Supreme Court of India
Canara Bank vs The Official Assignee, Madras on 17 December, 1996
Author: G Ray
Bench: G.K. Ray, B.L. Hansaria

PETITIONER:
CANARA BANK

Vs.

RESPONDENT:
THE OFFICIAL ASSIGNEE, MADRAS

DATE OF JUDGMENT: 17/12/1996

BENCH:
G.K. RAY, B.L. HANSARIA

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T G.N. RAY,J.

Leave granted.

Heard learned counsel for the parties. This appeal is directed against judgment dated 29.6.1995 passed by the Division Bench of the Madras High Court in O.S.A. No. 134 to 136 of 1988. By the impugned judgment, the appellant's claim for being treated as secured creditor under the proviso to Section 17 of the Presidency Town Insolvency Act (hereinafter referred to as the Act) read with Section 52 (2)(a) of the Act has been disallowed. The appellants claimed that the goods which were hypothecated to the appellant bank by the insolvents could be sold by the bank for recovery of its dues as secured creditor without approaching the Official Assignee like an ordinary creditor.

The main contention of the appellant is that the goods hypothecated to the appellant belonged to the insolvents who had created a charge over the said goods in favour of the appellant. In such circumstances Section 17 read with Section 52(2)(a) of the Act. and not Section 52 (2)(c) of the Act. is applicable. It will be appropriate to refer to Section 52 of the Act for appreciating rival contentions of the parties:

"52. Description of Insolvent's Property Divisible Amongst Creditors.

(1) The property of the insolvent divisible amongst his creditors, and in this Act referred to as the property of the insolvent. Shall not comprise the following particulars, namely

(a) property held by the insolvent on trust for any other person:

(b) the tools (if any) of his trade and the necessary wearing apparel, bedding, cooking vessels, and furniture, of himself, hi wife, and children to a value, inclusive of tools and apparel and other necessaries as aforesaid, not exceeding three hundred rupees in the whole.

(2) Subject as aforesaid the property of the insolvent shall comprise the following particulars, namely:-

(a) all such property as may belong to, or be vested in, the insolvent at the commencement of the insolvency, or may be acquired by, or devolve on, him before his discharge;

(b) the capacity to exercise, and to take proceedings for exercising, all such powers in or over, or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge; and

(c) all goods, being at the commencement of the insolvency, in the possession, order, or disposition of the insolvent, in his trade or business by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof;

Provided that things in action other than debts due or growing due to the insolvent in the course of his trade or business shall not be deemed goods within the meaning of clause (c):

Provided also that the true owner of any goods which have become divisible among the creditors of the insolvent under the provisions of clause (c) may prove for the value of such goods.

It is thus apparent that while Section 52(2) (a) of the Act refers to all the properties as may belong to or vest in the insolvent at the time of commencement of the insolvency or acquired by or devolved on the insolvent before his discharge, Section 52(2)(c) refers to specified goods namely goods in possession of the insolvent in his trade or business with the consent and provisions of the true owner.

Mr. Promod B. Agarwalla, the learned counsel for the appellant, has submitted that the insolvents in respect of the goods hypothecated to the appellant bank were in possession of such goods at the

commencement of the bankruptcy as its true owners, and had not been in possession of such goods belonging to a third party by the consent of such party. The appellant bank as a mortgagee cannot be termed as a true owner of the hypothecated property. According to the learned counsel, when a hypothedated is created, a floating charge is created on the hypothecated goods, and the title to such goods continues to remain with the mortgagor. Mr. Agarwalla has submitted that the property in the possession of an insolvent may fall either under Section 52(2) (a) of 52(2) (c) of the Act. In the instant case, hypothecated goods are identifiable. The goods which do not belong to the mortgagor put simply possessed with the permission and consent of true owner, cannot be mortgaged. Hence. the identifiable goods which belonged to the mortgagor and was hypothecated to the appellant bank must come under the provisions of Section 52 (2) (a) of the Act, and not under Section 52(2)(c) of the Act.

Mr. Agarwalla has submitted that the view as propounded by the respondent, that a secured creditor holding charge over debts due to a person omitting to give notice to the debtor and allowing the debtor to hold the secured goods in his possession, order or disposition would, upon such debtor becoming insolvent, be disentitled to proceed against the securities under the reputed ownership clause, will render Section 17 of the Act ptoise. Mr. Agarwalla has contanded that Section 17 nowhere provides that a secured creditor will not be entitled to proceed against the securities unless he would have given a prior notice to perfect his title. It is also contended by Mr. Agarwalla that Section 52 does not have a non obstante clause. Hence, it cannot be contended that Section 52(2)(d) is an exception to Section 17 of the Act.

Mr. V.R. Krishnamurthy, the learned counsel for the respondent, on the other hand has submitted that law is well settled by a catena of decisions of different High Courts in India ever since 1924 that in cases of goods in the possession and disposition of the insolvent in his trade or business with the consent of true owner, only Section 52(2)(c) applies which gets attracted both in the cases where the insolvent is the owner of the property and has created a charge over the same by pledging, hypothecating or mortgaging the same to a creditor, as held in the decisions reported in (1912) 22 Madras Law Journal 441.AIR 1924 Madras

214. AIR 1929 Sind 167, AIR 1931 Sind 40, AIR 1931 Sind 44 AIR 1964 Madras 47 and 1977 (1) Madras Law Journal 36 so also in the cases of the property belonging to the creditor out allowed to be kept in possession or used by the insolvent with the consent of such owner and the same was in possession and disposition of the insolvent at the time of insolvency, as held n the decisions reported in AIR 1930 Calcutta 171, AIR 1932 Calcutta 680, AIR 1933 Calcutta 366 and AIR 1937 Sind 37.

Mr. Krishnamurthy has also submitted that the contention of the appellant that in case of secured creditor section 17 of the Act will apply and not Section 52 (2) (c), cannot be accepted. The term true owner includes the owner of an acquitable interest. In support of such contention a decision of Madras High Court reported in AIR 1924 Madras 214 was relied on. Mr. Krishnamurthy has submitted that Section 52(2)(c) applies to cases where the insolvent pledges the property or gives the property as security but was in possession and disposition of the their security with the consent of the creditor. That Section is attracted only when secured creditor omits to give notice. In case of

omission to give notice, protection under Section 17 is not available. In support of such contention, reference has been made to the decision reported in AIR 1931 Sind 44 (Dhanrajmal Kishan Das vs. Official Assignee). Mr. Krishnamurthy has submitted that in view of such settled law no interference is called for in this appeal.

Mr. Agarwalla has however refuted the contentions of Mr. Krishnamurthy. He has submitted that in the instant case, the High Court (Division Bench) has held: "At first it must be pointed out that the bank cannot claim to be true owner of the goods. Mere hypothecation will not make the bank owner of the goods." He has further submitted that the concept of reputed ownership need not be kept in mind in the facts of this case. Mr. Agarwalla has submitted that in Dhanrajmal's case, the High Court proceeded on the footing that the book debt (which was the subject matter of security) which were shown in the books of insolvent and had been assigned by him would be the property of the assignee and would thus attract rebuted ownership clause. The High Court followed the views given in Mulla's book on law of Insolvency to the effect; that a secured creditor was required to perfect his title by giving notice to the original debtor and in case he omits to do so and allow the security to remain in the possession of the insolvent, the property would rest in the official assignee under the reputed ownership clause.

Mr. Agarwalla has further submitted that in Dhanrajmal's case, the High Court held that the insolent was the reputed owner of the book debt standing in its books with the consent of assignee who was the real owner of the book debts. According to Mr. Agarwalla such findings cannot be made in the facts of this case. That apart, the applicability of reputed ownership clause in case of secured creditor failing to give notice to the mortgagor militates against Section 17 read with Section 52(2)(a) of the Act and such view, therefore, requires rejection by this Court.

Considering the facts of the case and that the mortgage is a nationalised bank and goods in question undisputedly belonged to the mortgagors being the insolvents, and such mortgaged goods were found to be clearly identifiable from other goods belonging to the insolvents, and also considering the submission of the learned counsel of the appellant that the amount involved in the claim of the bank is small. We feel that justice of the case requires that the appellant ought to be allowed to recover its dues by sale of the hypothecated goods, and we order accordingly at the call of justice. The contentions raised by the respective parties in this appeal as to the import of reputed ownership clause and the overriding effect on Section 17 and 52(2)(a) of the Act when a mortgagee fails to give notice to the mortgagor, namely, the debtor insolvent to perfect his title even though hypothecated goods belonged to the mortgagor, are kept open to be decided in an appropriate case.

These appeals are accordingly disposed of without any order as to cost.