

SRI BABU RAM @ DURGA PRASAD
v.
SRI INDRA PAL SINGH (DEAD) BY LRS.

A

AUGUST 13, 1998

[S.B. MAJMUDAR AND M. JAGANNADHA RAO, JJ.]

B

Provincial Insolvency Act, 1920:

Sections 35, 37, 43,(1)—Annulment of insolvency—Effect of—In suit for insolvency a joint agreement was filed for sale with a clause for re-conveyance within 5 years—Plaintiff declared insolvent—Sale deed executed by official receiver—Plaintiff sent notice for re-purchase—Since creditor refused to re-convey, plaintiff filed suit for specific performance—Subsequently, adjudication as insolvent unconditionally annulled—Held—On annulment, property and rights of plaintiff stand restored to him with retrospective effect—Insolvency gets wiped out together—Notice sent and suit filed for re-conveyance when plaintiff was an undischarged insolvent, get retrospectively validated.

C

D

Contract Act, 1872 :

Section 55—Held—Time is of essence where contract is for re-conveyance of immovable property.

E

Section 62—Novation—Plea cannot be raised or accepted for the first time in second appeal under Section 100 CPC.

Code of Civil Procedure, 1908—Section 100—Contention of creditor that there was breach of re-conveyance agreement by plaintiff not pressed before trial court—However, in second appeal it was held that there was breach of re-conveyance agreement and sale deed was in pursuance of new contract—On appeal, held: High Court exceeded its jurisdiction w/s 100 C.P.C in giving a finding on an issue not pressed in trial court—Also, plea of novation cannot be accepted for the first time in second appeal.

F

G

Limitation Act, 1963—Part II of Article 54—Where agreement does not specify period within which vendee is to execute deed of re-purchase—Held—Time of three years starts to run only from the date vendee refuses to execute re-conveyance deed.

H

A The Respondent-defendant instituted an insolvency suit on 19.11.1963 against the appellant—Plaintiff since the Plaintiff failed to return Rs. 7,000 owed to him. On the same day, the plaintiff and the defendant filed a joint application before the Insolvency Court, seeking permission for the debtor to transfer his property to the creditor in full satisfaction of his dues, with the condition that the debtor may repurchase the property, within 5 years, B for Rs. 7,000. In terms of the settlement, the creditor agreed to withdraw the Insolvency Petition. Accordingly, on 22.11.1963 an Order was passed by the Court permitting the interim receiver to execute the sale deed. However, neither the sale deed was executed by the interim receiver nor were steps taken by the creditor to withdraw the Insolvency Petition and on 29.5. 1964, C the plaintiff was adjudicated an insolvent and directed to apply for discharge within one year.

The Official Receiver, however, executed a sale deed on 15.7.1964, wherein the plaintiff also joined as vendor, and reported to the insolvency court that the plaintiff had cleared all his debts. The plaintiff moved for D discharge and later unsuccessfully moved an application u/s 43(1) of the Insolvency Act for annulment since all creditors had been paid in full. In appeal, the adjudication of the plaintiff as an insolvent was annulled, unconditionally on 22.10.1964. In the meanwhile, before annulment, since the period of 5 years for seeking re-conveyance was going to expire, the E plaintiff issued notice on 12.7.1968 to the creditor to reconvey the property to him on payment of Rs. 7,000 However, the creditor refused to re-convey the property.

A suit was filed by the Plaintiff seeking specific performance of the re conveyance agreement entered into between the plaintiff and the creditor F on 19.11.1963 and filed in the insolvency court. The suit was decreed and the judgement of the trial court was affirmed in first appeal. However, in second appeal the High Court reversed the judgements of the lower courts. The High Court held that the agreement contained in the joint application dated 19.11.1963 was not given effect; the sale deed dated 15.7.1964 executed G by the official receiver was not in pursuance of the original agreement dated 19.11.1963 but in pursuance of a “fresh contract” which did not have a re-conveyance clause; the contract dated 19.11.1963 was a conditional contract and since the conditions laid down by Order dated 22.11.1963 had not been fulfilled, there was no enforceable contract of re conveyance.

H In appeal to this Court the plaintiff-appellant contended that the High

Court erred in holding that the order of insolvency court dated 22.11.1963 or sale deed dated 15.7.1964 executed by official receiver did not refer to re-conveyance agreement filed before the court and hence, the same was not enforceable; the High Court under Section 100 CPC, in second appeal, could not give a finding on an issue not pressed before the trial court and hold that the plaintiff had committed a breach of contract; that there was no fresh/new contract consequent to which the sale deed was executed by official receiver in favour of the creditor; that the annulment retrospectively validates the option exercised by the plaintiff vide notice dated 12.7.1968 and the filing of the suit on 6.10.1969, even though he was an undischarged insolvent on that date.

The respondent-creditor contended that there was fresh contract at the time of execution of sale deed by official receiver on 15.7.1964 which was not traceable to the agreement dated 19.11.1963 which had a clause for re-conveyance. The Plaintiff did not implement the first agreement by executing the sale deed in favour of the respondent. The suit was not maintainable since the plaintiff was an undischarged insolvent on that date.

Allowing the Appeal, this Court

HELD: 1. In case of un-conditional annulment of adjudication as insolvent under section 37r/w section 43 of the Provincial Insolvency Act, the property and rights of the insolvent stand restored to him with retrospective effect from the date of filing of insolvency petition and the insolvency gets wiped out altogether. All acts of the undischarged insolvent, on annulment, get retrospectively validated. However, all acts of the court and receiver prior to annulment will remain valid. Thus the acts of the plaintiff as an undischarged insolvent in issuing the notice for re-conveyance and, on failure to re-convey by the creditor, filing the suit for specific performance, stand retrospectively validated upon the unconditional annulment of the adjudication on 22.10.1963 with effect form the date of filing of the insolvency petition on 19.11.1963. [1164-A-D]

Arunachalam v. Naryana Swami, AIR (1951) Mad 63; *Ratnannavelu Chettiyar v. Franciscu Udayar*, AIR (1945) Mad 388 and *Subbuaiah Goudan v. Ramaswami Goundan*, AIR (1954) Mad 604, approved.

Peraya v. Kondayya, AIR (1948) Mad. 430 and *Rup Narain Singh and Anr. v. Hargopal Singh*, AIR (1933) All 449, referred to.

A *Arora Enterprises Ltd. and Ors. v. Indu Bhushan Obhar and Ors.*, [1997] 5 SCC 366; *Tukaram Ramachandra Mane (d) by Lrs. v. Rajaram Babu Lukule, (d) by Lrs.* [1998] 2 Scale 719; *Parvathi Amma, v. Faso Yohanan*, AIR (1955) TC 241 and *A.R. Ghazani v. Official Receiver*, AIR 1958 Mad. 486, cited.

B *Bailey v. Johnson*, (1872) 7 Ex. 263, referred to.

2.1. The High Court while holding that the sale deed dated 15.7.1964 was traceable to a new agreement, erred in making out a new case for which there was neither any issue nor evidence. The sale deed dated 15.7.1964 was not the result of a new agreement. The question of novation under section 62 of the Contract Act cannot be raised or accepted for the first time in second appeal u/s 100 C.P.C. [1156-D-E; 1157-B]

2.2. The High Court in second appeal exceeded its jurisdiction u/s 100 C.P.C in giving a finding on an issue not pressed in the trial court. The High Court error in holding that there was a breach by the plaintiff of the reconveyance agreement dated 19.11.1963 when this aspect was not pressed in the trial court. In any case, there was no breach of agreement dated 19.11.1963 by the plaintiff inasmuch as, the interim receiver and not the plaintiff was granted permission to execute the sale deed. [1157-E-D]

2.3. The absence of reference to the agreement to reconvey in the Court Order dated 22.11.1963 and the sale deed dated 15.7.1964 does not indicate that the original agreement to sell dated 19.11.1963 was superseded. Since the sale deed dated 15.7.1964 was not the result of a new agreement, the agreement for reconveyance dated 19.11.1963 cannot be said to have been superseded. [1158-E-F; D]

3. It was permissible for the plaintiff to move an application u/s 43(1) of the Provincial Insolvency Act to seek an annulment. Section 43(1) provides that court may annul an adjudication where debtor does not appear on the date of hearing of his discharge application, as in this case. [1159-E]

4. The principle stated in section 55 of the Contract Act, 1872 that in case of contracts for sale of immovable property time is not of essence, does not apply to contracts re-conveyance, where time is of essence. In the present case, the plaintiff exercised on 12.7.1968 his option to repurchase within 5 years from date of sale deed dated 15.7.1964 and hence, the vendee was bound to reconvey the property on receiving Rs. 7,000 from the plaintiff as stipulated in the agreement. [1164-F-G]

Bismillah Begum v. Rahmatullah Khan, [1998] 2 SCC 226 and *A.H. Mama v. Flora Sasson*, AIR (1928) PC 208, relied upon. A

5. Where an agreement does not specify the time within which vendee is to execute deed of re-conveyance, Part II of Article 54 of the Limitation Act, 1963 applies i.e. time starts to run only from the date the defendant refuses to execute re-conveyance deed. The suit was filed on 6.10.1969 within 3 years from 22.7.1968, when the creditor refused to execute the deed of re-conveyance, and hence, is in time. [1165-A-C] B

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2551 of 1977. C

From the Judgment and Order dated 21.3.77 of the Allahabad High Court in S.A. No. 175 of 1976.

Pramod Swarup, Praveen Swarup and Ms. Pareena Swarup for the Appellant. D

P. Anshu Mishra for the Respondents.

The Judgment of the Court was delivered by

M. JAGANNADHA RAO, J. The appellant is the plaintiff in the original suit bearing No.225 of 1969 on the file of the Additional Civil Judge, Aligarh. The respondent is the defendant. The suit was filed by the plaintiff appellant seeking reconveyance of the property covered by the sale-deed dated 15.7.1964 executed by the plaintiff in favour of the defendant and requiring the defendant to perform the agreement of reconveyance specifically as entered into in the joint application of the plaintiff and defendant dated 20.11.1963 filed in the Insolvency Court and in default praying that the reconveyance deed may be executed by the Court. The extent of land is 5 Bighas and 7 Bighas in village Jarothi. F

The trial court decreed the suit in favour of the plaintiff on 2.1.1970 on condition of the plaintiff paying back Rs. 7000 to the defendant. The said decree was affirmed by the first appellate court on 10.12.1975. However, the Second Appeal 175 of 1976 preferred by the defendant was allowed and the suit was dismissed on 21.3.1977 by the High Court of Allahabad. Against the said judgment, the plaintiff has preferred this appeal by special leave. G

The following are the facts : The plaintiff-appellant borrowed Rs. 5000 H

A from the defendant-respondent on 6.6.1961 and another sum of Rs. 2000 on 27.1.1962. On the ground that the plaintiff did not repay the said amount, the defendant filed Misc. Case 27 of 1963 before the Insolvency Court, Aligarh on 19.11.1963 (Lower Court described it as application dated 20.11.1963) for declaring the plaintiff as an insolvent. On the same day the plaintiff and defendant signed joint application before the Insolvency Court the material portion of which (in para 4 to 6) reads as follows:

C “That the creditor has agreed to accept Rs. 7000 in full satisfaction of his dues and the debtor applicant is transferring his Byhumichari property measuring 5 bighas 7 biswas to the creditor for the consideration of Rs. 7000 with the condition of repurchasing the same within 5 years from the creditor for Rs. 7000 the creditor has kindly given his consent to the same settlement and agreed to purchase same with the above condition and to get the petition of Insolvency dismissed.

D That the debtor has Bhumidhari property measuring 14 bighas 7 biswas 5 biswansis is paying Rs. 31.94 N.P. as revenue. Out of this property the creditor has agreed to purchase 5 bighas for the consideration of his dues. The details of the same are given below at the foot of this application.

E That the parties in view of the above arrangement settled amongst themselves request humbly that permission be kindly granted to the debtor applicant to sell his property as noted above and the creditor to purchase the same in order that the debt may be satisfied and the parties may not be put to unnecessary litigation and expenses.”

F Thus, in the said IA., there was an agreement for reconveyance inasmuch as it was agreed that the plaintiff could seek reconveyance within 5 years of the sale-deed.

On the said application, the said Court passed the following order on 22.11.1963:

G “I have heard the counsel for both the sides as well as Official Receiver. The Official Receiver has no objection except that he should be paid his legal fee. The request appears to be quite reasonable. The interim receiver is under the circumstances permitted to execute the sale deed in favour of the creditor petitioner of course of receipt of his legal commission. The present application for further order shall be put up after the sale deed is executed. Let the record be now put

up on 20.12.1963 for further orders.”

It will be noticed that the Insolvency Court's order was that the sale deed would be executed by the “*interim receiver*”. It appears that for some reason the sale deed was not executed. Though it is the case of the defendant that the plaintiff-appellant did not execute the sale-deed., the defendant admitted in his evidence that he neither issued any notice to the plaintiff nor complained to the Court that no sale was executed by the plaintiff. The creditor did not take steps to withdraw the insolvency petition. On 29.5.1964, the plaintiff was adjudicated as an insolvent and it was directed that he should apply for discharge within one year. It may be noted that two other sundry creditors to whom the plaintiff owed Rs. 300 and Rs. 700 respectively , got impleaded in the insolvency proceedings on 20.11.1963. Thereafter, the Official Receiver executed a sale-deed on 15.7.1964 in favour of the respondent for the suit land and the plaintiff also joined in the sale-deed as a vendor. It is in the plaintiff's evidence that on the same day, another sale-deed of some other property was executed by the Official Receiver in favour of one Shamlal for Rs.1000. Plaintiff stated in his evidence that he paid off the other two sundry creditors to whom, in all, he owed Rs. 1000 as referred to above. The Official Receiver reported to the Insolvency Court on 30.10.1964 that the plaintiff had cleared all his debts.

The plaintiff-appellant moved for discharge on 7.9.1964, i.e. within 1 year of the order of adjudication dated 29.5.1964. Unfortunately, the said application stood dismissed for default. On 9.7.1968, the plaintiff applied under Section 43(1) after Provincial Insolvency Act, 1920 (hereinafter called the ‘Act’) for an order of annulment alleging that all the creditors had been paid fully. That section permits such an application in cases where the debtor has not applied for discharge within the period fixed earlier. But the Insolvency Court dismissed the said application on 27.7.1968 on the ground that the insolvent could not invoke section 43(1) and he should apply for discharge. However, the appeal by the insolvent to the District Judge, Aligarh in Appeal No. 62 of 1968, was allowed on 22.10.1969 on the ground that section 43(1) was applicable and also on the ground that the insolvent had discharged all his debts as reported by the Official Receiver in his report dated 30.10.1964. The adjudication was annulled and an annulment order was passed on 22.10.1969 unconditionally. As the debts were all paid, there was no occasion for vesting the property in any person under section 37(1) while annulling the adjudication.

In the meantime, and before the annulment, inasmuch as the period of

- A 5 years within which the debtor could seek reconveyance was expiring, the debtor (i.e. plaintiff) issued a registered notice on 12.7.1968 to the creditor (defendant) to reconvey the property on payment of Rs.7000 by the insolvent. That notice was within 5 years from the date of sale-deed. But the creditor refused to do so by his reply notice dated 22.7.1968. The debtor then filed the present suit on 6.10.1969 for specific performance of the reconveyance agreement dated 22.11.1963 contained in the joint application of the plaintiff and defendant dated 19.11.1963. It may be noticed that both on the day when the debtor gave notice and on the day he filed the suit, he was an undischarged insolvent and whatever rights he had for reconveyance, they stood vested in the Official Receiver. Instead of the Official Receiver taking the above steps, the insolvent had himself taken up these matters.

The defendant accepted in his written statement dated 8.1.1970 that it was true that a joint application was made on 19.11.1963 as stated by the plaintiff before the insolvency Court. He, however, contended that it was further agreed therein, that the plaintiff should have executed a sale-deed in favour of the defendant and that if he had done so, plaintiff would not have been adjudicated as an insolvent. The plaintiff defaulted and, therefore, the defendant had no option except to press for adjudication and plaintiff was adjudicated as insolvent on 29.5.1964 and later the Official Receiver executed the sale-deed on 15.7.1964. The plaintiff also joined in the sale-deed. The plaintiff could not "rely upon the provisional talks of the parties prior to adjudication of insolvency petition". Plaintiff could not take advantage of his own default. It was also contended that the "previous agreement between the parties fell to the ground owing to non fulfilment thereof by the plaintiff himself". It was contended that there "never was any contract of repurchase with the Official Receiver" who was the vendor and in whom title to the property stood vested. After the adjudication, or after the sale, there was no agreement by the defendant to reconvey the property. The plaintiff was legally incompetent to seek reconveyance by notice dated 12.7.1968 as he was an undischarged insolvent on that date and the property remained wholly vested in the Official Receiver. The Official Receiver never exercised any option to repurchase within 5 years of the sale deed. Time was the essence of the contract. The plaintiff was also not competent to file the suit on 6.10.1969 as he was, even on that date, an undischarged insolvent and all rights including the right to seek reconveyance stood vested in the Official Receiver.

H On these contentions, the trial court framed various issues. On issue 2

relating to the alleged *default* on the part of the plaintiff in executing sale-deed as agreed to in the joint application, the Court held that the said issue was “*not argued*” by the defendant’s counsel. Nor did the counsel say how there was any breach on the part of the plaintiff. (We have stated earlier that the Insolvency Court, in its order dated 22.11.1963 asked the “*interim receiver*” to execute the sale-deed and that the defendant as PW1 admitted he had neither issued any notice to plaintiff nor moved the Court for a sale-deed to be executed). The trial Court held that in any event the sale-deed was executed and as such ‘there was no default’ on the part of the plaintiff. On the question as to the effect of annulment, the trial Court referred to the Full Bench decision of the Madras High Court in *Subbaiah Goundan v. Ramasami Goundan*, AIR (1954) Mad 604 (FB) to the effect that upon annulment, the property reverted to the insolvent with retrospective effect and the insolvency got wiped out altogether except to the extent reserved under section 47 of the Act and all transactions or actions in the interregnum got validated. The trial Court also referred to *Rup Narain Singh and another v. Hargopal Singh*, AIR (1933) Allahabad 449 for holding that an alienation by an undischarged insolvent was not void but was voidable at the instance of the Official Receiver. The trial Court also held that the plaintiff would get the competency to exercise option to repurchase - in view of the subsequent annulment. The plaintiff exercised the option within 5 years, time being essence of the contract. The debtor’s actions stood validated and even if the Official Receiver did not exercise the option to purchase within 5 years from the date of sale, it did not matter. The trial court also held that the suit was not barred by time. On these findings, the suit was decreed for specific performance for reconveyance subject to plaintiff paying Rs. 7000 back to the defendant. This judgment was confirmed in first appeal by the Additional District Judge.

In Second Appeal, the High Court of Allahabad reversed the judgments of the lower Courts. It held that the earlier agreement contained in the joint application dated 19.11.1963 made to the insolvency Court did not avail. Further, in the order dated 22.11.1963 passed on the joint application, the Court permitted the “*interim receiver*” to execute the sale-deed while the sale deed was executed by the Official Receiver and there was no fresh agreement for reconveyance between the Official Receiver and the defendant at the time the sale-deed was executed. The agreement dated 19.11.1963 contained in the joint application was, in fact, not given effect to as plaintiff did not execute the sale-deed and defendant did not have the insolvency petition dismissed. The facts showed that the sale-deed dated 15.7.1964 executed jointly by the Official Receiver and the plaintiff was *not* in pursuance of the original agreement

A dated 19.11.1963. The said agreement dated 19.11.1963 was a contingent one and was executed even before the Court directed sale of the property to the defendant. As the directions of the Insolvency Court dated 22.11.1963 directing execution of sale-deed by the plaintiff and also withdrawal of insolvency petition by the defendant, were not complied with by either party, the “execution of the sale-deed after adjudication *must be held to be in pursuance of a fresh contract* between the parties”. It might be that the substance of the sale-deed was the same as contained in the joint application but this was not relevant. The contract was still a “new one” upon which the sale deed was executed. At the time of the new contract, there was no reconveyance agreement - either oral or written. The suit for specific performance of the agreement of reconveyance contained in the joint application could not, therefore, be enforced. The High Court then referred to the judgments in *Subbaiah Goundan v. Ramasami Goundan* AIR, (1954) Mad. 604(FB); *Rup Narain Singh v. Hargopal Singh* AIR, (1933) Allahabad 449; *Arunachalam v. Narayana Swami*, AIR (1951) Mad 63(FB)), *Parvathi Amma v. Easo Yohanam*, AIR (1955) TC 241 and *AR Ghazani v. Official Receiver*, AIR (1958) Mad 486 and observed that the question of reverter of the debtor’s rights to the debtor upon annulment would have been relevant if the undischarged insolvent had entered into a contract with the creditor without the intervention of the Court and if the contract was not subject to conditions. Here the contract dated 19.11.1963 was dependent upon various conditions, execution of sale-deed by the plaintiff and the withdrawal of the insolvency petition by the defendant and permission by Court for a sale-deed. On account of non-fulfilment of the conditions laid the order dated 22.11.1963, there was no enforceable contract between the parties. On the above reasoning, the High Court allowed the Second Appeal and dismissed the suit.

F In this appeal, it was contended by Sri Pramod Swarup that the High Court erred in law in thinking that the Court order dated 22.11.1963 or the sale-deed dated 15.7.1964 by the Official Receiver did not refer to the reconveyance, and hence the earlier agreement dated 19.11.1963 for reconveyance was not enforceable. This plea raised by the defendant in the written agreement was not acceptable because the order of the Court dated 22.11.1963 permitting sale was only in pursuance of the agreement dated 19.11.1963 contained in the joint application and having got the sale-deed executed in his favour, the defendant could not blow hot and cold and repudiate the reconveyance agreement contained in the same joint petition dated 19.11.1963. There was no need to have a fresh agreement either on 22.11.1963 or on 15.7.1964. There was no ‘*fresh or new*’ contract on 15.7.1964 of sale between the defendant

and the Official Receiver as wrongly held by the High Court. The High Court could not have given such a finding unless there was a specific plea of novation between the Official Receiver and the defendant in the written statement. On the other hand, the evidence of the defendant as DWI was that there was no fresh contract before 15.7.1964 when the sale-deed was executed. The finding of the High Court was, therefore, contrary to the defendant's evidence. The Trial Court and the first appellate Court were right in holding that the annulment retrospectively validated the option exercised by the plaintiff on 12.7.1968 in his notice and the filing of the suit on 6.10.1969, though on those dates, the plaintiff was an undischarged insolvent. In fact, even on the date of annulment dated 22.10.1969, the suit was in time as the period of 3 years had not expired from 22.7.1968, the date of refusal to perform the contract of reconveyance.

On the other hand, learned counsel for the defendant Sri P. Anshu Misra contended that there was a fresh or new contract at the time of the sale by the Official Receiver on 15.7.1964 and the sale-deed was traceable to that agreement and not to the agreement contained in the joint application dated 22.11.1963. At the time of the fresh agreement for sale on 15.7.64, there was no further agreement for a reconveyance. The original agreement of reconveyance dated 19.11.1963 was given a go bye and could not be enforced any longer. The plaintiff did not also implement the terms of the first agreement by executing a sale-deed and the defendant did not withdraw the insolvency petition as contemplated by that agreement. The suit was not maintainable because the plaintiff, being an undischarged insolvent, was not competent to exercise the option for reconveyance on 12.7.1968 and the plaintiff was not competent to file the suit on 6.10.1969 since the annulment took place much later, on 22.10.1969.

On these contentions, the following points arise for consideration:

- (1) Could the High Court in Second Appeal under Section 100 CPC give a finding on issue No.2 which was not pressed in the trial court and hold that the plaintiff and defendant committed breach of the agreement dated 19.11.1963 and that, therefore, the sale deed dated 15.7.64 must be held to be traceable to a new contract entered into between the Official Receiver and the defendant on 15.7.64?
- (2) Whether absence of a reference to the agreement to reconvey in the Court order dated 22.11.63 and in the sale-deed dated

- A 15.7.1964 implied that the agreement of reconveyance contained in the original agreement to sell dated 19.11.1963 was superseded?
- (3) Would the two steps or actions of the plaintiff (i) exercising the option for renewal on 12.7.1968 and (ii) filing the suit on 6.10.1969 taken when he was an undischarged insolvent get retrospectively validated on account of the subsequent unconditional annulment of adjudication in view of sections 37 and 43 of the Provincial Insolvency Act, 1930 on 22.10.1969?
- B (4) Is time the essence of contract in a reconveyance agreement and was the option exercised by the plaintiff in this case in time in the context of section 55 Contract Act?
- C (5) Was the suit filed on 6.10.1969 for specific performance of the contract of reconveyance dated 19.11.1963 in time under Article 54 of the Limitation Act, 1963?

D *Point 1:*

In our view, the High Court, while holding that the sale-deed dated 15.9.1964 was traceable to a new agreement erred seriously in making out of a new case for which there was neither any issue nor evidence. In fact, the defendant specifically admitted in his evidence as DW1 that there was no fresh agreement between the Official Receiver and the defendant at or before the execution of the sale-deed dated 15.9.1964. The defendant, no doubt, came forward with such a statement to negative any fresh agreement of reconveyance entered into by and between the Official Receiver and the defendant. But that evidence equally negatives the theory that the sale-deed dated 15.9.1964 was executed pursuant to a fresh or new agreement entered into between the Official Receiver and the defendant. The recitals in the sale-deed do not support such a contention. Further, the sale by the Official Receiver was one made pursuant to the Court order dated 22.11.63 and was not a sale in exercise of his normal powers to sell the insolvents' property nor was it a sale for distributing the sale proceeds to the creditors. No doubt, the Court's order permitted the "interim receiver" to sell but in view of the subsequent adjudication of the debtor as insolvent on 29.5.1964, the sale-deed had to be executed by the Official Receiver. A reading of the sale-deed dated 15.7.1964 which is in Hindi and was read out in Court showed that it was executed in pursuance of the agreement between the creditor and the "insolvent, second party". The sale deed did not refer to any agreement with the "Official Receiver" who was one of the executants of the sale deed. It referred only

to the agreement with the “insolvent, second party”, which, in our opinion could only be the one entered into on 19.11.63 between the plaintiff and the defendant before adjudication. A

Novation under section 62 of the Contract Act requires a clear plea, issue and evidence. Such a question cannot be raised or accepted under section 100 CPC for the first time in Second Appeal. There was no such issue in the courts below and the defendant’s evidence was contrary to such a theory. B

The High Court, in our view, also erred in thinking that the plaintiff committed breach of the agreement dated 19.11.1963 covered by the joint application when the said aspect covered by issue No.2 was not pressed in the trial Court. Further, the permission for sale dated 22.11.1963 granted by the Court was in favour of the ‘interim receiver’ and, therefore, the debtor could not have executed any sale-deed. (We are not on the question whether the Insolvency Court could have asked the interim receiver to sell the property). The defendant admitted in his evidence that after 19.11.1963, he did not issue any notice to the plaintiff to execute a sale-deed nor did he move the Insolvency Court to direct the debtor to execute the sale-deed. C D

For the above reasons, we hold that the High Court in Second Appeal exceeded its jurisdiction under section 100 CPC in giving a finding on an issue which was not pressed in the Trial Court. So far as the finding as to a new contract is concerned, there was no issue or evidence. The evidence was to the contrary. We accordingly set aside these findings. Point 1 is therefore held in favour of the plaintiff and against the defendant. E

Point 2: F

The agreement contained in the joint application dated 19.11.1963 filed in the Insolvency Court not only contemplated that the plaintiff would execute a sale deed in favour of the defendant but also contemplated an option for repurchase by the plaintiff within five years of the sale, on repayment of the amount of Rs. 7000 to the defendant. Later, as stated earlier, the Court permitted the sale by the “interim receiver” by its order dated 22.11.1963 and a sale deed was executed jointly by the Official Receiver and the plaintiff or 15.7.1964. It is true that neither in the Court order nor in the sale-deed there is any reference to an agreement of reconveyance. Question is whether on that account the obligation to reconvey, in the event of the plaintiff exercising, within 5 years his option to repurchase contained in the a joint application G H

A dated 19.11.1963 could be said to have been given up by the plaintiff?

We have already held under Point 1 that the Court order and the sale-deed were not the result of any fresh or new agreement between the Official Receiver and the defendant at or before the date of sale on 15.7.1964. We have also held that there was no novation within section 62 of the Contract Act. If that be so, it is clear that the agreement for reconveyance contained in the original contract dated 19.11.1963 cannot be said to have been superseded. The defendant, having got the sale-deed only upon implementation of the obligation covered by the agreement of sale dated 19.11.1963 cannot approbate and reprobate and contend that the other part of the agreement dated 19.11.1963 regarding reconveyance need not be implemented. It is true that it is customary to include a recital regarding the agreement of reconveyance in the sale-deed itself. But where, as here, there was an agreement preceding the sale deed and that agreement contained such a clause, and a sale-deed was executed consequent thereto, the absence of a reference to the agreement of reconveyance in the sale-deed would not, in our opinion, lead to the inference that the said right was given up by the plaintiff. Unless there is a detailed plea and also evidence that before execution of the sale-deed there was novation and parties expressly agreed to give a go bye to the agreement or reconveyance, no inference could be drawn that the agreement of reconveyance contained in the agreement of sale dated 19.11.63 which preceded the sale-deed was given a go-bye.

For the reasons given above, it must be held that the absence of a reference to the agreement for reconveyance in the Court order dated 22.11.1963 or in the sale-deed dated 15.6.1964 was not an indication that the said agreement contained in the original agreement of sale was given a go bye by the parties. Point 2 is therefore held in favour of the appellants.

Point 3 :

This point relating to the effect of *annulment* is more important and as there is no authority of this Court earlier except *Arora Enterprises Ltd. & Ors. v. Indu Bhushan Obhar & Ors.*, [1997] 5 SCC 366 and *Tukaram Ramachandra Mane (d) by Lrs v. Rajaram Babu Lukule (d) by Lrs.*, [1998] 2 Scale 719 which deal with 'acts' of Receiver or Insolvency Court during the insolvency, we shall go into some details.

We have seen that the plaintiff was adjudicated insolvent on 29.5.1964 and the property vested in the Official Receiver who executed the sale-deed

in favour of the defendant on 15.7.1964. The plaintiff also joined in the sale-deed. It is true that on the date when the plaintiff exercised the option to repurchase on 12.7.1968 - within 5 years from the date of sale, i.e. 15.7.1964 - he was an undischarged insolvent. It is also true that on the day when the plaintiff filed the suit for specific performance of the agreement of reconveyance, on 6.10.1969, he continued to be an undischarged insolvent. The option to repurchase and the filing of the suit were acts which ought to have therefore been performed by the Official Receiver. But when later the annulment order was passed on 22.10.1969, could it be said, as contended for the debtor, that these acts get retrospectively validated on account of the subsequent annulment of adjudication? A B

Section 35 of the Act states if, in the opinion of the Insolvency Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the *debts of the insolvent have been paid in full*, the Court *shall*, on the application of the debtor, or any other person interested, by order in writing, annul the adjudication and the Court may, of its own notice or on application made by the receiver or any creditor, annul any adjudication made on the petition of a debtor who was, by reason of the provisions or sub-section (2) of section 10, not entitled to present such petition. C D

It is obvious that, in the present case, in view of the report of the Official Receiver dated 30.10.1964 that all the debts had been cleared by the insolvent, the Court was bound to annul the adjudication. It did so on 22.10.1969. It cannot be said that the debtor-plaintiff could not have applied for annulment under section 43(1). E

Now sub-clause (1) of section 43 states that if the debtor does not appear on the day fixed for hearing his application for discharge or on such subsequent day as the Court may direct, or if the debtor does not apply for an order of discharge within the period specified by the Court, the Court *may* annul the order of adjudication or make such other order as it may think fit, and if the adjudication is annulled, the provisions of section 37 shall apply. As the case of the appellant fell under this section, the application was in order. But the Insolvency Court dismissed the same on 27.7.1968 and on appeal, the District Court allowed the application on 22.10.1969 *unconditionally*. On the facts of this case, the debtor had to apply for discharge within one year of the adjudication. He made an application within that period but that application was dismissed for default. It was therefore clearly permissible for F G H

A him to invoke section 43(1).

Inasmuch as sub-clause (1) of section 43 requires the Court to apply section 37 of the Act in the event of passing an order of annulment, it is next necessary to refer to that section. Sub-clause (1) of section 37 states that where an adjudication is annulled, all sales and dispositions of property and payments made, and all *acts theretofore done, by the Court or receiver*, shall be valid; but, subject as aforesaid, the *property* of the debtor who is adjudged insolvent shall vest in such persons as the Court may appoint, or, *in default of any such appointment, shall revert to the debtor* to the extent of his right or interest therein on such conditions (if any) as the Court may, by order in writing, declare.

The case before us is one where, in view of section 35 and in view of the fact that the debtor had cleared all his debts, he was entitled to an order of annulment of adjudication. As there was nothing to administer *qua* his property, the Court did not think of vesting his property in the Official Receiver or any other person. In fact, sub-clause (1) of section 37 itself says that in default of the appointment of any person, the "*property*" of the debtor shall *revert* to the debtor to the extent of his *right or interest therein*. This is, however, subject to the condition that the sales, dispositions of property and payments made and all acts theretofore done by the Court or receiver, shall remain valid. Inasmuch as the sale of the suit property on 15.7.1964 was one made after the adjudication order on 29.5.1964, and before annulment, the said sale would remain valid, even after annulment of adjudication, unless the sale was subject to any further conditions.

Before the adjudication order, the debtor had a right of reconveyance *qua* the property purchased by the defendant from the receiver on 15.7.1964. That right in relation to the property continued to burden the sale. After adjudication that limited right stood vested in the Official Receiver. On annulment that right would, therefore, clearly *revert* back to the debtor from the Official Receiver. Sub-section (1) of section 37 uses the words, "the property of the debtor to the extent of his rights and interests therein" shall revert to him. For example, if he was a full owner or a mortgagee or a lessee of the property in question on the date of adjudication, those rights would revert back to him on annulment though during the pendency of the insolvency those rights stood vested in the Official Receiver. Likewise the right to obtain a reconveyance from the vendee which was vested in the Official Receiver would in our opinion also revert back to the debtor, upon annulment of the

adjudication. In the present case, the debtor had exercised the option and filed the suit even before annulment. A

Therefore, the more important question will be whether the reverter of the property or rights on annulment is retrospective or prospective? In other words, assuming that the debtor being an undischarged insolvent ought not to have exercised the option or filed the suit, inasmuch as these actions ought to have been taken by the Official Receiver, will the subsequent annulment of the adjudication retrospectively validate these actions of the undischarged insolvent? B

Before we go into the above aspect, we shall refer briefly to the legislative history behind section 37 of the Provincial Insolvency Act, 1920. In the earlier Indian Insolvency Act, 1848, it was stated in section 7 that “in case, after the making of any such vesting order, the petition of any such petitioner shall be dismissed by the said Court, such vesting order made in pursuance of such petition shall from and after such dismissal be *null and void* to all *interests and purposes*: provided also that in the case of any such vesting orders as aforesaid, shall become *null and void* by the dismissal of such petition, all acts theretofore done by any Assignee or other person acting under his authority according to the provisions of this Act shall be *good and valid* and no action or suit shall be commenced against the assignee, nor against any persons duly acting under his authority, except to recover any property of such petitioner detained after an order made by the said Court for delivery thereof, and demand made thereupon”. The above language was similar to the language in the earlier Bankruptcy Acts of England. By virtue of the Consolidating and Amending Bankruptcy Act, 1869 the language was altered and instead of the words ‘null and void’ the word ‘revert’ was used. That language was repeated in the English Act of 1914. The legislature adopted the word ‘revert’ in section 37 of the Provincial Insolvency Act, 1920. The word ‘revert’, according to Shorter Oxford Dictionary means ‘to return to the former position, to go back to the former state’. C
D
E
F

We shall initially refer to the leading decision of the English Court on the question as to whether the reverter is retrospective. In *Bailey v. Johnson* (1872) 7 Ex. 263 decided under section 81 of the English Bankruptcy Act, 1869, it was held by Cockburn, CJ as follows: G

“The effect of section 81 is, subject to any *bonafide* dispositions lawfully made by the trustee prior to the annulling of the bankruptcy, and subject to any condition which the Court annulling the bankruptcy H

A may by its order impose, to *remit the party whose bankruptcy is set aside to his original situation.*”

Adverting to the effect of an unconditional order of annulment it was stated by the learned Chief Justice:

B “Here the Court of Bankruptcy has imposed no condition; the general provision of the section has therefore its full effect, and that effect is to *remit* the bankrupt, at the moment the decree annulling his bankruptcy is pronounced, *to his original powers and rights* in respect of the property.”

C In the same case, Kelly CB observed:

D “...the only sensible meaning which can be attached the word ‘revert’ is, that what was apparently the property of the trustees at the time of annulling of the bankruptcy shall thereupon become the property of the person whose bankruptcy has been annulled, *as if it had always been his*”.

E It was pointed out in *Peraya v. Kondayya*, AIR (1948) Mad. 430 that though the words ‘null and void’ used in the Indian Insolvency Act, 1848 were not used in section 37 of the Provincial Insolvency Act, 1920, there was no reason to think that the effect of the later statute was any different from the former statute.

F A Full Bench of the Madras High Court in *Arunachalam v. Narayana Swami* AIR (1951) Mad 63 consisting of Subba Rao, J. (as he then was), Panchapakesa Ayyar and Balakrishna Ayyar, JJ reviewed the case law on the subject. In that case the question was whether the debtors could be treated as agriculturists having saleable interest in agricultural land on the crucial dates 1.10.1937 or 22.3.1938 for obtaining scaling down of the interest under the Madras Agriculturists Debt Relief Act, 1938. On those dates, being undischarged insolvents, they had no saleable interest in agricultural land. Much later, their adjudication was annulled by an unconditional order. The debtor’s representatives contended that the debtors should get the benefit of the debt relief Act, and that though on the above dates, the debtors did not, as a fact, have saleable interest in agricultural land as that interest stood vested in the Official Receiver, still they must be deemed to have acquired such interest with retrospective effect once there was a subsequent annulment of adjudication. This contention was accepted. Speaking for the Full Bench

G

H Balakrishna Ayyar, J. held that the annulment related back to the date of

adjudication in September 1928 and that the benefit of the debt relief Act must be extended to the debtors with retrospective effect,—ignoring the insolvency proceedings. A

We may here also refer to two other cases. In *Ratna Navelu Chettiyar v. Franciscu Udayar*, AIR (1945) Mad 388 Somayya, J. pointed out that it was clear that the legislature wanted the annulment to be retrospective. Otherwise, there was no need for the clause validating acts done by the Court or by the Receiver, as they would have in any event been valid because they were done at a time when the insolvent had been adjudicated and before the adjudication was annulled. B

The question again arose before another Full Bench in *Subbaiah Goundan v. Ramaswami Goundan*, AIR (1954) Mad 604. That was a case where the undischarged insolvent made alienations during the pendency of the insolvency. His status as an ‘agriculturist’ during insolvency was also material. It was held that section 7 of the 1848 Act and section 37 of the 1920 Act meant the same thing notwithstanding the difference in language. Satyanarayana Rao, J. after referring to the history of legislation under this section and also the dictionary meaning of the word ‘reversion’ and after referring to the English cases to which we have referred above, observed as follows: C

“It has therefore been uniformly held in this Court....that the effect of annulment is to vest the property *retrospectively* in the insolvent, in other words’ the consequence of annulling an order of adjudication is to *wipe out altogether* the insolvency and its effect except to the limited extent reserved under section. The Legislature introduced the fiction of vesting the title retrospectively in the insolvent”. D E F

On facts, it was held:

“In view of this, the *alienations* made of property, moveable and immovable, by the insolvent after adjudication, the decrees and execution proceedings suffered by him, during such insolvency, the status of an agriculturist, notwithstanding the property is taken away and transferred from him, are all *restored* and *validated* from the *date on which the insolvency petition was filed*”. G

We are of the view that the law stated in the above cases correctly represents the legal effect of annulment of adjudication. H

A Summarising the legal position, the position is as follows. In the case of an annulment under sections 37 read with section 43 of the Act, where the property is not vested in any other person and no conditions are imposed by the Insolvency Court, the property and rights of the insolvent stand restored or reverted to him with retrospective effect from the date of the filing of the insolvency petition and the insolvency gets wiped out altogether. All acts done by the undischarged insolvent between the date of the insolvency petition and the date of annulment get retrospectively validated. However, all sales and dispositions of property and payments duly made and all acts theretofore done by the Court or Receiver, will remain valid.

B

C Applying the above principles to the facts of the case, it must be held that the acts of the plaintiff, as an undischarged insolvent, in issuing the notice dated 12.7.1968 thereby exercising option for repurchase and his filing of the present suit on 6.10.1969 for specific performance of the agreement of reconveyance - all stand retrospectively validated upon the unconditional annulment of the adjudication on 22.10.1969, with effect from the date of filing of the insolvency petition on 19.11.1963. The contention of the respondent to the contrary is accordingly rejected. Point 3 is decided accordingly.

D

Point 4

E This Court has recently held in *Bismillah Begum v. Rahmatullah Khan*, [1998] 2 SCC 226 that time is the essence of contract in a contract of reconveyance. If a vendor, who agrees to sell his immovable property under an agreement of sale or who executes a sale deed, is given the option to repurchase the property within a particular period, then such an option must be exercised strictly within the said period. The principle stated under section 55 of the Contract Act that in regard to contracts of sales of immovable property time is not the essence of contract as stated by the Privy Council in *A.H. Mama v. Flora Sassoon* AIR (1928) PC 208 = 55 I.A. 260 (PC) does not apply to contracts of reconveyance.

F

G On the facts of the case, it will be seen that the plaintiff exercised his option on 12.7.1968 within five years from the date of sale deed 15.7.1964 and hence the defendant - vendee was bound to reconvey the property by receiving Rs. 7000 from the plaintiff as stipulated in the contract. This point is held in favour of the plaintiff.

Point 5 :

H Under Articles 54 of the Limitation Act, 1963, it is stated in the third

column that the suit for specific performance has to be filed within 3 years from the date stipulated in the contract or from the date of refusal to perform the contract. In the present case, even though a period of 5 years is fixed for exercising the option to repurchase, it is not specified in the agreement that the vendee shall execute the deed of repurchase within a particular period from the date of exercise of option. Hence the first part of the third column of Article 54 does not apply. The second part applies. Time therefore starts to run only from the 22.7.1968, the date when the defendant refused to execute the deed of reconveyance. The suit was filed on 6.10.1969 within 3 years from 22.7.1968. Suit is in time as held by the trial Court. Point 5 is held in favour of the plaintiff.

In the result, the Civil Appeal is allowed. The judgment and decree passed by the High Court are set aside and judgment and decree passed by the trial Court as affirmed by the first appellate Court are restored. There will be no order as to costs.

S.K.

Appeal dismissed.