(1964) 02 CAL CK 0003

In the Calcutta High Court

Case No : Appeal No. 186 of 1961

Sukhdevi Kumar Bibi APPELLANT

Vs

Nawal Kishore Bhargava RESPONDENT

Date of Decision : 26-02-1964

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1

Citation : (1966) 1 ILR (Cal) 453

Hon'ble Judges : Sankar Prasad Mitra, J;Masud, J

Bench : Division Bench

Advocate : R.N. Mitter and R.L. Sinha, for the Appellant;M.K. Banerjee, for the Respondent

Final Decision : Dismissed

Judgement

Sankar Prasad Mitra, J.—This is an appeal from the judgment and order of G.K. Mitter, J. dated May 17, 1961. The partners of Pearylal Kishorilal at Calcutta and of Bravo Stores at Asansol borrowed a sum of Rs. 28,000 from Sm. Sukhdevi Kumari Bibi, the Appellant herein and several other sums from four other sets of creditors. The total loan comes to a sum of Rs. 93,000. On April 27, 1953, these partners executed a letter of hypothecation in favour of Sm. Sukhdevi Kumari Bibi and the other creditors by creating a floating charge on the stocks, furniture and other assets of the said two businesses.

2. On January 10, 1956, Sm. Sukhdevi Kumari Bibi instituted a suit in this Court being Suit No. 107 of 1956 against the said partners for the recovery of Rs. 28,000 with interest.

3. On March 22, 1956, Ghanshyamdas Bhargava, one of the partners instituted a suit being Suit No. 814 of 1956 against his other partners for dissolution of the firms of Pearylal Kishorilal and Bravo Stores.

4. On the next day, namely, on March 23, 1956, the Official Receiver of this Court was appointed Receiver of the assets of the firms at Calcutta and at Asansol in

Suit No. 814 of 1956.

5. On May 7, 1956, on the application of Sm. Sukhdevi Kumari Bibi and by consent of parties the Official Receiver was also appointed Receiver in Suit No. 107 of 1956 of the furniture, moveables and stock-in-trade of Pearylal Kishorilal in Calcutta and of Bravo Stores in Asansol.

6. On June 4, 1956, in Suit No. 107 of 1956, an order was made appointing the Official Receiver, Manager of the business of Pearylal Kishorilal at Calcutta. The Official Receiver was directed to bring the stocks at Asansol to Calcutta with liberty to sell part of the Asansol stocks and apply the sale proceeds to the carrying on of the business in Calcutta. It was further ordered that the sale proceeds of the other furniture and fittings of the Asansol business are to be held to the credit of Suit No. 107 of 1956 and Suit No. 814 of 1956.

7. Sometime in July, 1956, the Official Receiver took possession of the stocks at Asansol.

8. On January 17, 1957, the landlords of the premises occupied by the Bravo Stores at Asansol, who are Respondents Nos. 14 to 17 herein, obtained leave from this Court to institute a suit in the Court of the 1st Munsiff of Asansol for recovery of arrears of rent and also to execute the decree that may be passed in that suit. Leave was obtained in Suit No. 814 of 1956 of this Court. The landlords eventually filed three suits in the Asansol Court. These are Suits Nos. 120 of 1956, 37 of 1957 and Money Suit No. 11 of 1957.

9. On January 29, 1957, an order was made in Suit No. 814 of 1956 giving liberty to the Official Receiver to carry on the business at Asansol. We are not aware of the circumstances in which this order was passed although it appears to a great extent to be contrary to the previous order made on June 4, 1956.

10. On March 15, 1957, Sm. Sukhdevi Kumari Bibi applied in her Suit No. 107 of 1956 for an order, inter alia, (a) that the Official Receiver should refrain from carrying on the business of Bravo Stores at Asansol and (b) that the business of Bravo Stores at Asansol be sold by public auction or by private treaty by the Official Receiver and the sale proceeds thereof be held to the credit of Suit No. 107 of 1956 and Suit No. 814 of 1956. In para. 17 of the petition of Sm. Sukhdevi Kumari Bibi it is stated as follows:

Thereafter the parties, at the meeting held by the Official Receiver on the February 1, 1957, decided to continue the said business for a month for trial and the said business was run for a month and at a loss and cannot be conveniently and reasonably preserved and run at a profit for the benefit of all concerned. Since March 1, 1957, the carrying on of the said business was stopped. The carrying on of the said business any further will destroy and prejudicially damage the good will of the said business. Every month a liability of Rs. 348-8 as. is incurred for rents of the shop room, and office room etc. in Calcutta Rs. 325 per month as rent of Bravo Stores at Asansol and for the benefit of all concerned the said business with all its assets, stocks, goodwill and tenancy right be sold by the Official Receiver....

11. This application of Sukhdevi Kumari Bibi was disposed of by Bachawat, J. by his Lordship''s order of June 4, 1957. His Lordship, inter alia, directed the Official Receiver to refrain from carrying on business both at Calcutta and at Asansol, and to sell by public auction the furniture, moveables and stock-in-trade, both at Asansol and at Calcutta. The sale proceeds were to be deposited to the credit of Suit No. 107 of 1956 and Suit No. 814 of 1956. So far as the tenancy at Asansol is concerned, the material portion of His Lordship''s order runs thus:

With regard to Bravo Stores, Mr. Mazumdar stated on behalf of his client that his client has no objection to surrender the tenancy as soon as the properties are sold. None of the parties appearing here opposes the surrender of tenancy in respect of Bravo Stores.

12. Mr. Mazumdar, we understand, appeared for the partners hereinbefore mentioned. I have already said that the Official Receiver took possession of the stocks at Asansol in July 1956 under orders of this Court. The stocks were lying in the premises belonging to the Respondents Nos. 14 to 17, and it is only in this order of Bachawat J. that we get the indication that the Official Receiver was directed to give up the tenancy at Asansol after the stocks had been sold. Sukhdevi Kumari Bibi, it appears from this order of Bachawat J., had no objection to this course being adopted. The Official Receiver gave up possession of the tenanted property at Asansol on September 22, 1957.

13. Between December, 1956 and August, 1957, the landlords of the Asansol premises obtained decrees in the Munsiff''s Court for arrears of rent against the said partners and the Official Receiver.

14. On July 12, 1957, Sukhdevi Kumari Bibi was granted a decree in Suit No. 107 of 1956 for Rs. 37,012 with interest and costs against the partners.

15. On August 24, 1957, the Official Receiver sells the assets at Calcutta for Rs. 25,000 and those at Asansol for Rs. 18,500.

16. Then on September 9, 1957, the landlords, that is the Respondents Nos. 14 to 17, applied to this Court that their dues in respect of arrears of rent be paid out of the funds in the hands of the Official Receiver in priority to the claims of all other creditors.

17. The sale of the assets by the Official Receiver was confirmed by this Court on September 12, 1957. Soon thereafter, as I have said, on September 22, 1957, the Official Receiver gave up possession of the Bravo Stores at Asansol. Having regard to the order of Bachawat J. dated June 4, 1957, the conduct of the Official Receiver appears to be proper.

18. On May 22, 1958, Sukhdevi Kumari Bibi filed another suit in this Court (Suit No. 739 of 1958) against the partners of Pearylal Kishorilal and Bravo Stores and

the other hypothecates as well as the Official Receiver for, inter alia, a declaration of charge on the sale proceeds of the assets on the basis of the Deed of hypothecation dated April 27, 1963.

19. On January 30, 1961, Sukhdevi Kumari Bibi obtained a decree in Suit No. 739 of 1958 declaring the charge prayed for.

20. The application of the landlords (Respondents Nos. 14 to 17) for payment of their dues out of the sale proceeds which were being held by the Receiver came up for hearing before G.K. Mitter, J. on or about May 17, 1961, and it is against the judgment and order of his lordship on this application that the present appeal has been preferred.

21. The learned Judge has held that the landlords are entitled to priority for the rents during the period of the Receiver''s occupation as an officer of this Court and for the purpose of winding up the business, and as such allowed their claim up to the sum of Rs. 5,927/13 in respect of rents from July, 1956, to September 22, 1957.

22. At the hearing before us, apart from the Appellant, the Respondents Nos. 14 to 17 only have appeared. There are no re-presentations either on behalf of the partners or on behalf of the Official Receiver.

23. Mr. R.N. Mitter, learned Counsel for the Appellant, has urged that on the facts of the instant case the Receiver has no personal liability for payment of rent to the landlords. The Receiver, Mr. Mitter contends, will be liable (a) when the Receiver himself has become a tenant; and (b) when the Receiver has collected rents from sub-tenants. Apart from these specified circumstances, according to learned Counsel, a Receiver appointed by the Court cannot be made personally liable for payment of rents. Learned Counsel has relied on a number of authorities including relevant passages from Kerr on Receivers, 11th ed., at pp. 215 and 217.

24. Mr. Mitter has argued further that a Receiver appointed at the instance of a mortgagee has also no liability to pay rent in preference to the mortgagee. In support of this proposition reliance was placed on certain passages in Kerr on Receivers, 11th ed. at p. 216, and in Halsbury''s Laws of England, 2nd ed., vol. 28, p. 77, Article 145. The landlords, Mr. Mitter has said, had made this application in the creditor''s Suit No. 107 of 1956 and can have no priority over the creditor herself.

25. To my mind, however, these principles do not arise for our consideration on the facts of the present appeal.

26. The Respondents Nos. 14 to 17 in this appeal are not seeking to recover their decretal dues from the Official Receiver personally. Here is a case in which the Receiver was asked to take possession of partnership assets lying in tenanted permises at Asansol. I am leaving out of consideration at the moment the question whether the tenancy was also an asset; but the fact remains that during

the period of occupation of the Asansol premises by the Receiver, the rents thereof had to be paid. If the Receiver had paid these rents instead of waiting for decrees in favour of the landlords, he could have certainly recovered the same as part of his costs, charges and expenses out of the assets of the partnership in priority to any other claim on those assets.

27. In this connection Re London United Breweries Ltd. (Smith v. London United Breweries. Ltd.) [1907] 2 Ch. 511, is a case which may incidentally be referred to. In a debenture-holders'' action, a Receiver and Manager was appointed. The Receiver, in carrying on the business of the company, incurred considerable debts without the leave of the Court or the consent of the debenture-holders, and subsequently became bankrupt. The funds in Court were the only assets of the Company, and were insufficient to discharge the Plaintiffs'' costs of realisation and the Receiver''s costs of carrying on the business. The trustee in bankruptcy of the Receiver claimed that the funds in Court, less the costs of realisation, ought to be paid out to him for distribution amongst the receivership creditors, whilst the Plaintiffs contended that the Receiver, having acted improperly, was not entitled to be indemnified out of the assets and that the funds, less costs of realisation, ought to be paid to the debenture-holders. It has been held that the funds in Court must be applied, first, in payment of the costs of realisation ; secondly, in payment of the Receiver''s costs.

Neville J. observes at p. 515 as follows:

In my opinion, where the Court has appointed a Receiver who has incurred liabilities in the proper management of the estate which was given to him to manage, the Court will see that those creditors are satisfied, either by the Receiver, or, in case the Receiver should become bankrupt or there should be any other reason making it advisable, by payment direct to the creditors out of the funds in Court.

28. The principle that this case establishes is that debts properly incurred by a Receiver in managing the estate placed in his charge must have priority over all other claims against that estate. It is the duty of the Court which appoints the Receiver to see that these debts are as far as possible duly paid off.

29. I may also refer to the case of Batten v. Wedgwood Coal and Iron Company (1884) 28 Ch. D. 317. A Receiver and Manager was appointed in a suit instituted by a debenture-holder of a company on behalf of himself and the other debenture-holders, against the Company and the trustees of a Deed, by which leasehold collieries and plant of the company were assigned to trustees to secure the payment of the debentures and to enforce the security. The Receiver worked the collieries for some years at a loss. Ultimately the property was sold, the Plaintiff having conducted the sale and the purchase money was paid into Court. The fund was insufficient. The original Plaintiff became bankrupt in the course of the proceedings, and another debenture-holder was substituted for him as Plaintiff. On the further consideration of the suit, it has been held, inter alia, that

the costs and other expenses must be paid out of the fund in the following order:

(1) The Plaintiff''s costs of realisation of the property, including the costs of an abortive attempt to sell.

(2) The balance due to the Receiver and Manager (including his remuneration) and his costs of the suit.

(3) Costs, charges, and expenses of the trustees of the Deed.

(4) The two Plaintiffs'' costs, pari passu, at p. 324 Pearson J. observes:

I have his simple question to decide ; ought the Receiver to be paid before it can be said that there is anything to distribute in payment of costs of anything else ? In my opinion, that is the Receiver''s position. He is the Officer of the Court, and the Court is bound to see that he is paid, just as, if the trustees had employed a Manager, they would have been bound to pay him without regard to the sufficiency of the estate to meet the claims upon it. I think the Court is bound to see that the Receiver is paid.

30. In the instant case, however, the Receiver did not or could not pay rents to the landlords who had to institute suits in the Asansol Court and obtain decrees thereon. But that, in my opinion, does not alter the position in law. The rents payable to the landlords during the period of the Receiver''s occupation were, as I have said earlier, part of the costs, charges and expenses of the Receiver and these costs, charges and expenses must be paid in preference to any other claim, secured or unsecured, that may exist against the estate concerned. This would be the position in the absence of any allegation that the Receiver had unjustly or improperly continued the Asansol tenancy and had wrongfully incurred liabilities for rent.

31. The next point is that G.K. Mitter J. has accepted the view of Romer L.J. expressed in Hand v. Blow [1901] 2 Ch. 721 (736). Romer L.J. says:

If you have a Company or person whose estate is being dealt with or administered by the Court, and a Liquidator or Receiver appointed by the Court has occupied or used premises that are part of the estate, then, as to rent and other outgoings payable to the landlord or other parties in respect of the premises for that occupation or user and for which the Company or person whose estate is being dealt with or administered is liable, the Court will see that such rent and other outgoings are paid out of the assets got in by the Liquidator or Receiver. But that principle does not and cannot apply to cases as between mortgagor and mortgagee when the mortgaged premises are leasehold demised or agreed to be demised by the mortgagor to the mortgagee, or charged by the mortgagor in favour of the mortgagee in such a way that the mortgagee is not liable to pay rent or other outgoings either to the mortgagor or to the mortgagor''s landlord. In such a case the Liquidator or Receiver is appointed in the right of the mortgagee. The Court is not administering the mortgagor''s estate but it is only dealing with the mortgaged property, and the mortgaged property, it is to be borne in mind, involves in itself ex hypothesis no liability to the landlord whatever.

32. It appears that strong reliance was placed before G.K. Mitter J. on this case on behalf of the Appellant herein who was contending that she was a mortgagee. His Lordship was of the view that in this case the Court was administering the assets of the partnership in the partnership action and for the sake of convenience, appointed the same Receiver and Manager both in the partnership action as also in the creditor''s action. The Court directed the Receiver to go into possession and manage the business and it was the Court which ordered the Receiver to sell the properties and effects of the partnership. His Lordship states that the Court took away the partnership business from the hands of the partners themselves and directed its officer to carry on the business at the place where it was being carried on with a view to wind up the same. In His Lordship''s opinion, the position is just the same as if there was a company of which a Liquidator had been appointed. The costs of winding up or liquidation, His Lordship points out, must have priority over the claims of the creditors. It cannot be suggested, according to His Lordship, that the Receiver was not to pay the employees of the business or to ask them to wait until after the liquidation of the dues of the creditors. Equally, His Lordship says, the Receiver was under an obligation to pay rent of the premises for the period of his occupation ; and the Court will direct the Receiver to do that which is just and honest. His Lordship is of the opinion that the landlord is entitled to priority for the rent during the period of the Receiver''s occupation as an officer of the Court and for the purpose of winding up the business.

33. Mr. R.N. Mitter, learned Counsel for the Appellant, submitted to us that these conclusions based on the judgment of Romer L.J. should not be upheld by us. Learned Counsel has urged that in this case the Court was neither administering the estate nor was it winding up the business even a preliminary decree for dissolution of the partnership had not been passed. The Receiver was appointed on interlocutory applications and he was merely an interim receiver pending the final decisions in the suits concerned.

34. In our opinion, on the facts and in the circumstances of this case there is no difference between the estate held by an interim receiver and a receiver appointed under a preliminary or a final decree. Under Order 40, Rule 1 of the CPC where it appears to the Court to be just and convenient, the Court may by an order appoint a Receiver of any property whether before or after the decree. The Court may also confer upon the Receiver all the powers for the realisation, management, protection and preservation of the property [vide Clause (d) of Order 40, Rule l.]. We find from the order of P.B. Mukharji J. dated May 7, 1956, that all these powers were conferred on the Official Receiver in the instant case. Secondly, no sanctity can be attached to the expression "The Court was administering the assets of the partnership" used by G.K. Mitter J. in the sense emphasized by learned Counsel for the Appellant. Hiralal Patni Vs. Loonkaram

Sethiya and Others, was the case of an interim Receiver and the Supreme Court has also used a similar expression, viz. "In the course of its administration of the estate through the agency of the Receiver." Similarly, Maharajadhiraj Sir Rameshwar Singh Bahadur v. Hitendra Singh AIR 1924 P.C. 202, was the case of a Receiver appointed on six months'' probation and the Privy Council has also used the expression "Appointment and administration by a Receiver".

35. In any event, Romer L.J. on whose judgment G.K. Mitter J. relied, (supra) has said that the Court will see that the rent payable by a Receiver to the landlord is paid out of the assets got in by the Receiver not only when the estate is being "administered" by the Court but also when it is being "dealt with" by the Court. Assuming, therefore, that Mr. Mitter, learned Counsel for the Appellant, is right in contending that, in the instant case the partnership assets were not being "administered" by the interim receiver, he is not entitled to succeed in this appeal. In our view if we may say so with great respect, G.K. Mitter J. has correctly applied the principles enunciated by Romer L.J. to the facts of the present case.

36. The next point urged before us is that the learned Judge should have held that the sale proceeds of the partnership properties having been deposited to the credit of Suit No. 107 of 1956 and Suit No. 814 of 1956 belong to the Appellant and as there was no possibility of any money being left, it could not be attached by the Respondents Nos. 14 to 17 who were not entitled to any priority for payment in respect of such money. Reliance was placed by Mr. Mitter appearing for the Appellant on Goananga Behari Basak v. Manindra Nath Das Gupta (1933) 58 C.L.J. 222. A Division Bench of this Cour points out that where an order is made directing the debtor to bring in Court, or to deposit with a specified person, a certain sum of money, which is to be kept as abiding the result of the creditor''s suit or is earmarked for him, the insolvency Receiver gets no priority over the creditor in respect of the amount deposited. This might have been a strong point in favour of the Appellant before us but for the order of Bachawat J. made on June 4,1957. This was an order by which the Receiver was directed to hold the sale proceeds of the partnership assets to the credit of Suit No. 107 of 1956 and Suit No. 814 of 1956. It appears that the Respondents Nos. 14 to 17, namely, the landlords had not only obtained decrees in the Asansol Court but had also attached the assets in the possession of the Official Receiver for satisfaction of their decretal dues. Bachawat J. makes it clear that there are numerous conflicting claims with regard to the properties in the hands of the Receiver; and those claims cannot be decided now and will be adjudicated upon in proper proceedings.... (vide p. 28 of the Paper Book).

The part of the order material to the. point under consideration is as follows:

The sale proceeds of the properties of Bravo Stores, Asansol, shall be kept separate from the sale proceeds of the properties of the firm of Pearylal Kishorilal at 161/1, Harrison Road, Calcutta.

The sale proceeds shall be held by the Official Receiver to the credit of this suit and Suit No. 814 of 1955 subject to further orders of this Court.

The sales would be free from the claims of the attaching creditors, the claims of the creditors claiming under distress warrants and free from the charges, if any, over the properties. The changes if any, over the properties to be sold under this order and the claims of the attaching creditors and the claims of the creditors under distress warrants in respect of those properties shall shift to the sale proceeds.

37. It appears, therefore, that no order was made in this case directing the Receiver to hold the sale proceeds earmarked for the creditor''s claim to be established in the creditor''s suit. The claims of others also upon that money, if any, were to be adjudicated upon in subsequent proceedings. In this view of the matter the contention of learned Counsel for the Appellant cannot be sustained by us. We should, however, mention that learned Counsel for the Respondents Nos. 14 to 17 told us that this particular point was not urged before G.K. Mitter J.; but we have dealt with it as we find that this is one of the grounds of appeal (Ground No. 6 at p. 88 of the Paper Book).

38. Mr. Mitter, learned Counsel for the Appellant, in his final reply raised another point. He said that his client had obtained a declaration of charge on the sale proceeds of the partnership assets by a decree dated January 30, 1961, in Suit No. 739 of 1958 (Sreematy Sukhdevi Kumari Bibi v. Nawal Kishore Bhargava). The Official Receiver, learned Counsel argues, was the Defendant No. 14 in the suit, and as such, no claim of the Official Receiver can have any priority over the Appellant''s claim. I am afraid we are unable to entertain this contention. It was not made before G.K. Mitter nor do we find it in the grounds of appeal. In any event, our view is that this charge does not affect the priority of the Official Receiver''s costs, charges and expenses.

39. In the result this appeal is dismissed with costs assessed at Rs. 1,000.

Masud, J.

40. I agree.

41. Published On 7.11.66

