CALCUTTA HIGH COURT

Radha Krishna Thakur

Vs

Official Receiver

(Mukerji, J.)

28.01.1932

JUDGMENT

Mukerji, J.

1. These two appeals have arisen out of a decision of the District Judge of the 24-Pargannas decreeing the claims of a receiver in insolvency. Sitanath Biswas was adjudicated insolvent by an order, dated 5th December 1927, upon his own petition dated 23rd September 1927. On 19th April 1923 he had executed a deed, described as a deed of gift, in favour of certain family deities, in respect of 66 bighas 6 cattas of land together with structures, gardens, trees, tanks, etc. On 25th October 1924 he transferred byway of sale certain moveable and immovable properties. The recipient of both the deeds was one Atul Krishna Biswas, as shebait of the said deities in respect of the former, and in his personal capacity in respect of the latter. On 21st May 1929 the receiver made a report to the District Judge alleging that the transactions were sham and fraudulently entered into by the insolvent, and prayed that it might be declared that they were void and inoperative and mere benami transactions and that the properties involved might be made available for distribution amongst the general body of creditors. The District Judge ordered notice to issue on Atul Krishna Biswas who appeared and objected to the receiver's application. In the objections so taken it was asserted that the transactions were real ones and it was also urged that the application was not maintainable as one under Section 4 of the Act. The District Judge having overruled the objections and upheld the receiver's contention, two appeals have been preferred to this Court: No. 121 by Atul Krishna Biswas as she-bait of the aforesaid deities in respect of the former of the two transactions, and No. 122 in his personal capacity in respect of the latter.

2. So far as the merits of the transactions are concerned very little indeed can be said against the view which the District Judge has taken. Some of the facts and circumstances, which

prominently stand out upon the materials that are in the record, may here be set out. In 1923, when the deed of endowment was executed, the insolvent who had served as tahsildar in a certain estate from 1312 to 1329 B. S., and in respect of which service ho had rendered accounts till 1325 B. S. and not later, stood indebted to the estate to a certain extent, but the extent of his liability on this head was yet unsettled. A suit in respect of this liability was instituted against him on 14th November 1924. In 1923 he had a debt on a hand-note for which a suit was instituted against him in 1925, and there was also a debt outstanding on mortgage of certain other properties of his for which a suit was instituted against him in 1927. All these suits were eventually decreed. As far as can be made out the debts were in excess of the assets, and there is little doubt that the insolvent executed these deeds in order that the properties covered thereby might not be available to his actual and prospective creditors. The execution and registration of the deed of endowment, not in the locality where the properties to which it related were situate, but at the Alipore Registry Office, is suspicious, and the absence of any witness belonging to the locality at the time when it was executed is a fact which suggests that secrecy was intended. The evidence of Atul Krishna confirms the view that no real transaction was meant. As regards possession we are not satisfied that it changed in any way with the execution of the deed. The same person, who used to collect the rents before, continued to do so after the deed was executed. It is true that rent receipts have been produced to show that Atul Krishna took the rents as shebait and certain accounts have been produced to show that from 1330 to 1335 B. S. expenses were incurred for the debuttar that was created. But the rent receipts would be issued in that way if this show was to be kept up; and as regards the accounts they are far from trustworthy. In spite of the endowment the insolvent himself and not the shebait instituted a suit for rent along with his cosharers of one of the plots covered by the deed. It is clear to our minds upon the materials we have before us that the endowment was a sham, however clearly worded the document was in so far as it never vested the properties in the deities but in the shebait Atul Krishna, and was never intended to be acted upon. As regards the kabala the circumstances . under which it came into existence were very similar to what they were as regards the deed of endowment. It would be sufficient to say in addition that Atul Krishna has admitted that the land dealt with by the kabala had already been dedicated by the deed of endowment. It is curious that the two witnesses to the kabala were the two witnesses in the danpatra. It is significant also that the kabala also was executed at the Alipur Registry Office as the danpatra was. Atul Krishna has chosen to say that at the time of the danpatra and the kabala he was not aware that the insolvent had any debts, but this can hardly be true. There is no evidence as to the passing of the consideration. Atul Krishna has said:When the kabala was executed, Sitanath possessed nothing else, moveable or immovable, except the ten mortgaged bighas which have been sold by the receiver.

3. In our judgment the kabala represented a. benami transaction. It has been contended in the appeal that the onus of proof was on the receiver. This is true; but that onus has, in our opinion, been amply discharged. As regards the maintainability of the application of the receiver or, in other words, the competency of the insolvency Court to deal with it, it has been contended on behalf of the appellant that Section 4, Provincial Insolvency Act, which empowers the Court to deal with questions of title, does not authorize it to determine a question of title of this nature which arises under Section 53, T. P. Act; because the power conferred by Section 4, Provincial Insolvency Act, is subject to the provision of the Act, and consequently subject to Section 53 of that Act; and that therefore if a transaction more than two years old is impeached by the receiver as fraudulent, the question cannot be decided under Section 4 because the transaction cannot be set aside under Section 53. In support of this view reliance has been placed upon the judgment of Mukerji J., of the Allahabad High Court in the case of Hari Chand Rai v. Motiram and the dissenting judgment of Sen, J., of the same Court in the Full Bench case of Anwar Khan v. Muhammad Khan . The history of the enactment relating to bankruptcy in England, so far as is necessary for our present purposes, is as follows : Section 72, Bankruptcy Act, 1869, effected a change in the law as it stood under the earlier Act of 1849 and was worded thus: Subject to the provisions of this Act, every Court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities and all other questions whatsoever, whether of law or fact, arising in any case of bankruptcy coming within the cognizance of such Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any case.

4. In the Bankruptcy Act, 1883, Section 72 of the Act of 1869 was re-enacted as Section 102 (1), and a proviso was added prohibiting the exercise of this jurisdiction by county Courts with regard to any claim not arising out of the bankruptcy, except under certain conditions. Section 102 (1) including the proviso was re-enacted in Section 105 (1), Bankruptcy Act, 1914. The diversity of judicial opinion such as there was under the English Bankruptcy Acts prior to 1883 has been pointed out in the case of Fool Kumari Dasi v. Khirod Chandra Das . In that case, the present state of the law as established by decisions under the Acts of 1883 and 1914 has been said to be this: That the jurisdiction of bankruptcy Courts to adjudicate on the rights of third parties is now fully recognized, though it has also been laid down that there is a discretion in the bankruptcy Courts to direct the trustee to institute or defend in the ordinary civil Courts suits concerning the rights of third parties: see the authorities in Williams on Bankruptcy, 12th Edn., pp. 377 to 378 and in Robson on Bankruptcy, p. 36, et seq.

5. The words of Section 4, Provincial Insolvency Act are, if at all, wider than those of Section 105, Clause (1), Bankruptcy Act, 1914. The word "title" is expressly mentioned in Section 4.

That under Section 4 the insolvency Court can deal with and decide questions of title as between an Official Assignee or Official Receiver and a stranger in respect of property which is claimed on the one hand as the insolvents and on the other hand as the stranger's is a proposition which cannot be, and indeed has not been, disputed on behalf of the appellant. But what has been contended before us is that the expression subject to the provisions of this Act," with which Section 4 opens, makes the power which is given by it governed and restricted by the other provisions of the Act in the sense that only such questions of title may be decided by the insolvency Court as the other provisions of the Act expressly contemplate. It may be pointed out here that the expression 'subject to the provisions of the Act" also appears in the corresponding sections of the Bankruptcy Act, 1869, 1883 and 1914; and notwithstanding this it has never been held that the power to decide questions of title is to be regarded as being restricted in the way suggested on behalf of the appellant. Mukerji, J., of the Allahabad High Court was of opinion in the case of Hari Chand v. Motiram that because Section 53, Provincial Insolvency Act, declares that so far as the receiver is concerned he can seek a declaration, as to the character of the transaction only if the transaction was within two years, the receiver must if the transaction was beyond two years seek his remedy in an ordinary civil suit instituted under Section 53, T. P. Act. In that case Sulaiman, J., was of the contrary opinion and expressed himself thus: The limitation of two years proscribed under Section 53 (meaning that section of the Provincial Insolvency Act) is applicable to all cases where the transfer, when originally made was a good transfer of property, though it was subject to an option of avoiding it to be exercised by the recover. But such a transfer is only voidable and not void and remains good so long as it is not annulled by the Court. On the other hand, a transfer which is wholly fictitious from the very beginning is of no effect and does not require to be annulled. All that the Court has to do in such a case is to decide that it is void, which decision will bind the claimant to the property as if it were by an ordinary civil Court.

6. Mukerji, J. on the other hand, was of opinion that such a distinction, namely, that between transfers void ab initio and and transfers voidable at the option of a party, does not exist so far as Section 53, Provincial Insolvency Act, is concerned. On the question whether transfers voidable under Section 53, T. P. Act, which are good in law so long as the option to avoid them is not exercised by the creditors who are defrauded, could be avoided by an insolvency Court on the application of the receiver, Sulaiman, J. reserved his opinion saying:

A prayer to avoid such voidable documents does not necessarily raise a question of title or of priority mentioned in Section 4, Provincial Insolvency Act of 1920. As to whether it is covered by the wider expression of any nature whatsoever, I would require further consideration before expressing my final opinion.

7. In a previous case in that Court Maharana Kunwar v. E.V. David A.I.R. 1924 All. 40 a firm having been adjudicated insolvent the Official Receiver took charge of the insolvent's estate and attached a house as appertaining thereto. A person protested and alleged that the house belonged to him, but without going to the insolvency Court she filed a regular suit for declaration in the ordinary civil Court. In defence to the suit one of the contentions urged was that the plaintiff's only remedy was to file objections in the insolvency Court, and the regular suit instituted as aforesaid in the ordinary civil Court was not maintainable. Sulaiman, J., observed: I accept the contention that under the new Act if a question of title has been actually raised by a stranger to the insolvency and decided by the insolvency Court the decision is final and the question cannot be reopened in a separate civil suit. This however does not mean that exclusive jurisdiction has been conferrrd on the insolvency Court and that the only remedy open to the aggrieved stranger is to apply to that Court. Lindsay, J., agreed with Sulaiman, J., so far as this particular matter is concerned, observing: It is argued that because of the provisions of Section 4, Act 5 of 1920 whereby jurisdiction has been conferred upon insolvency Courts to determine questions of title in insolvency cases it must necessarily follow that any person who has a question of title to raise must apply to the insolvency Court in other words, it must be assumed from the provisions of Section 4 that because these powers of dealing with questions of title have been conferred therefore the insolvency Courts have exclusive jurisdiction. That appears to me to be a deduction which cannot be made from the language of Section 4. In the case of Kaniz Fatima v. Narain Singh Sulaiman and Boys, JJ., held that once the question of title was decided by the insolvency Court the jurisdiction of the civil-Court was barred. In a Full Bench decision of the same Court in the case of Anwar Khan v. Mahommad-Khan where the receiver had pleaded that a transfer made by the insolvent four years before was fictitious, fraudulent and without consideration, the majority of the learned Judges (Dalai and King, JJ.) composing the Full Bench, held that Section 53, Provincial Insolvency Act, 1920, does not deal with the jurisdiction of the insolvency Court but only lays down certain rules of law affecting those transactions which fall within its scope, and that it does not control or restrict the jurisdiction conferred upon the Court by Section 4 to decide all questions of title. The learned Judges referring to the words "Subject to the provisions of this Act," explained them as meaning that the jurisdiction conferred by Section 4 was limited or. circumscribed by only such provisions of the Act as deal with jurisdiction; as instances it was pointed out that the proviso to para. 2, Clause (3), Section 56, does but Section 53 or Section 54 does not do so. The learned Judges approved of the decision of Sulaiman, J., in Hari Chand Rai v. Moti Ram to the extent that it went, that is to say, in holding that a transfer which was challenged by the receiver as fictitious or void ab initio could be avoided by the insolvency Act and also laid down that the jurisdiction of the insolvency Court went much further, so far as questions of title are concerned, being controlled by such restrictive provisions as to jurisdiction contained in any other part of the Act. In the aforesaid case Sen, J., who was in the minority was

of the same opinion as was expressed by Mukerji, J., in the case of Hari Chand Rai v. Moti Ram namely, that 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. His view was: The powers of the insolvency Courts to adjudicate upon claims as regards third parties are limited and controlled by sections like 63 and 54 and the opening words of Section 4 'subject to the provisions of this Act' have been deliberately introduced to indicate and define the extent of the jurisdiction which was intended to be conferred upon the Court of insolvency.

8. In a much earlier decision the same Court (Walsh and Wallach, JJ.) had interpreted Section 4 in these words: 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 instance a trustee is given higher powers than the original debtors. But the insolvency Court has also to decide all questions of general law, including such questions as are raised by Section 53, T. P. Act.

9. The Madras High Court in the case of *Ramaswami Chettiar v. Ramaswami lyengar*[1] on a consideration of Sections 4, 5 and 56 held that the legislature has invested the insolvency Courts with extensive powers under Section 4, and it would be anomalous to hold that such Courts have no power to investigate questions of title which a stranger may raise when possession is to be given to a purchaser from an Official Receiver. What exactly is meant by the expression "subject to the provisions of the Act" is illustrated in a subsequent decision of the same Court in the case of *Chittammal v. Ponnuswami Naickar*[2] In that case it was pointed out that one of the provisions to which Section 4 is subject is the proviso to Section 56, Clause 3, and that therefore the Court cannot direct any person to deliver up property in his possession to an Official Receiver unless the insolvent is entitled, on the date of the application under Section 56, to the immediate possession of the property and if a title however flimsy is set up by the person in possession the Court cannot act under that section, but that it is open to the Court on a proper application being made under Section 4 to try the issue whether the insolvent is entitled to the property or not.

10. With all deference to the opinion of Mukerji, J., and Sen, J., I must say that I am unable to subscribe to it. The words of Section 4 are very wide and they, in my opinion confer on insolvency Courts full power to deal with all questions of title as between the Official Receiver or Official Assignee and a stranger with reference to property which is claimed on the one hand as being the insolvent's, and on the other as the stranger's property. No other interpretation can be put upon the words of the section, if effect is to be given to the words: 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 or making a complete distribution of property in any such case.

11. It follows from the words just quoted that there may be questions of title raised, no matter by whom which the Court may not deem it expedient or necessary to determine and which on the other hand the Court may in its discretion, leave to be determined by an ordinary, civil Court. It does not follow from anything that has been said in the section that the Court has exclusive jurisdiction to deal with all questions of title that may possibly be but are not actually raised by a stranger, such exclusive jurisdiction being confined to matters decision whereof is called for by any of the provisions of the Act. But if a stranger raises a question of title for its decision, or submits to an investigation by it of a claim of title preferred against him, the decision when made is binding on him. The expression "subject to the provision of this Act" with which the section opens, in my opinion restricts the power conferred by the section only to this extent that it may not be exercised in any such manner as would be in conflict with any provision in the Act. The circumstances under which questions of title raised by or against strangers, except such as regards which the Court has exclusive jurisdiction, should or should not be investigated or determined have not been defined in the Act and the legislature has left the matter to the discretion of the Court it-self. In my judgment so far as questions of title against strangers are concerned the Court should ordinarily decline to go into them where the Receiver claims no higher right than the in-solvent himself; but if the Court, in its discretion, chooses to determine the' question, the decision cannot be said to be bad on the ground of want of jurisdiction or to be any the less a decision binding between the parties under Sub-section (2), Section 4 provided that it is not in conflict with any provision of the Act itself.

12. In the case before us the Official Receiver having impugned the transactions on the ground that they were sham, fraudulent and benami and it having been found that they are such, no question such as a stranger might raise as regards the decision offending the words "subject to the provision of this Act" really arises: the properties, upon investigation, have been found to be still the insolvent's property. But if it be, as it has been contended on behalf of the appellant that the application of the Official Receiver is in its essence an application to avoid a transfer on the principle enunciated in Section 53, T. P. Act, the Court having determined the question of title notwithstanding the appellant's protest can, at the most, be regarded as having exercised its discretion erroneously but as the decision no way conflicts with any of the provisions of the Act it stands good and binding between the parties. It has been argued that Section 55, Clause (c) of the Act militates against the avoidance of transfers Junder Section 53, T. P. Act. In my opinion the true interpretation of that section is that insolvency itself will not invalidate the transfer except in cases provided for by the Act itself but the avoidance of transfers under the general law or under Section 53. T. P. Act, is not affected by that 'section.

13. It has next been contended on behalf of the appellant that the deities in whose favour the

endowment was created were not properly represented, because there were other shebaits who were not made parties to the proceedings. The deed, as we read it, did not vest the properties in the deities, but only upon Atul Krishna as the shebait, but on this point we express no final opinion. This objection was not taken in the Court below, though it is also true that the omission cannot bind the deities. Any way, neither the decision of 'the Court below, nor of this [Court in this appeal, will bind the deities if they have not been properly represented and no remedy, available to them, will in that case be barred by reason of these proceedings. The result is that, in our opinion, these appeals cannot succeed. They are accordingly dismissed, the Official Receiver being entitled to his costs out of the insolvent's estate. Hearing-fee in the two appeals is assessed at three gold mohurs.

Guha, J.

14. I agree. The substantial question of law raised in this appeal is the one relating to the scope and effect of Section 4, Provl. Insol. Act, as it now stands, after the amendment of the section in the year 1920. It was urged on behalf of the appellants that the Court below, in its insolvency jurisdiction, had no power to decide a question of title in regard to two transactions which came into being more than two years before the order of adjudication was made in this case.

15. It was further contended that Section 53, Provl. Insol. Act, was a bar to the decision of a question of title as raised in this case, on the report and the prayer of a Receiver made to the insolvency Court. The Receiver, it would appear, had prayed for notice on the insolvent Sitanath Biswas as also upon Atul Kristo Biswas, to show cause why the sale evidenced by one of the documents, and the debut-tar purported to have been created by the other document, should not be declared to be void and inoperative, and why properties covered by the documents standing in the benami of the said Atul Kristo Biswas should not be declared to be properties of the insolvent, and as such made available for distribution among the general body of creditors, under Section 4, Provl. Insol. Act. Atul Kristo Biswas appeared in the proceedings thus started at the instance of the Receiver, and stated in his petition to the Court that the transfer in his favour by a kobala executed by the insolvent, was bona fide and for valuable consideration, and that he was the shebait of the Thakurs mentioned in the deed of dedication executed by the insolvent, and that he was in possession of the properties covered by the document which evidenced a valid dedication to the idols mentioned therein; that the insolvent had no right, title or interest in the properties dedicated; that the idols were, in possession of the properties in their own right, adversely to the insolvent, the insolvent having no right to dispossess the idols from their possession, the receiver in insolvency could not have also the right to dispossess him (Atul Kristo Biswas), from the properties. A question of jurisdiction of the Court was also raised, and it was stated that a question of title could not be decided, as the insolvency Court had no jurisdiction to

oust Atul Kristo Biswas from his possession of the properties. Issues were raised at the instance of parties, for determination by the Court; and of these issues, among those proposed by Atul Kristo Biswas were the following: Is the present application maintainable under Section 4 Insolvency Act ?" Is the transfer to the claimant a benami transaction and void and inoperative ?" "Is the debuttar void and inoperative, and liable to be annulled.

16. It is apparent therefore that the parties to the proceedings before the Court below wanted not only to have the question of jurisdiction decided by it, but also the question of title arising upon the merits as to whether the receiver's claim for having the transactions annulled was valid or not. The learned District Judge, has upon the materials before him, given effect to the Receiver's claim, as set out in his report, to which reference has already been made. The decision of the learned Judge that the kabala executed by the insolvent, and the deed of dedication creating a debuttar, were fraudulent and collusive, could be challenged before this Court under Section 75, Provincial Insolvency Act, on grounds mentioned in Sub-section (1), Section 100, Civil P. C. The decision come to, based as it is upon definite findings of fact, could not possibly be assailed in this Court, the scope of the appeal being a limited one.

17. The question therefore requiring our consideration is this : if by reason of any limitation imposed upon the authority of the Court, the Court of the District Judge, exercising jurisdiction under the Provincial Insolvency Act, was without jurisdiction to entertain the question of title, irrespective of the question of acquiescence or consent of parties, was the District Court a limited Court which had exercised a jurisdiction which it did not possess under the law, so far as the question of title raised in the present case was concerned between the Receiver and Atul Kristo Biswas, a stranger to the insolvency, or whether the question as has been decided by the insolvency Court, could only be decided by a suit filed in the ordinary tribunal, the transactions which the Receiver wanted to have annulled, having come into existence more than two years before the order of adjudication passed in the insolvency proceedings ? The application by the Receiver was not made under any particular provision contained in the Provincial Insolvency Act, as there was no express provision relating to the same it was an application made by way of a report submitted to the Court, invoking the implied jurisdiction of the insolvency Court. As to whether a Provincial Insolvency Court had power to decide questions of title of the nature raised in the case before us, at the instance of a Receiver in insolvency, there was a conflict of judicial opinion as between the decisions given by this Court, Nilmoni *Choudhuri v. Durga Charan Chowdhuri*[3] and Joy *Chandra Das v. Mahomed Amir*[4] *and the decision of the High Court at Allahabad Banidhar v. Kharagjit*[5] this Court holding that questions of title to property should be decided in a separate suit.

18. In order to make the intention of the legislature quite clear on the point, Section 4 was

introduced in the Provincial Insolvency Act, in 1920, adopting the view taken by the High Court at Allahabad. The word "title" has been used in the section to give prominence to the intention of the legislature that a Provincial Insolvency Court has the power to decide questions of title between the Receiver and strangers to the insolvency. It is to be noticed that where a person claiming to be in possession (as Atul Kristo Biswas did in the case before us), sets up a claim adverse to the insolvent, or where he claims present possession, the insolvency Court has no power to proceed under Section 53, Provincial Insolvency Act; and in such a case the appropriate procedure to follow is to decide the question of title as it is permissible under Section 4 of the Act. The section provides that subject to the provisions of the Act," the insolvency Court shall have full power to decide all questions of title" of any nature whatsoever, and whether involving matters of law or fact, which may arise in any case of insolvency coming within the cognizance of the Court. The jurisdiction thus conferred is not of an exclusive nature; but there can be no doubt that by the use of the words "subject to the provisions of this Act" no limitation has been imposed upon the authority of a Provincial Court of Insolvency to entertain and decide questions of title arising out of insolvency proceedings in a case like the one before us, where Section 53 has no application. No acquiescence, nor any consent was necessary so far as parties to the proceedings were concerned, in the matter of determination of the question of title as raised in the case before us, on the claim put forward by the Receiver in his report to the insolvency Court, which was resisted by Atul Kristo Bis-wfis. The view taken above is in consonance with, and is supported by the decision of this Court in the case of Phul Kumari Dasi v. Khirod Chandra Das although in that case, there was submission to the jurisdiction of the insolvency Court, by act of parties. Judging from the proceedings before the Court below, it cannot be said in the case before us that that element was wanting.

19. In the present case, the learned District Judge, as a Court of insolvency had jurisdiction to deal with the questions decided by him, and the exercise of the jurisdiction under the provisions of Section 4, Provincial Insolvency Act, was expedient and necessary, regard being had to the position taken up by the parties before him, and for the purpose of doing justice in the case as presented by them. The learned Judge has decided the question of title as raised before him, upon evidence adduced by the parties with a view to make a complete distribution of property belonging to the insolvent, and has thus satisfied the requirements of the law.

Cases Referred.

1A.I.R. 1922 Mad. 147
2A.I.R. 1926 Mad. 363
3[1918] 46 I.C. 377
4[1918] 44 I.C. 143
5[1915] 37 All. 65