

ALLAHABAD HIGH COURT

Amir Ahmad

Vs

Syed Hasan

(Sulaiman, C.J, and Bennet, J.)

06.02.1935

JUDGMENT

Sulaiman, C.J,

1. This is a plaintiff's appeal arising out of a suit for partition in which a question arose as to the title of the rival claimants. On 2nd February 1925, one Abdul Ghani, who was heavily in debt sold his share in the house in question to one Abdul Qaiyum. On 19th October 1926, Abdul Ghani himself applied for being adjudicated an insolvent and he was declared an insolvent on 21st. December 1926. On the following day, namely, 22nd December 1926, Abdul Qaiyum sold the property to the present defendant, Saiyid Hasan. On 25th June 1927. on an application made by the official receiver the sale deed of 2nd February 1925, which had been executed by the insolvent in favour of Abdul Qaiyum was annulled by the Court. In that proceeding Abdul Qaiyum alone had boon impleaded and did not appear, the subsequent transferee, Saiyid Hasan was not impleaded by the official receiver at all. After having obtained the order of annulment: the official receiver on 4th. August 1927, transferred the property to the present plaintiff Amir Ahmad. As Amir Ahmad did not obtain possession of the house, the present suit was instituted by him on 21st August 1930, for partition and separation of his share.

2. The plaint was very vague and did not clearly state how Saiyid Hasan came on the scene. The written statement was in the same way vague and did not contain an express plea that Abdul Qaiyum. was a bona fide transferee for value nor did it contain any express plea that the application did not lie under the Insolvency Act at all. Both the Courts below have dismissed the claim holding that inasmuch, as Saiyid Hasan, the defendant, in the absence of any evidence to the contrary must be taken to have been a bona fide purchaser for good consideration his title cannot be impeached.

3. This view is challenged in appeal. Our attention has been drawn to a large number of cases which have a close bearing on the point arising in this case, but there is no case which can be said, to be directly in point.

4. It seems quite clear that if a transfer made by a debtor is wholly fictitious and bogus and no interest in the property passes to the transferee, then the transfer is void ab initio and subsequent transferees can never be protected because the foundation of their title does not exist. There would be no necessity for the official receiver to have such a wholly ineffective, void and fictitious transfer annulled under Section 53 or Section 54 of the Provincial Insolvency Act. In case of dispute he can always ignore it and treat it as a nullity either in a separate suit or in a proceeding under Section 4, Insolvency Act.

5. On the other hand, if the transfer made by the debtor was not wholly fictitious and bogus but the intention of the parties was that property should in fact pass to the transferee, then the result would depend on whether the transferee was a purchaser in good faith and for valuable consideration or not. The transfer for the time being is valid, though it is voidable at the option of the receiver, and it is discretionary with the Court to annul it under Section 53, Provincial Insolvency Act. But so long as the transfer has not been avoided by the receiver and not annulled by the Court, the title vests in the transferee even though he may not have acted in good faith and might not have paid full consideration. Such a transfer can however be annulled, that is to say, declared to have ceased to be binding on the receiver. The annulment, however cannot be equivalent to a declaration that it was void from the very beginning.

6. Reliance has been placed on some English cases, but all of them, are not of much help because the language of the relevant sections in the various Bankruptcy Acts under which they arose was substantially different. But there are a large number of cases in India in which the view appears to have been expressed that Section 53, Insolvency Act has no application when once the transferee from the insolvent has transferred the property to a third party: See *Jaganath Ayyangar v. Narayana Ayyangar*¹ *Sudha v. Nanakchand Daulatram*² *Ponnammai Ammal v. District Official Receiver, Tinnevely*³ *Maung Myint v. Official Assignee*⁴ and *Govind v. Sonba*⁵

7. This view is based on the sole circumstance that Section 53 in terms does not apply to a transferee from a transferee. No doubt the transfer that is annulled by the Court is the transfer made by such transferee as is adjudged insolvent, but it does not follow that a subsequent transferee who is a legal representative is not equally bound by the annulment.

8. There is one significant circumstance which does not appear to have been brought to the notice of the learned Judges who decided the above mentioned cases, and it is that if Section 54(1) had stood by itself there would have been an equal reason for holding that it would not be applicable to a transferee from a creditor because the language of both the sections is almost similar. But there can be no doubt that the legislature has thought otherwise, and has provided in Sub-Section 2 of Section 54, that the rights of any person who has acquired title through or under a creditor will not be affected if he has acted in good faith or for valuable consideration. It follows, that but for this sub-section such a second transferee would not have been protected. Reading Sections 53

and 54 together, it would then seem to follow that the sections are general in their scope and if the transfer made by the insolvent has been annulled the annulment is binding on the initial transferee as well as his subsequent representative. It is noteworthy that the language of para. 1, Section 53, T.P. Act, is similar and there too there is a provision in the last paragraph that the rights of a transferee in good faith and for consideration would not be impaired.

9. This view finds some support from the remarks made by Vaughan Williams, J, *In re Vausittart, Ex Parte Brown* (1893) 2 Q.B. 377. In that case the learned Judge was dealing with the plea of pawnee from the wife of the insolvent to whom he had gifted certain jewellery. The learned Judge observed:

Of course, no question could arise at all unless it is that the respondents were persons claiming in good faith and for valuable consideration.

10. In that case the pawnee had taken the jewellery from the wife previous to the application for insolvency. Nevertheless the learned Judge considered that if he had not been a transferee in good faith and for valuable consideration, no question would have at all arisen.

11. On general principles also there seems to be no reason why, if the original transfer made by the insolvent is found to be voidable and has been annulled by the Court, the annulment should not be binding on subsequent transferees and affect their title. There is however one distinction. Section 54(1) declares that the transfer made by a person unable to pay his debts to a creditor with a view of giving that creditor a preference shall be deemed fraudulent and void and shall be annulled by the Court. The provision is imperative and the Court has no option but to declare it fraudulent and void and to annul it. It was therefore necessary to provide in Sub-section 2 that the rights of any person who in good faith and for valuable consideration has acquired title through or under a creditor would not be affected. On the other hand, the provisions of Section 53, are not so mandatory. A transfer other than one for consideration and made in favour of a purchaser acting in good faith, is only voidable as against the receiver and it is a matter of discretion for the Court to annul it or not. Obviously the Court would decline to exercise its discretion, if the transferee were to satisfy the Court that he acted in good faith, paid full consideration and was entitled to protection on equitable grounds. It was therefore not necessary to add any sub-section to Section 53, corresponding to Sub-section 2 to Section 54. The question of good faith and payment of good consideration as well as that of care and precaution can all be considered by the Court itself. But as the annulment made by the Court does not date back to the original transfer and can at the very most, date back to the date of the application for insolvency, it would follow that the avoidance of a second transfer against a second transferee, who took the second transfer before the application for insolvency was made, cannot be annulled under Section 53 of the Act, but if it is either absolutely void from the very beginning or is voidable under Section 53, T.P. Act, it can be declared to be void or avoided either in a separate suit or in a proceeding under Section 4, Provincial Insolvency Act.

12. Sections 53 and 54 as laid down by the majority of the Full Bench in the case of Anwar Khan v. Muhammad Khan 1929 Ali 105 do not deal with the jurisdiction to 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 and in no way control the provisions of Section 4. It therefore follows that in order to apply Section 53, the condition precedent is a finding that the transfer was otherwise than one made in good faith and for valuable consideration. That finding of fact can be arrived at only when a dispute as to title arises between two rival claimants. When property has been transferred by the transferee of an insolvent to a third party and the receiver is aware of the transfer the dispute is really between the receiver on the one hand and the subsequent transferee on the other and not between the receiver and the first transferee who has no longer got any interest in the property left. In order to start a proceeding under Section 4, the application should therefore be by the receiver against the person who is now claiming title to the property and an adjudication by the Court on such dispute would be final and would bar a second suit and would be binding on the parties to the proceeding. But if the receiver chooses to proceed under Section 4, against the first transferee who has no interest left in the property and obtains an order against him either ex parte or after contest, he cannot use that order as a final adjudication of the matter in dispute as against the real claimant of the title.

13. Some difficulty is certainly caused by the phraseology used in Section 4(2) under which all claimants against the debtor and all persons claiming under claimants are bound. But if the first transferee has ceased to have any interest in the property at all it is difficult to regard him as a claimant against the debtor so as to bind the second transferee. The real situation then is that the claimant is the subsequent transferee in whom the property vests for the time being and it is he and his legal representatives or persons who will claim through him afterwards who would be bound by the order. If a transfer were older than two years prior to the application for insolvency the only remedy open to the official receiver would be to avoid the transfer if he can, in accordance with the provisions of Section 53, T.P. Act, and he has to establish an intent to defraud or delay creditors. The learned Counsel for the appellant has argued that the order of annulment is a judgment, in rem and operates against, the whole world and that it dates back to the initial transfer made by the insolvent. This argument is based on the insolvency jurisdiction of the Court and also on Sections 4(2) and 28(7) of the Act, All adjudications as between the receiver representing the whole body of creditors on the one hand and the insolvent on the other are certainly judgments in rem and are binding on the whole world. But, when a dispute as to title to property arises between the receiver representing the creditors, on the one hand and a stranger to the insolvency proceeding, the judgment would be binding on the person against whom the decision is given and, not against the whole world. Section 28(7) merely lays down that the order of adjudication shall relate back to and take effect from, the date of the: presentation of the petition. Under Section 28(2) on the making of an order of adjudication the whole of the property of the insolvent vests in the Court of the receiver. The result of these: two sub-sections is that the vesting of the property in the receiver dates, back to the date of the application for insolvency. There is no provision in the Act under which the vesting of the property dates back to a previous

transfer made by the insolvent. Indeed such a transfer stands unless it is annulled by the Court.

14. It therefore seems to follow that the official receiver wrongly omitted, to implead Saiyid Hasan, particularly as it appears from the record that he was aware of the transfer in his favour, and that the order of annulment which he obtained against the absent Abdul Qaiyum is not binding upon the present defendant Saiyid Hasan and it is open to Saiyid Hasan to show that the original transfer in favour of Abdul Ghani was made to-purchaser in good faith and for valuable consideration and that it is also open to him to show that he himself acted in good faith and paid full consideration being unaware of insolvency proceedings. As the pleadings were defective the first question has not been gone into by the Courts below, but it has been assumed as a result of the previous order of annulment passed against Abdul Qaiyum that he was not a purchaser in good-faith and for valuable consideration. There is however a clear finding that the defendant Saiyid Hasan in the absence of evidence to the contrary must be taken to be a bona fide purchaser for good value. As Section 53 applies only; to cases of transfer other than those for consideration and in good faith, the burden of proving that the transaction was not in good faith and was without consideration would lie on. the official receiver in the insolvency proceedings : See Official Assignee of the Estate of Cheath Soo Tuan v. Khoo Saw Cheow (1931) A C 67 where the language of the statute was almost identical with that before us. Similarly the burden of proof would lie on the present plaintiff who claims through the official receiver. That burden has not been discharged. The plaintiff did not come to Court on the allegation that the transfer made by the debtor was voidable under Section 53, T.P. Act, and the case therefore has not been considered from that point of view. In our opinion the plaintiff cannot avail himself of Section 53, Insolvency Act, when the respondent acted in good faith, and he cannot succeed without making out a case under Section 53, T.P. Act, which he did not put forward in the plaint. Such a claim cannot be investigated without an amendment of the plaint and without allowing him to make out a new case which he cannot be allowed to do. We therefore dismiss this appeal with costs.

Cases Referred.

11920 Mad. 917
21925 Lah. 295
31927 Mad. 58
41925 Rang. 351
51930 Nag 34