

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

1 25. NAGINDAS DAHYABHAI (ORIGINAL OPPONENT), PETITIONER *v.*
 March 25. GORDHANDAS DAIYABHAI AND ANOTHER (ORIGINAL APPLICANTS),
 OPPONENTS^o.

Provincial Insolvency Act (V of 1920), sections 28 (7), 53 and 54—Adjudged insolvent—Doctrine of “relation back”—Construction.

The doctrine of “relation back” to which effect is given by section 28 (7) of the Provincial Insolvency Act (V of 1920), cannot be imported into section 53 of the Act so as to make it appear that the point of time from which the two years are to be calculated, is the date of presentation of the petition and not the date when the transferor is adjudged insolvent. If it had been intended that a voluntary transfer should be voidable if made within two years from the date of the presentation of the petition on which the adjudication order is made, it would have been as clearly stated in section 53 as it is in section 54 of the Act.

Rakhal Chandra Purkait v. Sudhindra Nath Bose ⁽¹⁾, dissented from.

On July 17, 1922, one G filed a petition to be adjudicated insolvent. On November 19, 1922, the order of adjudication was made. On November 2, 1920, G had effected a sale of his house in favour of N (opponent). The applicant D, a creditor of the insolvent, applied to the Court, under section 53 of the Provincial Insolvency Act, 1920, to have the transfer of November 2, 1920, annulled. The lower Courts held that, under section 28 (7) of the Provincial Insolvency Act, the adjudication order related back to the date of the presentation of the insolvency petition, and that the transfer in question, being within two years thereof, was voidable against the receiver.

Held, reversing the order, that the point of time from which the two years' period mentioned in section 53, was to be calculated, was the date on which the order of adjudication was made and not the date of the presentation of the petition.

APPLICATION under extraordinary jurisdiction praying for reversal of the order passed by P. J. Taleyarkhan, District Judge of Surat, confirming the order made by K. V. Desai, First Class Subordinate Judge at Surat.

One Thakor Girdhar sold his house to Nagindas Dahyabhai (petitioner) on November 2, 1920, for Rs. 699.

^oCivil Application No. 221 of 1924 under the Court's extraordinary jurisdiction.

⁽¹⁾ (1919) 46 Cal. 991.

On July 17, 1922, Thakor Girdhar applied to the First Class Subordinate Judge at Surat to be adjudicated an insolvent.

On November 19, 1922, the Court made the adjudication order.

On July 7, 1923, the opponent Gordhandas Dahyabhai and another creditor of the insolvent applied to the Court for an inquiry into the transaction of November 2, 1920. A notice was issued to the transferee Nagindas Dahyabhai to show cause why the transfer should not be annulled under section 53 of the Provincial Insolvency Act, 1920.

The Subordinate Judge held that the transfer of November 2, 1920, was not made in good faith and for valuable consideration and that, as, under section 28 (7) of the Act, the adjudication order (November 19, 1922) related back to the date of the presentation of the petition (July 17, 1922), the transfer was within the period provided in section 53. He, therefore, ordered that the transfer be annulled and that the receiver do take possession of the house.

On appeal, the District Judge confirmed the order, referring to the following, among other cases,—*Rakhal Chandra Purkait v. Sulhindra Nath Bose*⁽¹⁾ and *Sheonath Singh v. Munshi Ram*⁽²⁾.

The opponent applied to the High Court under section 75 of the Act.

G. N. Thakor with *M. B. Dave*, for the petitioner:—Section 53 of the Provincial Insolvency Act should be construed not with reference to the intention of the Legislature but with reference to the language which the Legislature in fact employed. The words “adjudged insolvent” refer to the date of the adjudication order and not to the date of the presentation of the insolvency petition by relation back under

⁽¹⁾ (1919) 46 Cal. 991.

⁽²⁾ (1920) 42 All. 433.

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section 28 (7). This interpretation of section 53 receives further support from a comparison of the language employed in sections 53 and 54. If the Legislature intended that the order of adjudication should relate back to the date of the presentation of the insolvency petition they should have added the words "on a petition presented" after the words "adjudged insolvent" in section 53 as is done in 54. But the intention of the Legislature does not seem to be so. Otherwise they would have changed the phraseology of section 53 when the Act was twice amended in 1907 and in 1920. The case of *Rakhal Chandra Purkait v. Sudhindra Nath Bose*⁽¹⁾, although similar to the present case, took into account an extreme case for interpreting section 53. This was not justified by the plain language of the section. Even if the order of adjudication be allowed to relate back, it would solely be for the purpose of vesting the property in the receiver and not for the avoidance of transfer.

B. D. Mehta, for opponent No. 1:—If section 53 be read with section 28 (7) the words "adjudged insolvent" in section 53 refer to the date when the adjudication of insolvency against the insolvent takes effect, viz., the date of the presentation of the insolvency petition and not the date when the order of adjudication is passed. What is the real meaning of these words and the intention of the Legislature, otherwise it is not possible to give any real meaning to the word "relate" or to the words "take effect from" in section 28 (7). This interpretation of section 53 has been approved and followed by three High Courts in India: *Rakhal Chandra Purkait v. Sudhindra Nath Bose*⁽¹⁾; *Sankaranarayana Aiyar v. Alagiri Aiyar*⁽²⁾ and *Sheonath Singh v. Munshi Ram*⁽³⁾. The language of section 54 had nothing

⁽¹⁾ (1919) 46 Cal. 991.

⁽²⁾ (1918) 35 Mad. L. J. 296.

⁽³⁾ (1920) 42 All. 433.

to do with the interpretation of the words "adjudged insolvent" in section 53. Section 53 relates to avoidance of voluntary transfer of property, whereas section 54 relates to avoidance of preference in cases of transfer of property, payments made, obligations incurred, &c. Under section 54 a preferred creditor is more leniently dealt with than a voluntary, colourable or fraudulent donee under section 53. The relation back to the adjudication order is not only for the purpose of vesting the estate of the insolvent in the receiver but also for the avoidance of voluntary transfer: See also sections 9 (*f*), 17, 51 (*a*) and 55 of the Presidency Towns Insolvency Act III of 1909; sections 1 (*f*), 7 (*l*), 37 (*l*), and 42 (*l*) of the English Bankruptcy Act of 1914, and Halsbury's Laws of England, Vol. II, paras. 38, 295, 458, 466 (3) and 468.

MACLEOD, C. J.:—This is an application under section 75 of the Provincial Insolvency Act V of 1920. One Thakor Girdhar had filed a petition to be adjudicated insolvent on July 17, 1922. The order of adjudication was made on November 19, 1922. An application was made to the Subordinate Judge on which notice was issued to Nagindas Dahyabhai to show cause why the transfer, dated November 2, 1920, by the insolvent in his favour should not be annulled under section 53 of the Provincial Insolvency Act V of 1920. The following issues were raised:—

1. Whether the transfer to the opponent, dated November 2, 1920, is or is not in good faith and for valuable consideration?
2. Whether the application is barred by limitation?
3. Whether the present applicant can apply under section 53 of the Insolvency Act?

The Judge found that the transfer was not in good faith or for valuable consideration; that the application was not barred by limitation; and that the present applicant could apply under section 53 of the Act.

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That section runs as follows :—

“ Any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged insolvent within two years after the date of the transfer, be voidable as against the receiver and may be annulled by the Court. ”

The transfer was made more than two years before the date of the adjudication order, but the Judge considered that the adjudication order related back to the date of the presentation of the petition under section 28 (7) of Act V of 1920, and therefore, held that the period of two years mentioned in section 53, should be two years before the presentation of the insolvency petition. An order was made accordingly that the transfer, dated November 2, 1920, was annulled and the receiver should take possession of the house in dispute.

An appeal was filed to the District Court. The District Judge said :—

“ There is a conflict of authority on the question whether in order to attract the applicability of the section the transfer must have been made within two years preceding the date of the adjudication or whether it is sufficient if it was made within two years preceding the date of the presentation of the insolvency petition. The weight of authority and the better opinion, however, appear to be in favour of the view that the effect of section 28 (7) of the Act on the interpretation of the words ‘ if the transferor is adjudged insolvent within two years after the date of the transfer ’ in section 53 is to put back that point of time to the date of the presentation of the insolvency petition. ”

The question was decided in that way in *Rakhal Chandra Purkait v. Sudhindra Nath Bose*⁽¹⁾. Their Lordships said (p. 994) :—

“ It is contended on behalf of the appellant that the transfer in the present case having been made more than two years before the date of the adjudication order, is not void against the Receiver.

Section 16 (b) of the Provincial Insolvency Act [*sc.* Act III of 1907], however, lays down that an order of adjudication shall relate back to and take effect from the date of the presentation of the petition on which it is made.

⁽¹⁾ (1919) 46 Cal. 991.

It is contended that section 16 (6) of the Act does not affect any transfer made two years before the order of adjudication, but that the relation back has reference to other matters.

We are of opinion, however, that an order of adjudication relates back to, and takes effect from, the date of the presentation of the petition for the purpose of making the properties of the insolvent liable to the claims of the creditors. Under the English law, an order of adjudication relates back to, and takes effect from, the date of an act of insolvency, but under the Indian law [section 16 (6) of the Provincial Insolvency Act], an order of adjudication operates only from the day when the petition of insolvency is presented to the Court. It follows that from that time the property of the debtor is made available for payment of the debts. If the contention of the appellant were accepted, the provisions of the Act might be defeated in some cases. After the petition for insolvency is made, the order of adjudication may be delayed in some cases for more than two years, for instance where the matter goes up to the Privy Council on appeal, and in such a case any transfer made by the insolvent within two years before the date of presentation of the petition of insolvency, but more than two years before the order of adjudication would become valid. We do not think that such a result was contemplated, and we are of opinion that the provisions of section 36 are to be read with section 16 (6) of the Act."

Section 28 (7) of Act V of 1920 corresponds to section 16 (6) of Act III of 1907. It would not be quite correct to say that under the English law the order of adjudication relates back to the date of the available act of bankruptcy on which it was made. That is not the scheme of the English Act on which the doctrine of "relation back" in the Provincial Insolvency Act is based.

Under section 37 of the English Act of Bankruptcy of 1914, "The bankruptcy of a debtor, whether it takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him". So that although the adjudication order can only be dated as of the day on which it is

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made, the commencement of the bankruptcy is determined by the date of the act of bankruptcy. Under section 42 of the English Act:—

“Any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy.”

The words “becomes bankrupt” also appeared in section 47 of the English Bankruptcy Act of 1883, and in *Ex parte Clough*⁽¹⁾ were construed as meaning “commits an available act of bankruptcy”. The bankrupt committed an act of bankruptcy on May 26, 1903, and was adjudicated in July. On June 10, he transferred a house and furniture to his settlement trustees. It was held that he must be deemed to have become bankrupt on May 26, and that the house and furniture not having been actually transferred before that date the deed was void against the trustee in bankruptcy, so far as was necessary to pay his debts in bankruptcy, under section 47 of the Bankruptcy Act of 1883, which enacted that any covenant made in consideration of marriage for the future settlement of a property on or for the settlor's wife and children wherein he had not at the date of the marriage any estate or interest shall on his “becoming bankrupt” before the property has been actually transferred be void against the trustee in bankruptcy. Wright J. said (p. 455):—

“What is the meaning of ‘becoming bankrupt’? There is, apparently, no authority to guide me. Strong reasons are urged for the view that the words ‘commencement of the bankruptcy’ would have been used if that had been intended. On the other hand, it is said that, if the date of adjudication had been intended, the use of the words ‘adjudicated bankrupt’ would have

(1) [1904] 1 K. B. 451.

been more natural than 'becoming bankrupt'. It seems to me that I must construe 'becoming bankrupt' in section 47 by the light of section 43, which says... 'the bankruptcy of a debtor shall be deemed to commence at the time of the first of the acts of bankruptcy proved to have been committed within three months next preceding the date of the presentation of the bankruptcy petition'. Now if that is so, the bankruptcy here must be deemed to have commenced as from May 26, and I think that the bankrupt must be deemed to have become bankrupt on that date."

I doubt very much whether the decision would have been the same if the words "is adjudicated bankrupt" had been used in the section instead of "becomes bankrupt".

So also under section 51 of the Presidency Towns Insolvency Act:—

"The insolvency of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to and to commence at the time of the commission of the act of insolvency on which an order of adjudication is made against him."

Then under section 55 of the same Act:—

"Any transfer of property, not being a transfer made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, shall, if the transferor is adjudged insolvent within two years after the date of the transfer, be void against the Official Assignee."

That section is practically in the same words as section 36 of Act III of 1907.

Section 56 of the same Act deals with fraudulent preferences, and under that section:—

"Every transfer of property...in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the Official Assignee."

In the same way by section 54 of the Provincial Insolvency Act V of 1920:—

"Any transfer of property...in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the receiver, and shall be annulled by the Court."

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It cannot be denied that a person is adjudged insolvent on the day on which the order is made, though the effect of the order on the insolvent's property relates back to an earlier date.

Therefore, in our opinion, if it had been intended that a voluntary transfer should be voidable if made within two years from the date of the presentation of the petition on which the adjudication order is made, there was no reason why that should not have been as clearly stated in section 53 as it is in section 54, and we do not think that the doctrine of "relation back" can be imported into the former section, so as to make it appear that the point of time from which the two years are to be calculated, is the date of the presentation of the petition, and not the date when the transferor is adjudged insolvent. The mere probability that in some cases a voluntary transfer cannot be defeated on account of the delay in making the adjudication order after the presentation of the petition, cannot provide sufficient ground for interpreting the words in section 53 otherwise than according to their clear meaning.

We think, therefore, that the decision of the Court below was wrong, and that the Rule must be made absolute with costs throughout.

Rule made absolute.

J. G. R.