
(1957) 04 KL CK 0003
In the High Court Of Kerala
Case No : A.S. No. 190 of 1954

Parameswaram Pillai Raman Pillai

APPELLANT

Vs

Lekshmi Pilla Kamalamma Pilla and Others

RESPONDENT

Date of Decision : 01-04-1957

Acts Referred:

Provincial Insolvency Act, 1920 — Section 28A, 59
Travancore-Cochin Insolvency Act, 1955 — Section 29

Citation : AIR 1957 Ker 144

Hon'ble Judges : T.K. Joseph, J; Raman Nayar, J

Bench : Division Bench

Advocate : M. Madhavan Nair and G. Balagangadharan Nair, for the Appellant;
N. Balakrishna Reddiar and M.N. Parameswaran Pillai, for the Respondent

Judgement

T.K. Joseph, J.—This appeal arises out of a suit for redemption of a mortgage. The property which is the subject-matter of the suit belonged to one Sun-daram Pillai. On his death it devolved on his son Nataraja Pillai who was adjudged insolvent in Insolvency Case No 6 of 1100 of the District Court of Trivandrum. The plaintiff's case is that the Official Receiver sold the property in auction and later executed a sale-deed to Sankara Warier, the auction-purchaser. The latter conveyed his rights to the plaintiff and the suit was instituted on the basis of title thus acquired. The mortgage right belonged to the 1st defendant on the date of suit and the 2nd defendant was stated to be in possession under her.

According to the plaintiff, the mortgagee had effected some improvements and had also committed waste on the property. The plaintiff prayed for redemption of the mortgage on payment of the mortgage money and value of improvements. He also prayed for recovery of damages on account of waste committed on the property. An injunction restraining the defendants from committing further waste was also sought. The 1st defendant contended that the plaintiff had not acquired title to the property as the auction sale alleged to have been conducted by the Official Receiver was not valid.

It was also pleaded that the 1st defendant had purchased the property from Nataraja Pillai find his son on 17-6-1120 and had thereafter redeemed the mortgage on payment of Rs. 6,140 towards mortgage money and value of improvements. The 2nd defendant was stated to have obtained a mortgage from her by fraud and misrepresentation. The 2nd defendant's contention was mainly a denial of the 1st defendants' allegation that the mortgage in his favour was vitiated by fraud and misrepresentation. He denied the allegation of waste and claimed a sum of Rs. 5,000 as value of improvements. He further stated that he was willing to surrender possession of the property on receipt of the mortgage money and value of improvements.

The 2nd defendant died during the course of the suit and his legal representatives were im-pleaded as defendants 3 to 6. They filed a written statement and in addition to the contentions set up by the 2nd defendant they impeached the sale by the Official Receiver to Sankara Warier. The plaintiff filed a replication denying the allegations in the written statement and reiterating those in the plaint. The Additional District Judge who tried the suit held that the sale by the Official Receiver was invalid. On the question of waste he assessed damages at Rs. 2,126. The value of improvements was found to be Rs. 7,818-27-14 cash. On the basis of the finding that the sale was invalid the suit was dismissed with costs. The plaintiff has therefore preferred this appeal.

2. The main question arising for decision relates to the validity of the sale by the Official Receiver. The learned Judge found that the Receiver could sell the property without leave of the Insolvency Court. III was however found that the receiver had no jurisdiction to sell the property in satisfaction of a secured debt and that the sale was inoperative. As regards the debt due to Sankara Warier it was held that there was "something fishy about the transaction." Unless the sale by the Official Receiver is held to be void the defendants cannot succeed. We are unable to accept the conclusion reached by the learned Judge on this point. The learned Judge was not prepared to hold that Sankara Warier's debt was a bogus one.

The debt was one admitted by the insolvent in his Insolvency Petition and it was incurred long before the commencement of the Insolvency proceedings. It was alleged by the defendants that Sankara Warier was a dependent of the insolvent and his father. There is no evidence in support of this allegation. On the other hand, it is seen that Sankara Warier was at that time a Government servant. The mere fact that Sankara Warier offered the hypothecation bond as security for a debt of Nataraja Pillai is insufficient to hold that the debt was a fictitious one. The Receiver's sale cannot therefore be successfully challenged on the ground that Sankara warier was not a creditor of the insolvent. There remains the question whether the sale is vitiated by the fact that Sankara Warier was a secured creditor.

What transpired in the insolvency case was that the receiver notified that the insolvent's property would be sold in auction. Ex. C is the notice dated

24-8-1101. Sankara Warier who was a secured creditor agreed to have the sale conducted free of his encumbrance so that he could realise his debt from the amount realised by sale. Such a procedure cannot be said to be not warranted by law. The receiver duly conducted the auction and the copy of the auction proceedings Ex. D shows that Sankara Warier offered a sum of Rs. 6,000 and that it was the highest bid. The auction sale was concluded on 26-9-1101 accepting Sankara Warier's bid and the receiver executed the sale-deed Ex. E to Sankara Warier on 18-8-1102.

The sale was not objected to either by the insolvent or by any of the other creditors. It was open for them to move the Court for getting the sale vacated but that right was not exercised by anybody. On the other hand Exts. H and J show that although some creditors disputed the sale of some other properties by the Receiver neither the Insolvent nor other creditors had any objection to urge regarding the sale to Sankara Warier. The sale-deed itself was executed only about 11 months after the death of the sale. The objection urged by the defendants that the sale was one to a secured creditor is without any foundation.

If the property had fetched an amount higher than the debt due to Sankara Warier, such excess would have been available for distribution among the body of creditors. The property however fetched only sufficient amount for satisfaction of Sankara Warier's claim. The manner in which the sale proceeds were distributed or adjusted by the Receiver cannot affect the validity of the sale. The learned Judge relied on Mahabir Prasad and Others Vs. Shivanandan Sahay and Others, . That decision cannot apply to the facts of this case The sale-deed which receiver was directed to execute in that case was one pursuant to an agreement for sale made by the insolvent's father before his death.

The District Judge's order allowing such a sale was set aside by the High Court on the ground that the receiver could exercise the power of sale only for the purpose of realising the property in order to distribute dividends among the creditors. The sale of Nataraja Pillai's properties was for distribution of the sale amount among his creditors. It so happened that Sankara Warier was the highest bidder and that the amount realised was not sufficient to satisfy the claims of the simple creditors. The sale in such circumstances cannot be said to be void. It follows that Sankara Warier obtained a valid title to the property purchased by him.

3. Another point urged by the Respondents is that even if the sale was valid, the interest of Nataraja Pillai's son was not conveyed by the receiver to Sankara Warier. The appellant relied on Section 29 of the Travancore-Cochin Insolvency Act II of 1956 corresponding to Section 28-A of the Provincial Insolvency Act and urged that Nataraja Pillai's right to sell the sons' interest also vested in the receiver. The section provides that the property of the insolvent shall comprise and shall be deemed to have comprised also the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the

commencement of his insolvency or before his discharge.

Even if Nataraja Pillai's power to sell his sons' interest in the joint family property vested in the receiver, the question still remains whether such power was exercised by the receiver. as observed by Satyanarayana Rao J., in *Thirumaleshwara Bhatta v. Govinda Bhatta* A I R 1952 Mad 776(B) the mere fact that the order of adjudication vested in the Official Receiver not only the share of the father but also his power of disposition of the son's share would not by itself convey to the auction-purchaser the share of the son, unless there is indication in the document or in the sale proceedings that the Official Receiver in fact purported to exercise that power of sale and did in fact sell the son's share as well.

Counsel for the appellant relied on the decision in *Chitturi Perraju v. Chitturi China Perra-ju*. 1936 AWR 586: AIR 1957 AP 609 (C). The learned Judges held that the question in each case would be what the Court did Intend to sell and what the purchaser bargained and paid for. It was also held that the Question whether in a particular case the Official Receiver had exercised the power of disposition of the son's share and conveyed the entire interest in the property should be decided on the facts of that case. The proclamation of sale published by the Official Receiver in that case clearly stated that he would be selling the entire family properties inclusive of the son's shares in exercise of the power of sale vested in him and the properties described in the sale notice were thereafter sold.

There is however an observpion in the judgment that it could be presumed that the Official Receiver exercised the right vested in him to sell the sons' shares also as it was not only the right but the duty of the receiver to sell the entire property of the insolvent for the benefit of his creditors. On the facts of that case the Court was certainly justified in drawing the presumption. But so far as the general principle is concerned the view laid down cannot be said to be different from that of Satyanarayana Rao J., in the case referred to above. Coming to the facts of this case Ext. E shows that what was conveyed by the sale was the interest notified to be eold.

It is seen from sale notice Ext. C that what was notified to be sold was the right, title & interest of the insolvent in the properties described in the schedule. There is no indication in Ext C or Ext. E that the Insolvent's son's share was intended to be or was sold by the receiver. It it therefore not possible to hold that the insolvent's son's share was conveyed to Sankara Warier. The interest obtained by the plaintiff must therefore be limited to Nataraja Pillai's half share in the porperty sold.

4. Learned counsel for the Respondents pointed out that the property sold did not include the plot of land 2 1/2 acres in extent lying north of the road mentioned in the plaint sche-dule. it was conceded by the appellant's counsel that plot of 8 acres & 50 cents lying north of the road was not included in Ext. E.

The plaintiff is not therefore entitled to claim any relief in respect of this plot.

5. On the questions of value of improvements and waste counsel appearing on both sides came to a fair agreement. It was agreed that in case redemption was to be allowed, value of improvements less the amount due to the plaintiff as damages for waste could be fixed at Rs. 5,000. In view of this, it is unnecessary to consider the various points raised regarding these matters.

6. In view of our finding that the plaintiff has title to one-half of the property, the decree dismissing the suit in entirety has to be set aside. We accordingly set aside the same and give the plaintiff a decree for recovery of one-half of the property lying south of the road and measuring 27 acres 84 cents in extent, on payment of Rs. 1,300 towards mortgage money and Rs. 2,500 on account of value of improvements in respect of half the property allowed to be recovered. This suit is dismissed in respect of the rest of the property. This decree will be treated as a preliminary decree for partition and the lower Court is directed to pass a final decree after getting the property divided by metes and bounds.

The disputes between the 1st defendant and the legal representatives of the 2nd defendant do not call for decision in this suit and will be decided in a fresh suit, if any, filed by either of them. The amount directed to be deposited by the plaintiff will be paid to the defendants jointly or to such of them as establish their title there to in a fresh suit. In the circumstances of the case we direct both sides to bear their costs throughout.