Ten days will be allowed for objections after return of finding.

Issue remitted.

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KAMPA DEVI v. KISHORI LAL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

1920 *March*, 23.

SHEONATH SINGH (APPLICANT) *v.* MUNSHI RAM (OPPOSITE PARTY)*

Act No. III of 1907 (*Provincial Insolvency Act*), *sections* 16 (2) *and* (6), *and section* 38—*Insolvency—Date of vesting of insolvent's property in the Receiver —Alienation of property by insolvent between the dates of the presentation of the petition and the order of adjudication.*

The effect of sub-sections (2) and (6) of section 16 of the Provincial Insolvency Act, 1907, is that, while no vesting of the property of the insolvent in the Receiver takes place until an order of adjudication is made, and it is the order of adjudication which vests the property, nevertheless, by a legal fiction, the vesting of the property of the insolvent in the Receiver must be deemed to have taken place, when once an order of adjudication has been made, at the date of the presentation of the petition, or, in other words, the commencement of the insolvency. It follows, therefore, that the insolvent cannot make a valid alienation of his property between the dates of the presentation of the petition and the order of adjudication. *T. V. Sankaranarayana* v. *Alagiri Aiyar* (1) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Dr. *S. M. Sulaiman*, Babu *Piari Lal Banerji* and the Hon'ble Saiyid *Raza Ali*, for the appellant.

The Hon'ble Dr. *Tej Bahadur Sapru* and Munshi *Girdhari Lal Agarwala*, for the respondent.

PIGGOTT and WALSH, JJ. :—This is an appeal from an order of the District Judge of Moradabad sitting in insolvency, dismissing an application filed by the Receiver for an order that a certain transfer made by the insolvent was void under the insolvency law and that the property be handed over to the Receiver. So far as the question decided by the learned Judge and now before us in appeal is concerned, the facts are not in dispute. The respondent suggests that there may be grounds for attacking the order of adjudication and the *locus standi* of the original petitioning creditor, but these are not matters which can be decided upon this application, and he must be left to take such

* First Appeal No. 107 of 1919, from an order of V. E. G. Hussey, District Judge of Moradabad, dated the 30th of May, 1919.

(1) (1918) 49 Indian Cases, 283.

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course as may seem proper to him by way of an independent application to the court below.

The facts are that the petition or application in insolvency was presented on the 3rd of March; a summons was issued on the 11th of March, on which day the debtor contracted for the sale of his immovable property, and on the following day, namely, the 12th of March, the sale deed in question was executed, providing that certain portions of the consideration money should be left with the purchaser for payment to certain creditors of the debtor of the debts due to them. The debtor was adjudicated insolvent on the 21st of March, 1919, and on the 25th of March, the present applicant, the Receiver, applied to set aside the transfer both under sections 36 and 37 and by a supplementary application or amendment of his original application made on the 24th of April, under section 16.

It is alleged that four witnesses were summoned on behalf of the applicant, the Receiver, and a large number on behalf of the debtor but that no evidence was actually recorded on either side, and that the Receiver declined to call any parole evidence or to put the witnesses summoned into the box simply because they had nothing relevant to say. The facts really speak for themselves and raise a question of bankruptcy law, which so far as the English law is concerned, has been settled for many years, and which, we think, is not doubtful under the Provincial Insolvency Act. Section 16, sub-section (2), provides that, on the making of an order of adjudication, in this case the 21st of March, the whole of the property of the insolvent shall vest in the Receiver and shall become divisible among the creditors. If that provision stood by itself, there would be no question but that any dealing with his property by the insolvent before the date of the adjudication would be good. Sub-section (6) contains a provision which is familiar in the English Bankruptcy law and which dates as far back at least as the year 1869, that an order of adjudication shall relate back and take effect from the date of the presentation of the petition on which it is made. In our view the joint effect of these two provisions in this :—No vesting takes place until an order of adjudication is made. It is the making of the order of adjudication which vests the property, and

only upon such an order being made can any vesting take place at all, but, once the order is made, the effect created by it is by a legal fiction taken to relate back to the presentation of the petition, or, in other words, the commencement of the insolvency. It is impossible to give any real meaning to the word "relate" or to the words "take effect from" contained in sub-section (6) unless this be the real meaning. This question has, so far as we have been able to ascertain with the assistance of the experienced gentlemen appearing in this appeal, not been seriously raised hitherto and there is no reported case in the official reports, but there is a record of a case in which the question arose indirectly by reason of the meaning sought to be put upon section 36, which was heard in the High Court at Madras in February, 1918, by two Judges, both of whom took the view which we now take. That case is *T. V. Sankaranarayana* v. *Alagiri Aiyar* (1). We are not satisfied that there is really all the difference between the provisions of the English law and the Provincial Insolvency Act, which appears to have troubled the Madras High Court, but it does not matter, as the view which we take is the view which was always taken from the earliest days in the administration of the Bankruptcy law for reasons inherent in the policy of the Bankruptcy law, some of which are contained in the judgment of the Madras High Court. The commercial community cannot be too often reminded of the risks which everybody runs in dealing with a man who is in low water and who may have committed an act of insolvency. Section 38 of the Provincial Insolvency Act, which is another section taken from the English Legislature, protects anybody who before the date of the order of adjudication deals with the insolvent for valuable consideration, but that protection has always been held to be unavailable to a transferee where the circumstances show that the transfer which he has taken is in itself an offence against the Bankruptcy law, that is to say, a man cannot claim the protection of a *bonâ fide* transfer for value, where he is himself engaged in an act which is an act of insolvency. There are reasons for thinking that this transfer might have been assailed on at least two other grounds. If it be the fact, as was suggested, but this has not

(1) (1918) 49 Indian Cases, 288.

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been proved, that it was a transfer under which the purchaser was to pay certain creditors of the debtor to the exclusion of others and the debtor was unable to pay his creditors in full, it would have been an undue preference and in itself an act of insolvency under section 4 (*c*). If, on the other hand, it was a transfer of the whole of the property which then remained to him with the intention of defeating or delaying his creditors, except those for whose payment he made provision, that also would have been an act of insolvency under section 4, and no transferee under such a deed could take any title against the Receiver if an *interim* order of adjudication were made. These matters have not been gone into because the adjudication appears to have proceeded upon an altogether different act of insolvency, anterior in date, and the circumstances explain, and in our opinion justify, the course taken by the Receiver in refraining from calling any evidence. Technically, no doubt, it may be said that the Receiver ought to make a formal affidavit setting out the facts which are ascertainable from the record as we have mentioned them above, and file such affidavit or formal evidence in support of his application, and if objection had been taken by the respondent to the absence of such an affidavit it could easily have been remedied by an adjournment and by the Receiver filing the necessary affidavit; but there are no rules which make such a course obligatory upon the Receiver. It is left to the court to use its discretion and common sense in each case and of course the court being the court in which the order of adjudication has been made and in which all preliminary proceedings have already been taken, it can take judicial notice of the debts and proceedings. Therefore no possible prejudice could arise to the respondent from the absence of any formal evidence of the nature we have suggested. The real mistake of the learned Judge is that he has not adjudicated at all upon the matter, which we think is clearly established by the admitted facts. He treated it as an application which was really not supported by any evidence at all. If that were correct, he would have been right in dismissing the application, or at any rate in adjourning it to compel the Receiver to file some affidavit or other evidence, but in this particular case the deed and the date on which it was made and

the date of the order of adjudication spoke for themselves and constituted really the sole evidence to which it was necessary for the Receiver to refer in order to establish the invalidity of this deed. The appeal must be allowed with costs and the deed declared void under section 16. We may say that we entirely agree with the learned Judge that no case was made out under section 37.

Appeal allowed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

MUHAMMAD HAMID-UD-DIN (PLAINTIFF) *v.* FAKIR CHAND AND OTHERS (DEFENDANTS.)*

1920

March, 26.

Construction of document—Sale or bai-bil-wafa—Ostensible sale with collateral agreement for repurchase—Agreement containing terms as to payment of interest and accounting for the profits of the property sold.

Of two documents executed on the same day and between the same parties the first purported to be an absolute sale of a certain village. The second was an agreement on behalf of the vendees, the material terms of which were as follows. After a description of the property purchased, the agreement continued with a recital that the property had been purchased by the executants for Rs. 6,125 "*on this condition* that whenever within five years the vendors shall pay to us the amount of consideration mentioned in this document we or our heirs shall have no objection in re-conveying the aforesaid share. If we set up any plea the same shall be invalid and the vendors shall be at liberty to take legal steps and to have the property reconveyed by us . . . . They shall also have to pay interest on the whole consideration at the rate of 10 annas per cent., per month, out of which the actual produce of the village sold shall be deducted, and they shall have to pay the balance along with the consideration money."

Held that the terms of the agreement that interest should be paid on the purchase money and that the profits of the village should be taken into account in order to ascertain the actual sum which the vendors would have to pay in order to recover the property indicated that the transaction was not merely a sale with a condition for repurchase but a bai-bil-wafa or mortgage by conditional sale. *Alderson* v. *White* (1), *Bhagwan Sahai* v. *Bhagwan Din* (2), *Ghulam Nabi Khan* v. *Niaz-un-nissa* (3) and *Jhanda Singh* v. *Wahid-ud-din* (4) referred to.

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* First Appeal No. 315 of 1917, from a decree of Ram Chandra Saksena, Additional Subordinate Judge of Moradabad, dated the 23rd of March, 1917.

(1) (1858) 2 De Gex and J., 97.
(2) (1890) I. L. R., 12 All., 387.
(3) (1910) I. L. R., 33 All., 337.
(4) (1916) I. L. R., 38 All., 570.