(1925) 11 CAL CK 0005

Calcutta High Court

Case No: None

(Hajee) Tyeb Ali Mullick		APPELLANT
	Vs	
Purna Chandra Pal and Others		RESPONDENT

Date of Decision: Nov. 19, 1925

Citation: AIR 1926 Cal 618

Hon'ble Judges: Sanderson, C.J; Rankin, J; Pearson, J

Bench: Full Bench

Judgement

Pearson, J.

June 18,1925. The applicant, one of the creditors of the insolvent, asks that certain proceedings held before the Registrar should be re-opened. Purna Chandra Pal claimed against the estate as a mortgagee. On his application, with the consent of Official Assignee, the usual enquiry was held by the Registrar under Rule 18 of the second schedule to the Act. The applicant now asks that that enquiry may be re-opened, alleging that the mortgage was collusive, without consideration, and in fraud of the creditors. He says the enquiry was held without notice to the creditors entitled to oppose and that the Official Assignee is not in a position to judge what his attitude should be unless he first consults the creditors.

2. In my opinion this application cannot succeed. The enquiry was in accordance with Rule 18. There is no procedure laid down in the Act which confers on a creditor the right to make such on application, or setting up charges which would come within Section 55 of the Act. The Official Assignee may proceed thereupon, if he will, after satisfying himself of the sufficiency of the allegations. But I cannot allow the enquiry that has taken place to be re-opened at the instance of a creditor.

3. The application is misconceived and must be dismissed with costs.

Pearson, J.

4. July 14.--This is a matter which came up before me on the 18th June last and I wrote an order on that occasion which resulted from a misconception of the circumstances in which the matter was brought before me; the order was therefore subsequently vacated by common consent and now comes up again.

5. It appears that what has happened in those proceedings is as follows: Steps have already been taken for proof of a mortgage under Rule 18 before the Registrar and an order has been made in those proceedings ex parte. Subsequent to the order being made the present applicant, who is one of the creditors, applied to the Registrar for the matter there to be re-opened. That application was granted by the Registrar and he sent the matter before this Court for further enquiry and proof of the mortgage.

6. It appears that the Official Assignee is now taking steps u/s 36 of the Act and a representation is now made on behalf of the creditor who is the applicant that this matter should stand over until those proceedings have terminated in order that the Official Assignee may then be in a position to judge whether or not proceedings u/s 55 should be adopted; if, not, then the present proceedings will be concluded upon that footing.

7. It appears to me unnecessary in the circumstances to delay the consideration of the present matter. I think that in point of fact, as I indicated in my previous judgment a creditor has no locus standi to make an application for the re-opening of the proceedings, and although there has been no appeal from that order that is the basis upon which the matter now comes before me, and I do not think a creditor ought to be heard in a matter of this kind. The Official Assignee, it is conceded, will not be embarrassed by the ex parte order that has already been made upon the enquiry into the mortgage in so far as his proceedings u/s 36 and Section 55 are concerned.

8. The order I now make is, let the records be sent back to the Registrar and the order for costs that has already been made will stand. (The following judgment is on appeal against this order).

Sanderson, C.J.

9. This is an appeal by Hajee Tyeb Ali Mullick against the judgment of my learned brother, Mr. Justice Pearson delivered on the 14th day of July 1925, when the learned Judge was exercising insolvency jurisdiction.

10. The facts relating to the matter, which this Court has to consider, do not appear in the two judgments of the learned Judge; and, as it is a matter of some importance I think it is necessary to state the facts shortly;

11. It appears that Hajee Amiruddin Mullick was adjudicated insolvent on his own petition on the 24th of January 1925. Before that, namely on the 12th of March 1923, he had executed a mortgage of certain immovable property in favour of Purna

Chandra Pal, and, in the same document, he included a charge upon certain shops, or stalls as they had been called, and their contents. P.C. Pal is the principal respondent in this appeal, the other respondent being the Official Assignee.

12. The appellant instituted a suit against the insolvent Hajee Amirruddin Mullick some time in 1923 and obtained a decree on the 11th of February 1924, and attached the shops and their contents on the 15th January 1925. It was stated by the learned advocate, who appeared for the appellant, that the insolvent had filed no schedule of his assets nor had any meeting of the creditors been called.

13. In that state of affairs the respondent, Purna Chandra Pal, made an application to this Court under Rule 18 of Sch. 2 of the Presidency Towns Insolvency Act; and, on the 21st February 1925, the Registrar made an order. That order recites that it was made with the consent of the Official Assignee.

14. The material parts of the order are as follows;

It is ordered that the Registrar of this Court do enquire whether the said Purna Chandra Pal is a secured creditor of the said insolvent and holds a mortgage from him, and if so for what consideration and under what circumstances such mortgage was effected by the said insolvent. And it is further ordered that in the event of his finding that the said Purna Chandra Pal is a Mortgagee of the properties of the said insolvent the said Registrar do take the accounts and make the enquiries necessary of ascertaining the principal and interest due to the said Purna Chandra Pal under such mortgage in his favour.... And it is further ordered that upon the said Registrar being satisfied that the said Purna Chandra Pal is a mortgagee of the said insolvent as aforesaid, and upon his making a report thereon, the said Official Assignee be at liberty to sell under the provisions of the Presidency Towns Insolvency Act III of 1909 the properties....

15. The Registrar apparently dealt with this matter on the assumption that the application was unopposed; and, on the 19th of March 1925, he made a report which is to this effect;

I hold that the mortgage has been proved, subject to a translation of the mortgage being put in, a report would be made to that effect.

16. I have some difficulty in understanding the exact meaning of that order, because, as I understand, at that time the Registrar was purporting to deal with this matter on the assumption that he had jurisdiction to entertain and dispose of it; and, therefore I do not understand the reference which he made to the report in the order, which I have read. I do not understand to whom the report would be made in view of the fact that it was the Registrar himself who would deal with the matter. He had in fact made an order that upon the Registrar being satisfied that Purna Chandra Pal was a mortgagee the Official Assignee would be at liberty to sell. However, that is not of much, if any, importance now, because on the 4th of April

the appellant made an application to the Court, and it appears that the application was for an order that the enquiry should be re-opened and the mortgage in favour of Purna Chandra Pal should be declared void and inoperative and that such other order should be made as the circumstances might require.

17. Upon that the Registrar came to the conclusion that as the mortgage was challenged he had no jurisdiction to deal with it. He therefore, directed that the equiry should be re-opened, and should be held before the learned Judge.

18. The matter came before my learned brother, Mr. Justice Pearson. He made an order which, it is agreed, was made under a misconception of the application which had been made to him, and which was subsequently vacated. The matter finally came before the learned Judge on the 14th of July 1925.

19. It appears that by this time the Official Assignee was taking steps u/s 36 of the Presidency Towns Insolvency Act for the purpose of examining the alleged mortgagee with regard to the mortgage, the consideration therefor and so forth; and, it now appears that the Official Assignee had withdrawn his consent to the application, which was made to the Court under Rule 18 of the second schedule. The Official Assignee has informed us this morning that he did not put that withdrawal of consent into writing and that he did not give any formal notice of that withdrawal, as in my opinion he ought to have done. He informed us that he had told the parties, and that the Registrar was aware of the fact that he had withdrawn his consent. He pointed out that the fact that he was taking proceedings u/s 36 of the Act would go to show that he had withdrawn his consent to the application made under Rule 18; I am inclined to agree with him. At the same time, in my judgment it would have been much better and in accordance with the usual course if he had expressly stated in writing that he had withdrawn his consent especially having regard to the fact that it appeared in the order, to which I have referred, that his consent had been given to the application.

20. The learned Judge discussed the question as to whether the creditor, that is, the appellant, had any locus standi in connexion with the application under Rule 18 of the second schedule. I do not think it necessary to express any definite opinion upon that question today, because it seems to me, with great deference to the learned Judge, that the order which he made should not be allowed to stand for reasons which I will presently give.

The order was as follows;

This Court does not think fit to make any order on this application except that the Registrar of this Court be at liberty to proceed with the enquiry now pending before him.

21. In my opinion this order ought not to have been made for these reasons. It was known that the Official Assignee was proceeding u/s 36 of the Presidency Towns

Insolvency Act for the purpose of arriving at a decision whether he would take any proceedings u/s 55 of the Insolvency Act or under any other provision with a view to set aside the mortgage or attack its validity.

22. It was also apparent that the appellant was contesting the validity of the mortgage. In these circumstances, in my judgment, it was not right to refer the matter back to the Registrar to proceed with the enquiry upon the basis of the mortgage being a valid one, and upon the basis that there was no contest as to its validity, when it must have been clear that if the Official Assignee were to take proceedings in consequence of his enquiries, the result might be that the mortgage might be held to be invalid.

23. In my judgment, the proper order which should be made in this case is that the proceedings under Rule 18 of the second schedule of the Act should be stayed pending the proceedings which are being taken by the Official Assignee u/s 36 of the Act. The Official Assignee will have one month from today (as we have now been informed that the proceedings u/s 36 are now concluded) within which time he will decide whether he will take any proceedings for the purpose of setting aside the mortgage. If he comes to the conclusion that he will take such proceedings, then the application under Rule 18 will continue to be stayed until those proceedings are determined. If, on the other hand, the Official Assignee comes to the conclusion that he will not take proceedings for the aforesaid purpose, then he must give notice in writing to the appellant that he does not intend to take further proceedings with respect to the mortgage. If that contingency arises then the proceedings under Rule 18 will be stayed for a further fortnight from the receipt of such notice, in order that the appellant may have that time within which to decide whether he will take any proceedings which he may be advised.

24. The order of the learned Judge must be set aside and there will be no order as to the costs of the proceedings before Mr. Justice Pearson; the reason for that direction is that the application was really for an adjournment and it is not possible to decide at the present moment whether that application for adjournment was justifiable.

25. We are of opinion that the respondent, Purna Chandra Pal, must pay the costs of the appellant as far as this appeal is concerned.

Rankin, J.

26. The proceedings in the Court below show so much misconception that it is perhaps worth while to attempt observations in the hope that they may be of some use in the future.

27. The present is a case where the adjudication order was made on the 24th of January 1925. The proceedings arise out of a mortgage document which purports to have been entered into on the 12th of March 1923, that is to say, within two years of the adjudication. I ignore the fact that some of the premises covered by the

mortgage would appear to be moveable property; The mortgagee on the 21st of February 1925, i.e., less than a month from the adjudication order before the insolvent had filed any schedule, before any notices apparently had gone to the creditors or the persons interested in the estate had any time to consider the position--made an application under Rule 18 of Schedule II to the Presidency Towns Insolvency Act. The form of the application was that the Official Assignee be at liberty to sell the mortgage subjects and after the sale to pay the mortgagee''s debt. The first thing that happened was that to that application the Official Assignee signed his consent: and, accordingly the matter was dealt with by the Registrar in Insolvency and not by the Judge. On reading that petition, the first order which under Rule 18 might have been made was an order appointing a certain time in the future as the date upon which the Court would enquire into the existence and validity of the mortgage. Nothing further should have been ordered at that stage. When the time came to hold an enquiry, if the mortgage had been substantiated then the officer had it open to him to make another order, namely, declaring the existence of the mortgage and directing that certain accounts should be taken if necessary, also by that order having declared the existence of the mortgage, he might direct a sale. In the present case the proceedings started by an order which was in my judgment improper and inexpedient, because it was an order which said that the Court was to enquire whether P.C. Pal was a "secured creditor" and so forth; and, it was ordered that in the event of his finding that P.C. Pal was a mortgagee, the Registrar would take the accounts and so forth; and upon his making a report thereon "that the Official Assignee be at liberty to sell." All this was before there was any finding that there was a mortgage at all and, in my judgment, that is a bad practice and contrary to the plain terms of Rule 18 itself which says;

If it is found that such person is such mortgagee, and if no sufficient objection appears to the title of such person to the sum claimed by him under such mortgage, the Court shall direct such accounts and inquiries to be taken as may be necessary for ascertaining the principal, interest and costs due upon such mortgage, and...if satisfied that there ought to be a sale.

28. i.e., to say at that stage there ought to be a sale) "shall direct notice to be given" and so on. That is the first thing that was wrong, if I may say so, was this: The mortgagee may stand upon his security and ignore the bankruptcy altogether except to this extent that he must recognize that the Official Assignee now stands in the place of the original mortgagor. He may, therefore, bring a suit like anybody else upon the mortgage making the Official Assignee a defendant mortgagor and if he does that then all enquiries proper in a mortgage suit will be made by the Court, all the necessary parties will be present in Court and a good deal of time and expense will be incurred. But to facilitate the administration of an involvent''s estate Rule 18 of Sch. 2 of the Presidency Towns Insolvency Act gives the mortgagee the great advantage which one of the English Bankruptcy Rules--R. 75 has for many years past given to a mortgagee where the mortgagor is an insolvent. Instead of

bringing a suit a summary application may be made under the terms of this rule; and when a summary application was made at a time when the Official Assignee had had no opportunity to make an enquiry into the circumstances of this insolvency, the first thing, I should have thought, to be done was that some endeavour should have been made to postpone the consideration of this application until the Official Assignee was fully satisfied that he knew enough about the dealings of the mortgagor to enable him safely to admit the mortgage.

29. However, the matter came before the Court as an unopposed application under Rule 18 and the conclusion now before the Court on behalf of the mortgagee as I understand it is this; He says that only the mortgagee and the Official Assignee are recognized by that rule. If the Official Assignee likes to admit the existence and validity of the mortgage and consents to an order for sale then the Court has got no option and all that the Court can do is to go through the formality of hearing what these people have to say, and is bound to make an order, but no other person can possibly intervene at all. It is quite true that the mortgagee is not obliged under Rule 18 any more than if he brings a suit to implead any creditor or any other person than the Official Assignee. But this summary procedure to enforce his rights is not intended to exclude people who may have rights contrary to his own, and I would point out in particular that a duty is cast upon the Court by Rule 18 of Sch. 2 to hold an independent enquiry not merely to determine issues between the mortgagee and the Official Assignee and to make orders by consent. What the Court is to do is this; The Court shall proceed to enquiry whether such person has mortgage and for what consideration and under what circumstances: and, by the Rule which follows immediately afterwards the Court is entitled to summon people and examine them for the purpose of satisfying itself as to the circumstances under which the mortgage has been executed. It is perfectly absurd to say, to my mind, that in these circumstances it would not be open to the Court to send for any creditor or his witnesses and hear them. In addition to that, if the Official Assignee had known that any creditor was taking exception to this mortgage or if the Court had known that anyone was taking that course, it would be improper for the Official Assignee to allow that case to go by default or to take any steps to prevent the creditor and his information from being brought to the notice of the Court. In these circumstances what happened here was that the Registrar had gone so far as coming to the conclusion that the mortgage was proved subject to a translation being put in and he recorded that he was minded to make a report to that effect; and apparently he was minded that he would go and take the account. Before the report came into existence the present appellant objected and his objections to the mortgage were brought to notice by a petition. Accordingly the Registrar, as I think very properly, sent the whole matter to the Judge. He never concluded his report, but sent the whole matter to the Judge to deal with it, because it had entirely changed its aspect. He was suite entitled to do that whether it was an opposed or unopposed application, at that stage. He thought that the Judge was the more proper person to

deal with it in the circumstances.

30. The matter came before the learned Judge at a time when the Official Assignee no longer desired that any such summary order for sale should be made. The Official Assignee apparently did not get notice of the application made by the present appellant. He did not formally withdraw his consent and ask for these proceedings to be stayed or postponed. The present appellant as a creditor who had proved his debt in the meantime asked for such postponement. Then a point was taken that the present appellant had no locus standi whatsoever; in other words, that although he was a person who was a cestui qua trust and the Official Assignee was his trustee in the insolvency, and although he and the Official Assignee were at one and although it was desired by them that this enquiry should not be rushed through because there were matters to consider, the learned Judge sent the thing back to the Registrar apparently on the footing that he should complete his report to the effect that the mortgage was valid and take an account and that the sale should go on.

31. To my mind that order is entirely impossible. The learned Judge was administering an insolvent''s estate and the rules of the Insolvency Court are to be given a meaning consistent with reasonable administration. I do not propose to decide now whether there is any objection to a question u/s 55 being dealt with under Rule 18 of Sch. 2. The questions u/s 55 are questions where a trustee claims by a higher title than the insolvent mortgagor. On the other hand, if a mortgagee takes proceedings under Rule 18 the Court has no option but to make enquiries which that rule directs; and, if objections u/s 55 are brought to its notice I do not at present see how it can purport to ignore them. But it may be that the most convenient and sensible course in such cases is for proceedings to be stayed to enable a bankruptcy motion (motion in insolvency) to be brought u/s 55. Ordinarily it would be brought by the Official Assignee. If the Official Assignee being tendered a reasonable indemnity by a creditor unreasonably refuses to bring such proceedings u/s 55 the Court has ample jurisdiction to authorize a creditor in one or the other or several different ways to take proceedings to give effect to the section. The learned Judge might perfectly well have stopped these proceedings and limited a time within which proceedings u/s 55 should be dealt with. There were other ways of dealing with this matter. But the order made in this case, namely, to send the proceedings back in such manner that a conclusive decision between the mortgagee and the Official Assignee as to the validity of, this mortgage might come upon the file of the Court without any enquiry into the real matter, was a proceeding which was both unnecessary, and, in my opinion unjustifiable.

32. I entirely agree in the order which the learned Chief Justice has proposed. It seems to me to be a beneficial order--a reasonable direction-enabling this matter to be tried upon proper materials by the Court doing its duty to the creditors on the one hand and the mortgagee on the other.

33. For these reasons I think the appeal should succeed.