, by an order dated the 9th October 1944 the mortgagor had been declared insolvent.

At the time when the order of adjudication was passed no receiver was appointed for the estate of the insolvent. The receiver was appointed subsequently by an order dated the 31st July 1946 on the same date the suit was decreed ex parte. The ex parte decree was, however, subsequently set aside and the suit restored to its original number on the 3rd May 1947. It was only on the 27th April 1948 that the plaintiffs applied for impleading the receiver as a party and he was made a party by an order of the same date. No permission was obtained from the Insolvency Court for impleading the receiver as a party but no importance need be attached to that omission because it has not been contended before us on behalf of the defendants that such a permission was necessary in the case or that omission to take that permission affected the suit in any material manner.

15. The contention raised on behalf of the receiver was that as soon as the order of adjudication was passed on 9th October 1944 the estate of the defendant No. 1 including the equity of redemption in the mortgaged property got vested in the Court. When subsequently a receiver was appointed the property got vested in the receiver. On the date on which the suit had been filed, therefore, the equity of redemption in the mortgaged property vested not in the persons who had been impleaded in the suit but in the Court, and it was necessary for the plaintiffs to implead the Insolvency Court as one of the defendants in the suit. In the absence of the Insolvency Court as a defendant the suit was not competent. By the time the receiver was impleaded on the 27th April 1948 the period of limitation had expired and as against the receiver, therefore, the suit was bound to be held to be time barred.

16. It is not disputed on behalf of the plaintiffs that in view of Section 28(2) of the Provincial Insolvency Act as soon as the order adjudging Ganga Prasad as an insolvent was passed on the 9th October 1944 his entire estate including the mortgaged property got vested in the Court. Subsequently when the receiver was appointed on the 31st July 1946 the estate got vested in the receiver. Learned counsel for the plaintiffs, however, urged that in spite of these facts the suit of the plaintiffs should have been treated as within time. The form which his argument took was something like this :

(1) In view of Sub-section (6) of Section 28 of the Provincial Insolvency Act the plaintiffs being secured creditors their rights were not affected by the insolvency proceedings. It was, therefore not necessary for them to take any notice of the insolvency proceedings or to implead the Court or the receiver.

(2) On the passing of the adjudication order the mortgaged property did vest in the Court but that did not mean that the mortgagor ceased to be the owner of

the property. Vesting only meant that for certain purposes the Court became entitled to take the property in order to satisfy the debts of the insolvent. It did not mean that the insolvent lost his title to the property. That being the legal position, if the suit was filed against the insolvent within limitation it could not fail simply on the ground that the property had vested in the Court.

(3) Even if it he conceded that on account of the property vesting in the Court the title vested in the Court still some sort of title continued in the original owner, the defendant No. I, and so far as that part, of title was concerned the plaintiffs could still pursue their remedy.

(4) Till the 31st July 1946 the mortgaged property had not vested in the receiver because no Order appointing a receiver had been passed by that date. It was, "therefore, not possible for the plaintiffs to impleaded the receiver till that date or at the time when they filed their suit. The receiver came into the picture only on the 31st July 1946 and if, therefore, the plaintiffs impleaded him as a party on the 27th April 1948 he could not defeat their claim on the ground that he ought to have been impleaded earlier and that the suit should have been filed against him within twelve years of the amount becoming due.

(5) In any case Section 10 of the Limitation Act saved the suit and in fact there way no limitation lit all for the plaintiffs" pursuing their remedy against the property in the hands of the receiver.

17. It is true that the plaintiffs are secured creditors and they were not bound to approach the Insolvency Court for the enforcement of their claim. If they wanted to intervene in the insolvency proceedings and to have their debts satisfied through those proceedings the only course open to them was, in view of Section 47 of the Insolvency Act, either to give up their security or to value it. They could also after realising their security prove their debt for the balance that remained due to them. That course was, however, not adopted by the plaintiffs. They sought their remedy in the ordinary course; presumably they wanted to take advantage of Sub-section (6) of Section 28. That sub-section reads:--

"Nothing in this section shall affect the power of any secured creditor to realise of otherwise deal with his security, in the same manner as he would have been entitled to realise or deal with it if this section had not been passed."

Now this sub-section does not entitle the secured creditor to ignore the insolvency proceedings altogether or to treat the Court or receiver as non-existent. It only saves the power of the secured creditor to realise his security of to otherwise deal with it and authorised him to do so in the same manner as he would have done had the section not been passed. The power of the plaintiffs as secured creditors was to realise their money by the sale of the mortgaged property. The manner in which that right could be exercised was to file a suit, obtain a decree, get it executed and get the property sold in execution of that decree.

The only effect of Sub-section (6), therefore is that the plaintiffs' power of realising the security in the manner indicated above was left unaffected. But for this sub-section it would have been necessary for the plaintiffs to approach the Insolvency Court to prove their debt there and to realise it by receiving a dividend like any other creditor. It was to save that botheration that this sub-section was enacted and permitted the secured creditor to realise his security outside the Insolvency Court. On the basis of this sub-section, therefore, the plaintiffs could not shut their eyes to the fact that an order of adjudication had been passed and the property had vested in the Court. They could certainly file a suit for realising their money and get the property sold but the property having vested in the Court or receiver as the case may be, it was necessary for them to sue the Court or receiver also so that an effective decree could be passed in their favour and the property could be sold for the satisfaction of their debt.

18. The argument of the learned counsel For the appellants" that on the basis of Sub-section (6) the plaintiffs could proceed as if there had been no vesting in the Court or the receiver under Sub-section (2) of Section 28 was repelled by their Lordships of the privy Council in AIR 1927 108 (Privy Council) where it was observed :--

"That the rights of the secured creditor over a property are not affected by the fact that the mortgagor or his heir has been adjudicated an insolvent is of course plain, but that does not in the least imply that an action against him may proceed in the absence of the person to whom the equity of redemption has been assign-ed by the operation of law. The latter alone is entitled to transact in regard to it, and he and not the insolvent, has the sole interest in the subject-matter of the suit. To him, therefore, must be given the opportunity of redeeming the property. The contrary view would encourage collusive arrangements between the secured creditor and the insolvent and might involve the sacrifice of valuable equities of redemption which ought to be made available for the benefit of the unsecured creditors of the insolvent with whose interests the Receiver is charged.

19. The equity of redemption having got vested in the Court in view of the order of ad-indication if the plaintiffs wanted to proceed against the property for the realization of then mortgage debt it wag necessary for them to impleaded the person in whom the property had got vested, viz. the Court, and in the absence of that person the security could not be realized. On the basis of Sub-section (6), therefore, it is, in our opinion not open to the plaintiffs to say that they could proceed as if no order of vesting had been passed and they could ignore the insolvency proceedings,

20. The word "vesting" has not been defined in the Provincial Insolvency Act. But the effect of vesting has been the subject-matter of judicial consideration. In all the cases which have been brought to our notice on this point it has been held consistently that vesting of a property in the Court or the receiver not only gives the Court or the receiver the right to take possession of the property and deal

with it in a certain manner but amounts to a legal transfer of the right, title and interest of the insolvent in the Court or the receiver as the case may be and as a result of the vesting, the property for the purposes of the Insolvency Court becomes the property of the Court or the receiver and ceases to be the property of the insolvent.

21. It is not necessary to refer to many cases on the point; a few may, however, be cited. In *Ram Rattan v. Fazal Haq* AIR 1939 Lab 346 It was laid down (vide head-note):--

"Where a person is adjudged insolvent and his property becomes vested in the Official Receiver u/s 28. legally the receiver and not the insolvent is the owner of the property."

22. In *Paleti Chandrayya and Others Vs. Yeruva Chinnappa Reddi and Others*, it was laid down:--

"The legal consequence of adjudication in bankruptcy is that the ownership of the insolvent in all the property owned and possessed by him on the date of adjudication is divested from him and vested in the Official Receiver. As observed by Mellish L.J. in *In re Oriental Inland Steam Co., Ex parte Scinde Ry. Co.* (1874) 9 CHN 557 at p. 560:

In bankruptcy, the whole estate, both legal and beneficial, is taken out of the bankrupt, and is vested in his trustees or his assignees.

So until the property is again re-vested in the insolvent, the insolvent has no title to the said property."

23. In *Buddhu Lal v. Ram Sahai*, AIR 1932 Oudh 244, it was said :

"All the property of the insolvent vests in the Court or the receiver as soon as the order of adjudication is made. It follows therefore that from the date of the order Kamal Lal and Ham Lal ceased to have any interest in the property. The property was taken away from them and became vested in the Court so that after such vesting Kamal Lal ceased to be the owner of the property in law and dealings by him with respect thereto became void."

24. Learned counsel for the plaintiffs is, therefore, not correct when he says that the order of vesting gave the Court or the receiver only a power to possess the property for certain purposes. The real effect of the vesting was that the right, title and interest of the defendant No. 1 in the property got completely suspended, and the Court and after the appointment of the receiver, the receiver became the owner of the property entitled to take possession of it and to deal with it for certain purposes. Had that not been the legal position it would not have been possible for the Court or the receiver to pass a valid and complete title to the property when it transferred it for the satisfaction of the debt of the insolvent.

25. The contention that as a result of the vesting only some sort of title passes to

the Court or the receiver and not the whole title, and something continues to vest in the insolvent, must also be rejected on the same basis. As a result of the order of adjudication all the rights and interest which the insolvent had in the property got transferred by operation of law to the Court or the receiver and the plaintiffs could not say that any rights against which their claim could be enforced continued to remain in the defendant No. 1.

26. Learned counsel, however, argues that if that is the effect of vesting the provisions of Section 28 of the Provincial Insolvency Act which provide for such vesting must be held to be void under the Constitution as the fundamental rights guaranteed by the Constitution under Articles 19 and 31 of the Constitution get contravened. This contention appears to be wholly unacceptable.

(26a) Let us take up Article 31 first. Under Clause (1) "No person shall be deprived of his property save by authority of law" Here there is a duly enacted piece of legislation, viz. the Provincial Insolvency Act, which has the effect of depriving the insolvent of his property, it cannot, therefore, be said that there is no authority of law. Clause (2) of the Article applies only when some property is either requisitioned or acquired for a public purpose and save by authority of law. Here the property of the insolvent which vests in the Court or the receiver is neither requisitioned nor acquired for a public purpose. It has also not been requisitioned or acquired save by authority of law, Clause (2A) of the Article makes it quite clear that compulsory requisition or acquisition contemplated by Clause (2) can come into existence only if the law provides for the transfer of the ownership or right to possession of the property to the State or a corporation owned or controlled by the State. This is not the case when vesting takes place u/s 28(2) of the Provincial Insolvency Act.

27. So far as Article 19 is concerned, it is not suggested that the restriction put by Section 28 of the Provincial Insolvency Act on the right to hold property is unreasonable or is not in the interest of the general public. The argument put forward is that if the insolvent is deprived of his property altogether it cannot be a case of reasonable restriction being put on his right to hold property. In other words, what the learned counsel contends is that the word "restriction" used in Clause (5) of Article 19 of the Constitution cannot include deprivation of the insolvent of his property rights. With reference to the word "restriction" used in some of the other clauses of Article 19 it has now been held by the Supreme Court: vide *Narendra Kumar and Others Vs. The Union of India (UOI) and Others*, that restriction will include "absolute prohibition", There is, therefore, no reason why restriction should not include even absolute suspension of title for particular purposes contemplated by the law. The purpose of insolvency is that the insolvent should not be in a position to deal with his properties after he had been adjudicated a bankrupt and that the Court or the receiver should have complete dominion over the property in order to satisfy the debts of the insolvent. The properties will be held in trust for the creditors and if any balance is left it will be returned to the insolvent. For the fulfillment of this purpose it is

necessary to suspend the rights of the insolvent altogether for a limited time and a limited purpose. It is in the circumstances not possible to accept the contention that the restriction is unconstitutional and goes beyond the limits set forth in Clause (5) of the Article.

28. When the adjudication order was passed against the defendant No. 1 it was open to the Insolvency Court to appoint a receiver. Had the receiver been appointed on that very date the property of the insolvent would have got vested in the receiver from that very time. In case, however, no receiver was appointed on that date the law provided that the property got vested in the Court. u/s 58 of the Provincial Insolvency Act the Court had all the powers of a receiver and could deal with the property in the same manner as a receiver would have done had one been appointed. The vesting of property in the Court or a receiver as a result of an order of adjudication has been held to be a transfer by operation of law. In AIR 1927 108 (Privy Council) the Privy Council considered (the vesting of the equity of redemption to be "an assignment by operation of law." In Pinnamameni Basava Sankaram by mother and guardian Rattamma Vs. Garapati Narasimhulu and Others, it was observed:

"When, the property vests in a Receiver in insolvency there is a transfer by operation of law....." The same view was taken more recently in Shyam Kali Bai v. R.N. Verma, AIR 1956 Nag 57 where it was said:

"The effect of the vesting is that the ownership of the property is transferred by operation of law to the receiver who becomes its legal owner."

As a result of the order of adjudication passed on the 9th of October 1944, therefore, the equity of redemption in the property mortgaged to the plaintiffs got transferred by operation of law in favour of the Court. When the receiver was subsequently appointed on the 31st July 1946 there was a second transfer by operation of law. This is clear from the word "thereupon" used in the first clause of Section 56 of the Provincial Insolvency Act. In the eye of law, therefore, there was a transfer of the equity of redemption in the present case from the mortgagor defendant No. 1 to the Court on the 9th October 1944 and there was again a transfer from the Court to the receiver on the 31st July 1946. That being the legal position if the plaintiffs wanted to enforce their security against the mortgaged property and the property already stood transferred to the Court before their suit was filed the only way open to them was to implead the Insolvency Court as a party to the suit in its capacity as owner of the equity of redemption. That was not done. By the time the subsequent transfer was made in favour of the receiver on the 31st July 1946 the claim of the plaintiffs had already become time-barred.

No advantage can, therefore, be taken by the plaintiffs in these circumstances of the fact that the receiver came into the picture after the institution of the suit. On that account they cannot claim that a fresh period of limitation started to run from the date of the appointment of the receiver. The actual effect of the

omission of the plaintiffs to impleaded the Insolvency Court was that they filed the suit not against the real owner of the equity of redemption but against a person who had really lost all his rights and interest in the mortgaged property. As against the real owner, the receiver, the suit could be held to have been filed only on the date on which the receiver was impleaded and by that date the period of limitation had expired. On the date on which they impleaded the Official Receiver, therefore, as their suit was barred by time, the receiver could very well defeat it on the ground of limitation.

29. Section 10 of the Limitation ACT does not appear to be attracted at all and the plaintiffs cannot, in our opinion, get any advantage of it. That section reads as under:

"Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns not being assigns for valuable consideration, for the purpose of following in his or their hands such property or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time.

For the purposes of this section any property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose, and the manager of any such property shall be deemed to be the trustee thereof."

30. The argument of the learned counsel is that the Court as well as the receiver were trustees for the creditors and if the property in dispute had vested in either of them they held it as trustees and if the plaintiffs who were the beneficiaries wanted to follow the property in their hands there was no limitation for their action.

31. In the first place, it appears to be well settled that the expression "trust for a specific purpose" used in Section 10 will not apply to a trust arising by operation of law vide *Soonderdass Thakersay v. Bai Laxmibai* AIR 1946 Bom 131. The Insolvency Court or the Official Receiver were trustees for the creditors only by operation of law. Section 10 could not, therefore, be utilised against them.

32. Secondly, the plaintiffs being secured creditors stood outside the insolvency proceedings. The Court or the Official Receiver was not trustee for them. When they were trying to enforce their security in the ordinary course, therefore, they could not claim to be following the trust property or its proceeds in the hands of trustees,

33. All the contentions urged on behalf of the plaintiffs to bring their suit within time are, therefore, unacceptable and the learned Civil Judge was, in our opinion, justified in his view that so far as the receiver defendant No. 6 was concerned he having been impleaded long after the period of limitation had expired the suit was time-barred as against him.

34. The equity of redemption had got vested first in the Insolvency Court and then in the receiver. The Court was never impleaded in the suit at all. The receiver was not impleaded within limitation. No effective decree for the enforcement of the plaintiffs' security could, therefore, be passed in this suit in the absence of necessary parties. Our view on the point receives support from what Division Bench of the Nagpur High Court observed in *Shyamlal Gokul Prasad v. J. Saran Ram Prasad* AIR 1953 Nag 268. The head-note of that case reads:

"A decree obtained by a secured creditor against an adjudged insolvent without impleading the insolvency Court as a defendant after an order of adjudication has been passed u/s 27 but before a receiver is appointed to take charge of the insolvent's estate, is ineffective and does not bind the receiver." The same view was taken in AIR 1956 Nag 57 (*supra*).

35. The suit of the plaintiffs could not, therefore, succeed and must be held to have been rightly dismissed.

36. In the end learned counsel for the plaintiffs wanted to have the plaintiffs' right reserved for seeking their remedy in the Insolvency Court by proving their claim there. We do not think we are called upon to express any opinion on that claim. When it is made it will, of course, be considered on merits.

37. The appeal in the result fails and is dismissed with costs to the respondents Nos. 6 and 7 who alone contested the appeal. There will be only one set of costs for both these respondents.