

## APPELLATE CIVIL

Before Mr. Justice Iqbal Ahmad and Mr. Justice Kisch

1933  
February, 28

RUP NARAIN SINGH AND ANOTHER (DEFENDANTS) v.  
HAR GOPAL TEWARI AND OTHERS (PLAINTIFFS)\*

*Provincial Insolvency Act (V of 1920), section 28—Vesting of insolvent's property in receiver—Transfer (mortgage) by undischarged insolvent of property which had vested in receiver—Whether void or only voidable—Mortgaged property re-vesting in insolvent after his discharge—Mortgage enforceable—Transfer of Property Act (IV of 1882), section 43.*

An alienation by an undischarged insolvent of property belonging to him is not altogether void but only voidable at the option of the receiver. The effect of an order of adjudication is, no doubt, to vest the property of the insolvent which belonged to him, or which he acquires while the order of adjudication is in force, in the receiver, but that does not mean that an alienation by the insolvent is wholly void and cannot be enforced against him after an order of discharge has been passed and the property has been divested from the receiver and re-vested in the insolvent. A distinction must be drawn between cases in which because of a statutory prohibition a person is incompetent to contract or to transfer his property, and cases where the person entering into a contract or transferring his property is under no such disability. Notwithstanding the order of adjudication an insolvent is not incompetent to enter into a contract and there is no statutory provision prohibiting an insolvent from transferring his property.

So where, after a person was adjudicated an insolvent certain property was gifted to him and he executed a mortgage thereof, but the receiver did not raise any objection and did not himself deal with the property, and after an order of discharge had been passed the mortgagee sued to enforce the mortgage, it was held that the mortgage was not void and could be enforced, and that section 43 of the Transfer of Property Act applied.

\*Second Appeal No. 1547 of 1931, from a decree of Muhammad Junaid, Second Additional Subordinate Judge of Gorakhpur, dated the 21st of May, 1931, modifying a decree of M. M. Seth, Munsif of Gorakhpur, dated the 28th of January, 1929.

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Mr. A. P. Pandey, for the appellants.

Messrs. *Haribans Sahai* and *Sri Narain Sahai*, for the respondents.

IQBAL AHMAD and KISCH, JJ. :—This appeal arises out of a suit for sale on a mortgage, dated the 5th of September, 1924. The mortgage deed was executed by Ramnaresh Singh, defendant No. 1, and his sons Brijnandan Singh and Lahiri Singh who were arrayed as defendants Nos. 2 and 3 in the suit. Mst. Munno Kuari, the mother of Ramnaresh Singh, also joined in the execution of the mortgage deed and she was impleaded as defendant No. 4. She, however, died during the pendency of the suit and is not a party to the present appeal.

The mortgage deed was for a sum of Rs.1,551. Out of this amount a sum of Rs.857-5 was borrowed by the mortgagors for discharging a simple money decree against Ramnaresh Singh and for the payment of Government revenue. The property mortgaged originally belonged to Mst. Munno Kuari, but before the date of the mortgage Mst. Munno Kuari had transferred that property by gift to Ramnaresh Singh. Therefore the property on the date of the mortgage was owned by Ramnaresh Singh. The mortgage was in favour of the father of the plaintiffs respondents, and it is not disputed that the plaintiffs have succeeded to the rights of the mortgagee.

Rup Narain Singh, a nephew, and Lachhmi Narain Singh, a brother of Ramnaresh Singh, were also arrayed as defendants to the suit, on the allegation that they were subsequent transferees of a portion of the mortgaged property.

It is common ground that before the execution of the mortgage deed Ramnaresh Singh had been adjudicated an insolvent and was an undischarged insolvent on the date of the mortgage. It is further admitted that an order of discharge was passed on the 14th of February, 1928, and on the date of the institution of the suit giving rise to the present appeal Ramnaresh was no longer an insolvent.

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The suit was not contested by the executants of the mortgage deed. Rup Narain and Lachhmi Narain contested the suit on the ground, *inter alia*, that the mortgage deed, having been executed by Ramnaresh when he was an insolvent, was void and unenforceable. They further denied the allegation of the plaintiffs that they were subsequent transferees of the mortgaged property.

The trial court held that Ramnaresh being an undischarged insolvent on the date of the mortgage "had no right to deal with the property and the hypothecation of the same was invalid". It also held that Rup Narain was not proved to be a subsequent transferee of the mortgaged property but that Lachhmi Narain was subsequent transferee of a portion of the mortgaged property. But in view of its finding that the mortgage was invalid it refused to pass a decree for sale of any portion of the mortgaged property and accordingly dismissed the claim against Rup Narain and Lachhmi Narain. It, however, passed a simple money decree against the executants of the mortgage deed, as the claim was brought within six years of the accrual of the cause of action.

The plaintiffs appealed in the lower appellate court contending that they were entitled to a decree for sale with respect to the entire amount claimed by them. At the hearing of the appeal, however, their learned counsel pressed the appeal only with respect to the sum of Rs.857-5 which was borrowed for the payment of a decree and Government revenue. The lower appellate court held that the mortgage deed was not void but only voidable at the option of the receiver or the court that had appointed the receiver in the insolvency case, and, as neither the receiver nor the court had taken exception to the mortgage deed, the mortgage was enforceable at law. It further held that both Rup Narain and Lachhmi Narain were subsequent transferees of the mortgaged property and the property in their hands was liable for the satisfaction of the plaintiffs' claim. The lower appellate court, accordingly, modified the decree of the trial court by

granting to the plaintiffs a decree for sale with respect to Rs.857-5 with interest at the stipulated rate from the date of the bond till the period of grace fixed by the decree for sale.

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Rup Narain and Lachhmi Narain have come up in second appeal to this Court and it is contended on their behalf that the mortgage deed was void and unenforceable and that the plaintiffs were not entitled to a decree for sale. In support of this contention reliance is placed on section 28(2) and (4) of the Provincial Insolvency Act by which it is provided that on the making of an order of adjudication the whole of the property of the insolvent vests in the court or the receiver, and that the property which is acquired or devolves on the insolvent after the date of the order of adjudication and before his discharge also vests in the court or the receiver. It is argued that the gift by Mst. Munno Kuari to Ramnaresh Singh did not vest the property gifted in Ramnaresh Singh and that that property vested in the receiver or the court, and, as such, Ramnaresh Singh had not a disposing power over the same. Accordingly it is urged that the mortgage was wholly void. We are unable to agree with this contention. We are of opinion, for the reasons about to be given, that an alienation by an undischarged insolvent of property belonging to him is not void but only voidable at the option of the receiver or the court and is not wholly void. It is true that the effect of an order of adjudication is to vest the property of the insolvent which belonged to him, or which he acquires while the order of adjudication is in force, in the receiver or the court, and, therefore, an insolvent is incompetent to deal with or to dispose of the property that is vested in the receiver. It is, however, quite another thing to say that an alienation by an insolvent is wholly void and cannot be enforced against him after an order of discharge has been passed and the property has been divested from the receiver and re-vested in the insolvent. Notwithstanding the order of

adjudication an insolvent is not incompetent to enter into a contract and there is no statutory provision prohibiting an insolvent from transferring his property. A reference to section 38 of the Provincial Insolvency Act makes it clear that the insolvent, even after the date of an order of adjudication, is competent to enter into composition with his creditors. In other words he can enter into a contract with his creditors. There is no statutory prohibition with respect to the transfer of the property of the insolvent. A transfer of his property by the insolvent cannot, therefore, be wholly void. It is, no doubt, voidable at the option of the receiver or the court, for the simple reason that so long as the order of adjudication is in force the property vests in the receiver or the court, and it is open to them to refuse to recognize the validity of the transfer by a person in whom, at the time of the transfer, the property did not vest. A distinction must be drawn between cases in which because of a statutory prohibition a person is incompetent to contract or to transfer his property, and cases where the person entering into a contract or transferring his property is under no such disability. In the former case the contract or the transfer would be wholly void, but in the latter class of cases it would only be voidable and not void *ab initio*. To illustrate the former class of cases reference may be made to section 37 of the Court of Wards Act (U. P. Act No. IV of 1912) and section 10(2) of the Bundelkhand Encumbered Estates Act (Act No. I of 1903). By section 37 of the Court of Wards Act it is provided that a ward shall not be competent to transfer or create any charge on, or interest in, any part of his property, or to enter into any contract which may involve him in pecuniary liability. Similarly, it is provided by section 10(2) of the Bundelkhand Encumbered Estates Act that so long as the Commissioner has not declared that the proprietor has ceased to be subject to the disabilities mentioned in the Act, the proprietor shall be incompetent to sell, mortgage or lease his proprietary rights in land or any part thereof. There are

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no analogous provisions to be found in the Provincial Insolvency Act.

The view that we take finds support from the decision in *Shiam Sarup v. Nand Ram* (1). We are not overlooking the fact that in the reported case the mortgage made by the insolvent was for discharging an earlier mortgage executed by him, and one of the grounds on which the learned Judges held that the mortgage was not void was that by section 16(5) of the Provincial Insolvency Act (Act No. III of 1907), which corresponds to section 28(6) of the present Insolvency Act, the remedies of a secured creditor for the realisation of his debts are not affected by the mere fact of the debtor being adjudicated an insolvent. But the learned Judges further observed in that case that it is not open to the representatives of an insolvent to assail the validity of a mortgage executed by him, if the mortgage has not been avoided by the creditor of the insolvent or the receiver appointed by the court.

It is contended by the learned counsel for the defendants appellants that as a transfer by an insolvent of the property that is vested in the receiver has the effect of defeating the provisions of the Provincial Insolvency Act, the transfer must be void. The assumption that the transfer in any way defeats the provisions of the Provincial Insolvency Act is unfounded, for the simple reason that it is open to the receiver or the court to avoid the transfer and to ignore it.

In the present case, on the date of the mortgage the property mortgaged had vested in the receiver, but before the date of suit an order of discharge was passed and on the passing of that order the mortgaged property re-vested in Ramnaresh, and therefore the mortgagee was, in view of the provisions of section 43 of the Transfer of Property Act, entitled to recover the mortgage debt by sale of the mortgaged property. Ramnaresh, on the date that he executed the mortgage,

was, no doubt, not "authorized to transfer" the property mortgaged, but on the passing of the order of discharge the mortgaged property re-vested in him and the mortgagee could, therefore, enforce the mortgage by sale of the mortgaged property.

Exception is also taken to the finding of the lower appellate court that Rup Narain and Lachhmi Narain were subsequent transferees of the mortgaged property. [After discussing the evidence on this question the judgment proceeded.] We have, therefore, no hesitation in agreeing with the lower appellate court that both Rup Narain and Lachhmi Narain were subsequent transferees of the mortgaged property.

In our judgment the decree appealed against is perfectly correct and we accordingly dismiss this appeal with costs.

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*Before Sir Shah Muhammad Sulaiman, Chief Justice, and  
 Mr. Justice Thom*

CHHANGA MAL AND OTHERS (JUDGMENT-DEBTORS) v. 1933  
 RAM DULAREY LAL (DECREE-HOLDER)\* February, 28

*Civil Procedure Code, order XXII, rules 8, 11, 12—Applicability of rule 12 to execution appeal—Abatement of appeal—Appellant's insolvency—Refusal of receiver to give security for costs—Dismissal of appeal.*

Order XXII, rule 12 of the Civil Procedure Code does not exempt pending appeals from the operation of rule 8 of that order, even though the appeals arise out of execution proceedings. An appeal stands on quite a different footing, in this respect, from an application for execution. Rule 12 does not contemplate that if an appeal has been preferred from an order in execution, then also rules 3, 4 and 8 would never apply.

So where in a pending appeal by the judgment-debtor against an order in execution the appellant became an insolvent, and the receiver refused to give the security for costs required under order XXII, rule 8(1), it was held that the appeal must be dismissed under rule 8(2).

\*First Appeal No. 131 of 1932, from an order of Shyam Behari Lal, Subordinate Judge of Farrukhabad, dated the 18th of June, 1932.