

NAGPUR HIGH COURT

G.N. Godbole

Vs

Nani Bai

Second Appeal No. 162-B of 1935

(Niyoygi and Gruer, JJ.)

22.07.1938

JUDGMENT

Gruer, JJ.

1. This appeal arises out of insolvency proceedings in which one Mahadeo Deshmukh was adjudicated insolvent on 29th July 1932 on his application dated 16th January 1933. The present appellant is the Receiver in that case and the respondents are Mt. Nanibai, wife of Mahadeo and Sahebrao, their minor son. The question at issue was whether the Receiver was entitled to have declared void a partition which took place in that family on 22nd February 1923 as evidenced by a deed of partition of that date and to pursue the sharer which went to the wife and son, in order to satisfy pre-partition debts incurred by the insolvent, These debts are acknowledged in promissory notes dated 11th June 1922 and 4th August 1922 in favor of Madanlal and Shriram respectively, on which about ₹ 3100 were due on decrees when the insolvency case was started.
2. The Receiver's application dated 20th January 1933 purports to be under Section 4, Insolvency Act, and states that the deed of partition is fraudulent and bogus, intended to shield the property from creditors, that the minor son and the wife are shown in the village papers as in possession of their shares and so the deed must be set aside before the Receiver can take actual possession: hence the prayer that, being void as against the Receiver it should be set aside.
3. To call a deed both fraudulent and bogus is not a clear piece of pleading. By 'bogus' is meant that the partition was a mere cloak or blind, i.e. there was no partition but a pretence of making one. On the other hand, to say that a fraudulent deed of partition was effected means that there was a real partition executed with a fraudulent intent. Of course fraud would nearly always be committed in executing a bogus deed, but a deed may be fraudulent without being bogus, and so it is better to keep the positions separate. The trial Court however finds that in the present case the partition deed is fraudulent and bogus and liable to be annulled, while the lower Appellate Court finds that there was nothing fraudulent or bogus about the partition which should not be annulled so long afterwards. The first Court also found that these pre-partition debts were incurred by the insolvent as manager and for joint family purposes, and that finding has not been

interfered with by the lower Appellate Court. The decision of the latter Court depends on its finding that provision was made in the partition deed for the payment of existing debts and so there was no fraud en creditors, and secondly, it is found that the remedy of the Receiver is barred by limitation.

4. Although this is a second appeal the findings of fact are questioned by learned counsel for the appellant. It is therefore necessary to settle them before seeking for the law to be applied. There can be no doubt that the partition was real and not bogus. The shares were determined, and it was carried into effect by mutation of names and has been acted on for a number of years by the giving of kabuliyats mentioned by the witnesses. It was also not contended that it was unreal in so far as the insolvent's brother Rangarao was concerned. The finding of the lower Appellate Court on this point is therefore unassailable. Secondly, were the debts borrowed by Mahadeo as manager for family purposes? The Receiver proved that Mahadeo was a young man of extravagant, and to a certain extent of dissipated habits, but he failed to prove that these particular debts were incurred for the purposes of vice. On the contrary the first Court believed the evidence that the debts were incurred for agricultural purposes. If so, they would be binding even if there would have been no necessity to borrow them if Mahadeo had been more careful of his money. The lower Appellate Court, although it recognizes that Mahadeo was a young man of weak intellect and dissipated habits does not find that the debts were not binding; on the contrary it proceeds on the assumption that they were, but that the non-appellants are protected because they made provision for their payment. The concurrent finding of the two Courts on the point must be accepted by us.

5. Taking the partition to be a real transaction, and assuming for argument's sake that it was made to elude the creditors. let us see what follows. It has been established in two recent cases of this Court, *Firm Govindram Dwarkadas v. Nathulal*¹ and *Jainarayan Mulchand v. Sonaji*², following *Subramania Ayyar v. Sabapathy Ayyar*³, and *Arumugam Chetty v. Muthu Koundan*⁴, and other authorities that a creditor cannot in execution of a decree against a father alone on a pre-partition debt proceed against the shares allotted to the sons at partition, the reason being that after partition that property neither belongs to the father nor has he any disposing power over it. In such circumstances the only course for the creditor would be to file a suit against the son on the score of his pious obligation to pay his father's debts and get a decree to reach the son's share. Now, in insolvency the creditor cannot proceed against the son's property directly when the son is not adjudicated insolvent. He could however have either filed a suit against the son as above, or sued under Section 53, Transfer of Property Act, for a declaration that the partition was fraudulent and did not bind him. Is the Receiver in any better position than this? If he can invoke Section 53, Provincial Insolvency Act, he undoubtedly is, but when he has to fall back on Section 4 of that Act, how is he situated?

6. The words in that Section "subject to the provisions of this Act" are certainly not otiose, and one of the provisions which must apply is Section 56(3). This is conceded

¹ AIR (1937) 24 Nag 45 : 170 IC 724 : ILR (1938) Nag 10

² AIR (1938) 25 Nag 24 : 174 IC 621 : ILR (1938) Nag 136

³ AIR (1938) 15 Mad 657 : 110 IC 141 : 51 Mad 361 : 54 MLJ 726 (FB)

⁴ AIR (1919) 6 Mad 75 : 52 IC 525 : 42 Mad 711 : 37 MLJ 166 (FB)

even when it is argued that Section 4 is not subject to Section 53, for instance by Dalai J. in *Anwar Khan v. Muhammad Khan*⁵, For the Receiver to realize the assets they must be shown to

belong to the insolvent. If they do not, the receiver has no present right to remove a stranger in possession; he would have to file a separate suit against him. Even on the view that proceedings under Section 4, Insolvency Act, should be held to be tantamount to a suit under Section 53, Transfer of Property Act, it would follow that the suit would have to be within time when the insolvency proceedings began. This would be six years under Art. 120, Limitation Act, from the date of accrual of the cause of action: *Lal Singh v. Jai Chand*⁶,

7. Authorities certainly differ on this question whether Section 4, Provincial Insolvency Act, allows the Court to travel beyond the restriction of two years fixed by Section 53 of the Act, and deal with a transfer alleged to be voidable because it is in fraud of creditors, as distinct from bogus or sham. In *Hari Chand Rai v. Moti Ram*⁷, the transaction, a lease, was entirely fictitious. Sulaiman J. distinguished such a transfer from one of the kind under discussion, i.e. one which was a good transfer when originally made but subject to an option of avoiding it to be exercised by the Receiver. He held that Section applies to the fictitious transfer, while Mukerji J. held that it applies to neither kind and that the only possible Section was Section 53 for which the alleged distinction in the nature of these transactions did not exist. It would appear that Sulaiman J. did not give a decided opinion about voidable transfers. He did say that the limitation of two years prescribed under Section 53 is applicable to all cases where the transfer when originally made was a good one, but he also said that he would require further consideration before expressing any final opinion as to whether the expression "of any nature whatsoever" in Section 4 would cover a prayer to avoid a document voidable under Section 53, Transfer of Property Act. In *Anwar Khan v. Muhammad Khan*⁸, the following two questions were referred to a Full 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 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?

8. Dalal and King JJ. answered the first question in the affirmative, and so far then the second did not arise. Sen J. dissenting held that only where the transfer was intended not to be operative could the Receiver apply for its annulment under Section 4. In reviewing previous authorities, Dalal J. said that Sulaiman J. in *Hari Chand Rai v. Moti Ram*⁹, was of opinion that the jurisdiction of the Insolvency Court extended to all transactions raising questions of title whatever their date may be. With due respect we think that Sulaiman J. did not go to that length. At p. 557 of *Anwar Khan v. Muhammad Khan*, AIR (1929) 16 All 105 : 113 IC 819 : 51 All 550 : 1929 ALJ 155

5 AIR (1929) 16 All 105 : 113 IC 819 : 51 All 550 : 1929 ALJ 155 (FB) at p. 557

6 AIR (1931) 18 Lah 70 : 130 I C 778 : 12 Lah 262 : 31 PLR 1014

7 AIR (1926) 13 All 470 : 94 IC 429 : 48 All 414 : 24 ALJ 495

8 AIR (1929) 16 All 105 : 113 IC 819 : 51 All 550 : 1929 ALJ 155 (FB)

9 AIR (1926) 13 All 470 : 94 IC 429 : 48 All 414 : 24 ALJ 495

(FB)(SUPRA) Dalal J. lays down that Section 4 deals with jurisdiction and the words "subject to the provisions of this Act" mean that the jurisdiction is circumscribed only by such subsequent Sections as deal with the jurisdiction of the Court. On this view he holds that it is circumscribed by Section 56 but not by Ss. 53 and 54. We confess that we are unable to follow this distinction,

and prefer the reasoning of Sen J. who says that Ss. 53 and 54 do not merely lay down a rule of substantive law or a rule of evidence favouring the Official Receiver but also confer jurisdiction upon a Court of Insolvency, and hence limit the operation of Section 4. The Judge pertinently asks if Section 56 imposes restrictions upon the power of the Court of Insolvency, why not Section 53.

9. The view expressed by Sen J. was followed in *Amjad Ali v. Nand Lal*¹⁰, by Muhammad Raza and Pullan JJ. This case is precisely in point as the deed in question was alleged to be in fraud of creditors, executed to defeat them and not binding on the Receiver or the creditors. The learned Judges referred to the conflict of authority between the Allahabad and Calcutta High Courts which led to the genesis of Section 4, and approved of the opinion of the Madras High Court in *Official Receiver, Tinnevely v. Sankaralinga Mudaliar*¹¹, that the Section declares what has been the law all through. Referring to Sen J.'s judgment, they say:

The learned Judge has laid emphasis on the limited nature of the jurisdiction of the Insolvency Court as dear from the Act itself and we would support this view by referring to the head-note which appears to the Act over the Ss. 51 and 55 inclusive. The head-note runs: 'Effect of insolvency on antecedent transactions.' We do not consider that where in Section 53, which is governed by this heading, the Act gives the Court power to annul transactions entered into within two years, we should go out of our way to find that a general Section in the same Act gives power to the Court to annul transactions which may have been entered into at any time and which are voidable under the ordinary law under Section 53, Transfer of Property Act. In our opinion transactions of this nature must be challenged, if at all, in the ordinary Civil Court and not in the Insolvency Court. This was the view expressed by a Bench of this Court in *Hinge Lal v. Jawahir Prasad, (1928) 5 OWN 964 : 114 IC 126(SUPRA)*, and it appears from the judgment of the Full Bench of the Allahabad High Court, to which we have referred, that the Judges of the Court are far from being unanimous in holding the contrary view.

10. These remarks have our respectful concurrence and we also feel the force of Sen J.'s observation:

If the Insolvency Court is competent to determine the legality and propriety of transfers which had taken place more than two years before the orders of adjudication there could have been no object in prescribing a shorter term in Section 53 of the Act.

11. We are aware that in *Radhakrishna Thakur v. Official Receiver*¹²,

¹⁰ AIR (1930) 17 Oudh 314 : 123 IC 217 : 5 Luck 742 : 7 OWN 377

¹¹ AIR (1921) 8 Mad 204 : 62 IC 495 : 44 Mad 524 : 40 MLJ 219

¹² AIR(1932) 19 Cal 642 : 139 IC 323 : 59 Cal 1135 : 56 CLJ 446 : 36 CWN 492

after a review of the authorities, the opinions of Mukerji and Sen JJ. were not followed, and it was held that the Insolvency Court could decide questions of title-where Section 53 had no application. The matter before the Court however was a sham or benami transaction and not a real but fraudulent one, and so these remarks are really obiter dicta so far as we are now

concerned. We would indeed agree with these remarks of Mukerji J. in the Calcutta case *Radhakrishna Thakur v. Official Receiver*, AIR (1932) 19 Cal 642 : 139 IC 323 : 59 Cal 1135 : 56 CLJ 446 : 36 CWN 492(*supra*):

It has been argued that Section 55, Cl. (c) of the Act militates against the avoidance of transfers under Section 63, Transfer of Property 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, Transfer of Property Act, is not affected by the Section.

12. We have to add to this only that in our opinion such avoidance under the general law or under the Transfer of Property Act must be by separate proceedings and not under the Insolvency Act. In *Biseswar Chaudhury v. Kanhai Singh*¹⁴, the Judges had to deal with a transaction, alleged to be benami and in fact no transfer at all. However a clear distinction was drawn by the Judges between such cases and those of real transfers, and their opinion was that Section 4 was controlled by Section 53 only in respect of real transfers made by the insolvent. In view of their discussion of the whole question, that opinion, though in part obiter, is valuable.

13. In the above discussion we have proceeded on the assumption that the partition could be avoided because no proper provision has been made for payment of debts. Our conclusion being, that whether this be so or not, the question could not be agitated in the Insolvency Court except under Section 53 of that Act, we need not launch into a detailed examination of the nature of the partition. We note briefly the objections to it that it repudiates the debts incurred by Mahadeo and throws the liability for their payment upon the share allotted to him which share is less by eight pies than that to which he was legally entitled. Farther, it does not provide for the debts before allotting the shares but says that Mahadeo should pay them out of his share. On the other hand it appears that at the moment the property allotted to Mahadeo was ₹ 10,000 which was more than sufficient to cover the debts amounting then to about ₹ 9000, Sulaiman Ag. C.J. in *Bankey Lal v. Durga Prasad*¹⁵, has discussed what the making of a proper provision for debt means, and the above arrangement certainly does not come up to his criterion as the debts were not provided for before the father was given his share in the remainder; nor was that share his legal one on a par with that of his son. On that view of the matter the partition might have been avoided if appropriate steps to do so outside the Insolvency Act had been taken in time. As things are, we find that the decision of the lower Court is correct, and dismiss this appeal with costs on the appellant. Pleader's fee ₹ 100.

¹⁴ AIR (1938) 19 Pat 129 : 136 IC 299 : 11 Pat 9 : 13 PLT 298

¹⁵ AIR (1931) 18 All 512 : 136 IC 139 : 53 All 868 : 1931 ALJ 917 (FB) at p. 877

Appeal dismissed.