APPELLATE CIVIL.

Before Nasim Ali and Henderson JJ.

1935

June 5, 18.

JOGENDRANATH KUNDU

v.

YAJNESHWAR MANDAL.*

Insolvency—Execution of decree by creditor when barred—Receiver—Purchaser in good faith—Provincial Insolvency Act (V of 1920), ss. 28(7), 51(3), 52.

The mere admission of an insolvency petition does not debar a creditor from executing his decree against the debtor.

But, where execution of a decree has issued against any property of a debtor and before sale thereof notice is given to the executing court that an insolvency petition has been admitted, the executing court is bound under section 52 of the Provincial Insolvency Act, on application, to direct the property attached to be delivered to the receiver and the receiver can sell the property for satisfying the charge on the property for the costs incurred by the attaching creditor.

There is divergence of opinion on the question, whether the section contemplates an *ad interim* receiver.

The executing court is not bound to stay its hand, if no receiver, to whom the attached property can be made over, is in existence at the time of the sale.

By the operation of section 28(7) the title of the auction-purchaser, who purchases the property of the debtor, after the admission of the insolvency petition but before the order of adjudication, is not absolute but contingent on the insolvency application being dismissed.

If the insolvency application is dismissed he gets an indefeasible title: but, if the order of adjudication is made, he cannot claim any title as against the receiver.

An exception, however, has been made by the legislature in favour of purchasers in good faith in all cases (section 51, clause 3).

APPEAL FROM ORIGINAL ORDER by the auction-purchasers.

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

Gopendranath Das and *Pashupati Ghosh* for the appellants.

Krishnakamal Maitra for the respondents.

Cur. adv. vult.

*Appeal from Original Order, No. 317 of 1933, against the order of K. C. Chunder, District Judge of Pabna and Bogra, dated Mar. 23, 1933.

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NASIM ALI J. This is an appeal against an order under section 4 of the Provincial Insolvency Act. The appellants obtained a decree for money against one Jagat. On the 6th January, 1928, Jagat applied to the District Judge of Pabna for being adjudged an insolvent. On the 11th January, 1928, the appellants applied to execute their decree against Jagat in the court of the Munsif at Pabna. On the 16th January, 1928, they received notice of Jagat's application for insolvency. On the 11th February, 1928, certain huts belonging to the debtor were attached by the executing court. On the 18th March, 1928, the appellants appeared before the insolvency court and filed objections to the application for insolvency. On the 19th May, 1928, the debtor informed the executing court that his application for insolvency was admitted and prayed for stay of sale of the properties attached. This application, however, was dismissed for non-prosecution. The attached huts were sold on the 23rd May, 1928, and were purchased by the appellants for Rs. 200 paid in cash. Jagat was adjudged insolvent on the 23rd August, 1929. The *nâzir* of the court, who was thereafter appointed receiver, sold the huts (already purchased by the appellants at the auction sale for Rs. 200) to respondent No. 4, the son of respondent No. 3, another creditor of the insolvent. The *nâzir* receiver was subsequently discharged and respondent No. 2, a pleader, was appointed receiver. He applied to the insolvency court, under section 4, for a declaration that the appellants acquired no title to the huts on the basis of the auction-purchase as against him and the purchaser, to whom he had sold the huts. The learned judge has given judgment for him. Hence the present appeal by the auction-purchaser.

The point for determination in this appeal is whether the appellants have acquired any title to the disputed huts by the auction-purchase.

Now the mere admission of an insolvency petition does not debar a creditor from executing his

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decree against the debtor. But where execution of a decree has issued against any property of a debtor and before sale thereof notice is given to the executing court that an insolvency petition has been admitted, the executing court is bound, under section 52 of the Provincial Insolvency Act, on application, to direct the property attached to be delivered to the receiver and the receiver can sell the property for satisfying the charge on the property for the costs incurred by the attaching creditor. There is divergence of opinion on the question whether the section contemplates an *ad interim* receiver. In some cases, it has been held that, as the section contemplates delivery of property to the receiver *after the admission of the insolvency petition and not after the order of adjudication* as laid down in section 35 of the Provincial Insolvency Act of 1907 and section 54 of the Presidency Towns Insolvency Act, the legislature must have contemplated an *ad interim* receiver in section 52 of the present Provincial Insolvency Act. On the other hand, it has been held that the section cannot contemplate an *ad interim* receiver, as an *ad interim* receiver has no power to sell and the section authorises the receiver to sell the property for satisfaction of the charge on the property for costs of the attaching creditor. Again the opinion on the question, whether an application for delivery of the property to the receiver (if a receiver has already been appointed) is necessary, does not appear to be uniform. The following observations were made by Mitter J. in *Mahendrakumar Baishya Shaha* v. *Deeneshchandra Ray Chaudhuri* (1):—

> It has been argued that if this view (*i.e.*, application to the executing court is not necessary) 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 the court is apprised of the pendency of an application for insolvency in another court and of the further fact that such application has been admitted, it should stay its hands so far as the execution of the decree by the creditor of the insolvent is concerned.

(1) (1933) I. L. R. 60 Cal. 696, 700.

In the case of *Mathuresh Chakravarty* v. *S. R. Mills Co., Ltd.* (1), Mukerji and S. K. Ghosh JJ. have observed :—

On reading section 52 of the Provincial Insolvency Act, it seems to us to be perfectly clear that an application has got to be made to the court which was executing the decree and it is that court which, on such an application being made, can direct the property to be delivered to the receiver in order that the sale may be held.

In the two cases cited above a receiver was appointed before the sale. If the executing court comes to know that the application for insolvency has been admitted and that there is a receiver, the attached properties can be made over to him. In the present case, however, no receiver was appointed before the sale in question.

The only order which the court can pass under section 52 is that the property be delivered to the receiver, so that it follows that the order can only be made if the receiver has already been appointed and clothed by the insolvency court with power to take possession of the insolvent's property.

Per Das J. in *Tirpit Thakur* v. *Ramperkash Das* (2).

It cannot be denied that the court executing the decree is to deliver possession to the receiver and to no one else, so far, at any rate, as the provisions of section 52 are concerned. Having regard to the finding, that there was no receiver in existence till after the sale in execution, the court executing the decree could not have acted under section 52.

Sahu Durga Saran v. *Beni Pershad* (3).

On reading the section I am of opinion that the executing court is not bound to stay its hand, if no receiver, to whom the attached property can be made over, is in existence at the time of the sale. But the difficulty of the appellants does not end here. I have already pointed out that the auction-sale in the present case took place on the 23rd May, 1928, and the order of adjudication was made on the 23rd August 1929. The order of adjudication, therefore related back to the date of the presentation of the insolvency petition by section 28(7) of the Act. Now what is the effect of the operation of this doctrine of relation back on the

(1) (1934) 38 C. W. N. 1122, 1123.
(2) [1930] A. I. R. (Pat.) 406 (407); 125 Ind. Cas. 783 (783).
(3) [1933] A. I. R. (All.) 559 (560); 146 Ind. Cas. 832 (834).

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auction-purchaser's title *vis-a-vis* the title of the receiver appointed after the order of adjudication, in whom the property of the insolvent rests by legal fiction from the date of the presentation of the insolvency petition? This point was raised in the Allahabad case cited above. But the learned Judges did not express any opinion on that question, as it was not raised before the lower court. In the present case, however, the decision of the learned judge is mainly based upon the doctrine of relation back. It seems to me that by the operation of section 28(7) the title of the auction-purchaser, who purchases the property of the debtor, after the admission of the insolvency petition but before the order of adjudication, is not absolute but contingent on the insolvency application being dismissed. If the insolvency application is dismissed he gets an indefeasible title: but, if the order of adjudication is made, he cannot claim any title as against the receiver. An exception, however, has been made by the legislature in favour of purchasers in good faith in all cases (section 51, clause 3). In the present case the learned judge has found that the appellants are not purchasers in good faith. In view of the facts and circumstances of this case I find no reason to differ from the finding of the learned judge on this point. I am, therefore, of opinion that the learned judge was right in holding that the appellants have acquired no title to the disputed huts on the basis of the auction-purchase. The appeal is accordingly dismissed with costs. Hearing fee two gold mohurs.

HENDERSON J. I agree. It was strenuously argued before us that the decision of Mitter and M. C. Ghose JJ. (1), to which my learned brother has referred in his judgment, is not correct and we were pressed to refer the question to a Full Bench. But in the present case no receiver was appointed. Section 52 has no application and this point does not require to be decided.

Appeal dismissed.

G. S.

(1) (1933) I. L. R. 60 Cal. 696, 700.