

## APPELLATE CIVIL

Before Mr. Justice Ismail

1938  
July, 25

MUNNU LAL (OPPOSITE PARTY) v. P. K. BANERJI (APPLICANT)\*

*Civil Procedure Code, section 11—Res judicata—Directly and substantially in issue—Provincial Insolvency Act (V of 1920), section 36—Stay of proceedings—Order passed by High Court of another province—Provincial Insolvency Act, section 53—Avoidance of transfers—Burden of proof.*

*T* obtained a preliminary decree for sale on a mortgage in the court of the Munsif of Hardoi and transferred his rights under the decree to *M* in September, 1931. *M* applied for a final decree. During the pendency of these proceedings *T* applied for and obtained an adjudication order in insolvency from the court of the Insolvency Judge at Cawnpore in January, 1932. The official receiver filed an objection in the court at Hardoi against *M*'s application for a final decree, alleging that *T*'s transfer to *M* was fraudulent and without consideration; the court decided that the transfer was genuine and for consideration, and that the official receiver had no *locus standi* to make the objection, and it passed the final decree. Upon an application by certain creditors of *T* he was adjudicated an insolvent by the Insolvency Judge, Hardoi, in February, 1933, but the order was annulled by him in August, 1933. On appeal from the last order the Chief Court of Oudh directed that the proceedings in the insolvency case in the court at Cawnpore be stayed. The Insolvency Judge, Cawnpore, stayed the proceedings, but on application by the official receiver revived them and proceeded with an application of the official receiver, dated 23rd March, 1934, under section 53 of the Provincial Insolvency Act, for a declaration that *T*'s transfer to *M* was null and void against the official receiver. *M* made an objection, but the court held that the transfer was fictitious and without consideration and made with the object of defrauding creditors, and the declaration asked for was granted: *Held—*

(1) The decision of the Munsif of Hardoi that *T*'s transfer to *M* was genuine and for consideration did not operate as *res judicata* when the question was subsequently raised in the Insolvency Court at Cawnpore. The official receiver was no party to the mortgage suit in the court of the Munsif, and, as held by the Munsif, had no *locus standi*. As the genuineness of the transfer by *T* in favour of *M* was not a question directly

\*Second Appeal No. 9 of 1936, from an order of D. C. Hunter, District Judge of Cawnpore, dated the 2nd of January, 1936.

and substantially in issue in the suit on the mortgage, the subsequent trial of that question by the Insolvency Judge was in no way barred.

(2) Section 36 of the Provincial Insolvency Act did not stand in the way of the Insolvency Judge at Cawnpore reviving the proceedings in his court. The Chief Court of Oudh could not pass an order of stay of a case pending in the court of the Insolvency Judge at Cawnpore unless the direction of the Chief Court was confirmed by this High Court. As there was no such confirmation the Insolvency Judge at Cawnpore was not bound to stay the proceedings and was therefore free to revive them.

(3) In proceedings under section 53 of the Provincial Insolvency Act the burden of proof is on the receiver in the first instance.

Mr. P. L. Banerji, for the appellant.

Mr. I. B. Banerji, for the respondent.

ISMAIL, J.:—This is a second appeal from order arising out of an insolvency matter. It appears that one Tulshi Ram had a mortgagee right in a mortgage. Tulshi Ram obtained a preliminary decree in enforcement of the mortgage in his favour on the 31st of July, 1931, from the court of the learned Munsif of Hardoi. On the 29th of September, 1931, Tulshi Ram transferred his rights under the decree in favour of the appellant Munnu Lal. The transferee thereupon applied to the Munsif for a final decree. During the pendency of the above mentioned suit Tulshi Ram applied to the Insolvency Judge, Cawnpore, to be adjudged an insolvent. The learned Insolvency Judge declared him an insolvent on the 15th of January, 1932. An official receiver was appointed by the insolvency court and he made an objection to the application of Munnu Lal for the passing of the final decree on the ground that the transfer in favour of Munnu Lal was fraudulent and without consideration. The learned Munsif framed several issues and ultimately dismissed the objection of the official receiver and passed a final decree as prayed by Munnu Lal. The official receiver on the 23rd of March, 1934,

1938

---

MUNNU  
LAL  
v.  
P. K.  
BANERJI

1938

MUNNU  
LAL  
v.  
P. K.  
BANERJEE

applied to the insolvency court, Cawnpore, under section 53 of the Provincial Insolvency Act for a declaration that the sale deed, dated the 29th of September, 1931, was null and void against him. The appellant made an objection but the court of first instance granted the declaration asked for and held that the transfer was fictitious and without consideration and was made with the object of defrauding the creditors. The learned District Judge on appeal affirmed the decision of the court of first instance. Munnu Lal now comes to this Court in appeal.

Learned counsel for the appellant has reiterated the objections taken by his client in the court of first instance and decided against him by the learned District Judge. The first question that has been argued is that the order of the learned Munsif of Hardoi, dated the 6th of March, 1934, was *res judicata* and it was not open to the learned Insolvency Judge to allow the official receiver to re-open the same question. In my judgment the contention of learned counsel for the appellant on this point is untenable. The main issue which the learned Munsif of Hardoi was called upon to decide in the civil suit was whether the preliminary decree passed in favour of Tulshi Ram could be made absolute. The official receiver was no party to the suit and the learned Munsif definitely held that he had no *locus standi*. On the objection of the official receiver the learned Munsif did frame certain issues and came to the conclusion that the transfer in favour of Munnu Lal was genuine and for consideration. But this question was not germane to the suit and incidentally arose because of the objection of the official receiver who intervened as a representative of the judgment-debtor. As the learned Munsif came to the conclusion that the official receiver had no authority to intervene, the matter ended there as far as the civil suit was concerned. Under section 11 of the Civil Procedure Code "No court shall try any suit or issue in

which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties . . ." As the genuineness of the transfer by Tulshi Ram in favour of Munnu Lal was not a question directly and substantially in issue in the suit on foot of the mortgage the subsequent trial of this question by the Insolvency Judge is in no way barred. In my opinion the court below has come to a right conclusion on this point.

The next question pressed in appeal is that the learned Insolvency Judge had no jurisdiction to proceed with the application of the official receiver in view of an order of stay passed by his predecessor. It appears that an application was made by certain creditors of Tulshi Ram for the declaration of the latter's insolvency in the court of the Insolvency Judge, Hardoi. On the 13th of February, 1933, the Hardoi court adjudged Munnu Lal an insolvent. Later, on the 23rd of August, 1933, the same court annulled the previous order of adjudication. The aggrieved party appealed from the order of annulment to the Chief Court of Oudh. The learned Judge of the Chief Court seised of the case gave a direction that the proceedings in insolvency case No. 57 of 1931 (the present proceedings) be stayed. This order of the Chief Court was communicated to the Registrar of this Court and the Deputy Registrar forwarded it to the Insolvency Judge, Cawnpore, saying that it was for the Insolvency Judge to decide whether he was bound by the order of the Chief Court or not. The Insolvency Judge at Cawnpore stayed the proceedings but on the application of the official receiver revived them, with the result stated above. On these facts it is argued that the Insolvency Judge, having elected to stay the proceedings, was not entitled to re-open them until the final decision of the insolvency appeal pending before the Chief Court. Learned counsel for the appellant has referred me to section 36 of the Provincial Insolvency Act. In my

1933

---

 MUNNU  
LAL  
v.  
P. K.  
BANERJI

1938

MUNNU  
LAL  
2.  
P. K.  
BANERJI

judgment this section in no way helps the contention of learned counsel. The Chief Court of Oudh could not pass an order of stay of a case pending in the court of the Insolvency Judge, Cawnpore, unless the direction of the Chief Court was confirmed by this Court. The letter of the Registrar clearly shows that this Court did not in any way direct the Insolvency Judge to act under section 36. The stay order was not for any particular period and the re-opening of it did not depend on the happening of any event. That being so, the court that had jurisdiction to pass the order of stay was undoubtedly authorised to re-open the proceedings stayed by itself. In my judgment the decision of the learned District Judge on this point is perfectly correct.

The last point pressed by learned counsel for the appellant relates to the merits of the case. It is urged that the Insolvency Judge had erred in throwing the onus of proof on the transferee. The learned District Judge has fully discussed this matter and I entirely agree with him that on merits the decision of the court of first instance is correct. In view of the case of the *Official Receiver v. P. L. K. Chettyar Firm* (1) it must now be held that the onus of proof in proceedings under section 53 of the Provincial Insolvency Act is on the receiver in the first instance. The Insolvency Judge was wrong in holding that the onus of proof was on the transferee but the learned District Judge has fully analysed the evidence and has considered the circumstances of the case, and upon a consideration of the materials on the record has come to the conclusion that the transfer in favour of Munnu Lal appellant was not genuine. The vendor Tulshi Ram about the time of transfer was hard pressed for money. Apparently his creditors were clamouring for the repayment of the debts due to them. Within three months of the date of the transfer Tulshi Ram applied to the Insolvency Judge to be declared

(1) [1931] A.L.J. 444.

insolvent and some creditors about the same time moved the Insolvency Judge at Hardoi to the same effect. In the sale deed it is stated that the money was required to pay a certain creditor. The creditor himself did not enter the witness box but sent his son to prove a receipt purporting to have been given by him to Tulshi Ram in proof of the payment of the money due to him. But, no books of the firm of the creditor were produced before the court nor did Munnu Lal himself enter the witness box.

Having regard to all the circumstances there appears no doubt whatsoever that the transfer was not *bona fide* and was made with the intention of defrauding the creditors. In the result I dismiss the appeal with costs.

1938

---

 MUNNU  
LAL  
v.  
P. K.  
BANERJI

---

 FULL BENCH

*Before Mr. Justice Bennet, Acting Chief Justice, Mr. Justice Ismail and Mr. Justice Verma.*

GOVIND DAS AND ANOTHER (APPLICANTS) v. INDRAWATI AND OTHERS (OPPOSITE PARTIES)\*

---

 1938  
July, 25

*Civil Procedure Code, section 115—"Case decided"—Order setting aside an award in a pending suit.*

An order setting aside an award and superseding the reference to arbitration in a pending suit, with the consequence that the suit is to be tried by the court, does not amount to a "case decided" within the meaning of section 115 of the Civil Procedure Code, and no revision lies from such order.

Messrs. S. K. Dar and M. L. Chaturvedi, for the applicants.

Messrs. P. L. Banerji, V. D. Bhargava, Kamta Prasad and J. K. Srivastava, for the opposite parties.

BENNET, A. C. J.:—In this civil revision an issue has been referred to the Full Bench as follows: "Can the court be considered to have decided a case within the meaning of section 115 of the Civil Procedure Code where it has set aside the award and superseded the