

JOHRILAL SONI

v.

SMT. BHANWARI BAI

August 1, 1977

[N. L. UNTWALIA AND S. MURTAZA FAZAL ALI, JJ.]

Provincial Insolvency Act 1920—Section 453—Whether transfers effected more than 2 years prior to commencement of insolvency proceedings can be declared void and inoperative by insolvency court—Difference between void and voidable transfers.

Pyare Lal Gupta, an insolvent, executed a deed of gift in favour of his wife about 7 years before an application under s. 10 of the Provincial Insolvency Act 1920 was made for adjudging him as an insolvent. The appellant was appointed as a Receiver by the Court. He made an application under s. 4 of the Act for declaring the deed of gift as void and inoperative on the ground that it was a sham transaction. The Insolvency Court upheld the plea of the appellant and declared the deed of gift as being void and inoperative.

The respondent donee filed an appeal to the High Court challenging the judgment of the Insolvency Court on the ground that s. 53 of the Act does not authorise an Insolvency Court to decide questions about title or validity in respect of transfers made during a period beyond two years of the commencement of the insolvency proceedings. The High Court upheld the contention of the respondent.

In an appeal by certificate the appellant contended that the High Court had taken an erroneous view of s. 53 of the Act. Section 53 merely deals with voidable transfer and not void transfer. The respondent contended that since the gift was made about 6½ years before the insolvency proceedings began, the Insolvency Court could not examine the question of title.

Allowing the appeal,

HELD : Section 4 of the Act empowers the Insolvency Court to decide all questions whether of title or of priority or of any nature whatsoever which may arise in any case of insolvency. The said provision is, however, subject to the other provisions of the Act. Under s. 53 any transfer of property not being made before and in consideration of marriage or made in favour of a purchaser or encumbrancer in good faith and for valuable consideration shall if the transferor is adjudged insolvent on a petition presented within two years after the date of the transfer, be voidable, against the Receiver and may be annulled by the court. Section 53 only deals with transfers which are voidable. There is a well known distinction between a void and a voidable transfer. Void transfer is no transfer at all and is completely destitute of any legal effect. It is a nullity and does not pass any title at all, where a transfer is nominal, sham or fictitious, the title remains with the transferor and so does the possession and nothing passes to the transferee. Such a transfer clearly falls outside the purview of s. 53. The limitation of two years imposed by s. 53 applies only to voidable transfers. [233H, 234A-E]

Haji Anwar Khan v. Mohammad Khan & Ors. AIR [1929] All. 105, referred to.

Madan Kumar and Anr. v. M/s. Hari Narain Agrawal & Ors. A.I.R. [1977] All. 141; *Padamsi Premchand and Ors. v. Laxman Vishnu Deshpande and Ors.* AIR [1949] Bom. 129; *Radha Krishna Thakur and Anr. v. Official Receiver* AIR [1932] Cal. 642; *Biseswar Chaudhuri v. Kanhai Singh* AIR [1932] Pat. 129; *G. N. Godhole v. Mt. Nani Bai* AIR [1938] Nag. 546 and *Budha Mal v. Official Receiver* AIR [1930] Lah. 122, approved.

A *Amjad Ali and Ors. v. Nand Lal Tandon and Ors.* AIR [1930] Oudh. 314, over-ruled.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 149 of 1976.

From the Judgment and Order dated 26-9-1973 of the Rajasthan High Court in D. B. Civil Insolvency Appeal No. 50 of 1972.

B *Badri Das Sharma* and *S. R. Srivastava* for the Appellant.

O. P. Verma for the Respondent.

The Judgment of the Court was delivered by

C FAZAL ALI, J.—To what extent is s. 4 of the Provincial Insolvency Act, 1920 controlled by s. 53 of the said Act in the matter of determination of the question of title of a property transferred by the insolvent before he was declared insolvent is the serious question of law which is involved in this appeal by certificate. The insolvent Pyarelal Gupta appears to have executed a deed of gift in favour of his wife on November 7, 1961. About seven years later i.e. on April 1, 1968 an application under s. 10 of the Provincial Insolvency Act hereinafter to be referred for short as “the Act”—was made for adjudging Pyarelal as an insolvent. On April 5, 1968 the appellant Zohri Lal Soni an Advocate was appointed receiver by the Court. On October 15, 1960 Pyarelal was on his own application adjudged as an insolvent by the Additional District Judge, Jodhpur. On January 4, 1969 the appellant who was the receiver moved the Court under s. 4 of the Act for declaring the deed of gift dated November 7, 1961 as void and inoperative inasmuch as it was a sham transaction. On March 3, 1972 the Insolvency Court of the Additional District Judge, Jodhpur, after making an inquiry, upheld the plea of the receiver/appellant and declared the deed of gift dated November 7, 1961 as being void and inoperative. Thereafter the respondent Smt. Bhanwari Bai (donee) went up in appeal to the High Court assailing the judgment of the Insolvency Court on the ground that it was legally erroneous. The plea of the respondent Bhanwari Bai seems to have found favour with the High Court of Rajasthan which allowed the appeal and act aside the judgment of the Insolvency Court declaring the deed of gift as void by its judgment dated September 26, 1973. The appellant thereafter applied for grant of certificate of fitness for leave to appeal to this Court which was granted by the High Court on October 27, 1975, and this is how the appeal has been brought to this Court.

H The High Court was of the opinion that in view of the express provision of s. 53 of the Act, the Insolvency Court had no jurisdiction to determine the question of title, nor could it go into the question of the validity of a transfer which was made more than two years before the Insolvency proceedings had started. According to the High Court, while s. 4 of the Act undoubtedly conferred a power on the Insolvency Court to decide questions of title, but this power could not be exercised in respect of transfers made during a period beyond two years of the insolvency proceedings.

In support of the appeal, learned counsel for the appellant submitted that the High Court had taken an erroneous view of the law and had misconstrued the scope and ambit of s. 53 of the Act. Learned counsel for the respondent, however, supported the stand taken by the High Court and submitted that as the gift was made about 6½ years before the proceedings began, the Insolvency Court could not examine the question of title. A number of authorities have been cited by counsel for the parties in support of their respective submissions, but we think the question lies within a very narrow compass. It would appear that s. 4 of the Act was not there in the Insolvency Act of 1907, but was introduced for the first time by Act 5 of 1920. Before 1920, the Provincial Insolvency Act did not contain any such provision as a result of which there was a serious divergence of judicial opinion on the question as to whether or not an Insolvency Court could determine a question of title regarding a transfer made by the insolvent. Act 5 of 1920, however, set at rest this controversy and gave wide powers to the Insolvency Court to determine questions of title.

We now proceed to interpret the provisions of s. 4 itself, the relevant part of which may be extracted thus :

"4. (1) Subject to the provisions of this Act, the Court shall have 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."

It would be seen that the section has been couched in the widest possible terms and confers complete and full powers on the Insolvency Court to decide all questions of title or priority, or of any nature whatsoever, which may arise in any case of insolvency. The only restriction which is contained in s. 4 is that these powers are subject to the other provisions of the Act. In other words, the position is that where any other section of the Act contains a provision which either runs counter to s. 4 or expressly excludes the application of s. 4, to that extent s. 4 would become inapplicable. Counsel for the respondent strongly relied on the provisions of s. 53 which runs thus :

"53. Any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged insolvent on a petition presented within two years after the date of the transfer, be voidable as against the receiver and may be annulled by the Court."

It was submitted that the effect of s. 53 of the Act clearly is that it bars the jurisdiction of the Insolvency Court to determine the validity

A of any transfer made beyond two years of the transferor being adjudged insolvent. It is no doubt true that the words "within two years after the date of the transfer" being voidable as against the receiver does fix a time-limit within which the transfer could be annulled by the Court. But a plain construction of s. 53 would manifestly indicate that the words "within two years after the date, be voidable as against the receiver, and shall be annulled by the Court" clearly connote that only those transfers are excepted from the jurisdiction of the Court which are voidable. The section has, therefore, made a clear distinction between void and voidable transfers—a distinction which is well-known to law. A void transfer is no transfer at all and is completely destitute of any legal effect : it is a nullity and does not pass any title at all. For instance, where a transfer is nominal, sham or fictitious, the title remains with the transferor and so does the possession and nothing passes to the transferee. It is manifest, therefore, that such a transfer is no transfer in the eye of the law. Such transfers, therefore, clearly fall beyond the purview of s. 53 of the Act which refers only to transfers which are voidable. It is well settled that a voidable transfer is otherwise a valid transaction and continues to be good until it is avoided by the party aggrieved. For instance, transfers executed by the transferor to delay or defraud his creditors may be avoided under s. 53 of the Transfer of Property Act. Similarly transfers made under coercion, fraud or undue influence may be avoided by the party defrauded. It is only such transfers which, if they take place beyond two years of the date of transfer, cannot be enquired into by the Court by virtue of s. 53 of the Act. This appears to us to be the plain and simple interpretation of the combined reading of ss. 4 and 53 of the Act. Indeed if a different interpretation is given, it will render the entire object of the section nugatory, because the Court would be powerless to set at naught transfers which are patently void, merely because they had been made at a particular point of time.

F Reliance was placed by counsel for the appellant on a Full Bench decision of the Allahabad High Court in *Haji Anwar Khan v. Mohamad Khan & Ors*⁽¹⁾ where the following two questions were referred for the decision of the Full Bench :

G "(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 s. 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 ?"

H After discussing a large number of authorities, Dalal, J., answered the first question in the affirmative and held that an Insolvency Court could try a question of title raised on the basis of a transfer which

(1) A.I.R. 1929 All. 115.

took place two years prior to the adjudication, but the learned Judge, however, refrained from giving any opinion on the other question, which in our opinion was the most pertinent question to be answered having regard to the specific distinction made by s. 53 between void and voidable transactions. Sen, J., appears to have sounded a discordant note in observing as follows :

"My answer to the reference is (1) 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 having regard to the provisions of s. 53, Insolvency Act.

(2) Where the transfer was intended not to be operative from the beginning and the insolvent had remained in possession of the property the receiver may apply for its annulment. But where the transfer was executed by a proper instrument and duly registered and was intended to put the property beyond the reach of the creditors and a third party is claiming under the transfer, such a transaction cannot be treated as a mere paper transaction."

We feel that the view of Sen. J., appears to be based on a correct interpretation of ss. 4 and 53 of the Act. King, J., agreed with Dalal, J., and observed as follows :

"I see no difficulty, therefore, in giving a meaning and effect to the words "subject to the provisions of this Act" without construing them in the restrictive sense suggested by my learned brother Sen, J. In my opinion they do not bar the jurisdiction of the insolvency Court to decide a question of title under the ordinary law when the special provisions of the Act do not apply."

In a later decision of the Allahabad High Court in *Madan Kumar and Anr. v. M/s. Hari Nardin Agrawal and Ors* (1) following the Full Bench decision referred to above, it was observed as follows :

"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."

We are of the opinion that the learned Judge has laid down the Correct law on the subject. A Full Bench of the Bombay High Court in *Padamsi Premchand and others v. Laxman Vishnu Despande and others*(2) has taken the same view, which we have taken. In that

(1) A.I.R. 1977 All. 141.

(2) A.I.R. 1949 Bom. 129.

A case, and which we feel is based on a correct and true interpretation of ss. 4 and 53 of the Act, after considering the history of the Act, Chagla, C. J., speaking for the Court observed as follows :

B "It is perfectly true that s. 4 is merely declaratory of the jurisdiction of the insolvency Court. Therefore, Mr. Desai is right when he says that if a transaction falls within the ambit of s. 53, then it can only be challenged provided the conditions laid down in that section are satisfied."

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

D We find ourselves in complete agreement with the view expressed by Chagla, C.J., in the aforesaid decision. The Bombay High Court further pointed out that the same view was taken by the Calcutta High Court in *Radha Krishna Thakur and Anr v. Official Receiver*,⁽¹⁾ by the Patna High Court in *Biseswar Chaudhuri v. Kanhai Singh*,⁽²⁾ the Nagpur High Court in *G. N. Godbole v. Mt. Nani Bai*,⁽³⁾ and the Lahore High Court in *Budha Mal v. Official Receiver*.⁽⁴⁾ The only decision which appears to have taken a contrary view is of the Oudh Chief Court in *Amjad Ali and others v. Nand Lal Tandon and others*⁽⁵⁾ which appears to be the shoot-anchor of the argument of the learned counsel for the respondent. The Oudh Chief Court observed as follows :

E "We do not consider that where in s. 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 s. 53, T. P. Act. In our opinion transactions of this nature must be challenged, if at all, in an ordinary civil Court and not in the insolvency Court."

F With due respect, however, we are unable to agree with the view expressed by the learned Judges of the Chief Court Oudh, because they seem to overlook the distinction made by s. 53 between a void and a voidable transaction. Moreover, the Oudh Chief Court was concerned with a *benami* transaction and it is not necessary for us to say anything about such a transaction, because in the instant case we

(1) A.I.R. 1932 Cal. 642.

(2) A.I.R. 1932 Pat. 129.

(3) A.I.R. 1938 Nag. 546.

(4) A.I.R. 1930 Lah. 122.

(5) A.I.R. 1930 Oudh. 314.

are concerned with a transfer which was sought to be challenged on the ground that it was a nominal and sham transaction and thus a void transaction which clearly falls within the four corners of s. 4 of the Act and is not covered by s. 53 of the Act so as to deprive the Insolvency Court of its jurisdiction to determine the question of title of the transfer. **A**

For these reasons, therefore, we are clearly of the opinion that in the present case the Additional District Judge was right in holding that the Insolvency Court had complete jurisdiction to decide the validity of the transfer when it was challenged on the ground that it was a sham and a fictitious transaction which need not have been set aside and a declaration that the transfer was void was sufficient. The view taken by the High Court is legally erroneous and is not in consonance with the correct interpretation of ss. 4 and 53 of the Act. **B**

We, therefore, allow the appeal, set aside the judgment of the High Court and remit the case back to it for a fresh disposal of the appeal on merits. We make no order as to costs. **C**

P.H.P.

Appeal allowed.