

**(1935) 09 AHC CK 0024**  
**In the Allahabad High Court**

Govind Ram and Others

APPELLANT

Vs

Kashi Nath and Others

RESPONDENT

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**Date of Decision :** 26-09-1935

**Acts Referred:**

**Citation :** (1935) 09 AHC CK 0024

**Hon'ble Judges :** Bajpai, J

**Bench :** Single Bench

**Final Decision :** Disposed Of

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## Judgement

Bajpai, J.—This is an appeal by the defendants. The plaintiff Seth Kashi Nath who was said to be of weak intellect brought a. suit with his mother Mb. Asharfi Kunwar as next friend for a declaration that the property mentioned at the foot of the plaint was owned by the defendants second party and was liable to be attached and sold in satisfaction of the plaintiffs' decree passed in Suit No. 42 of 1930 of the Court of the Subordinate Judge of Aligarh (Seth Kashi Nath v. Roshan Lal and others).

2. He impleaded as defendants to the suit Govind Ram and six others who were described as defendants first party and the firm of Phool Chand Roshan Lal situate at Hathras with its various partners who were described as defendants second party. The allegations contained in the plaint were that the firm of Phool Chand roshan Lal was about to become bankrupt in the month of April 1929 and that the partners thereof, with a dishonest intention approached the plaintiff's guardian who was a purdanashin lady and borrowed a sum of one lakh of rupees. The firm subsequently, on 25th May 1929, executed a collusive document by way of a composition deed in favour of the defendants first party as trustees, although as a matter of fact no property was transferred to the trustees nor were the moveables belongings, ornaments and cash entrusted to them. The plaintiff obtained a decree on the basis of the loan mentioned above in Suit No. 42 of 1930, from the Court of the Subordinate Judge of Aligarh on 22nd August 1930, but when the decree was put into execution an objection was filed by the

trustees and this was allowed on 28th February 1931. It is now said that the composition deed did not have the effect of vesting the property mentioned in the plaint in the trustees and that the plaintiff was entitled to get it attached and sold in execution of his decree.

3. The two sets of defendants filed separate written statements and pleaded that the composition deed dated 25th May 1929 was executed in good faith and for the benefit of all the creditors, that the moveable and Immovable property of the defendants second party was made over to the trustees for the benefit of all the creditors and that after the execution of the document the trustees entered into possession and paid a dividend of five annas out of sixteen for the creditors. The contention of the defendants was that the trustees had got an absolute right over the property of the debtors by virtue of the composition deed and that the property was not liable to be attached and sold in execution of the plaintiff's decree. A point was made by the plaintiff that, the document not being registered, the trustees had not acquired any right in the property in dispute, while it was pleaded in defence that there was no necessity for the composition deed to be registered.

4. The learned Subordinate Judge framed three issues which were: (1) whether the composition deed, dated 25th May 1929, was fictitious and was executed fraudulently to defeat the creditors or it was executed honestly and for the benefit of all the creditors. (2) Is the plaintiff also bound by the terms of the composition deed in dispute? If so, is he entitled to obtain the declaration claimed? (3) Is the plaintiff entitled to the relief sought? It would thus appear that no issue was struck on the question whether the composition deed required registration or not and no finding was given by the learned Subordinate Judge on the point. He came to the conclusion that the deed was executed in collusion with the trustees and that it was a colourable transaction. As regards "The legal position of the composition deed," he was of the opinion that the authorities cited by the defendants, being of a time when there was no insolvency codified law, were not applicable to the facts of the case, and that

the defendants could have proceeded either by way of a contract, if they had obtained the signatures of the plaintiff also on the composition deed, or could have proceeded under the insolvency law in force in these Provinces,

but that they had taken neither of those courses. He further observed that as the document effected

a sort of adjustment between the plaintiff decree-holder and the defendants second party the latter could have proceeded under the CPC under Order 17.

5. He wound up by saying:

To my mind, the entire proceedings of the defendants' second party appear to be mere dishonest ones and most injurious to the plaintiff, one of the two big creditors of theirs, and the composition deed appears to be a collusive one only.

6. He therefore decreed the plaintiff's suit with costs and gave a declaration

that the property in dispute was liable to be auctioned and attached in execution of the decree No. 42 of 1930 as the property of the defendants' second party.

7. We might mention at the very outset that the case was not properly handled in the Court below by the parties and that the learned Subordinate Judge himself did not examine the case from all points of view and has done very scant justice to the complicated questions of law and fact that arose in the case. The contention of the appellants is that the composition deed, dated 25th May 1929, was executed honestly for the benefit of all the creditors, that the finding of the learned Subordinate Judge to the contrary was wrong and that the property was not liable to attachment and sale at the instance of the plaintiff in execution of his decree against the defendants' second party. Upon the judgment of the Court below the very first question that we have got to decide is whether the composition deed was a paper transaction or whether it had the effect of vesting the property of the debtor firm in the trustees. No plea connected with the Registration Act was taken in the grounds of appeal, but in the course of arguments that point assumed importance and we shall have to discuss it at length at a later stage. It was not said that it was not open to a debtor to arrive at a composition with his creditors, but it was contended strenuously on behalf of the respondents that a composition deed properly so called was an offspring of contract and did not contemplate the intervention of trustees. In support of this contention our attention was drawn to the definition of a "Composition" given in Wharton's Law Lexicon, Edn. 13, at p. 197 as

an agreement made between an insolvent debtor and his creditors by which the latter accept a part of their debts in satisfaction of the whole,

but the learned writer after giving this definition makes a reference to "arrangements" which are described at p. 69 and the discussion contained there under the heading of "Arrangements between debtors and creditors" refers to the various enactments in England, especially the Deeds of Arrangement Act, 1914, and there cannot be the slightest doubt that the machinery of trust is recognised there. In Bouvier's Law Dictionary a "composition" is defined as

an agreement made upon a sufficient consideration, by which the creditor accepts part of the debt due to him in satisfaction of the whole,

but this does not show if the agreement provides for the intervention of the trustees that it will not be a composition. In the same book a deed of arrangement" is defined as "a term used in England to express an assignment for the benefit of creditors," and in England, as we have said before, the Deeds of Arrangement Act provides for the creation of trusts. The expression "Composition deed" has not been defined or described in any Indian statute except in Article 22, Schedule 1, Stamp Act, (Act 2 of 1899) where, in the term "Composition deed," are included instruments executed by a debtor (1) whereby he conveys his property for the benefit of his creditors, (2) whereby payment of a

composition or dividend on their debts is secured to the creditors and, (3) whereby provision is made for the convenience of the debtor's business under the supervision of Inspectors or under letters of licence for the benefit of his creditors. We shall presently show that arrangements by which a debtor bona fide assigns his entire property to trustees for the benefit of his creditors are well known in England as well as in India and have the effect of divesting the debtor of any interest in the property so assigned, so that the property cannot be the subject of attachment issued subsequently at the instance of a creditor who has obtained a decree upon his debt. Lewin on Trusts, Edn. 13, p. 542, says:

Indeed it has now been decided that if property be assigned to a trustee and he takes possession of it and communicates with certain of the creditors, who express satisfaction, the trust is irrevocable.

8. May on Fraudulent Disposition, Edn. 3, p. 379, says:

The general rule is that a complete transfer of property by a voluntary donor, which is effectually vested in trustees for his donee is irrevocable,

and that a legal assignment is made. According to this learned author communication to the creditors in the case of trusts for the benefit of creditors seems to be necessary which is not necessary in the case of a trust for the benefit of a mere donee, but at p. 78 he says:

The intentional exclusion of a creditor or creditors or of a certain class of creditors from the benefits of an assignment in trust for creditors does not render the assignment void.

9. Underbill in his Law of Trusts and Trustees, Edn. 7, p. 36, observes:

Prima facie a trust deed for the payment of the settlor's creditors generally is deemed to have been made for the debtors' convenience.... But on the other hand where the creditors are parties to the arrangement, the inference then is that the deed was intended to create a trust in their favour which they are entitled to call on the trustees to execute.

10. The cases of *Siggers v. Evans* (1855) 5 E1 & B1 367, *Harland v. Binks* (1851) 15 Q B 713 and *Synnot v. Simpson* (1854) 5 HLC 121 lend support to the views of the learned writers-mentioned above. In the present case the composition deed which is printed at p. 49 of our record is described as an indenture between the debtors of the first part, the trustees of the second part and the creditors of the third part. It was signed on 25th May 1929 by the debtors and the trustees who it may be mentioned, were some of the creditors-of the debtor firm, and it was on subsequent dates signed by many other creditors. The debtor firm was indebted at the time when the composition deed was executed to the extent of about ten lakhs, the trustees who signed the document on 25th May 1929 were creditors to the extent of over three lakhs, and on subsequent dates thirty six creditors from Bombay and seven from other places-signed the deed in token of their assent. The debtors were indebted to

sixty-nine creditors in Bombay and one hundred and fifty creditors in other places. The assenting creditors held claims against the debtors to the extent of about eight lakhs and fifty thousand rupees and the creditors who have not signed the document represent debts aggregating about a lakh and forty thousand rupees; of such creditors the principal person is the plaintiff whose debt amounts to a lakh of rupees. It would thus appear that the majority of the creditors have given their assent to the document and the trustees who have shouldered the responsibility of administering the trust represent about one-third of the general indebtedness of the firm of Phool Chand Roshan Lal. Although some of the creditors may not have expressed their willingness to accept the arrangement made by the debtors, yet, as was decided in *Siggers v. Evans* (1855) 5 E1 & B1 367, referred to above, a creditor who does not assent to the assignment can sue the debtor but cannot proceed against the property which under the deed has vested in the trustees. The document cannot be deemed to have been made only for the debtors' convenience nor can the trustees be treated as mere mandatories. They have a right to claim directly under the deed as parties taking a legal and equitable interest, which cannot be defeated at the instance of a subsequent execution creditor. Lord Campbell, G. 3., in *Siggers v. Evans* (1855) 5 E1 & B1 367, after mentioning the terms of the document under enquiry there and the circumstances from which the assent of some of the creditors could be inferred, observed:

We think that we cannot hold that this lead, which is made to a creditor as trustee for himself and others could be revoked by the assignor after it was communicated to the assignee or that it was a void deed within the rule referred to.

11. The cases decided by the Indian High Courts also favour such compositions. The earliest case perhaps is the case of *Bomanjee Manockjee v. Navroji Palanji* (1864) 1 Bom HCR 233, decided in 1864. It was held there that a bona fide assignment by a debtor of his entire property to trustees for the benefit of his creditors divests him of any interest which can be the subject of attachment subsequently issued in execution of a decree against such debtor until the trusts of the deed of assignment have been carried out. In this case the debtor had assigned all his goods, property and outstanding to five persons in trust to divide the proceeds amongst his creditors by a document dated 23rd September 1862. In accordance with the agreement the debtor handed over his property to the trustees who took possession and caused it to be sold by public auction. 58 creditors out of 65 had signed the trust deed but one had not done so and he filed a plaint in 1863 to recover the amount of his debt and obtained an ex parte judgment for the amount, after which he issued execution and attached in the hands of the auctioneer a portion of the proceeds of the trust property. On a suit by the debtor and the trustees the defendant execution creditor was restrained from receiving and the auctioneers from paying the amount of the attaching creditor's debt out of the trust property. In *Cecil Stephenson v. Col. Bomgarther* (1868) 3 Agra HCR 104, it was held that an insolvent debtor in the mofussil may

assign all his property to trustees for the benefit of creditors who may assent to the conditions of the assignment: and such an assignment will be valid although it may operate to defeat an expected execution, if the intention of the assignor was to confer on the assenting creditors a substantial interest in the property assigned: and not merely to defeat or hinder a judgment-creditor. Such an assignment will confer on the trustees a title to the property assigned superior to that of a judgment? creditor who has obtained an order for attachment subsequently to the assignment.

12. In this case also some of the creditors did not give their assent to the arrangement made by the debtor, and this judgment of a learned single Judge was affirmed in appeal and the appellate judgment is to be found at p. 321 of the same volume. In *Bapuji Audit Ram v. Umedbhai Hathesing*(1871) 8 Bom HCR 245, it was held that:

The assignment in a trust deed by which a person assigns all his property to trustees for the benefit of his creditors protects the assets so assigned from all creditors.

13. The learned Judges observed:

Such assignments to trustees are as remarked by Sausse, C.J. in *Synnot v. Simpson* (1854) 1 Bom HCR 233, highly favoured by Courts of Equity and in that case, as in the present, a creditor who had not signed the trust deed was nevertheless held bound by it.

14. In *Malukchand v. Manilal* (1904) 28 Bom 364, a composition deed was executed on 14th December 1900 by which certain persons were appointed trustees. It was signed by the debtor and some of his creditors and the debtor made over to the trustees his immovable property, account books and goods. *Chandavarkar and Batty, JJ.* held that the deed which was described as a composition deed in the document itself and which was so treated by the Court below and which was for the benefit of the creditors, but which did not comprise the whole of the property of the judgment-debtor was not void if the transaction was fair and bona fide and in the ordinary course of business or upon the pressure of the creditors and that it did not become void by the circumstance that it was signed by some only of the creditors. This very deed came up for consideration in 1909 before the Bombay High Court in a subsequent case, *Fida Ali Mohammad Ali v. Chandra Shanker Pran Shanker* Second Appeal No. 332 and 347 of 1907, a report of which appears at the bottom of p. 584 in the case of *Chandra Shanker v. Bai Magan* 1914 38 Bom 576, and it was held to be a composition deed binding on a subsequent execution creditor who was held to have no rights which he could enforce under an attachment. The same deed was again before the learned Judges of the same High Court in *Shekh Adam Hasanali Vs. Chandrashankar Pranshankar*, It does not appear that any translation of the document was supplied to the Court and then their Lordships said:

There is nothing whatever in the language of the deed to show that there was

any composition, any settlement with the creditors that the debtor should pay less than he owed to them and that they agreed to accept that compositions; the essential test of a composition deed is that there ought to be a compounding of debts due; of that there is no trace whatever so far as the language of this document is concerned.

15. On this reasoning the document was held not to be a composition deed. The Courts' opinion, however, appears to have been based upon the case of *The Queen v. Cooban* (1886) 18 QBD 269, where the question was whether a *cessio bonorum* for the benefit of creditors by a document which incorporated a release by the creditors was a composition deed. Curiously enough the same deed was again interpreted in the Bombay High Court by Scott, C.J., and Batchelor, J., in *Chandra Shanker v. Bai Magan* 1914 38 Bom 576, where the terms of the deed are given at length. It appears that the debtor executed a deed making over all specified assets to certain nominated trustees with the consent of creditors to the extent of one lakh twenty-two thousand rupees out of the total number of creditors claiming one lakh sixty thousand eight hundred rupees and the document was held to be a composition deed and to have the effect of vesting the property in the trustees.

16. In *Subbaraya v. Vythilinga* (1893) 16 Mad 85 the facts were that a certain debtor was adjudicated bankrupt in Mauritius and a receiver was appointed by the Court, but subsequently the creditors met and resolved that if the adjudication was annulled, a composition payable by instalments be accepted and that the security of a certain firm be accepted for payment of such composition and that the bankrupt's estate be assigned to that firm. An instrument was then executed to give effect to these resolutions and was concurred in by the receiver and approved by the Court which annulled the adjudication and ordered that the bankrupt's estate in Mauritius and India vest in the firm which had stood security and which was appointed trustee to carry out the said composition with full power of realization. The learned Judges held that the above instrument was valid as a composition deed. The case of *Manindra Chandra Ray v. Lal Mohan Ray* 1929 56 Cal 940, may also be mentioned in this connexion. The judgment in the report is a judgment of the Letters Patent Bench and is on a different point altogether, but the facts are stated at length and it would appear from those facts that a single Judge had a somewhat similar document before him which he interpreted as a composition deed and which he held to be valid and it was made to prevail against the claim of a subsequent mortgagee. The composition deed or the deed of trust was executed on 1st April 1921 and it was contended by a subsequent mortgagee that the conveyance was fraudulent inasmuch as it was executed for the benefit of some of the creditors only who had executed the agreement, whereas other creditors had not executed the conveyance or assented to it. This contention was repelled.

17. We have left for the last the decision of their Lordships of the Privy Council in *Bank of Upper India, Ltd. v. Kaniz Abid* 1935 ALJ 785. Here their Lordships were

construing a certain document executed by one Ch. Sharf-uz-zaman on 30th January 1912 by which he appointed certain persons as trustees of the whole of the estate. The document declared that the said trustees should from the date of the indenture enter upon and take possession of all the estate and properties mentioned in Schedule A, pay Government revenue and public charges and after payment of Government revenue and public charges and certain other necessary expenses apply the balance to the payment of certain monthly allowances to Sharfu-uz-zaman and members of his family, and after that apply the surplus towards the liquidation of the debts and liabilities chargeable upon the estate as specified in Schedule B, and others not so charged as specified in Schedule C in the manner and in the order the trustees might consider proper and beneficial to the estate. Their Lordships observed that when once a deed of trust was executed and property conveyed to the trustees for the benefit of the creditors of the author of the trust and for other purposes recited in the deed, the author of the trust ceased to have any interest in the property covered by the deed of trust. This case has been referred to at this stage of the judgment only for the purpose of showing that the author of the trust after the execution of a deed of trust ceases to have any interest in the property covered by the deed of trust and that therefore nothing is available against which a subsequent execution creditor can proceed. There was no question of a composition deed before their Lordships of the Privy Council and to that extent this case might be said to be distinguishable.

18. Applying the principles laid down in the above cases and text books, we now proceed to consider the terms of the deed before us in order to arrive at a conclusion whether it was a fair and bonafide transaction in the ordinary course of business and thus not open to objection or whether it was fraudulent and intended to give an undue preference to certain creditors over others or whether it was only a paper transaction. For this purpose the evidence of Bansidhar, the munim of the debtor firm who gives the complete history of the document, is of great importance. It appears that the firm sustained heavy losses in 1929 and in the beginning of May the situation of the firm became very critical as the settlement of seed and cotton Sadas was approaching and there were no funds available to meet the situation. The liabilities of the Bombay firm alone came to over seven lakhs and the entire indebtedness of the firm with its branches in other parts of India came to about ten lakhs. There were three proprietors of the firm, namely Roshan Lal, Sagar Mai and Hoti Lal. Of these Roshan Lal alone was in Bombay and the situation was explained to him by the witness and it was represented that unless funds to the extent of two to three lakhs could be arranged it was not possible to tide over the difficulty. Lala Roshan Lal said that it was not possible to make any arrangement in Bombay and it was suggested that he and the witness should go to Hathras. Roshan Lal and Bansidhar therefore left for Hathras on 2nd May and at that place there was a conference of three proprietors and it was decided that Bansidhar should proceed to Bombay and approach all the creditors and persuade them to agree to a composition. The

proprietors handed over to Bansidhar all their jewellery packed in two boxes and gave a list of all their Immovable and moveable property. Bansidhar arrived in Bombay on the 14th May and on the 15th or the 16th May there was a settlement with the members of the East India Cotton Association in this way: that the two-boxes of jewellery were pledged for a sum of Rs. 20,000 with one Chunni Lal Onkar Mal and the debts of the creditors whose claims arose out of transactions in cotton made subject to the rules of the East India Cotton Association and the debts of the creditors whose claims arose out of transactions in wheat and linseed made-subject to the rules of the Marwari Chamber of Commerce Ltd., were satisfied to the extent of five annas in the rupee and for the balance of eleven annas in the rupee hundis were passed.

19. One informal meeting of creditors was then held on the 16th or the 17th or the 18th May and another on 20th May 1929 when Bansidhar entreated the creditors to accept a composition. He stated that the debtors were prepared to place all their property, moveable and immovable, and outstandings to the extent of eight to ten lakhs at the disposal of the creditors and if the offer was refused, the creditors would get nothing and the firm would have to go in insolvency. The creditors after consultation amongst themselves, selected seven persons who were given authority to do whatever they thought proper in the matter. The seven persons so selected were: (1) Govindram of the firm Tarachand-Ghunshamdas; (2) Ramkumar Murarka; (3) Soorajmal, Munim of Champalal-Ramswaroop; (4) In-darmal, Munim of Joharimal-Ramlal; (5) Babu Lal, partner of Ramjimal-Babulal; (6) Jagannath of the firm of Gopiram-Eadhakishan and (7) Kakubhai of the firm of Khimji-Vishram. It was decided that the work of drafting a composition deed should be entrusted to Messrs. Malvi Modi and Ranchoddas, a firm of solicitors. The deed was then drawn up on a stamp paper and it was signed by Bansidhar as the agent of the debtor firm under a power of attorney executed by the partners on 12th May 1929 and by the trustees mentioned above on 25th May 1929. It was provided in the deed that the trustees should stand possessed of the trust estate which was conveyed, assigned and transferred to them upon trust. They had full power to sell properties and to pay the debtors and were given extensive powers for the composition and payment of debts.

20. The debtors covenanted that they would at the request of the trustees assign and deliver all other premises and properties which might be discovered to belong to them or any of them which were not hereby conveyed. The claims arising under the transactions made subject to the rules of the East India Cotton Association and the Marwari Chambers of Commerce were exempted and the creditors in respect of those claims were declared not to be entitled to receive any dividend or benefit from the trustees. On the face of it the document appears to be a fair and bona fide transaction; the debtors placed all their properties in the hands of the trustees giving them power to realise the outstandings and to convert the Immovable property and shares into cash and pay the creditors. The document was drawn up by Mr. Damodar Das, a member

of the firm of solicitors, selected by the trustees. He drew up the document on the basis of instructions given to him by the trustees, such instructions, being contained in certain notes taken down by the trustees at the meeting of the creditors. The firm of solicitors is a respectable firm paying an Income Tax of over Rs. 6,000 a year. The composition deed was drawn up in duplicate and after the 25th of May, thirty-six more creditors signed the document of which seven were creditors from outside Bombay. As mentioned in an earlier part of this judgment the trustees represent creditors to the extent of over three lakhs and in conjunction with the other signatories the assenting creditors represent as much as about eight and a half lakhs out of a total indebtedness of about ten lakhs. Three other witnesses, namely, Suraj Mal, Govind Ram and Hansraj were also examined on commission. (It might be mentioned that all the witness examined by the defendants were examined on commission at Bombay). They are trustees nominated in the composition deed. Govind Ram is the manager of the board of trustees and Suraj Mal was the president of the meeting of creditors which was held on 20th May 1929.

21. It is contended on behalf of the plaintiff respondent that the meetings of creditors never took place. It is urged that no witness except Bansidhar speaks of two meetings and that as regards the meeting of 20th May 1929, no list of the persons who attended the meeting was kept and no notes of the discussion that was had are available (the evidence that the notes were destroyed after the drawing up of the composition deed is attacked as false). It is however impossible to believe that there was no meeting whatsoever of the creditors and that the composition deed was executed in a secret manner. We know that seven trustees had actually signed the document on 25th May, that others signed it subsequently and in that state of the market at Bombay when claims were pouring in, the execution of a document of this nature in the office of an established firm of solicitors at Bombay could not be effected in a clandestine manner. We therefore feel inclined to believe in spite of the fact that the list of the creditors who attended the meeting and the notes of the proceedings are not available, that there was a meeting of some of the important Bombay creditors and that the composition deed was the result of an agreement between the debtors as represented by Bansidhar and the trustees and certain other creditors. It is admitted that no notice was printed and that the creditors were informed only by word of mouth but that does not in any way prove that there was no meeting of the creditors nor does the absence of any regular meeting of the creditors or of any notice invalidate the deed, for all that is wanted is that there should be no fraud contemplated by the debtor and that the trustees should not be participants in any such fraud.

22. In support of the respondents' contention it is said that it is incredible that if there was a meeting of the creditors they should have accepted the statement of Bansidhar alone as regards the assets of the debtor; but it was well known in Bombay that the munim had been in the employment of the firm for 22 years and was managing the affairs of the firm and was fully cognizant of the entire

position. After all it is not necessary in view of the cases which we have mentioned above that all the creditors should assent to the composition. It was conceded by Dr. Sen on behalf of the respondents that as a pure question of law it could not be argued that the giving of a notice or the holding of a meeting of all the creditors was essential nor that it was necessary that regular proceedings should be drawn up and accounts overhauled before a composition deed could be said to be bona fide. All that he said was that the absence of those facts might lead the Court to conclude bad faith. In the absence of any evidence contradicting them we are not in a position to hold that the statements of three of the trustees, of the solicitor, and of Bansidhar regarding the circumstances under which the deed was drawn up should be rejected.

23. It was then said that some portion of the property was reserved by the debtors. This property is mentioned in Sell. 3 of the composition deed. It consists of certain mortgagee rights and according to Hansraj its value is Rs. 9,000 or Rs. 10,000; the same witness stated that he went to Hathras in order to make enquiries regarding the position of the debtors and he believed that all the brothers had given their jewellery to the trustees except Hoti Lal. The matter however was not pursued further and we do not know whether this belief of Hansraj was well founded or whether Hoti Lal had any jewellery worth the name. The mere fact that the creditors allowed the debtors to reserve a small portion of their property for their own purposes would not invalidate the transaction, for after all the debtors also have to live. In *Cecil Stephenson v. Col. Bomgarther* (1868) 3 Agra HCR 104, referred to above, it was held that the fact that the composition deed empowered the trustees to permit the debtor to retain such portion of his furniture, linen, etc., as they might think fit, would not render the deed invalid, but that the power should be exercised only when the other assets were sufficient to discharge the primary object of "the trust. In the case reported in *Malukchand v. Manilal* (1904) 28 Bom 364, the property covered by the deed did not exhaust the whole of the debtor's assets, but was only a part thereof, the rest being left with the debtor for his benefit. Lewin on Trusts 10th Edition, p. 583 says:

If a person assigned part only of his property in trust for creditors, then, if the transaction was fair and bona fide in the ordinary course of business or upon the pressure of the creditors, it was not open to objection; but if the settlor contemplated bankruptcy or even thought it probable though not inevitable and wished to give an undue preference to certain creditors over others, it was fraudulent and constituted an act of bankruptcy.

24. The real test is whether there has been concealment by the debtor or whether he had, to use a common expression, placed his entire cards on the table. The property reserved is mentioned in the deed, itself, and so far as the plaintiff is concerned he is in no way prejudiced, for the trustees have no right in that property and it may be open to the plaintiff to proceed against the reserved property for the debtors have not divested themselves of their rights in that

property. On this ground alone therefore it is not possible to hold that the transaction was in bad faith. It is then said that the trustees did not function after the execution of the deed and that the business of the firm was conducted on the old lines under the supervision of the old servants. So far as the evidence in this case goes Govind Ram who is the President of the Board of Trustees says that 50 or 60 meetings of the trustees must have been held since the creation of the trust. It is true that no proceedings book kept by the trustees has been produced although according to the statement of Suraj Mal a minute book of the proceedings of the meetings of the trustees was kept. The answer to this is that this was never demanded from the trustees, and we see no reason to disbelieve the statements of Suraj Mal and Govind Ram on this point. The Bahikhatas of the firm Phool Ghand Roshan Lal are now kept by the trustees and Govind Ram signs them monthly. It is true that the trustees have kept some of the old servants but that was only natural inasmuch as such old servants were expected to know the business of the firm and would naturally be of great assistance in realising the outstandings. In *Janes v. Whitbread* (1851) 11 CB 406, it was held that an assignment of all the traders effects, bona fide executed to a trustee for the general benefit of all his creditors is not valid, although it contains a clause empowering the trustee to employ the grantor or any other person or persons in winding up the affairs of the grantor and in collecting and getting in his estate and the effects thereby assigned and in carrying on his trade if thought expedient by him. Further under Clause (7) of the composition deed the trustees were empowered to engage the munims and Gumashtas of the debtors for the purpose of realizing the outstandings. After the execution of the composition deed the trustees sent Jagannath to Hathras to make enquiries into the affairs of the partners of the firm. It would have been better if Jagannath had been produced, but another trustee, namely Hansraj Jiwandas who also went to Hathras to make enquiries has been produced. The statement of Bansidhar that the partners had no cash and had no jewellery beyond what was handed over to Bansidhar was undoubtedly accepted on trust, but the books of the firm were given to the trustees and they had ample opportunity to find out from the books regularly kept in the course of business if the statement of the munim Bansidhar was correct or not. Further under Clause (12) of the composition deed the debtors covenanted to assign to the trustees all, other premises and properties which might be discovered to belong to them. A criticism was advanced on behalf of the plaintiff that the trustees did not either before or after the deed dated 25th May 1929, prepare a list of the money due to the firm from others, but no question on this point was put to the trustees, and after all this failure can amount only to negligence on their part and a deed cannot be invalidated by subsequent negligence on the part of" trustees. This was held in *Cecil Stephenson v. Col. Bomgarther* (1868) 3 Agra HCR 104. On this part of the case it might be mentioned that the trustees took possession of the books of the firm, sold the Immovable property at Cawnpore, Chandausi and Ganjdandwara and the shares belonging to the partners and prepared a list of the creditors. (This list is to be found at p. 128 of our record). The amount of their debts is

calculated up to 7th June 1929 and dividends at the rate of five annas in the rupee were distributed to the various creditors in two instalments.

25. Some of the non-assenting creditors returned the cheque but the majority off the creditors accepted the dividends sent by the trustees. According to the evidence of Bansidhar on 26th May 1929 a notice was sent to the plaintiff by the trustees through the solicitors informing him about the composition deed and requesting him to submit his account and the plaintiff did submit a statement of his account. This shows that the plaintiff at first accepted the authority of the trustees but later resiled from this position. The books of the debtor firm are now in the possession of the trustees and came to Court from their custody. The trustees went to Hathras and obtained rent agreements from certain tenants occupying houses belonging to the. debtors. There were eleven such rent agreements of which five have-been printed at pp. 59, 61, 63, 65 and 67 of our record. In some cases the debtors themselves who were occupying some of the houses executed rent agreements in favour of the trustees and from the accounts we find that such rents were paid regularly by them.

26. Some persons who had obtained decrees against the firm of Phul Chand Roshan Lal put their decrees in execution and the trustees intervened. Three such cases were the cases of Sheocharan Lal, Bohra Ram Narain and the firm of Murlidhar Bhagwan Das. The objections of the trustees were allowed and the decree-holders accepted the validity of the deeds of trust. It is said however that in these cases the decree-holders were bribed and some money was paid to them outside the Court and in, return the creditors accepted the position taken up by the trustees. Reference is made to the evidence of Behari Lal and Hazari Lal in this connexion. It is true that these witnesses deposed that in the case of Shivcharan Lal a sum of about Rs. 2,000 was paid by the defendants" second party to his guardian Mt. Chanda. This evidence may be true but this does not in any way militate against the fact that the composition deed was a genuine transaction. The debtors might well in order to purchase peace have paid a portion of the decretal amount to the creditor. It might however be mentioned that this sum is not entered in the books and no question was put to the trustees on this point. Neither Mt. Chanda nor her books were produced but Behari Lal and Hazari Lal were produced after the evidence of the defendants was over.

27. It is then said that some of the trustees are relations of the debtors. Govind Ram is related by marriage. Babu Lal is a Bagla just as the debtors are. Suraj Mal is a munim of the firm of Champa Lal Ram Sarup and Ram Sarup is related by marriage to the debtors. Kakabhai has been the Mukaddam of the firm of the debtors for the last 20 years. We are satisfied that there are these connexions, but it is only natural that such persons should come forward to help the debtors and the debtors themselves would naturally have some confidence in their friends and expect them to carry out the conditions of the trust efficiently and with due regard to the interests of the debtors. Our attention was drawn to the fact that some small sums were paid by the debtors themselves after the

execution of the composition deed but these sums were very very insignificant. At Hathras a sum of Rs. 118-4-0 was paid to Madan Lal on the 27th May and another sum of Rupees 1,600 was paid to Bankey Lal Sheo Charan Lal on 30th May 1929 and a third sum of Rs. 500 was paid to Bhiku Mal Shanker Lal on the 2nd June. At Amritsar seven items aggregating Rupees 1,460-4-6 were paid between 30th May and 12th June 1929. It might well be that these sums were paid by the firm of the debtors at Hathras and Amritsar at a time when they were not cognisant of the completion of the composition deed at Bombay. It may also be that some of these amounts were paid in the ordinary course of business; the payees might have rendered some personal service for which they had to be paid in full. The trustees came to Hathras about 5th or 6th June 1929 and after that date it does not appear that any amount was paid at Hathras.

28. These are some of the criticisms that were levelled against the bona fides of the deed by the Court below and advanced by learned Counsel. It remains however to consider three other grounds on which great stress is laid against the validity of the deed and they deserve discussion at length. (His Lordship after dismissing the grounds on consideration of the facts and evidence proceeded.) There now remains to consider one question of law which was argued at great length before us. We made a passing reference to this question in, the beginning of our judgment when we said that the plaintiff in his plaint at two different places commented on the fact that the composition deed was not registered and the defendants equally in their written statements said that there was no necessity for the composition deed to be registered. It is a pity that no issue was struck by the Court below on that point and no finding was given by the learned Subordinate Judge. The plea that the document is invalid for, want of registration is based principally on Section 5, Trusts Act, but it is said that because of Clause 2(1), Section 17, Registration Act, a composition deed does not require registration. Before the plaint property can be said to be not attachable and saleable in execution of the plaintiff's decree, it must be shown that the property has passed out of the ownership of the defendants second party and has vested in the defendants first party.

29. The document must be said to be a conveyance before the defendants can succeed and as it purports to create or to assign a vested interest in Immovable property of the value of Rs. 100 the document should be registered u/s 17(1)(b), Registration Act. So far as the Registration Act itself is concerned, we are of the opinion that by reason of the exemption contained in Clause 2(1) of the Act the document does not require registration, but the plea u/s 5, Trusts Act, remains. We propose, before noticing the cases that were cited by Sir Tej Bahadur Sapru, to give our own view on the subject which is in disagreement with the opinion of the Bombay High Court. It is true that Clause 2, of Section 17, Registration Act, distinctly provided that nothing in Clause (b) (and it is only under Clause (b) that the document might require registration) applies to any composition deed, but this does not mean that if a document requires registration under any other enactment the exemption contained in Clause 2 would prevail against that other

enactment. What the Registration Act provides is that a composition deed so far as it purports or operates to create, declare, assign, limit or extinguish whether in present or in future any right, title or interest whether vested or contingent of the value of Rs. 100 and upwards to or in Immovable property will not require registration, but it does not say that any composition deed if it purports to do or operates to do anything else will not require registration either. A trust is something different from the mere creation or assignment of a right in Immovable property. A trust provided for something more than mere creation or assignment of a right in Immovable property. This is obvious from the fact that a trust contemplates the author of the trust, the trustees, the beneficiaries, the trust estate and the manner in which the trust is to be administered.

30. It is however contended that there is a presumption that a subsequent general enactment is not intended to interfere with a special enactment unless the intention to do so is very clearly manifested and in support of this contention reliance is placed on *Janes v. Whitbread* (1898) AC 748, *Mary Seard v. The Owner of the "Vera-cruz"* (1885) 10 AC 59 and *Corporation of the City of Montreal v. Montreal Industrial Land Co., Ltd.* 1932 PC 252. We concede that when the Legislature has given its consent to a separate subject and made provisions for it, the presumption is that a subsequent general enactment will not override the special provisions contained in the earlier enactment dealing with the separate subject unless such an intention is made clear, but the principle laid down in the cases mentioned above is not applicable to the facts of the present case. The Registration Act and the Trusts Act may both be said to be enactments dealing with special subjects and both of them equally might be said to deal with general subjects. As we pointed out before, there is no conflict between the two Acts so far as the question of registration is concerned and the presumption to which reference has been made can only be invoked when there is an attempt by the general Act to interfere with the special enactment. The exemption relating to composition deeds was mentioned for the first time in the Registration Act of 1866 and continued in 1877 and 1908. The Trusts Act was brought on the statute book in the year 1882 and the contention for the appellants is that if it was intended that a composition deed, if it provided for the machinery of a trust, should be liable to registration, the Registration Act of 1908 could undoubtedly have made some provision for it.

31. We do not however think that it was necessary that a distinct provision should have been made in the Registration Act. On the contrary if it was intended that the exemption from registration in connection with a composition deed as mentioned in the Registration Act should also apply when the composition deed happened to operate as a trust deed as well, there should have been a saving clause in the Trusts Act. As a matter of fact the preamble of the Trust Act has a saving clause and it says that nothing therein contained affects the rules of Mahomedan Law as to waqf or the mutual relations of the members of an undivided family as determined by any personal or customary law or applies to public or private, religious or charitable, endowments or to trusts to distribute

prizes taken in war among the captors, but it nowhere says that it does not apply to trusts created by a composition deed. The Registration Act simply says what documents require registration in a general manner. It also exempts for purposes of the Registration Act certain documents from registration either by express words of exemption or by implication. It is very easy to think of an example of exemption by implication. If it is a conveyance of Immovable property of the value of less than Rs. 100, it does not require registration, but it is clear that it is permissible to the Legislature by a subsequent enactment to say that henceforth certain kinds of conveyances of properties of less than Rs. 100 will be valid only if effected by means of a registered instrument, and no well established principle relating to the interpretation of statutes will be affected thereby. We are therefore of the opinion that the abovementioned cases cited by learned Counsel for the appellants have no application to the present case and are clearly distinguishable.

32. We now propose to discuss the cases that were cited before us. We might mention at once that cases which were decided before the Trusts Act have obviously no application because we are of the opinion that the document before us requires to be registered not under the provisions of the Registration Act but only under the provisions of the Trusts Act. The cases in *Synnot v. Simpson* (1854) 1 Bom HCR 233, *Cecil Stephenson v. Col. Bomgarther* (1868) 3 Agra HCR 104 and *Bapuji Audit Ram v. Umedbhai Hathesing* (1871) 8 Bom HCR 245, already referred to above, are of no importance. In *Subbaraya v. Vythilinga* (1893) 16 Mad 85, and in *Manindra Chandra Ray v. Lal Mohan Ray* 1929 56 Cal 940, the point relating to the Trusts Act was not taken. There are only two cases in which the point was discussed. They are *Malukchand v. Manilal* (1904) 28 Bom 364 and *Chandra Shanker v. Bai Magan* 1914 38 Bom 576. In the latter case some strength was sought to be obtained from the description of the expression "Composition deed" as given in the Stamp Act, and it was thought that "the Stamp Act was in large measure in pari materia with the Registration Act." With great respect to the learned Judges we are of the opinion that the two enactments are not in pari materia. The Stamp Act is a purely fiscal Act providing for the payment of Government revenue, whereas the Registration Act has for its objective the conservation of evidence, assurance of title, publicity of documents and prevention of fraud, and it is not permissible to interpret one word used in one enactment by a reference to its description in a different Act altogether. As pointed out before, the exemption from registration is available to a composition deed only to the extent that it purports to create or assign a right in Immovable property and not when it amounts to a trust which obviously contemplates something more than mere creation or assigning of a right in Immovable property. In *Chandra Shanker v. Bai Magan* 1914 38 Bom 576, the learned Judges simply say that for the reasons given in *Malukchand v. Manilal* (1904) 28 Bom 364, a composition deed does not require registration under the provisions of Section 5, Trusts Act of 1882.

33. The reasons given in *Malukchand v. Manilal* (1904) 28 Bom 364 are that if

there is an element of trust in a composition deed, that element enters into it as a mere accident and it is not the essence of it. With great respect we are unable to agree with this. It is true that in a composition deed the essence is undoubtedly the compounding of debts, but where it lays down the machinery of a trust, the trust is an integral part of it and the trust contained therein cannot be said to be accidental or incidental. Another reason given by Chandavarkar, J., is that in a composition deed the property of the debtor vests in the trustee only for the purpose of giving effect to the terms of the composition and "the ownership of the property is transferred to the trustee for the benefit of the creditors." This reasoning cannot now be supported in view of the dictum of the Privy Council in *Bank of Upper India, Ltd. v. Kaniz Abid* 1935 ALJ 785, where their Lordships say that when once a deed of trust is executed and property conveyed to the trustee for the benefit of the creditors of the author of the trust and for other purposes recited in the deed, the author of the trust ceases to have any interest in the property conveyed by the deed of trust. For the reasons given above we find ourselves unable to agree with the view of law taken by their Lordships of the Bombay High Court on the question of registration and we are of the opinion that so far as the composition deed is a trust, deed, it is not valid because of the fact that it is not registered.

34. The learned Counsel for the appellants, however, put in two applications before us, one for the reception of additional evidence under Order 41, Rule 27, Civil P.C., and the other for the amendment of pleadings under Order 6, Rule 17, Civil P.C. So far as the application for the reception of additional evidence is concerned, we are of the opinion that it has no force, for the document now sought to be brought on the record was not produced before the Court below and it cannot be said that that Court rejected a piece of evidence which it should have accepted, nor can it be said that we require the document for the purpose of pronouncing judgment, nor again can it be said that the said document was not within the knowledge of the applicant. The application for the amendment of pleadings however stands on a different footing and we think that in the interests of justice that application ought to be allowed. It is conceded that the pleadings might be allowed to be amended at any stage of the proceedings even before an appellate Court, but the principle safeguard in a matter of this kind is that the other side should not in any way be prejudiced or taken by surprise nor should a new case be attempted to be made out by the altered pleading. To a certain extent there would be a little inconsistency when a new plea is allowed to be taken, but that in itself should not be the reason for refusing an application" for amendment. It is true that the plaintiff did mention pointedly in his plaint that the composition deed was not registered and it is equally true that the defendants said that the document did not require registration and they did not in the same breath say that even if the document required registration, the defect was cured by the fact that there was another document dated 6th June 1929 in their possession which was registered and which should be read with the document dated 25th May 1929.

35. The fact however, remains that no issue was struck on that point and it may well be that if such an issue had been struck, the defendants might have been better advised and might have asked the Court below to allow them to amend their written statement by mentioning the document of June 1929. There are certain other facts which might be taken into consideration in this connexion. The defendants carried on their business in Bombay, the deed was drawn in Bombay, the solicitor at Bombay advised them that the document did not require registration and his advice was based on two decisions of the Bombay High Court that a composition deed did not require registration. The deed was produced before the executing Court when the plaintiff sought execution of his decree and the trustees intervened and the learned Subordinate Judge there held that the deed did not require registration. Under these circumstances there is no wonder that the defendants were lulled into a sense of security and the interests of justice require that they should be allowed to amend their pleadings and permitted to produce the document dated 6th June 1929. In this view it would be necessary for the case to go back to the Court below with opportunity given to the defendants to produce evidence for the purpose of proving the document and such other evidence as might be relevant to the document in question and the plaintiff should be given an opportunity to produce such evidence as he deems fit to produce in rebuttal.

36. We have so far considered the various objections that were advanced against permitting the defendants to amend their written statement and have come to the conclusion that the defendants should be permitted to amend their written statement, but it is further said that the defendants cannot in any way better their position by the production of the document dated 6th June 1929. It is enough for us to say that it is not for us to decide the point. The contention of the appellants is that the document dated 25th May 1929 not requiring registration u/s 17 of the Act, there is nothing in Section 49 to prevent its admissibility in evidence. The document being admissible in evidence it can be read together with the subsequent document and if so read together, a trust is created and the property conveyed to the trustees and no objection can be taken on the ground of want. of registration inasmuch as the second document is registered and the trust is therefore valid. It is not necessary for us to decide whether there is any force in this plea or not and we in no way fetter the discretion of the Court below on this point, in as much as we have not, heard the other evidence of the parties which they might be advised to produce and the arguments that might be advanced in favour of the contending parties at a subsequent stage when the whole evidence is available.

37. The result of what we have said above is that we allow this appeal to this extent: that we set aside the decree of the Court below and remand the case to that Court, under our inherent jurisdiction with directions to that Court to re-admit the suit on its original number in the pending file and to dispose of it according to law after giving the defendants an opportunity to amend the pleadings in the light, of their application dated 12th August 1935 and to produce

the document dated 6th June 1929 and such other evidence as might be necessary for the purpose of proving the document and such other evidence as might be relevant to it, and the plaintiff should also be given an opportunity to take such plea as might be available to him in rebuttal and to produce such evidence as might be relevant to the question. Costs here and heretofore will abide the event.