

PRIVY COUNCIL

Ragunath Das and others

Vs.

Sundar Das Khetri and another

(Lords Moulton, CJ, and Parker Of Waddington, Sir John Edge J and Mr. Ameer Ali JJ)

18.5.1914

JUDGMENT

Lord Parker J.

1. The action in which this appeal arises is an action for the recovery of a leasehold colliery. The plaintiffs (the present appellants) claimed title to the property under the Official Assignee in the insolvency of the lessees. The order vesting the property in the Official Assignee was made under the Insolvent Debtors (India) Act, 1848, on the 8th September, 1904. At the date of this order the colliery had been attached in execution case No. 303 of 1904, in which the lessees were the judgment-debtors and the defendants (the present respondents) were the judgment-creditors and an order had been obtained for the sale of the interest therein of the judgment-debtors. Counsel for the respondents admitted that attachment in execution of a money-decree followed by such an order for sale does not confer on the judgment-creditor any charge on the land, (See *Sarkies v. Mussumat Bandno Bace*¹. An attachment prevents and avoids any private alienation, but does not invalidate alienation by operation of law such as is affected by a vesting order under the Act of 1848, and an order for sale, though it binds the parties does not confer title.

2. It follows that under the order of the 8th September, 1904, the property vested in the Official Assignee free from any charge in favour of the judgment-creditors. The Official Assignee in due course, by order of the Court having jurisdiction in the insolvency, sold the property, and the appellants derive title through the purchaser. Their title is thus prima facie a good and valid title, but it is disputed by the respondents under the following circumstances.

3. On the 12th September, 1904, the Judge in the execution proceedings stayed the

sale therein directed, until further order. This was the proper and indeed the only thing he could do, for the judgment-debtors had no longer any interest which could be sold. Further, if, as was no doubt the case, the judgment-debt was included in the schedule filed by the insolvents under the Act, their Lordships are of opinion that he was bound to stay the sale under Section 49 of the Act. At any rate the execution could not proceed until the Official Assignee had been properly brought before the Court and an order binding on him had been obtained. In their Lordships' opinion, this could only be done by obtaining an order for the issue of, and by serving him with a notice under Section 248 of the Civil Procedure Code of 1882, which was the Code then in force. It was suggested in argument that he might have been made a party to the proceedings either under Section 32 or under Section 372 of the Code, but even if these sections are applicable after final decree as to which there is considerable doubt (See *Goodall v. Mussoorie Bank Ltd.*² no proceedings seem to have been taken there under. What the judgment-creditors did was this: they applied to the Judge in the execution case for an order, and on the 30th September, 1904, and again on the 3rd November, obtained an order for the issue and service on the Official Assignee of a notice calling upon him to show cause why he should not be substituted in the suit for the judgment-debtors. This was not a proper notice under the 248th section. A notice under that section should have called upon the Official Assignee to show cause why the decree should not be executed against him. Had the Official Assignee been served with such a notice it is at least probable that he would as in their Lordships' opinion be certainly could have shown good cause why the decree should not be executed, the property having under the Act and vesting order been transferred to him for the benefit of the creditors of the insolvent generally. It is possible that the notice might be upheld as a proper notice preliminary to adding the Official Assignee as a party under the 32nd section if that section were applicable but in order to bind a party added, under the 32nd section he has after being added, to be served with a summons to appear and answer and it is not suggested that any such summons was served. Similarly it is not suggested that any order to carry on proceedings was obtained under the 372nd section.

4. Having obtained leave in that behalf the respondents proceeded to serve the notice in question and their Lordships will assume that the notice was duly served on the Official Assignee. The Official Assignee took no notice of it, possibly because he had no objection to being substituted as a party, and expected to be served with notice of any further application against him. There is no evidence that he knew that an order for sale had been already made. The time fixed by the notice for cause to be shown having expired, the respondents, without further notice to the Official Assignee,

applied for and obtained an order not only substituting the Official Assignee as a party in the place of the judgment-debtors but directing the sale to proceed. The sale accordingly proceeded. There had to be a fresh sale proclamation by reason of the 291st section of the Code: Such proclamation is not in evidence, but their Lordships must presume in default of evidence to the contrary that the property offered for sale was the property ordered to be sold, that is to say, the right and interest of the judgment-debtors in the colliery. At the sale the respondents (the judgment-creditors) having obtained leave to bid, became the purchasers. The sale was confirmed by the Court on the 8th April, 1905, and on the 25th April, 1905, the respondents obtained the usual certificate which refers to the right, title and interest of the judgment-debtors as the property sold. Their Lordships are of opinion that this sale was altogether irregular and inoperative. In the first place the property having passed to the Official Assignee, it was wrong to allow the sale to proceed at all. The judgment-creditors had no charge on the land and the Court could not properly give them such a charge at the expense of the other creditors of the insolvents. In the second place no proper steps had been taken to bring the Official Assignee before the Court and obtain an order binding on him, and accordingly he was not bound by anything which was done. In the third place the judgment-debtors had at the time of the sale no right, title or interest which could be sold to or vested in purchaser and consequently the respondents acquired no title to the property.

5. Their Lordships' attention was called in this connection to the case of *Malkarjun Bin Shidramappa v. Narhari Bin Shivappa*³, but in their opinion there is nothing in that case which had any bearing upon the present appeal. As laid down in *Gopal Chunder Chatterjee v. Gunamoni Dasi*⁴ a notice under Section 248 of the Code is necessary in order that the Court should obtain jurisdiction to sell property by way of execution as against the legal representative of a deceased judgment-debtor. In the case in Indian Appeals such a notice had been served, and the Court had determined, as it had power to do for the purpose of the execution proceedings, that the party served with the notice was in fact the legal representative. It had therefore jurisdiction to sell though the decision as to who was the legal representative was erroneous. There being jurisdiction to sell, and the purchasers having no notice of any irregularity, the sale held good unless or until it were set aside by appropriate proceedings for the purpose. The present case is of a wholly different character. No proper notice was served under the section and the respondents had full notice of and indeed were responsible for the irregularities of the procedure adopted.

6. The respondents suggested that with regard to certain machinery which was included in the sale of the colliery by the Official Assignee and which was also sought to be recovered in this action, the statute of limitations was a good defence. This point does not appear to have been taken at any time prior to the hearing before Their Lordships' Board. It was not one of the issues settled by the Court on the action, nor did the respondents mention it among their grounds of appeal from the decision of the Subordinate Judge. Their Lordships consider that it involves an inquiry as to the nature of the machinery to which it is said to be applicable and it is therefore too late to raise it.

7. Their Lordships will humbly advise His Majesty that the appeal ought to be allowed and the decree of the High Court of the 4th June, 1912, set aside with costs, here and below and that the judgment of the Subordinate Judge of Burdwan of the 8th September, 1909 ought to be restored.

Appeal allowed.

Cases Referred.

1. [1869] 1 N.W.P.H.C.R.172
2. [1900] 25 B.337 : L.R.27 I.A.216
3. [1887] 10 All. 97
4. [1892] 20 C. 370