

(1921) 01 AHC CK 0044
In the Allahabad High Court

Sat Narain Singh and Others

APPELLANT

Vs

Kayastha Trading and Banking Corporation Ltd.

RESPONDENT

Date of Decision : 22-01-1921

Acts Referred:

Citation : (1921) ILR (All) 433

Hon'ble Judges : Walsh, J;Piggott, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Piggott, J.—The appellant in this case is the Official Liquidator of a Company known as the Kayastha Trading and Banking Corporation, Limited. This Company was brought into liquidation on a winding up application presented to this Court by a creditor on the 26th of February, 1920, and the winding up order was made on the 29th of May, 1920. Long previously to this the immovable property belonging to the Company with which we are concerned in this appeal had been attached at the instance of certain creditors. During the year 1919 the property was repeatedly proclaimed and put up for sale. For reasons with which we are not now concerned the Court had seen fit to fix a reserve price of Rs. 30,000, and at one sale after another no one came forward prepared to bid this price. The judgment-debtor, that is to say, the Company, had in the meantime more than once represented to the Court that there was a reasonable prospect of their being able to dispose of the property to greater advantage by private treaty. The reasonable price suggested in these various petitions to the court was from Rs. 35,000 to Rs. 40,000; but as a matter of fact the Company, although allowed abundant opportunity by the Execution Court, had not succeeded in finding a purchaser prepared to give even as much as the reserve price of Rs. 30,000 which had been fixed for the auction sale. Finally, the property stood advertised for sale on the 26th of February, 1920, the very day on which the winding-up proceedings were initiated by the presentation of a petition on the part of another creditor in this Court. Once more there was no bidder prepared to offer

the reserve price and the Amin reported accordingly. The Court's order on his report was that the decree-holder be allowed 14 days within which to make some further application. On the 1st of March, 1920, however, the court received from the Special Manager, Court of Wards, who is now the principal respondent to this appeal, a communication expressing his willingness to pay Rs. 32,000 for the property under attachment. On this the learned District Judge fixed the 3rd of March, 1920, for auction sale. No fresh proclamation was issued, and we understand that no bid was received except the respondent's bid of Rs. 32,000. The sale was concluded upon this basis and has since been confirmed by the Execution Court, in spite of protests by the judgment-debtor. The appeal before us is against the order confirming the sale, or the order overruling the judgment-debtor's objections to the sale. Two distinct points are taken, one under the CPC and one under the Indian Companies Act. We may take them in this order. It is contended that the learned District Judge in fixing the 3rd of March, 1920, for the auction sale, without issuing a fresh proclamation, committed a material irregularity and that by reason of this irregularity the appellant has suffered substantial loss. In the view which we take on the question of substantial loss it is not really necessary for us to discuss the question of the alleged irregularity at any length. We may say simply that in our opinion there was an irregularity committed in this matter. As we look at the point, the order actually passed by the Execution Court on the 26th of February, 1920, was in effect an order adjourning the sale sine die. No doubt in passing his subsequent order of the 1st of March, 1920, the learned District Judge was actuated simply by a laudable desire to save the executing creditors from having to pay fresh proclamation fees, which they had fruitlessly done over and over, again in the course of the previous year. We think, however, that, as a strict point of law, his powers of adjournment were exhausted by the order of the 26th of February, 1920, and that his order of the 1st of March, 1920, was really an order fixing a new date for the sale and that a proclamation should have issued. We feel, however, perfectly satisfied that no substantial loss was suffered by the judgment-debtor in consequence of this procedure.

2. The case in favour of the alleged substantial loss begins and ends with the fact that, since these proceedings were concluded, that is to say, in the month of August last, the Municipal Board of Gorakhpur came to a resolution that they were prepared to acquire this property for Rs. 40,000. Why they should have arrived at this resolution in the month of August, 1920, when the property had been advertised for sale over and over again in the year 1919 and could then have been acquired by any one prepared to bid Rs. 10,000 less, it is impossible for us to say; but for the purposes of this appeal it is quite sufficient to make the point that there is not the slightest reason to suppose that, if a fresh sale proclamation had been issued in the month of March, 1920, either the Municipal Board of Gorakhpur or any one else would have bid any sum in excess of the sum of Rs. 32,000 actually bid and since paid by the respondent. The Municipal Board of Gorakhpur obviously was not prepared in that month to pay Rs. 40,000,

or any other sum, for the property.

3. We, therefore, overrule the objection taken under the Code of Civil Procedure.

4. The point taken under the Companies Act is based upon the wording of Section 232, considered along with Section 168 of the said Act. According to the earlier of these two sections the winding-up proceedings are deemed to commence at the time of the presentation of the petition. In. this case, therefore, these proceedings commenced, within the meaning of this section, with the presentation of the creditor's petition to this Court on the 26th of February, 1920. The relevant words u/s 232 are the following:

Where any Company is being wound up, any attachment, distraint or execution put in force without the leave of the Court after the commencement of the winding-up shall be void.

5. The appellant asks us to hold that the sale of the property was a putting in force of an execution within the meaning of this section. The expression which we have quoted is taken bodily from the English law and is not altogether reconcilable with the rules of our CPC on the subject of execution of decrees. We take note of the fact that in the Companies Act itself provision is made for two distinct contingencies. The court to which the winding-up petition is presented can, if it sees fit to do so, pass an order the effect of which would be to suspend all proceedings, including execution proceedings, against the Company's assets for the period between the presentation of the petition and the passing of the winding-up order. Secondly, on the passing of the winding-up order, all proceedings, including proceedings in execution, are automatically suspended unless the leave of the court be obtained. In the present instance no interim order was passed by the court in charge of the winding-up, and we may say that on looking into the matter we think it very unlikely that any such order would have been passed if it had been asked for. Looking at the scheme of the Companies Act as a whole, and also at the English authorities in which the expression with which we are concerned has been interpreted, we have no doubt that the words "any attachment, distraint or execution put in force" must be considered as a whole and that in this particular case the execution with which we are concerned had been "put in force" within the meaning of this section long prior to the 26th of February, 1920. It was in fact put in force, for the purposes of this section, when this particular property was attached. This plea, therefore, also fails and we dismiss the appeal accordingly with costs.

6. With regard to the Official Liquidator we think it fair to say that the point taken by him under the Companies Act was in our opinion so far arguable that it Was not improper for him to raise it before this Court, so that we see no objection to his taking the costs of this appeal out of the assets of the Company.

Walsh, J.

7. I entirely agree. With regard to the point under the Companies Act, there

would appear at first sight superficial difficulty in reconciling Section 232 with Section 168, which says that the winding-up shall be deemed to commence at the time of the presentation of the petition, and with the provisions vesting in the Court the power to stay or to allow execution proceedings after presentation of the petition or even after the winding-up order. But these sections are lifted verbatim from the English Act and have been substantially in force in England since 1857. It was decided by the English Court of Appeal, in dealing with the very question now raised before us, as long ago as 1864, that Section 232 of the Indian Companies Act of 1913 must be read with and controlled by Sections 169 and 171. In addition to that, in applying this law to India, it must be noted that the words "putting in force" are not strictly applicable to the machinery for issuing execution in this country. After all, they really mean no more than putting in motion, and it has been decided in England that where the writ for possession has been handed to the Sheriff or the Sheriff, has actually entered, execution has been "put in force" within the meaning of that section. Moreover, if the matter had come before me sitting as the Judge in winding-up and there had been an application by the Company, either before the actual winding-up order or after it, to stay further proceedings by the decree-holder under this decree, I am quite satisfied after examining the authorities on the subject in England, that it would have been my duty to have allowed the execution to proceed. For example, where a creditor has issued execution bond fide, that is to say, applying that term to India, has applied for execution, which in this case he did as long ago as 1917, and the Sheriff has been put in possession before the presentation of the petition, the creditor will not, except under exceptional circumstances, be restrained from selling. If a sale were shown to be likely to be ruinous to the goodwill or assets of the Company the creditor would, according to the English practice, be restrained from selling but allowed a first charge on the assets of the Company in the winding-up for his debt and costs as a condition of granting the stay. It has further been held that where a Company has vexatiously delayed its creditor so that he could not obtain a decree before the presentation of the petition and had to issue execution after the winding-up had taken place, nonetheless he has been allowed to proceed with his execution. Secondly, while agreeing with what my brother has said about the costs in this case, I would draw attention to the recognized practice with regard to liquidators, who are officers of the court and not ordinary litigants at all, that a liquidator appointed in a winding-up by the court ought not to appeal in any case without the permission of the winding-up court, and if he does so, he runs considerable risk, in the event of failure, of having to pay the costs out of his own pocket.