

(1938) 03 CAL CK 0014
In the Calcutta High Court

Nagendra Lal Pal Choudhury and Others	APPELLANT
Vs	
Hemanta Kumar Mukherjee and Others	RESPONDENT

Date of Decision : 10-03-1938

Acts Referred:

Provincial Insolvency Act, 1920 — Section 28, 28(7), 51, 52

Citation : AIR 1938 Cal 503

Hon'ble Judges : Derbyshire, C.J.;B.K. Mukherjea, J

Bench : Full Bench

Judgement

Derbyshire, C.J.—This is an appeal from an order of the District Judge of Faridpur passed on 23rd September 1936, wherein he declared that an auction sale of certain immovable property held on 20th September 1935, was null and void. The learned Judge was sitting in Insolvency. The history of the matter is this : the decree, holder Nagendra Lal Pal Chowdhury on 8th March 1934, obtained a money decree against the judgment-debtors for Rupees 883 and costs. Execution proceedings were started in the first Munsif's Court at Chikandi in the district of Faridpur. On 17th May 1935 a notice was issued upon the judgment-debtor under Order 21, Rule 66, Civil P. C, fixing 2nd July 1935 as the date for hearing objections to the proposed proclamation of sale. On 2nd July 1935 proclamation of sale was drawn up, the date of sale being fixed for 12th August 1935. On 10th August 1935 the two judgment-debtors filed an insolvency petition in the Court of the District Judge of Faridpur. On 12th August, that is, the date fixed by the executing Court for the sale of the judgment-debtors' property, the judgment-debtors in the executing Court at Chikandi prayed for time to bring a stay order from the District Judge's Court, or the order sheet of the insolvency case. As a result, the Munsif in the executing Court adjourned the same for ten days, until 22nd August 1935. On 15th August in the Insolvency Court at Faridpur, the insolvency petition of the two judgment-debtors was registered. On 22nd August 1935 in the executing Court at Chikandi, the judgment-debtors filed a certified copy of the order sheet in the insolvency case and prayed for time. The Munsif allowed the prayer recording that " on the judgment-debtors' prayer the case is

adjourned to 6th September 1935 next for sale at 12 noon." On 27th August the judgment-debtors, the petitioners in the insolvency case, prayed for time to deposit costs, and time was granted until 5th September, the insolvency Judge saying that no further time would be allowed. On 5th September in the Insolvency Court at Faridpur a petition was presented by the petitioners stating that the decree-holder in the money execution case in the executing Court at Chikandi had attached properties of the petitioners, and prayed for stay of further proceedings in the said execution. The Court ordered as follows:

As the order of adjudication has not yet been made this Court has no jurisdiction to entertain this petition. It is therefore rejected.

2. On 6th September in the executing Court at Chikandi the judgment-debtors prayed for time to bring a stay order from the Appellate Court. The order was made:

That sale is adjourned to 20th September 1935 next for sale at 12 noon without fresh proclamation of sale

3. On 20th September in the executing Court at Chikandi the judgment, debtors asked for further time. The Munsif recorded:

He (they) has not obtained any stay order from the Judge's Court. There is nothing to show that any receiver has been appointed. I do not think that the applicants' prayer is bona fide. Already three adjournments have been granted to the applicants. Petition is rejected.

4. On the same day the Munsif also ordered : "Necessary papers for sale be sent to Nazir and put up after his report." The sale was held on the same day. It is recorded that the decree holder was permitted to bid and in fact purchased various lots at various prices amounting in all to Rs. 380. The Munsif records : " case adjourned to 8th November 1935 for set off and confirmation of sale." On 8th November 1935, an order was made in the executing Court that the confirmation of sale be adjourned to 16th November. On 16th November in the executing Court it was recorded:

L.L. Fees deposited. 80 days passed from the date of sale. No objections raised. Purchase money be set off. Sale be confirmed and the case be decreed in part satisfaction.

5. On 20th January 1936, petitioner 2 was examined; the petitioners were adjudged insolvents and Babu Hemanta Kumar Mukherjee, pleader, was appointed receiver. On 18th April 1936, the receiver placed before the Court a report dealing with the sale, and a notice was issued upon the decree-holders to show cause why the sale in the executing Court should not be declared null and void. After some delay, that matter came on 23rd September 1936 when, as I have already stated, the sale was declared null and void. It is from that order that this appeal has been taken. The learned Judge in giving his decision says:

Under the provision of Section 28 (7), Provincial Insolvency Act on the making of an order of adjudication this order shall relate back to and take effect from the date of the presentation of the petition on which it is made. Consequently the force and effect of the order of adjudication will-operate from 15th August 1935. It appears further that the judgment-debtors got notice of the insolvency case on 12th August 1935, 22nd August 1935, 6th September 1935. The judgment-debtors even filed a certified copy of the order sheet of the insolvency case on 22nd August 1935 before the Court with a prayer for time. * * * Thus it is perfectly clear that the creditors knew of the insolvency case. In spite of this they had the properties sold in auction and purchased by themselves on 20th September 1935. Under the provisions of Sections 51 and 52 of the Act the creditors are not entitled to the benefit of the execution against the receiver. The receiver is therefore entitled to delivery of possession of the property. I decide these points accordingly in favour of the receiver who has relied also upon the authorities reported in Mahendrakumar Baishya Shaha Vs. Deeneshchandra Ray Chaudhuri, and Jogendra Nath Kundu and Another Vs. Jogneswar Mandal and Others, . The creditor auction purchaser relied upon the case reported in G.C. Chakrabarty v. E. White (1935) 63 Cal 535.

6. Now, Section 28 (7), Provincial Insolvency Act enacts:

An order of adjudication shall relate back to, and take effect, from the date of the presentation of the petition on which it is made.

7. Section 51 (1) enacts:

Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realized in the course of the execution by sale or otherwise before the date of the admission of the petition.

(2) Nothing in this section shall affect the rights of a secured creditor in respect of the property against which the decree is executed.

(3) 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.

8. Section 52 enacts:

Where execution of a decree has issued against any property of a debtor which is saleable in execution and before the sale thereof notice is given to the Court executing the decree that an insolvency petition by or against the debtor has been admitted, the Court shall on application, direct the property, if in the possession of the Court, to be delivered to the receiver, but the costs of the suit in which the decree was made and of the execution-shall be a first charge on the property so delivered and the receiver may sell the property or an adequate part thereof for the purpose of satisfying the charge.

9. The learned Judge has held under those sections and under the authority of

the cases that he has mentioned that the sale was null and void and that under it no title passed to the decree holder auction purchaser. In Mahendrakumar Baishya Shaha Vs. Deeneshchandra Ray Chaudhuri, , D. N. Mitter and M. C. Ghose JJ. referring to Section 52 of the Provincial Insolvency Act said:

It has been argued that if this view (that is the view of Sir Dinshah Mulla, Tagore Law Lecturer) 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 Section 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 had been admitted, it should stay its hands so far as the execution of the decree by the creditors of the insolvent is concerned.

10. In that case a receiver had been appointed of the insolvent's property at the time the execution sale took place. In Jogendra Nath Kundu and Another Vs. Jogneswar Mandal and Others, , Nasim Ali J. commented upon the case in Mahendrakumar Baishya Shaha Vs. Deeneshchandra Ray Chaudhuri, and pointed out that there, as I have already pointed out, a receiver had been appointed at the time of the sale : whereas Nasim Ali J. was dealing with a case where no receiver had been appointed. Referring to Section 52 he said at page 1291:

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.

11. There was no receiver at the time of the sale in the present case. It seems to me on a perusal of the history of the execution case and the history of the early proceedings in insolvency that the learned Munsif was fully justified in coming to the conclusion as he did, that the applicants' prayer for further time was not bona fide. My impression on reading the history of the execution case and the insolvency proceedings in chronological order is that the judgment debtors were trying to delay and if possible to defeat the judgment-creditors. The judgment-debtors two days before the sale on 20th September 1935, filed application to be adjudicated insolvents and then came to the executing Court to have a stay of the sale. Three days later, their petition for insolvency was admitted and then there followed delay tactics on their part. That is obvious from the history of the case, I have set out. It was open to the judgment-debtors if they were anxious to take advantage of the provisions of the Insolvency law to ask for the appointment of an interim receiver either on 15th August or any day later, to take charge of their property. That would have made it possible for them to apply to the executing Court u/s 52, Provincial Insolvency Act for the property to be delivered to the receiver, and that, of course, would have prevented the sale. But that was not done. The adjudication of insolvency did not take place until 20th January 1936, a matter of some four months after the sale of the property. There was a deliberate delay on the part of the judgment-debtors here. The result was that on 20th September 1935, there was no receiver of the property either

permanently or temporarily, to whom the Munsif in the executing Court could order the property to be handed over u/s 52 of the Act. It has been suggested that he should have stayed the proceedings in the executing Court until a receiver was appointed. There was no certainty that a receiver would be appointed if he stayed the proceedings. The learned Munsif from his experience in the case could have no ground for thinking that a receiver would be appointed if he stayed the sale. I am not prepared to say that he would have been right in staying the sale if a receiver were likely to be appointed; I agree with the remarks of Nasim Ali J. quoted above. On 20th September the Munsif in the executing Court did not stay the sale. In my view, he was justified in not staying the sale of the property in question. The sale went forward in the ordinary way. The sale was directed by the proper executing Court acting pursuant to a decree which had been properly passed. It appears to me that the auction sale itself is regular and proper. The question is whether by reason of Sub-section (1) of Section 51 of the Act the decree-holder auction purchaser is entitled to the property which he has purchased. If that sub-section alone were to be considered, I should hold that he would not be entitled to the benefit under the execution. But regard must be had to Sub-section (3) of Section 51. If the decree-holder auction-purchaser can show that he purchased that property in good faith he has acquired a title to it under Sub-section (3). That matter does not appear to have been considered by the learned District Judge in his judgment.

12. In my view, this case must go back to the Judge in the Insolvency Court for him to consider whether the decree-holder purchased the property at the auction sale in good faith i.e. honestly. If after going into all the evidence which both the parties may bring before him on that question, that is whether the decree-holder purchased the property honestly, he comes to the conclusion that he did, in my opinion it would be his duty to say that the decree-holder auction purchaser acquired a good title to it as against the receiver u/s 51, Sub-section (3), Provincial Insolvency Act. If he is not satisfied that the decree-holder auction purchaser purchased it honestly, then it would be his duty to say that he did not acquire good title as against the receiver. For these reasons, I am of opinion that this case must go back to the Judge of the Insolvency Court for him to deal with it in accordance with this judgment. The appellants will be entitled to their costs of this appeal, hearing fee being assessed at two gold mohurs.

B.K. Mukherjea, J.

13. I agree with my Lord the Chief Justice in the order that has just been made in this case and I desire only to add a few words. The trial Judge in deciding the case against the auction purchaser relied upon Sections 28, 51 and 52, Provincial Insolvency Act. It cannot be disputed that u/s 28 (7), Provincial Insolvency Act an order of adjudication relates back to the date of the admission of the petition of insolvency. If a sale therefore is held before the adjudication order is made but after the presentation of the petition of insolvency a purchaser would acquire what has been called a contingent title which is liable to cease in the event of an

adjudication order being actually passed in the proceeding, subject, however, to the exception that is contained in Section 51 (3), Provincial Insolvency Act. The position taken up by the Court below and which has been sought to be supported on behalf of the respondent before us, is that the purchasers here were not bona fide purchasers within the meaning of Section 51 (3) and could not invoke the protection which is given by that sub-section. The trial Court held further that u/s 52, Provincial Insolvency Act the sale is a nullity out and out, inasmuch as the executing Court after being apprised of the fact of the pendency of the insolvency petition ought to have stayed the sale and had no jurisdiction to proceed further with the execution proceedings. The decision on both these points has been challenged before us by Dr. Basak who appears for the appellants. Taking the second point first we find that Section 52, Provincial Insolvency Act provides that where execution of a decree has issued against any property of a debtor which is saleable in execution and before the sale thereof notice is given to the Court executing the decree that an insolvency petition by or against the debtor has been admitted, the Court shall on application direct the property if in the possession of the Court, to be delivered to the receiver. The section itself shows that two conditions are necessary before the executing Court can make an order for delivery of the attached property to the receiver in insolvency. The first is that notice is given to the executing Court of the admission of a petition of insolvency by or against the judgment-debtor and in the second place there must be an application before the executing Court for delivery of such property to the executing Court.

14. There is some divergence of judicial opinion on the point as to whether an application by a receiver either ad interim or otherwise is necessary before an executing Court can be asked to deliver over the attached property to him. Mitter J., sitting with M. C. Ghose J., decided in *Mahendrakumar Baishya Shaha Vs. Deeneshchandra Ray Chaudhuri*, that such an application was unnecessary and if the executing Court is apprised of the fact of the admission of an insolvency petition, it is bound to stay its hands and if he proceeds with execution and sale is actually held, the purchaser acquires no title to the property by such purchase. On the other hand, it was observed by Mukherji J. sitting with S. K. Ghose J. in *Mathuresh Chakravarty Vs. S.R. Mills Co. Ltd. and Another*, that an application was necessary and must be made before the executing Court and without that no delivery of property by that Court to the receiver for purposes of sale could be made. It is difficult to accept the view of Mitter J. in view of the plain wording of the section. But if we assume that the view taken by the learned Judge is correct, even then I think that Section 52, Provincial Insolvency Act would have no application to a case like this where no receiver had actually been appointed. As Das J. pointed out in *Tirpit Thakur v. Ramperkash Das* (1930) 17 AIR Pat 406.

it cannot be denied that the Court executing a decree is to deliver possession to the receiver and to no one else whatever at any rate so far as the provisions of Section 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 should not have acted u/s 52.

15. This view was adopted by Nasim Ali J. sitting with Henderson J. in Jogendra Nath Kundu and Another Vs. Jogneswar Mandal and Others, . Accepting this view and distinguishing this case from the one reported in Mahendrakumar Baishya Shaha Vs. Deeneshchandra Ray Chaudhuri, where a receiver was actually appointed I hold, agreeing with my Lord the Chief Justice, that Section 52 could have no application to the facts of the present case. There remains the only other point to consider viz. as to whether the purchase would be protected under Sub-section 3 of Section 51, Provincial Insolvency Act. Sub-section 3 lays down that:

A person who purchases in good faith the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the receiver.

16. The words "good faith" signify that the purchase must be an honest purchase and the Legislature does not use the additional words " without notice of the insolvency Proceedings " as it does in Section 55, Provincial Insolvency Act. I think that it does not follow that simply because the purchaser had notice of the insolvency proceedings, he necessarily becomes a mala fide purchaser. The question has not been properly investigated by the trial Judge and as my Lord the Chief Justice has pointed out it requires a proper inquiry. The Court will consider the entire evidence that may be adduced on this point and come to a pro-per conclusion as to whether the purchaser was really a bona fide purchaser. If he answers the question in the affirmative the appellants' purchase will be protected, otherwise the sale will be void under the provision of Section 51(1), Provincial Insolvency Act.