

Abdul Razab Vs. Basiruddin Ahmed and ors.

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Court : Kolkata

Decided On : Mar-23-1910

Reported in : 6Ind.Cas.95

Judge : Mookerjee and ;Teunon, JJ.

Appellant : Abdul Razab

Respondent : Basiruddin Ahmed and ors.

Judgement :

1. The substantial question of law, which has been argued upon this Rule, relates to the power of this Court to make an ad interim order for protection of an insolvent, and for appointment of a Receiver of the assets, during the pendency of an appeal preferred tinder the provisions of the 'Provincial Insolvency Act'. The petitioner before us, on the 5th April 1909, made an application to the Court below to be declared an insolvent. This application was dismissed on the 9th August 1909. He then preferred an appeal to this Court, under Section 46 of the Provincial Insolvency Act'. During the pendency of the appeal, some of the creditors have taken out execution of their decrees, and one of them has applied for the issue of a warrant of arrest. The petitioner has, therefore, applied for ad interim protection, and at the hearing of the Rule, one of the creditors has applied for the appointment of a receiver, should such ad interim order be made. A question, however, has been raised as to the power of this Court to make any order of this description, and it has been argued that inasmuch as the 'Provincial Insolvency Act' makes no

express provision for an ad interim order during the pendency of an appeal, it is not competent to the Court to make any such order. In our opinion, there is no foundation for this contention.

2. Section 47 provides that, subject to the provisions of the Act. the Court, in regard to proceedings under the Act, shall have the same powers and shall follow the same procedure as it has, and follows in the exercise of Original Civil Jurisdiction. As the term Court is defined in Section 2, Sub-section (1), Clause (g), to mean the Court exercising jurisdiction under the Act, this makes ample provision for the Court of first instance. The second sub-section of Section 47, then, provides, that subject as aforesaid, High Courts and District Courts, in regard to proceedings under this Act in Courts Subordinate to them, shall have the same powers, and shall follow the same procedure as they respectively have and follow in regard to Civil suits. This provision is of a very comprehensive character, and authorizes this Court as a Court of appeal to exercise all the powers, which it may exercise in the care of a Civil suit pending in appeal before it. This provision read with Section 151 of the Civil Procedure Code of 1908, which saves the inherent powers of Courts of Justice, does, in our opinion, adequately meet the present case. The principles, which ought to regulate the exercise of the inherent power of a Court in the matter of stay of proceedings during the pendency of an appeal, were examined and explained in the cases of *Panchanan Singha Roy v. Dwarka Nath Roy* 3 C.L.J. 29 and *Hukum Chand Baid v. Kamala Nand Singh* 3 C.L.J. 67 : 33 C. 927. It was pointed out in these cases that in the exercise of such inherent power the Court must be careful to see that it does not act arbitrarily, but that its decision is based on sound general principles, and is not in conflict with them or with the intentions of the Legislature. Two tests which, however, need not be regarded as exhaustive by any means, were applied in these cases, to determine whether, and in what manner, this inherent power should be exercised for the purpose of stay of proceedings namely, first, the power to stay proceedings is ancillary to the power of the Court as the appellate authority to reverse the order of the inferior Court, in other words, proceedings may be stayed so as to enable the ultimate successful party to reap the fruits of litigation, and not to obtain a merely barren success. Secondly, as the effect of the appeal is to give the seisin of the proceedings to the Court of appeal, during its pendency, the Court may make any

order for stay of proceedings such as might have been made by the original Court when the proceedings were before it. To put the matter in another way, an ad interim order, made by a Court of appeal, is merely the exercise by it, for a limited time and purpose, of its wider power to make an order of the same description in reversal or modification of the order of the Court of first instance. Now, in the case before us, if the appeal is ultimately successful, this Court will make the order of adjudication which should have been made by the Court of first instance, under Section 16 of the Act, and the effect of that order will be, that the whole of the property of the insolvent will become vested in the Court or in a Receiver, the insolvent, if imprisoned, will be released, and no creditor, to whom the insolvent is indebted in respect of any debt provable under the Act, will have any separate remedy against his property or person. It is manifest, therefore, that this Court may, on the principle just explained, make an ad interim order affording the petitioner protection against proceedings by any creditor, taken for the enforcement of any debt provable under the Act; in other words, the Court in passing such ad interim order makes by anticipation as it were, for a limited time and purpose, the order which it is competent to make at the final hearing of the appeal under Section 45, read with Section 16, by Clause 6 of which section it will relate back to, and take effect from, the date of the presentation of the petition of insolvency. On the same principle also, it is competent to the Court to appoint an ad interim receiver. In fact, the position here is still stronger, as under Section 13 the original Court itself might have appointed an ad interim receiver of the property of the debtor. We are of opinion, therefore, that although there is no express provision on the subject, it is competent to this Court in the exercise of its inherent powers, as a Court of appeal, to make an ad interim order for protection of the appellant and for the appointment of a receiver of his assets during the pendency of the appeal.

3. As regards the merits of the case, we have no desire to prejudge the appeal; but it is fairly clear that there are substantial points in controversy, which required consideration, and it is consequently desirable to stay proceedings during the pendency of the appeal.

4. The result, therefore, is, that this Rule is made absolute. The parties, upon whom this Rule has been served, will be restrained from proceeding with execution against the person and property of the petitioner, and the whole of his assets will be placed in charge of the Nazir of the Court of the District Judge of 21-Pergannahs as Receiver. The Receiver will act under the control and direction of the District Judge. The costs of this Rule will be costs in the appeal. We assess the hearing fee at two gold mohurs.

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