(1947) 03 PAT CK 0006

In the Patna High Court

Girija Kumari and Others — APPELLANT

Vs

Kiran Chandra Baksi and Others — RESPONDENT

Date of Decision : 11-03-1947

Acts Referred:

Provincial Insolvency Act, 1920 — Section 4, 53

Citation : AIR 1947 Patna 471

Hon'ble Judges : Sinha, J;Meredith, J

Bench : Full Bench

Judgement

Meredith, J.—This appeal arises out of an order made by the learned District Judge in insolvency proceedings in the following circumstances. On 7-2-1935, five persons, members of a Hindu joint family, filed an application to be adjudged insolvent, showing debts at Rs. 23,839-14-6 and assets at Rs. 65,015-8-6. But of the assets no less than Rs. 53,000 represented debts due and unrealised, and the value of the movable and immovable properties of the family was placed at Rs. 12,000. Thus, it was claimed they were unable to pay their debts. On 1-3-1935, they applied for the appointment of a Receiver, and on 15-1-1938, the Receiver applied to the Insolvency Court u/s 4, Provincial Insolvency Act for an adjudication that two deeds of gift executed by members of the family were sham and colourable, and not real transactions.

2. On 23-6-1981, Masudan Sah, a member of the family, executed a deed of gift in favour of his wife in respect of certain lakhiraj lands comprising plots Nos. 2798, 2793 and 1131 of which the value is said to be Rs. 400 to Rs. 800. On 5-3-1934, the wife executed a will, leaving these lands to her daughters-in-law. She subsequently died, and on 5-7-1935, the said daughters-in-law obtained letters of administration.

3. On 20-4-1932, Dular Sah, the head of the family, executed a second deed of gift in respect of lakhiraj lands covering plots Nos. 2037, 2107 and 2106 in favour of his five daughters-in-law, the wives of his five sons, who subsequently applied to be adjudged insolvent. These plots included the family residential

house, and the value including the house is said to be Rs. 4000 to Rs. 5000.

4. On 20-9-1939, the insolvency Court rejected the Receiver''s application on the ground that the transfers were executed more than two years, before the petition for insolvency was filed, and, therefore, Section 53, Provincial Insolvency Act, had no application. The Receiver appealed to this Court, and the Bench which heard the appeal pointed out that Section 53 related only to the annulment of real transactions, whereas the contention of the Receiver was that these were benami transactions and represented as no real transfers. Irrespective of Section 53, it was open to the insolvency Court u/s 4 to decide where the real title lay, whether in fact these were still really the property of the insolvents, and if this was the case the two years period fixed in Section 53 of the Act had no application. The case was, therefore, remanded for consideration whether the transactions were real or sham. After remand, the District Judge has decided that the deeds of gift did not represent real transactions, but were colourable transactions made with the purpose of defrauding the creditors, and he ordered the Receiver to take possession and include the properties amongst the assets.

5. Against this order the daughters-in-law have now appealed.

6. I have formed the opinion that on the evidence it was not established that the transactions were benami, and not real. The learned District Judge has relied mainly on the Record of Rights. In the Santal Parganas the entries in the Record of Rights finally published do not merely carry a presumption of correctness, they are conclusive. The Record of Rights was finally published on 18-5-1931, and the lands were recorded in the names of Masudan and Dular. On 11-11-1931, Masudan''s wife filed an objection, urging that her name should be recorded, but this application was not, pressed, and was dismissed for defaults

7. The District Judge in relying on this as evidence of benami lost sight of the fact that the Record-of-Rights was finally published before the execution of even the first deed of gift. The Record-of-Rights, therefore, in any view correctly represented the state of affairs at the time of final publication, and the application by the wife was wholly misconceived. It could not possibly have succeeded, and this may explain why it was not pressed. The entry in the Record-of-Rights and dismissal of the wife''s application have, therefore, no bearing on the question of benami. The remaining evidence consists mainly of the statements of more or less interested witnesses, and certainly the evidence with regard to subsequent possession was inconclusive. It was not denied that the daughters-in-law were living in the family house, together with some male members of the family. Where an alleged benami transaction is in favour of female members of the family it is, of course, extremely difficult to secure definite evidence on the point of subsequent possession, but the onus to establish benami is on the person who alleges it, and thus where there is no satisfactory evidence of possession one way or the other it must be held that it was not established that the transactions were not real.

8. In this view the order of the learned District Judge cannot be supported. We have been pressed to hold, however, that it was open to the Insolvency Court to annul these transactions not u/s 53, Insolvency Act, but u/s 53, T.P. Act. In a suit u/s 53, T.P. Act, there is no question of a two years bar. Limitation is six years under Article 120 Limitation Act. This argument has raised a legal question of some difficulty. No decision of this Court has gone so far. In Biseswar Chaudhari v. Kanhai Singh AIR 1932 Pat. 129 it has been held by a Bench of this Court that Section 4 is controlled by Section 53 only in respect of real transfers made by the insolvent, and where the; transaction is challenged as being benami, that is no transaction at all in the eye of law, the insolvency Court has complete jurisdiction to deal with the question, and its jurisdiction is not controlled by the limitations imposed by Section 53; and even in the case of a transaction entered into more than two years before the presentation of the petition in insolvency it can make a declaration that the properties covered by the transaction belonged to the insolvent and they vested in the Receiver. But the Court did not go so far as to say that the insolvency Court could interfere with real transactions entered into more than two years before the petition, and the decision that Section 4 is controlled by Section 53 in respect of real transfers certainly implied that the view of the Bench was to the contrary.

9. In a previous year, 1930, there was a decision which even more strongly suggests that view. I refer to the case of Radhika Kuer Vs. Sushil Chandra Mitra, . That was a case where the Insolvency Court had annulled the transaction u/s 128, T.P. Act, and it was held that the Court had no jurisdiction to do so, because u/s 4 the Court is limited to deciding what properties belonged to or vested in the insolvent at the commencement of the insolvency proceedings, or which were acquired by or devolved on him before his discharge. The Bench held that properties validly gifted away could not be divided by the Insolvency Court amongst the creditors, as they ceased to belong to the insolvent from the date of gift.

10. The respondent relies mainly on decisions of the Allahabad High Court, and particularly upon Shikri Prasad v. Aziz Ali AIR 1922 All 196 in which it was definitely held that the Insolvency Court u/s 4 can decide all questions of general law including such questions as are raised by Section 53, T.P. Act, 1882.

11. The opinion even in the Allahabad High Court, however, has been by no means uniform. In a later case in Hari Chand Rai Vs. Moti Ram there was a difference of opinion between Sulaiman J., and Mukerji J. Mukerji J., however, was definitely against the opinion expressed in Shikri Prasad v. Aziz Ali AIR 1922 All 196 while even Sulaiman, J., rather suggested in his judgment that he also was not prepared to go so far. The Court was dealing not with a real transaction to defraud the creditors, but with a benami transaction. It is true that the Receiver had asked the Court to treat his application as one u/s 53, T.P. Act, but the District Judge found that the transaction impugned was entirely a fictitious one which was never intended to be carried into effect. Sulaiman J. said:

The learned Advocate for the appellant contends before us that it was not open to the insolvency Court to go into this matter at all. If the petition of the Receiver were to be construed strictly and he were pinned down to the section under which it was made, there may be some thing to be said in support of this contention; but there is no doubt that allegations made in the petition, although the wrong section was quoted, amounted to an assertion that the transaction was a wholly fictitious one and was in no way binding on the insolvent. In view of this circumstance I am of opinion that the finding of fact arrived at by the District Judge was not improper.

The learned Judge went on to say in regard to transactions which are voidable u/ s 53, T.P. Act, but good in law so long as the option to avoid them is not exercised by the creditors:

A prayer to avoid such voidable documents does not necessarily raise a question of title or of priority mentioned in Section 4, Provincial Insolvency Act of 1920. As to whether it is covered by the wider expression ''of any nature whatsoever'' I would require further consideration before expressing any final opinion.

12. In Haji Anwar Khan Vs. Mohammad Khan and Others the matter was considered by a Full Bench, but here again the Court was dealing with a case of a wholly void transfer. Of the three Judges, Dalai J. does not really go further than holding that the Insolvency Court can decide whether the transaction was benami or real, that is to say, where the real title lies. King J. does go further, but his observations are, with respect, obiter. Sen J. would not even go so far as Dalai, J.

13. The respondent has relied on two further decisions, a Calcutta case, Fool Kumari Dasi Vs. Khirod Chandra Das Gupta, but this also was a case of benami, not of a real transfer, and the other case cited, Chittammal v. Ponnuswami Naicher AIR 1926 Mad. 363 does not really touch the point under consideration.

14. Shikri Prasad v. Aziz Ali AIR 1922 All. 196 is, in almost direct conflict with the Patna cases I have referred to, and my own opinion is that it is wrong. It is, no doubt, well settled by now that u/s 4 an Insolvency Court has full jurisdiction to decide whether the property is in fact the property of the insolvent or otherwise. But suppose that the Insolvency Court considers the question from the aspect of Section 53, T.P. Act. A suit u/s 53, T.P. Act proceeds on the assumption that the transfer is real though fraudulent, and that title has gone to the transferee. The finding, therefore, could only be that title lies not with the insolvent, but with the transferee. What is necessary to give relief is the annulment of the real transfer. That is what a civil Court can do in proper circumstances in a suit u/s 53, T.P. Act. But where does the Insolvency Court get the power? It cannot be said that it has automatically all the powers of a civil Court. It is a creature of statute, and its powers are conferred by and limited by the statute. Section 4 confers wide powers to decide questions of title, but it confers nothing further than the right to decide. To put it differently, it gives power to make a declaration, but no

power to give consequential relief. For its power to give consequential relief we must look elsewhere in the Act. Section 53 of the Act gives it the power in proper circumstances to annul a transfer made within two years of the petition for insolvency, but nowhere in the Act is any power conferred to annul a transfer made outside the two-years'' period; nor, as I have said, is there anything in the Act which confers all the powers of a civil Court. On the other hand, we find in Section 56(3) that where the Court appoints a Receiver it is empowered to remove any person found in possession or custody of the insolvent''s property, but subject to the proviso that nothing in the section shall be deemed to authorise the Court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove.

15. Where an insolvent has made a real transfer in fraud of his creditor he has no present right to remove the transferee, unless it has first annulled the transfer, and it can only annul the transfer subject to the provisions of Section 53, Insolvency Act. Section 4, as I have said, gives a right to decide a question, but not to annul anything.

16. In my opinion, the proper course for the Insolvency Court in such circumstances is first to satisfy itself whether the transfer is really one liable to be annulled u/s 53, T.P. Act, and if it decides that it is so, then to instruct the Receiver to file a suit for the purpose in the civil Court.

17. I would accordingly allow this appeal, and set aside the decision of the learned District Judge, but I would direct him to consider in the light of all the circumstances, including the question of limitation, whether the case is one in which he should give a direction to the Receiver to file a suit u/s 53, T.P. Act. He should understand that we have merely decided that benami has not been established. We are expressing no opinion whatever on the question of whether the transfers were made in order to defraud or delay creditors.

18. I would make no order for costs.

Sinha, J.

19. I entirely agree.

