

Bhanwarlal and ors. Vs. Babulal and ors.

Bhanwarlal and ors. Vs. Babulal and ors.

SooperKanoon Citation : sooperkanoon.com/497274

Court : Madhya Pradesh

Decided On : Jun-24-1991

Reported in : AIR1992MP6; 1991(0)MPLJ966

Judge : D.M. Dharmadhikari, J.

Acts : [Provincial Insolvency Act, 1920](#) - Sections 4 and 68; [Contract Act, 1872](#) - Sections 74

Appeal No. : Misc. Appeal No. 155 of 1982

Appellant : Bhanwarlal and ors.

Respondent : Babulal and ors.

Advocate for Def. : M.M. Agarwal, Adv.

Advocate for Pet/Ap. : M.M. Sapre, Adv.

Disposition : Appeal allowed

Judgement :

Dharmadhikari, J.

1. This appeal is by the auction purchasers, under Section 75 of the [Provincial Insolvency Act, 1920](#) (hereinafter referred to as 'the Act'). They are aggrieved by the action of the receiver -- forfeiting their one-fourth deposit of the bid money for

alleged breach of the terms of the auction in not depositing remaining sum of the bid within thirty days of the auction.

2. The applicants first approached the Insolvency Court by an application under Section 68 of the Act which was allowed and the forfeiture was set aside with directions to the receiver to return the one-fourth deposit. The receiver preferred an appeal under Section 75 of the Act to the Court of the District Judge, Raipur, who by order dated 4-3-1982 allowed the appeal by setting aside the order of the Insolvency Court and upholding the action of the receiver of forfeiture of one-fourth deposit. The auction purchasers have, therefore, approached this Court in this appeal.

3. By order passed on 25-3-1974, the partners of firm Jawerchand Thakarsi, Sadar Bazar, Raipur were adjudged insolvent under Section 9 of the Act with effect from 4-10-1972. That was the date of presentation of the petition in the Insolvency Court for the purpose. By order dated 11-1-1975, one Shri R.M. Agarwal, Advocate, was appointed receiver under Section 56 of the Act to take possession of the property and assets of the insolvents and for exercising statutory powers of sale and realization of the debts under Section 59 of the Act. On 31-12-1975, in place of Shri R.M. Agarwal, Advocate Shri N.K. Pandey, Advocate, respondent No. 4 was appointed receiver. On 10-1-1977, the Insolvency Court directed the newly appointed receiver to take charge of the property of the insolvent on 19-4-1978. The receiver sought permission of the Court to sell some properties of the insolvents. On 25-1-1979, however, there were objections filed to the proposed sale. Hence the Court directed the receiver not to finalize the sale till the objections were decided. The receiver was directed to conduct the sale by auction and submit its report. The receiver advertised the date of sale and held auction of house Nos. 11/109 to 113 of Sadar Bazar, Raipur on 29-1-1979. The highest bid of Rs.2,81,000/- offered by the appellants was accepted and they deposited a sum of Rs. 1,38,000/- immediately on acceptance of the bid. It is not disputed that the remaining 3/4th amount of bid was not deposited within thirty days of the date of the auction. The appellants' case is that the receiver failed to produce title deeds of the houses and backed out of his assurance to deliver vacant possession of the properties auctioned which was the main cause of rising of the bid. The appellants,

therefore, had withheld their 3/4th deposits. It is also not in dispute, as is clear from the report of the receiver and the contents of the written reply submitted by him to the Court, after the auction on 17-10-1981, that the terms of the auction were neither advertised before auction nor were they reduced in writing for supply to the intending bidders present on the date of auction. The case of the receiver is that the terms of the auction required deposit of one-fourth amount immediately on acceptance of highest bid and liability to deposit the remaining 3/4th within thirty days as a condition was orally informed to the bidders present.

4. After conducting the auction, the receiver submitted his report to the Court on 8-5-1979 and informed that 1/4th deposit made by the auction purchasers had been forfeited for non-deposit of the remaining bid money within the stipulated period of thirty days. It is also not in dispute that no formal intimation of forfeiture of 1/4th deposit was given to the auction purchasers by the receiver. The auction purchasers complained against the action of the receiver, by their application under Section 68 of the Act filed on 25-4-80. By order dated 20-11-1982 the Insolvency Court set aside the action of the receiver holding that the application of the auction purchasers can be treated to be one invoking powers of the Court under Section 4 of the Act and the limitation prescribed under Section 68 of the Act can have no application to the facts of the case. The Insolvency Court also held that the terms of auction permitting forfeiture of 1/4th deposit having not been duly notified to the bidders before sale, the action of forfeiture of Rs. 70,000/-, being 1/4th deposit of the total bid, was without authority.

5. The lower appellate Court, however, did not agree with the reasoning of the Insolvency Court and instead held that the application of the auction purchasers was barred by the provisions of Section 68 of the Act which alone was applicable. The District Judge, in appeal, confirmed the action of the receiver holding that 1/4th deposit was nothing but an 'earnest' by way of guarantee for performance of the contract and could be forfeited on the ground of alleged breach on the part of the auction purchasers and without violence to the provisions of Section 74 of the Contract Act.

6. The first legal question raised by the learned counsel on behalf of the auction purchasers which needs decision is whether in the facts and circumstances of the case, the auction purchasers could seek remedy against the action of the receiver under Section 4 of the Act, without any restriction of limitation; or the only remedy available to them was under Section 68 of the Act within limitation of 21 days prescribed. It would be necessary at this stage to reproduce Sections 4 and 68 of the Act, which are under consideration in this appeal :--

'4. Power of Court to decide all questions arising in insolvency.-- (1) Subject to the provisions of this Act, the Court shall have full powers 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 in any such case.

(2) Subject to the provisions of this Act and notwithstanding anything contained in any other law for the time being in force every such decision shall be final and binding for all purposes as between, on the one hand, the debtor and the debtor's estate and, on the other hand, all claimants against him or it and all persons claiming through or under them or any of them.

(3) Where the Court does not deem it expedient or necessary to decide any question of the nature referred to in Sub-section (1), but has reason to believe that the debtor has a saleable interest in any property, the Court may without further inquiry sell such interest in such manner and subject to such conditions as it may think fit.'

68. Appeal to Court against receiver.-- 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.

Provided that no application under this section shall be entertained after the expiration of twenty-one days from the date of the act or decision complained of.'

7. On behalf of the appellants/auction purchasers it is contended that the order-sheets dated 10-1-1977, 19-4-78 and 25-1-1979 of the Court, clearly go to show that the auction was conducted by the Court through the agency of the receiver and it was the 'Act of the Court' and 'not of the receiver', which was complained against. Hence Section 68 of the Act is no bar to approach the Insolvency Court. Heavy reliance has been placed on the decision in the case of Deosthan Narsinghji Maharaj v. V.D. Bhake, AIR 1938 Nagpur 320. It was also relied on by the Insolvency Court to decide the issue in favour of the auction purchasers.

8. At the outset I may point out that the Nagpur case (supra) decided by Pollock, J. can no longer be held as good law in view of the decision of the Supreme Court in the case of Hans Raj v. Rattan Chand, AIR 1967 SC 1780. The Nagpur case (supra) placed reliance on the decision of the Allahabad High Court in the case of Nathuram v. Madangopal, AIR 1932 All 408. Nathuram's case (supra) was expressly disapproved by the Supreme Court in the case of Hansraj, (AIR 1967 SC 1780) (supra) at paragraph 9 (page 1783) and paragraph 11 (page 1784) of the above report.

9. Learned counsel appearing for the receiver in the light of the Hansraj's case (supra) appears to be right in submitting that Section 68 alone is attracted to the facts of the case, even though the receiver had acted under the directions and supervision of the Insolvency Court. My attention has been invited to the provisions of Section 56 of the Act whereunder the property of the insolvents vests in the receiver for exercising by him all powers under Section 59 of the Act of sale, realization of debts and payment to the creditors from properties of the insolvents. The act of sale and forfeiture of bid money cannot, therefore, be attributed as acts of the Insolvency Court falling outside the provisions of Section 68 of the Act. The purpose, scope and inter-relation of Section 4 containing general powers of the Insolvency Court and Section 68 providing specific remedy against action and decisions of the receiver, came first for consideration before the Rangoon High Court in the case of Ma. Sein Nu v. U. Mg. Mg., AIR 1934 Rangoon 97. The Rangoon decision has been quoted with approval by the Supreme Court in the case of Hansraj, (AIR 1967 SC 1780) (supra), in the last but concluding paragraph 15 at page 1786 of the report reproduced hereunder :--

'15. In our opinion, Jai Lal, J. correctly pointed out the correlation between Sections 4 and 68 in *Daulatram v. Bansilal*, AIR 1937 Lahore 2. The appellants had a money decree against the insolvents which he executed by attachment of a moiety of a share in a house which he alleged belonged to the judgment-debtor. This was before the order of adjudication. An objection was raised by the respondent, Bansilal that he was a purchaser for consideration of the attached property. The objection having been allowed a suit was filed under Order 21, Rule 63, C.P.C. by the attaching decree-holder and Ultimately decreed, it having been held that the sale by the judgment-debtor was fraudulent as against the creditors. The receivers in insolvency then took possession of the property attached by the appellant and sold the same in the insolvency proceedings. Bansilal thereupon made an application under Section 68 on the ground that the action of the receivers was illegal. The District Judge allowed the application holding that the decree passed in the suit under Order 21, Rule 63 was operative only so far as the execution proceedings were concerned and that it did not enure for the benefit of the other creditors. He, therefore, set aside the sale by the receivers. The creditors including the appellant came up in appeal from the order of the District Judge. An objection was raised by the respondents that no appeal lay without the leave either of the District Judge or of the High Court. In disposing of this, Jai Lal, J. observed.

'I am inclined to think that though the District Judge was moved under Section 68 which is not one of the sections mentioned in Sch. I, the investigation which he is expected to make in a case like the present, should be under Section 4, Provincial Insolvency Act and any order passed by him under Section 4 is appealable as of right to this Court'.

An observation similar to the above was made by the same learned Judge in *Mul Raj v. Official Receiver*, AIR 1937 Lahore 297. This point was also brought out in *Gendaram v. Shiva Nand Ganesh Das*, AIR 1937 Lahore 757. The scope of the two sections was brought out even more clearly in a judgment of the Rangoon High Court in *Ma Sein Nu v. U. Mg. Mg.*, AIR 1934 Rangoon 97, where it was said:--

'Now Section 4 defines the powers of the insolvency Court to decide question 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 S.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 Ss. 53, 54 and 68, have to be consulted.'

10. Relying on the above Rangoon case (*supra*) and the decisions of the Lahore High Court reported in the case of *Daulatram v. Bansilal*, AIR 1937 Lahore 2, *Mul Raj v. Official Receiver*, AIR 1937 Lahore 297 and *Gendaram v. Shiva Nand Ganesh Das*, AIR 1937 Lahore 757, the Supreme Court clearly gave its verdict on the correlation between Sections 4 and 68 of the Act. This was what the Supreme Court held in paragraphs 7 and 11 of its report:--

'(7) 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 Ss. 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 envisages the making of an application for relief such application would be subject to Section 68 of the Act.

(11) These decisions, in our opinion, do not assist the appellant on whose behalf it was argued that an application might be made either under Section 68 or under Section 4 of the Act. It is clear from the above decisions that a person complaining of the act of the receiver may either apply under Section 68 or proceed under the ordinary law of the land. 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 the choice of making an application under Section 4 or under Section 68. Section 4 comes into operation whenever any question of nature mentioned therein is sought to be canvassed before a Court exercising insolvency jurisdiction such questions may arise because of acts or decisions of the receiver complained of. A question as to whether an insolvent has any interest in the property attached by the receiver would fall within the purview of Section 4 but the application for the adjudication of such a question when the receiver acts otherwise than under the order of a Court would be covered by Section 68 and as such the period of limitation of twenty one days would be attracted to any such application.'

11. Relying on the above decision of the Supreme Court in the case of Hansraj (AIR 1967 SC 1780) (supra) it has to be held that even where the receiver acted on directions and supervision of the Court, the only remedy before the Court available against the action of the receiver is an approach by an application or complaint within the prescribed period of limitation of 21 days, under Section 68 of the Act. The Nagpur case (AIR 1938 Nagpur 320) (supra) relied on is no longer good law and even otherwise I find it distinguishable because in that case, the Court had expressly restricted the powers of the receiver in respect of sale of the property of the insolvent and it reserved all rights to itself in that regard. See the following condition quoted in the Nagpur judgment which is a clear distinguishing feature :--

'The receiver shall not dispose of any property or money coming into his hands 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.'

12. The second question which arises is whether the application made to the Court by the auction purchasers on 25-4-1980 is liable to be rejected as barred by time since the same was filed much after 21 days of the auction held on 29-1-1979 or from the date of expiry of one month fixed for deposit of the remaining 3/4th amount.

13. On behalf of the appellants/auction purchasers, it is submitted that even if Section 68 is held applicable, the application complaining against the action of the receiver cannot be held as barred by time because no formal communication of the forfeiture was made by the receiver to the auction purchasers. The lower appellate Court held the application barred by time inferring an implied term of the auction that the 1/4th deposit stood automatically forfeited on expiry of thirty days from the date of auction due to non-deposit of the remaining 3/4th bid money within the above prescribed time.

14. The proviso to Section 68 prescribes limitation of twenty one days from the date of act or decision complained of. In a case where the act or decision is not formally conveyed, the limitation cannot be held to commence unless the party aggrieved had the actual or constructive notice of the act or decision complained of. I rely on the decision in the case of *Raja Harish Chandra Raj Singh v. The Deputy Land Acquisition Officer*, AIR 1961 SC 1500, for above proposition:--

'Where the rights of a person are affected by any order and limitation is prescribed for the enforcement of the remedy by the person aggrieved against the said order by reference to the making of the said order, the making of the order must mean either actual or constructive communication of the said order to the party concerned. So the knowledge, of the party affected by the award made by the Collector under Section 12 of the Land Acquisition Act, 1894, either actual or constructive is an essential requirement of fair play and natural justice. Therefore, the expression 'the date of the order' used in proviso (b) to Section 18(2) of the Act must mean the date when the award is either communicated to the party or is known by him either actually or constructively. It will be unreasonable to construe the words from the date of the Collector's award used in the proviso to Section 18 in a literal or mechanical way.'

15. Admittedly, in this case there was no formal notice of forfeiture of 1/4th deposit. The question is, can the auction purchasers be deemed to have constructive notice of it? The term forfeiture, as stated above, was not written and notified in the sale advertisement. It is clear from the reply of the receiver, filed on 17-10-1981 to the application of the auction purchasers that the receiver, on the

date of the auction had orally informed the bidders that on non-deposit of 3/4th bid-money, the 1/4th advance deposit would be forfeited as earnest. The auction purchasers cannot, therefore, be held to have even constructive notice of the date of forfeiture of 1/4th deposit or that it stood forfeited on expiry of thirty days from the date of the auction. The auction purchasers served legal notice on the receiver calling upon him to perform his part of the contract. The receiver readvertised the properties for sale to which the present applicants raised objections. The receiver applied to the Court for permission to re-auction the property and it is thereafter that the appellants filed an application on 25-4-1980 complaining against the action of the receiver and claiming refund of their deposits. The appellants thus had neither actual nor constructive notice of the date on which their 1/4th advance deposit was forfeited by the receiver. The application filed on 25-4-1980, therefore, cannot be rejected as barred by time.

16. The last question on merits which survives for decision is whether the forfeiture of 1/4th deposit by the receiver was warranted in law. The Insolvency Court had set aside the action of the forfeiture made by the receiver only on the ground that the receiver had not duly notified the terms of the auction to the parties. The lower appellate Court did not agree with the Insolvency Court and took a view that the very fact of requirement of 1/4th deposit and its actual deposit by the highest bidder implies that the deposit was a 'earnest' by way of security for performance of the contract, which could be forfeited on the bidders' failure to deposit the remaining bid money within the stipulated time. The appellate Court held that Section 74 of the Contract Act will not come in the way of the receiver, in such a case where the advance deposit was in the nature of 'earnest' and not merely 'part of price' and the forfeiture was not by way of 'penalty'. Reliance was placed by the appellate Court on the decision in the case of *Shree Hanuman Cotton Mills v. Tata Air Craft Ltd.*, AIR 1970 SC 1986.

17. Learned counsel appearing on behalf of the auction purchasers, in this appeal before me, challenged the above reasoning of the lower appellate Court. The submission on their behalf is that the deposit was paid as 'part of price' and there is nothing on record to hold it as having been paid as 'earnest'. The forfeiture, according to them, is by way of penalty which the receiver could not recover under

Section 74 of the Contract Act without proof of any loss caused to the insolvents. Reference is made to the decision in the case of *Maula Bux v. Union of India*, AIR 1970 SC 1955, and *Pollock and Mulla on Contract Act Tenth Edition* (page 703).

18. The learned counsel appearing on behalf of the receiver supported action of forfeiture contending that the 1/4th deposit was 'earnest', if contract is broken by the depositor and was to be adjusted as part of the price, if the contract went through. The submission is that the order of the District Judge, in appeal, suffers from no error of law and no interference is called for in this appeal by the High Court. Reliance on behalf of the receiver is placed on the decision in the case of *P. Srinivasa Naicker v. Engammal*, AIR 1962 SC 1141.

19. Having considered the rival submissions of the counsel for the parties and the case law on the subject, in the light of the provisions of Section 74 of the Contract Act. I have not been able to persuade myself to agree to the view that in this case 1/4th advance deposit could be forfeited by the receiver as 'earnest'. To justify forfeiture of advance deposit, being a part of price as 'earnest', the terms of contract should be sufficiently explicit and made known to the party making the deposit. In this case, the receiver, in his written reply filed on 17-10-1981 in the Court clearly confessed that terms of auction were neither advertised in writing nor were they supplied to the intending bidders at the time of the auction. What has been stated by him is that the terms were orally intimated by him on the date of auction. It is not clear from his reply that he pointedly told the bidders that the 1/4th initial deposit will be treated as 'earnest' and would be liable to be forfeited in the event of default by the highest bidders to make deposit of the remaining auction money within the stipulated period of thirty days. The contents of reply dated 17-10-1981 submitted by the receiver in the Court are also, in my opinion, not sufficient to hold that 1/4th advance deposit of bid money was by way of earnest and as guarantee for fulfilment of other terms of the contract so as to justify its forfeiture on the alleged breach on the part of the highest bidder. Without proof of any loss to the auctioning authority the forfeiture of 1/4th deposit, therefore, cannot be supported by provisions of Section 74 of the Contract Act.

20. As a result of the discussion aforesaid, this appeal succeeds and is hereby allowed. The action of the receiver forfeiting 1/4th deposit of the bid money in the sum of Rs. 70,000/- is hereby set aside. The receiver is directed to refund the amount (with interest which it earned being in deposit with the bank under orders of the Court) to the appellants. In the circumstances of the case, I leave the parties to bear their own costs throughout.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com