APPELLATE CIVIL.

1926
March, 2.

Before Mr. Justice Sulaiman and Mr. Justice Mukerji.

HARI CHAND RAI (APPLICANT) *v.* MOTI RAM (RECEIVER).*

Act No. V of 1920 (*Provincial Insolvency Act*), *sections* 53 *and* 4—*Insolvency—Application by receiver to declare an ostensible transfer executed by the insolvent to be void—Transfer more than two years old—Act No. IV of* 1882 (*Transfer of Property Act*), *section* 53.

The limitation of two years prescribed by section 53 of the Provincial Insolvency Act, 1920, is applicable to all cases where the transfer, when originally made, was a good transfer of property though it was subject to an option of avoiding it, to be exercised by the receiver. But such a transfer is only voidable and not void and remains good so long as it is not annulled by the court. On the other hand a transfer which is wholly fictitious from the very beginning is of no effect and does not require to be annulled. All that the court has to do in such a case is to decide that it is void, which decision will bind the claimant to the property as if it were by an ordinary civil court.

So *held* by SULAIMAN, J., (MUKERJI, J., dissenting).

Per MUKERJI, J.,—An insolvency court has no jurisdiction to entertain an application of the receiver to declare an ostensible transfer void within the meaning of section 53 of the Provincial Insolvency Act, 1920, if the transaction took place more than two years before the adjudication.

Shikri Prasad v. *Aziz Ali* (1), *Gaura* v. *Nawab Muhammad Abdul Majid* (2), and *Bansidhar* v. *Khadgjit* (3), referred to.

THIS was an appeal arising out of an application made by a receiver in insolvency. The receiver alleged that some time before the adjudication the insolvent had made an entirely fictitious lease of the greater part of his property at a nominal rent in

* First Appeal No. 38 of 1925, from an order of G. O. Allen, District Judge of Saharanpur, dated the 6th of November, 1924.

(1) (1921) I.L.R., 44 All., 71. (2) (1920) 64 Indian Cases, 523.
(3) (1914) I.L.R., 37 All., 65.

favour of his brother-in-law, Hari Chand Rai, and he asked that the lease might be annulled and the property covered by it put in his possession. The application originally was one under section 53 of the Provincial Insolvency Act, 1920; but, on an objection being raised that that section could not be applied as the transaction in question took place more than two years before the adjudication, the receiver asked the court to treat his application as one made under section 53 of the Transfer of Property Act, 1882. The District Judge went into the facts of the case and found that the transaction impugned was entirely a fictitious one, which was never intended to be carried into effect, and was not, for the lessor remained in possession all along and there was nothing to show that the lessee ever at any time had effective possession of the property leased. He accordingly gave the receiver the declaration which he asked for.

The lessee appealed to the High Court.

Dr. *Kailas Nath Katju* and Pandit *Narmadeshwar Prasad Upadhya*, for the appellant.

Munshi *Durga Prasad*, for the respondant.

The judgement of SULAIMAN, J., after stating the facts and expressing agreement with the finding of the court below that the transaction in dispute was a totally fictitious one, thus continued :—

The learned advocate for the appellant contends before us that it was not open to the insolvency court to go into this matter at all. If the petition of the receiver were to be construed strictly and he were pinned down to the section under which it was made, there may be something to be said in support of this contention; but there is no doubt that allegations made in the petition, although the wrong section was quoted, amounted to an assertion that the transaction was a wholly fictitious one and was in no way

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binding on the insolvent. In view of this circumstance I am of opinion that the finding of fact arrived at by the District Judge was not improper.

Sulaiman, J.

The question remains whether it was open to the insolvency court to go into this matter at the instance of the receiver. The learned vakil for the respondent has strongly relied on the case of this Court, *Shikri Prasad* v. *Aziz Ali* (1), where two learned Judges expressed the view that the insolvency court has to apply and decide all questions of general law, including such questions as are raised by section 53 of the Transfer of Property Act. After expressing this opinion, the learned Judges remanded the case for disposal of the question that was raised. It may, however be pointed out that documents, which are voidable under section 53 of the Transfer of Property Act are good in law so long as the option to avoid them is not exercised by the creditors who are defrauded. A prayer to avoid such voidable documents does not necessarily raise a question of title or of priority mentioned in section 4 of the Provincial Insolvency Act of 1920. As to whether it is covered by the wider expression " of any nature whatsoever " I would require further consideration before expressing any final opinion. It, however, seems to me that there is nothing to prevent an insolvency court from going into the question of title and holding that a certain document executed by the insolvent is not only voidable but really void, being fictitious. If a document which is never intended to take effect and which in law does not pass title is void *ab initio*, the property remains vested in the insolvent and belongs to him. Any person who puts forward a claim to such property is a claimant to it and raises a question of title. I am, therefore, unable to hold that the

(1) (1921) I.L.R., 44 All., 71.

receiver cannot at his own instance have such a question of title decided by an insolvency court. Even prior to Act V of 1920, when there was no provision corresponding to section 4 of the new Act, a Bench of this Court held that, even if a case did not fall under section 36 of the old Provincial Insolvency Act, the Court had power to inquire whether a disputed property was the property of the insolvent or not, vide *Bansidhar* v. *Kharagjit* (1). As pointed out by me in the case of *Maharana Kunwar* v. *E. V. David* (2), there was a conflict of opinion between this Court and the Calcutta High Court, the view prevailing in the latter court being that a question of title could be disposed of by a regular suit only. The enactment of section 4 gives effect to the view which prevailed in this Court. Under that section, full power is given to the insolvency court to decide not only all questions of title or priority, but also of any nature whatsoever, whether they involve matters of law or 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. It seems, therefore, that the insolvency court has full power to declare, even though it be at the instance of the receiver, that certain property belongs to the insolvent and that any other person, who is putting forward a claim to it, is not really entitled to it. This by no means implies an annulment of a voidable transfer within the meaning of section 53 of the Provincial Insolvency Act. The limitation of two years, prescribed under section 53, is applicable to all cases where the transfer, when originally made, was a good transfer of property though it was subject to an option of avoiding it, to be exercised by the receiver. But such a transfer

Sulaiman, J.

(1) (1914) I.L.R., 37 All., 65. (2) (1923) I.L.R., 46 All., 16 (21).

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is only voidable and not void and remains good so long as it is not annulled by the court. On the other hand, a transfer which is wholly fictitious from the very beginning is of no effect and does not require to be annulled. All that the court has to do in such a case is to decide that it is void, which decision will bind the claimant to the property as if it were by an ordinary civil court. In this view of the matter, I am unable to hold that the court below has acted without jurisdiction in recording its finding that the transfer is wholly fictitious and not binding on the insolvent or the receiver. I would, therefore, dismiss the appeal.

MUKERJI, J.—While I agree entirely with my learned brother on the question of fact, I have the misfortune to disagree with him on the question of law. I agree that the transaction in the present case was a fictitious one and was only a cloak to protect the insolvent Lachman Das's property from being taken in execution of decrees. But the matter does not end there.

The receiver sought the aid of the insolvency court by a petition setting forth that the transaction was voidable as against him and asking that under section 53 of the Insolvency Act it might be avoided. It was pointed out on behalf of the transferee, the lessee, that the transaction had taken place more than two years prior to the adjudication of the insolvent and that therefore it was beyond the jurisdiction of the insolvency court to touch the transfer. The learned Judge was of the same opinion. But he allowed the petition of the receiver to be treated as a suit under section 53 of the Transfer of Property Act. He accordingly took cognizance of the petition and having heard the case, came to the conclusion already stated.

I have given the point raised my best consideration and I am clearly of opinion that an insolvency court has no jurisdiction to entertain an application of the receiver to declare an ostensible transfer void within the meaning of section 53 of the Insolvency Act if the transaction took place more than two years before the adjudication.

It is clear that section 4 of the Insolvency Act is controlled by the opening words " subject to the provisions of this Act." The question is whether an adjudication of a question of title is or is not controlled by the provisions of sections 53 of the Insolvency Act. It has been urged on behalf of the respondent that section 53 would apply to the case of a transfer which would be good enough unless challenged by the receiver, but would not apply where the transfer is void *ab initio* and in fact is fictitious, giving no title to the ostensible transferee.

This alleged distinction, in my opinion, does not exist so far as section 53 of the Insolvency Act is concerned. All that it lays down is this, that a receiver can ask the insolvency court to declare as of no effect certain transactions which appear to be on the face of them transfers. The section has nothing to do with the distinction between a transaction which is void *ab initio* and a transaction which is voidable at the option of a party. Indeed, in the case of transfers by debtors, either they are meant to operate *bonâ fide* or they are meant to be mere cloaks for the protection of the debtors' property. So far as I am aware there is no third class. Either the property is to be protected from the creditors or the property is to be taken by the ostensible transferee as under a real transfer. Where a transfer is meant to be good and is *bonâ fide* no title whatever remains in the transferor, the debtor, and the property passes beyond the control of the debtor

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and also of the receiver in insolvency. Where the transfer is a mere cloak for the protection of the debtor's property, the creditors and also the receiver can seek proper remedy for a declaration of the character of the transfer. The question is as to the forum where the creditor or the receiver will seek his remedy. In my opinion section 53 of the Insolvency Act declares that so far as the receiver is concerned he can seek the relief in the insolvency court, provided the transaction is within two years, as already mentioned. If the transaction is beyond two years, he must seek his remedy by an ordinary civil suit instituted under section 53 of the Transfer of Property Act.

Mukerji, J.

As for authority. The only authority that has been produced before us by the learned counsel for the receiver is the case of *Shikri Prasad* v. *Aziz Ali* (1). In that case no distinction, as has been sought to be drawn on behalf of the respondent, was drawn. The case decided that it was open to an insolvency court to try questions raised under section 53 of the Transfer of Property Act. The court was not called upon to decide what would be the effect of section 53 of the Insolvency Act in particular cases. In my opinion this case is no authority on the question which we have now to decide. On the other hand, in the case of *Gaura* v. *Nawab Muhammad Abdul Majid* (2), two learned Judges of this Court (one of whom was on the Bench which decided the case in I. L. R., 44 Allahabad) held that where the transaction was more than two years old, it was not open to the insolvency court to scrutinize it under the provisions of section 53 of the Transfer of Property Act. It is true that the learned Judges considered the provisions of section 36 of the Insolvency Act of 1907 and they had

(1) (1921) I.L.R., 44 All., 71. (2) (1920) 64 Indian Cases, 523.

not to construe the present Act. But in my opinion that is no distinction, because section 53 of the present Insolvency Act is a pure reproduction of the old section 36 of the Act of 1907, and section 4 of the present Act is subject to the provisions of section 53.

I may point out that if the question of limitation and jurisdiction that has been raised in this case has to be determined after a trial on the merits of the question raised, no utility will be left for a section like section 53 of the Insolvency Act. One party, the receiver, would assert that the transfer is fictitious, pure and simple, and that it did not pass any title to the transferee and that therefore a declaration to that effect should be made by the court. The other party, the ostensible transferee, would assert that it is a good transfer and that he has been holding the property for more than two years in good faith. The preliminary question of limitation and jurisdiction cannot be decided without the court going fully into the merits of the case and finding whether the transaction is a good one or a bad one. This I think could not have been contemplated by the framers of section 53 of the Insolvency Act.

I would, therefore, allow the appeal, set aside the decree of the court below and dismiss the receiver's application with costs.

BY THE COURT.—The appeal is accordingly dismissed, but as it raised a difficult question of law, we direct that the parties should bear their own costs of this appeal.

Appeal dismissed.