

(1962) 06 KL CK 0028

High Court Of Kerala

Case No: A.S. No. 596 of 1958

Kottayam Orient Bank Ltd.

APPELLANT

Vs

The Official Receiver, Kottayam
and Another

RESPONDENT

Date of Decision: June 28, 1962

Acts Referred:

- Provincial Insolvency Act, 1920 - Section 51(3)
- Travancore-Cochin Insolvency Act, 1955 - Section 28(2)

Citation: (1962) KLJ 1427

Hon'ble Judges: M.S. Menon, C.J; K.K. Mathew, J

Bench: Division Bench

Advocate: M.P. Varghese and M.P. Thomas, for the Appellant; C.K. Sivasankara Panicker for Respondent 1, for the Respondent

Final Decision: Dismissed

Judgement

Mr. K.K. Mathew, J.

This is an appeal filed by the 2nd counter-petitioner in Insolvency case No. 6 of 1117 of the Kottayam District Court. One Kymal was adjudicated as insolvent on 29th Karkatakam 1118 on a petition filed by a creditor on 13th Kumbham 1117. Thereafter the Official Receiver filed an application under Sections 4, 53 and 54 of the Travancore Insolvency Act, VIII of 1108, to set aside Ext. A sale deed, dated 13th Vrischigam 1117, executed by the insolvent in favour of the 1st counter-petitioner and also a court sale held on 6th Karkatakam 1119 in execution of the decree in O. S. No. 552 of 1109 of Kottayam Munsif's Court. This decree was passed on the basis of a hypothecation bond executed by the insolvent on 24th Chingam 1105 and it is dated 19th Karkatakam 1109. The appellant-bank took an assignment of the decree in 1112 and in execution, purchased the property in court auction on 6th Karkatakam 1119. The court sale was confirmed on 6th Chingam 1120 and the appellant got delivery of possession on 3rd Kanni 1120. The receiver's application

was filed on 6th Chingam 1122. The lower court came to the conclusion that Ext. A sale deed was executed by the insolvent without any bona fides and without any intention to transfer the title to the property to the vendee and therefore set aside Ext. A; and as regards the court auction sale, the lower court found that the Receiver was a necessary party to the execution proceedings; and as there was no representation of the equity of redemption at the time when the property was sold in court auction, the court sale was invalid. Therefore, the lower court allowed the petition filed by the Receiver.

2. In this appeal the main contentions raised are :

(1) that Ext. A sale deed is not void,

(2) that the court auction purchase by the appellant should not have been declared invalid, and

(3) that the Official Receiver should not have been allowed to recover the property as the appellant was a bona fide purchaser in court auction. With respect to the first contention, the Learned Counsel submitted that the only conclusion possible on the finding of the lower court is that the Receiver was not a necessary party to the proceedings in execution, as the title to the property passed under Ext. A to the vendee; and therefore, there was no vesting of the property in the Receiver on the date of the order of adjudication. We are afraid that the appellant has misconceived the scope of the finding by the lower court. The finding by the lower court is that Ext. A sale deed was a fictitious document, that the considerations recited therein were non-existent, that there was no intention to transfer title to the property and that possession did not pass to the vendee but remained with the insolvent. The actual finding recorded by the lower court is:

To me it appears that it is not necessary to decide in this case as to whether Ext. A can be set aside under S. 53 or 54 of the Insolvency Act for, Ext. A was only a sham document by which the insolvent did not intend to part with his right in the property. On this ground Ext. A has to be set aside.

Earlier in that paragraph it is stated :

To me it appears that Ext. A was only a fictitious transaction and Ext. A was brought into existence, at the instance of the bank to defeat and defraud the other creditors of the bank.....From what I have stated above it is clear that the Official Receiver has proved beyond a shadow of doubt that Ext. A was brought into existence at the instance of the bank to defeat and defraud the other creditors of the insolvent.

On reading the judgment, we are left with the impression that, all that the learned Judge really meant was that Ext. A sale deed was executed by the insolvent with no intention to transfer the title in favour of the vendee. If that is so, we are of opinion that what the lower court really did was to declare Ext. A as a sham transaction, u/s 4. Ext. A being a sham transaction, the title to the property remained with the

insolvent and it vested in the Receiver on the adjudication of the debtor as insolvent.

3. The next point is whether the court auction sale is liable to be set aside. The appellant's Learned Counsel contended that the sale held in auction cannot be set aside merely because the Receiver was not a party to the execution proceedings. He referred to the proviso to Section 28 (2) of the Travancore Insolvency Act in support of his contention that a secured creditor can proceed to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it, if the sub-section had not been enacted. He contended that if insolvency had not intervened, the Official Receiver would not have been a necessary party. We do not think that Section 28(2) would warrant a secured creditor to proceed to sell the property in the absence of the person to whom the equity of redemption has been assigned by operation of law. In *Kola Chand Banerjee v. Jaganath Marwari* (I. L. R. 54 Cal. 595) the Privy Council has held, that after an order of adjudication, proceeding in execution of a decree charged on the property without the Official Receiver on record to represent the equity of redemption is not binding on the estate of the insolvent. Lord Salvesan, delivering the judgment of the Judicial Committee observed at page 598 :

Their Lordships are clearly of opinion that this construction of the clause cannot be supported. That the rights of the secured creditor over a property are not affected by the fact that the mortgagor or his heir has been adjudicated insolvent is, of course, plain, but that does not in the least imply that an action against him may proceed in the absence of the person to whom the equity of redemption has been assigned by the operation of law. The latter alone is entitled to transact in regard to it, and he and not the insolvent, has the sole interest in the subject matter of the suit. To him, therefore, must be given the opportunity of redeeming the property. The contrary view would encourage collusive arrangements between the secured creditor and the insolvent and might involve the sacrifice of valuable equities of redemption which ought to be made valuable for the benefit of the unsecured creditors of the insolvent with whose interests the Receiver is charged.

This view was followed by the Travancore High Court in *Gopala Kammathi v. Official Receiver, Alleppey* (1945 T. L. R. 483) and by the Madras High Court in [Guduri Anjayya and Another Vs. Devabhaktuni Gundarayudu and Others](#), [Subbaiah Goundan Vs. Ramasami Goundan and Others](#), and [Bachu Mallikarjuna Rao Vs. The Official Receiver and Others](#). We agree with the reasoning in these cases and respectfully adopt it and hold that the court auction purchase is invalid and not binding on the estate of the insolvent.

4. It was next contended for the appellant that whatever be the defect in the title, a person, who in good faith, purchased the property of the debtor under a sale in execution, is protected by Section 51(3) which reads as follows:

A person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the Receiver.

In support of his contention, he relied upon a ruling reported in *Srirangamma v. Narayananamma* (A. I. R. 1956 AP 243) where a Full Bench of the Andhra High Court has held that a bona fide purchaser of the debtor's property in an execution sale in a mortgage decree, held after the order of adjudication, will acquire a good title as against the Receiver u/s 51(3). The learned Judge who spoke for the Full Bench referred to the decision of the Privy Council in *Raghunath Das v. Sunder Das* (I. L. R. 42 Cal. 72) and observed at page 246 as follows:

The Judicial Committee hold that the execution sale was inoperative to convey any title to the purchaser. In the Indian Insolvency Act there was no provision corresponding to Section 51 (3) of the Provincial Insolvency Act, 1920 or Section 34(3) of the Act of 1907 affording protection to the purchaser at the court sale. This was pointed out by Venkatasubbarao J. in *Muthan Chettiar and Another Vs. Venkituswami Naicken*, who took the view that Section 51(3) was not controlled by the provisions of O. XXI, R. 22, Civil Procedure Code, that a court sale of the property of the judgment-debtor after adjudication was not a nullity and that a purchaser in good faith was protected by Section 51(3). Mockett J. in *Mallikarjuna v. Official Receiver, Krishna*, adverted to this point and observed :

If the word debtor (in Section 51(3)) is to be used as meaning insolvent (i.e.) a person who has been adjudicated, then in spite of the decision of the Judicial Committee, in *Raghunath Das v. Sundar Das* where no provision similar to Section 51(3), Provincial Insolvency Act had to be considered, I should feel constrained to hold that the Indian Legislature intended to give sanctity to sales by the Court in all cases and that all cases mean sales both before and after adjudication.

The learned Judge, however, went on to hold that the word "debtor" found in Section 51(3) was inapplicable after adjudication. "Debtor" includes a "judgment-debtor" but there is no other definition of the word in the Act. An insolvent is and remains a debtor even after adjudication and until discharge. The words "debtor" and "insolvent" have been so loosely used in the Act that no inference can be drawn from the use of the word "debtor" in S. 51(3). There are numerous sections where an adjudicated insolvent is referred to as a debtor. See for example Sections 43 (1) and (2), 41 (1) and (5), 36, 35, 31 (2), 29, and 27 (1) and (2).

The same view is taken in the decisions reported in *Jogendra Nath Kundu and Another Vs. Jogneswar Mandal and Others*, *Khurshid Ali Vs. Lachman Singh and Others*, and *Motilal v. Nathu* (I. L. R. 1942 Nag. 377). The contrary view that a sale in execution of a decree charged on the property held after the order of adjudication without the Receiver on the party array is not protected by Section 51(3) is taken in the following cases: *Gopala Kammathi v. Official Receiver* (1945 T. L. R. 483), *Thiruvarimuthu Pillai Bhagavathi Muthu Pillai v. Official Receiver* (I. L. R. 1950 T. C.

125), Pulvarathi Ammanna v. Ramakrishna Rao (A. I. R. 1949 Mad. 886), Anjayya v. Gundarayudu (A. I. R. 1943 Mad. 381), Subbiah v. Ramasami (A. I. R. 1954 Mad. 604) and Mallikarjuna Rao v. Official Receiver (A. I. R. 1938 Mad 449). In Gopala Kammathi v. Official Receiver (1945 T. L. R. 483) the erstwhile Travancore High Court considered this question and Nokes J. delivering the judgment of the court, is reported to have said at page 487:

Prima facie the sub-section establishes a title in a purchaser in good faith against the receiver "in all cases" and this construction has found favour in some jurisdictions in British India; as exemplified by the decisions in Choudhuri v. Biswas (I. L. R. 62 Cal. 457) and AIR 1940 414 (Nagpur). But other jurisdictions have held the apparent universality of the words" in all cases as limited by the heading of the chapter which starts with S. 51, and is in the words, "effect of insolvency on antecedent transactions"; as exemplified by the decisions in Mallikarjuna Rao v. Official Receiver, Kistna (I. L. R. 1938 Mad. 1063) and Karamsetti Guravaiah Vs. V. Rangiah, Official Receiver and Others, , where many of the earlier cases were considered.

At page 488, the learned Judge observed :

In the absence of any authority on this point in Travancore, we hold that S. 51 (3) applies only to sales in execution before some proceeding in insolvency, in this case adjudication. It therefore does not validate an execution sale which is otherwise void.

In Thiruvarimuthu Pillai Bhagavathi Muthu Pillai v. Official Receiver (I. L. R. 1950 T. C. 125) this question was considered by the Travancore-Cochin High Court and the learned Judges expressed the view that a sale in execution of a mortgage decree after the order of adjudication is not protected by S. 51 (3). In Bachu Mallikarjuna Rao Vs. The Official Receiver and Others, , Burn J. considered the question rather elaborately and at page 450, he made the following observations:

Again it must be noticed that S. 51 (3) deals with purchase of the "property of a debtor." Now upon adjudication the property of an insolvent vests immediately in the Official Receiver, i.e., the property passes to the Official Receiver and in so far as the judgment-debtor is concerned, there is no property of his which can be sold by the executing court. This was very clearly stated by Their Lordships of the Privy Council in 42 Cal. 72. The Judgment of Lord Parker states that in Their Lordships opinion, the sale in that case was altogether "irregular and inoperative." His Lordship goes on to state three grounds for this opinion:

"In the first place, the property having passed to the Official Assignee, it was wrong to allow the sale to proceed at all. The judgment-creditors had no charge on the land, and the court could not properly give them such a charge at the expense of the other creditors of the insolvents. In the second place, no proper steps had been taken to bring the Official Assignee before the Court and obtain an order binding on

him, and accordingly he was not bound by anything which was done. In the third place the judgment-debtors had at the time of the sale no right, title or interest which could be so sold to or vested in a purchaser, and consequently the respondents acquired no title to the property".

We are inclined to agree with the reasoning in *Mallikarjuna Rao v. Official Receiver* (A. I. R. 1938 Mad. 449). One reason which induced us to adopt this reasoning is that when once it is held that a purchase in execution without the Official Receiver on record is not binding on the estate of the insolvent, it would be rather anomalous and illogical to hold that the purchaser is protected because of his good faith. We think that this is a case where pre-eminently the maxim *nemo dat quod non habet* should be applied. No person can convey a higher title than he himself has. After all, a court auction purchaser will get only the right, title and interest of the judgment-debtor. If the judgment-debtor had ceased to have any right, title, and interest in the property at the time of the sale, it stands to reason, to hold, that a sale held with him on record would be a nullity, and the fact that the auction purchaser is a bona fide person, is not a ground for holding that a non-existent title has been conveyed. It is very doubtful whether the Legislature intended to extend the immunity of a purchase in good faith in court-auction to such cases, even in spite of the apparent universality of the language in sub-section (3) of Section 51. In this view of the matter, we hold that Section 51(3) can afford no protection to the appellant in this case.

5. The next point argued by counsel for the appellant is that his client ought not to have been made liable for Rs. 1,500/- for value of the building removed by him. We think that this contention of the appellant is reasonable. In Exts. D and E, petitions filed by the insolvent, the value of the building was shown as Rs. 1,000/-. We accept the correctness of the valuation of the building in Exts. D and E and hold that the value of the building is Rs. 1,000/-. Then the further submission made by the appellant is that his liability for mesne profits can arise only from the date of the adjudication by the lower court of the non-binding character of the court auction purchase. The lower court has made the appellant liable for mesne profits from the date of presentation of the petition by the Official Receiver to annul the court sale. We hold that the appellant will be liable for mense profits only from the date of the order of the lower court, i.e., from the 2nd August 1958. In the result, we dismiss the appeal with the modifications mentioned above, but in the circumstances without costs.