

(2003) 03 MAD CK 0207

In the Madras High Court

Case No : SA No. 1130 of 1990 and CMP No. 3392 of 2003

N. Janardhanam (deceased), Kasturi, Thilagavathy, J.
Karthigeyeni and Senthil Kumar

APPELLANT

Vs

Tiruchirapalli Cooperative Building Society Limited and The
Official Receiver

RESPONDENT

Date of Decision : 28-03-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Provincial Insolvency Act, 1920 — Section 28(2), 28(6), 28(7), 51(3)

Citation : AIR 2004 Mad 142 : (2003) 2 MLJ 423

Hon'ble Judges : K. Gnanaprakasam, J

Bench : Single Bench

Advocate : T.R. Rajagopalan, SC for S.K. Kalavathy, for the Appellant; M.V. Venkataseshan, for-R2, for the Respondent

Final Decision : Allowed

Judgement

K. Gnanaprakasam, J.—The plaintiff is the appellant.

2. The plaintiff's suit is one for permanent injunction.

3. The plaintiff's case is that the suit property originally belonged to one Rajamani Devadoss, who had mortgaged the same to the 1st defendant and he having defaulted to discharge the mortgage debt, the 1st defendant took steps for realisation of the amount, under the Tamil Nadu Cooperative Societies Act to pass an award in ARC. No. 139/1970-71 and an award was passed on 23.8.1971. Pursuant to the same, EP. No. 24/1972-73 was filed before the Regional Deputy Registrar of Cooperative Societies (Housing) Cuddalore and the property was brought to sale in public auction and the plaintiff purchased the property in the public auction held on 24.1.1974. The plaintiff filed EA. No. 1317/1975 on the file of the District Munsif Court, Trichy and took possession of the property through court on 5.11.1975. After taking possession, he made improvements at heavy cost. As such, the plaintiff is the bonafide purchaser of the property for value.

While so, the plaintiff received a phone message from the 1st defendant, stating that the 2nd defendant, viz. the Official Receiver, Trichy is bringing the property again for sale on 20.7.1983. On enquiry, the plaintiff came to know that the debtor in ARC. No. 139/1970-71, Rajamani Devadoss filed a petition for adjudicating him as an insolvent before the Sub Court, Trichy, in IP. No. 134/1972, in which the 2nd defendant filed a petition and obtained an order to bring the property for sale, for the benefit of General Body of Creditors. It is stated that the 2nd defendant was aware of the award proceedings taken by the 1st defendant and also the sale held in favour of the plaintiff and as such, he cannot bring the property for sale.

4. The 1st defendant, in his written statement, has stated that as per the directions in IA. No. 540/1975 in IP. NO. 134/1972 and CMA therefrom, this defendant is bringing the suit property to sale again after a notice to the Official Receiver as per the award. The prior execution sale by this defendant was held bonafide as per the rules and regulations laid down by the Cooperative Societies Act.

5. The 2nd defendant, the Official Receiver, in his written statement, has stated that the proceedings taken by the 1st defendant to bring the property for sale and the sale held on 24.1.1974 are not valid. But, however, it is admitted that the plaintiff took possession of the property, but, the improvements made were not admitted. It is stated that the plaintiff was aware of the proceedings in IP. No. 134/1972 and also in IA. No. 540/1975, filed by the defendants to declare that the sale held by the 1st defendant is null and void and the insolvency court declared the sale held on 24.1.1974 as null and void and the said order is valid.

6. The trial court did not accept the case of the plaintiff and dismissed the suit and the same was confirmed in the appeal. Aggrieved by the same, the plaintiff has preferred this appeal.

7. Heard the learned advocates for the appellants and the respondents.

8. The learned advocate for the appellants has raised three folded contentions: (1) That he was not a party to the insolvency proceedings and therefore, the said proceedings taken in his absence are not valid and binding upon him, (2) That the 1st defendant is the secured creditor, who brought the property for sale and the same is not affected by the insolvency proceedings, and (3) That the appellant is a court auction purchaser and purchased the property in good faith and therefore, he is entitled to the benefit of Section 51(3) of the Provincial Insolvency Act, 1920.

9. Now, let us consider the case of the appellant, for which certain dates are important. Rajamani Devadoss by executing a mortgage in favour of the 1st defendant borrowed the amount and for the non-payment of the amount, the property was brought to sale by the 1st defendant. The award was passed on 23.8.1971 and the date for the sale of the property was fixed on 26.10.1972. The property was purchased by the plaintiff in the auction held on 24.1.1974 and

he filed an application on 30.10.1975 in EA. No. 1317/1975 before the District Munsif Court, Trichy for delivery and delivery was also effected and the same was recorded on 4.3.1976. After the date was fixed for the sale of the property by the 1st defendant, the mortgagor filed the insolvency petition on 23.10.1972 in IP. No. 134/1972 and also filed an application in IA. No. 372/1972 in the said IP for injunction, restraining the 1st defendant from bringing the property to sale on 26.10.1972 and an order of injunction was also granted on 23.10.1972 and Rajamani Devadoss was adjudicated as an insolvent on 28.8.1973.

10. As the 1st defendant is the secured creditor, the right of the 1st defendant shall not be affected as provided u/s 28(6) of the Provincial Insolvency Act, 1920, which states, "Nothing in this section shall affect the power of any secured creditor to realise or 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" and that therefore, the order of adjudication of Rajamani Devadoss as insolvent is not binding upon the 1st defendant and brought the property for sale in CEP. No. 24/72-73 and 26.10.1972 was fixed for the sale of the property and ultimately the plaintiff purchased the property in the court auction on 24.1.1974 and the sale was confirmed on 1.11.1974. On purchase, the plaintiff filed EA. No. 1317/1975 in ARC. No. 139/1970-71, before the District Munsif Court, Trichy for delivery of possession and delivery was ordered on 1.11.1975 and the same was also effected on 5.11.1975. The 2nd defendant in this suit, viz. The Official Receiver, Trichy filed EA. No. 1354/1975 for redelivery of the suit property u/s 47 CPC. The said petition came to be dismissed by order dated 4.3.1976 (Ex.A20).

11. The order of dismissal of the application u/s 47 CPC was passed before the amendment of CPC under the Act 104/1976, and hence, any order passed u/s 47 CPC is a decree and hence, appealable. But, however, the 2nd defendant, the Official Receiver, has not preferred any appeal as against the order passed u/s 47 CPC and therefore, the order of delivery pursuant to the confirmation of the sale in favour of the plaintiff has become final.

12. The 2nd defendant, who has not chosen to question the order passed u/s 47 CPC, has chosen to file an application in IA. No. 540/1975 in IP. No. 134/1972 for declaration that the sale in favour of the plaintiff is void and in the petition, the 1st defendant alone was made as a party and the plaintiff was not made a party to the insolvency proceedings. The 2nd defendant also filed IA. No. 541/1975 on 5.11.1975, against the 1st defendant and the plaintiff, for stay of all further proceedings in EA. No. 1317/1975 in ARC. No. 139/1970-71, before the District Munsif Court, Trichy and an interim stay was also obtained on 5.11.1975 and the same was vacated on 21.1.1976, on the ground that the 2nd respondent (plaintiff in the suit) is not a party in IA. No. 540/1975 (Ex.A4) and thereafter, the 2nd defendant herein filed an application in IA. No. 121/1976 in IP. No. 134/1972 to implead the auction purchaser (plaintiff herein) as the 2nd defendant in IP. No. 540/1975 in IP. No. 134/1972. But, however, the 2nd defendant herein withdrew the said petition by making an endorsement in the

said petition on 16.3.1976 that "it may be dismissed as not pressed." i.e. (Ex.A19). As such, the plaintiff herein was not made as a party in the insolvency proceedings.

13. The 2nd defendant filed a revision petition on 29.10.1974, u/s 4 of the Provincial Insolvency Act in IA. No. 540/1975 in IP. No. 134/1972, before the Subordinate Judge, Trichy to declare the sale held by the respondent therein, viz. the 1st defendant herein, on 24.1.1974 as null and void, to which, the plaintiff was not a party. The said petition was allowed by order dated 25.1.1982 (Ex.B8). As against the same, the 1st defendant herein preferred CMA. No. 65/1982 before the District Judge, Trichy and in the said appeal also, the plaintiff herein was not a party. The said appeal came to be dismissed on 6.4.1983. After the dismissal of CMA. No. 65/1982 only, the 2nd defendant herein took steps to bring the property for sale and only in that juncture, the plaintiff filed the present suit.

14. Now, the questions to be answered are, whether the 2nd defendant, who having suffered an order before the Civil Court, in an application u/s 47 CPC, is entitled to bring the property for sale before the insolvency court? and whether the 2nd defendant can bring the property for sale in the absence of the plaintiff in the suit and that too, when the 2nd defendant having filed an application to implead him as a party had withdrawn the same? and whether the sale in favour of the plaintiff in the above circumstances is valid?

15. Admittedly, the 1st defendant is a secured creditor, who after having passed an award, brought the property for sale and the date for the sale of the property was fixed on 26.10.1972 and the plaintiff purchased the property in the court auction held on 24.1.1974. Three days prior to the fixation of the sale, the debtor filed IP.No. 134/1972 and he was adjudicated as an insolvent on 8.8.1973. In pursuance of the court sale, the plaintiff herein took delivery of the suit property on 31.10.1975 and the said delivery was also recorded on 4.3.1976. Thereafter, the 2nd respondent, the Official Receiver filed an application in EA. No. 1354/1975 before the Civil Court for redelivery of the suit property and the same was dismissed on 4.3.1976. The 2nd defendant, viz. the Official Receiver did so by virtue of the order of adjudication dated 8.8.1973. As against the order passed in EA.No. 1354/1975, the 2nd defendant has not preferred an appeal and therefore, the sale made in favour of the plaintiff in the suit has become final.

16. But, however, the 2nd defendant filed IA. No. 540/1975 on 29.10.1974 in IP. No. 134/1972 for declaration that the sale in favour of the plaintiff is void, without making the plaintiff herein as a party and also sought for an order of stay and an interim stay was granted, but, the same was vacated on 21.1.1976, on the ground that the plaintiff herein was not made as a party. Thereafter, the 2nd defendant filed an application to implead the plaintiff as the 2nd respondent in the insolvency proceedings, but the same was withdrawn.

17. In the above said situation, whether the order passed by the Insolvency

Court in IA. No. 540/1975, declaring that the sale in favour of the plaintiff is void, is a valid order?

18. A similar facts arose in the case of RSK.Chandrasekaran Vs. The Official Receiver, Madurai and another 94 LW 284 . In the said case, the suit was filed to enforce a mortgage and the same was decreed. EP was filed and the property was sold in auction on 1.11.1971 and the appellant in the said case was the auction purchaser. The judgement debtors filed an application under Order 21 Rule 90 to set aside the sale and the same was dismissed on 5.1.1974 and the appeal preferred by the judgement debtors in AAO. No. 51/1974 before this court was also failed. In the meanwhile, a petition to adjudge the judgement debtors as insolvents was filed on 30.10.1971 and the order of adjudication itself was made on 17.12.1971. The Official Receiver representing the estate of the insolvents, filed EA. No. 2/1975 to set aside the sale on the ground that no notice was given to him and that the permission of the court was also not obtained. The learned Subordinate Judge of Madurai passed an order on 1st Mach 1975, dismissing the application, holding that the adjudication took place only on 17th December 1971, that on the date when the sale took place, namely, 1st November, 1971, the Official Receiver was not in the picture and that therefore, there was no question of giving notice to him or obtaining the permission of the Court for the sale of the property. As against the said order, the Official Receiver filed AAO. No. 182/1975, before this Court and this court by order dated 6.10.1975, allowed the appeal, reversing the order of the Subordinate Judge, Madurai and as against the same, the LPA was filed. The Division Bench, after considering the relevant provisions of the Provincial Insolvency Act, viz. Section 51(3), Section 28(2), Section 28(7) and Section 28(6), had stated that "A combined reading of Sub Section (2), (6) and (7) of Section 28 of the Act will lead to the inference that in the case of a secured creditor his right to realise or otherwise deal with the security will not be affected either by the vesting provided for in S. 28(2) or by the doctrine of relation back provided for in S. 28(7) of the Act." It was further held, "In our opinion, it is not even necessary to go so far, in view of the provision contained in Sub S.(6) of S. 28, that nothing contained in the Section shall affect the power of any secured creditor to realise or otherwise deal with the security in the same manner as he would be entitled to realise or deal with it, if that section had not been passed, and, when it so provides, it proceeds to create a fiction that, with regard to the rights of a secured creditor referred to in Sub. S.(6) of S. 28 neither Sub. S.(2) nor Sub. S.(7) of S. 28 should be deemed to have been in existence or enacted. If so, there is no scope for applying either the provisions of vesting or the theory or relation back, so as to restrain or curtail the power of the secured creditor saved under Sub. S.(6) of S. 28 and ultimately, allowed the appeal thereby, holding that the sale in favour of the auction purchaser is valid.

19. On the contrary, the learned advocate for the 2nd respondent relied upon the case of Velayudha Konar Vs. Kora Miah Sahib and others 1974 2 MLJ 408 . In that case also, the question came for the consideration of the court was, what is

the position of the court auction purchaser in the execution sale when the Official Receiver, who had not been made a party to the said sale treats it as void as against him and sell the property to a third party, and whether the remedy of the auction purchaser is to file an application under Order 21, Rule 91 of the Code of Civil Procedure, to set aside the court sale. In that case also, the Official Receiver was not made as a party in the court auction sale and in the said circumstances, it was observed, "10. In this case the Court sale to which the Official Receiver was not made a party has been ignored by the Official Receiver as he is entitled to, and he has sold the property to Sivasankaran Pillai, the predecessor-in-title of the respondent. It is elementary principle that a sale held without making the affected persons a party to the proceedings is one made without jurisdiction. If in a given case no notice of the execution sale goes to the judgement-debtor and without such notice his property is sold in Court auction, undoubtedly such a sale is one made without jurisdiction for, no court has jurisdiction to sell the property of a person without he being informed about it." It was held, "11. In the present case, the Official Receiver had stepped into the shoes of the judgement-debtor before the court sale was held. Therefore, he ought to have been made a party to the execution proceedings. It may be noted that the Official Receiver came into the picture only after the final decree in the mortgage suit was passed. Therefore, the Official Receiver is undoubtedly bound by the final decree. However, the execution proceedings in which the property was sold had been taken subsequent to the adjudication of the mortgagor (judgement debtor), and hence the Official Receiver ought to have been made a party to the said proceedings. He not having been so made a party, the Court sale is of no effect at all as against him." In the said circumstances, it was held that the sale in favour of the auction purchaser in the absence of the Official Receiver, who was not made as a party to the execution proceedings is not valid.

20. The appellants also relied upon the case of E.K. Raghava Reddy Vs. The Official Assignee of Madras and others 1964 MLJ 168 and G.P.V Lakshmi Ammal Charity Trust rep. By K.S. Venkatesamurthy, Trustee and another Vs. The Official Receiver 1998 1 LW 30 .

21. The respondents also relied upon the case of Ramagopal Naicker Vs. Muthukrishna Ayyar and another 1957 Mad 1 AIR V 44 C 1Jan and Kripa Nath and Another Vs. Ganga Prasad and Others, :

22. In RSK.Chandrasekaran Vs. The Official Receiver, Madurai and another 94 LW 284 the suit was filed to enforce the mortgage debt and therefore, he was a secured debtor. In that case, it was held, "4. Under these circumstances, the question for consideration is whether there is any reality in the requirement that the decree holders should have obtained the permission of the court for bringing the property to sale or should have given notice tot he Official Receiver before obtaining an order for sale. Even giving full effect to the doctrine of relation back provided for in S. 28(7) of the Act, the order of the Court directing the sale of the property having been passed even before 30th October 1971, it

could not have been possible in practice for the decree holders to have given notice to the official receiver or to have applied for and obtained the permission of the court, because on that date even the petition for adjudication was not there and more so the Official Receiver."

23. In our case, the facts are slightly different. We have already seen that the 1st defendant passed an award on 23.8.1971 and after passing the said award, the property was brought to sale, after the sale notice dated 26.10.1972. Three days prior to that, the mortgagor filed IP. No. 134/1972, to which, the 1st defendant was a party. In the said circumstances, the 1st defendant could have deferred further proceedings. But, however, the 1st defendant brought the property for sale and the same was purchased by the plaintiff in the court auction held without any notice of the insolvency proceedings and that therefore, the plaintiff was a bonafide purchaser of the suit property and purchased the same in good faith. Pursuant to the purchase, the plaintiff took delivery of the property on 5.11.1975 and the same was also recorded on 4.3.1976. Thereafter, the Official Receiver, who has already stepped into the shoes of the mortgagor (judgement debtor), filed an application u/s 47 CPC for redelivery of the property and the said petition came to be dismissed and the same was left unchallenged.

24. The Official Receiver, having suffered an order before the Civil Court, has chosen to file IA. No. 540/1975 in IP. NO. 134/1972 before the Insolvency Court for declaration that the sale in favour of the plaintiff in this suit, is void, but, the plaintiff was not made as a party to the said proceedings. From the proceedings, it is made out that the 2nd defendant sought for an order of interim stay and the same was also granted and subsequently, vacated on the ground that the plaintiff herein was not a party to the insolvency proceedings. Thereafter, the Official Receiver filed an application to implead the plaintiff herein as a party in IA. No. 540/1975 in the insolvency proceedings, but, the same was withdrawn. This conduct of the Official Receiver is unbecoming of himself as Official Receiver. The Official Receiver is an Officer of the Court. He having participated in the proceedings before the Civil Court and having suffered an order, if aggrieved should have challenged the said order, but instead of doing so, he has chosen to take proceedings before the insolvency court, wherein also he has not chosen to implead the plaintiff herein, who is a necessary party to the said proceedings. As a matter of fact, the order of stay obtained by him, before the Insolvency Court was vacated on the ground that the plaintiff was not a party to the insolvency proceedings. Having suffered such an order before the insolvency court, the Official Receiver filed an application to implead the plaintiff as a party in the insolvency proceedings, but, subsequently, withdrawn the same, without assigning any reason. That shows that the Official Receiver wanted to keep the plaintiff herein in dark and also to put him out of the insolvency proceedings and to take all actions in his absence. There also the Official Receiver did not act as an Officer of the Court.

25. No doubt, the plaintiff purchased the property only after the mortgagor

adjudged as insolvent on 8.8.1973, but, whereas, the plaintiff purchased the property only on 24.1.1974. At the time of sale, the plaintiff had no knowledge about the insolvency proceedings as he was not put on notice by any of the parties and that therefore, the plaintiff herein is the purchaser of the property in good faith and therefore, he is protected u/s 51(3) of the Provincial Insolvency Act, which states, "A person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the receiver." That is the stand taken by the Division Bench of this Court in RSK. Chandrasekaran Vs. The Official Receiver, Madurai and another 94 W 284 . Section 28(6) of the Act also protects the sale in favour of the plaintiff, which states, "Nothing in this section shall affect the power of any secured creditor to realise or 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." As such, the insolvency proceedings taken by the mortgagor would not bind the secured creditor and therefore, the sale in favour of the plaintiff /appellant is valid.

26. We have already seen that the Official Receiver, who came to the Civil Court, questioning delivery of the property to the plaintiff had suffered an order, but, has not chosen to question the same, is also estopped from questioning the validity of the sale in favour of the plaintiff.

27. For the reasons stated above, the sale in favour of the plaintiff is valid and he is entitled to a decree as prayed for and these facts were not properly taken into consideration by the courts below and therefore, the judgement and decree passed by the courts below, are liable to be set aside and accordingly, they are set aside.

28. In the result, the second appeal is allowed. No costs. The CMP. No. 3392/2003 is allowed.