## APPELLATE CIVIL.

*Before Derbyshire C. J. and Mukherjea J.*

RAMA NANDA PAL

*v.*

PANKAJ KUMAR GHOSH.*

1938

*Feb.* 15, 16.

*Insolvency—Good faith, if on the part of the transferor or the transferee—Date of the transfer, Meaning of, when the transfer is effected by a registered deed—Provincial Insolvency Act (V of 1920), ss. 53, 54.*

No transfer of property is voidable under s. 53 of the Provincial Insolvency Act if the transferee only has acted in good faith. It is not necessary that both transferor and the transferee should act in good faith in order that the transfer may be valid.

*Mackintosh* v. *Pogose* (1) followed.

When a transfer of property can only be effected by a registered deed, the date of such transfer, within the meaning of s. 54 of the Provincial Insolvency Act, is the date of the execution of the deed and not the date of its registration.

*Muthiah Chettiar* v. *Official Receiver of Tinnevelly* (2) and *U Ba Sein* v. *Maung San* (3) dissented from.

*Per* MUKHERJEA J. If a debtor transfers a valuable property on the eve of insolvency to a creditor of his, the consideration being the past debt due to the creditor, an inference of undue preference can legitimately be drawn. But if the debtor approaches a creditor for a loan and substantial advance is made by the latter who insists as a part of the same bargain, on the payment of the existing debt, the debtor consenting to it cannot be said to have voluntarily given preference to the creditor.

APPEAL FROM ORIGINAL ORDER by the insolvent.

One Brindaban Chandra Das Basak was adjudicated an insolvent. But, prior to the filing of the petition of insolvency, the said Brindaban mortgaged a considerable portion of his properties to some of his creditors, Rama Nanda Pal and others. After the adjudication order stated above and at the instance of the receiver in insolvency and some other

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(3) (1934) I. L. R. 12 Ran. 263.

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creditors the learned District Judge of Dacca declared that the aforesaid mortgage in favour of Rama Nanda Pal and others was void under ss. 53 and 54 of the Provincial Insolvency Act. Hence the present appeal by the mortgagees to the High Court. The other material facts appear from the judgment.

*H. D. Bose, Gopal Chandra Das* and *Sudhir Chandra Chowdhury* for the appellants. Under s. 53 of the Provincial Insolvency Act, good faith of the transferee is sufficient. My clients have proved good faith, which means honesty. Under s. 54, the date of the transfer is the date on which the mortgage was executed and not the date of the registration of the mortgage deed. I rely on s. 47 of the Indian Registration Act (XVI of 1908). The cases relied by the learned District Judge, *Muthiah Chettiar* v. *Official Receiver of Tinnevelly* (1) and *U Ba Sein* v. *Maung San* (2), I submit, with great respect, have not correctly laid down the law.

*Sharat Chandra Roy Chowdhury, Krishna Kishore Basak, Bhupendra Nath Roy Choudhury, Rakhal Chandra Dutt, Satya Priya Ghosh* and *Smriti Kumar Ray Chaudhuri* for the respondents. The cases relied on by the lower Court have correctly interpreted s. 54. The mortgage became effective only on registration. Therefore, the date of mortgage under s. 54 is the date of the registration and not of execution. "Good faith" in s. 53 must relate to the transferor. In mortgaging the property to the creditor, the debtor as the transferor gave undue preference to the creditor and therefore did not act in good faith.

*Bose,* in reply.

*Cur. adv. vult.*

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DERBYSHIRE C. J. This is an appeal from an order of the District Judge of Dacca, made on May 27, 1935, wherein he declared a certain mortgage deed executed by the insolvent to be void as against the receiver, first, as a fraudulent or undue preference under s. 54 of the Provincial Insolvency Act and, secondly, under the provisions of s. 53 of the same Act.

The insolvent, Brindaban Chandra Das Basak, resided and carried on business as a cloth-dealer in Dacca. In addition to having his business, he had a certain quantity of private property in the form of land and houses. Prior to 1931, his affairs seemed to have become somewhat difficult and he was undoubtedly short of money. On February 23, 1931, he executed a deed, whereby he purported to transfer some of his property to *debattar* purposes. On March 11, 1931, he executed the mortgage deed, which is now in question. This deed was registered on March 23, 1931. On June 16, 1931, certain creditors filed a petition in insolvency against Brindaban and on January 11, 1932, he was adjudicated insolvent. On Februay 13, 1933, the receiver made an application to have both the *debattar* deed and the mortgage deed set aside. The learned District Judge set aside both the deeds.

We heard the appeal relating to the *debattar* deed yesterday and we upheld his decision with regard to that. The circumstances relating to the execution of the mortgage deed are these:—

On March 11, 1931, the insolvent was undoubtedly in financial difficulties. Many decrees had been obtained against him and some of his property was attached. In addition to the decree-holders, there were other creditors for a sum somewhere about Rs. 70,000. Amongst those creditors was the opposite party in this matter, Rama Nanda Pal. Rama Nanda Pal was a creditor for a matter of Rs. 9,000. He lived in Dacca and was well-known to the insolvent. Several witnesses have stated that

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they were friendly. On March 14, the mortgage deed in question was drawn up and it conveyed property worth about Rs. 60,000 to Rama Nanda Pal by way of mortgage. When the document was executed, according to the evidence, the mortgagee, Rama Nanda Pal, produced a sum of Rs. 33,000. He paid Rs. 13,000 odd to Brindaban and retained some Rs. 19,000 odd. Of the Rs. 19,000 Rs. 9,000 odd was retained by Rama Nanda against the debt that Brindaban owed. The other Rs. 10,000 was paid to various creditors, who had obtained judgment against Brindaban or had attachment upon his property. Of the Rs. 13,400 paid to Brindaban, he appears to have paid it all with the exception of a small sum well under Rs. 1,000 to various creditors. However, there were still creditors for a sum of about Rs. 50,000 in value who received no payment at all. It is those creditors, acting through the receiver, who have challenged this transaction. It is said that the transaction was one in which the chief, if not the entire, remaining asset of the insolvent was transferred to Rama Nanda and so put out of the reach of the dissenting creditors and in return Rama Nanda was paid and a favoured batch of creditors also out of the money that Rama Nanda lent under the mortgage. It is said that this amounts to an undue preference under s. 54 of the Provincial Insolvency Act and that it is also bad under s. 53 as being a transfer of property not made in good faith and for valuable consideration.

I will deal with the question of undue preference first. Section 54 provides that every transfer of property and every payment made by any person unable to pay his debts as they become due in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition, presented within three months after the date thereof, be deemed fraudulent and void as against the receiver, and shall be annulled by the Court.

It was contended on behalf of Rama Nanda that s. 54 did not apply, because the mortgage deed was executed on March 11th and the creditors' petition was presented on June 16th, more than three months afterwards. The receiver replied to that argument that the mortgage deed was registered on March 23rd within three months of the presentation of the petition and that time begins to run from the registration of the deed. In support of that contention he relied upon two cases, namely, the case of *Muthiah Chettiar* v. *Official Receiver of Tinnevelly* (1) and the case of *U. Ba Sein* v. *Maung San* (2). I have given careful consideration to those two decisions. From the point of view of the operation of the bankruptcy law, there is something to be said for them. But, in my view, the legal position is concluded by s. 47 of the Indian Registration Act of 1908, which provides:—

> A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made and not from the time of its registration.

Having regard to s. 47 of the Registration Act, I can only hold that the mortgage deed operated from March 11, 1931, and not from March 23rd. In my opinion, therefore, time began to run, as far as insolvency proceedings under the Act were concerned, from March 11th. In consequence, the petition brought in these proceedings was not brought within three months of the transfer of the property concerned, and thus s. 54 has no application. The learned District Judge held, on the authority of the two cases I have mentioned, that s. 54 did operate, that there was an undue preference and that, therefore, the deed was void under s. 54. In my opinion, the learned Judge was in error in so holding.

I now turn to the second question, namely, was this transaction within the mischief of s. 53 of the

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Act. Section 53 of the Provincial Insolvency Act provides :—

> Any transfer of property not being a transfer made before or 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.

Here, the insolvent was adjudicated insolvent on January 11, 1932. The section provides that a transfer of property which is not made in favour of a purchaser or incumbrancer in good faith and for valuable consideration shall be set aside if the transferor is adjudged insolvent within two years. The question is, was this mortgage made in favour of an incumbrancer in good faith and for valuable consideration? There is no doubt that it was made for valuable consideration. The mortgagee extinguished his own debts of Rs. 9,000 odd; he paid over to various creditors—some of them decree-holders—on behalf of the insolvent, sums amounting to between nine and ten thousand rupees in satisfaction of their claim. He also paid over to the insolvent himself about Rs. 13,000 odd which the insolvent paid to some of his creditors. The total consideration was about Rs. 33,000. The value of the property was somewhere about Rs. 60,000. There was not only valuable consideration, but substantial valuable consideration. Furthermore, it must be borne in mind that what the mortgagee, Rama Nanda, got, was not an out and out conveyance of the property to him, but a mortgage upon it; the equity of redemption remained with the mortgagor insolvent and is available for the remainder of the creditors.

The next question is—was it a transfer made in favour of an incumbrancer in good faith? Some question has arisen as to whether it is the transferee incumbrancer who must receive in good faith or whether it is that the transfer itself must be made by the transferor in good faith to the transferee incumbrancer also acting in good faith. This particular

part of s. 53 is modelled upon s. 42 of the Bankruptcy Act of 1914 in England, which in turn was modelled upon s. 47 of the Bankruptcy Act of 1883. In *Mackintosh* v. *Pogose* (1), this question was discussed under s. 47 of the Bankruptcy Act of 1883 and Stirling J. giving judgment said :—

> Now I am of opinion that a person is a " purchaser in good faith " within the meaning of s. 47 of the Bankruptcy Act of 1883, if he himself act in good faith, and it is not necessary that both parties should act in good faith.

The learned Judge then goes on to give his reasons. He says :—

> I come to this conclusion on three grounds—first, because I think that is the natural interpretation of the statute ; secondly, because it is in accordance with the principles of those bankruptcy cases decided by the Courts before the passing of the Bankruptcy Acts ; and thirdly, because it is in accordance with the bankruptcy statutes previous to the Act of 1883.

In my view, the same considerations apply here and it is a question in this case whether the transferee, that is the mortgagee, acted in good faith. The words "good faith" have been defined in the General Clauses Act of 1887 as follows :—

> A thing should be deemed to be done in " good faith " where it is in fact done honestly, whether it is done negligently or not.

The question is—did the mortgagee in this case act honestly? If it had been a question whether a mortgagor insolvent acted honestly in this particular transaction, I should have had considerable difficulty in coming to an affirmative conclusion, partly because of his execution of the *debattar* deed. But where the actions of the mortgagee are concerned, I am unable to come to the conclusion that he acted otherwise than honestly. In the first place, the mortgagee paid out either to creditors of the insolvent or to the insolvent himself to be paid to the creditors, a sum of Rs. 24,000. What he got in return for that was not the property that was conveyed to him, but a charge on the property for the amount of money that he had paid out, plus the

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cancellation of his own debt. I find it difficult to say that a man who provides Rs. 24,000 to help to pay off the debts of a man whom he knows to be in financial difficulties, receiving nothing more than a charge on certain property is acting dishonestly. There may be circumstances in which that may be said, but I am unable to say that in this particular case. It may be that Rama Nanda was a friend of the insolvent's, but even that does not lead me to the conclusion that he acted dishonestly. A man may assist a friend, who is in difficulties, with a loan of money in return for a change in property—that was all this was—and yet be acting honestly. It is said that Rama Nanda must have known that the payment of the particular creditors to whom Rs. 24,000 went was an undue preference within the meaning of s. 54, or might be such an undue preference, and that his payment of those creditors, his willingness that others should be paid, and his forgetfulness of the remainder, was an undue preference and as such an act of bad faith. I am unable to accept that contention.

No evidence has been given to show that Rama Nanda knew how many creditors would be benefited and how many would be left out. No evidence has been given to show how many of the creditors, who were not paid, were not exercising pressure and how many of those who were paid were exercising pressure. There is evidence that some creditors were exercising pressure upon the insolvent, but there is no clear evidence as to whether most of those creditors exercising pressure were those who were paid or those who were not paid.

In my view, the evidence before us does not enable one to come to the conclusion that the mortgagee in this case was acting in bad faith. The transactions were clearly for valuable considerations and I am of opinion that the transaction comes within the protection afforded by the words "incumbrancer

"in good faith and for valuable consideration" and, consequently, the mortgage is not void as against the receiver.

In my view, this appeal must be allowed with costs. The appellants will recover half of their costs from the receiver to the extent of the assets which are in his hands or may come to his hands before the completion of the insolvency proceedings, and the other half will be recovered from the other respondents equally. We assess the hearing-fee at seven gold mohurs.

MUKHERJEA J. I agree with my Lord the Chief Justice in holding that this appeal should be allowed.

[Then his Lordship stated the facts of the case which have been already stated in the judgment of Chief Justice.]

The District Judge while holding that this transfer by way of mortgage was for valuable consideration has annulled it on two grounds. In the first place, it has been held that the transfer was in favour of a creditor with a view to give him an undue preference and as such was void under s. 54 of the Provincial Insolvency Act. In the second place, it has been held that the transferees did not act in good faith and as the mortgage was made within two years of the presentation of the petition of insolvency, the transaction was hit by s. 53 of the Provincial Insolvency Act.

Mr. Bose, who appears for the appellants, has assailed the propriety of the decision of the learned Judge on both these two points.

Now, so far as the first ground is concerned, I am of opinion that s. 54 of the Provincial Insolvency Act has no application to the facts of the present case. The mortgage bond was admittedly executed on March 11, 1931, and, according to the evidence of the mortgagees, which has been believed by the District Judge, the consideration money was also paid on that date though the document was actually registered on March 23, 1931. If the date of

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transfer was the date of execution of the mortgage-deed, the petition for insolvency was admittedly presented more than three months after that date and s. 54 could not possibly be attracted. The view taken by the District Judge which is sought to be supported on behalf of the respondents is that the date of commencement of the period of three months under s. 54 is the date when the transfer becomes effective in law and as the mortgage bond was compulsorily registrable before it could be operative, the time would run from the date of registration and not from the date of the execution of the mortgage deed. In support of this contention, reliance has been placed upon two decisions, one of the Madras and the other of the Rangoon High Court which are to be found reported in the cases of *Muthiah Chettiar* v. *Official Receiver of Tinnevelly* (1) and *U Ba Sein* v. *Maung San* (2). I agree with my Lord the Chief Justice in holding that the view taken by the learned Judges in both these decisions is not correct. It is true that a mortgage upon immoveable property to secure an advance of Rs. 100 or upwards can be made only by registered document, the only exception being where the mortgage is effected by deposit of title deeds; but once a document is registered it takes effect not from the date of registration but from the date of execution as laid down in s. 47 of the Indian Registration Act. Section 54 of the Provincial Insolvency Act uses the expression "date of transfer" and this must mean, when the deed of transfer has been actually registered, the date when the transfer takes effect according to law and that is the date of the execution of the deed, unless the document itself specifies some other date from which it takes effect. I am not impressed by the argument upon which so much stress has been laid by the learned Judges of the Rangoon High Court that, as the document can be presented for registration within a period of four months from the date of its execution, an insolvent, in collusion with a creditor whom he desired to

(1) [1933] A. I. R. (Mad.) 185. (2) (1934) I. L. R. 12 Ran. 263.

favour, might execute a deed of mortgage secretly and present it for registration after three months have expired. In this way, it is said, s. 54 of the Provincial Insolvency Act can be nullified altogether. In my opinion, s. 54 of the Provincial Insolvency Act has nothing to do with the publicity or secrecy of the transaction; for it contemplates payment of money and incurring of other obligations which do not require registration in law and need not be made openly at all. It seems to me that the legislature has deliberately dealt more leniently with a favoured creditor than a voluntary transferee and the former can escape if the preference is given more than three months before the application for insolvency was presented. In this view, it is not necessary to decide as to whether the circumstances of this case do establish that the transfer by way of mortgage was made by the insolvent with a view to give the mortgagees an undue preference over his other creditors. It is the dominant intention of a debtor that it is the determining factor in all such cases. Speaking for myself, I might say that if a debtor transfers a valuable property on the eve of insolvency to a creditor of his, the consideration being the past debt due to the creditor, an inference of undue preference can legitimately be drawn. But if the debtor approaches a creditor for a loan and substantial advance is made by the latter who insists, as a part of the same bargain, on the payment of the existing debt, the debtor consenting to it, cannot be said to have voluntarily given preference to the creditor. As I have said, it is not necessary to decide this matter in this case.

The only other question that requires consideration is, as to whether the mortgage can be avoided under s. 53 of the Provincial Insolvency Act. It is perfectly true that to enjoy the protection under s. 53, the purchaser or an incumbrancer must not only show that the transfer was for valuable consideration but it must also be proved that it was made in good faith. I agree with my Lord the Chief

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Justice in the view that good faith is necessary only on the part of the transferee. It is not required that the transferor should act in good faith also. It may be true that in this case the transferee was aware of the financial position of the debtor and was also cognisant of the fact that he had other creditors whose debts had to be satisfied, but these by themselves do not show that there was want of *bona fides* on the part of the transferee. It would be a *mala fide* transaction no doubt if it is shown that the transfer was a mere cloak to retain benefit for the transferor or the object of the transferor was to defeat or delay creditors and the transferee being aware of that object assisted the transferor in its execution. See the case of *Kamini Kumar Roy* v. *Hira Lal Pal Chowdhury* (1). In the present case, it is beyond dispute that the mortgage was a genuine transaction and the object of raising money was to carry on business of the debtor or at any rate to pay off some of the business creditors. The consideration for the mortgage was not the satisfaction of the past debt merely but a substantial advance of Rs. 24,000 in addition to that; and I cannot say that any dishonesty could be imputed to the mortgagees even if it so happened that the mortgage money was not distributed rateably amongst all the creditors or that some creditors were paid to the exclusion of others. Apart from the cases which come definitely within the purview of s. 54 of the Provincial Insolvency Act, there is no duty cast on a creditor to protect the interests of other creditors and it cannot be said that one is defrauded by payment to another.

For all these reasons, I agree with my Lord the Chief Justice that the appeal should be allowed and the application of the respondents to annul the mortgage should be dismissed.

*Appeal allowed.*

N. C. C.

(1) (1919) 23 C. W. N. 769.