

Bombay High Court

Gangadhar Revappa Umbaranikar vs Shankar Vithoba Gholasgaonkar on 15 September, 1970

Equivalent citations: (1971) 73 BOMLR 461

Author: Nain

Bench: Nain

JUDGMENT Nain, J.

1. This is an appeal against the appellate judgment dated July 31, 1965 of the learned District Judge, Sholapur, It arises out of the sale of a house belonging to an insolvent. One Ramchandra Pralhad Naik was adjudged an insolvent in Insolvency No. 24 of 1954 and respondent No. 3 was appointed Receiver in Insolvency. At an auction sale of the house of the insolvent on June 14, 1964 the property was knocked down to the appellant in this appeal. Respondents No. 1 and 2 are two of the creditors of the insolvent who objected to the sale in favour of the appellant and applied to the Insolvency Court for the sale being set aside. The Insolvency Court dismissed their application as time barred. They appealed to the District Court at Sholapur. On appeal the District Court set aside this sale in favour of the appellant and on December 5, 1965 at a fresh auction, the property was knocked down to respondent No. 4. Respondent No. 4 was added as a party respondent after this appeal was filed. Mr. Khare appearing for respondent No. 3 has stated that he has instructions to submit to the orders of this Court.

2. The appellant is a tenant of the house which is the subject-matter of this litigation. This house is situated on city survey No. 810 in the town of Akalkot. At the auction held by the Receiver on June 14, 1964 the appellant was found to be the highest bidder and was so declared. His bid was for Rs. 4,200. It appears that some of the creditors of the insolvent were not satisfied with this sale and protested to the Receiver that the price fetched was too low. The Receiver gave them one month's time to find a person who was willing to offer more than Rs. 4,200. The creditors were unable to find such buyer. On July 15, 1964 the Receiver made a report to the Court about the sale stating therein that he had carried out the sale after getting the sanction of the Court and that the appellant was found to be the highest bidder and therefore the sale be confirmed. On July 21, 1964 the learned Civil Judge passed an order reading, "Read report. The sale by the Receiver is approved. The receiver to take further steps." On July 21, 1964 the Receiver executed and got registered the necessary sale deed in favour of the appellant.

3. On August 24, 1964 some of the creditors made an application to the Insolvency Court praying for setting aside the sale in favour of the appellant. In the application exh. 41 they stated that the amount of Rs. 4,200 was inadequate. The insolvent had in his schedule valued the property at Rs. 20,000. They further stated that the property would fetch a price of Rs. 10,000. They stated that there was no proper publication of the notice of sale and merely hand-bills were distributed. They contended that if the sale had been advertised in local newspapers and by beat of drums the price fetched would have been higher. They further stated that there were persons who were willing to offer Rs. 5,000 for the house and therefore fresh auction sale should be held.

4. The Insolvency Court dismissed this application on October 14, 1964 as time barred. It held that the application was an appeal to the Court against the act of the Receiver and that such appeal is

required to be made within 21 days and as the appeal was not filed within 21 days after the sale was approved by the Court, it was time barred. Against the said decision only two of the creditors of the insolvent, namely, respondents Nos. 1 and 2, appealed to the District Court at Sholapur.

5. Before the learned District Judge, respondents Nos. 1 and 2 contended that the sale had taken place at the instance of the Court through the Receiver and was subject to the confirmation of the Court. It would therefore not be an act of Receiver under Section 68 of the Provincial Insolvency Act 5 of 1920 (hereinafter referred to as the Insolvency Act), but the application exh. 41 was under Section 4 of the Insolvency Act. The learned District Judge accepted this contention and held that the application exh. 41 was not time barred. He further held that the publication of the notice of sale was insufficient. He therefore set aside the sale in favour of the present appellant. Against the said decision, the auction purchaser has filed the present appeal. However, no stay of fresh auction was obtained.

6. It appears that a fresh auction was held on December 5, 1965. It is an admitted fact that in the auction notice the Receiver set out the fact of the first sale on June 14, 1964 in favour of the present appellant and the fact that the present appellant had filed this second appeal in the High Court and that the second appeal was pending. The notice stated that if in the present appeal the appellant succeeded and the sale in his favour was confirmed, the Receiver would not be liable and that the sale was subject to the result of the present appeal. At the auction sale, the present appellant raised an objection to the sale. The Receiver read out the objection of the appellant at the sale. Thereafter at the auction sale the property was knocked down to respondent No. 4 for a sum of Rs. 9,825. Thereafter respondent No. 4 was joined as a party respondent to this appeal by an order dated February 26, 1970.

7. The only question argued by the parties before me is whether the application exh. 41 was or was not an appeal under Section 68 of the Insolvency Act and if it was, whether it was beyond the period of limitation prescribed by the said section. To appreciate the arguments, it might be worthwhile to refer to certain provisions of the Insolvency Act.

8. Section 4(1) provides that subject to the provisions of the said Act, the Court shall have full power to decide all questions whether of title or priority, or of any nature whatsoever and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property. Section 59 provides that subject to the provisions of the said Act the Receiver shall, with all convenient speed, realise the property of the debtor and distribute dividends among the creditors entitled thereto, and for that purpose may sell all or any part of the property of the insolvent. Section 68 provides that if the insolvent or any of the creditors or any other person is aggrieved 'by any act or decision of the Receiver, he may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just. The proviso to the said section states that no application under the said section shall be entertained after the expiration of 21 days from the date of the act or decision complained of. The heading of Section 68 is "Appeal to Court Against Receiver."

9. The contention of Mr. Lalit on behalf of respondents Nos. 1 and 2, who are two of the creditors of the insolvent, is that as the first sale which has been set aside by the District Court was held with the approval of the Insolvency Court and the knocking down of the property to the appellant was also approved by the Insolvency Court, the sale was not an act of the Receiver but an act of the Court. The application exh. 41 therefore was not an appeal to the Court against the act of the Receiver under the provisions of Section 68 and therefore the limitation of 21 days prescribed by the proviso to that section did not apply. He contended that the said application was an application under the provisions of Section 4 of the Insolvency Act for which no limitation was prescribed and therefore it could be made at any time. Mr. P. S. Shah, who appeared for respondent No. 4, the second auction purchaser, supported Mr. Lalit and in addition contended that in any case the application exh. 41 was under the inherent powers of the Court to rectify the errors of the Receiver who was an officer of the Court. Mr. Lalit cited the judgment of Pollock J. in the case of *Deosthan Narsingji v. Bhake* [1938] A.I.R. Nag. 320. In that case the Receiver was appointed Receiver of the property of the insolvent on some conditions. One of those conditions was that the receiver shall not dispose of any property without the express permission of the Court... No sale of immovable property would be knocked down by the receiver but he shall ascertain the highest bid on the spot and reserve final acceptance of the confirmation by this Court.

In view of the said term, the Receiver merely invited bids under the instructions of the Court and referred the bids received to the Court which accepted the highest bid. Pollock J. held that the sale was not the act of the Receiver and Section 68 did not apply and that the application to set aside such sale did not fall under Section 68, but it fell under Section 4 and was not barred by time although filed after 21 days after the date of sale.

10. In our case it has not been shown that the powers of the Receiver were limited by any express orders of the Court. He was not appointed on the condition that he would merely ascertain the highest bid and reserve final acceptance of the bid by the Court. I am therefore entitled to assume that the appointment of respondent No. 3 was unconditional and his powers of sale were derived from Section 59 of the Insolvency Act. Section 59 confers on the Receiver unconditional power to sell all or any of the property of the insolvent. In our case the Receiver undoubtedly exercised this power. 1 expressly asked Mr. Lalit and Mr. Shah to point out any provision of the Insolvency Act which required the Receiver to seek approval of the Court for the proposed auction or of the highest bidder. They were, however, unable to point out any such provision. It is true that in this case the Receiver sought and obtained such approval. But this may have been a matter of precaution, because ultimately if the insolvent or a creditor complained to the Court under Section 68, it would be the Court which would have to confirm, reverse or modify the act of the Receiver. But in my opinion the seeking and obtaining of such approval did not render an act of the Receiver for which he was fully empowered under Section 59 an act of the Court. There is yet another aspect of the matter. If we were to assume for the sake of argument that the auction sale of June 14, 1964 was an act of the Court which was confirmed by the Court on July 21, 1964, no application would lie to the very Court for setting aside the sale. The application exh. 41 would in that case fail as being incompetent. The remedy of respondents Nos. 1 and 2 would have been to appeal to the District Court under Section 75 of the Insolvency Act against the order of confirmation dated July 21, 1964, By virtue of Section 75(4), such an appeal would have to be filed within 30 days. However, the

application exh. 41 was filed before the Insolvency Court itself expressly praying that the sale by the Receiver be set aside. In my opinion, therefore, the application exh, 41 was an appeal under Section 68 and not having been filed within a period of 21 days was clearly time barred.

11. With regard to the inherent jurisdiction of the Insolvency Court invoked by Mr, Shah, it is true that no one shall suffer by a wrongful administrative act of an officer of the Court and the Court has an inherent power to rectify the mistakes of its officers. But in this case it was not the question of a wrongful administrative act of the Receiver, but what was challenged was the sufficiency of the notice of sale given by him. For such an act of the Receiver, there is an express provision for appeal under Section 68 of the Insolvency Act and in view of the express provision, the Court would not have an inherent power to set aside the sale.

12. Mr. Jahagirdhar on behalf of the appellant invited my attention to a Division Bench judgment of the pre-partition Lahore High Court in the case of Jai Kishan v. Chiragh Din [1935] A.I.R. Lahore 60. In that case the insolvent made an application to the Insolvency Court purporting to be under Section 68 of the Insolvency Act objecting to the sale on the ground that the sale was opposed to the provisions of the Punjab Alienation of Land Act. One of the grounds on which the application was dismissed was that it was beyond a period of 21 days prescribed by the proviso to Section 68, rejecting the contention of the insolvent that the application was under Section 4 for which no period of limitation is prescribed. It was contended that intituling of the application as being under Section 68 was a mistake and the correct provision of law must be applied. On appeal the High Court held that even Section 4 expressly provided that it was subject to the other provisions of the Act and Section 68 of the Act provided that the application to set aside the order of the official receiver should be made within 21 days and therefore even if the application be deemed to be under Section 4, it should have been made within 21 days as it was made to set aside an order of the official receiver. The above judgment of the Lahore High Court was relied upon in a Division Bench judgment of the Punjab High Court in the case of Rattan Chand v. Hans Raj . In that case the Receiver had taken possession of certain property as being of the insolvent. A stranger made an application to the Insolvency Court to establish his title to the property. The High Court held that the stranger could have gone to an ordinary Court to establish his title within the ordinary period of limitation. If, however, he wanted relief to be given to him against what he considered to be an improper act of the Receiver, he must comply with the provisions of Section 68 and take the consequences that follow with regard to the finality of the orders as provided under Sections 4 and 75 of the Insolvency Act. The High Court hold that such application even though filed under Section 4, if made more than 21 days after the attachment of the property by the Receiver of the property, was barred by time under the proviso to Section 68. This judgment of the Punjab High Court went in appeal to the Supreme Court. The judgment of the Supreme Court is reported in Hans Raj v. Rattan Chandel [1967] A.I.R. S.C. 1780. One of the passages in the judgment of Hitter J. reads as follows (p. 1783) .-

Leaving aside the decisions which were cited at the Bar it appears to us, on a plain reading of the sections mentioned above and in particular, Sections 4 and 68, that there can be no doubt that a person (like the appellant before us) complaining of the receiver taking possession of or attaching property in which the insolvent has no interest, must apply for relief within 21 days of the wrongful

act of the receiver. He cannot be heard to say that his application is not under Section 68 but under Section 4 and thus seek to avoid the short period of limitation prescribed under Section 68. Moreover, Sub-section (1) and Sub-section (2) of Section 4 both start with the phrase 'subject to the provisions of this Act' and even if it was possible to construe that Section 4 envisaged the making of an application for relief, such application would be subject to S. 68 of the Act.

Referring to the case of Heerabai v. Offl. Receiver [1963] A.I.R. A.P. 290, the Supreme Court observed as under (p. 1785) :

...It is difficult to accept the soundness of some of the dicta in the above judgment. The Official Receiver's act in selling the property on 16th April 1960 may have been wholly wrong, but if the petitioner wanted the same to be set aside, she could either have made an application under Section 68 to the Court or she could have filed a suit for relief under the ordinary law of the land. She could not, after a period of 21 days, start a proceeding in the insolvency Court describing it as one under Section 4 so as to get out of the bar of limitation imposed by Section 68. She need not have waited till the sale of property. She might have applied to the Court as soon as the receiver took the first step by attaching the property.

In another place in the said judgment, (at p. 1786), the Supreme Court cites with approval the following passage from the judgment of the Rangoon High Court in the case of Ma Sein Nu v. U Mg Mg [1934] A.I.R. Ran. 97.

...Now, Section 4 defines the powers of the Insolvency Court to decide questions of law and fact arising in insolvency proceedings, but it does not lay down how the Court is to be moved to exercise those powers. ... Of course, the powers of the Court in deciding such an application are defined in Section 4, but this does not mean that the application itself is made under Section 4, and clearly it cannot be for Section 4 contains no provision as to how the Court is to be moved to exercise its powers, and for the mode of invoking the authority of the Court other provisions of the Act, such as Sections 53, 34 and 68, have to be consulted.

13. It therefore appears that Section 4 does not prescribe any application for relief under that section. Its object is to define the limits of jurisdiction, of the Courts exercising powers in insolvency. It is not correct to say that a person aggrieved by an act of the Receiver has a choice of making an application under Section 4 or under Section 68. Where the application is for the setting aside a sale held by the Receiver or any other act of the Receiver or against any decision of the Receiver, it is an appeal under Section 68 of the Insolvency Act and as such the period of limitation of 21 days would be attracted to such application.

14. I therefore hold that the application exh. 41 filed by the creditors was an appeal under Section 68 of the Insolvency Act, It was neither an application under the provisions of Section 4, nor under any inherent powers of the Insolvency Court. The application was therefore time barred. The judgment and order of the District Court is therefore set aside and the order dated October 14, 1964 of the learned Civil Judge, Senior Division, Sholapur, is confirmed. Respondents Nos. 1 and 2 will pay to the appellant the costs of this appeal and the appeal in the District Court. The costs of respondent

No. 3 will come out of the assets in insolvency. The sale dated December 5, 1965 in favour of respondent No. 4 is set aside.

15. [The rest of the judgment is not material to this report.]