

1934
 NAWAB ABDUL
 HASSAN KHAN
 v.
 MST. MAHMUDI
 BEGAM.
 DIN
 MOHAMMAD J.

him in the performance of his functions. He should then send them in original under section 38 (2), Stamp Act, to the Collector for any action that he may deem fit under section 40, read with section 29, Stamp Act.

ADDISON J.—I agree.

A. N. C.

*Appeal accepted,
 Case remanded.*

APPELLATE CIVIL.

Before Addison and Din Mohammad JJ.

1934
 Dec. 4.

WARYAM SINGH (DEFENDANT) Appellant

versus

THAKAR DAS-DHAMALI RAM }
 (PLAINTIFF) AND ALLAH DITTA } Respondents..
 (DEFENDANT)

Civil Appeal No. 452 of 1931.

Transfer of Property Act, IV of 1882, section 53 : Suit by one creditor for a declaration that a mortgage effected by the debtor in favour of another creditor is fraudulent and void — Major part of consideration found to be fictitious — whether the whole transaction should be set aside.

One W. S. effected a mortgage of his property by means of a registered mortgage deed, in favour of A. D. for a consideration of Rs.1,400; one of his creditors instituted a suit for a declaration that the mortgage was fraudulent and not binding upon other creditors. The defence was that as A. D. was also a creditor of W. S. the principle of section 53 of the Transfer of Property Act did not apply. The trial Court found the transfer for consideration and dismissed the suit. On appeal the Additional District Judge, finding that out of the consideration of Rs.1,400 an item of Rs.222 only was genuine, the rest of the items being fictitious, held that the transfer was void *in toto* against the creditors and could not be upheld even to the extent to which it was supported by consideration. On appeal to the High Court by W. S.—

Held, that under section 53 of the Transfer of Property Act it is fraud that vitiates the transaction, and if fraud be established on the record, the transaction should not be held partially valid, merely on the ground that part of the consideration was found to be genuine.

The only exception contemplated is in favour of a transferee in good faith and for consideration, and if there are circumstances which clearly negative the presumption of good faith, the protection afforded by the exception cannot be given.

Held also, that the transaction being, to all intents and purposes, one and indivisible, and the genuine part of the consideration being grossly inadequate, the whole transfer must be held to be void.

Madan Gopal v. Lahri Mal (1), and *Bhikabhai Muljibhai v. Pana Chand* (2), followed.

Rajani Kumar Dass v. Gaur Kishore Shaha (3), and *Loorthia Odayar v. Gopalasami* (4), not followed.

Musahar Sahu v. Lala Hakim Lal (5), and *Hakim Lal v. Mooshahar Sahu* (6), referred to.

Held further, that items, advanced to the mortgagor at the time of the execution of the deed, cannot be considered as a part of his pre-existing liability to the mortgagee, and unless this was so, no preference could be claimed for them over the debts of the other creditors. What is protected, is the preference of one creditor over the others for his pre-existing liabilities and not for those that are being freshly incurred.

Musahar Sahu v. Lala Hakim Lal (5), explained.

Second Appeal from the decree of Sardar Indar Singh, Additional District Judge, Lyallpur, dated 24th January, 1931, reversing that of Lala Har Sarup, Subordinate Judge, 2nd Class, Lyallpur, dated 20th June, 1930, and granting the plaintiff a declaratory decree.

1934

WARYAM SINGH
v.
THAKAR DAS-
DHAMALI RAM.

(1) 1930 A. I. R. (Lah.) 1027; I. L. R. 12 Lah. 194.

(2) (1919) I. L. R. 43 Bom. 707. (4) (1924) 80 I. C. 147.

(3) (1908) I. L. R. 35 Cal. 1051. (5) (1916) I. L. R. 43 Cal. 521 (P.C.).

(6) (1907) I. L. R. 34 Cal. 999.

1934

WARYAM SINGH

v.
THAKAR DAS-
DHAMALI RAM.DIN
MOHAMMAD J.

JAI GOPAL SETHI, for Appellant.

CHIRANJIV LAL, for (Plaintiffs) Respondents.

DIN MOHAMMAD J.—The Firm Thakar Das-Dhamali Ram, one of the creditors of Waryam Singh, instituted a suit for a declaration that the mortgage effected by him in favour of one Allah Ditta by a registered-deed, dated the 16th February, 1929, was fraudulent and not binding upon the creditors. The suit was resisted on the ground that as Allah Ditta was also a creditor of Waryam Singh, the principles of section 53 of the Transfer of Property Act did not apply. The Subordinate Judge came to the conclusion that the transfer was for consideration and had been effected to pay off the other creditors of the mortgagor including the mortgagee himself and hence the plaintiffs could not legally succeed in avoiding it. On appeal the Additional District Judge found that out of the consideration of Rs.1,400 there was no proof of the item of Rs.100 which was said to have been paid to a previous creditor of the mortgagor on account of the purchase of a bullock, nor was there any proof for the items of Rs.100 on account of land-revenue, Rs.274 alleged to have been paid to Ram Chand and Rs.120 kept in trust for Anar. So far as the items of Rs.500 and Rs.28 were concerned, his finding is not very clear, although his reasoning leads to the conclusion that he held these two items also, along with the other items mentioned above, as fictitious. The only remaining item of Rs.222 was considered to be genuine, but in view of *Madan Gopal v. Lahri Mal* (1), he held that the transfer was void *in toto* against the creditors and could not be upheld even to the extent to which it was supported by consideration. Waryam Singh, defendant, alone appeals.

Counsel for the appellant lays stress on the fact that having found that the items of Rs.500 and Rs.28 had been paid to the mortgagor, the learned District Judge erred in law in ignoring those items from the valid part of the consideration of the mortgage. He also urges that when it was found that Rs.222 were genuine the whole transfer could not be declared void and that the mortgage should have been held binding to this extent at least. I will take up his second contention first. In support of this, he relies on *Rajani Kumar Dass v. Gaur Kishore Shaha* (1) and *Lorthia Odayar v. Gopulasami* (2). In *Rajani Kumar Dass v. Gaur Kishore Shaha* (1), the appeal arose out of an action brought by the plaintiffs to enforce a mortgage-bond, alleged to have been executed by some of the defendants, in consideration of some money advanced to them in cash and some due by them in respect of their outstanding debts, the other defendants being the attaching creditors of the mortgagors. The learned Judges arrived at the conclusion that the real consideration for the mortgage was only the sum due on account of outstanding debts and that the entry relating to the cash advance was fictitious. On a consideration of section 53 of the Transfer of Property Act, they observed that the section saved the rights of transferees in good faith and for consideration, and that as the major portion of the consideration had been held to be genuine, to that extent the transaction could not be regarded as fraudulent, as the mortgagees did not with reference to that sum do any act not warranted by law to the prejudice of the attaching creditors. They further observed that even if their action was crafty and deceitful in one sense and morally wrong, the law did not prevent them

1934

WARYAM SINGH

v.

THAKAR DAS-
DHAMALI RAM.

DIN

MOHAMMAD J.

(1) (1908) I. L. R. 35 Cal. 1051.

(2) (1924) 80 I. C. 147.

1934

WARYAM SINGH

v.

THAKAR DAS-
DHAMALI RAM.

DIN

MOHAMMAD J.

from taking proper security for the advances actually made by them. In *Loorthia Odayar v. Gopaldasami* (1), after reviewing some decisions of their Lordships of the Privy Council as well as those of the other Courts in India, a Bench of the Madras High Court held that a mortgage in favour of a person, who had discharged the debts of the mortgagor due to third parties, was good to the extent of the money so paid and that the property mortgaged could only be sold subject to this right. These authorities, therefore, appear to support the appellant's contention that the mortgage could not have been set aside to the extent of Rs.222 at least.

As against this, counsel for the respondents has invited our attention to *Bhikabhai Muljibhai v Panachand* (2), in which *Rajani Kumar Dass v. Gaur Kishore Shaha* (3) was also considered, in addition to *Hakim Lal v. Mooshahar Sahu* (4), which was upheld by their Lordships of the Privy Council in *Musahar Sahu v. Lala Hakim Lal* (5). The learned Judges observed in that case that as they were of opinion that the consideration stated in the mortgage-deed must, in the circumstances of the case, be treated as one and indivisible, the whole transaction should be set aside. In addition to this counsel relies on *Madan Gopal v. Lahri Mal* (6), where a Bench of this Court held that if intent to defraud creditors is shown by a transferee there is no good faith and the transfer will not stand though full consideration has passed. They further observed that if a transfer, though in part for valuable consideration, is as regards the other part only an arrangement to defeat creditors, it is wholly void against the creditors and cannot be upheld to the

(1) (1924) 80 I. C. 147.

(4) (1907) I. L. R. 34 Cal. 999.

(2) (1919) I. L. R. 43 Bom. 707.

(5) (1916) I. L. R. 43 Cal. 521 (P.C.).

(3) (1908) I. L. R. 35 Cal. 1051.

(6) 1930 A. I. R. (Lah.) 1027; I. L. R. 12 Lah. 194.

extent to which it is supported by consideration. I respectfully agree with this view. It is fraud that vitiates the transaction and if fraud be established on the record, the transaction should not be held partially valid, merely on the ground that part of the consideration was found to be genuine. The only exception that the law contemplates is in favour of a transferee in good faith and for consideration and if there are circumstances which clearly negative the presumption of good faith, the protection afforded by the exception cannot be availed of. It is no doubt true that the view expressed in *Rajani Kumar Dass v. Gaur Kishore Shaha* (1) and *Loorthia Odayar v. Gopalasami* (2), favours the appellant. But I am rather impressed by the reasoning of Sir Basil Scott C. J. employed in *Bhikabhai Muljibhai Patel v. Panachand* (3), and inclined on that basis to hold that the whole transfer is void. Here also, in view of all the circumstances of the case, the transaction is to all intents and purposes one and indivisible. Moreover, I cannot lose sight of the fact that the genuine part of the consideration is grossly inadequate, representing as it does, even less than one-sixth of the whole consideration. In my opinion the mortgagee appears to have offered himself to the mortgagor merely as a shield to protect the mortgagor's property from the inroads of his creditors in the mortgagor's own interest. It is significant to note in this case that after the decision of the Additional District Judge the mortgagor disappears from the scene altogether and it is the mortgagee alone who has now appealed to us.

The first contention of the counsel for the appellant is also untenable. The Additional District

1934

WARYAM SINGH

v.

THAKAR DAS-
DHAMALI RAM.

DIN.

MOHAMMAD J.

J. K. SINGH

(1) (1908) I. L. R. 35 Cal. 1051. (2) (1924) 80 I. C. 147.

(3) (1919) I. L. R. 43 Bom. 707.

1934

WARYAM SINGH

v.

THAKAR DAS-
DHAMALI RAM.

DIN

MOHAMMAD J.

Judge has held in his own way that the two items of Rs.500 and Rs.28 were bogus. I am inclined to agree with him. But even if they were genuine and were actually advanced to the mortgagor at the time of the execution of the deed they still cannot be considered as a part of his pre-existing liability to the mortgagee and unless this was so, no preference could be claimed for them over the debts of the other creditors. What is protected under the decision of their Lordships of the Privy Council in *Musahar Sahu v. Lala Hakim Lal* (1), is the preference of one creditor over the others for his pre-existing liabilities and not for those that are being freshly incurred.

The result is that I would dismiss this appeal with costs.

ADDISON J.

ADDISON J.—I agree.

P. S.

Appeal dismissed.

(1) (1916) I. L. R. 43 Cal. 521 (P.C.).