

(1955) 03 BOM CK 0003
In the Bombay High Court
Case No : O.C.J. Appeal No. 68 of 1954

M.S. Kumar and Co.

APPELLANT

Vs

Official Assignee of Bombay

RESPONDENT

Date of Decision : 30-03-1955

Acts Referred:

Presidency Towns Insolvency Act, 1909 — Section 2, 45, 51, 55, 56

Citation : AIR 1956 Bom 38 : (1955) 57 BOMLR 979 : (1955) ILR (Bom) 941

Hon'ble Judges : Chagla, C.J.;Desai, J

Bench : Division Bench

Advocate : H.D. Banaji, for the Appellant; P.P. Khambatta and P.R. Vakil, for the Respondent

Judgement

Chagla, C. J.

1. This is an appeal against a judgment of Coyajee J. by which he granted relief to the Official Assignee on a notice of motion taken out by him. It appears that one Daulatram gave notice of suspension of payment on 2-8-1951. On 9-8-1951, the creditors presented a petition for adjudication and Daulatram was adjudicated insolvent on 21-8-1951, and the Official Assignee is the assignee of his effects.

Now, prior to the petition and prior to the notice of suspension given by Daulatram, an agreement was entered into on 17-5-1951, between the insolvent and the appellants Messrs. M.S: Kumar and Co. By this agreement the insolvent gave on lease -- to use the language of the agreement -- certain machinery for dyeing, bleaching and printing to the appellants on a monthly tenancy commencing from 1-7-1951, and the lessees agreed to pay Rs. 500 per month as rent. By this agreement the lessor agreed not to demand possession of the property so long as the lessees carried out the conditions of the agreement. Pursuant to this agreement the appellants went into possession and used the machinery and on 30-8-1951, the Official Assignee gave a notice to the appellants to hand over this machinery to him as representing the insolvent. He

gave them a month's time and took out the notice of motion on 26-9-1951, on which Coyajee J. has made the order.

By this notice of motion he claimed a declaration that the agreement dated 17-5-1951, was void and no interest in the property passed to the appellants, and also for an order that the appellants should hand over possession of the machinery etc. to the Official Assignee.

2. The case of the Official Assignee is based upon Section 51, Presidency Towns Insolvency Act, read with Section 9(b). Section 51 deals with relation back and the doctrine embodied in that section is that in certain cases the title of the Official Assignee arises prior to the actual order of adjudication, and in this particular case the case falls under Sub-section (b) which provides that if the insolvent is proved to have committed more acts of insolvency than one, and, if the time of the first of the acts of insolvency is proved to have been committed by the insolvent within three months next preceding the date of the presentation of the insolvency petition, then the title of the Official Assignee relates back to the first of the acts of insolvency.

In this particular case what is urged by the Official Assignee is that although the order of adjudication was made on the act of insolvency committed on 2-8-1951, the transfer made by the insolvent on 17-5-1951, also constituted an act of insolvency, and as that act was committed within three months of the presentation of the petition, that was the available act to the Official Assignee and his title related back to 17-5-1951.

If his title related back to 17-5-1951, then the transfer made by the insolvent on that day was void against the Official Assignee and the goods covered by that transfer in the eye of the insolvency law belonged to the Official Assignee and were available for payment of debts of the insolvent.

3. The first contention urged by Mr. Banaji is that the transaction of 17-5-1951, does not constitute a transfer of the insolvent's property or any part thereof. The learned Judge has taken the view that not only does it constitute a transfer, but it is with intent to defeat or delay the creditors of the insolvent, and Mr. Banaji has not advanced any argument before us that if in fact this transaction constitutes a transfer within the meaning of Section 9 (b) it was not with the necessary intent required by that Sub-section.

Indeed, the facts are so eloquent that it is impossible to contend that any other intent was present except the one referred to in Section 9(b). It may be pointed out that the appellants' firm consists of the son of the insolvent, a son-in-law of the insolvent, and two outsiders who were at some time or other in the employ of the insolvent. Mr. Banaji has urged that the agreement of 17-5-1951, is a hire agreement, that the appellants are the hirers and as hirers they have no interest conveyed to them in the property of the insolvent and the insolvent continues to be the owner of the property.

Therefore, there is no transfer within the meaning of Section 9(b)_ Now, "transfer of property" has been defined by Section 2 and it includes a transfer of any interest in property. Therefore, if by this document the insolvent has transferred any interest in his property to the appellants, he would come within the mischief of Section 6 (b).

What has been strongly emphasised by Mr. Banaji is that notwithstanding this transaction, notwithstanding the execution of this document, the insolvent continues to remain the owner and therefore there is no conveyance of any property in favour of the appellants. Ownership is a bundle of rights and some of the most important rights which an owner enjoys is the right to be in possession of the property he owns, the right to use the property as he likes and to make such profit out of the property as he wants. Once the appellants went into possession of the property in question, the insolvent had no right to possession of that property.

Although the right of the appellants to be in possession was not as owners, they were in juridical possession and they had a right to that juridical possession so long as they paid the rent stipulated under the agreement. The insolvent could not disturb the possession of the appellants and could not deprive the appellants of that possession. Equally; so long as the agreement subsisted, although the insolvent might continue to be the owner, he had no right to make any use of the property which was in possession of the appellants, nor to deal with that property.

Therefore, with regard to certain important indicia of ownership the appellants had an interest in the property and had rights in the property. In our opinion, it is entirely an erroneous contention to put forward that u/s 9(b) a transfer is constituted only when the insolvent ceases to be the owner of the property. If that contention were to be accepted, then a mortgage or a lease created by the insolvent would not come within the ambit of Section 9(b) because both in the case of a lease and in the case of a mortgage the lessor or the mortgagor continues to remain the owner of the property and he only transfers certain rights and interests in the property to the lessee or the mortgagee.

What Section 9(b) requires is that some interest in the property must be transferred by the insolvent. That interest may not be large enough to constitute all the rights of ownership, that interest may be less than the totality of rights which constitute ownership, but so long as the insolvent deprives himself of certain rights or interests in his own property and transfers those rights and interests to someone else, the transaction constitutes a transfer which falls within Section 9. In our opinion, therefore, this particular transaction was a transaction constituting a transfer by the insolvent of interest in his property to the appellants.

4. The second contention urged by Mr. Banaji is that the transaction which is challenged by the Official Assignee is a protected transaction within the meaning of Section 57. The marginal note of Section 57 indicates that what is protected is

bona fide transactions. It is true that, a marginal note is not strictly part of a section, but it is now well established that the Court may look -- and indeed should look -- at the marginal note in order to determine what is the drift of the section or what is being aimed at by the Legislature in enacting a particular section.

It is rather curious that we have partly followed the language of the corresponding English section in enacting this section, and the corresponding English section is Section 49. There also the marginal note is "the protection of bona fide transactions" but the expression "bona fide" does not occur in the section itself. But there is a material difference between our section and the English section in that the proviso to our section lays down that any such transaction, viz., a transaction which claims to be protected, must take place before the date of the order of adjudication and that the person with whom such transaction takes place must not have at the time notice of the presentation of any insolvency petition by or against the debtor._

According to Mr. Banaji the only two conditions required in order to protect the transaction are that it should have taken place before the date of the order of adjudication and the person with whom the transaction takes place should not have notice of the presentation of the insolvency petition. Mr. Banaji says that if these two conditions are satisfied, then the Court must afford to the transaction the protection given by the Legislature.

Under the English Act the notice that is required is not of the presentation of the insolvency petition, but of any available act of insolvency. If the proviso to Section 57 was in the same terms as the English proviso, then no difficulty would have arisen in this case because undoubtedly the appellants had notice of an available act of insolvency which took place on 17-5-1951.

But Mr. Banaji's rather startling argument is that although the appellants might have had notice of the available act of insolvency, inasmuch as they had no notice of the insolvency petition and inasmuch as the transaction took place before the date of the order of adjudication, the transaction is protected.

5. Now, Section 57 has been made subject to the foregoing provisions in the Act with respect to the effect of insolvency on an execution and with respect to the avoidance of certain transactions and preferences, and it is clear, therefore, that Section 57 is subject to Section 51. Mr. Banaji attempted to argue that Section 57 is only made subject to Sections 55 and 56 which deal with the avoidance of voluntary transfer and avoidance of preference in certain cases. Mr. Banaji says that Section 51 does not deal with avoidance of transfer and therefore Section 57 is not subject to Section 51.

In our opinion, Section 51 does deal with the avoidance of transfers because by embodying the doctrine of relation back in that section it makes the title of the Official Assignee prevail against the title of any stranger and permits the Official Assignee by reason of that doctrine to avoid any transaction which was entered

into by the insolvent and which constituted the act of insolvency. In this very case the effect of Section 51 is that the Official Assignee can come to the Court and tell the Court that although the insolvent purported to transfer his property on 17-5-1951, his title relates back to that date and therefore he is entitled to avoid that transfer.

In other words, his contention is and would be that his title must prevail against the title of the appellants and that the goods in the eye of the law were not in the disposal of the insolvent but the goods were available to him for the payment of the debts of the insolvent. Once that is appreciated, then really there is no difficulty in the construction of Section 57, although we may agree, with respect, with Sir Dinshah Mulla in his well known Commentary on Insolvency Act that it would be better if the Legislature had amended the proviso so as to bring it into line with the English law.

It is clear, therefore, that no transaction can be considered a bona fide transaction which itself constitutes an act of insolvency. If the transfer constitutes an act of insolvency, it is liable to be avoided by the Official Assignee, and if it is liable to be avoided by the Official Assignee, Section 57 in terms excludes such a transaction from its protection.

It is unnecessary to consider that aspect of the matter in this case, but it would seem that even transactions which are against the policy of the Insolvency Act would not come within the protection of Section 57 because in no view of the case could such transactions be considered to be bona fide transactions.

6. Mr. Banaji has relied on a judgment of Lord-Williams J in an insolvency matter in the case of -- "Surjya Kumar Naik v. Bejoy K. Hazra" 41 CWN 105 (A). Lord-Williams there considered the scheme of Sections 51, 55, 56 and 57 and he agreed with the learned author Sir Dinshah Mulla that the proviso to Section 57 may result in certain anomalies. Then the learned Judge considered what effect should be given to the expression "bona fide" used in the margin of the section, and what Mr. Banaji relies upon is the ultimate conclusion that the learned Judge reached which, is to be found at p. 110:

"On the whole I think that, if the words "bona fide" are to be incorporated in the section, the only meaning which can be given to them is absence of knowledge of the presentation of an insolvency petition."

Now, with respect to the learned Judge, he seems to have overlooked what he himself considered to be the correct interpretation of the expression "bona fide" in the earlier part of the judgment. He refers to the Allahabad case in Bhagwan Das and Company Vs. Chuttan Lal and Another, where the Allahabad High Court held that acts which are themselves acts of insolvency or fraudulent preferences could not fall within the ambit of Section 55, Provincial Insolvency Act, which corresponds to Section 57, Presidency Towns Insolvency Act, and the learned Judge also refers to the English decisions which he approves and which have laid down that anything done contrary to the policy of the bankruptcy law is sufficient

to show bad faith and to deprive the transaction of the protection afforded by Section 57.

7. Mr. Banaji suggested that the proper procedure for the Official Assignee to have followed was to have made an application u/s 65, Presidency Towns Insolvency Act for cancellation of the contract between the insolvent and the appellants. Now, Section 65 gives the power to the In-solvency Court to rescind contracts where contracts are considered by the Official Assignee to be onerous, but the contracts which the Court can cancel u/s 65 are contracts which were valid when they were made by the insolvent. It is only on the cancellation by the Court that the contract ceases to have force.

The scheme of Section 51 is entirely different. Section 51 is enacted as just pointed out, for avoidance of contracts or transfers when they were entered into or effected. In other words, whereas u/s 51 what the Official Assignee has to satisfy the Court is that by reason of his superior title the transfer made by the insolvent was void, u/s 65 the Official Assignee is not relying upon his superior title, but on the contrary he accepts the position that the insolvent had the right to enter into the contract but because of the nature of the contract he does not wish to be bound any longer by it.

8. There were two other procedural points on which Mr. Banaji relied. One was that the notice of motion had not been taken out by the Official Assignee but was taken out by the petitioning creditors. Now, when we look at the notice of motion, the applicant is the Official Assignee and we see no reason why we should look upon the notice of motion as not taken out by the Official Assignee merely because the Official Assignee has been moved by the petitioning creditors to apply to the Court.

The second point raised by Mr. Banaji is that although in the notice given by the Official Assignee on 13-8-1951, he called upon the appellants to hand over the property on or before 30-9-1951, the notice of motion was taken out on 26-9-1951, prior to the expiry of the period of the notice. Now, the notice given by the Official Assignee is not a statutory notice. It is not incumbent upon the Official Assignee to give any notice at all, and therefore it could not be said that the cause of action arose only after the expiry of the time mentioned in the notice. There is, therefore, no substance in this contention either,

9. The result is that we uphold the view taken by the learned Judge that the notice of motion was well founded and the Official Assignee was entitled to the relief that he sought. The appeal fails and must be dismissed with costs.

10. Liberty to the respondent's attorneys to withdraw the sum of Rs. 500 deposited in Court and to appropriate it towards costs.

11. Appeal dismissed.