

APPELLATE CIVIL.

Before Mitter and M. C. Ghose JJ.

1933

Jan. 4.

MAHENDRAKUMAR BAISHYA SHAHA

v.

DEENESHCHANDRA RAY CHAUDHURI.*

Insolvency—Receiver—Sale in execution of a decree—Provincial Insolvency Act (V of 1920), s. 52.

On an application by a Receiver in Insolvency for withholding the confirmation of a sale in execution, held after the executing court had received information of the insolvency proceedings,

held that when the court is apprised of the pendency of an application for insolvency in another court and of the further fact that such application had been admitted, it should stay its hands so far as the execution of the decree by the creditors of the insolvent is concerned.

Ralla Ram v. Ram Labhaya Mal (1) dissented from.

APPEAL FROM APPELLATE ORDER by the decree-holder.

This appeal arises on an application by Deeneshchandra Ray Chaudhuri, a Receiver in Insolvency, for withholding confirmation of a sale in execution of a decree against the insolvent judgment-debtor. On 20th July, 1931, and during the pendency of the execution proceedings, the executing court received information from the insolvency court that, at the instance of another creditor, a petition for declaring the judgment-debtor an insolvent had been admitted. On 22nd July, 1931, the sale was allowed to be held in spite of such information. The learned Munsif, to whom the application was made, dismissed it, holding that the sale was valid. On that the receiver appealed to the Subordinate Judge and the appeal was allowed.

*Appeal from Appellate Order, No. 167 of 1932, against the order of P. C. Guha, Second Subordinate Judge of 24-Parganas, dated Feb. 27, 1932, reversing the order of M. N. Ray, First Munsif of Alipore, dated Sep. 12, 1931.

Thereupon this Second Appeal was filed before the High Court.

Gunendrakrishna Ghosh for the appellant.

Pyarilal Chatterji and Krishnalal Banerji for the respondent.

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MITTER J. This is an appeal against an order of the Subordinate Judge, Second Court of 24-Parganâs, and arises out of an application made by the Official Receiver concerning an insolvency proceeding, in which the receiver asked the Munsif of Alipore, who dealt with the matter in the first instance, that a certain auction-sale, which was held at the instance of one of the decree-holders, should not be confirmed. The Munsif was of opinion that the sale was not illegal and should be confirmed. An appeal was taken to the court of the Subordinate Judge of 24-Parganâs, He set aside the order of the Munsif and he was of opinion that the order of the Munsif directing the sale and confirming it should be set aside.

Against this order, the present appeal has been brought, and it is contended by the decree-holder, who is himself the purchaser, that the order of the Subordinate Judge is not justified by the provisions of section 52 of the Provincial Insolvency Act.

The respondent has taken a preliminary objection to the hearing of this appeal, and he contends that no second appeal lies to this Court. It is not necessary, however, to decide this question, seeing that we are of opinion that the appeal should fail on the merits.

It appears that, in the course of the execution proceedings, a receiver was appointed by the insolvency court after the application for insolvency at the instance of another creditor had been admitted. The receiver was an *ad interim* receiver. An information of the fact that an insolvency petition pending before the District Judge had been admitted was conveyed to the Munsif before the sale in execution of the decree took place. It is contended on behalf of the appellants that this sale was a valid

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sale as there was no application by the Official Receiver asking that if the property had been in the possession of the court, it was to be delivered to the receiver within the meaning of section 52. It is contended that the mere fact that the executing court had notice of the pendency of the insolvency application was not sufficient to justify the executing court in staying the sale, and great stress has been laid on the words "the court shall, on application, "direct the property, if in the possession of the court, "to be delivered to the receiver." It is admitted in this case that there was no application made by the *ad interim* receiver. We are of opinion that, even in such a case, looking to the scheme of the provisions of the Insolvency Act, the executing court would not be justified in holding the sale if it is apprised of the pendency of the insolvency application. Reliance has been placed in support of the contrary view on the decision of the Lahore High Court in the case of *Ralla Ram v. Ram Labhaya Mal* (1). That was a decision of a single judge. That decision no doubt supports the contention of the appellants. That decision, however, has been dissented from in the decisions of the other High Courts in India. Reference may be made in this connection to a decision of the Madras High Court in the case of *Sivasami Odayar v. C. R. Subramania Aiyar* (2), where it has been held that an *interim* receiver is entitled to apply under section 52 of the Provincial Insolvency Act. Section 52, as now amended, contemplates the presentation of an application, not, as it used to do, after adjudication, but at an earlier stage, that is to say, after an insolvency petition has been admitted. The same view has also been taken in the case of *Anantharama Iyer v. Kuttimalu Kovilamma* (3) and also in another case, namely, the case of *Mahasukh Jhaverdas v. Valibhai Fatubhai* (4). The Lahore case, on which reliance has been placed by the appellants, has been commented upon by Sir

(1) (1924) 80 Ind. Cas. 509.

(2) (1931) I. L. R. 55 Mad. 316.

(3) (1916) 30 Mad. L. J. 611.

(4) (1927) 30 Bom. L. R. 455.

Dinshaw Fardunji Mulla in the Tagore Law Lectures on the "Law of Insolvency in British India". It would be useful to quote his comments in this behalf :

Two conditions must be satisfied before an order can be made by the court executing the decree for delivery of the attached property to the Official Assignee or Receiver. The first is that notice must be given to the executing court of the order of adjudication or of the admission of the insolvency petition as the case may be, and the second is that there must be an application to the executing court for delivery of the property to the Official Assignee or Receiver. If such notice is given and such application is made, the executing court is bound to direct the property to be delivered to the Official Assignee or Receiver. 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.

The learned author then refers, in support of his view, to the decision of the Bombay High Court, to which I have already referred, namely, to the case of *Mahasukh Jhaverdas v. Valibhai Fatubhai* (1) as also to the Madras case referred to above, namely, *Anantharama Iyer v. Kuttimalu Kovilamma* (2). In the latter case it was said that a sale by an executing court, after notice of the order of adjudication, was void as against the receiver. The Lahore decision proceeds on a decision of an English Court in the case of *Trustee of Woolford's Estate v. Levy* (3). Sir Dinshaw Mulla in his lecture points out the distinction between a case under the English Bankruptcy Act of 1883 and a case under the Indian Provincial Insolvency Act, and he is of opinion that the Lahore decision is erroneous. The learned author points out this :

In support of its judgment the court relied upon *Trustee of Woolford's Estate v. Levy* (3), a case under section 46 of the Bankruptcy Act of 1883. In that case it was held that a sale by the Sheriff after receiving order in execution of a decree against the debtor, though made with notice of order, was valid as against the trustee in bankruptcy appointed after adjudication, if no application was made by the Official Receiver under that section for delivery of the property to him. The distinguishing features of that case are, first, that the sheriff after he came to know of the receiving order communicated with the Official Receiver and the Official Receiver wrote to the Sheriff asking him to realise the goods and to account to him for the sale-proceeds, and, secondly, that a receiving order under the English law does not vest the debtor's property in the Official Receiver as an adjudication order vests it in the trustee in bankruptcy. The Lahore decision, it is submitted, is erroneous.

(1) (1927) 30 Bom. L. R. 455.

(2) (1916) 30 Mad. L. J. 611.

(3) [1892] 1 Q. B. 772.

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In view of this opinion of the learned Tagore Law Lecturer, which is entitled to very great weight, we are of opinion that the contention of the appellants must fail. It has been argued that if this view is taken, the words, "on application" become superfluous and redundant. There is no force in that contention. The underlying principle of the Provincial Insolvency Act as can be gathered from the provisions of section 52 is that when a court is apprised of the pendency of an application for insolvency in another court and of the further fact that such application had been admitted, it should stay its hands so far as the execution of the decree by the creditors of the insolvent is concerned.

In this view, we are of opinion that the decision of the learned Subordinate Judge is right and must be affirmed. The appeal is dismissed with costs. The hearing fee is assessed at one gold mohur.

It is not necessary to pass any order on the application in the alternative.

M. C. GHOSE J. I agree.

Appeal dismissed.

N. G.