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been obtained by means of fraud. We, therefore, do not think that in this particular case the plaintiff should now be given a decree for the amount when the court below has recorded a clear finding that he has failed to prove that the money was lent to the defendant. He cannot be allowed to take advantage of the weakness in the defendant's evidence, namely that the want of consideration had not been satisfactorily established, when his suit is professedly not based on the bond.

The appeal is accordingly dismissed with costs.

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

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 February, 6

AMIR AHMAD (PLAINTIFF) v. SAIYID HASAN (DEFENDANT)\*

*Provincial Insolvency Act (V of 1920), section 53—Annulment of transfer within two years before insolvency—Burden of proof—Transfer by transferee of insolvent—Parties to annulment proceedings—Annulment order obtained against the first transferee whether binding on the second transferee—Provincial Insolvency Act, sections 4(2), 28(7)—Judgment in rem.*

Although section 53 of the Provincial Insolvency Act does not in terms apply to a transferee from a transferee of the person adjudged an insolvent, it does not follow therefrom that a subsequent transferee, who is a legal representative of the original transferee, cannot be bound at all by an order of annulment under that section. At the same time it must be remembered that except where the transfer by the insolvent was wholly fictitious and it was not intended that the property should in fact pass to the transferee, the transfer for the time being is valid, though voidable at the option of the receiver, and the subsequent annulment can not be equivalent to a declaration that the transfer was void *ab initio* with the necessary consequence that all subsequent transfers must as a matter of course fall through.

If a transfer made by the debtor is wholly fictitious and bogus and no interest in the property passes to the transferee, then the transfer is void *ab initio* and subsequent transferees

\*Second Appeal No. 924 of 1931, from a decree of Ratan Lal, First Subordinate Judge of Saharanpur, dated the 14th of September, 1931, confirming a decree of R. S. Agarwal, City Munsif of Saharanpur, dated the 19th of December, 1930.

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can never be protected because the foundation of their title does not exist. There would be no necessity for the receiver to have such a transfer annulled under section 53; he can ignore it and treat it as a nullity. But if the transfer was not wholly fictitious and bogus and the intention of the parties was that property should in fact pass to the transferee, then it is discretionary with the court to annul it under section 53 of the Provincial Insolvency Act, the provisions of which are not so mandatory as those of section 54(1). The question of good faith and payment of consideration, as well as that of care and precaution, will have to be considered by the court. The burden of proving that the transaction was not in good faith and for valuable consideration lies on the receiver.

In order to apply section 53 of the Provincial Insolvency Act the condition precedent is a finding that the transfer was other than one made in good faith and for valuable consideration. That finding of fact can be arrived at only when a dispute as to title arises between two rival claimants. When property has been transferred by the transferee of the debtor to a third party and the receiver is aware of the subsequent transfer, the dispute is really between the receiver on the one hand and the subsequent transferee on the other, and not between the receiver and the first transferee who has no longer got any interest in the property left. The proceeding should therefore be by the receiver against the person who is now claiming title to the property; and if the receiver chooses to proceed against the first transferee only, who has no interest left in the property, and obtains an order against him either *ex parte* or after contest, he can not use that order as a final adjudication of the matter in dispute as against the real claimant of the title. No doubt, under section 4(2) of the Act the decision of a question of title is binding upon all claimants against the debtor and upon all persons claiming under claimants. But if the first transferee has ceased to have any interest in the property at all, he can not be regarded as a "claimant against the debtor" so as to make a decision obtained against him binding on the second transferee, who is the person in whom the property has vested for the time being.

All adjudications as between the receiver representing the whole body of creditors on the one hand and the insolvent on the other are certainly judgments *in rem* and are binding on the whole world; but when a dispute as to title to property arises between the receiver and a stranger to the insolvency pro-

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ceeding, the judgment would be binding on the person against whom it is given and not against the whole world.

The result of sub-sections (2) and (7) of section 28 is that the vesting of the property in the receiver dates back to the date of the application for insolvency, but there is no provision in the Act under which the vesting of the property dates back to a previous transfer made by the insolvent.

Mr. *A. M. Khwaja*, for the appellant.

Mr. *M. A. Aziz*, for the respondent.

SULAIMAN, C.J., and BENNET, J.:—This is a plaintiff's appeal arising out of a suit for partition in which a question arose as to the title of the rival claimants. On the 2nd of February, 1925, one Abdul Ghani, who was heavily in debt, sold his share in the house in question to one Abdul Qaiyum. On the 19th of October, 1926, Abdul Ghani himself applied for being adjudicated an insolvent and he was declared an insolvent on the 21st of December, 1926. On the following day, namely, the 22nd of December, 1926, Abdul Qaiyum sold the property to the present defendant, Saiyid Hasan. On the 25th of June, 1927, on an application made by the official receiver the sale deed of the 2nd of February, 1925, which had been executed by the insolvent in favour of Abdul Qaiyum was annulled by the court. In that proceeding Abdul Qaiyum alone had been impleaded and did not appear; the subsequent transferee, Saiyid Hasan, was not impleaded by the official receiver at all. After having obtained the order of annulment the official receiver on the 4th of August, 1927, transferred the property to the present plaintiff, Amir Ahmad. As Amir Ahmad did not obtain possession of the house the present suit was instituted by him on the 21st of August, 1930, for partition and separation of his share.

The plaint was very vague and did not clearly state how Saiyid Hasan came on the scene. The written statement was in the same way vague and did not contain an express plea that Abdul Qaiyum was a *bona*

*fide* transferee for value nor did it contain any express plea that the application did not lie under the Insolvency Act at all. Both the courts below have dismissed the claim holding that inasmuch as Saiyid Hasan, the defendant, in the absence of any evidence to the contrary must be taken to have been a *bona fide* purchaser for good consideration, his title cannot be impeached.

This view is challenged in appeal. Our attention has been drawn to a large number of cases which have a close bearing on the point arising in this case. but there is no case which can be said to be directly in point.

It seems quite clear that if a transfer made by a debtor is wholly fictitious and bogus and no interest in the property passes to the transferee, then the transfer is void *ab initio* and subsequent transferees can never be protected because the foundation of their title does not exist. There would be no necessity for the official receiver to have such a wholly ineffective, void and fictitious transfer annulled under section 53 or section 54 of the Provincial Insolvency Act. In case of dispute he can always ignore it and treat it as a nullity either in a separate suit or in a proceeding under section 4 of the Insolvency Act.

On the other hand, if the transfer made by the debtor was not wholly fictitious and bogus but the intention of the parties was that property should in fact pass to the transferee, then the result would depend on whether the transferee was a purchaser in good faith and for valuable consideration, or not. The transfer for the time being is valid, though it is voidable at the option of the receiver, and it is discretionary with the court to annul it under section 53 of the Provincial Insolvency Act. But so long as the transfer has not been avoided by the receiver and not annulled by the court, the title vests in the transferee even though he may not have acted in good faith and might not have paid full consideration. Such a transfer can however be annulled,

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that is to say, declared to have ceased to be binding on the receiver. The annulment, however, cannot be equivalent to a declaration that it was void from the very beginning.

Reliance has been placed on some English cases, but all of them are not of such help because the language of the relevant sections in the various Bankruptcy Acts under which they arose was substantially different. But there are a large number of cases in India in which the view appears to have been expressed that section 53 of the Insolvency Act has no application when once the transferee from the insolvent has transferred the property to a third party: *Jagannatha Ayyangar v. Narayana Ayyangar* (1), *Sudha v. Nanakchand Daulatram* (2), *Ponnammai Ammal v. District Official Receiver* (3), *Hayat Muhammad v. Bhawani Das* (4), and *Govind v. Sonba* (5). This view is based on the sole circumstance that section 53 in terms does not apply to a transferee from a transferee. No doubt the transfer that is annulled by the court is the transfer made by such transferor as is adjudged insolvent, but it does not follow that a subsequent transferee who is a legal representative is not equally bound by the annulment.

There is one significant circumstance which does not appear to have been brought to the notice of the learned Judges who decided the above mentioned cases, and it is that if section 54(1) had stood by itself there would have been an equal reason for holding that it would not be applicable to a transferee from a creditor, because the language of both the sections is almost similar. But there can be no doubt that the legislature has thought otherwise and has provided in sub-section (2) of section 54 that the rights of any person who has acquired title through or under a creditor will not be affected if he has acted in good faith or for valuable consideration. It

(1) (1919) 52 Indian Cases, 761. (2) (1925) 88 Indian Cases, 89.  
(3) (1925) 97 Indian Cases, 918. (4) (1925) 90 Indian Cases, 1037.  
(5) A.I.R., 1930 Nag., 34.

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follows that but for this sub-section such a second transferee would not have been protected. Reading sections 53 and 54 together, it would then seem to follow that the sections are general in their scope and if the transfer made by the insolvent has been annulled the annulment is binding on the initial transferee as well as his subsequent representative. It is noteworthy that the language of the first paragraph of section 53 of the Transfer of Property Act is similar and there, too, there is a provision in the next paragraph that the rights of a transferee in good faith and for consideration would not be impaired.

This view finds some support from the remarks made by VAUGHAN WILLIAMS, J., in *In re Vansittart, Ex Parte Brown* (1). In that case the learned Judge was dealing with the plea of a pawnee from the wife of the insolvent to whom he had gifted certain jewellery. The learned Judge observed at page 379: "Of course, no question could arise at all unless it appeared that the respondents were persons claiming in good faith and for valuable consideration." In that case the pawnee had taken the jewellery from the wife previous to the application for insolvency. Nevertheless the learned Judge considered that if he had not been a transferee in good faith and for valuable consideration, no question would have at all arisen.

On general principles also there seems to be no reason why, if the original transfer made by the insolvent is found to be voidable and has been annulled by the court, the annulment should not be binding on subsequent transferees and affect their title. There is, however, one distinction. Section 54(1) declares that the transfer made by a person unable to pay his debts to a creditor with a view of giving that creditor a preference shall be deemed fraudulent and void and shall be annulled by the court. The provision is imperative

(1) [1893] 2 Q.B., 377.

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and the court has no option but to declare it fraudulent and void and to annul it. It was therefore necessary to provide in sub-section (2) that the rights of any person who in good faith and for valuable consideration has acquired title through or under a creditor would not be affected. On the other hand, the provisions of section 53 are not so mandatory. A transfer other than one for consideration and made in favour of a purchaser acting in good faith is only voidable as against the receiver and it is a matter of discretion for the court to annul it or not. Obviously the court would decline to exercise its discretion if the transferee were to satisfy the court that he acted in good faith, paid full consideration and was entitled to protection on equitable grounds. It was therefore not necessary to add any sub-section to section 53 corresponding to sub-section (2) to section 54. The question of good faith and payment of good consideration as well as that of care and precaution can all be considered by the court itself. But as the annulment made by the court does not date back to the original transfer and can, at the very most, date back to the date of the application for insolvency, it would follow that a second transfer against a second transferee, who took the second transfer before the application for insolvency was made, cannot be annulled under section 53 of the Act; but if it is either absolutely void from the very beginning or is voidable under section 53 of the Transfer of Property Act, it can be declared to be void or avoided either in a separate suit or in a proceeding under section 4 of the Provincial Insolvency Act.

Sections 53 and 54, as laid down by the majority of the Full Bench in the case of *Anwar Khan v. Muhammad Khan* (1), do not deal with the jurisdiction of the insolvency court but only lay down rules as to the manner in which evidence should be considered in certain cases arising in that court and in no way control the provisions

of section 4. It therefore follows that in order to apply section 53 the condition precedent is a finding that the transfer was otherwise than one made in good faith and for valuable consideration. That finding of fact can be arrived at only when a dispute as to title arises between two rival claimants. When property has been transferred by the transferee of an insolvent to a third party and the receiver is aware of the transfer, the dispute is really between the receiver on the one hand and the subsequent transferee on the other and not between the receiver and the first transferee who has no longer got any interest in the property left. In order to start a proceeding under section 4 the application should therefore be by the receiver against the person who is now claiming title to the property, and an adjudication by the court on such dispute would be final and would bar a second suit and would be binding on the parties to the proceeding. But if the receiver chooses to proceed under section 4 against the first transferee who has no interest left in the property, and obtains an order against him either *ex parte* or after contest, he cannot use that order as a final adjudication of the matter in dispute as against the real claimant of the title.

Some difficulty is certainly caused by the phraseology used in section 4(2), under which all claimants against the debtor and all persons claiming under claimants are bound. But if the first transferee has ceased to have any interest in the property at all it is difficult to regard him as a claimant against the debtor, so as to bind the second transferee. The real situation then is that the claimant is the subsequent transferee in whom the property vests for the time being and it is he and his legal representatives or persons who will claim through him afterwards who would be bound by the order. If a transfer were older than two years prior to the application for insolvency, the only remedy open to the official receiver would be to avoid the transfer, if he can, in

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accordance with the provisions of section 53 of the Transfer of Property Act, and he has to establish an intent to defraud or delay creditors. Learned counsel for the appellant has argued before us that the order of annulment is a judgment *in rem* and operates against the whole world and that it dates back to the initial transfer made by the insolvent. This argument is based on the insolvency jurisdiction of the court and also on sections 4(2) and 28(7) of the Act. All adjudications as between the receiver representing the whole body of creditors on the one hand and the insolvent on the other are certainly judgments *in rem* and are binding on the whole world. But when a dispute as to title to property arises between the receiver representing the creditors on the one hand and a stranger to the insolvency proceeding, the judgment would be binding on the person against whom the decision is given and not against the whole world. Section 28(7) merely lays down that the order of adjudication shall relate back to, and take effect from, the date of the presentation of the petition. Under section 28(2), on the making of an order of adjudication the whole of the property of the insolvent vests in the court or the receiver. The result of these two sub-sections is that the vesting of the property in the receiver dates back to the date of the application for insolvency. There is no provision in the Act under which the vesting of the property dates back to a previous transfer made by the insolvent. Indeed such a transfer stands, unless it is annulled by the court.

It therefore seems to follow that the official receiver wrongly omitted to implead Saiyid Hasan, particularly as it appears from the record that he was aware of the transfer in his favour, and that the order of annulment which he obtained against the absent Abdul Qaiyum is not binding upon the present defendant Saiyid Hasan and it is open to Saiyid Hasan to show that the original transfer in favour of Abdul Ghani was made to a pur-

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chaser in good faith and for valuable consideration and that it is also open to him to show that he himself acted in good faith and paid full consideration, being unaware of the insolvency proceedings. As the pleadings were defective the first question has not been gone into by the courts below, but it has been assumed as a result of the previous order of annulment passed against Abdul Qaiyum that he was not a purchaser in good faith and for valuable consideration. There is, however, a clear finding that the defendant Saiyid Hasan in the absence of evidence to the contrary must be taken to be a *bona fide* purchaser for good value. As section 53 applies only to cases of transfer other than those for consideration and in good faith, the burden of proving that the transaction was not in good faith and was without consideration would lie on the official receiver in the insolvency proceeding: See *Official Assignee v. Khoo Saw Cheow* (1), where the language of the statute was almost identical with that before us. Similarly the burden of proof would lie on the present plaintiff who claims through the official receiver. That burden has not been discharged. The plaintiff did not come to court on the allegation that the transfer made by the debtor was voidable under section 53 of the Transfer of Property Act, and the case therefore has not been considered from that point of view. In our opinion the plaintiff can not avail himself of section 53 of the Insolvency Act when the respondent acted in good faith; and he can not succeed without making out a case under section 53 of the Transfer of Property Act which he did not put forward in the plaint. Such a claim cannot be investigated without an amendment of the plaint and without allowing him to make out a new case, which he can not be allowed to do. We therefore dismiss this appeal with costs.

(1) [1931] A.C., 67.