
(1937) 07 CAL CK 0017
In the Calcutta High Court

Patit Paban Daw

APPELLANT

Vs

Harisadhan Nandi and Others

RESPONDENT

Date of Decision : 08-07-1937

Acts Referred:

Provincial Insolvency Act, 1920 — Section 20

Citation : AIR 1938 Cal 182

Hon'ble Judges : Costello, Acting C.J.;Edgley, J

Bench : Full Bench

Judgement

Costello, Ag. C.J.

1. This is an appeal from an order made on 2nd June 1937 and also an order made on 4th June 1937, both of them by the learned District Judge, Alipur, in connexion with an insolvency matter which is described as Insolvency Case No. 21 of 1937. This matter was inaugurated by a petition filed by one Jog Jiban Koch, son of Nil Kamal Koch, of No. 4 Orphangunj Bazar, Police Station Watgunj, within the jurisdiction of the District Judge of 24-Parganas. The petitioner asked that he should be adjudicated an insolvent and to the petition was attached a schedule in which were set forth the names of the creditors the amount owing to each of them and their addresses. There was a further schedule setting out the names of the debtors, the amounts owed by them, and their addresses. Amongst the creditors, under No. 30, were two persons named Harisadhan Nandi and Harimohan Nandi, their address being Ram Kumar Rakshit Lane, and the amount owing to them was stated to be Rs. 1000. The petition was filed on 19th May 1937, and on that date the learned District Judge made this order:

Register. Put up on 27th May 1937 for orders. Applicant to put in costs and notices within the date fixed.

2. On 27th May 1937, the applicant put in a petition praying for amendment of his original petition in insolvency in the manner stated in this supplementary petition.

3. The learned Judge recorded this order:

Allowed. Costs and notices filed. Fix 28th June 1937 for hearing. Let publication be made and notices issue. Creditor No. 30 files vakalatnama.

4. Creditor No. 30 consists of two persons whose names I have already mentioned. Under date 29th May 1937 there is recorded this order:

Applicant files some account books with a petition. Heard pleader. File.

5. Now comes the order which is the subject of the present proceedings, or rather one of the orders. It is the order chiefly complained of, the order of 2nd June 1937. It is in these terms:

Creditor No. 30 puts in a petition praying for directing the applicant to produce forthwith all his books of account. Issue order on applicant as prayed for. Creditor No. 30 puts in another petition praying for appointment of interim receiver. The Official Receiver is appointed ad interim receiver. He will take possession at once on deposit of costs.

6. It is really against this appointment of an interim receiver that these proceedings in appeal are directed. We are told that in order to make quite certain that the Official Receiver in his capacity as ad interim receiver took possession forthwith of the debtor's property, the order was shown to the receiver and he was required to acknowledge that he had seen it by appending his signature at the time at which it was shown to him, and that was done. We are told and it appears from the report later made by the receiver, that the very same afternoon he went and took possession not only of a shop at 4/5 Orphangunj Market which had been carried on by the debtor himself and which is referred to in his petition, but also of a shop carried on by two grandsons of the debtor and a third shop carried on at Nos. 2/1 and 2/2 Orphangunj Market by the present appellant Patit Paban Daw. It is really the taking possession of this shop which is the gravamen of the complaint which is now made by Patit Paban Daw. The grounds of appeal are set out in this way:

1. The learned District Judge erred in directing the ad interim receiver to take possession of the appellant's shop merely on the basis of a creditor's petition which was supported neither by an affidavit nor even by a verification. 2. The learned District Judge erred in making the order aforesaid without notice to the appellant and without hearing him. 3. The learned District Judge erred in not making an enquiry into the truth of the creditor's allegations before directing the ad interim receiver to take possession of the appellant's shop. . . .

7. The petition upon which the order dated 2nd June was made and which is referred to in the order was filed on 2nd June 1937 and it is headed "petition u/s 20, that is to say Section 20, Provincial Insolvency Act, 1920. The material part of it is as follows:

The applicant Jog Jiban Koch has applied for being adjudicated insolvent in the

above case and 28th June 1937 is fixed for hearing of the above case.

The total value of the asset consisting of both moveable and immovable properties as given in the application for insolvency is Kb. 33,141.

Though the applicant has been carrying on business in Kidderpur under the different name and style such as (1) Sen Daw & Co., at 17/1 Orphangunj Market, and (2) Patit Paban Daw at 2/1 Orpharigunj Market, (3) Jogjiban Koch at 4/5 Orphangunj Market, he has mentioned in his application only one place, viz. 4 Orphangunj Bazar, as his place of business.

The business at 17/1 Orphangunj Market is the business which is said to have been carried on by the two grandsons of Jogjiban Koch.

The petitioners have been informed and believe that the applicant who is able to pay his debts with a view to defeat and delay his creditors is tampering and fabricating his books of account and is selling off his goods at an under value.

In the aforesaid circumstances it is necessary that an interim receiver should be appointed of the property of the debtor applicant and he should take immediate possession of the same.

Under these circumstances your petitioner prays that your Honour will be pleased to appoint an interim receiver of the properties of the debtor and direct him to take immediate possession thereof or pass such other order.

8. It is to be observed therefore that this petition purports to be in effect an application made under the provisions of Section 20 of the Act. That section provides:

The Court when making an order admitting the petition may, and where the debtor is the petitioner ordinarily shall appoint an interim receiver of the property of the debtor or any part thereof, and may direct him to take immediate possession thereof or of any part thereof, and the interim receiver shall thereupon have such of the powers conferrable on a receiver appointed under the Code of Civil Procedure, 1908, as the Court may direct; if an interim receiver is not so appointed, the Court may make such appointment at any subsequent time before adjudication, and the provisions of this sub-section shall apply accordingly.

9. It is not easy to discover here any valid reason why the Court should not have complied with the provisions of the earlier part of this section and have made an order appointing an interim receiver of the property of the debtor at the same time as the order was made admitting the petition, that is to say on 19th May 1937. That was not done, but presumably the; Court in making the order of 2nd June 1937 was acting, or was purporting to act under the provisions of the last part of Section 20. It would seem that even so, the Court ought to have given direction as to which of the powers ordinarily conferrable upon a receiver appointed under the Code] of Civil Procedure, 1908, should be exercisable by the

receiver in this particular" case.

10. The important matter however for our consideration in this appeal is the fact that Section 20 relates and relates only to the property of the debtor or some part of the property of the debtor. What happened here was that in conformity with, or rather in pursuance of the order of 2nd June 1937, the Official Receiver went and took possession of the stock-in-trade and the books of account, certain articles of jewellery and some money in cash which he found in the shop which is situated at 2/1, 2/2 Orphangunj Bazar,, and that he did in spite of the protest of Patit Paban Daw and his employees who were then on the premises; in spite of the fact that Patit Paban Daw protested that the shop was his own shop and that it was in no way part of the property of the debtor who happened to be his father-in-law. On the day following, that is to say on 3rd June 1937, Patit Paban Daw put in a petition before the learned Judges which was supported by an affidavit asking that the order of attachment should be vacated. The learned Judge thereupon made an order : "Official Receiver should make a report by to-morrow at the latest," that is to say by 4th June 1937. The receiver duly made a report in which were set out an account of his taking possession of the shop situated at 2/1 and 2/2; on 4th June there was this order recorded:

Read report of receiver and heard receiver and pleaders for the Sen Daw and Co., Patit Paban. Daw, and creditor No. 30 Harisadhan Nandy. The order of attachment will be vacated on security being furnished by Ben Daw and Co., Rupees 10,000. The security will be tested by the Nazis.

11. As I have already stated the present appeal is directed against that order, the order of 2nd June 1937. The appellant here is Patit Paban Daw, and he complains that; the order made on 2nd June 1937 was in effect not only wrongly made by the learned Judge but was made by him without any jurisdiction to make an order of that kind. The main ground put forward on behalf of the appellant is that the petition put in by creditor No. 30, that is to say by the Nandis, on 2nd June 1937, was not supported by an affidavit; it was not even verified and there was no evidence at all before the learned Judge on 2nd June from which he could properly come to the conclusion that he could make an order appointing the interim receiver.

12. As regards the property of the debtor or any part of the property of the debtor, undoubtedly the learned Judge could have acted and indeed ought to have acted under the provisions of Section 20, but although the petition of 2nd June 1937 was nominally put in u/s 20, it is obvious that in spite of the wording of the last para-graph, what these particular creditors were really asking for was that a receiver should be appointed and that he should take possession of properties which were not only manifestly the properties of the debtor set forth by him in the schedule A attached to the petition but of properties which were supposed to be the properties of the debtor including his shop situated at 2/1, 2/2 Orphangunj Bazar. To all intents and purposes therefore, the petition was really a petition asking for an order of the kind contemplated not by Section 20

but by Section 21, Provincial Insolvency Act, 1920 and indeed Mr. Mukherji in his careful and able argument on behalf of the respondents in this appeal has dealt with the matter upon the footing that that was the position.

13. Section 21 is in these terms:

At the time of making an order admitting the petition or at any subsequent time before adjudication, the Court may either of its own motion or on the application of any creditor make one or more of the following orders, namely...

14. (I pause here to remark that the order complained of was made before adjudication. It was an order made on the application of the creditor described as creditor No. 30.) The "following orders" are:

(1) Order the debtor to give reasonable security for his appearance until final orders are made upon the petition, and direct that in default of giving such security he shall be detained in the civil prison.

15. We are not concerned with that.

(2) Order the attachment by actual seizure of the whole or any part of the property in the possession or under the control of the debtor, other than such particulars (not being his books of account) as are exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree.

(3) Order a warrant to issue with or without bail for the arrest of the debtor, and direct either that he be detained in the civil prison until the disposal of the petition, or that he be released on such terms as to security as may be reasonable and necessary.

16. With No. 3 we are not concerned. We are concerned only with No. 2. That con. templates an order of attachment which is analogous to an attachment before judgment and the provisions of the Code of Civil Procedure, 1908, apply to such attachments by virtue of the provisions of Section 5, Provincial Insolvency Act 1920. There is however an important proviso to Section 21 which seems to have been entirely overlooked by the learned Judge and by the pleaders appearing before him and even I venture to think by the learned advocates appearing in this appeal. The proviso is in these terms:

Provided that an order under Cl (2) or Clause (3) shall not be made unless the Court is satisfied that the debtor with intent to defeat or delay his creditors or to avoid any process of the Court, (i) has absconded or departed from the local limits of the jurisdiction of the Court or is about to abscond or to depart from such limits or is remaining outside them, or (ii) has failed to disclose or has concealed, destroyed, transferred or removed from such limits or is about to conceal, destroy, transfer or remove from such limits, any documents likely to be of use to his creditors in the course of the hearing, or any part of his property other than such particulars as aforesaid.

17. It is obvious that in the present instance there is nothing to show that the Court was satisfied as to any of the things mentioned in this proviso, and no attempt was made to put before the Court any material other than the bare statements in the petition of the Nandis upon which the Court could properly form any opinion as to whether the necessary conditions precedent to the making of an order u/s 21 were present or not. It is quite clear to my mind that the learned Judge never directed his attention to the provisions of Section 21 or at any rate not to the terms of the proviso to that section, but although, as events subsequently showed, the interim receiver took it upon himself in what I can only describe a high-handed manner to take possession of, and close down a shop which was ostensibly, at any rate, being carried on by somebody quite different from the debtor; what the learned Judge originally had in mind was that the interim receiver should only take possession of property which was admittedly, or at any rate, *prima facie*, property belonging to the debtor himself. The position is this : This over-zealous and somewhat hasty receiver went to the shop 2/1, 2/2, Orphangunj Bazar, because he had been told by the Nandis or because they had alleged in their petition that that shop was really the property of the petitioning debtor, though it stood in the name of Patit Paban Daw and the business there was being carried on by him. On the arrival of the Official Receiver, Patit Paban Daw at once set up a claim to be the owner of the shop contending that the shop had nothing whatever to do with the petitioning debtor. In these circumstances, it is clear law, beyond all question, in my opinion, that the receiver should have stayed his hand until the question of whether or not the shop was the property of the debtor had been determined by the Court.

18. In passing I may observe once more that the fundamental conditions required by Section 21 had never been fulfilled, because this shop was not in the possession or under the control of the debtor, outwardly at any rate. In my view the receiver should have gone away, and the matter should have been brought before the Court in order that the claim put forward by Patit Paban Daw might be properly adjudicated upon. Whether the matter is one which can fall within the provisions of Section 4, Provincial Insolvency Act, we need not consider, but undoubtedly there should have been an investigation. In this connexion I refer to the case in *Hashmat Bibi v. Bhagwan Das* AIR (1914) All 264. The headnote of that case is as follows:

Where certain property was attached u/s 13 (3), Provincial Insolvency Act 1907, by a Court exercising jurisdiction under the Act, before the petitioner was declared an insolvent and a receiver appointed, it was held that the Court was bound to hear and adjudicate upon any claims which might be preferred by persona alleging themselves to be in fact the owners of such property. Procedure u/s 13 (3) of the above mentioned Act was analogous to attachment before judgment under the Code of Civil Procedure. It might have been open to the objectors to wait until the receiver had taken some action in respect of the property attached and then to apply u/s 22 of the Act but this they were not bound to do.

19. Ryves and Piggott JJ. said at page 67:

Now an attachment u/s 13 (3), Provincial Insolvency Act, is strictly analogous to an attachment before judgment effected under Order 38, Rules 5 to 12, Civil P.C. According to Order 38, Rule 8, Civil P.C., a claim may be preferred to property attached before judgment, and the Court is thereupon bound to investigate such claim in the manner provided for the investigation of claims to property attached in execution of a decree for payment of money. This refers us back to Order 21, Rule 58, Civil P.C. In our opinion therefore the District Judge was bound to entertain the objections put forward by Hashmat Bibi and Abdul Ghani and to hold an investigation as to the validity of the claims put forward by them to the ownership of the property attached. The necessity for doing this at some stage or other of the proceedings is apparent when we consider that by reason of Section 16 (2), Provincial Insolvency Act, the property in question vested in the receiver from the date of his appointment, if in fact it was the property of the insolvent, but did not so vest if it was the property of Hashmat Bibi and Abdul Ghani.

20. In the present instance, if this shop 2/1, 2/2, Orphangunj Bazar was in fact the property of Patit Paban Daw, it would not vest in the receiver by virtue of the order made by the learned District Judge. The moment Patit Paban Daw set up a claim to this property, the matter ought to have been investigated before the receiver proceeded to exercise any rights over this property. That was not done, and accordingly we can come to no other conclusion than that these proceedings were wholly misconceived and the order made by the learned District Judge on 2nd June 1937, in so far as it purported or was assumed to authorize the receiver to take possession of the shop 2/1, 2/2, Orphangunj Bazar, was an illegal order and one made without jurisdiction. It must therefore be set aside.

21. As regards the order of 4th June 1937, that was, in a sense consequential upon the order of 2nd June 1937, and that too must be vacated. The appeal is therefore allowed with costs, hearing fee being assessed at five gold mohurs. Costs of the paper books are to be taxed. The receiver is to pay his own costs. The order for payment of costs will be against all the respondents. This order will not preclude the District Judge from making such other orders as he thinks fit on proper materials and after proper inquiry. Any goods, articles, jewellery or money, or account books or papers which were taken by the receiver from the shop 2/1, 2/2, Orphangunj Bazar, if not already restored to Patit Paban Daw must be restored to him by the receiver within four days from today.

Edgley, J.

22. I agree.