

BOMBAY HIGH COURT

Padamsi Premchand

Vs.

Laxman Vishnu Deshpande

(M.C. Chagla, C.J.)

03.02.1948

JUDGMENT

M.C. Chagla, C.J.

1. One Keshavji Manekchand was adjudicated an insolvent on a petition presented by his creditors on August 24, 1940. Subsequently the Receiver in the insolvency filed three applications for setting aside three deeds of transfer dated January 25, 1935, January 30, 1935, and March 30, 1932, These transfer deeds were: one in favour of his son Harkissondas Keshavji, the second for the education and marriages of his daughters and for the maintenance and residence of the insolvent himself and third again for the benefit of his son Harkissondas.

2. In the trial Court an issue was raised whether the Court had jurisdiction on its insolvency side to set aside these deeds of transfer. The learned Judge took the view that Section 53 of the Insolvency Act did not apply to the case as the deeds of transfer were made more than two years before the date of the insolvency petition, but he held that the Court had jurisdiction under Section 4 of the Act. An appeal was preferred to the District Court, and the learned Assistant Judge, Thana, dismissed the appeal. In second appeal on the arguments advanced before me I felt some doubt as to whether the view taken as to the powers of the insolvency Court by a division bench of this Court in *Baoji Pandarkar v. Bawachekar*¹, was the correct view, and on that the matter was referred to a full Bench and it has now come before us.

3. Section 58 of the Insolvency Act enables the Receiver in insolvency to avoid voluntary transfers. If a transfer is made which is not in good faith and not for valuable consideration unless it is made before and in consideration of marriage and if it is made within two years of the presentation of the insolvency petition, then it can be avoided by the Receiver in insolvency. It is important to note that the transfers when they were made by the insolvent were valid transfers. Under ordinary law it is open to a person to make a voluntary transfer. He can make a gift or he can pass a valid title by executing a deed of transfer without taking any consideration for the transfer. But Section 53 provides that these transfers although valid can be challenged at the option of the Receiver in insolvency provided the conditions laid down in that section are satisfied, viz. that the transfer must be made within two years of the date of the presentation of the petition. If the transfer was made anterior to that date, then it is not subject to the challenge of the

4. Mr. Desai for the appellants has contended that these three transfers were executed long before two years of the date of the presentation of the insolvency petition and according to Mr. Desai these transfers fall within the ambit of Section 53 and therefore it is not open to the Receiver in insolvency to challenge these transactions in the insolvency Court. The jurisdiction of the insolvency Court to consider questions of title is conferred by Section 4 of the Act, which lays down that subject to the provisions of the Act, the Court has full power to decide all questions whether of title or priority or of any nature whatsoever, and whether involving matters of law or of 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 or making a complete distribution of property in any such case.

5. It is perfectly true that Section 4 is merely declaratory of the jurisdiction of the insolvency Court. It does not declare any substantive law and Section 4, as its very terms indicate, has to be read subject to the other provisions of the Insolvency Act. Therefore Mr. Desai is right when he says that if a transaction falls within the ambit of Section 53, then it can only be challenged provided the conditions laid down in that section are satisfied. It would then not be open to the Receiver to say that although the transaction falls under Section 53 and he could not challenge it under Section 53 because he could not satisfy the conditions, he would fall back upon Section 4 and invoke the wider jurisdiction conferred by that section. But the question we have to consider is whether all transfers made by an insolvent which are to be challenged necessarily fall under Section 53 of the Act.

6. In this particular case the Receiver challenged these three deeds of transfer on the joround that they were nominal and fictitious transactions and that they were not intended to transfer the real interest of the insolvent in the properties. Therefore, on the allegation of the Receiver no title passed under these deeds of transfer to the transferee. These transactions were not voidable but they were void. These transactions were not valid in their inception and at no time did they transfer any title to the transferee. 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. Unfortunately the trial Court did not raise the issue in the proper form. The issue it raised was : Has the Court jurisdiction on its insolvency side to set aside the trusts created ? If the transaction is fictitious or nominal, it is not necessary to set it aside. It is not necessary to avoid it. It was void ab initio and all that the Receiver in insolvency might want is a mere declaration that in fact those transactions were void and of no effect. Therefore the issue that the trial Court should have considered and should have tried was whether these three transactions challenged by the Receiver were nominal and fictitious as alleged by him. If they were nominal and fictitious, then they did not fall within the ambit of Section 53 and could be declared to be void under Section 4 of the Insolvency Act. If they were not fictitious and not nominal and they were real transactions although voluntary, then they would fall within the ambit of Section 53-and not having been challenged within the period required by that section could not be avoided by the Receiver in insolvency. The learned District Judge took the right view of the case and held that the trial Court had yet to find whether these transfers were real or fictitious, and it also took the view that if

ultimately they were found to be fictitious, then the trial Court had jurisdiction beyond all question.

7. The position with regard to the law on the subject is this. Under the Provincial Insolvency Act as it was enacted in 1907 there was no section corresponding to Section 4. That section was incorporated in the statute by Act V of 1920. There was a conflict of view between the Allahabad High Court and the Calcutta High Court whether the Court had jurisdiction to adjudicate on titles affecting strangers with regard to transactions which were challenged on the ground that they were fictitious and nominal. The Allahabad High Court took the view that the Court had jurisdiction and the Calcutta High Court took the view that the Court had no jurisdiction (See judgment of Suleman J. in *Hari Chand Rai v. Moti Ram*⁴) Thereupon the Legislature enacted Section 4 of the Insolvency Act and it seems to us that after the enactment of that section there can be no doubt as to the jurisdiction of the Court to decide questions of title affecting strangers in cases which are not covered by Section 58 of the Act. It is also important to note that the language of Section 4 is much wider than the language of Section 7 of the Presidency-towns Insolvency Act and also Section 105 of the English Act of 1914. Neither the English Act nor the Presidency-towns Insolvency Act refers to title in the corresponding sections. Both these sections deal merely with the question of priority. It is only the Provincial Insolvency Act which in terms confers upon the Court jurisdiction not only to consider questions of priority but also questions of title. This was the view taken by this Court in *Raoji Pandarker v. Bawachekar*⁵, Mr. Justice Murphy and Mr. Justice Barlee were dealing with a case of a sham and colorable transaction and they held that the Provincial Insolvency Court had jurisdiction to deal with such a transaction under Section 4 irrespective of Section 53 of the Insolvency Act and Mr. Justice Murphy at p. 481 says that there is a consensus of judicial opinion in favor of the view that the Court has jurisdiction to deal with such transactions under Section 4. That was as long ago as 1935, and since 1935, if anything, that consensus has grown against the view put forward by Mr. Desai and in support of the view of this Court.

8. Our attention has been drawn to the decision of the Allahabad High Court, *Anwar Khan v. Muhammad Khan*⁶ the decision of the Calcutta High Court in *Shree Shree Radhakrishna Thakur v. The Official Receiver*⁷ of the Patna High Court in *Biseswar Chaudhuri v. Kanhai Singh*⁸ Pat. 9 of the Nagpur High Court in *G.N. Godbole v. Mt. Nani Bai*⁹ and of the Lahore High Court in *Budha Mai v. Official Receiver*¹⁰ all the High Courts taking the same view as taken by this Court. The only solitary exception, with respect, is the Lucknow Chief Court which take a contrary view in *Amjad Ali v. Nand Lal Tandon*¹¹ In our opinion, therefore, *Raoji Pandarker v. Bawachekar*¹², was rightly decided and the Court has jurisdiction to try the question whether these three transfer deeds were fictitious and nominal as alleged by the Receiver.

9. Mr. Desai has impressed upon us the point of view that a stranger should not be compelled to submit to the jurisdiction of the insolvency Court unless he consents so to do. Section 4 merely confers power upon the Court to decide questions of title affecting

⁴(1926) I.L.R. 48 All. 414, 417

⁶(1920) I.L.R. 51 All. 550, F.B

⁸(1931) I.L.R. 11

⁵(1935) 37 BOMLR 478, 157 Ind Cas 680

⁷(1932) I.L.R. 59 Cal. 1135

⁹[1938] A.I.R. Nag.

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¹⁰[1930] A.I.R. Lah. 122

¹²(1935) 37 BOMLR 478, 157 Ind Cas 680

¹¹[1930] A.I.R. Oudh 314

strangers. It is left to the discretion of the Court whether it should be done or not. In this case both the lower Courts have exercised the discretion in favor of deciding this question of title in

which strangers to the insolvency are interested, and we see no reason why we should interfere with the discretion exercised by the lower Courts, the more so when the allegation of the Receiver is that all these three transfer deeds were intended by the insolvent as a screen against his creditors and nominally he was benefiting not any outsider but his own relations, being his son, wife and daughter. We therefore agree with the learned Assistant Judge that the trial Court should try the issue whether the transfers are real or fictitious. If the trial Court comes to the conclusion that they are nominal and fictitious as alleged by the Receiver, then it should proceed to give the declaration that the Receiver asked the Court to do. If, on the other hand, the Court comes to the conclusion that the transfers are not nominal or fictitious but they were real transactions although voluntary in their nature, then it would be the duty of the Court to decide that they fall under Section 53, and not having been challenged within two years of the date of the presentation of the insolvency petition, the application of the Receiver would fail.

10. We therefore dismiss the application with costs.

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