

## ALLAHABAD HIGH COURT

Madan Kumar

Vs.

Hari Narain

Second Appeal Nos. 1 and 2 of 1973

(K.N. Seth, J.)

03.08.1976

### JUDGEMENT

**K.N. Seth, J.**

1. These two appeals arise out of insolvency proceedings initiated by Vishnu Narain who made an application to the Insolvency Judge on 9-8-1966, for declaring him insolvent. The court by its order dated 15-1-1968 declared him insolvent. Respondents Nos. 1 to 5 in these appeals made applications under Section 4 of the Provincial Insolvency Act alleging that the disputed house and the shop were the assets of the insolvent and the transactions relating to them were sham and fictitious and hence void. It was alleged that on 16-4-1963 Vishnu Narain executed a gift deed in favour of his minor sons relating to the house in question. The mother of the minors, acting as their guardian, executed a sale deed dated 7-9-1966 in favour of Madan Kumar, appellant in S. A. F. O. No. 1 of 1973 Vishnu Narain executed a sale deed in favour of his brother-in-law Hari Krishna, appellant in S. A. F. O. No. 2 of 1973, on 27-9-1965 covering the shop in question. According to the respondent-creditors both these transactions were entered into with a view to defeat the claims of the creditors. They prayed that the gift deed dated 16-4-1963 and the two sale deeds be declared null and void. It was alleged that the insolvent continued to remain in possession of both the properties even after the sale deeds. It was also asserted that the fair market value of the house was Rs. 20,000/- but the sale consideration was shown to be Rs. 4000/- which further indicated the true nature of the transaction.

2. The courts below have recorded concurrent findings that the gift deed in favor of the minors and the sale deeds relating to the two properties were sham

and fictitious transactions. I have carefully considered the reasoning adopted by the learned Judge in arriving at the conclusion that these transactions were sham and fictitious and I am of the opinion that the findings arrived at are fully justified and they must be affirmed. The learned counsel in fact did not challenge these findings before me.

3. Learned Counsel urged that the creditors were not competent to make the applications under Section 4 of the Provincial Insolvency Act and the court had no jurisdiction to declare the gift deed and the two sale deeds null and void. It was contended that an application to declare the transactions void could be made either by the Receiver or by a creditor after prior permission of the Court. The argument is wholly misconceived. Section 4 of the Provincial Insolvency Act does not prescribe for any application for relief under that Section. This section defines the limits of jurisdiction of courts exercising powers in insolvency. When a question of title of the insolvent to any property is raised, the court is competent to decide that controversy. It is necessary for the court to find out the assets of the insolvent with a view to make a complete distribution of the property of the insolvent among the creditors. The jurisdiction of the court may be invoked by a creditor. I see nothing in Section 4 of the Act to debar a creditor from invoking the jurisdiction of the court for adjudication of the title of the creditor to the disputed property. The opening words of the section "subject to the provisions of this Act" only mean that Section 4 may not be exercised in such a manner as would be in conflict with any other provisions of this Act. I do not find any provision in the Act which puts a bar in the way of a creditor to invoke the jurisdiction of the insolvency court under Section 4 of the Act. Learned counsel for the appellant referred to Section 54-A and urged that a petition for the annulment of any transfer under Section 53 or of any transfer, payment, obligation or judicial proceeding under Section 54 could be made either by the Receiver or by a creditor with the leave of the court and since the present creditors had not obtained the prior leave of the court before making the application, the court was not competent to declare that the transfers complained of were sham and fictitious transactions and that the properties continued to be the assets of the insolvent. There is no dispute that in the present case no Receiver has been appointed by the Insolvency court. Obviously the creditors could not avail of the right to move the court through a Receiver. The objection that the application could be moved by the creditors

only with the prior leave of the court and in the absence of such a leave the court was not competent to adjudicate upon the title of the insolvent relating to the properties in question is untenable. It may be pointed out that the transfers, payments, obligations etc., mentioned in Section 54-A are confined to valid transfers or payment made or obligations incurred. Where the grievance is that the transfers made were in fact fictitious and sham transactions only with a view to defeat the claim of the creditor Section 54-A is not attracted. Same is the case with the transfers referred to the Section 53 of the Act. This question came to be considered before a Full Bench of the Bombay High Court in *Fadamsi Premchand v. Laxman Vishnu*.<sup>1</sup> The Court observed:

"In our opinion transactions which are challenged on the ground of their being fictitious or nominal do not fall within the ambit of Section 53. If they do not fall within the ambit of Section 53, then Section 4 is wide enough to confer upon the insolvency court jurisdiction to decide whether these transactions were in fact nominal or fictitious."

This view is based on the reasoning that such transactions are not voidable but are void. They were not valid in their inception and at no time did they transfer any title to the transferee. It must, therefore, be held that it was within the competence of the insolvency court under Section 4 to adjudicate upon the title of the transferees on being moved by the creditors. Assuming, however, that the leave of the court was required before the creditors could invoke the jurisdiction of the court under Section 4, the fact that the court entertained the application and proceeded to determine the title relating to the properties in question, a presumption can legitimately be drawn that necessary leave was accorded to the petitioners.

4. It was next urged that the court had no jurisdiction to adjudicate on the validity of the gift deed on the ground that the gift deed was made more than two years prior to the date of declaration of Vishnu Narain as insolvent. Reliance was placed on Section 53 of the Act which provides for a period of two years within which a transfer of the nature referred to in that section may be declared voidable and be annulled by the court. As observed earlier, Section 53 refers to transfers which are only voidable and it does not cover a case where the transfer is claimed to be void since its inception. The bar of two years

provided for in Section 53 should not therefore, apply to a transaction which is claimed to be void. This Court in *Anwar Khan v. Mohammad Khan*,<sup>2</sup> laid down that 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. These sections, therefore, do not control the provisions of Section 4 and the insolvency court is competent to try the issue whether the insolvent is entitled to the property or not even though the transactions complained of took place beyond two years of the declaration of insolvency. In *Vinayak Shamrao v. Moreshwar Ganesh*,<sup>3</sup> Also the view taken was that Sections 53 and 54 empower the court to annul certain transfers which take place within a specified time but either section does not take away the general and wide power conferred by Section 4. Sections 53 and 54 are enabling sections. They confer certain additional powers on the insolvency court which an ordinary civil Court does not have. They are not restrictive and do not take away anything which is already there. Neither Section 53 nor Section 54 deal with sham transfers. For one thing such transfers do not require annulment, and for another they are not really transfers, they only pretend to be. They are matters relating to the property which the court can deal with apart from Sections 53 and 54. The same view was taken by the Bombay High Court in *Padamsi Premchand's case* (FB) (supra). On the principle laid down by these decisions it must be held that the insolvency court is competent to adjudicate upon the validity of the transfers made even prior to two years of the date of insolvency.

No other point has been pressed before me. The appeals have no merits and are dismissed with costs.

Appeals dismissed.

Cases Referred.

1. AIR 1949 Bom 129
2. AIR 1929 All 105 (FB)
3. AIR 1944 Nag 44 (FB)