
(1871) 06 CAL CK 0003

Calcutta High Court

Case No: None

Aga Mahomed Ali
Shiraji

APPELLANT

Vs

S.E. Judah

RESPONDENT

Date of Decision: June 5, 1871

Final Decision: Allowed

Judgement

Phear, J.

I think Mr. Marindin's answer to Mr. Evans' objection is the right one. Section 49 of the Insolvent Act gives power to the Court in which the matter of litigation is pending to stay proceedings in the suit, or, if the suit has come into the execution stage, to set aside or suspend such execution. I do not think that it was intended by that section to give the Court power merely on the occurrence of insolvency to set aside a sale which has rightly and duly taken place upon process of execution. Obviously the rights of the purchaser come in at that stage, and there is no provision or suggestion made in section 49 for bringing the purchaser before the Court. No doubt, the Court always has power to set aside a sale which has taken place in execution, if it is satisfied that there has been anything like fraud, or any other irregularity in regard to the sale, such as would vitiate it in the view of a Court of Equity. But the mere filing of a petition of insolvency by the judgment-debtor of course amounts to nothing of this kind. If this construction be a true one, then it follows that the sale in execution having taken place, and the money having been paid into Court, the Official Assignee is in the same position with regard to that money as any other person who is interested in the decree. He can only get at the money by the regular course of proceedings under the execution sections of Act VIII of 1859. And that seems to have been the view taken in the case cited by Mr. Marindin of *Winter v. Gartner* 1 B.L.R., O.C., 79. The money has rightly come into Court as the result of the execution proceedings. There is no ground upon which I can undo these. The money is therefore in Court, to be distributed according to the provisions of Act VIII of 1859. Under those provisions the debtor himself, had there been no insolvency, would have been entitled only to the surplus after payment of the attaching creditors. And clearly, unless

section 49 gives me power to alter the rights of parties to this fund, I cannot pay out to the Official Assignee more than I could have paid to the judgment-debtor himself in the case supposed. But I think the power to suspend or set aside an execution which is given by section 49 does not extend so far as this. I think the true view is, as I have stated in the Full Bench case of [Panchilal Sarma Vs. Anand Chandra Pal](#), that proceedings in execution are proceedings by which the judgment-creditor seeks to establish a right to have his money paid out of the property of the judgment-debtor. When he has obtained the order for sale, he has substantially established a charge on that property to the extent of his judgment-debt; and although the Court might, no doubt, in some circumstances, see sufficient reason to recall an order for sale, I think that it would always be a strong step for the Court to take at that stage of the proceedings. Generally the rights of all parties may be said to be finally determined by the order for sale, except so far as there may be priority of claims to be settled, to be paid out of the proceeds according to the enactments of the Civil Procedure Code. So that, had the Official Assignee in this case any right to step in after the order for sale, but before the sale had actually taken place, and had he done so, the burden on him necessary to be discharged before he got a stay of the proceedings u/s 49 of the Insolvent Act, is, I think, heavier and different in character from what it would have been if he had come in before the order for sale. In the case before the Full Bench, the judgments which were delivered were given in contemplation of the interference of the Official Assignee before the order for sale. None of the Judges appear to have contemplated his coming in after the order for sale had been made. In this case not only had the order for sale been made, but the sale had actually taken place before he made this application. I think, then, that the right of the judgment-creditor to have the money paid out to him has been made out. No order for costs against the Official Assignee.

¹ 11 & 12 Vict., c. 21, s. 49.-- If after the filing of any insolvent's schedule in the said Court for the relief of insolvent debtors, and before such insolvent shall obtain his discharge in the nature of a certificate hereinafter mentioned, any suit or action shall be pending against the insolvent, his heirs, executors, or administrators in any Court within the limits aforesaid, or any execution or process shall be sued out or issued from any of the said Courts, or be enforced against such insolvent, his heirs, executors, or administrators, for or in respect of any debt or demand admitted in the schedule of the insolvent, or disputed as to amount only, the said Court in which such action or suit shall be pending, or from which such execution or process as aforesaid shall issue, on proof to its satisfaction that such action or suit, execution or process, is in respect of the debt or demand aforesaid, may stay the proceedings in such suit or action, so far as the same respects the said debt or demand, until further order of the said Court, and may set aside or suspend such execution or process, so far as the same respects the said debts or demand, until further order of the said Court as it shall think fit.