

1931

SANT
BAKSHI
v.
BHAGWAN-
DIN SINGH

terms (if any) as it thinks fit from time to time postpone the day fixed for such payment.

From the foregoing analysis, it is clear that under the old provisions of the Code, a defendant could ask for extension of time upon good cause being shown in case the plaintiff made an application for a final decree debarring the defendant from all right to redeem, but now, when no such application is made, the defendant can make an application for a final decree in his favour at any time before a decree, debarring him from all right to redeem, is passed.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

MISCELLANEOUS CIVIL.

*Before Mr. Justice Bisheshwar Nath Srivastava, and
Mr. Justice A. G. P. Pullan.*

1930
December,
22.

ABDUL HASSAN KHAN AND ANOTHER (OBJECTORS APPELLANTS) v. B. RAJBIR PRASAD AND ANOTHER (OPPOSITE PARTY-RESPONDENTS.)*

*Provincial Insolvency Act (V of 1920), sections 4 and 53—
waqf deed executed by insolvent more than two years
before adjudication, alleged to be fictitious—Insolvency
court's power to decide the question of its being ficti-
tious.*

Held, that the Insolvency court under section 4 of the Provincial Insolvency Act (V of 1920) has full power to decide that a *waqf* alleged to have been executed by the insolvent was fictitious. Under that section the Insolvency court can decide all questions of title to any property which appears to belong to the insolvent and section 53 of that Act would apply to actual transfers. *Amjad Ali v. Nand Lal Tandon* (1) distinguished. *Anwar Khan v. Mohammad Khan* (2), *Hinga Lal v. Jwala Prasad* (3) and *Abadi Begam v. Kaniz Zainabi* (4), referred to.

*Miscellaneous Appeal No. 22 of 1930 against the order of K. G. Harper, District Judge of Sitapur, dated the 27th of February, 1930.

(1) (1930) 7 O.W.N., 377.

(2) (1929) I.L.R., 51 All., 550.

(3) (1928) 5 O.W.N., 964.

(4) (1926) L.R., 54 I.A., 33.

Messrs. *Radha Krishna* and *Habib Ali Khan* for the appellants.

Messrs. *M. Wasim*, *Haider Husain*, *Mahesh Prasad*, *Muhammad Ayub* and *G. D. Khare*, for the respondents.

PULLAN, J. :—This is an appeal from a decision of the District Judge of Sitapur in which he declared a so-called deed of *waqf* executed by Nurul Hasan insolvent void as against the receiver of the insolvent's estate and that the property which the insolvent purported to have conveyed by that deed vests in the receiver. This appeal is based on the fact that the deed of *waqf*, which has been set aside, was executed more than two years before the insolvency and could not therefore be set aside in view of the provisions of section 53 of the Insolvency Act and that section 4 of the same Act does not permit the Insolvency Court to go beyond the provisions of section 53 and annul a deed which has been executed more than two years before the insolvency. We have heard this appeal mainly on the question of law raised, and the motives which influenced the insolvent Nurul Hasan in executing this deed of *waqf* are not now under consideration. The facts are sufficiently stated in the judgment of the Court below and we need not repeat them. It is sufficient to say that a decree was obtained against Nurul Hasan on certain mortgages and this decree was made absolute on the 31st of March, 1920. A notice for preparation of the sale proclamation is said to have been served by affixation on the judgment debtor's house on the 17th of December, 1920. On the 25th of February, 1921 Nurul Hasan presented for registration the deed of *waqf* which is dated the 21st of December, 1920. Insolvency proceedings date from the second application made by Nurul Hasan on the 19th of July, 1925 and he was declared insolvent on the 19th of January, 1926. The receiver in insolvency seeks to set aside the deed of *waqf*. Section 4 of the Insolvency Act gives the court, subject to the provisions of the Act, full power to decide all questions, whether of

1931

ABDUL
HASAN
v.
E. RAJBIB
PRASAD.

1930
December,
19.

1931

ABDUL
HASAN
J.B. RAJDIR
PRASAD.

Pullan, J.

title or priority, or of any nature whatsoever, which may arise in a 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 such a case. In my opinion these powers being subject to the provisions of the Act are subject to the provisions of sections 51 to 55 which fall under the heading "Effect of insolvency on antecedent transactions." Thus it is improper in my opinion to hold that section 4 supersedes section 53 and that a court can set aside a transfer which has been made more than two years before adjudication. This view has been expressed by a Bench of this Court in the case of *Amjad Ali v. Nand Lal Tandon* (1). In that judgment the Bench of which I was a member considered the decision of a Full Bench of the Allahabad High Court reported in *Anwar Khan v. Mohammad Khan* (2) and preferred the dissentient judgment of Mr. Justice SEN to those of the other two Judges who wished to extend the scope of section 4 of the Insolvency Act. Our ruling however must be confined to cases where there has been a transfer and it has no application as held by Mr. Justice SEN in the Full Bench decision to which we have referred where the transfer was intended to be inoperative from the beginning and the insolvent had remained in possession of the property. There is some authority of this Court in the case of *Hinga Lal v. Jwala Prasad* (3) for holding that where a person has made a fraudulent gift to his wife more than two years before insolvency the transfer cannot be assailed under section 53 of the Insolvency Act and the creditor should file a regular suit, but it does not appear that in that case any reference was made to section 4 of the Act or that it was pleaded that there had been no transfer in fact. In the present case it is strongly argued on behalf of the respondent that there has been no transfer at all. In the first place the *waqf* itself is void under the Muhammadan law and in the second place the Court below has on sufficient grounds found that there has been no vesting of the

(1) (1930) 7 O.W.N., 377.

(2) (1929) I.L.R., 51 All., 550.

(3) (1928) 5 O.W.N., 964.

property in the hands of the beneficiaries. It is pointed out that there is one defect in the *waqf-nama* itself which renders it unenforceable as a *waqf-al-aulad* and that is that there is no ultimate disposition in favour of charity or any religious purpose. The effect of the document is to vest the residue of the property in the hands of the heirs of the executant. We cannot find any clause in the deed which will save it from this objection. Again under the Shia Muhammadan law a deed of *waqf* is not valid unless possession has been given under it. Further the property must be entirely taken out of the *waqif*. See *Abadi Begam v. Kaniz Zainab* (1). The learned Judge of the Insolvency court has gone into this question at length and has adduced arguments which satisfy me that as a matter of fact possession was never transferred to the *mutawallis*. It is true that certain transactions had been undertaken by the sons but I find that even after the alleged deed of *waqf* Nurul Hasan and his sons jointly sold portions of this very property to pay off Nurul Hasan's debts, and there are no trust accounts which will prove that the sons had really taken possession and that their father had divested himself of the management of the property. There may be some question as to whether a *waqf* of this kind is void or merely voidable but in my opinion the *waqf* in this case has not had the effect of a transfer. As I would only apply section 53 of the Insolvency Act to actual transfers I see no difficulty in bringing this case within the scope of section 4 of the Insolvency Act by which the Insolvency Court can decide all questions of title to any property which appears to belong to the insolvent.

In my opinion this is a case to which the judgment of this Court reported in *Amjad Ali v. Nand Lal Tandon* (2), referred to above has no application.

A preliminary objection was taken by the respondent that the question which has been raised in this appeal is one of jurisdiction which should have been raised earlier. Indeed it is argued that in paragraph 7 of the

1931

 ABDUL
 HASAN
 v.
 B. RAJBIR
 PRASAD.

Pullan, J.

(1) (1926) L.R., 54 I.A., 33.

(2) (1930) 7 O.W.N., 377.

1931

ABDUL
HASAN
v.
B. RAJBIR
PRASAD.

written statement the present appellant accepted the jurisdiction of the Insolvency Court. In view of the opinion which I have formed that there has been no transfer and that it is open to the Insolvency Court to go into the question of possession of this property by the insolvent I do not think it necessary to give any decision on this question as to the right of the appellant to challenge the jurisdiction of the Insolvency Court at this stage.

In my opinion this appeal should be dismissed.

1930

December,
20.

SRIVASTAVA, J. :—The learned District Judge has discussed the matter at great length and has given very good reasons for coming to the conclusion that the alleged *waqf* was a fictitious and sham transaction. In spite of the execution of the document, the possession continued all along with Nur-ul-Hasan and was never transferred to the *mutawallis*. I am in agreement with my learned brother PULLAN, J., that the finding arrived at by the learned District Judge in this matter is correct and must be accepted. I would also point out that the appellants in paragraph 7 of their written statement filed in reply to the application of Habib-ur-Rahman, dated the 15th of August, 1929, in express terms accepted the jurisdiction of the Insolvency Court to adjudicate on the title of the insolvent in respect of the property which formed the subject of the alleged *waqf*. This being the position I agree that the Insolvency Court under section 4 of the Provincial Insolvency Act V of 1920, had full power to decide that the alleged *waqf* was fictitious. I do not wish to express any opinion on the question whether the Insolvency Court can or cannot annul a transfer made more than two years before the adjudication on the ground of its being fraudulent within the meaning of section 53 of the Transfer of Property Act, as the question does not arise in this case.

For the above reasons I agree that the appeal should be dismissed.

BY THE COURT—The appeal is dismissed with costs.

Appeal dismissed.