

APPELLATE CIVIL.

Before Guha and Bartley JJ.

DINESHCHANDRA RAY CHAUDHURI

v.

JAHANALI BISWAS.*

1934

Nov. 29 ;
Dec. 5.

Insolvency—Receiver—Representative of judgment-debtor and creditor—Application by receiver in interest of judgment-debtors—Second Appeal—Adjudication—Sale in execution—Purchase by decree-holder in good faith—Code of Civil Procedure (Act V of 1908), s. 47; O. XXI, r. 22—Provincial Insolvency Act (V of 1920), ss. 28(2), 51(3).

The receiver, in whom the property of an insolvent vests after the passing of an order of adjudication under section 28, sub-section (2) of the Provincial Insolvency Act, represents both the insolvent and the creditors of the insolvent; and if any application is made to the court, which on the face of it is an application made in the interest of the insolvent judgment-debtor, the application can, under the law, be treated as an application under section 47 of the Code of Civil Procedure, made by the receiver in insolvency, as representative of the insolvent judgment-debtor and so is open to a Second Appeal.

Mohitosh Dutta v. Satish Chandra Chaudhuri (1) referred to.

Though the creditors of the insolvent are no doubt interested in the application, that does not take away anything from the legal position of the receiver representing both the insolvent judgment-debtor, whose property is vested in him, and the creditors.

The provisions in Order XXI, rule 22 of the Code of Civil Procedure does not control the provisions in section 51, sub-section (3) of the Provincial Insolvency Act, even in a case, in which the decree-holder, purchaser at the sale in execution of his decree, purchases the property of an insolvent at a sale in execution in good faith after an order of adjudication has been passed by the insolvency court and after the property of the insolvent has vested in the receiver in insolvency. Such a sale is not a nullity.

Raghunath Das v. Sundar Das Khetri (2) distinguished.

The provision contained in section 28, sub-section (2) of the Provincial Insolvency Act is controlled by the later provision contained in section 51, sub-section (3) of the Act, and effectively secures the title of a purchaser of an insolvent's property at a sale in execution, in case of good faith being established on the part of the purchaser.

Madhu Sudan Pal v. Parbati Sundari Dasya (3) referred to.

*Appeal from Appellate Order, No. 523 of 1933, against the order of S. K. Ganguli, District Judge of Khuina, dated May 27, 1933, affirming the order of Bijanlal Mukherji, Second Munsif of Bagerhat, dated Dec. 22, 1932.

(1) (1931) 35 C. W. N. 971.

(2) (1914) I. L. R. 42 Calc. 72 ;
L. R. 41 I.A. 251.

(3) (1916) 35 Ind. Cas. 643.

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APPEAL FROM APPELLATE ORDER by the receiver in insolvency.

The facts of the case and the arguments in the appeal appear sufficiently in the judgment.

Bijankumar, Mukherji and *Jogeshchandra Singha* for the appellant.

Radhabinode Pal and *Abul Hosain* for the respondents.

Cur. adv. vult.

The judgment of the Court was as follows:—

This is an appeal by a receiver in insolvency, arising out of an application made by him as the legal representative of the judgment-debtors, in whose favour an order of adjudication had been passed under the Provincial Insolvency Act, on the 19th September, 1932. The application made by the receiver was to have a sale in execution of a decree declared null and void; and there was a prayer in the application that the aforesaid sale held on the 22nd September, 1932, in execution, might not be confirmed. The decree-holders, purchasers at the sale held in execution of their decree, opposed the application of the receiver, on the ground that they were *bona fide* purchasers at the sale in execution, who were not aware of the insolvency proceedings; and their title could not be called in question by the receiver.

The courts below have concurrently held, on materials before them, that the decree-holders, purchasers, were not at all aware of the insolvency proceedings, or of the order of adjudication. It was also held by the courts below that the decree-holders were purchasers at the sale in execution of the decree in good faith. On the above conclusion on facts, the decision given by the courts below was that the sale held in execution of decree could not be vacated and the confirmation of the sale could not be withheld for the reason that the properties of the insolvent

judgment-debtors had vested in the receiver in insolvency under section 28, sub-section (2) of the Provincial Insolvency Act. The learned District Judge in the court of appeal below has further come to the decision that, in view of the provision contained in section 51, sub-section (3) of the Provincial Insolvency Act of 1920, the operation of section 28, sub-section (2) of the Act will be suspended in the case of *bona fide* purchasers, and protection given to such purchasers.

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A preliminary objection was raised on behalf of the respondents in this appeal, relating to the maintainability of a Second Appeal to this Court, as preferred by the receiver in insolvency, on the ground that the application before the court of execution could not be treated as one under section 47 of the Code of Civil Procedure, and there could not be any Second Appeal in a case arising out of an application for setting aside a sale, or an application praying that a sale held in execution of a decree might not be confirmed. The question for consideration, on the preliminary objection as raised, is whether or not the application, in which the appeal has arisen, was one under section 47 of the Code of Civil Procedure, there being no question that a Second Appeal would otherwise be barred under the law. For determination of that question, the position of the receiver in insolvency making the application before the court has to be taken into account. Was the receiver a "representative" of the judgment-debtors, and could he be treated as such, in the matter of the application before the court? On this point the observations of Sir George Rankin C. J. in *Mohitosh Dutta v. Satish Chandra Chaudhuri* (1) is entitled to great weight. As observed by the learned Chief Justice,—

Any general statement to the effect that a receiver is or is not a representative for the purposes of section 47 of the Code is necessarily misleading. It

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all depends on the purpose and nature of the application made by the receiver whether he is a representative of the judgment-debtor or not. For some purposes, he would be entitled as representing the judgment-debtor to litigate matters under section 47 of the Code.

The most important factor to be considered in this connection is whether the receiver in the matter of the application before the court represented the judgment-debtor, for the purpose of having the property escape execution. The receiver, in whom the property of the insolvent vested after the passing of the order of adjudication under section 28, sub-section (2) of the Provincial Insolvency Act, does represent both the insolvent and the creditors of the insolvent; and, if any application is made to the court, which on the face of it was an application made in the interest of the insolvent judgment-debtor, the application in our judgment could under the law be treated as an application under section 47 of the Code of Civil Procedure, made by the receiver in insolvency, as representative of the insolvent judgment-debtor. The creditors of the insolvent were no doubt interested in the application, but that did not take away anything from the legal position of the receiver representing both the insolvent judgment-debtors, whose property has vested in him, and the creditor. In the case before us, as it appears from the order recorded by the Munsif on the 22nd December, 1933, the receiver had made the application under section 47 of the Code of Civil Procedure purporting to act as the legal representative of the judgment-debtors declared insolvents; and, on the application before the court as made, we have no hesitation in coming to the conclusion that in the matter of that application the receiver in insolvency took the attitude—that he would represent the judgment-debtors for the purpose of having the property escape execution—, which was well within section 47 of the Code of Civil Procedure; and a Second Appeal in the case before us was, therefore, maintainable under the law.

In support of the appeal to this Court it was argued before us that the sale sought to be avoided

by the receiver was a nullity in view of the non-compliance with the provisions of Order XXI, rule 22 of the Code of Civil Procedure; it was contended that the property, having been sold on the 22nd September, 1932, after the judgment-debtor was adjudicated insolvent, and no notices having been served on the legal representative of the judgment-debtor as required by Order XXI, rule 22 of the Code of Civil Procedure, the sale was void *ab initio*. It was also urged in support of the appeal that the provision contained in section 51, sub-section (3) of the Provincial Insolvency Act was controlled by Order XXI, rule 22 of the Code, and that the fact, that the purchasers purchased the property in good faith, would not give them protection, seeing that the sale itself was a nullity. There can be no doubt that the property of the judgment-debtor vested in the receiver in insolvency before it was sold in execution; but the fact remains, as it has been found by the courts below, that the decree-holders were not at all aware of the insolvency proceedings. In the circumstances of the case, therefore, it could not be said that proper steps had not been taken to bring the receiver before the court to enable him to take up the position that he was not bound by any thing, that was done in the course of the execution proceedings culminating in the sale of the judgment-debtor's property on the 22nd September, 1932. The decree-holders, having no notice of the insolvency proceedings and having been wholly unaware of the same, were not responsible for the irregularities of procedure adopted in the matter of non-service of notice under Order XXI, rule 22 of the Code of Civil Procedure. The sale of the property in the present case cannot be held to be a nullity, as it was contended before us, on the ground that the court had no jurisdiction to sell, in view of the non-service of notice under Order XXI, rule 22 of the Code, as such non-service was attributable to the fact, that the decree-holders had not been notified about the insolvency proceedings at any time before

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the application, out of which this appeal has arisen, was made by the receiver in insolvency, on the 16th November, 1932. In our judgment, therefore, the decision of the Judicial Committee and the observations of Lord Parker of Waddington in *Raghnath Das v. Sundar Das Khetri* (1), on which very strong reliance was placed on the side of the appellant, have no application on the facts and in the circumstances of the case before us; and we are unable to hold that the sale in the present case was a nullity, and that Order XXI, rule 22 of the Code of Civil Procedure controlled the provisions of section 51, sub-section (3) of the Provincial Insolvency Act even in a case, in which the decree-holder, purchaser at the sale in execution of his decree, purchased the property of an insolvent at a sale in execution in good faith, after an order of adjudication has been passed by the insolvency court, and after the property of the insolvent has vested in the receiver in insolvency. The purchase was made in good faith, without any knowledge whatsoever of the insolvency proceedings, and the sale was not a nullity on account of the fact that no notice under Order XXI, rule 22 of the Code of Civil Procedure was served, seeing that the decree-holder, purchaser, was not aware of the insolvency proceedings, of the order of adjudication passed in those proceedings and of the vesting of the insolvent's property in the receiver in insolvency.

On the scope and operation of section 51, sub-section (3) of the Provincial Insolvency Act, the decision of this Court in the case of *Madhu Sudan Pal v. Parbati Sundari Dasya* (2) is an authority in support of the position apparent on the face of the statutory provision, that a purchaser of an insolvent's property, at a sale in execution of a decree, even with notice of the insolvency, who purchased the property in good faith, acquires a good title to it, against the receiver, in whom the insolvent's property

(1) (1914) I. L. R. 42 Calc. 472 ;
L. R. 41 I.A. 251.

(2) (1916) 35 Ind. Cas. 643.

had vested under section 28, sub-section (2) of the Provincial Insolvency Act. In the case before us, we do not see any difficulty in the application of the rule laid down in the above case, on the definite finding arrived at by the courts below, that the purchase at the sale in execution of the decree made by the decree-holders themselves was made in good faith. In our judgment the provision contained in section 28, sub-section (2) of the Provincial Insolvency Act is controlled by the later provision contained in section 51, sub-section (3) of the Act, and effectively secures the title of a purchaser of an insolvent's property at a sale in execution, in case of good faith being established on the part of the purchaser. On the findings arrived at by them, the courts below were right in the conclusion that the receiver in insolvency could not be allowed to have the sale, held in Execution Case No. 390 of 1932 in the second court of the Munsif at Bagerhat, to be declared null and void, so as to defeat the title of the decree-holders, purchasers, the respondents in this appeal.

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The result of the conclusions, we have arrived at as mentioned above, is that this appeal fails, and it is dismissed with costs. The hearing fee in this Court is assessed at two gold *mohurs*.

Appeal dismissed.

G.S.