

## APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Das and Mr. Justice Maung Ba.

M.T.T.K.M.M.N. VENKATACHELAN CHETTYAR

v.

M.T.T.K.M.M.S.M.A.R. MURUGESAN AND  
ANOTHER.\*

1931

Feb. 12.

*Provincial Insolvency Act (V of 1920), s. 68—Sale by Receiver—Court's discretion to set aside sale—Power whether limited.*

A sale of property by the receiver is an act of the receiver within s. 68 of the Provincial Insolvency Act. Such sale can be set aside by the Court whenever it is not a fair or just one. The discretion of the Court is not limited to cases of fraud, collusion or material irregularity.

*Hanseshur Ghosh v. Rakkhal Das*, 18 C.W.N. 366; *Ex-parte James*, 9 Ch. Ap. 609; *Mahomed Kala Meah v. Harperink*, 5 L.B.R. 25; *In re Thellusson*, (1919) 2 K.B. 735; *Tiruvenketachariar v. Thangayiammal*, I.L.R. 39 Mad. 479—referred to.

*Maung Tha Dun v. Po Ka*, I.L.R. 5 Ran. 768—dissented from.

*Anklesaria* for the appellant. The ruling in *Maung Tha Dun v. Po Ka* (1) does not express the correct law. The relationship of the receiver to the Court in a case like this is that of an officer of the Court and the Court has unfettered discretion in controlling his acts, see *Tiruvenketachariar v. Thangayiammal* (2). The honour of the Court is in the hands of the receiver whose position is that of a trustee in bankruptcy in England. In *Mahomed Kala Meah v. Harperink* (3) their Lordships of the Privy Council have laid down a high standard of fairness and justice to be expected in dealings between the Court and

\* Civil Miscellaneous Appeal No. 174 of 1930 from the order of the District Court of Tharrawaddy in Civil Miscellaneous Case No. 128 of 1929.

(1) (1927) I.L.R. 5 Ran. 768. (2) (1916) I.L.R. 39 Mad. 479. (3) 5 L.B.R. 25.

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the citizens of the state and the same standard is to be expected from the officers of the Court.

*Aiyangar* for the respondents. Section 68 of the Provincial Insolvency Act gives discretion to the Court to confirm, reverse or modify the act or decision of a receiver against which there is an appeal to the Court. The principles of the decision in *Maung Tha Dun's* (1) case are correct. While the Court has discretion to interfere with the sale by a receiver, it will not exercise this discretion except on the ground of fraud or collusion or on the ground of material illegality or irregularity in conducting the sale, if the interests of creditors are prejudiced thereby. The wording of the paragraph in 5 Rangoon beginning with the words "It is settled law that the Court has no jurisdiction, etc.," is perhaps too wide and not quite accurate. The ruling recognises that the Court has jurisdiction to set aside sales in cases where fraud, collusion, material illegality or irregularity in the conduct of the sale are proved. In the present case it has been found as a fact by the judge of the Court below that there has been no such ground established. The sale should therefore not be interfered with by this Court, and the decision of the Court below should be confirmed.

PAGE, C.J.—This case involves the construction of section 68 of the Provincial Insolvency Act (V of 1920). Section 68 runs as follows:—

"If the insolvent or any of the creditors or any other person is aggrieved by any act or decision of the receiver he may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just."

In the present case the Bailiff of the District Court of Tharrawaddy was appointed receiver of the estate of an insolvent, Maung Po Bu. There were only two creditors interested in the insolvency. On the 20th of August 1930 the receiver, pursuant to the powers with which he was invested under section 59, sold some paddy land belonging to the insolvent to one of the two creditors, who is now the 1st respondent, for Rs. 1,750. On the following day the present application was filed by the appellant who is the other creditor, for an order setting aside the sale. The learned District Judge, holding that there was no fraud or collusion alleged, and no material irregularity proved in connection with the the conduct of the sale, dismissed the application. The appellant has appealed to the High Court.

The facts material for the purpose of disposing of this appeal are few and simple. The appellant lived some distance away from Tharrawaddy, and it appears that the usual hour at which sales are held at Tharrawaddy is 12 o'clock mid-day. The 18th of August was the day appointed by the Bailiff's receiver for the sale of the property in dispute, but on that day the sale was not held, and the Bailiff informed the two creditors that the property would be sold on the following day. On the 19th of August the appellant duly appeared at Tharrawaddy with a view to bidding at the sale, but as the other creditor (the 1st respondent) was not present, the Bailiff stated that he would not hold the sale in his absence, and informed the appellant that he must come early on the morning of the 20th August when the sale would take place. On the 20th of August the appellant arrived at the Court House about 9-30 in the morning, but when he reached the Bailiff's office the Bailiff was not there, and the door of the

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office was closed. Being surprised at not finding the Bailiff in his office the appellant made enquiries, and was informed that the Bailiff was ill, and had gone home. He then proceeded to the Bailiff's house and arrived there about 10-30 a.m. He asked when the sale would take place and the Bailiff then informed him that he had already sold the property. The appellant was much distressed at hearing that the property was already sold and returned forthwith to the Court where he entered an oral protest against the confirmation of the sale. Later in the morning the Bailiff came to the Court, and reported that the sale had taken place without the appellant being present, as he was late. The Bailiff further suggested that the sale might be cancelled if the appellant was prepared to offer Rs. 2,400 for the property. The learned District Judge thereupon ordered that before the sale could be set aside the receiver must give notice to the purchaser, and pay him compensation for the loss that he might thereby incur. On the following day the present application was filed by the appellant.

At the hearing of the application the evidence of a number of witnesses was taken and it was admitted or proved *inter alia* that the Bailiff had gone to his office about 9 o'clock in the morning of the 20th August; that shortly afterwards he had left his office and that between 9 and 10 a.m. he had sold the property to the 1st respondent on the Prome Road in front of the Tharrawaddy Police Station. Admittedly, the appellant was not present, and the 1st respondent in the course of his evidence stated that the Bailiff did not ask him whether the appellant had come to Tharrawaddy or not, and did not make any enquiries as to whether the appellant was proposing to attend the sale. It appears that as soon as

the sale was over the Bailiff asked the Under Bailiff to take the purchase money from the 1st respondent, and then returned home as he said that he was ill.

Now, in these circumstances, it is not surprising that the learned District Judge should have observed that the conduct of the receiver "looked suspicious" although there might not have been any technical irregularity in his conduct of the sale. We are satisfied in the circumstances obtaining in the present case that the sale cannot be upheld. It is unnecessary to find that there was any fraud or collusion in connection with the sale, and I am not prepared to hold that there was any technical irregularity in the conduct of the sale because the Bailiff held it at 10 o'clock in the morning instead of at 12 o'clock mid-day. But in the circumstances of the present case I am satisfied that it was not such a fair sale as should be allowed to stand when conducted by an officer of the Court. As there were only two competitive prospective bidders, the appellant and the 1st respondent, and the Bailiff had expressly refrained from selling the property on the 19th of August in the absence of the 1st respondent, it was neither fair nor reasonable that the Bailiff should hold the sale on the 20th of August in the absence of the appellant at an earlier hour than that at which sales normally were held, and long before the appellant could reasonably be expected to be present, and without making any enquiries to ascertain whether the appellant was in Tharrawaddy or giving the appellant any opportunity to be present when the sale took place.

Now, the learned District Judge based his decision to dismiss the appellant's application solely upon the authority of *Maung Tha Dun and one v. Po Ka and one* (1). In that case an application was made by

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certain insolvents to set aside a sale by the receiver in insolvency, and the learned Judges (Heald and Darwood, JJ.) held that the provisions of Order 21 of the Civil Procedure Code did not apply to sales by a receiver under the provisions of the Provincial Insolvency Act. It was therefore incumbent upon their Lordships to consider whether the sale should be set aside in a proceeding which they treated as an appeal from an act of the receiver under section 68 of the Provincial Insolvency Act. In the course of their judgment the learned Judges observed that :

“ For the purposes of this appeal it may be assumed that the petition asking for cancellation of the sale was in effect an appeal under section 68 of the Provincial Insolvency Act to the District Judge against the sale made by the receiver. But in view of the fact that the receiver was entitled to sell the property without the consent of the Court the power of the Court to set aside the sale comes into question.

It may, we think, be taken as settled law that the Court has no jurisdiction to set aside a sale held or made by the receiver in the absence of proof of fraud or collusion or material illegality or irregularity in conducting the sale or misconduct on his part causing injury to the estate. The sale may, of course, be set aside if the receiver acts beyond his authority, or in excess of the powers conferred on him.”

Upon a consideration of the evidence the learned Judges held that there was no justification for setting aside the sale either upon the ground of fraud or collusion or material irregularity, and upon the facts disclosed in the evidence I respectfully agree with the learned Judges that there was no ground to justify the cancellation of the sale. But in laying down the law in the terms to which I have referred the learned Judges, in my opinion and with all due respect, were not correctly stating the law. However, as the learned Judges observed that the law might be taken as settled in the above sense we adjourned the hearing

of the appeal in order that the learned advocates might endeavour to ascertain whether there was a line of authorities to support of the proposition of law which was enunciated in that case. Notwithstanding their researches they have not been able to discover any authority in support of the law as laid down by their Lordships. On the contrary I venture to think, both upon principle and upon authority, that the law as settled is to the following effect. It is expressly enacted in section 68 of the Provincial Insolvency Act that any act of the receiver may be confirmed, reversed or modified as provided in the section. It cannot be doubted, I think, that a sale of property by the receiver is an act of the receiver within section 68. Under section 28 (2) "on the making of an order of adjudication the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided," and by section 56 (1) "the Court may, at the time of the order of adjudication or at any time afterwards, appoint a receiver for the property of the insolvent, and such property shall thereupon vest in such receiver." It was decided by the Madras High Court in *Tiruvenkatachariar v. Thangayiammal and another* (1) that "the language of section 22 of the Provincial Insolvency Act (now section 68 of the present Act) is clear and unambiguous, and gives unfettered discretion to the Court to set aside the order passed by the Official Receiver." Now, in what circumstances ought the Court in the exercise of its discretion under section 68 to set aside a sale by the receiver of an insolvent's estate? The Court would not readily set aside such a sale unless in the circumstances of the case the Court is satisfied that it would not be fair or just that the sale should stand. No doubt, if fraud

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(1) (1916) I.L.R. 39 Mad. 479 at p. 483.

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or collusion was proved in connection with the sale that would be a ground upon which the Court would set aside the sale, or, again, if there was material irregularity in the conduct of the sale the Court probably in that case also would be disposed to set aside the sale. But the Court is not fettered in its discretion to set aside the sale in any case in which it thinks that the sale was neither a fair nor a just one. Upon his appointment, and while he is acting as receiver, the receiver is an officer of the Court: (*Hanseshur Ghosh v. Rakhal Das Ghosh* (1); *Civil Miscellaneous Appeal No. 89 of 1915 in the Chief Court of Lower Burma*;) and the standard of conduct that the Court requires of its officers in conducting their business has long been settled. In *Ex-parte James* (2), James, L.J., observed:—

“I am of opinion that a trustee in bankruptcy is an officer of the Court. He has inquisitorial powers given him by the Court, and the Court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The Court, then, finding that he has in his hands money which in equity belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people.”

In *Mahomed Kala Meah v. A. V. Harperink and one* (3) Lord Macnaghten, delivering the judgment of the Judicial Committee of the Privy Council, in memorable words observed:—

“It has been laid down again and again that in sales under the direction of the Court it is incumbent on the Court to be scrupulous in the extreme, and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. The Court, it is said, must at any rate not fall below the standard of honesty which it exacts from those on whom it has to pass judgment. The slightest suspicion of

(1) 18 C.W.N. 366.

(2) L.R. 9 Ch. Ap. 609 at p. 614.

(3) (1909-10) 5 L.B.R. 25 at p. 33.



trickery or unfairness must affect the honour of the Court, and impair its usefulness."

[See also *In re Thellusson* (1).]

Applying these principles to the facts of the present case, in my opinion it would be neither fair nor just for the Court to allow the sale to stand, and for the reasons that I have stated the appeal will be allowed, the order of the District Court discharged, and the sale set aside. The appellant is entitled to his costs out of the estate, 5 gold mohurs in each Court. We make no order as to the costs of the 1st and 2nd respondents.

DAS, J.—I agree.

MAUNG BA, J.—I agree.

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### FULL BENCH (CRIMINAL).

*Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Das and Mr. Justice Offer.*

### KING-EMPEROR

v.

MAUNG BA THON AND ANOTHER.\*

1931

Feb. 16.

*Criminal Procedure Code (Act V of 1898). sections 435, 436—Further enquiry, meaning and scope of—Enquiry and trial differentiated—Section 438, when to be applied.*

*Held*, that a subordinate Magistrate, directed to make further enquiry into a warrant case by an order made under section 436 of the Criminal Procedure Code, has all the powers prescribed in Chapter XXI of that Code.

*Per* PAGE, C.J.—In an order for further enquiry passed under section 436 of the Criminal Procedure Code no directions or instructions fettering his discretion in the exercise of the powers granted under Chapter XXI of the Code can lawfully be given to the Magistrate as to the manner in which he should conduct the inquiry.

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(1) (1919) 2 K.B. 735.

\* Criminal Reference No. 1 of 1931 arising in Criminal Revision No. 168 of 1930 at Mandalay.

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