

C. Ponnudurai, Official Receiver Vs. K.A. Kumaraswamy Mudaliar and ors.

LegalCrystal Citation : legalcrystal.com/811551

Court : Chennai

Decided On : Mar-12-1971

Reported in : (1971)2MLJ252

Appellant : C. Ponnudurai, Official Receiver

Respondent : K.A. Kumaraswamy Mudaliar and ors.

Judgement :

ORDER

G. Ramanujam, J.

1. The Official Receiver, Chingleput, who failed to have a sale in favour of the second respondent in a Court auction sale held on 4th September, 1967 in E.P.No. 594 of 1966 in O.S.No. 92 of 1966 on the file of the District Munsif's Court, Kanchipuram set aside, is the petitioner herein. One Kumaraswami Mudaliar, the first respondent herein filed a suit against the third respondent and obtained a decree in O.S.No. 92 of 1966. In execution of that decree, the decree-holder brought the judgment-debtor's property to sale. The sale was fixed for 4th September, 1967. On 1st September, 1967 the third respondent, judgment-debtor, filed I.P.No. 9 of 1967 and the petition was directed to be published on 4th September, 1967 and actually the petitioner herein was appointed as interim Receiver on 6th September, 1967. There was an order adjudicating the judgment-debtor as insolvent on 26th February, 1968. Before the sale fixed for 4th September, 1967 by the executing Court could take place, the judgment-debtor filed an application under Section 52 of the Provincial Insolvency Act bringing it to the notice of executing Court that I.P. No. 9 of 1967 has been admitted and asking for the postponement of the sale awaiting disposal of I.P. No. 9 of 1967. The executing Court proceeded to sell the properties on 4th September, 1967 holding that mere filing of an insolvency petition does not take away its jurisdiction to sell the properties in execution of the decree. The second respondent herein became the purchaser of the properties in the Court auction.

2. After the sale was held by the executing Court, the petitioner herein filed an application under Order 21, Rule 90 to set aside the sale on the ground that the properties have fetched a low price, that the second respondent, the purchaser is the son of the decree-holder and that in any event, the sale held by the executing Court after the admission of the insolvency petition, I.P.No. 9 of 1967, was invalid. This application was resisted by the decree-holder as well as the auction-purchaser contending that the price fetched was quite fair, that the properties sold were subject to a mortgage for a sum of Rs. 5,000 that the mere filing and admission of an insolvency petition does not take away the jurisdiction of the Court in proceeding with the sale in execution of the decree against the judgment-debtor and that there

are no vitiating circumstances for setting aside the sale. On these rival contentions of the parties, the executing Court considered the following point:

Whether the sale is liable to be set aside.

On this point the executing Court held that since the petitioner had been appointed as interim Receiver on 4th September, 1967, the sale held on that date after the property has vested in the interim Receiver is bad in law, and set aside the sale in favour of the second respondent. On appeal, however, the appellate Court found from the records in the insolvency proceedings that the petitioner was appointed as interim Receiver only on 6th September, 1967, that on 4th September, 1967 there was no bar for the executing Court from proceeding with the sale of the properties that the petitioner having been appointed only on 6th September, 1967 he cannot challenge the Court sale held on 4th September, 1967 on the ground that the property sold had vested in him, and that the mere filing and admission of an insolvency petition will not take away the jurisdiction of the executing Court to proceed with the execution against the insolvent's properties. It is the correctness of the view taken by the lower appellate Court that is being challenged in this revision.

3. In this revision the learned Counsel for the petitioner puts forward a contention that if the admission of an insolvency petition is brought to the notice of the executing Court that is sufficient to oust the jurisdiction of the executing Court to deal with the property of the insolvent. According to the learned Counsel Section 28(7) read with Section 52 of the Provincial Insolvency Act made it clear that the order of adjudication made on 26th February, 1968 in this case relates back to the date of the filing of the petition, that is, 1st September, 1967, that therefore the sale held on 4th September, 1967 will not affect the rights of the petitioner as interim Receiver, and that the sale held by the executing Court after the filing of the insolvency petition will be invalid. I am not inclined to agree with the said contention. It is true that according to Section 28(7) once an order of adjudication is made it will relate back to the date of filing of the petition, but that will not have the effect of nullifying the judicial orders made in execution of the decree against the judgment-debtor. Section 52 contemplates a situation that at the time of the execution sale of the insolvent's properties there has been a Receiver appointed by the Insolvency Court as a result of which the property had vested in him. Section 52 will have no application when a Receiver had not been appointed in respect of the insolvent's properties. So an executing Court while executing a decree passed against the insolvent need not stay its hands merely on the admission of an insolvency petition. This has been so held in *Nagendra Lal v. Hemanta Kumar* : AIR1938Cal503 .

4. The learned Counsel for the petitioner, however, seeks reliance from the decision in *T.S. Saliappan v. Subbiah Pillai* : (1962)2MLJ493 , wherein it has been held that in interim Receiver appointed under Section 20 of the Provincial Insolvency Act whether appointed subsequent to or before any execution sale, can be clothed by the Insolvency Court with authority to take proceedings to set aside the sale and such authority can be given expressly or even impliedly. But in this case there is nothing on record to show that the petitioner had been given any express or implied authority to set aside a sale held earlier to his appointment as interim Receiver. Reliance was also placed on the decision in *Mahendra Kumar Baishya Shaha v. Deeneshachandra Ray Chaudhari* I.L.R. (1933) Cal. 696 wherein it has been expressed that when the Court is apprised of the filing and admission of an insolvency application in another Court, it should stay its hands so far as the execution of the decree by the creditors against

the insolvent is concerned. The decision in *Mahasukh Jhaverdas v. Valibai Patubhai* (1928) 109 Ind.Cas. 152, has also been pressed into service. In that case, it had been observed as follows:

A Court which attaches the property of a judgment-debtor is in possession of such property within the meaning of Section 52 of the Provincial Insolvency Act, and must stop the proposed sale and direct the property to be delivered to the Receiver if the debtor applies to be adjudicated as an insolvent before the sale is conducted.

The learned Counsel for the petitioner also seeks support for his contention from some of the observations made by the author in 'Mulla's Law of Insolvency' 1930 edition, page 425, paragraph 604 wherein the following comment occurs:

It does not, however, follow that if no such application is made, the Court executing the decree can sell the property even if it had such notice as is mentioned above

suggesting that the executing Court is bound to take into consideration the admission of the insolvency petition and stay its hands even without an application by the judgment-debtor for the purpose. But as stated already Section 52 would apply only when the Insolvency Court has appointed an interim Receiver and where no Receiver has been appointed, the executing Court's jurisdiction to execute the decree cannot be said to be taken away by the mere filing or admission of the insolvency petition. The rights of the Court auction-purchaser will be protected under Section 51 (3) of the Act. *Prasad Math v. Ambika Prasad* A.I.R. 1930 Pat. 407, had laid down that the object of Section 52 is not to give an advantage to the insolvent but to prevent individual creditors deriving unfair advantage over other creditors and to place the property in the hands of a receiver for equal distribution to the general body of creditors and that Section 52 no doubt gives a right to the insolvent to make such an application but it is obvious the application should be made for the general body of creditors and not for the insolvent. It was further expressed that in an application under Section 52 the property attached in execution of the decree has to be delivered to the receiver if such receiver had been appointed already, but if no such receiver had been appointed, the Court should proceed with the execution but hold the sale proceeds subject to such orders as the Insolvency Court may pass in the matter.

5. In *Muthan Chettiar v. Venkituswami Naicken* : AIR1936Mad819 , this Court held that on an application made to it by the interim Receiver the executing Court is, under Section 52 of the Provincial Insolvency Act, bound to direct the property of the debtor in the custody of the Court to be delivered to the receiver and to stay the execution sale if a receiver has been appointed, and that the executing Court's defiance of Section 52 has not, however, the effect of making the sale in execution a nullity, and that under Section 51(3) a person who in good faith purchases a property of the debtor under a sale in execution shall in all cases acquire a good title to it against the receiver even though the sale has been held after the admission of the insolvency petition. The observations of Mulla in his 'Law of Insolvency' relied on by the Counsel for the petitioner has been commented upon in this case and the learned Judges have expressed that the author's comments occurring at page 425 is opposed to the plain wording of the section which says that the Court shall on application direct the property to be delivered to the receiver. The learned Judges in that case make a distinction between an interim Receiver appointed under Section 20 and a receiver appointed under Section 28 as a result of the order of adjudication, and as regards the effect of the orders made in insolvency. On the creditor's remedies, the

learned Judges have referred to Sections 28 and 29 dealing with the effect of the order of adjudication, and Sections 51 and 52 dealing with the effect of an order admitting the petition and have pointed out the distinction between the two sets of provisions. With respect, I prefer to follow the principle laid down in that case. The effect of Section 28 is that if an order of adjudication has been made, a creditor can proceed against the insolvent's property or commence any suit or other legal proceeding against him only with the leave of the Court and subject to such terms as it may impose. Section 29 related to pending suits or other proceedings and provides that the Court shall, after an order of adjudication has been made, either stay the proceedings or allow them to continue on such terms as it may impose. Section 52, however, directs the executing Court to deliver the insolvent's properties to the receiver if two conditions are satisfied: (i) execution has issued against the property but, before its sale, notice is given to the Court that an insolvency petition has been admitted and (2) an application has been made to the executing Court for delivery of the property to the receiver. The difference between Section 29 and 52 is that whereas under Section 29, on mere proof that an order of adjudication has been made, the executing Court's power is checked, under Section 52 no such result automatically follows from the mere fact that notice of the admission of an insolvency petition has been given to the Court. Section 51, unlike Sections 28, 29 and 52, deals not with procedure but with substantive rights. It enacts that an execution creditor is not entitled to the benefit of the execution against the receiver unless the assets are realised before the admission of the petition and the material date here is the date not of the insolvent's adjudication but of the admission of the insolvency petition.

6. In *C. Venkateswarlu v. Official Receiver, Guntur* (1970) 2 A.W.R. 1.85, the facts are somewhat similar to those in the present case. In that case also the executing Court ordered the sale of the property on 24th June, 1968. In the meanwhile, I.P. No. 7 of 1968 had been filed by another creditor for adjudicating the judgment-debtor as insolvent. In that petition an interim Receiver was appointed on 28th March, 1968. He filed a petition on 20th June, 1968 stating that if the sale was held by the executing Court, all other creditors of the insolvent would suffer huge loss and therefore in the interests of the general body of the creditors as well as insolvents the sale should not be held by Court, but that application was dismissed by the executing Court. The Official Receiver took the matter in appeal but, in the meanwhile, the properties had been sold and purchased by the decree-holder himself and the matter came up for confirmation on 28th July, 1968. The appellate Court stayed the confirmation of sale and ultimately allowed the appeal holding that in view of the mandatory provisions of Section 52 the executing Court should have transferred the property to the interim Receiver without proceeding with the execution and sale of the property. After referring to the scope of Sections 51 and 52 of the Provincial Insolvency Act the learned Judges in that case following the decision in *Muthan Chettiar v. Venkituswami Naicken* : AIR1936Mad819 , held that even if the properties had been sold in contravention of Section 52, the question of the validity of the sale had to be decided with reference to Section 51 of the Act, that there is nothing in the Provincial Insolvency Act to preclude the decree-holder from proceeding with the sale with the knowledge of the insolvency, and that even if the purchaser had knowledge of the insolvency, that will not indicate any absence of good faith on his part. According to the learned Judges, the only result that will flow from the contravention of Section 52 is that the decree-holder will not be entitled to the sale proceeds of the properties but the sale proceeds had to be handed over to the interim Receiver for distribution among all the creditors of the insolvent. The same principle has also been adopted earlier by a Full Bench of the Andhra Pradesh High Court in *Srirangamma v.*

Narayanamma (1956) A.W.R. 815 : A.I.R. 1956 A.P. 243, even to a sale held after the order of adjudication had been made against the debtor. It is stated that in this case the sale proceeds realised as a result of the sale held on 4th September, 1967 are still in Court deposit and the first respondent, the execution creditor, has not withdrawn the same. Now that an order of adjudication has been made against the judgment-debtor, the third respondent, the right of the Official Receiver is only to proceed against the sale proceeds for making it available to all the creditors.

7. The learned Counsel for the petitioner faintly contended that the sale is vitiated under Order 21, Rule 90, Civil Procedure Code, for certain irregularities and one of the irregularities pointed out is that the Court auction-purchaser is the son of the decree-holder. As pointed out by the lower Court, the mere circumstance that the purchaser happened to be the son of the decree-holder will not be sufficient to hold the sale to be invalid, unless it is specifically shown by reliable evidence that the decree-holder had purchased the property benami in the name of his son. In this case no such attempt has been made. The price obtained in the sale also seems to be fair compared with the value given by the petitioner himself. Hence the sale cannot be said to be vitiated under Order 21, Rule 90, Civil Procedure Code, for any reason.

8. The result is that the order of the lower appellate Court is upheld and the civil revision petition dismissed. No costs.

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