

APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Parsons.

ISHVAR LAKHMIDAT (ORIGINAL OPPONENT), APPLICANT, v.
HARJIVAN RAMJI (ORIGINAL APPLICANT), OPPONENT.*

896.

January 30.

Decree—Execution—Order for sale of mortgaged property in execution—Application by judgment-debtor to be declared insolvent—Sale in execution pending application—Subsequent declaration of insolvency does not affect sale—Civil Procedure Code (Act XIV of 1882), Secs. 344-351.

An order for the sale of mortgaged property having been made on the application of the mortgagee who had got a decree, and before the sale had taken place, the mortgagor (judgment-debtor) applied to be made insolvent under section 344 of the Civil Procedure Code (Act XIV of 1882). Five months after the sale he was duly declared an insolvent under section 351.

Held, that the subsequent declaration of the mortgagor's insolvency did not affect the sale or render it illegal. No consequences in derogation of the ordinary rights of judgment-creditor follow from an application by the judgment-debtor under section 344 of the Civil Procedure Code (Act XIV of 1882). It is only when a receiver is appointed under section 351 that the property of the insolvent vests in the receiver under section 354 and the rights of the creditor are interfered with. It is not provided that such an order shall have any retrospective effect.

APPLICATION under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Gilmour McCorkell, District Judge of Ahmedabad, confirming the order of Khán Sáheb Navroji Byramji, Subordinate Judge of Umreth.

On the 25th April, 1893, opponent Harjivan Ramji mortgaged his house and other property to one Ishvar Vrajlal for Rs. 300. Ishvar obtained a decree on the mortgage for the recovery of the debt by the sale of the mortgaged property in default of payment. On the 26th February, 1894, Ishvar applied for the sale of the mortgaged property in execution of the decree. While this application was pending, Harjivan, on the 2nd April, 1894, applied to be declared an insolvent under section 344 of the Civil Procedure Code (Act XIV of 1882). On the 17th July, 1894, the mortgaged property was sold in execution and was purchased by the applicant Ishvar Lakhmidat. Subsequently the inquiry as to Harjivan's insolvency was proceeded

* Application No. 195 of 1895 under the Extraordinary Jurisdiction.

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with, and he was declared to be an insolvent on the 22nd December, 1894. The Názir of the Court was appointed receiver of his property and the sale of the house to the applicant was set aside on the ground that the pendency of the insolvent's application rendered the sale illegal.

On appeal by the applicant the Judge confirmed the order.

The applicant then obtained a rule *nisi* to set aside the order.

Gokuldas K. Parekh appeared for the applicant in support of the rule :—We contend that the Subordinate Judge had no authority to quash the execution proceedings in a summary manner. A court-sale can be set aside only on the grounds mentioned in section 311 of the Civil Procedure Code. Further, the order under section 351 of the Civil Procedure Code is not retrospective. The mere application under section 344 has no effect. There is no vesting order made until the applicant is declared an insolvent. The Subordinate Judge has relied on the decision in *Firaraghava v. Parasurama* ⁽¹⁾, which has nothing to do with attachments which came into existence before a vesting order is made.

There was no appearance for the opponent.

FARRAN, C. J.:—The sequence of the proceedings which gave rise to this application was as follows. Ishvar Vrajlal early in 1894 obtained a decree upon a mortgage of the 25th April, 1893, against his mortgagor Harjivan. The decree directed the sale of the mortgaged premises—a house—in default of payment. On the 26th February, 1894, Ishvar applied to have the house sold in execution of his decree, and the usual orders for sale were made. Prior to the sale taking place, Harjivan on the 2nd April, 1894, presented an application to be declared an insolvent under section 344 of the Code of Civil Procedure. While this application was pending, the house in question was sold in execution on the 17th July, 1894, and the present applicant, Ishvar Lakhmilat, became the purchaser.

Certain objections had been made as to the right of Harjivan to make the application to be declared an insolvent. These were

(1) L. L. R., 15 Mad., 372.

disposed of by the Subordinate Judge on the 1st August, 1894, when he decided to entertain the application and to proceed under section 347 of the Code. The usual notices were served. Harjivan was examined, and on the 22nd December, 1894, was declared an insolvent. The Názir of the Court was at the same time appointed receiver of his property.

At the same hearing the Subordinate Judge set aside the sale of the house to the auction-purchaser on the ground that the pendency of the insolvent's application rendered the sale of the house illegal. The District Judge on appeal confirmed the order. The present application under section 622 of the Code is made to set aside the order of the Subordinate Judge.

We are unable to find any ground for the action of the Subordinate Judge. The Code of Civil Procedure does not provide that any consequences in derogation of the ordinary rights of judgment-creditors shall follow from an application by the judgment-debtor under section 344. It is only when a receiver is appointed under section 351 that the property of the insolvent vests in the receiver under the provisions of section 354, and the rights of the creditors are interfered with. It is not provided that such an order shall have any retrospective effect.

There was nothing illegal, therefore, in the sale of the house to the present applicant, and the order of the Subordinate Judge setting it aside must be cancelled. The difficulty has arisen from the great delay which occurred in dealing with the insolvent's application. Such matters should be at once disposed of.

Rule made absolute.

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