

(1942) 04 AHC CK 0011
In the Allahabad High Court
Case No : First Appeal No. 176 of 1936

Jagdamba Pande

APPELLANT

Vs

Ram Khelawan Upadhya and after His Death Mst. Sonkali and
others

RESPONDENT

Date of Decision : 28-04-1942

Acts Referred:

Provincial Insolvency Act, 1920 — Section 64
Transfer of Property Act, 1882 — Section 53

Citation : (1942) 04 AHC CK 0011

Hon'ble Judges : Verma, J;Allsop, J

Bench : Division Bench

Advocate : K.N. Malaviya, for the Appellant; S.P. Sinha and Satya Narain Prasad
for Respondents, for the Respondent

Final Decision : Dismissed

Judgement

Allsop and Verma, JJ.—This appeal arises out of a suit in which the Plaintiff, Jagdamba Pande, sought a declaration that a deed of sale executed on the 20th of August 1931, by Badri and Kedar in favour of Ram Khelawan was void as against the creditors of the vendors of whom he was one.

2. The deed of sale purported to have been executed in consideration of the payment of a sum of Rs. 4,000 of this sum Rs. 1,200 was paid in cash at the time of registration and it was recited that a sum of Rs. 100 had previously been paid in order to enable the vendors to purchase the necessary stamp paper and to pay the other necessary expenses towards the execution and completion of the document. The balance of Rs. 2,700 was left in the possession of the vendee so that he might discharge certain liabilities which the vendors had incurred towards himself and others. These liabilities consisted of a sum of Rs. 1,158 due on four usufructuary mortgages and of four sums due on the basis of promissory notes. The largest of these sums was one of Rs. 795 due to the vendee himself. The property transferred consisted of a one-anna Zamindari share in the village

of Bandhwa, a half share in a residential house and three blocks of fixed rate tenancy, that is an area of 23 Bighas 11 Biswas and the shares of the vendors in 10 Bighas 11 Biswas and in 28 Bighas 14 Biswas of land. The share in the former of these two last items was one-eighth being equivalent to 1 Bigha 6 Biswas 7 Dhurs and the share in the latter one-fourth being equivalent to 7 Bighas 3 Biswas 10 Dhurs.

3. The learned Judge of the Court below held that it had not been established, as alleged, that the sale was fictitious or that it was intended to defeat and delay the creditors of the vendors. He also held as a matter of law that no declaration could be given because neither the Plaintiff nor any other creditor had at the time of the decision of the suit any claim against the vendors. This second finding was based upon the fact that the vendors had been adjudicated insolvents on the 4th August, 1934 and had been discharged on the 13th July, 1935, before any debts had been proved against them.

4. The first question we have to consider is whether it has been established that the learned Judge of the Court below was wrong in his conclusion that the deed of sale was neither fictitious nor intended to defeat and delay the creditors. We may mention that the plaint purports to set out a case under the provisions of Section 53 of the Transfer of Property Act but that the allegations made therein amount really to this that there was no transfer at all, that no consideration passed that the property remained in the possession of the vendors and that the deed was purely fictitious and was never intended to operate as a deed of sale. We need scarcely repeat again what has been often said and for the last time in the case of *Parbhu Nath Prasad v. Sarju Prasad* 1940 AWR (HC) 422 : 1940 ALJ 470 that there is a distinction between a fictitious and fraudulent transfer. In the former case there is really no transfer at all and in the latter there is a transfer but, as it is the result of a conspiracy between the transferor and the transferee to defeat the claim of others, it can be avoided by those others if they wish to avoid it. In the present case the statements in the plaint and the arguments which have been addressed to us suggest that this was not a fraudulent transfer but a case of a complete fiction. We have been taken through the whole of the evidence and we are not satisfied that the decision of the learned Judge of the Court below was wrong. The first point which has been suggested to us is that the consideration for the property was inadequate and that consequently we should hold that there was a fiction or fraud of some kind. It seems to us that this argument is based, in some measure, upon a confusion of thought because as we have already said, the allegations in the plaint suggest rather that there was no transfer than that there was a transfer with the intention of defeating and delaying the Plaintiff and other creditors and if there was no transfer, there was no consideration so that the question of its adequacy does not really arise. The argument is that the property was worth a good deal more than Rs. 4,000 and in fact was worth as much as Rs. 10,000. The learned Judge of the Court below has not accepted the estimate put forward by the Plaintiff. He has stated that the property might have been worth as much as Rs. 5,000 or Rs. 6,000 at the time

but that it certainly was not worth as much as Rs. 10,000. The statement made by the Patwari of the village who was produced by the Defendants was that the income from the property amounted to Rs. 270 a year and that property of this nature was ordinarily transferred at 20 years purchase in the year 1931. Accordingly to this calculation, the property might have been worth about Rs. 5,400. We may mention, however, again that there were four usufructuary mortgages upon the property or parts of it and that its value might have been affected by fear of expensive and troublesome litigation. Certain deeds were produced by way of exemplars to show the rates at which property of this kind had, in fact, been transferred. The learned Judge of the Court below rejected those deeds which were executed earlier than the year 1931 for the very good reason that there was, as is well-known, a world-wide depression which caused a great reduction in the value of landed property about the time when the deed in suit was executed. He has referred to three deeds which were executed about the same time or a little later. One of these is a deed of sale, dated the 12th of June, 1931. The learned Judge was under the impression that an area of 3 biswas of fixed rate tenancy had been transferred for a sum of Rs. 300 and he had some difficulty in reconciling this fact with his ultimate decision, but we find that the learned Judge was misled and that it was an area of 1 Bigha 3 Biswas which was transferred together with 5 trees (not four as shown in the printed copy of the deed) for a sum of Rs. 300. The trees may themselves have been worth about Rs. 100 and consequently the price of the land might have been less than Rs. 200 per Bigha and not Rs. 2,000 per Bigha as the learned Judge has found. At this rate the value of the property in suit might be about Rs. 6,000 although we know nothing about the value of the zamindari or the house, but there may have been special reasons for the transfer of this small area of 1 Bigha 3 Biswas and the land may not be of the same quality as that with which we are dealing.

5. Then the learned Judge has referred to a deed of mortgage. The date which he mentions is not the same as that mentioned in Exhibit 13 which is printed at page 59 of our paper book but this seems very likely to be the deed which the learned Judge means because the areas transferred are the same and so is the consideration for the mortgage. We do not think that this document is of much assistance one way or the other in assessing the value of the land with which we are concerned. The only money actually advanced was a sum of Rs. 257-8-0 which was alleged to have been paid to meet the expenses of execution and registration. The remainder of the consideration of Rs. 3,000 was a debt of Rs. 1,277-8-0 due to the mortgagee and certain smaller debts due to others. The property mortgaged consisted of 3 Bighas 10 Biswas of fixed rate tenancy, a one-sixth share in two wells, a half share in a sugar pressing mill, a grove comprising an area of 2 Biswas 10 Dhurs and another block of fixed rate tenancy (1 Biswa 10 Dhurs). Without knowing the value of the mill or the house or the wells or the grove it is very difficult to say what was the value of the fixed rate tenancy which was mortgaged. We may further point out that it may well have been that the

mortgagee who had a claim of Rs. 1,277-8-0 against the mortgagor, had no other means of recovering his money and was consequently willing to accept, for what it was worth, the security of such property as the mortgagor possessed while undertaking to discharge his other liabilities. It was by no means a free transaction from which one could infer that the mortgagee was of opinion that the property was sufficient to secure an advance of Rs. 3,000.

6. The third document is a deed of sale by which 4 Bighas 10 Biswas 1 Dhur of fixed rate tenancy, a grove, some miscellaneous property, a house and two trees were transferred for Rs. 800. The learned Judge was of opinion that this deed suggested that the property transferred by the deed of sale in question was transferred somewhat cheaply but we are not satisfied that any such conclusion is justified. It may be that the grove, the miscellaneous property, the house and the trees were worth Rs. 200 or Rs. 300 and if that was so, 4 Bighas 10 biswas odd of fixed rate tenancy would have been transferred at a rate which, if applied to the property in suit, would produce a price of about Rs. 4,000 which was the price mentioned in the deed. On the whole, we are satisfied that there is nothing to establish that the property was sold at so low a price that the sale must have been (sic) or fraudulent. We may add that, if the sale was fictitious and there was no consideration, it was open to the parties to mention as consideration any amount that they chose. Ram Khelawan, it has been pointed out in argument, was a practising Mukhtar and knew something about the law and it is, therefore, to be assumed, if he had been a party to a fictitious or fraudulent transaction, that he would have taken care that the transaction could not be challenged upon the ground that the consideration for the transfer was insufficient.

7. Another point which has been argued is that the vendors remained in possession of the property. The Plaintiff produced certain witnesses upon this point but they were contradicted by the Patwari who deposed that the vendee had taken possession of all the property. We see no reason to disagree with the learned Judge of the Court below upon the question whether the evidence of the Patwari should be believed. In our opinion, it is worth a great deal more than the evidence of the witnesses produced by the Plaintiff. It has been mentioned that the house which was transferred is still in the possession of the vendors and this is admittedly so, but it is in their possession under the terms of a registered lease executed by Ram Khelawan in their favour and we have no reason to suppose that this lease was also a fictitious document.

8. There was a suggestion that the sum of Rs. 1,200 paid in cash before the Registrar was returned immediately afterwards but this is based on the sole testimony of a Chaukidar and we are unable to believe so improbable a story on the unsupported evidence of a person of this standing.

9. Then it has been suggested that the vendors transferred the whole of their property so that the Plaintiff and other creditors had nothing against which they could proceed. This argument is made against the evidence of the Patwari who deposed that there was a fixed rate tenancy and some other property in the

possession of the vendors.

10. Finally, it was argued that Ram Khelawan was a relation of the vendors and that it might consequently be inferred that he had assisted them in defeating the claims of the Plaintiff and other creditors. The relationship, even if it is considered to be established, is not very close. There is the evidence of certain witnesses that the son of one of the vendors, Badri, was married to the niece of Ram Khelawan's wife, that is, to the daughter of the wife's brother. Ram Khelawan himself deposed that he was not related to the father of the wife of Badri's son and that his wife came from quite another village. He was not cross-examined on this point and we do not think that the evidence produced on the other side is of any great value. We doubt very much whether Ram Khelawan was related to the vendors, but even if he was, the relationship was distant and we do not think that it would justify the conclusion that the sale was fictitious. It has not been suggested that there was any special reason why the vendors and Ram Khelawan should wish to defeat the Plaintiff in particular or any other creditors of the vendors. The result is that we agree with the learned Judge of the Court below that it has not been established that the deed in suit was fictitious or that it was intended to defeat and delay the creditors of the vendors. For this reason alone the appeal must fail.

11. We may, however, mention that we are in agreement with the learned Judge upon the question of law which was raised before him. The Appellant has relied upon four rulings namely, the cases of Sivasubramania Pillai v. Theethisappa Pillai (1923) 47 Mad. 120 : AIR 1924 Mad. 163, Arjun Das Kundu Vs. Marchia Telini, , Babu Lal Sahu Vs. Krishna Prashad, and Jhan Bahadur Singh v. The Bailiff of the District Court of Toungoo (1927) 5 Rang. 384 : AIR 1927 Rang. 263. The point which he wishes to make is that a creditor can prove his debts until such time as the whole of the insolvent's estate has been distributed. It has however, been admitted that the last two cases quoted are not directly in point and that the only case which definitely supports the contention is that of Arjun Das Kundu Vs. Marchia Telini, . The point has been raised because the vendors of the deed of sale which is in question were as we have already said, adjudicated insolvents and no creditor apparently proved any debt before their discharge. The learned Judge of the Court below held that it was too late for any creditor to prove his debt after the discharge of the insolvents and consequently that he has been freed by his discharge from all liability to any of the creditors with the result that it would be useless to give any declaration that the property alleged to have been transferred by the deed of sale was not in fact transferred and was still the property of the insolvents at the time when the insolvency proceedings were continuing. The learned Judge considered that the declaration would be useless because the property would not be available in any event to the Plaintiff or the other creditors of the insolvents.

12. We may mention that in the case with which we are dealing the learned Judge of the Insolvency Court had passed an order that there should be a

summary administration of the estate. Having passed that order it was incumbent upon him at the time when he made the order of adjudication to determine by an order in writing the debts of the insolvents. This he apparently did not do but we are not now concerned with the validity or regularity of the orders and proceedings of the Insolvency Court. It appears that no order in writing was passed at that time and that no creditors at any later time submitted any proof of the existence of their debts. In these circumstances, we do not think that it matters in this case that the administration of the estate was intended to be summary. We have to consider the question whether the creditors, after the discharge of the insolvents, could go to the Insolvency Court for the first time and prove their debts so that the property, if it belonged to the insolvents, could be taken over by the Court and used for the purpose of discharging the liabilities of the insolvents to the creditors. It is set forth in Section 33(3) of the Provincial Insolvency Act (Act V of 1920) that

any creditor of the insolvent may, at any time before the discharge of the insolvent, tender proof of his debt and apply to the Court for an order directing his name to be entered in the Schedule as a creditor in respect of any debt provable under the Act.

13. It seems to us that the meaning of this section is quite clear. It sets forth (1) that a creditor when he applies to have his name entered in the schedule of creditors in respect of any debt must, at the same time, tender proof of his debt and (2) that he must tender his proof and make his application at some time before the discharge of the insolvent. We do not think that it can possibly be read into the terms of this section that a creditor may tender his proof and make his application at any time after the insolvent has been discharged. It is true that some complication is caused by the provisions of Section 64 of the Provincial Insolvency Act. This section is in the following terms:

When the receiver has realised all the property of the insolvent or so much thereof as can, in the opinion of the Court, he realised without needlessly protracting the receivership, he shall declare a final dividend; but before so doing, he shall give notice in manner prescribed to the persons whose claims to be creditors have been notified, but not proved that, if they do not prove their claims within the time limited by the notice, he will proceed to make a final dividend without regard to their claims. After the expiration of the time so limited, or if the Court, on application by any such claimant, grants him further time for establishing his claim, then on the expiration of such further time, the property of the insolvent shall be divided among the creditors entered in the schedule without regard to the claims of any other persons.

14. In the Calcutta case which has been quoted to us and in some measure in the dicta in the Madras case, it has been considered that the provisions of this section justify the conclusion that a claim by a creditor may be proved after the discharge of the insolvent. The learned Judges have relied upon some remarks made in an English case in considering the provisions of the English Bankruptcy

Act which are not in the same form as the provisions in our Provincial Insolvency Act. With the greatest deference to the learned Judges, we should not ourselves approach the construction of an Indian statute on procedure by first considering the methods which are adopted in accordance with another statute in the English Courts. It seems to us that the provisions of Section 33(3) and Section 64 of the Provincial Insolvency Act are not necessarily irreconcilable. It is not laid down in Section 33(3) that the debt of a creditor must be proved before discharge. The rule is that the application to be included in the schedule must be made before that time and that it must be accompanied by proof of the debt. It may be that the proof is not considered sufficient by the receiver and if that is so, there is no reason why farther proof should not be provided after the discharge of the insolvent. The provisions of Section 64, it seems to us, are subject to the rule laid down in Section 33(3). They are provisions for the final distribution of the assets of the insolvent and this distribution may or may not take place before an order of discharge is passed. If the distribution is to take place before such an order, then there is no difficulty. If the distribution is to take place after the order of discharge, it seems to us that there would be no question of proof by any person who had not already made an application supported by such proof as he himself thought sufficient u/s 33(3) of the Act. There is no provision that we can find for any notification of the debt within the meaning of Section 64 except that provided by Section 33(3). In the case with which we are dealing there was no application on behalf of any creditor, as far as we know and there was no order in writing by which the debts of any of the creditors could be established. In our judgment, it would be too late now for any creditor to go to the Insolvency Court and make an application that his debt should be entered in any schedule and should be discharged by the disposal of any property which might now be found to belong to the insolvents. This is our view upon the question of law, although for the purpose of this appeal it is sufficient for us to have held on the facts that the Plaintiff had failed to make out the case which he put before the Court in his plaint. We are confirmed in our view upon the law by the decision of the Rangoon High Court in the case of Bank of Chettinad Ltd. v. Ko Tin AIR 1936 Rang 393. The result is that the appeal fails and it is hereby dismissed with costs.