

(1922) 06 CAL CK 0021
In the Calcutta High Court

Shamal Das Kshetry and Others

APPELLANT

Vs

Phanindra Nath Roy Choudhuri and Others

RESPONDENT

Date of Decision : 23-06-1922

Acts Referred:

Provincial Insolvency Act, 1920 — Section 28, 28(3)

Citation : AIR 1923 Cal 532 : 72 Ind. Cas. 467

Hon'ble Judges : Pearson, J;N.R. Chatterjea, J

Bench : Division Bench

Judgement

1. This appeal is against an order of the District Judge of the 24-Pergunnahs in an insolvency case.
2. One Sarada Prosad Ghosh was a dealer in jute. He entered into an agreement with a certain person called Khettry under which the latter was to make advances to Sarada on the security of jute kept in his godown. By the agreement, the key of the godown was to be kept by Khettry but was to do the buying and selling independently and Khettry was to have no control over that. Further, Sarada was to have the delivery of the jute. In this manner Khettry used to finance Sarada until An that 1920 when he stopped further advances. On the 19th January 1921 Sarada presented a petition of insolvency. The adjudication order was made on the 21st January, 1921 and a Receiver was appointed.
3. Khettry claimed to be a secured creditor in respect of the jute, which lay, in, the godown. His dues were about Rs. 38,500. The dues of other, creditors amount in all to about Rs. 53,000 and, out of this amount something over Rs. 25,000 represents the dues of traders in jute dealing with Sarada.
4. The question was investigated by the learned District Judge and upon a consideration of the evidence, he came to the conclusion that the jute was in the possession, order and disposition of Sarada by the consent or permission of Khettry and in such circumstances that Sarada was the reputed owner.
5. The evidence has been placed before us, and, so far as this finding goes, we

are no reason to differ from that arrived at, by the learned Judge.

6. Although the other creditors impugned the¹ bona fides of the agreement with Khettry in their petitions, their Pleader in the lower Court stated that his clients recognised that the agreement, Exhibit A, was executed in good faith, with the intention that it should be ,given effect to but that it was not acted upon.

7. Khettry's case was that Rajani, the Sircar in the jute godown, was his agent, that there was a Darwan also who acted for him and kept the key of the godown for him, and that the Pay of Rajani and the Darwan was to be paid by Sarada and deducted from the amount due to Khettry. There is, however, nothing to show that it was deducted from the amount due to Khettry.

8. It is admitted that the Darwan had no badge and there was nothing to show that the Darwan was the sarvant of Khettry.

9. On behalf of the other creditors, a large number of witnesses have been examined and they say that Rajani was the Sircar of Sarada and that they were not aware that Rajani was the Sircar of Khettry. Most of the witnesses were; no doubt, interested as creditors; but at least three of them had only a very small amount, a few rupees, due to them and the learned Judge before whom the witnesses were examined believed their evidence which showed that Sarada was in control of the buying, selling and, of delivery of the jute and upon a consideration of the entire evidence the Court below came to the conclusion that the jute was in the possession, order and disposition of Sarada by the consent or permission of Khettry and in such circumstances that Sarada was the reputed owner.

10. We need not discuss the evidence in detail, because we must set aside the judgment of the lower Court upon a construction of Section 28 of the Provincial Insolvency Act. We may state that this point was taken almost at the conclusion of the argument before us.

11. Now, Section 28, Clause (2) lays down: "On the making of an order of adjudication the whole of the property of the insolvent shall vest in the Court or in a Receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy, against the property of the insolvent ?in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose."

12. Section 28 Clause (3) says: "For the purposes of sub-Section (2) all goods being, at the,, date of the presentation of the petition on which the order is made, in the possession, order or disposition of the insolvent in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof, shall be deemed to be the

property of the insolvent."

13. Then, Section 28 Clause (6) provides: "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 realize or deal with it if this section had not been passed."

14. u/s 2(1)(e) of the Act a "secured creditor" means "a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor."

15. It is true that a mortgagee has been held to be the true owner and where he allows the mortgagor to be in possession of the goods mortgaged, the principle of reputed ownership has been applied, see Hatsbury's Laws of England Volume II, III, where it is stated that if the goods have been mortgaged, the mortgagee is the true owner, and if the mortgagee allows the mortgagor to continue in possession of the goods until his bankruptcy, the goods pass to the trustee. The question is whether this principle is applicable to the case having regard to the provisions of Section 28, Clause (6) of the Provincial Insolvency Act.

16. The English Bankruptcy Act (4 & 5 Geo. V, Ch. 59) Section 7(1) lays down : "On the making of a receiving order an Official Receiver shall be thereby constituted Receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, unless with the leave of the Court and on such terms as the Court may impose."

17. Clause (2) says : "But this section shall not 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 realize or deal with it if this section had not been passed."

18. It may be pointed out that Section 7 of the English Bankruptcy Act corresponds to Section 17 of the Presidency Town Insolvency Act. The reputed ownership clause is contained in Section 38, Clause (c), of the English Bankruptcy Act and Section 52, Clause (2)(c), of the Presidency Towns Insolvency Act. The difference between the English Bankruptcy Act on the one hand and the Provincial Insolvency Act on the other upon this point is that in the former there is only a receiving order. It is true that, under Sub-section (2) of Section 7 of the Bankruptcy Act, such receiving order shall not affect the powers of any secured creditor to realize or otherwise deal with his security, but an order of adjudication is not the same as a receiving order. Under Sub-section (2) of Section 28 of the Provincial Insolvency Act, the whole of the property of the insolvent vests, in the Court or in a Receiver, that is to say, under the Provincial Insolvency Act, it starts with the adjudication order and Sub-section (6) of the same section lays down that nothing in the section "shall affect the power of any

secured creditor to realize or otherwise deal with his security, in the same manner as he would have been entitled to realize or deal with it if this section had not been passed."

19. It is contended that Sub-section 28(6) merely gives the powers to proceed against the property of the insolvent in or out of Court, as distinguished from the rights of ordinary creditors who cease to have any right to proceed against the property of the insolvent in or out of Court.

20. If, however, a secured creditor can proceed to realize his security or deal with it in the same manner as he would have been entitled to do had Section 28 not been passed, we do not see how the reputed ownership Clause in Sub-section (3) of Section 28 can have any operation.

21. It may be pointed out that the amount due to Khettry exceeds the value of the jute in the godown which has been taken charge of by the Receiver. Therefore, there can be no question of having a surplus in favour of the general body of creditors after satisfying the debts of the secured creditor (Khettry). It may be said that this interpretation of the section would be against the spirit and object of the reputed ownership Clause in Sub-section (3) of Section 28, but having regard to the express terms of Clause (6) of the section, we are bound to give effect to the provisions of that Sub-section and we are constrained to hold that the order of the lower Court must be set aside and the appeal allowed. We direct that each party do bear his own costs in both Courts.

Rule No. 681M of 1921.

22. The Rule is discharged.

23. We direct that the Government Promissory-notes of the face-value of Rs. 25,000 (Rupees twenty-five thousand) deposited by the appellant as security in this Court be returned to the appellant.