
(1935) 02 BOM CK 0012
In the Bombay High Court

H. Hunter

APPELLANT

Vs

Rani Kaniz Abid

RESPONDENT

Date of Decision : 28-02-1935

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 145

Citation : (1935) 37 BOMLR 874

Hon'ble Judges : Tomlin, J;Thankerton, J;Shadi Lal, J;Russell, J;Lancelot Sanderson, J

Bench : Full Bench

Judgement

Lancelot Sanderson, J.—These are six consolidated appeals from decrees of the Chief Court of Oudh, Mr. H. Hunter is the liquidator of the Bank of Upper India, Limited, Lucknow, which is in liquidation, and for the sake of brevity he is hereinafter referred to as " the liquidator." The Bank appeals against a judgment and decree of the Chief Court, dated December 22, 1930. Rani Kaniz Abid is the beneficial owner of certain decrees obtained in respect of promissory notes executed by Chaudri Shafiz-uz-zaman, hereinafter called " the insolvent" and she appeals against a decree of the Chief Court, dated October 15, 1929. Chaudhri Sharf-uz-zaman is the son of the insolvent, and K. B. Sheikh Matin-uz-zaman, Mohammed Wasim, Chaudri Hyder Husain, Chaudri Ehsan Husain are the trustees of a deed of trust executed by the insolvent and dated January 30, 1912. They are hereinafter referred to as "the trustees". The abovementioned Chaudri Sharf-uz-zaman and the trustees appeal against a decree of the Chief Court, dated August 4, 1930, and the said decree of December 22, 1930, as well as the said decree of October 15, 1929. Pande Piare Lal is a creditor of the insolvent upon certain bonds in respect of which he obtained decrees. He supports Rani Kaniz Abid in her appeal against the said decree of the Chief Court, dated October 15, 1929. The insolvent is the Talukdar of Bhilwal in the Bara Banki district; he succeeded to the Taluqa, on September 19, 1907. Apparently by the end of 1911 he had incurred considerable debts and on January 30, 1912, he executed the abovementioned deed of trust and appointed certain persons as

trustees of the whole of his estates. Only three of the named trustees took up the trust. By the terms of the deed all the insolvent's estates as specified in Sch. A of the deed were conveyed to the trustees to be held in trust for the use and benefit of the insolvent's son Sharf-uz-zaman for the objects and on the conditions thereafter specified. Clauses 15, 16 and 21 are material, and are as follows :

Transfer of Estate.

15. That the said trustees shall from the date of this indenture enter upon and take possession of all the estates and properties mentioned in Sch. (A) aforesaid and at once apply for and obtain mutation in their names in place of mine in all the Revenue Records and shall out of the rents and profits of the said estates and properties after deducting therefrom the cost of management, the Government revenue and after public charges payable in respect thereof and the expenses of litigation, if any, incurred in instituting or defending suits in respect of the property aforesaid or in contesting liability for any debt and the necessary repairs of houses maintenance of private roads and the improvements in respect of the aforesaid properties such as sinking of wells, constructing of aqueducts and other improvements which the trustees may in their discretion consider necessary for the improvement and preservation and enhancement of rent of any land or lands in the aforesaid estates and properties, apply the balance to the payment of monthly allowance of : (1) Rs. 400 to me for my personal use and expenses which shall be payable to me during the natural term of my life. (2) Rs. 200 to my aforesaid wife, Mt. Razi-un-nisa, during the term of her natural life for her personal use and expenses. (3) Rs. 100 for the education and bringing up of my aforesaid son Sharf-uz-zaman during the continuance of the trust. But the trustees shall be at liberty to spend more money on the educational advancement of my aforesaid son either in India or abroad. (4) Rs. 80 to my sister Mt. Zarif-un-nisa during the term of her natural life. (5) Rs. 50 to Chaudhri Ehsan Husain, the son of my eldest sister, deceased, during the term of his natural life. (6) Rs. 50 to Ali Haider and Ishtiaq Ahmed, the sons of my sister Mt. Manzur-un-nisa deceased, for the terms of their natural lives jointly or the survivor of them, and other petty allowances which the estate may be liable to pay ; and the balance to be applied towards the liquidation of my debts and liabilities chargeable upon the estate as specified in Sch. (B) and others not so charged as specified in Sch. (C) aforesaid in the manner and the order the trustees may consider proper and beneficial to the estate.

Authority to Transfer.

16. That the annual profits available for the payment of the aforesaid" debts and liabilities being insufficient, the trustees are hereby empowered and given full authority to transfer the whole or part of any of the aforesaid estates and properties by sale, mortgage, Zar-i-peshgi the lease or other beneficial lease of the properties but in the exercise of their discretion in the matter of sale of the aforesaid properties, regard may be had that Sikandarpore and Sharifabad

estates may be sold first and in case it be necessary to sell other properties for the purpose aforesaid, the fractional shares and Pattis of the Khanpur and Bhilwal estates may be next sold and in case the sale of the aforesaid properties be not sufficient and the trustees deem a further sale necessary for the payment of debts, the Khanpur estate" may then be sold and even if this be not sufficient then the remaining villages of Hasanpur estate may be sold. But in no case the villages of Bhilwal and Subeha with their hamlets and appurtenances shall be sold.

Nature of Expenses and Investments.

21. That after payment and discharge of all debts and liabilities, the trustees shall, if there are surplus profits, increase my monthly allowance from 4 to 6-hundred and that of my aforesaid wife from 2 to 3 hundred and the surplus if any after meeting the aforesaid expenses shall be accumulated to accrue for the benefit of my aforesaid son, his heir and assign and it shall be lawful for the trustees to invest such surplus in Government Promissory Notes, Railway shares, debentures, village properties, house properties at Lucknow or any other advantageous investments as the trustees may think fit.

2. Previously to the execution of the said deed, the insolvent had executed four mortgages in favour of the said Bank, which was shown as a secured creditor in Sch. B of the said trust deed in respect of the said mortgages. This schedule was described as " approximate debts to the extent chargeable upon the estates and properties mentioned in Sch. A." The debt in respect of which Pande Piare Lal claims to be a creditor of the insolvent was not included in the schedules of the trust deed. The name of Rani Kaniz Abid does not appear in either of the schedules, but it was alleged that she had an interest in the debts standing in the names of Raja Bhagwan Bakhsh and Debi Lal Moolchand which appear in Sch. C of the trust deed. Their Lordships are not in a position to express and do not express any opinion upon this last-mentioned allegation.

3. A few months after the execution of the trust deed the insolvent succeeded" in preventing the trustees from managing the estate, with the result that in proceedings instituted by the trustees u/s 145, Criminal Procedure Code, the Magistrate took possession of the properties u/s 146 of the said Code. The trustees then applied to the Court of the District Judge for their discharge, and on August 12, 1912, the District Judge discharged the trustees,, refused to appoint new trustees and held that the trust had become extinguished. The result was that the insolvent resumed management of the estate.-

4. In 1913, the aforesaid Bank went into liquidation, and at a later date, viz., in 1917, Mr. Hunter was appointed liquidator. Shafiz-uz-zaman was adjudicated an insolvent on January 27, 1914 : The Deputy Commissioner of Bara Banki was appointed receiver in the insolvency and he took possession of the properties covered by the deed of trust and other properties belonging: to the insolvent. The trustees of the deed, while in possession of the estate,- had executed a

further mortgage on the above-mentioned properties in favour of the Bank to secure advances needed for the management of the estate ; so that at the time of the adjudication of the insolvent, there were five mortgages held by the Bank secured upon the estate of the insolvent.

5. On July 22, 1918, Sharf-uz-zaman, the son of the insolvent, instituted a suit in the Court of the Additional District Judge against the receiver in the insolvency, the insolvent, the liquidator and certain other parties praying for a declaration that the properties which were the subject-matter of the suit," were comprised in the trust deed and that the deed was binding on the defendants. The District Judge dismissed the suit, but on appeal, the Judicial Commissioner's Court held that the trust was a valid trust. The receiver in the insolvency then applied in the Insolvency Court for an order to annul the deed of trust u/s 53, Provincial Insolvency Act. The result of the proceedings thus initiated was that on April 14, 1924, the Court of the Judicial Commissioner on appeal held that the deed of trust was made in good faith and for valuable consideration and was not voidable as against the receiver. That decision has been accepted by all the parties appearing before their Lordships as a final decision binding upon them, and this appeal therefore has to be decided upon the assumption that a valid trust was created by the deed of January 30, 1912, in respect of the properties specified therein.

6. On August 8, 1924, the insolvent appointed the trustees who are parties to these appeals as trustees of the deed and the properties specified in the deed thereupon vested in the trustees. In 1921, the liquidator, on behalf of the Bank, had instituted a suit on the above-mentioned five mortgages against the insolvent, the receiver in the insolvency and others. He obtained the usual preliminary mortgage decree on May 31, 1923 ; the decree absolute was made on March 11, 1924, and the total decretal amount was Rs. 16,59,929-13-6. In August, 1924, the new trustees applied to the District Judge's Court for delivery of the insolvent's property comprised in the said trust deed to them after removing it from the control of the receiver in insolvency. This application failed : the Judge apparently regarded the Court of Insolvency as a " de facto trustee" and decided that there was no necessity for

a Civil Court dealing with a trust to remove that trustee and make over possession of that trust property to other trustees.

7. The trustees appealed, but the Chief Court, on August 3, 1926, dismissed the appeal and expressed the opinion that there was no necessity to award the trustees relief because the receiver had stated frankly and clearly that in distributing the assets of the estate he would take into full account anything which might be due under the trust after the liabilities of the trust had been satisfied. The learned Judges thought that the District Judge was well justified in exercising his discretion to refuse to accede to the prayer of the trustees. The learned Judges seem to have lost sight of the fact that the property comprised in the trust deed was not the insolvent's property, but was vested in the trustees,

and that consequently, it was not competent for the receiver in insolvency to deal with the said property in any way. At the instance of the liquidator the consent of the Government to the sale of the taluqa was obtained, and in September, 1926, the properties comprised in the mortgages were sold at auction in pursuance of the mortgage decree, for Rs. 13,49,216-15-6. Taking into account a sum for poundage, the balance due to the Bank after the sale under the decree was Rs. 3,24,227-14-0. On August 1, 1927, the liquidator applied to the Judge of the Small Cause Court, sitting on the insolvency side under 3, 47, Provincial Insolvency Act (Act V of 1920), for permission to prove in the insolvency for the said balance, together with future interest at six per cent, per annum up to the date of settlement. From that time there were numerous proceedings initiated by one party or the other, and numerous orders made in respect thereof; their Lordships are of opinion that it is not necessary to refer to them in detail.

8. They were due to the fact that none of the parties seem to have appreciated the position which was created as soon as it was finally decided that the trust deed of January 30, 1912, was a valid deed and that the property comprised therein was not part of the insolvent's estate, but belonged to the trustees. These proceedings culminated in a judgment and decree of the District Judge, dated January 29, 1929, whereby he allowed an appeal from the Judge of the Small Cause Court, sitting in his insolvency jurisdiction, which had rejected the liquidator's application for permission to prove for the said balance. The District Judge held that the liquidator, u/s 47, Provincial Insolvency Act, was entitled to share in the money in the hands of the receiver and he directed that the liquidator's claim for Rs. 3,24,227-14-0 be allowed to rank rateably with the claims of other creditors in the distribution of the assets in the hands of the receiver. Rani Kaniz Abid appealed against the above-mentioned decree to the Chief Court which, on October 15, 1929, dismissed the appeal. This is the decree against which the said Rani and the insolvent's son and the trustees have appealed to His Majesty in Council. The next judgment to which it is necessary to refer is dated August 4, 1930. There were no less than four appeals before the Chief Court for consideration and in the judgment it was stated that,

the point now for decision is whether other creditors whose names are not included in the trust deed executed by Chaudri Shafiz-uz-zaman, on January 30, 1912, are entitled to share in the distribution of assets included in the trust deed.

9. The Chief Court decided that all creditors who had a claim against the estate prior to the execution of the deed of January 30, 1912, had a right to share in the assets and they remanded the case to the Insolvency Court in order that the Court should prepare for the use of the Chief Court u/s 61, Provincial Insolvency Act, a complete list of all debts incurred by the insolvent prior to the date of the execution of the said deed whether they were due to persons named in the deed of trust or persons who were not so named. This is the judgment of August 4, 1930, against which the son of the insolvent and the trustees have appealed to His Majesty in Council. On December 22, 1930, the matter came again before

the Chief Court. The said Court had then received the list of the debts incurred by the insolvent, in accordance with the Court's direction of August 4, 1930, and certain objections which had been made to some of the items in the list.

10. The material part of the judgment is that which dealt with the objection which had been raised to the sum which the Insolvency Court had declared to be due to the Bank for dividend. Strange to say, this objection was taken by the trustees who, according to the judgment of the Chief Court, had the support of all the other creditors. It therefore appears that the trustees, instead of supporting the interests of the Bank, their cestui que trust, were opposing its claim. It may be mentioned incidentally that even during the argument before the Board, the learned counsel for the trustees was inclined to resist the appeal of the Bank until his attention was drawn to what might be the result if his clients persisted in taking up such an attitude. The Chief Court came to the conclusion that Section 48(2), Provincial Insolvency Act, applied to the claim of the Bank and accordingly they deleted from the list the amount stated therein to be due to the Bank.

11. The effect of the order of the Chief Court was a dismissal of the appeal, inasmuch as it appeared to the Chief Court that the above-mentioned decision was in accord with the view taken by the District Judge. This is the judgment and decree against which the Bank by the liquidator, the insolvent's son and the trustees have appealed to His Majesty in Council. It was agreed during the argument before the Board that the money which remains in the receiver's hands, consists entirely of the rents and profits of the property which was the subject-matter of the above-mentioned mortgages, and that being so, their Lordships fail to understand how the provisions of Sections 47 and 48, Provincial Insolvency Act, are in any way material to the claim of the liquidator, or how the receiver in the insolvency had any right to deal with the said money. It is true that it was not until April, 1924, that it was finally decided that the deed of trust dated January 30, 1912, was a valid deed, and that when the adjudication of the insolvent was made in January, 1914, the receiver took possession of all the property which he considered to belong to the insolvent, which included the property covered by the mortgages, but the greater part of this unfortunate litigation, which has lasted for so many years, is due to the failure to recognize the true position when once it had been established that the deed of January 30, 1912, was a valid and effective deed of trust. By that deed, the insolvent's interest in the mortgaged properties became vested in the trustees to be held and administered by them on the trusts mentioned in the deed, which trusts included the payment of certain specified creditors, one of whom was the Bank.

12. After the execution of the said trust deed the insolvent had no interest in the properties covered by the mortgages and consequently the said properties never vested in the receiver in insolvency and were not subject to be administered by him on behalf of the general body of creditors. Nor had the receiver in insolvency any right to administer the assets in accordance with the terms of the trust, as

seems to have been the view at one period of this litigation ; such a proposition is altogether untenable. It is therefore obvious that the three decrees against which the appeals are directed must be set aside, and this will involve the setting aside of other decrees and orders to which their Lordships will presently refer.

13. It remains to be considered what is the proper course to adopt in order that the rights of the parties may be duly determined and that this litigation should be brought to a conclusion. With this end in view, their Lordships are of opinion that the declaration and order hereinafter set out should be made. In view of the fact that the judgment deals only with the rights of the parties before the Board, they desire to make it clear that the declaration is not intended in any way to prejudice the rights of the persons specified in Clause 15 of the trust deed as being entitled to monthly allowances. Their Lordships are not aware what is the position with regard to this matter, and express no opinion in respect thereof, but they make the above-mentioned reference to it in case it may be necessary for the Court, which administers the trust, to deal with this matter.

14. Their Lordships are of opinion : 1. That a declaration should be made that having regard to the validity of the trust deed of January 30, 1912, and in the events which have happened, the rents and profits received by the receiver from the trust properties since the date of the adjudication of insolvency (A) are held by him as trustees of the said deed and accordingly are subject to the provisions of the trust deed and in particular to the provisions of Clause 15 thereof, and (B) do not form part of the estate of the insolvent and accordingly do not fall to be administered under the Provincial Insolvency Act, 2. That the orders and decrees set forth in the schedule attached to this judgment should be set aside, except in so far as they deal with costs. 3. That upon the liquidator undertaking forthwith to institute a suit for the administration of the trust in the appropriate Court in India having jurisdiction in that behalf and to apply to the Insolvency Court for a transfer to the Court of administration of the funds in the hands of the receiver and for the necessary accounts, if any, no further order on these appeals should be made, and they will humbly advise. His Majesty accordingly.