Sakow Industries Pvt. Ltd. Vs State Bank of India

Court: Calcutta High Court

Date of Decision: June 26, 1973

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 19 Rule 3

Citation: (1974) 2 ILR (Cal) 597

Hon'ble Judges: Sen Gupta, J; A.K. Sinha, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

A.K. Sinha, J.
This appeal is preferred against an order passed by the Subordinate Judge, Second Court. Alipore, appointing Joint

Receivers ex parte at the instance of the Plaintiff Respondent No. 1, the State Bank of India, in respect of the disputed properties briefly in the

following circumstances:

2. On November 23, 1972, the Plaintiff State Bank of India instituted a suit in the Original Side of this Court praying for a decree for over rupees

53 lacs and for other reliefs against the present Appellant and also two other Defendants Surinder Paul Mehta and Mrs. Nirmala Devi Mehta. The

Plaintiff"s case, in short, was that the present Appellant was given overdraft facilities on different accounts for running their business of manufacture

of certain chemicals and other things known and named as Sakow Industries Private Ltd. on and from April 11, 1967. This overdraft arrangement

was covered by two sets of agreements entered into by and between the Appellant and the State Bank from time to time under which the

Appellant pledged or hypothecated all its stocks, machineries, finished goods and assets specified therein at the factory premises and godowns at

Kaikhali, Dum Dum, 24-Parganas, to the Bank by way of first and paramount charge for payment of all moneys that may be due by the Appellant

to the State Bank. Some of these documents were registered with the Registrar of Companies, West Bengal. Apart from the factory and godowns

at Kaikhali, the Appellant started another factory and also had its godown in places known as "Trochi" and "Asavari". The Appellant also agreed

to create mortgages in respect of all its stocks, chemicals, minerals and machineries as and by way of paramount charge for payment of all the

moneys that may be so advanced, as aforesaid, by the State Bank of India covered by the overdraft facilities given to it. After appropriating all

amounts paid a sum of Rs. 53,05,463-02 with interest calculated upto October 31, 1972, fell due and owing by the Appellant to the State Bank.

3. The Appellant, however, did not find out the ways and means of payment of this amount nor did it execute any deed of mortgage as was agreed

to in respect of the properties lying in both the units of Faridabad. On the contrary, the Appellant created a lease of the entire factory and godowns

with machineries and materials etc. in favour of another party, the Respondent No. 4 Sakow Industries (Faridabad) Pvt. Ltd. and stopped running

its entire business in Faridabad. The Appellant also created a lease in respect of its factory and godowns in favour of a party added as the

Defendant No. 4 (Respondent No. 3) known as ''Sakow Trading and Industrial Corporation''. That is how, in short, the first Respondent the State

Bank of India became highly apprehensive as their security for payment of huge sums still due and owing by the Appellant was in jeopardy and

might be ultimately lost and, in consequence, the first Respondent would suffer irreparable loss and injuries.

4. After the institution of the above suit on the prayer of the first Respondent Mr. R. Guha and Mr. T.K. Ghosh, members of the Bar, were

appointed as Joint Receivers by this Court on November 24, 1972. Ultimately, however, this suit was withdrawn by the first Respondent as it was

found that the High Court had no territorial jurisdiction, but leave was granted to the first Respondent to file a fresh suit on the same cause of action

and against the same parties.

5. After the withdrawal of this suit the Appellant instituted a suit on December 20, 1972, in the Court of the Subordinate Judge at Ballavgarh in the

State of Haryana against the Bank, inter alia, for a declaration that the Bank was not entitled to recover any amount from the company and also for

a direction on the Bank to furnish accounts and for other consequential reliefs. On December 22, 1972, the Respondent No. 4, Sakow Industries

(Faridabad) Pvt. Ltd., filed a suit against the Bank at Ballavgarh praying, inter alia, for permanent injunction not to disturb its possession over the

factories and godowns covered by the lease granted to it by the present Appellant at Faridabad. Another suit was filed by the Respondent No. 3,

Sakow Trading and Industrial Corporation (Suit No. 98 of 1972) on December 23, 1972, at Alipore for damages etc. against the first

Respondent. On January 18, 1973, the first Respondent State Bank of India filed the present suit (T.S. No. 4 of 1972) against the present

Appellant and Mehtas, the firm Sakow Industries Corporation and Sakow Industries (Faridabad) Pvt. Ltd. claiming, inter alia, for a decree for Rs.

53,05,463-02 and other reliefs.

6. On January 19, 1973, on the application of the first Respondent the learned Subordinate Judge issued a show-cause notice and by an ad interim

order restrained the Appellant and Mehtas from disposing of or alienating or encumbering the securities. On another application on the same day

for appointment of Receiver by the first Respondent the learned trial Court appointed ex parte both Mr. Guha and Mr. Ghosh as Joint Receivers

on the view that

having regard to the magnitude of the amount involved, the conduct of the Defendants Nos. 1-3, the terms of the agreement and the apprehensive

and special circumstances, buttressed by facts as disclosed in the petition under consideration and in the exigencies of circumstances the prayer for

ad interim order of appointment of Receivers should be allowed.

In the same order, however, the learned trial Court, amongst other things, also allowed the Defendants, i.e. the Appellant and also other

Respondents, to file objections against the petition for appointment of Receiver by January 31, 1973. The present Appellant did not, however,

prefer to file any objection against appointment of the said Receivers but straightway came up to this Court in appeal.

7. In the circumstances, the first point that strikes us is whether art appeal is at all maintainable against such a provisional order. Although this

question has not been raised on behalf of the first Respondent, we think, however, the matter is of some importance in this case. The learned trial

Court at the first instance has appointed the Receivers ex parte but at the same time it did not finally dispose of the matter for it allowed the parties

to file their objections within certain time so that after considering their objections the learned trial Court would still have to decide whether the ex

parte appointment so made would finally remain. It seems to be fairly settled that when an order is made provisionally appointing Receivers and the

parties are called upon to prefer their objections against such appointment or as regards the appointment of person or power of such Receiver or,

in other words, the application is not finally disposed of or, the order is not final no appeal lies against such an order. This really is the law stated by

Sir John Woodroffe in his Law Relating to Receivers (4th ed., p. 158) and supported by a number of decisions of this Court and also of other

High Courts: see Ranjit v. Koman (1915) 27 I.C. 446, Upendra v. Bhupendra (1910) 13 C.L.J. 157 and Srinivas Prosad Singh v. Kesho Prasad

Singh 14 C.L.J. 489. of course, we must say that the opinion as regards this question is not uniform in all the High Courts of this country, but it

seems to us clear that at this stage nothing has been done except appointment of Joint Receivers as a case of emergency. It is at least, if not settled,

extremely doubtful whether in such a situation this Court in appeal should give any opinion on the matter. For it seems clear to us upon a fair

reading of the order that the matter is awaiting Court''s final decision. In our opinion, therefore, this is a case where normally the High Court, even if

any such appeal lies, should not pass any opinion in either way, for, that might ultimately prejudice the case of either parties which remains really to

be decided by the trial Court as yet.

8. Nevertheless, as the matter has been elaborately argued by either parties before us we proceed to examine the case on merits. Mr. Banerjee

appearing in support of the appeal in the first place has contended that on the face of the record it would appear that ever on July 30, 1971, the

overdraft facilities given to the Appellant was enhanced to Rs. 28-75 lacs. Strangely enough, it is said in November 1972, a suit was abruptly filed

in the Original Side of this Court for recovery of a huge sum of money. According to Mr. Banerjee, nothing has been done during such a short

period which could support either the institution of such a suit or appointment of Receiver.

9. In the second place, Mr. Banerjee relying on a decision of the Judicial Committee in Benoy Krishna Mukherjee v. Satish Chandra Giri L.R. 55

IndAp 131 has contended that interim appointment of a Receiver of property in the possession of and claimed by the Defendant in the suit should

be made only if there is a well-founded fear that in absence of protection the property will be dissipated or irreparably injured. It is submitted ex

facie that there are no allegations or materials before the Court leading to such apprehension or well-founded fear that in absence of protection the

property will be wasted, damaged or dissipated. It is said that there are equally no allegations that the securities of the first Respondent have in any

way been damaged or wasted or alienated. They are lying intact either in the godowns of Kaikhali or Faridabad although it may be that the factory

or godowns of the Appellant have been transferred to third parties by granting leases. It is also said that the Joint Receivers, in fact, proceeded to

the locale and made inventories of the secured and hypothecated goods and kept the godown under lock and key. It is, therefore, submitted that

even on the face of the records there is nothing to suggest that the Appellant in any way interfered with the goods secured and hypothecated in the

Bank so that their valuation may be diminished or such securities may be in jeopardy.

10. In the third place, it is contended by Mr. Banerjee that, although the first Respondent has pleaded fraud practised by the Appellant upon the

Bank, no particulars of such fraud has been given either in the plaint or in the application for appointment of Receiver. Reliance is placed on several

decisions, namely, (1888) ILR 15 533 (P.C.) (Privy Council) ; Bal Gangadhar Tilak v. Shriniwas Pandit (1915) L.R. 42 IndAp 135; Bishundeo

Narain and Another Vs. Seogeni Rai and Jagernath, and Subhas Chandra Das Mushib Vs. Ganga Prosad Das Mushib and Others, to show that

under the well-settled rule of pleading mere allegations of fraud cannot be taken notice of, as to quote the words of the Judicial Committee in

Gunga Narain''s case--

they are ineffectual to give a fraudulent colour to the particular statements of fact in the plaint unless those statements taken by themselves are such

as to imply that a fraud has actually been committed.

The only allegation that is pointed out by Mr. Banerjee referred to in para. 69, Clause (ix) of the application is that

they have been attempting to defraud the Petitioner of its just dues and that they have resorted to the aforesaid and other dishonest and

questionable means to secrete and/or dispose of its assets so that the securities of the Petitioner remain beyond the Petitioner''s reach.

It is said that some of the particulars alleged to be given therein as refusal to execute mortgage or that the representatives of the first Respondent

were being prevented from entering the said premises or the other particulars contained in several sub-clauses are insufficient and inadequate and

they cannot be set up as effective pleading to constitute such fraud.

11. and fourthly, Mr. Banerjee has contended that in any case the so-called particulars are not properly verified. It is pointed out that all the

allegations made in para. 69, Clause (ix) and the sub-clauses thereunder of the application are based on information received from records. It is

submitted that, as the application was not properly verified, the Court ought not to take any notice of such allegations, for, in the rule of pleading if

there was no compliance with Order XIX, Rule 3 of the Code of Civil Procedure, the application ought to be thrown out. In aid of such contention

Mr. Banerjee has relied on several decisions, namely, State of Bombay v. Purushottam Jog Naik 1952 (3) S.C.R. 674, B. Chemicals Ltd. v.

Company Law Board 1966 (1) S.C.A. 747, A.K.K. Nambiar Vs. Union of India (UOI) and Another, , and also on a decision of this Court in

Padmabati Dasi v. Rasik Lal Dhar ILR (1909) Cal. 259. It is, therefore, argued that these allegations not being properly verified cannot be

admitted in evidence in support of the facts stated either in the application or in the plaint.

12. Lastly, it is contended by Mr. Banerjee that in this case no opportunity was given to the Appellant to controvert the allegations made in the

plaint or in the application for appointment of Receiver either by using the affidavit-in-opposition or written objection. Although it is argued that it is

open to the Court in its discretion in a given case to appoint Receiver even without giving any hearing to the opposite parties, such discretion has to

be exercised on sound judicial principle and it is possible to do so only after giving opportunities to the affected parties of hearing in the matter. In

this case the reasons given by the Court were not only inadequate but wholly unsound and improper. In fine, it is argued that the learned trial Court

has not applied its mind at all to the facts of this case.

13. At the present moment, we do not think it would be necessary for us to deal with each of the points raised by Mr. Banerjee categorically.

While the legal proposition indicated in the decisions cited by Mr. Banerjee cannot be disputed the question, however, has to be decided and the

law has to be applied on the facts of each case. It may be that in the absence of any written objection or effective counter-allegations by affidavit

or otherwise it is not possible to decide finally whether the Petitioner''s apprehension that their properties under hypothecation or pledge creating

paramount charge would be damaged or wasted, but then facts remain that this apprehension has been sufficiently stated in the application. It is

also sufficiently made clear that a huge sum of money is due and owing by the Appellant to the first Respondent. In fact, Mr. Banerjee did not

proceed on the footing that the Appellant was not given such overdraft facilities as stated in the application or from time to time for the purpose of

running their business substantial amounts were not being advanced or that large amount which was now due and owing to the Appellant was

repaid to the first Respondent. It is also undisputed in this case that the Appellant created leases in favour of the Respondent Nos. 3 and 4 of their

factory premises and godowns both at Dum Dum and Faridabad. It is also clear from the letter of the Appellant annexed to the application that

they failed to execute a proper mortgage in respect of the entire stocks, machineries and other goods which were agreed to be kept as security for

payment of the moneys that may be due to the Bank on account of overdraft facilities on various accounts to the Appellant. In these circumstances,

we do not think that the question of particulars of fraud or that the particulars, even if there be any, are not properly verified would be material

consideration for the purpose of appointing Receiver ex parte. The question is not one of fraud but of appointment of Receiver over the properties

which were hypothecated or pledged creating paramount charge in favour of the first Respondent. Mr. Roy Chowdhury, on behalf of the first

Respondent, has relied on a decision of the Bombay High Court in Damodar Moreshwar Phadke Vs. Radhabai Damodar Ranade, and also

another decision of the Patna High Court in Haragopal Nandy Chowdhry and Another Vs. Deoniti Prasad Singh and Others, , we think rightly, to

show that in cases where, as here, the mortgagor agrees by series of documents to have the Receiver appointed over the properties pledged or, in

case of default in payment of dues hypothecated, the mortgagee will be within its right to apply for and get a Receiver appointed almost as a matter

of course in case there is default in payment of the dues of the mortgagee. It is, therefore, not necessary to decide whether fraud or fraudulent acts

complained of have sufficiently been supported by particulars or whether the allegations of such fraud are properly verified or not.

14. It is not really the case of Mr. Banerjee, as already noticed, that the Court is not competent to appoint a Receiver ex parte. Normally,

however, the Court ought to appoint a Receiver after giving opportunity to all the parties who may be affected by the result of the Court''s decision

ultimately but then there may be cases where such Receiver without hearing the other side may be appointed. Mr. Roy Chowdhury has relied on

several decisions on this aspect of the matter, namely, Asadali Chowdhury v. S.M. Hossain Chowdhury (1916) 20 C.W.N. 1009, which was

followed in Alla Subbareddi Vs. Lankireddi Narayanaswamireddi and Others, and also referred to Mt. Ishri v. Shib Ram AIR 1923 Lah. 239.

The principle really is that in case of emergency such Receiver may be appointed. From the discussion which we have already made we think that

such a situation of urgency has been established in this case.

15. It is, however, contended on behalf of the Respondent No. 3 by Mr. Chakraborty that it is a partnership firm which has taken lease of the

entire factory premises and godowns of the Appellant and, as such, the order appointing the Joint Receivers cannot be binding on them. It is said

that the factory premises and the godowns excepting the properties, which are alleged to be securities, cannot be the subject-matter of

appointment of the Receivers cannot take possession of the factory premises or the godowns. We are not concerned with this question here as to

how the appointment of Receivers would affect the interest of a third party. This matter is entirely for the Court below to decide. It is, however,

contended on behalf of the first Respondent that the persons who are the partners are no better than the sons and daughters of the Managing

Director of the Appellant. This partnership has been constituted in collusion and conspiracy with the Director of the Appellant to defeat and

defraud the first Respondent of its just and legitimate dues. We will not decide this question either. For the purpose of the present appeal it is

enough to notice that this firm has been made a party in this suit and, if Receiver can be appointed in respect of the disputed properties in a case of

urgency, we think, the question concerning the claim of the Respondent over some of the properties would not be relevant at this stage. The first

Respondent is entitled to have a Receiver appointed in respect of the disputed properties. What are the disputed properties is a matter which has

not been decided and remain to be decided by the Court below on the proper application of the parties affected in that Court.

16. Mrs. Bose appearing on behalf of the Respondent No. 4 has substantially advanced the same argument and laid special stress on the question

of legal title which has been acquired by lease granted to the Respondent No. 4 by the Appellant in its favour in respect of the entire factory

premises and godowns situated at Faridabad. It is said that the Respondent No. 4 is a bona fide lessee and nothing can prevent it from running the

business in the factory premises and godowns so leased out and the Receivers thus appointed cannot in law interfere with running of business and

possession. Mrs. Bose has also on the question of title relied on a Bench decision of this Court in Siddheswari Devi v. Abhayeswari Devi (1888)

15 Cal. 818 to impress upon us that the Court will not interfere by appointing a Receiver where a right is asserted under the legal title unless a very

clear case is made out. We are equally unable to decide this point at the present moment. But, fact remains that the Appellant in the letter

addressed to the first Respondent annexed to the application betrayed their utter reluctance to make any payment. On the other hand, the

Appellant set up certain excuse for non-payment of the dues or for not executing mortgage in respect of the properties agreed to be secured for

payment of the dues on the overdraft arrangement and thereafter granted lease in favour of the Respondent No. 4. It is, however, said that the

goods intended to be secured in favour of the first Respondent are lying intact and they may be taken away, but the Receivers cannot interfere with

the possession of Respondent No. 4. These axe questions relating to the extent of the properties over which the Receivers should take or exercise

their possession. That matter, if necessary, will be decided by the Court below on a proper application if made by the Respondent No. 4. We are

unable to decide that question merely because an interim injunction has been granted in favour of the Respondent No. 4 in civil Court at Haryana in

which the suit was instituted. It cannot be said that Receivers appointed by the court below will be powerless in taking possession of the

properties. In any case, this is a matter which ought to be agitated, if necessary, in a proper form and the question does not require any decision in

this Court.

17. From the above discussions, it seems to us clear that the Court below is justified in the facts and circumstances of the case in appointing the

Receivers ex parte and we are satisfied that the first Respondent has been able to establish the case of urgency in this matter. In our opinion,

several reasons given by the learned Subordinate Judge in support of his order appointing the Joint Receivers clearly establish that the learned

Court below exercised sound judicial discretion in appointing such Receivers and the order passed is correct.

18. Before parting with this case we must make it clear that on the controversies raised in this case we have not given any final opinion excepting

that a sufficient case of urgency, we have held, exists justifying the appointment of the Joint Receivers. As the Court has already given opportunity

to the parties concerned for filing objections, it will now proceed to deal with and dispose of such application of appointment of Receivers finally

after hearing all parties.

19. Accordingly, this appeal is dismissed, but there will be no order as to costs. All interim orders are vacated.

20. In view of the order passed by us in this appeal the applications dated March 30, 1973, is also dismissed.

21. Stay of the operation of the older, as asked for, is refused.

Sen Gupta J.

I agree.