
(1991) 09 BOM CK 0033
In the Bombay High Court
Case No : Appeal No. 432 of 1988

The Podar Mills Limited

APPELLANT

Vs

State Bank of India and others

RESPONDENT

Date of Decision : 18-09-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1
Companies Act, 1956 — Section 397, 398, 52
Transfer of Property Act, 1882 — Section 96

Citation : AIR 1992 Bom 277 : (1992) 94 BOMLR 822 : (1994) 79 CompCas 455

Hon'ble Judges : S.P. Bharucha, J; S.M. Jhunjhunwala, J

Bench : Division Bench

Advocate : S.H. Doctor and P.R. Diwan, instructed by M/s. Mehta and Girdharilal, for the Appellant; N.G. Thakkar and S.A. Diwan, instructed by . M/s. Little and Co., S.N. Shah, instructed by M/s. Bhaishankar Kanga and Girdharilal, for the Respondent

Judgement

Bharucha, J.—By the order under appeal the learned single Judge, upon the Notice of Motion taken out by the plaintiffs, appointed the Court Receiver receiver of Immovable property at Jaipur belonging to the 1st defendants and of goods, stocks, machineries and moveables therein and of book-debts. He directed the Court Receiver to appoint the 1st defendants his agents in respect of the machinery, fittings, fixtures and Immovable property at Jaipur on such terms and conditions as he thought proper. Further, he gave liberty to the Court Receiver to sell the machines and the moveables and retain the sale proceeds with himself in the event that the 1st defendants were not willing or not in a position to accept the terms of the agency. The 1st defendants are in appeal.

2. The plaintiffs are the Stale Bank of India. The suit is filed against the 1st defendants for recovery of the sum of Rs. 13,59,49,986.59 due by the 1st defendants under a cash credit account and the sum of Rs. 1,16,58,682.59 due under a term loan account and interest thereon. The suit prays for a declaration that the aforementioned sums are secured by a valid and subsisting equitable

mortgage in respect of two Immovable properties at Bombay and land admeasuring 35,380 square meters with structures thereon at Jaipur.

3. It is an admitted position that, by reason of the provisions of the Textile Undertakings (Taking Over of Management) Act, 1983, the textile undertakings of the 1st defendants situated at Bombay have been taken over and vest in the Central Government. The only security in the form of immovable property which is, therefore, available to the plaintiffs is the Immovable property at Jaipur.

4. It was contended before the learned single Judge that, by reason of the provisions of Section 8(1)(c) of the said Taking Over of Management Act a receiver could not be appointed of the immovable property at Jaipur. The learned single Juge, upon an interpretation of Section 8 rejected the contention. He also rejected the contention that, this being a case of an equitable mortgage in which the mortgagee has no right to possession no receiver could be appointed. He came to the conclusion that a case for the appointment of a receiver had been made out by the plaintiffs.

5. Section 2(d) of the said Taking Over of Management Act defines "textile undertakings" or "the textile undertaking" to mean an undertaking specified in the second column of the First Schedule thereto. Sub-section (e) of Section 2 defines "textile company" to mean a company (being a company as defined in the Companies Act, 1956) specified in the third C column of the First Schedule, as owning the undertaking specified in the corresponding entry in the second column of that Schedule. The First Schedule, at Item Nos. 9 and 10, refers to the two undertakings of the 1st defendants at Bombay and, in the corresponding entry in column 3, refers to the 1st defendants as the owners thereof. Section 8 reads thus:

"8. Application of Act 1 of 1956.-- (1) So long as the management of the textile undertaking of a textile company remains vested in the Central Government under this Act, notwithstanding anything contained in the Companies Act, 1956 or in the memorandum of articles of association of such company,--

(a) it shall not to be lawful for the shareholders of the textile company or any other person to nominate or appoint any person to be a Director of such textile company in relation to such undertaking;

(b) no resolution affecting (whether directly or indirectly) such undertaking which is passed at any meeting of a shareholders of the textile company on or after the appointed day shall be given effect to unless approved by the Central Government;

(c) no proceeding for the winding up of the textile company or for the appointment of a liquidator or receiver in respect thereof shall lie in any court except with the consent of the Central Government.

(2) Subject to the provisions contained in sub-section(i), and to the other provisions contained in this Act and subject to such other exceptions, restrictions

and limitations, if any, as the Central Government may, by notification, specify in this behalf, the Companies Act, 1956, shall continue to apply to the textile companies in the same manner as it applied thereto before the appointed day."

6. It was contended by Mr. Doctor, learned counsel for the 1st defendant, that, by reason of clause (c) of sub-sec. (1) of S. 8, there was an embargo upon the filing of a proceeding for the appointment of a receiver in any court except with the consent of the Central Government, which, admittedly, had not, in the instant case, been taken. He drew pointed attention to the fact that Sections made a distinction between a textile company and a textile undertaking and submitted that in clause (c) the embargo was upon a proceeding for the appointment of a receiver in respect of a textile company. He submitted that the notice of motion taken out by the plaintiffs before the learned single Judge was for the appointment of a receiver in respect of the textile company and that, having regard to Section 8(1)(c), the notice of motion was not maintainable. Mr. Thakkar, learned counsel for the plaintiffs, submitted, on the other hand, that a proper construction of Section 8 showed that the embargo was only in respect of the appointment of a receiver in proceedings under the Companies Act, 1956. He drew our attention to the note in the margin of Section 8 which reads : "Application of Act I of 1956". It was his submission that there was no bar placed by the Taking Over of Management Act upon an application for the appointment of a receiver under Order XL of the Code of Civil Procedure.

7. Clause (a) of sub-section (1) of Section 8 makes it unlawful for shareholders of a textile company or any other person to nominate or appoint any person a director thereof in relation to a textile undertaking whose management has been taken over. Clause (b) provides that, unless approved by the Central Government, no resolution which is passed at a meeting of the shareholder's of a textile company which affects a textile undertaking whose management has been taken over shall have effect. Clause (c) makes a proceeding for winding up a textile company a proceeding for the appointment of a liquidator in respect thereof and a proceeding for the appointment of a receiver in respect thereof not maintainable in any court except with the consent of the Central Government. The words "in respect thereof" which follow the words "for the appointment of a liquidator or receiver" must undoubtedly be read as referring to a proceeding for the appointment of a liquidator or a receiver in respect of the textile company. Proceedings for winding up and for the appointment of a liquidator can only be proceedings under the provisions of the Companies Act. The proceedings for the appointment of a receiver in respect of a textile company must be read in this context. The word "receiver" must take colour from the words "winding up" and liquidator. So read, the embargo will be seen to be placed only upon proceedings for the appointment of a receiver in respect of a textile company in the course of proceedings under the Companies Act.

8. The provisions of Section 8 must be read as a whole and harmoniously. Subsection (2) thereof provides that, subject to the provisions contained in sub-

section (1) and other provisions of the Taking Over of Management Act and subject to such other exceptions, restrictions and limitations as the Central Government might, by notification, specify, the Companies Act "shall continue to apply to the textile companies.....". This sub-section makes it clear that Section S is intended to carve out of the provisions of the Companies Act certain provisions which will not apply to a textile company the management of whose textile undertaking has been taken over by the Central Government under the Taking Over of Management Act.

9. That a receiver can be appointed in proceedings under the Companies Act is not in dispute. The necessity for specifying proceedings for the appointment of a liquidator and of a receiver in addition to proceedings for winding up in clause (c) would appear to be because a liquidator or a receiver might be appointed in a petition for mismanagement and oppression under Sections 397 and 398 of the Companies Act.

10. Having so construed the provisions of Section 8, we may refer to the note in the margin thereof. It says, "application of Act 1 of 1956". It shows that Section 8 is intended to regulate the application of the Companies Act to textile companies as defined in the Taking Over of Management Act. That we may so take the assistance of the marginal note is indicated by the judgment of the Supreme Court in *K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another*, . Having, there, construed the provisions of S. 52(2) of the Income Tax Act, 1961, the Supreme Court referred to the marginal note to Section 52 and said, "it is undoubtedly true that the marginal note to a section cannot be referred to for the purpose of construing the section but it can certainly be relied upon as indicating the drift of the section or to show what the section is dealing with or, to use the words of Collins MR in *Bushell. v. Hammond*, (1904) 2 KB 563 to show what the section is dealing with. It cannot control the interpretation of the words of a section particularly when the language of the section is clear and unambiguous but, being part of the statute, it prima facie furnishes some clue as to the meaning and purpose of the section." We are fortified in the construction that we have placed upon Section 8 by the marginal note thereof.

11. Accordingly, we reject the submission on behalf of the 1st defendants that the plaintiffs' notice of motion for the appointment of the Court Receiver as receiver of the Immovable property at Jaipur was not maintainable in the absence of the consent of the Central Government.

12. Before the learned single Judge it was contended that no receiver could be appointed in a suit on an equitable mortgage. Mr. Doctor, learned counsel for the 1st defendants, moderated the submission before us and urged that while a receiver may be appointed in a suit on equitable mortgage, it could only be done in extraordinary cases and where there are allegations of waste. Our attention was drawn by Mr. Doctor to the judgments of the Privy Council and several High Courts, as also to two judgments of this Court, We shall refer to them briefly.

13. In *Benoy Krishna v. Satish Chandra*, AIR 1928 PC 49 , the Privy Council held that as a general rule, and in the absence of special circumstances or some unusual occasion for its exercise, the power of making interlocutory orders was not a suitable subject for review. This observation was, of course, of no assistance to Mr. Doctor's case. What he relied upon was the observation that on an interim application for a receivership, the court has to consider whether special interference with the possession of a defendant was required, there being a well-founded fear that the property in question will be dissipated or that other irreparable mischief may be done unless the court gave its protection. If the court of review rightly concludes that proper discretion was not used below, it was free to exercise its own discretion in the matter. A single Judge of the Madras High Court in *Ethirajalu v. Rajagopalachari*, AIR 1929 Mad 138 , held that while courts would not ordinarily deprive the mortgagor of his possession in cases where the mortgage was a simple one, there might be circumstances created either by the conduct of the mortgagor or connected with the state of the property which might render it necessary in the interests of justice and for the protection of the mortgage that a receiver should be appointed. It was impossible to lay down a hard and fast rule setting out under which circumstances the court would appoint a receiver. But, ordinarily, there should be some loss or detriment not foreseen by the mortgagee at the time when he chose to take a simple mortgage and allowed possession to remain with the mortgagor, which loss could not be compensated except by the appointment of a receiver. Where a simple mortgagor made a default in paying the interest and the mortgaged property fell in value, the case was fit for the appointment of a receiver. With all these observations there can be no quarrel.

14. A single Judge of the Madras High Court in *T. Krishnaswamy Chetty Vs. C. Thangavelu Chetty and Others*, , held that the appointment of a receiver was recognised as one of the harshest remedies which the law provided for the enforcement of rights and was allowable only in extreme cases and in circumstances where the interest of the person seeking the appointment of a receiver was exposed to manifest peril. Therefore, this exceedingly delicate and responsible duty had to be discharged by the court with the utmost caution and only when the five requirements embodied in the words "just and convenient" in Order XL, Rule 1 were fulfilled by the facts of the case under consideration. Briefly stated, those requirements were, (1) the appointment of a receiver pending a suit was a matter resting in the discretion of the court; (2) the court should not appoint a receiver except upon proof by the plaintiff that prima facie he had a "very excellent" chance of succeeding in the suit; (3) not only must the plaintiff show a case of adverse and conflicting claims to property, but he must show some emergency or danger or loss demanding immediate action and of his own right he must be reasonably clear and free from doubt; (4) an order appointing a receiver would not be made where it had the effect of depriving a defendant of de facto possession since that might cause irreparable wrong; and (5) the court, on the application made for the appointment of a receiver, looked

to the conduct of the party who made the application and would usually refuse to interfere unless his conduct had been free from blame. We agree, broadly, except with the proposition that an order appointing a receiver will not be made where it has the effect of depriving a defendant of de facto possession. An order appointing a receiver which has also the effect of depriving a defendant of possession may be made if the circumstances of a case so warranted. In fact, a single Judge of the Madras High Court itself held in *Muniammal and Another Vs. Pagadala Guruvayya Naidu and Others*, , that where proper cause was shown and the relevant circumstances justified, a receiver could be appointed at the instance of the mortgagee even with regard to properties covered by a simple mortgage.

15. A Full Bench of the Allahabad High Court, in *Anandi Lal and Others Vs. Ram Sarup and Others*, , held that where a party to a suit who was sought to be dispossessed was a simple mortgagor in possession, the court had no power to appoint a receiver and order his dispossession under the provisions of O. XL, R. I. A simple mortgagor had the right to remain in possession and to appropriate the profits of the mortgaged property till the sale had actually taken place and that right could not be defeated by the appointment of a receiver. This extreme proposition was not, as we have pointed out, advanced by Mr. Doctor. In fact, we note that a Division Bench of the Allahabad High Court in *Bireshwar v. Sudhansu Shekhar*, AIR 1947 All 157 , held that the question whether the appointment of a receiver of property which was the subject-matter of a simple mortgage upon proof that interest was in arrears was just and convenient had to be determined on general principles. The general ground upon which the court appointed a receiver was the protection of the property for the benefit of the persons who had an interest in it. In the case of a simple mortgage the property in which the mortgagee had an interest was limited to that which he could cause to be sold in the event of the mortgagor failing to pay in accordance with his contract. Therefore, prima facie, the fact that interest was in arrears was not enough to render the appointment of a receiver just or convenient and the court had to be satisfied that the effect of the mortgagee's conduct was not merely to postpone the final determination of the suit but to imperil the realisation of the amounts secured by the mortgage.

16. A Division Bench of this Court, in, *Damodar v. Radhabai*, AIR 1939 Bom 54 , held that the court had jurisdiction to appoint a receiver in the case of a simple mortgage, whether before or after a preliminary decree. The mere appointment of a receiver did not affect the ultimate rights of the parties in any property the receiver might collect. The court, when it appointed a receiver, merely took charge of the property which was the subject-matter of the suit in order to protect it until it was decided who was entitled thereto. This court noted that at the time when the application for the appointment of the receiver was made in the case before it, not only was interest in arrears but rates and taxes were also in arrears and the property was, therefore, in jeopardy. A learned single Judge of this court followed the Division Bench judgment in *Bai Fatubai Fidaali Lala Vs.*

Yusufally Esmailjee Nagree, , in a case relating to as equitable mortgage. There are, of course, many orders of this court appointing receiver of property which was the subject-matter of equitable mortgage where the power of the court to do so was not questioned.

17. Now, it will be seen that the learned single Judge exercised his discretion and appointed the receiver. As the Privy Council noted in the case of Benoy Krishna AIR 1928 PC 49, the power of making interlocutory orders is not a suitable subject for review, and such orders should not be reviewed in the absence of special circumstances. The authorities of this court and, indeed of other High Court show that even in cases of simple mortgage which, by reason of Section 96 of the Transfer of Property Act, are placed on a par with equitable mortgages, a receiver can be appointed if it is just and convenient to do so. A receiver is appointed to protect the mortgaged property pending the disposal of the suit if the circumstances of the case so warrant.

18. This brings us to the present circumstances. The suit is filed by the State Bank of India for recovery from the 1st defendants of loans aggregating to, approximately, Rs. 14 crores, 76 lacs. The loan accounts have, admittedly, been dormant since 1984, which means that no part of the outstandings, which are public monies, have been recovered by the plaintiffs. We asked Mr. Doctor what the 1st defendants' defence to the suit was, and he drew our attention to the 1st defendants' affidavit in reply to the Notice of Motion. It is there stated that all papers, books of accounts and other documents relating to the 1st defendant mills have been handed over to the Custodian appointed under the Taking Over of Management Act so that "in absence of the relevant papers being available with the defendants, it is virtually impossible for the Defendants No. 1 to deal with the allegations made in the plaint or in the affidavit in support of the Notice of Motion." Such a traversal of the allegations in the plaint and in the affidavit in support of the Notice of Motion would suggest that the plaintiffs have, in the phrase of the Madras High Court, a "very excellent" chance of succeeding in the suit. The management of the 1st defendants' textile undertakings at Bombay was taken over under the Taking Over of Management Act in October 1983. Admittedly, the 1st defendants' textile undertaking at Jaipur has been closed since August 1985. The plaintiffs alleged in the affidavit in support of the Notice of Motion that the property at Jaipur was unprotected. In reply the 1st defendants stated that the plaintiffs had themselves appointed security staff to protect it. In a further affidavit filed by the plaintiffs it was alleged that the 1st defendants were partitioning the Jaipur property, the security staff was obeying the 1st defendants' management and it was apprehended that machinery would be removed by the 1st defendants therefrom. It was also apprehended that the partitioning was being carried out with the intention of creating third party rights therein. This affidavit remains uncontroverted.

19. Mr. Doctor submitted that the plaintiffs had been guilty of such delay as disentitled them to an order for a receiver. He pointed out that the operation of

the loan accounts had stopped in 1984. The suit had been filed in December 1986. The application for ad-interim relief had been made in February 1987 and the order for inventory by the Court Receiver made on that application was implemented only in August 1987. We do not think that, even in ordinary circumstances, we would have declined a receiver on this ground alone. Here, additionally, we must bear in mind that the claim is in respect of public monies in so large an amount as, approximately, Rs. 14 crores, 76 lacs. Such security as is now available to the plaintiffs must, therefore, be protected.

20. There is, therefore, no reason for us to interfere with the discretion exercised by the learned Judge (except to the extent we now state). Upon the facts, the order appointing the receiver was certainly called for.

21. The learned Judge directed the Court Receiver to appoint the 1st defendants his agents on such terms and conditions as he deemed proper and if the 1st defendants were not willing or were not in a position to accept the terms and conditions of the agency, the Court Receiver was given liberty to sell the hypothecated machinery and moveables and retain the sale proceeds with himself. Mr. Doctor submitted that the 1st defendants should be appointed the Court Receiver's agents without any condition as to security or compensation. He said that the only income which the 1st defendants now derived was the sum of Rs. 54/- per month, which was the result of the taking over of the textile undertakings at Bombay under the Taking Over of Management Act. Having regard to this fact and the fact that the textile undertaking at Jaipur has remained closed since August 1985, no purpose will be served by the 1st defendants by taking the agency, but that is for the 1st defendants to decide. We cannot permit them to take the agency without paying any compensation or furnishing any security. If they want the agency, they must enter into an agreement with the Court Receiver to pay such compensation and furnish such security as he deems proper.

22. If the 1st defendants are not willing or are not in a position to accept the terms and conditions of the agency, however, we do not think that it would be proper that, pending the disposal of the suit, the machinery and the moveables should be sold. We, therefore, modify the order under appeal to this extent : that if no agency agreement is entered into by the 1st defendants with the Court Receiver within a period of three months from today, the plaintiffs shall have liberty to apply, on a Notice of motion, that the Court Receiver should be permitted to invite offers from third parties to the 1st defendants' textile undertaking at Jaipur on an agency basis

23. Subject to the aforesaid modification, the order under appeal is upheld. The appeal is dismissed. The costs of the appeal shall be costs in the cause.

24. Mr. Doctor applies that the Court Receiver, who has taken only formal possession of the land and structures and machinery at Jaipur, should be directed not to dispossess the 1st defendants therefrom for a period of three months from

today because that is the time that we have given to the 1st defendants to enter into the agency agreement. Having regard to the doubt that we have expressed in the matter of the agency, we are unable to grant such time as has been applied for. The Court Receiver is, however, directed not to take possession from the 1st defendants for a period of four weeks from today.

25. The Court Receiver shall act on a certified copy of the minutes.

26. Certified copies of this order to be furnished to all parties expeditiously.

27. Appeal dismissed.