

ALLAHABAD HIGH COURT

Haji Anwar Khan

Vs

Mohammad Khan

(Dalal,J.)

07.01.1929

JUDGMENT

Dalal, J.

1. This reference to a full Bench raises the question of jurisdiction of the insolvency Court. The questions submitted to us for decision are;

(1) Whether an insolvency Court can try a question of title raised on the basis of a transfer which took place more than two years prior to the adjudication, having regard to the provisions of Section 53, Insolvency Act?

(2) Would it make any difference if the receiver alleges that no transfer had been intended from the very beginning and no title had passed, the transaction being a mere paper transaction and void?

2. If the answer to the first inquiry is in the affirmative the second question will not arise.

3. Every Judge of this Court except one who had to consider the point has decided in favor of jurisdiction of the insolvency Court, that is, the first question has been answered by him in the affirmative. The present Section 4, Insolvency Act (No. 5 of 1920) is an addition to the previous insolvency statute law as laid down in Act No. 3 of 1907. The present Act came into force on 25th February 1920, and on 18th July 1921 a Bench of two Judges, Walsh and Wallach JJ., had occasion to consider the scope of Section 4 of the new Act. The case before the Court was one of a sale by the insolvent more than three years before the insolvency with intent to defraud and delay his creditors. The learned Judges observed: The District Judge has held, rightly, that it does not come within any of the express provisions of the insolvency law, and he has gone on to hold, erroneously, that a transaction cannot be attacked under the provisions of the Transfer of Property Act or under general provisions of the law in the insolvency Court. Here he is wrong. The insolvency Court has to administer the law under its own procedure and to decide questions

arising in insolvency which are covered by special provisions of the Insolvency Act, where, for example, a trustee is given a higher title than the original debtor. But the insolvency Court also has to apply, and to decide, all questions of general law, including such questions as are raised by Section 53, T.P. Act. That is one reason why the administration of insolvency is so onerous and imposes a very heavy burden on the District Courts. If the receiver is right in fact, clearly this transaction was void under Section 53, T.P. Act, and the property attached by the receiver ought to be distributed as a part of the estate among the creditors... There ought to be a full inquiry between the receiver and the creditor on one hand, and the debtor and his family on the other, as to the bona fides of this transaction. Whether you call it summary or not, it ought to follow the ordinary course of a suit. In the main, the provisions of the Code of Civil Procedure are applicable to such inquiry, and there ought to be sworn testimony and the same care used with regard to documents, and the admission or rejection of documentary evidence, as in a suit: *Shikri Prasad v. Aziz Ali*¹

4. Next in order comes a Bench case decided on 3rd July 1923 by Lindsay and Sulaiman, JJ. Both the Judges held that if a question of title is raised in the insolvency Court that Court has jurisdiction to decide it. Lindsay, J., stated at p. 748 of the report: All that Section 4 intended to provide was that if a question involving title is raised before an insolvency Court, then the insolvency Court is to be deemed to have power to decide that question of title.

5. The difference of opinion between the two Judges lay in this that Sulaiman, J., was of opinion that if the matter was once decided even as against a stranger by the insolvency Court the jurisdiction of the civil Court would be barred under Section 11, Civil P.C. Lindsay, J., was not prepared to take the view that a decision under Sub-section (2), Section 1, would be binding upon a stranger who is not making any claim against the debtor or the debtor's estate: *Maharana Kunwar v. E.V. David*² On 6th July 1926 the question as to the bar of the jurisdiction of the civil Court came up before another Bench composed of Sulaiman and Boys, JJ., in which Boys, J., agreed with the opinion of Sulaiman, J., expressed in the case of Maharana Kunwar, and held that once the question of title was decided by the insolvency Court the jurisdiction of the civil Court was barred: *Kaniz Fatima v. Narain Singh*³ Finally, there was a difference of opinion between Sulaiman, J. and Mukerji, J., in *Hari Chand Rai v. Moti Ram*⁴ As we have already seen Sulaiman, J., was of opinion that the jurisdiction of the insolvency Court extended to all transactions raising questions of title whatever their date may be while Mukerji, J., was of opinion that the provisions of Section 4 were circumscribed by the provisions of Section 53, Insolvency Act, The point of the opinion of Mukerji, J., appears on p. 420(of 48 All.) If the transaction is beyond two years the receiver must seek his remedy by an ordinary civil suit instituted under Section 53, T.P. Act.

6. I am in agreement, with the opinion of Sulaiman, J. As that learned Judge pointed out in the case of Hari Chand Rai: Prior to Act 5 of 1920 when there was no provision corresponding to Section 4 of the new Act, a Bench of this Court held that, even if a case did not fall under Section

36 of the old Act of 1907, the Court had power to inquire whether a disputed property was the property of the insolvent or not: *Bansidhar v. Kharagjit*⁵ The Calcutta High Court had held otherwise, that a question of title could be disposed of by a regular suit only. The enactment of Section 4 gives effect to the view which prevailed in this Court. Under Section 4 power is given to the insolvency Court to decide not only all questions of title or priority, but also of any nature whatsoever, whether they involve matters of law or 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.

7. In a Bench ruling of the Madras High Court in *Kochu Mahomed v. Sankaralinga Mudaliar*⁶ the jurisdiction of the insolvency Court was considered under the Insolvency Act of 1907. Seshagiri Aiyar, J., observed at p. 500(of 62 I.C.) of the report: There was a conflict of decisions in the various High Courts, as to whether even without a provision similar to Section 7, Insolvency Act, the Provincial Insolvency Court has jurisdiction to direct delivery of property to the receiver when it is moved by a petition. Section 4 of the present Act has been so altered as to confer such a power. The amendment should not be regarded as if for the first time a new power had been conferred. I am of opinion that Section 4 declares what has been the law all through.

8. In the same case Oldfield, J., considered the provisions of the Act of 1907 in Sections 36 and 37 corresponding to S3. 53 and 54 of the present Act and observed: Of the provisions in the Act relating to property held actually or colourably against the insolvent, Sections 86 and 37 merely prescribe a rule of evidence applicable to two classes of alienations, those completed within particular periods before the adjudication, not, like the sale now in question after it, and it is material only that they assume and do not confer the power of cancellation, which they imply, but which must be looked for in another place." (p. 497, Col. 2.)

9. In *Sriramalu v. Ponakavira Reddi* A.I.R. Mad., there is an interesting discussion as to the scope of Sections 36 and 37 of the Act of 1907 by Venkatasubba Rao, J., at p. 114(of 45 M.L.J.) He has pointed out that the provisions of those sections corresponding to Sections 53 and 54 of the present Act do not involve questions of jurisdiction but lay down rules of evidence under which an insolvency Court is directed to draw an absolute and irrebuttable presumption like the one contained in Section 112, Evidence Act. As remarked by Oldfield, J. in the case of *Kochu Mahomed* we must look elsewhere than in Sections 36 and 37 for jurisdiction of an insolvency Court. Under the present Act a Bench of the Madras High Court held that it was open to an insolvency Court on a proper application being made under Section 4 of the Act to try the issue whether the insolvent is entitled to a certain property or not: *Chittammal v. Ponnuswami*⁷

10. It was argued before us on behalf of the appellant that the words "subject to the provisions of this Act" at the commencement of Section 4(1) of the Act makes Section 4 subject to the provisions of Section 53. I am of opinion that Section 4 deals with jurisdiction, and the jurisdiction will be circumscribed only by such subsequent sections as deal with the jurisdiction of the Court. As painted out in the various judgments of the Madras High Court, Sections 53 and

54 do not deal with the jurisdiction of the insolvency Court, but only lay down rules as to the manner in which evidence should be considered in certain cases arising in that Court. Those sections, therefore, in my opinion, do not control the provisions of Section 4. These words are used to limit the power of the insolvency Court as it is limited, for instance, by the proviso to Section 56 that nothing in that section shall be deemed to authorize the Court to remove from the possession or custody property of any person whom the insolvent has not a present right so to remove. This limitation is excellently illustrated by the case of Chittammal of the Madras High Court. In this case the District Judge directed certain parties to hand over possession of the property in their possession to the Official Receiver. The Madras High Court held that this order was beyond the jurisdiction of the insolvency Court by reason of the enactment of para. 3, Clause (3), Section 56, unless the insolvent was entitled on the date when the receiver applied for possession to the possession of such property. The Court cannot direct the person in possession to deliver up property if a title, however flimsy, is set up by the person in possession. This is the provision of the Act to which the provisions of Section 4 are subject. In the same case the High Court declared that it was open to the insolvency Court on a proper application being made under Section 4, Prov. Insol. Act, to try the issue whether the insolvent is entitled to the property or not after proper opportunity is given to the other side to plead to the application.

11. For these reasons, my answer to the first question is in the affirmative. The second question, therefore, does not arise.

Sen, J.

12. One Afzal Khan applied for being adjudicated an insolvent on 7th July 1926. The adjudication order was passed on 25th March 1927. The Official Receiver having attached a house as the property of the insolvent, one Anwar Khan intervened and claimed title to the house by right of purchase from Afzal, under a registered sale-deed dated 1st January 1923. The receiver pleaded that the sale-deed was fictitious, that it was without consideration and that it had been executed in favour of a relation with a view to defraud the creditors. The trial Court disallowed the objection of Anwar Khan upon the findings that the sale in his favour was a mere cloak to conceal the real ownership and that the insolvent was the owner of the property. On appeal to the lower appellate Court it was urged that the sale having taken place more than two years from the date of adjudication, the receiver was not competent to challenge the sale under Section 53, Provincial Insolvency Act, and that the insolvency Court had no power to annul the same. This contention was repelled by the lower appellate Court which held that the sale was "farzi," that no transfer was as a fact made in favour of the appellant and that Section 53, Provincial Insolvency Act, did not apply to a transaction like this. The appeal was, therefore dismissed. Anwar Khan appealed to this Court and reiterated the pleas already referred to.

13. In view of the importance of the questions involved in the appeal, the learned Judges who heard the appeal have referred the following points for decision by a larger Bench:

(1) Whether an insolvency Court can try a question of title raised on the basis of a transfer which took place more than two years prior to the adjudication having regard to the provisions of Section 53, Insolvency Act?

(2) Would it make any difference if the receiver alleged that no transfer had been intended from the very beginning and no title had passed, the transaction being a mere paper transaction and void.

14. Under Section 9, Civil P.C., the ordinary civil Courts have jurisdiction to try all suits of a civil nature, excepting suits of which their cognizance is either expressly or impliedly barred. Where there has been an infringement of a legal right, the ordinary civil Courts are bound to entertain the claim, unless their jurisdiction has been ousted either by an express enactment or by necessary implication flowing either from statutory provisions or general principles of law.

15. Under Section 53, T.P. Act, where a transfer of an immovable property has been made with intent to defraud... persons having an interest in such property or to defeat or delay the creditors of the transferor, it is voidable at the option of any person so defrauded, defeated or delayed.

16. The remedy of such a person is by a suit in the ordinary civil Court of original jurisdiction.

17. The Court, of insolvency is a creature of statute. It is a special tribunal, having jurisdiction over a limited range of cases within such limits as have been imposed by the statute to which it owes its existence. Unless the Insolvency Act, expressly or by necessary implication (1) took away the powers of ordinary civil Courts to adjudicate upon the validity or otherwise of certain transfers which are sought to be impugned, either upon the ground of fraud or on the ground of want of consideration etc., and (2) invested the insolvency Court with the trial of such matters, the jurisdiction of the civil Courts is not affected or impaired, The following statement of law is to be found in Maxwell's Interpretation of Statutes (6th Edn. 1920, p. 318): Where an Act took away the right of bringing an action respecting certain disputes which were referred to the summary adjudication of justices, it was held that the subsequently established County Courts acquired no jurisdiction to try such cases, under the general authority to try all pleas.

18. The limited nature of the jurisdiction of the Court of insolvency is clear from the provision of the Act itself, notably from Sections 51, 53, 54 and 55. Section 51 deprives the execution creditor of the benefit of execution in certain circumstances in favour of the general body of creditors with reference to property not sold in execution "before the date of the admission of the petition." Section 54 provides that transfers made in favour of the creditor with a view of giving that creditor a preference over other creditors shall be deemed fraudulent and void as against the receiver and shall be annulled by the Court, if the transfer in question is within three months of the presentation of the petition for insolvency. The jurisdiction of the insolvency Court depends upon the fulfillment of the conditions contained in the section.

19. Section 55 affords protection to transfers made by the insolvent before the date of the order of adjudication if they are bona fide and for consideration, the transferee not having had notice of the presentation of an insolvency petition. It is to be noticed that no power is hereby conferred upon the Court of insolvency to displace a transfer which has taken place before the presentation of the petition for insolvency. Section 53 aims at only such transfers which have been made within two years of the date of the order of adjudication.

20. Sections 53 and 54 do not merely lay down a rule of substantive law or a rule of evidence favouring the Official Receiver, but confer a jurisdiction upon the Court of insolvency with reference to only such transfers as are mentioned in those sections and upon the fulfillment of the conditions contained therein, without which the receiver has no right to challenge the transfers nor has the Court a power to annul the same.

21. Section 53, Prov. Insolv. Act (Act 5 of 1920) corresponds to Section 36 of the old Act (Act 3 of 1907). The rule of law enacted by the section is analogous to Section 42, English Bankruptcy Act, 1883 which runs as follows:

(1) Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or encumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of the property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement be void against the trustee in the bankruptcy etc., etc...." (3) "Settlement" shall for the purpose of this section include any conveyance or transfer of property.

22. It will thus appear that both under the English and Indian law, a settlement or transfer of property can be annulled by the insolvency Court at the instance of the Official Receiver or the trustee in the bankruptcy upon the transfer conforming to the conditions mentioned in the Act, one of which is that the transfer had taken place within a certain period either from the date of the settlement or the order of adjudication.

23. The reason is obvious for prescribing a time-limit in cases where the Act starts with a presumption against the validity of such transfers. In a suit under Section 53, T.P. Act, the onus lies upon the transferee to prove that the transfer was not to defraud the prior or subsequent transferees or to defeat or delay the creditors. But there is no presumption of law against the transferee, except where a transfer is made gratuitously or for a grossly inadequate consideration. Under Section 53, Prov. Insol. Act, the question of the intent to defraud defeat or delay is outside the enquiry and the Official Receiver has the right of avoidance if the transfer is within two years of the order of adjudication.

24. The principle underlying the fixation of time in Sections 53 and 54 is that where the transfer precedes the insolvency proceeding by a short period, it may be reasonably assumed that the financial difficulties of the insolvent had already commenced, that he anticipated that the crash was coming and resorted to these transfers in order to place his property beyond the reach of creditors. No presumption should reasonably be raised against his financial soundness more than two years before the date of adjudication. A time-limit in a statute must necessarily be an artificial rule, but the limit of two years is not unreasonable.

25. Under Act 3 of 1907, the trend of decisions on the powers of the insolvency Court has not been uniform. In *Jokhan Singh v. Deputy Commissioner of Faizabad*⁸ Piggott, J.C. held that the intention of the legislature was only to give the Judge sitting in insolvency jurisdiction under Section 36, Act 3 of 1907, in respect of transfers made within two years of the date of his order of adjudication.

26. In *Bansidhar v. Kharagjit* [1915] 37 All. 65(Supra), where the transaction had been entered into by the predecessor-in-title of the insolvent more than two years before the adjudication of the insolvency, Chamier and Piggott, JJ, held that the Court had inherent power to enquire whether the disputed property in possession of the transferee was the property of the insolvent, that it was the duty of the receiver to move the Court and the Court was competent under Section 18 of the Act to remove the transferee from the possession and to vest it in the receiver. Their Lordships noticed that the Indian Provincial Insolvency Act contained no provisions as Section 102, English Bankruptcy Act, which expressly empowered the Bankruptcy Court to decide all other questions whatsoever whether of law or of fact which may arise in any case of bankruptcy coming within the cognizance of Court or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice and making a complete distribution of property in any such case.

27. The judgment of the Court therefore proceeded upon the assumption of an inherent jurisdiction.

28. In *Pitaram v. Jujhar Singh* ⁹Piggott and Walsh, JJ. held that the insolvency Court had concurrent jurisdiction with the ordinary civil Court to enter into a question of the legality of attachment against a person who is a stranger to the bankruptcy. This would appear from the following observations: Now it is to be observed that in accordance with the English Bankruptcy practice a person in the position of the plaintiff in this action, who is a stranger so to speak to the bankruptcy and whose property has been seized wrongfully, according to his view of the case, by the receiver in bankruptcy is not confined to the remedy given him by the Provincial Insolvency Act. He can, if he pleases, apply to the insolvency Court inasmuch as Section 22 applies in express terms to his grievance. But he can if he pleases ignore the insolvency Court and sue in a civil Court for return of his property in an ordinary action against a trespasser...." The question which is an important one is by no means free from difficulty.

29. It may be doubted if it was at all necessary and if the legislature could ever have intended to invest two Courts of co-ordinate jurisdiction with the same powers over the same matter. The decision in this case proceeded upon the application of the doctrine of res judicata.

30. In *Irshad Husain v. Gopi Nath*¹⁰ Richards, C.J. and Banerji, J. followed this ruling but with considerable reluctance. Since finality is claimed for the decision of the insolvency Court on the question of title affecting a third party, this decision is not without its relevancy to the question now under consideration. They observed: If we had to consider the matter in the absence of any authority, we doubt very much whether the order of the insolvency Court and the Court of appeal from that order can operate as res judicata.

31. Unless the object of the legislature was to invest the insolvency Court with summary powers analogous to those conferred upon the ordinary civil Courts under Order 21, Rule 58, Civil P.C., no purpose could have been served in clothing the insolvency Court with powers so narrow and limited.

32. In *Gaura v. Nawab Abdul Majid*¹¹ Piggott and Walsh, JJ., held that where a transaction is seven years old it cannot be questioned by a receiver or creditor under Section 36, Insolvency Act, and the proper remedy is to institute a suit under Section 53, T.P. Act. They observed that this case was the converse case to that of *Pitaram v. Jujhar Singh* [1917] 15 A.L.J. 661 (Supra) already referred to.

33. In *Nilmoni v. Durga Charan*¹² a Bench of the Calcutta High Court in a comprehensive decision which examined all the authorities refused to follow the decision of this Court in *Bansidhar v. Kharagjit* [1915] 37 All. 65 (Supra). It noticed that no power was to be found in the Provincial Insolvency Act corresponding to Section 102, English Act of 1883.

34. In this state of authorities, it was necessary to sufficiently define the powers of the insolvency Court and when the Act was amended in 1920, Section 4 was added in consequence.

35. It is contended on behalf of the respondents that Section 4 confers upon the Court of insolvency full powers to decide all questions whether of title or priority or of any nature whatsoever and whether involving matters of law or fact, and it is contended that the decisions of the insolvency Court are clothed with finality under the express provision of Section 4, Sub-section (2). A Court of insolvency has ordinarily a jurisdiction to decide all matters affecting a claim between the insolvent and the creditors. But some exceptions have been grafted upon this general rule which are to be found in sections like 51, 53 and 54 which have been referred to already. The powers of the insolvency Court are controlled and restricted by these sections, and the opening words of Section 4, Clause (1) "subject to the provisions of this Act" have been deliberately introduced by the legislature to indicate and define the extent of the jurisdiction

which was intended to be conferred upon the Court of insolvency. If the insolvency Court is competent to determine the legality and propriety of transfers which had taken place more than two years before the order of adjudication there could have been no object in prescribing a shorter term in Section 36 of the Act. Section 4 is an enabling section in the sense that it defines the competence of the Court and the extent of its jurisdiction. The powers of the ordinary civil Courts to entertain suits relating to the title of third parties cannot be defeated or extinguished except by statutory enactment. Section 4 does not purport to do this. Under Sub-section 2, finality attaches to only such decisions of the insolvency Court as are *intra vires*. I would, therefore, respectfully differ from the judgment of Sulaiman, J., in *Maharana kuer v. David*¹³. I share the view of Lindsay, J. at p. 748 (of 21 A.L.J.): I am not prepared to take the view that a decision under Sub-section 2, Section 4, would be binding upon a stranger like the plaintiff in the present case who, in my opinion, is not making any claim against the debtor or the debtor's estate. In the present case I am satisfied: (1) that the plaintiff was under no obligation to seek any relief in the insolvency Court; (2) that she had the ordinary remedy under the civil law against the Official Receiver; and (3) that for the purpose of maintaining the suit she was under no obligation to seek any sanction from the insolvency Court.

36. It is to be observed that no question arose in this case as to the legality of transfer more than two years before adjudication and the observations of the learned Judges were mere *obiter*. But the question directly arose in *Hari Chand v. Moti Lal A.I.R. 1926 All. 470*, (Supra) Sulaiman, J., adhered to his view expressed in *Maharana Kuer v. David A.I.R. 1924 All. 40* (Supra). I am not quite sure that the enactment of Section 4 given effect to the view which prevailed in this Court when Act 3 of 1907 was in force. Section 4 defines and restricts the jurisdiction of the Court of insolvency. The transferee does not represent the debtor and the debtor's estate and cannot be said to be a claimant against the debtor in the insolvency proceedings. "Subject to the provisions of this Act" ought to be construed in their natural and grammatical sense and ought not to be narrowed down to a mere right of appeal. I respectfully differ from this decision and from the later decision *Kaniz Fatima v. Narain Singh A.I.R. 1927 All. 66*, (supra) and agree with the decision of Mukerji, J, in *Hari Chand Rai v. Moti Ram A.I.R. 1926 All. 470* (supra).

37. In *Shikri Prasad v. Aziz A.I.R. 1922 All. 196* (supra), the construction of Section 4, Act 5 of 1920, was not in issue and the Court did not consider the meaning or effect of the words "subject to the provisions of this Act" in Sub-section (1) nor of the words: 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 persons claiming through, or under them or any of them.

38. These important words of limitation have evidently been lost sight of by the learned Judges who decided that case. The above remarks apply to the decision of Oldfield and Aiyar, JJ. in *Kochu Mohamed v. Sankaralinga A.I.R. 1921 Mad. 204*. Their Lordships were considering the powers of the insolvency Court under Sections 16 and 18 of Act 3 of 1907 and were of opinion that the Court had jurisdiction to adjudicate upon the title of a third party independent of Section

4, Act 5 of 1907. "I am of opinion that Section 4 declares what has been the law all through". The limitation upon the powers of the insolvency Court within the Act have not been considered or discussed.

39. In *Sriramulu v. Ponakavira Reddi* A.I.R. Mad. all that was decided was that the general power of the Court of insolvency was exercisable to require into the validity of a secured debt independently of Sections 30 and 37. Those sections were only rules of evidence applicable to particular kinds of transfer by the insolvent. Venkatasubba Rao, J., observed: The arguments covered a wide ground, and the question that was raised was whether the insolvency Court has jurisdiction under the Provincial Insolvency Act 3 of 1907 to adjudicate upon claims of third parties as against the insolvent or his estate represented by the receiver. I must state at once that, in my opinion, this question does not arise at all in the present case, and that the matter before us can be decided on a ground very different from the one stated

40. This decision, therefore, cannot be of very great value in the present case. The learned Judge further observes: The Court has to prepare a schedule of creditors which may be amended from time to time and this function cannot be properly or adequately performed unless the Court has equal power to deal with secured as well as unsecured debts. To a proceeding appropriate to this enquiry the parties are not a person subject to the insolvency Court and a stranger.

41. The last observation is in accord with my view of the matter. In *Chittammal v. Ponnuswami Naicker* A.I.R. 1926 Mad. 363, the judgment does not proceed upon a construction of the language of sub-Section (1) and (2), Section 4, Act 5 of 1920, which has already been referred to. The decision, however, recognizes the fact that restrictions have been imposed upon the power of the Court of insolvency, such as under Section 56(3). Devadoss, J., observed at p. 764: But where the person in possession claims adversely to the insolvent, or where he is able to show that the insolvent is not entitled to present possession the Court has no power to proceed under Section 56, etc

42. Further: In a recent case, *Official Receiver" of South Arcot v. Perumal Pillai*, it was decided by Spencer, J.. and myself that the power given by Section 4, Provincial Insolvency Act, is subject to the provisions of the Act, one of which is the proviso to Section 56(3) which is in the way of the Court removing any person from the possession of property whom the insolvent has no present right to remove.

43. If Section 56 imposes restrictions upon the power of the Court of insolvency, why not Section 53?.

44. The Insolvency Acts in this country were modelled upon the English Bankruptcy Act and Section 4, Act 5 of 1920, is practically a reproduction of the corresponding section of the English Acts of 1914, 1883 and 1871. In *Ellis v. Silver*¹⁴ Lord Selbourne, L.C. made the following

observations: The effect of the provisions in the several Acts of the Parliament relating to bankruptcy is, that in these cases of arrangement-deeds, which have been registered in bankruptcy, the trustee for the purpose of administration under the deed has all the powers and all the rights in the Court of bankruptcy which assignees or trustees under a regular bankruptcy would have, and that for all the purposes of administration in bankruptcy, the Court of bankruptcy is armed with very large powers, both legal and equitable as large as may be necessary to do complete justice. But there was no case cited and no clause quoted from any Act of Parliament to the effect that whenever the trustee of a deed or the trustee or assignee in bankruptcy has a demand against a third person, which but for the bankruptcy would be proper to be prosecuted in a Court of law or in a Court of equity is against that third person transferred to the Court of bankruptcy. I apprehend that there is nothing whatever in the Acts relating to bankruptcy which in an ordinary case not governed by the special clauses of the Act has any such effect.

45. The eminent Judge continues; That which is to be done in bankruptcy is the administration in bankruptcy. The debtors and creditors, as the parties to the administration in bankruptcy are subject to that jurisdiction. The trustees or assignees, as the persons entrusted with that administration, are subject to that jurisdiction. The assets which come to their hand and the mode of administering them are subject to that jurisdiction and there may be, and I believe are, some special classes of transactions which under special clauses of the Acts of Parliament may be dealt with as regards third parties. But the general proposition, that whenever the assignees or trustees under such deeds as these have a demand at law or in equity as against a stranger to the bankruptcy, then that demand is to be prosecuted in the Court of bankruptcy appears to me to be a proposition entirely without the warrant of anything in the Acts of Parliament and wholly unsupported by any trace or vestige whatsoever of authority.

46. These observations are applicable in their entirety to the provisions of the Provincial Insolvency Act and specially to Sections 53 and 4.

47. My answer to the reference is (1) An insolvency Court cannot try a question of title relating to a transfer which has taken place more than two years before the order of adjudication having regard to the provision of Section 53, Insolvency Act. (2) Where the transfer was intended not to be operative from the beginning and the insolvent had remained in possession of the property, the receiver may apply for its annulment. But where the transfer was executed by a proper instrument and duly registered and was intended to put the property beyond the reach of the creditors and a third party is claiming under the transfer, such a transaction cannot be treated as a mere paper transaction. In the latter case, Section 53, Insolvency Act will apply.

King, J.

48. I have had the advantage of studying the foregoing judgments of my learned brothers. I fully

agree to the, view expressed by Dalal, J., but as it is diametrically opposed to the opinion formed by Sen, J., I feel it necessary to state my reasons.

49. The main question is whether an insolvency Court can decide the validity of a transfer made by the insolvent more than two years before the order of adjudication.

50. The answer depends upon the interpretation of Section 4(1) read with Section 53, Provincial Insolvency Act, 1920.

51. Section 4(1) appears to me to give to the insolvency Court the widest possible powers to decide all questions of title arising in a case of insolvency. In the present case the question was whether certain property belonged to the insolvent, notwithstanding the fact that he purported to have sold the property to the objector more than two years before the order of adjudication. This was a question of title arising in a case of insolvency, and was moreover a question which the Court might have deemed it expedient or necessary to decide for the purpose of doing complete justice, or of making a complete distribution of the property. Prima facie therefore the insolvency Court undoubtedly was empowered under Section 4(1) to decide the question.

52. The question then arises whether the opening words of Section 4(1) namely "subject to the provisions of this Act," when read with Section 53, have the effect of restricting the jurisdiction of the insolvency Court, so as to prohibit it from deciding the validity of a transfer made by the insolvent more than two years before the order of adjudication. In my opinion this question must be answered in the negative.

53. Section 53 is one of a group of sections namely Sections 51 to 55(both inclusive) which come under the heading "effect of insolvency on antecedent transactions." They lay down certain rules of law applicable to transactions effecting the property of a person who is subsequently adjudged an insolvent. Under Section 53, for instance, a sale of the insolvent's property if made within two years before the order of adjudication can be set aside, as against the receiver, unless the sale was made in good faith and for valuable consideration. This merely lays down a rule of law affecting transactions that fall within its scope. It shows that an order of adjudication affects certain transactions entered into within a period of two years, but no longer. The insolvency Court will of course apply this rule to any case that falls within its scope, but I am unable to interpret this rule as restricting the jurisdiction conferred upon the Court by Section 4(1) to decide all questions whether of title or priority, or of any nature whatsoever.

54. In my opinion Sections 51 to 55 do not restrict, or purport to restrict, the wide jurisdiction conferred by Section 4(1). They merely enact rules which define the effect of insolvency upon antecedent transactions and which must be followed by insolvency Courts whenever the rules are applicable.

55. In the present case Section 53 does not apply, since the sale was transacted more than two

years before the order of adjudication. Hence the insolvency Court certainly cannot annul the sale under Section 53, but I see no reason why the insolvency Court should not annul it under the general law (e.g., under Section 53, T.P. Act) if it is liable to annulment by a civil Court.

56. The intention of the legislature in enacting Section 4(1) seems to have been to confer upon the insolvency Court full powers of deciding all questions of title that arise for decision in cases of insolvency, so that there should be no necessity for having recourse to the ordinary civil Courts. The object probably was to avoid multiplicity of suits and proceedings. Before that section was enacted in 1920 there was a conflict of judicial opinion as to whether the Court had power to determine whether a disputed property belonged to the insolvent or not. The Calcutta High Court held that the question of title could only be determined by a regular suit. I take it that Section 4 was enacted so as to make it clear that questions of title could be determined by the insolvency Court and that there was no necessity to have the questions determined by a regular suit.

57. But, it is urged, what is the meaning of the words "subject to the provision of this Act" in Section 4. Are they not intended to restrict the jurisdiction of the Court to dealing with special cases in which the special provisions of the Act are applicable? I am unable to read the words in this restrictive sense. They may refer to the rules of procedure and appeal laid down in the Act itself. They doubtless refer to the special rules laid down in Sections 51 to 55 meaning that the Court should follow those rules whenever they are applicable. They may also refer to Section 81 under which the Local Government can bar the application of many provisions of the Act, including (for instance) the provisions contained in Sections 51 to 55. They may also refer to such limitation of the power of the Court as is contained in the proviso to Section 56(3). I see no difficulty, therefore, in giving a meaning and effect to the words "subject to the provisions of this Act" without construing them in the restrictive sense suggested by my learned brother Sen, J. In my opinion they do not bar the jurisdiction of the insolvency Court to decide a question of title under the ordinary law when the special provisions of the Act do not apply.

58. I am fortified in this opinion by the previous decisions of this Court. As pointed out by my learned brother Dalal, J. Every Judge of this Court, except one, who had to consider the point has decided in favour of jurisdiction of the insolvency Court.

59. I approve the decisions in *Shikri Prasad v. Aziz Ali A.I.R. 1922 All. 196, (supra)* Maharana Kunwar v. David A.I.R. 1924 All. 4(supra)0, *Kaniz Fatima v. Narain Singh A.I.R. 1927 All. 66(Supra)*, and the opinion of Sulaiman, J., in *Hari Chand Rai v. Moti Ram A.I.R. 1926 All. 470(Supra)*. I must record my respectful dissent from the opinion expressed by Mukerji, J., in the last mentioned case, that if the transaction is beyond two years, the receiver must seek his remedy by an ordinary civil suit instituted under Section 53, T.P. Act.

60. I agree with Dalal, J., that the first question submitted to this Full Bench should be answered

in the affirmative, and that the second question does not arise.

61. In the opinion of the majority of the Judges of this Full Bench the first question submitted to them should be answered in the affirmative, and, in consequence, the second question does not arise.

Cases Referred.

- 1A.I.R. 1922 All. 196
- 2A.I.R. 1924 All. 40
- 3A.I.R. 1927 All. 66
- 4A.I.R. 1926 All. 470
- 5[1915] 37 All. 65
- 6A.I.R. 1921 Mad. 204
- 7A.I.R. 1926 Mad. 363
- 8[1914] 23 I.C. 924
- 9[1917] 15 A.L.J. 661
- 10[1919] 44 All. 378
- 11A.I.R. 1922 All. 443
- 12[1918] 22 C.W.N. 704
- 13A.I.R. 1924 All. 40
- 14[1873] 8 Ch. 83