

MISCELLANEOUS CIVIL.

Before Mr. Justice Muhammad Raza and Mr. Justice
A. G. P. Pullan.

1930
February.
14.

SHEIKH AMJAD ALI AND OTHERS (OPPOSITE-PARTY-
APPELLANTS) v. MR. NAND LAL (APPLICANT) AND
ANOTHER (OPPOSITE-PARTY), RESPONDENTS.*

*Provincial Insolvency Act (V of 1920), sections 4 and 53—
Jurisdiction of insolvency courts—Insolvency court's power
to annul transfers made more than two years before adju-
dication—Deed of release accompanied by mutation, if a
transfer.*

Section 4 of the Provincial Insolvency Act, 1920, as framed does not purport to give the court any powers beyond what is given by other sections of the Act but rather to make it clear what the powers of court are under the Act. That section does not give to the insolvency court a wider power than that which is contained in section 53 to annul transfers executed more than two years before the date of adjudication Transactions which may have been entered into more than 2 years before the date of adjudication and which are voidable under the ordinary law must be challenged, if at all, in an ordinary civil court and not in the insolvency court. *Fool Kumari Dasi v. Khirod Chandra Das* (1), *Chittamal v. Ponnuswami Naicker* (2), referred to. *The Official Receiver, Tinnevely v. Sankaralinga Mudaliar* (3) and *Hinga Lal v. Jawahir Prasad* (4), relied on. *Anwar Khan v. Mohammad Khan* (5), dissented from.

The case was originally heard by PULLAN, J., who referred it to a Bench of two Judges for decision. His order of reference is as follows:—

PULLAN, J. :—This appeal raises a question as to the jurisdiction of insolvency courts which does not appear to have been decided by this Chief Court or by the late Court of the Judicial Commissioner of Oudh.

*Miscellaneous Appeal No. 62 of 1929, against the decree of Pandit Shyam Manohar Nath Shargha, Third Additional District Judge of Lucknow, dated the 5th of October, 1929, confirming the decree of B. Jotendra Nath Roy, Judge, Small Cause Court, Lucknow, dated the 10th of July, 1929.

(1) (1927) 31 C.W.N., 502.

(2) (1925) I.L.R., 49 Mad., 762.

(3) (1920) I.L.R., 44 Mad., 524.

(4) (1923) 5 O.W.N., 964.

(5) (1929) I.L.R., 51 All., 550.

Section 53 of the Provincial Insolvency Act lays down that any transfer of property with certain exceptions shall, "if the transferor is adjudged insolvent within two years after the date of transfer, be voidable as against the receiver and may be annulled by the court" This section reproduced section 36 in the previous Act, but in the new Act there is a new section 4 which gives a wide jurisdiction to the insolvency court to decide all questions of title or priority, or of any nature whatsoever, which may arise in any case of insolvency or "which the court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case." It has been held by a majority of a Bench of the Allahabad High Court in the case of *Anwar Khan v. Mohammad Khan* (1), that, on an interpretation of sections 4 and 53 of the Provincial Insolvency Act of 1920, an insolvency court can try a question of title raised on the basis of a transfer which took place more than 2 years prior to the adjudication. One of the Judges of that Bench, dissenting from the view of the majority, held that the receiver could apply for annulment only where the transfer was intended not to be operative from the beginning and the insolvent remained in possession of the property. That is to say he held that a transfer could only be annulled if it were within 2 years of the adjudication, but the insolvency court could decide the question as to the title of the insolvent where there had been no real transfer but only a fictitious transfer that was not intended to be operative.

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In the present case the official receiver has asked the insolvency court to declare that a deed of release, dated the 20th of May, 1924, is a deed in fraud of creditors executed to defeat them and it is not binding on the receiver or the creditors. His application is headed "An application under section 4 of Act V of

(1) (1929) I.L.R., 51 All., 550.

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1920", but admittedly it is an application for the annulment of a deed of release executed more than 2 years before adjudication. The lower court gave the following opinion.

"I am of opinion that if the deed of release had been a transfer of interest the cognizance of the insolvency court would be barred under section 53 of the Provincial Insolvency Act . . . But I am of opinion that the deed of release executed by the insolvent Ahmad Ali was not a deed of transfer which created any title by its own virtue. It is, what it purports to be, an admission by the insolvent that the deed of gift in favour of Musammat Rabia, which was the origin of his title to the property, was really a fictitious document not intended to create any interest in the property covered by it."

If the Judge means by this that the deed of release is a genuine document admitting that the insolvent never obtained possession of the property, it appears to me that he should not have handed this property over to the creditors. If, on the other hand, he believes the insolvent's statement and considers that he was really in possession of the property, I am unable myself to see how this deed of release accompanied as it was by a transfer of possession and mutation proceedings was other than a transfer. The meaning, therefore, of the order of the court below will have to be very carefully considered, but at the back of this lies the main question whether the insolvency court can or cannot take cognizance of the application by an official receiver for cancellation of a document purporting to be a transfer which was executed more than two years before the adjudication. As I consider that this is a question which should be considered by a Bench, I refer this appeal

under section 14 clause (2) of the Oudh Courts Act to a Bench of two Judges for decision.

Mr. *Hargobind Dayal Srivastava*, for the appellants.

Mr. *Sri Dhar Misra*, for the respondents.

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RAZA and PULLAN, JJ. :—One Ahmad Ali was adjudicated an insolvent on the 26th of May, 1927. On the 24th of April, 1928, an application was made by one of the creditors making certain allegations as to insolvent's title in certain property and asking that a receiver should be appointed. As the result of this application the official receiver was appointed receiver and he made an application on the 12th of July, 1928 which reproduces the allegations which had already been made by the creditor. The transactions which formed the basis of these applications are as follows. One Nisar Ali was an owner of immoveable property. On his death the property was inherited by his three sons. One of these Nizam Ali died in the year 1915 and his one-third share was inherited by his widow, his two brothers and one sister. The widow and the sister relinquished their shares in favour of the two brothers Amjad Ali and Hamid Ali and they on the 25th of July, 1916, made a deed of gift in favour of Musammat Rabia in respect of one-third of the one-third share of Nizam Ali. Musammat Rabia was the wife of Amjad Ali and the mother of the insolvent Ahmad Ali. The one-ninth share conferred upon Musammat Rabia by the deed of gift was inherited on her death by the insolvent and mutation was effected in his favour. For the purpose of this appeal it must be held that Ahmad Ali became the owner of this property. If he did not, the creditors can make no claim to it. On the 20th of May, 1924, Ahmad Ali executed a deed of release in favour of Amjad Ali and Hamid Ali, his father and uncle, and they on the same date transferred a portion of the property to Musammat Nasir-un-nisa, the wife of Ahmad Ali. The rest of the property so released passed into the possession of Amjad

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Ali and Hamid Ali and mutation was made in their favour. In this application the official receiver prays for the annulment of the deed of release. He also asks for a declaration that Musammat Nasir-un-nisa is the *benamidar* of her husband in respect of the property gifted to her and that the insolvent is the real owner of that property. No claim is made in this court to the property now in possession of Nasir-un-nisa but the official receiver has obtained from the courts below a decision that the deed of release in favour of Amjad Ali and Hamid Ali was fictitious and executed in order to defraud the creditors of Ahmad Ali and he has also obtained an order of the court annulling that transaction. We have now to consider whether such an order could be passed by an insolvency court in view of the fact that the deed of release was executed more than two years before the adjudication of Ahmad Ali as an insolvent. We cannot accede to the argument of counsel that a deed of release accompanied by mutation and transfer of possession is not a transfer. It may have been a fraudulent transfer in order to defeat the creditors of the transferor but it is none the less a transfer. An insolvency court is given power under section 53 of the Insolvency Act (V of 1920) to annul any transfer of property not being a transfer made before and in consideration of marriage or made in favour of the purchaser or incumbrancer in good faith and for valuable consideration, if the transferor is adjudicated insolvent within two years after the date of the transfer. This section reproduces, with only a verbal alteration which is immaterial to the purposes of this case, section 36 of the Provincial Insolvency Act (III of 1907) and it is therefore clear that when the Act was amended in 1920 it was not intended to give to the insolvency court the same powers in respect of transactions entered into more than two years before the adjudication as were conferred in the case of transfers within two years of the date of adjudication. There was however a new section added

(section 4) and it has been held by the courts below that under that section they had jurisdiction to annul this transaction even although it was entered into more than two years before the date of adjudication. It appears that this section was enacted because of a conflict between the Allahabad and Calcutta High Courts. The former held that insolvency courts had jurisdiction to decide questions of title and the Calcutta High Court held that it had not. But the section as framed does not purport to give the court any powers beyond what is given by other sections of the Act but rather to make it clear what the powers of court are under the Act. The section is to be read subject to the provisions of the Act and it gives to the court "full power to decide all questions whether of title or priority or of any nature whatsoever, and whether involving matters of law or of fact which may arise in any case of insolvency coming within the cognizance of the court." It is the opinion of the Madras High Court: *The Official Receiver, Tinnevely v. Sankaralinga Mudaliar* (1) that section 4 declares what has been the law all through, and in our opinion there is nothing in the section which leads to a contrary view. It states for the first time in clear terms that the court has power to decide any question that may arise in the course of proceedings in order to ascertain what are the assets of the judgment-debtor which may be distributed amongst the creditors. In order to come to a proper decision on this question the court must be able to go into evidence as to the title of the judgment-debtor in the property which may have been concealed by him in the insolvency proceedings. In pursuance of such an inquiry the court may consider *benami* and other transactions which purport to vest in other persons what is really the property of the judgment-debtor. But we do not consider that this section gives to the insolvency court a wider power than that which is contained in section 53 to annul transfers executed more than two years

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(1) (1920) I.L.R., 44 Mad., 524.

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before the date of adjudication. We have been asked to consider that a contrary view has been taken by the High Courts in Calcutta, Madras and Allahabad. But this is not the interpretation which we place upon the rulings of the two former courts to which we have been referred. The most recent ruling of the Calcutta High Court reported in *Fool Kumari Dasi v. Khirod Chandra Das* (1) deals with a case in which the District Judge had already held that the transfer challenged was *benami* and that there had been no transfer in fact, nor was the court required to annul the transfer. The judgment of the Madras High Court in *Chittamal v. Ponnuswami Naicker* (2) confines itself only to a statement that it is open to an insolvency court on a proper application being made under section 4 of the Act to try the issue whether the insolvent is entitled to property or not and this is in no way opposed to the view which we ourselves take. It is only in the Allahabad High Court that we find a definite opinion expressed that transfers more than two years old which cannot be assailed under section 53 can be assailed under section 4 of the Insolvency Act. We refer to the judgments of a Full Bench of three Judges reported in *Anwar Khan v. Mohammad Khan* (3), and we find that while two of the learned Judges would give this extended power to the insolvency court under section 4 the third member of the Bench Mr. Justice SEN after discussing all the case law on the subject came to the conclusion that an Insolvency court cannot try a question of title relating to a transfer which has taken place more than two years before the order of adjudication. The learned Judge has laid emphasis on the limited nature of the jurisdiction of the insolvency court as clear from the Act itself and we would support this view by referring to the head-note which appears in the Act over the sections 51 and 55 inclusive. The head note runs: "Effect of insolvency on antecedent transac-

(1) (1927) 31 C.W.N., 502.

(2) (1925) I.L.R., 49 Mad., 52.

(3) (1929) I.L.R., 51 All., 550.

tions." We do not consider that where in section 53 which is governed by this heading the Act gives the court power to annul transactions entered into within two years, we should go out of our way to find that a general section in the same Act gives power to the court to annul transactions which may have been entered into at any time and which are voidable under the ordinary law under section 53 of the Transfer of Property Act. In our opinion transactions of this nature must be challenged, if at all, in an ordinary civil court and not in the insolvency court. This was the view expressed by a Bench of this Court in *Hinga Lal v. Jawahir Prasad* (1) and it appears from the judgment of the Full Bench of the Allahabad High Court to which we have referred that the Judges of that court are far from being unanimous in holding the contrary view. We hold therefore that the deed of release being a transfer entered into by the insolvent more than two years before the adjudication cannot be annulled by the insolvency court either under section 53 or by the general powers given to the court by section 4 of the Insolvency Act (V of 1920). Thus the orders of the court below are without jurisdiction and we allow the appeal, set aside the order of the court below and dismiss the receiver's application but having regard to all the facts and circumstances of the case we direct that the parties should bear their own costs throughout. We express no opinion as to whether the receiver can assail the transaction in some other court, but it is no doubt open to him, if so advised, to apply to the insolvency court for leave to sue under section 28, clause (2) of the Act.

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Appeal allowed.

