

## In Re: Kedarnath Sen; Ex parts, Harsookdas Balkissendas

**Court:** Calcutta High Court

**Date of Decision:** April 12, 1940

**Acts Referred:** Presidency Towns Insolvency Act, 1909 " Section 17

**Citation:** AIR 1941 Cal 112

**Hon'ble Judges:** Panckridge, J

**Bench:** Division Bench

### Judgement

@JUDGMENTTAG-ORDER

Panckridge, J.

In this case a creditor's petition for adjudication of the insolvent was presented on 9th August 1938. On 14th March 1939

Lort-Williams J., who was then insolvency Judge, made a consent order which provided that the debtor should be adjudicated an insolvent, but

that the order should not be completed, and should stand vacated if the debtor liquidated the petitioning creditor's claims in certain instalments.

The order concluded : "In default of payment of any one instalment within the time allowed, the order will be completed and filed." The debtor

failed to make payments as provided by the order and on 13th June 1939 the order was drawn up on the application of the creditor.

2. It appears that certain judgment-creditors of the insolvent had taken execution proceedings in the Court of the second Munsif of Hooghly and in

the course of those proceedings they had attached certain immovable property in which the insolvent had a share. This property was brought to

sale on 17th June 1939 and the plaintiff's son, Ajoy Kumar Sen, was declared the highest bidder for the sum of Rs. 902. The sale has never been

confirmed, because before the day fixed for confirmation, the official assignee initiated proceedings in the execution Court for setting aside the sale.

These proceedings are now pending, and. I have some doubt whether the official assignee has any locus standi in the matter, but that is a point on

which I need not express an opinion. One of the creditors who is supported by the petitioning creditor has now applied for an order that the sale of

the insolvent's properties effected on 17th July (sic) be declared void, and that the attachment effected by the judgment-creditors may be released,

and that the official assignee should be directed to take possession of the property and have the same sold in due course of administration. u/s 17,

Presidency Towns Insolvency Act

on the making of an order of adjudication, the property of an insolvent, wherever situated, shall vest in the official assignee and become divisible

amongst his creditors and thereafter, except as directed by the Act, no creditor, to whom the insolvent is indebted in respect of any debt provable

in insolvency, shall during the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt, or shall continue

any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose.

3. Prima facie, therefore, on 17th June 1939, when the insolvent's son was declared the highest bidder, the property which he bought at the sale

was no longer the property of the insolvent but had vested in the official assignee. Mr. Khaitan for the petitioning creditors, has submitted that the

sale is a nullity because it has never become absolute as contemplated by Order 21, Rule 92 (1), and he has drawn my attention to Section 65,

Civil P. C., which provides that

where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the

purchaser from the time when the property is sold and not from the time the sale becomes absolute,

and he argues that the property does not vest at all until the sale is made absolute, when it vests as from the date on which the purchaser is

declared the highest bidder. I express no opinion as to the soundness of this submission, for, in the view that I take it is not necessary to decide that

question, and I accordingly assume that there has been an execution sale within the meaning of the CPC and within the meaning of the Presidency

Towns Insolvency Act.

4. The purchaser relies on Section 53(3), Presidency Towns Insolvency Act. Section 53 is the first of a number of sections from Sections 53 to 57

inclusive, grouped under the heading ""Effect of Insolvency on Antecedent Transactions."" Sub-section (1) provides that where execution of a

decree has issued against the property of a debtor, no person shall be entitled to the benefit of execution against the official assignee, except in

respect of assets realized in the course of execution by sale or otherwise before the date of the order of adjudication, and before he had notice of

the presentation of any insolvency petition by or against the debtor. Mr. Ghose argues, and I think rightly argues, that that does not really throw

much light upon the validity of execution sales in cases where the judgment-debtor becomes insolvent, because the sub-section seems to assume

that execution has been effective and it merely makes provision as to the destination of the fruits of such execution. The sub-section on which Mr.

Ghose relies is Sub-section (3), which is 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

official assignee.

5. Mr. Sircar for the applicant has argued that that sub-section does not apply to sales taking place subsequent to adjudication, because, when

property is purchased or purports to be purchased after adjudication, it is no longer the property of a debtor but the property of an insolvent, and

he has referred to various sections in the Act, from the language of which he draws the conclusion that when the Act mentions a debtor it intends

thereby to indicate a person, who, although possibly insolvent in the popular sense of not being able to meet his financial obligations, has not yet

been adjudicated. There is certainly a good deal of force in that argument, because in sections such as Sections 13, 14 and 15 the word ""debtor

clearly contemplates a person who has not yet had an adjudication order made against him. On the other hand, Section 17 which deals with the

state of things prevailing after the order of adjudication refers not to the debtor but to the insolvent. Mr. Sircar's view has also some authority in its

favour, because this point was directly discussed by the Madras High Court in *Bachu Mallikarjuna Rao Vs. The Official Receiver and Others*,

where the learned Judges came to the conclusion that the sub-section which I am considering can only refer to cases of execution sales held before

adjudication, and cannot operate in cases of sales held after adjudication, their reasons being that the sub-section comes in a portion of the Act

which deals with the effect of insolvency on antecedent transactions, and by insolvency is meant adjudication. They also were of opinion that after

adjudication the property vested in the official assignee, and was no longer the judgment-debtor's property available for execution. Mockett J.,

deals at some length with the distinction between ""debtor"" and ""insolvent"" to which I have referred. The point there was directly in issue, and in my

opinion the case has more relevance than *Dinesh Chandra Roy Choudhury Vs. Jahan Ali Biswas and Others*, in which there are observations

which are not reconcilable with the Madras authority.

6. I am therefore disposed to hold that Sub-section 3 of Section 53 has this effect that if it can be shown that a purchaser in execution proceedings

has purchased in good faith prior to the order of adjudication, his purchase cannot be assailed on grounds based on Section 51, Presidency Towns

Insolvency Act, which has the effect of antedating the insolvency in various circumstances which it is not necessary to discuss. However be that as

it may, I am of opinion that on the facts Sub-section (3) affords no protection to the purchaser. It appears to me that if a party seeks to validate an

otherwise invalid purchase by relying on Sub-section (3), the burden falls on him of showing that he is covered by it. In this case the parties being

father and son, one is entitled to draw the strongest inference that the purchaser was well aware of his father's circumstances when he made the

purchase. He admits that he knew that his father was in financial difficulties, and he must be taken to have known that his father had committed an

act of insolvency by permitting the attachment of his property in execution of a decree to subsist. It would need the most cogent evidence on his

part to convince me that he was not either perfectly well aware that insolvency proceedings were pending against his father, or at any rate that he

did not deliberately shut his eyes to the probability that there were such proceedings. In these circumstances I hold that the purchase was not in

good faith, and I think there is every reason to suppose that it was made in his father's interest, though possibly it would not be strictly accurate to

describe the transaction as a benami transaction. In these circumstances the application succeeds. There will be an order in terms of the notice of

motion. The applicant will add the costs to his claim.