(1974) 12 PAT CK 0003

In the Patna High Court

Case No : Miscellaneous Judicial Case No. 2 of 1970

Rani Lalitha Rajya Laxmi APPELLANT

Vs

Chotanagpur Banking Association Ltd. (in liquidation) RESPONDENT

Date of Decision : 03-12-1974

Acts Referred:

Banking Regulation Act, 1949 — Section 45A, 45B, 45D, 45T, 47
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, Order 21 Rule 59, Order 21 Rule 60, Order 21 Rule 61, Order 21 Rule 62

Citation : (1976) 46 CompCas 454

Hon'ble Judges : H.L. Agrawal, J

Bench : Single Bench

Advocate : Prem Lal and Yogendra Mishra, for the Appellant; S.C. Ghose and K.K. Ghose, for the Respondent

Judgement

H.L. Agrawal, J.—The present proceeding arises out of an objection filed by Rani Lalita Rajya Laxmi (hereinafter referred to as "the Rani") in an execution proceeding in respect of a property commonly known as "Padma Palace", which admittedly at one time belonged to her husband, Raja Bahadur Kamakhya Narain Singh (hereinafter referred to as "the Raja"), against whom the Chotanagpur Banking Association Ltd. (now in liquidation) (hereinafter referred to simply as "the bank") has obtained some decrees.

2. The relevant facts are these : During the period 1944 to 1946, the bank made advances to the tune of several lakhs of rupees to the Raja on different securities. On November 3, 1962, in the course of settlement of the list of debtors u/s 45D of the Banking Regulation Act, 1949 (hereinafter referred to as "the Act"), in Company Act Case No. 1 of 1958, the bank obtained decrees for about Rs. 15,00,000 as principal, besides costs, against the Raja. By an order of this court dated the 29th March, 1966, the decree was transmitted to the court of the subordinate judge at Hazaribagh for execution and, accordingly, the official liquidator put the decree in execution in Execution Case No. 7 of 1967, in the Court of the Subordinate Judge, Hazaribagh. At the time the Raja was alive. One

of the properties sought to be proceeded against in the said execution case is an immovable property, commonly known as "Padma Palace", situated near the town of Hazaribagh. This court exercising the powers u/s 45C(3) of the Act, by its order dated April 10, 1970, got the above execution case transferred to itself, which has been registered in this court as Miscellaneous Judicial Case No. 2 of 1970.

3. On the death of the Raja on May 6, 1970, his heirs and legal representatives, including the Rani, were added as parties in the execution proceeding of this court by order dated August 14, 1970. The Rani has filed an application in this court purporting to be u/s 47 and Order 21, Rule 58 of the Code of Civil Procedure, claiming the said Padma Palace as her own property on the basis of a registered deed of gift dated September 28, 1947 (exhibit 2) executed by the Raja, challenging its liability under the decree in question.

4. One of the points raised in the claim application by the Rani was that there had been no attachment of the palace. As this fact was thought to have some bearing regarding the scope of the enquiry by this court, in view of the Patna amendment of Rules 58 and 59 of Order 21 of the Code, on hearing the parties on this question, recorded a finding to the effect on March 30, 1970, that there had been no attachment of the property in question. Rule 59 of Order 21 of the Code has been substituted by an amendment of this court as follows :

"The claimant or objector must adduce evidence to show that at the date of the decree or attachment, as the case may be, he had some interest in, or was possessed of, the property in question."

5. The parties were directed to proceed with the hearing of this matter accordingly and evidence has been led by them. Five witnesses have been examined by the claimant, including herself (on commission), and four on behalf of the decree-holder. Some documents have also been exhibited. I shall discuss the evidence on the record a little later, but would like to dispose of first the question of law that was raised during the course of the arguments.

6. The claimant has preferred her claim on the basis of the deed of gift in her favour executed by the judgment-debtor in the year 1947, on a date subsequent to the incurring of the loans by the Raja, but certainly before the decree was passed against him. Prima facie, therefore, the claimant had an interest in the palace at the date of the decree within the meaning of the provision of Rule 59 referred to above. According to the case of the decree-holder in the rejoinder application, the deed of gift was a sham and fraudulent transaction, having never been acted upon, and the possession of the palace remained all along with the Raja himself and that in order to defraud a large number of creditors, the judgment-debtor created various sham and collusive documents, including the deed of gift in question.

7. A question, therefore, arises as to whether this court in the present proceeding can and should enter into all these complicated questions of benami,

fraud or title elaborately or may examine them only incidentally as an aid to decide the question of the claimant having "some interest" in the property in. order to show that the said interest would mean the possession of the claimant not on account of the judgment-debtor, but on her own account. It was also faintly contended by Mr. Prem Lal that if this court decides the above question elaborately, prejudice might be caused to the claimant, inasmuch as, in that event, she would have produced more comprehensive evidence.

8. The contention regarding prejudice does not appear to have any substance. In view of the clear order dated March 30, 1970, already referred to, it was clearly understood that the claimant had not simply to prove her possession, but her interest in the property, meaning thereby that she had to prove her title and, therefore, all the evidence relating to her title which was considered necessary should have been produced by her, and apparently it seems to have been done.

9. I now propose to decide first the scope of the inquiry to be held by this court. Proceedings for winding up of companies, including banking companies, were previously governed by the provisions of the Indian Companies Act, 1913. With the object of avoiding difficulties to a large number of depositors of a banking company (in liquidation), special provisions for speedy disposal of winding-up proceedings of a banking company were made by introduction of Sections 45A to 45H in Part IIIA of the Act by an Ordinance in the year 1949, replaced by Act 20 of 1950. Sections 45A and 45B introduced by this Part are very comprehensive and give exclusive jurisdiction to High Courts, notwithstanding anything inconsistent thereunder contained in the Companies Act or the Codes of Civil or Criminal Procedure, or any other law for the time being in force or any instrument, having effect by virtue of any such law, to entertain and decide any claim made by or against a banking company (in liquidation) and all matters arising in course of the said winding-up proceeding. Even after the above comprehensive amendment, complaints continued to be received from the distressed depositors and a committee was set up to go into the question and suggest necessary changes in law, procedure and administrative machinery so as to expedite the liquidation proceeding. Accordingly, further amendments were made by Act 52 of 1953.

10. It is now well settled that the provisions of this Act has got overriding effect, notwithstanding anything inconsistent therewith under any other law for the time being in force. Suffice it may be to refer to two authorities of the Supreme Court, namely, Dhirendra Chandra Pal v. Associated Bank of Tripura Ltd. [1955] 25 Comp Cas 19 and Shri Ram Narain v. Simla Banking & Industrial Co. Ltd. [1956] 26 Comp Cas 280 In the first case, it has been observed that the scope of the amending provision was that elaborate proceedings by way of a suit involving time and expense, to the detriment of the ultimate interests of the company under liquidation, were not contemplated and comprehended all sorts of claims which related to or arise in the course of the winding-up. Untwalia J. (as he then was), in a case arising out of this very winding-up proceeding, namely, In Re:

Chotanagpur Banking Association Ltd., in answering a question raised as to whether an insolvency proceeding in the Court of the District Judge filed by some of the proprietors of a debtor-firm could be allowed to continue in that court, held that the Court of the District Judge had no jurisdiction to entertain the insolvency case as the matter relating to the winding-up of the banking company could be entertained and determined only by the High Court, where the liquidation proceeding was pending, as the High Court had got the exclusive jurisdiction to the exclusion of all courts throughout the territory of India to deal with such a matter.

11. By the expression "exclusive jurisdiction", however, it should not be understood that no proceeding can be taken by a court subordinate to the High Court. In my judgment, the, position that obtains from reading the scheme of the Act and the various authorities is that if a decree is transferred for execution by the winding-up court, namely, the High Court, to the civil court in its ordinary civil jurisdiction under the powers conferred u/s 45T, and any objection to the attachment of any property or any claim is put forth in respect of the same, the executing court is competent to investigate and decide upon all objections and claims with the like power, and in all other respects will investigate and decide under the provisions of Order 21 of the Code, and the decision arrived at by that court will be final and conclusive, subject to the result of the suit, if any, instituted under Order 21, Rule 63. Since there is no inconsistency in the provisions of Rules 58 to 63 of Order 21 with that of the provision u/s 45B, the transferee-court can avail of all the provisions of the CPC in enforcing the order by virtue of the order of transfer passed u/s 45T. In support of this view, reference may be made to a Bench decision of the Calcutta High Court in Kartic Chandra Pal v. Noakhali Union Bank Ltd. (In liquidation) [1969] 39 Comp Cas 309 .

12. The claimant or objector has also an alternative remedy to prefer his claim in the High Court itself u/s 45B, and it is not obligatory for him to apply to the executing court under Rule 58 of the Code. If, however, he chooses to take resort to prefer a claim before the High Court itself, the same has to be governed by the comprehensive provision contained in Section 45B of the Act and the High Court will decide the claim against the company finally, either based on law or fact. I find ample support for this view from the two decisions of the Rajasthan High Court; firstly, of a learned single judge in Rameshwarlal v. Pareek Commercial Bank Ltd. [1971] 41 Comp Cas 635 which has been affirmed by a Bench decision in Mossomat Mooli Devi v. Pareek Commercial Bank Ltd. [1971] 41 Comp Cas 625 Orders passed by the High Court have, therefore, been made appealable u/s 45N.

13. In the case in hand, the claim or objection under consideration of the Rani was made in this court on 7th April, 1972, when the execution proceeding had been recalled, as already stated above. The petition of objection, therefore, must be a petition directly u/s 45B of the Act and the provision of Order 21, Rule 58

and Section 47 of the Code mentioned in the said petition is of no consequence. Once this position is clearly understood, there is no difficulty in holding that this court is competent to go fully into the matter and determine the question elaborately as to whether the deed of gift is a sham and fraudulent transaction.

14. In Brahmayya and Co. Official Liquidators, Hanuman Bank Ltd. (In Liquidation) Vs. V.S. Ramaswami Aiyar and Another, , the question that fell for determination before a learned single judge was as to whether under the provision of Section 45B of the Act, the question of the deed of release executed by the debtor in respect of some of his properties in favour of his sons was void against the bank and all other creditors, could be gone into. It was held with reference to Section 53 of the Transfer of Property Act that the debtor must not fraudulently retain any benefit for himself, and if the debtor had executed the release deed in favour of his sons in order to screen the properties from being proceeded against, the matter could be decided by the High Court in this proceeding itself.

15. Having considered the scope of the inquiry in this proceeding, I now proceed to consider the case on its merits. It will be necessary to trace the origin and the history of the loans and debts in question in some detail. The Raja had a current account with the bank at Hazaribagh. On his application, an overdraft facility to the extent of rupees two lakhs was originally sanctioned by the bank for which the Raja had executed a pronote on April 21, 1944, agreeing to repay the amount due under the account with interest at 4 per cent. per annum. Subsequently, the limit was extended to rupees five lakhs and, accordingly, on November 8, 1945, he executed another pro-note on the same terms for the additional sum of rupees three lakhs. On September 24, 1946, a further pro-note for Rs. 35,000 for a temporary extended limit was also executed. The Raja also executed a letter of continuity.

16. In this account there was no other security with the bank except the pro-notes and a letter of continuity taken from the Raja according to the banking system. This overdraft account was operated upon by the Raja and withdrawals and deposits were made from time to time within the sanctioned limit. Subsequently, a sum of Rs. 3,35,020-3-11 was found due according to the balance outstanding on the 31st December, 1948. On the 23rd December, 1949, the Raja partly secured the outstanding balance by executing a registered deed of assignment, assigning his rights to the extent of Rs. 2,00,000 to be received from the Jharkhand Mines & Industries Ltd. payable by the said company, to which document the company was also made a party. The company paid a total amount of Rs. 1,35,000 to the bank out of the said sum of Rs. 2,00,000, but did not pay the remaining sum of Rs. 75,000. A money suit, being Money Suit No. 5 of 1958, was filed by the bank in the Court of the Subordinate Judge at Hazaribagh against the Raja and the said company claiming a decree for Rs. 3,28,374.69, as was found due under this account.

17. The history of the other claim is that the Raja borrowed a sum of Rs.

8,00,000 from the bank on October 15, 1946, from its Hazaribagh office under a pro-note on interest at the rate of 5 p.c. p.a. and 18,304 shares of Messrs. Bokaro & Ramgur Ltd. were pledged simultaneously as security for the said loan. Some of the shares were standing in the name of the Raja himself and some in the names of other persons, the Raja''s nominees. The share scrips of all the shares (except for 200 shares) with blank transfer deeds were also delivered to the bank. Later on, when the market value of the shares declined, the Raja furnished an additional security by executing a registered deed of assignment dated December 23, 1949, in favour of the bank assigning his dues to the extent of Rs. 2,50,000 payable by Messrs. Rajasthan Mines Ltd. to him. This document was also jointly executed by this company. This company, however, did not make any payment under this agreement, but the bank realised a sum of Rs. 60,000 by sale of 3,000 shares on different dates and sent the remaining 15,304 shares to the Bokaro & Ramgur Ltd., for transferring the same in the bank''s name, but for some reason or the other, the company refused to transfer the shares in question.

18. The Raja made only one payment on April 5, 1947, of Rs. 50,000 in cash in this account and for the balance under this account, as confirmed from time to time, another money suit, namely. Money Suit No. 6 of 1958, was filed in the same court by the bank against the Raja and the aforesaid two companies for recovery of Rs. 11,43,013.05 as due on May 30, 1958.

19. Both the aforesaid money suits were transferred to this court in the year 1960, on account of the winding-up proceeding and are pending as Money Suits Nos. 1 and 2 of 1960, respectively. It is for these amounts that the Raja was settled in the debtors'' list in Items Nos. 1A and 1B for the amounts of Rs. 11,62,215.31 and Rs. 3,35,681 by this court, which was affirmed by the Supreme Court also in Civil Appeal No. 770 of 1964, as already stated above. The Raja was examined under Rule 41 of Order 21 of the Code by this court on January 31, 1964, in Miscellaneous Judicial Case No. 3 of 1963. In this Miscellaneous proceeding, this court had to pursue the attendance of the Raja very vigorously and could realise a sum of Rs. 2,00,000 on February 22, 1964, and in spite of all its efforts and undertakings given by the Raja, it could not recover any further sum. . It was only thereafter, that the official liquidator filed the aforesaid Execution Case No. 7 of 1967, in the court of the Subordinate Judge, Hazaribagh, which also was later on transmitted to this court.

20. It has already been seen that the Rani''s claim is based upon the deed of gift (exhibit 2) dated September 28, 1947, and according to her case, she has been in peaceful possession of the palace under the deed, whereby she claims to have acquired absolute right, title and interest in this property. The plea of the official liquidator, however, is that the entire transaction under the deed of gift was sham, the Raja having taken huge amount of loans from the decree-holder and other creditors long before the execution of the deed of gift, started creating a large number of sham and collusive documents with intent to defeat or delay his

creditors. It has been further pleaded that the deed of gift was never acted upon and the Raja himself lived all along in the palace and maintained his cutcherry and offices therein and exercised all acts of possession, including additions, alterations and improvements in the same.

21. In support of their respective cases, five witnesses were examined on behalf of the claimant, namely, the Rani, and four on behalf of the official liquidator. Some documents have also been filed on behalf of the claimant to show that the palace in question was being assessed in her name by the Income Tax and wealth-tax authorities, including some order sheets of certificate cases.

22. I shall now deal with the evidence. Nageshwar Prasad (A.W. 1) is a formal witness. He was in the service of the Ramgarh Raj till September, 1950. He was examined to prove the deed of gift, being himself an attesting witness to the same. The next witness, Tulsi Ram (A.W. 2) is an accountant of the Rani who attends to her Income Tax and wealth-tax cases. According to this witness, the palace was in possession of the Rani, and not of the Raja, and that all the servants of the palace were paid by the Rani, including the chaukidari tax. He, however, admitted in cross-examination that Raja''s mother, son and daughter-in-law, all lived within the same compound, but, in different houses. It has also come in evidence that the Raja has got only one son and that on his (Raja''s) death the Rani would have inherited the property along with her son in due course in her own right.

23. Bindo Ram (A. W. 3) is a care-taker of the palace and be has stated that there were 20-22 employees of the Rani within the palace and that all the employees were paid by the Rani out of her own personal fund and that the palace was in her possession from 1947-48. He also stated that the Raja never held his cutcherry within the palace nor did he make any repair or did anything in respect of the building. He, however, stayed in the palace with the Rani when he used to visit her from Patna.

24. Kumudh Bandhu Gupta (A. W. 4), who is an old man of 70 years, claims himself to be a Kaviraj who had gone inside the palace to see the Rani for her treatment as also for the treatment of sonic of her employees. He stated that the Rani used to meet all the expenses of the treatment and was in possession of the palace. He is a casual witness and his evidence is practically of no consequence.

25. The Rani herself was examined on commission as A.W. 5 in support of her case. From her evidence it appears that she is the daughter of a principal Rana of Nepal of affluent circumstances and he had given sufficient money to the Rani. From her long cross-examination I do not find any substantial material which could reflect upon the genuineness of the deed of gift. She has, of course, admitted that the Raja also used to live in the palace with her whenever he used to visit Hazaribagh. In my opinion, on account of the relationship between the donor and the donee, that, by itself is not of much significance. She has denied all the suggestions thrown to her that it was the Raja who was looking after the

management and upkeep of the palace and spending money for the said purposes or that he was still holding his cutcherry inside the compound of the palace. She has also denied the suggestion that the Raja was indebted to various creditors to the extent of Rs. 40,00,000 and that on that account he had executed the deed of gift with the intent of defeating his creditors. In her cross-examination she has, of course, admitted that some accounts were maintained in her office with respect to her income and expenditure but the same has not been produced.

26. It is well settled that the apparent state of affairs must be taken to be the real state of affairs unless the contrary is proved, the burden of which lies on the party pleading that the transaction was not real or was sham, as in the present case. Mere existence of some suspicious circumstances here and there are not sufficient to prove, what appears apparent or real, to be sham or fraudulent. The evidence must be forceful and conclusive. Suffice it to refer to only one Bench decision of this court in support of this view in Satyadeo Prasad Vs. Smt. Chanderjoti Debi and Others, , which is based upon a consideration of a large number of decisions of the Privy Council and of the Supreme Court.

27. To discharge the above onus and to prove his case, four witnesses have been examined on behalf of the official liquidator in this case. Basudeo Narain (O.W. 1) is the employee of the bank. After stating the history of the loans until the settlement of the debtors'' list, he stated that the Raja used to live in the palace itself and also held his cutcherry there and that he did not part with his possession. In his evidence-in-chief, however, he has stated that "the motive behind executing the deed of gift might be to evade payment of the loans to the bank". He has admitted in his cross-examination that he never went inside the inner compartments of the palace, but had gone 7 or 8 times inside the palace only as an escort of the bank''s van to deliver the money to the building contractor who used to reside in the palace itself in the northern side on one corner and that after 1946, he had gone there for the said purpose only in the year 1950, He has further admitted that there was no construction work going on in between 1947 and 1950 on account of a dispute between the Raja and the contractor. He has further very specifically stated that he had gone inside the cutcherry of the Raja only during the year 1945 or 1946.

28. Serajuddin Ahmad (O.W. 2) is another bank''s employee. He had two occasions to go to the palace; once in the year 1950 as an assistant cashier of the bank to pay some money to Surat Babu and on the second occasion in the year 1955 in connection with the mutation of the name of the bank in respect of village Morram Kalan which the bank had purchased at an auction sale in a decree against the proprietor thereof in 1939 for which an application for mutation had been filed and claims to have met the record-keeper who had told him that since the Raja was staying there at the time, it was not possible to find out the paper and hand it over to him. The other relevant statement that he has made is to the effect that he had heard "that the Raja had executed some

document in favour of the Rani in connection with the palace" and was told "that the aforesaid document had been executed with a view to defraud the creditors". In his cross-examination he admitted that he had learnt about the execution of the aforesaid deed only on the 30th March, 1974, when he came to this court from the papers with the advocate of the bank.

29. The third witness is Wali Mohammad, a peon of the aforesaid Surat Babu, the contractor, and used to carry money to the palace for payment of wages of the labourers working in the Padma Palace and met the Raja frequently in that connection. Through this witness the bank wants this court to believe that the Raja was taking interest and looking after the repair works of the palace. This witness has not stated the period of his visit to the palace. From his answers in the cross-examination it is evident that this witness has no idea of the time or period and he came to depose in this case at the request of the tahsildar of the bank.

30. The fourth witness examined on behalf of the official liquidator is one Peman Ram (O.W. 4) who had worked under a contractor of the Raja in respect of building of a road from Karmatanr to Padma Palace and stated that a sum of Rs. 150 was paid to him by the Raja for this work which was executed 20-25 years before. He also stated that the labourers and masons working therein were also paid by the Raja himself.

31. This is all the oral evidence adduced on behalf of the official liquidator. In my opinion, from the evidence discussed above, it is difficult to come to a conclusion with reasonable amount of certainty that the deed of gift was a sham, transaction. The witnesses examined on behalf of the official liquidator are wholly incompetent and are themselves indefinite even to not seriously assert the claim of the bank. Their evidence that the Raja was also seen on occasions to be living in the palace, where his wife, namely, the Rani was living, is also, in my opinion, of no consequence, inasmuch as this situation must exist on account of their relationship of husband and wife. Similarly, the evidence of the witnesses examined on behalf of the official liquidator that the Raja himself used to supervise the repairs or construction work in the palace and also used to pay himself the wages of the labourers and masons working in the palace even if accepted is equally of no consequence, inasmuch as this the Raja could also do on behalf of the Rani. The heavy burden that lay upon the bank has not been discharged by it and no reliance can be placed on the evidence of these sundry and casual witnesses examined on its behalf to throw away the genuineness of the deed of gift.

32. Coming to the documentary evidence, the bank has filed only four documents. Exhibits A and A-1 are the certified copies of two decrees passed in its favour in the course of the settlement of the debtors'' list and exhibit B is the execution petition itself. These documents have no bearing on the question at issue. I shall advert to the fourth document, which is the certified copy of a judgment (exhibit C) later on.

33. On behalf of the Rani various documents have been filed to show that the palace in question was being included and subjected to Income Tax by the Income Tax department and was also included for assessing the wealth-tax by the wealth-tax department. Exhibits 3 and 3/2 are the Income Tax assessment orders for the assessment years 1957-58 and 1963-64, respectively, and exhibits 3/1 and 3/3 in respect of the wealth-tax for the same periods. From the Income Tax assessment orders it is evident that under the head "Income from house property", Padma Palace was included in the income of the Rani Similarly, under the provisions of the Wealth-tax Act, which came into force in the year 1957, the Padma Palace was included in computing the value of the properties of the Rani herself along with other properties.

34. The contention of Mr. S.C. Ghose, however, was that the assessment orders of the Income Tax department for the earlier period were not filed by the Rani and adverse inference should be drawn against her as the earlier Income Tax returns would have shown that the deed of gift was not acted upon in the previous years, that is, prior to 1957-58 It is difficult to accept this contention. The Raja was settled on the debtors'' list in the year 1962 and the execution case was levied in the year 1967. The claimant, therefore, has rightly produced the two assessment orders, one of an earlier period, that is, for the assessment year 1957-58, when the bank went into liquidation, and the other of the assessment year 1963-64, when the decree was passed. Exhibits 4 and 7 are the certified copies of the order sheets in Certificate Cases Nos. 11 and 31 of 1965-66, which have been filed to show that the Income Tax Officer, Ranchi, had started certificate proceedings against the Rani for recovery of the Income Tax dues and had proceeded against the properties given to her under the deed of gift. Exhibit 5 is the Khatian in the name of the Rani showing details of the plots on which the palace stands. Two other documents, namely, a Chaukidari receipt (exhibit 6) for the year 1970-71 in the name of the Rani, and a certified copy of the decree obtained by the Raja against the aforesaid contractor, Surat Babu and others, are of no particular importance on the question at issue. The claimant has also filed the original order of the assessment order for the year 1947-48 of the Raja on November 29, 1974, with an affidavit explaining the reason of the delay to show that during the relevant period the Raja was possessed of sufficient properties and was a very solvent person. From this assessment order it appears that the Raja was assessed at an income of Rs. 7,23,722 from various other sources, including mines, minerals, forests and considerable income from dividend. The above documentary evidence produced on behalf of the Rani fully supports her case that the deed of gift was fully acted upon and she acquired a complete right, title and interest in the properties given to her under the deed of gift (exhibit 2) and was in possession of the same. The evidence adduced on behalf of the decree-holder to show that the Raja also used to stay in the palace with the Rani when he visited Hazaribagh from Patna or even looked after and supervised the repairs and construction works of the palace is, in my opinion, not sufficient circumstance to come to a conclusion that the transaction of gift was

sham or fraudulent.

35. The relevant period of time to judge the intention of the transferor is the date of the transfer itself. Fraudulent intention of the transferor to defeat or delay his creditors should be on that date, and not whether the creditors haw been defeated since. This decision must depend upon consideration of the entire circumstances surrounding at the time of the execution of the impugned document. Simply because on the happening of some events later on, the creditors are, defeated, will not be a circumstance to relate back the same to the date of the execution of the impugned document and to take a view that on the date of the transaction there was such an intention. In support of this view reliance may be placed upon a Bench decision of this court in Mt. Bibi Kubra Begum and Another Vs. Jainandan Prasad and Others, .

36. Mr. S.C. Ghose also advanced an argument that the Rani herself was a very rich lady, having received sufficient wealth from her father, and had only one son and, therefore, in any event, she was entitled on the death of the Raja to a half share in his estate. According to him, in the ordinary course of business, therefore, there was no particular necessity at all for executing a deed of gift by the Raja to the exclusion of the son in favour of the Rani and as such the transaction must be held to be a sham transaction. In order to strong then his contention learned counsel placed reliance upon the certified copy of judgment delivered by the Subordinate Judge, Hazaribagh, in Title Suit No. 122 of 1950 (etc). This suit was filed by the State of Bihar against the Raja and others for various reliefs. The subordinate judge had occasion to consider in this judgment the various transactions of transfers and alienations by the Raja, and in the course of that he has come to a finding that the Raja was in the habit of creating false and sham transactions (vide paragraphs 262-265 of the judgment). No reliance can he placed upon this observation of the learned subordinate judge in his judgment for various reasons. This judgment is still sub judice in First. Appeal No. 191 of 1974, pending in this court. The Rani was not a party to that suit, and if a person has been held to have executed some sham document, for that reason all the documents executed by such a person cannot be held to be sham and fraudulent. Each transaction has to be judged and considered in accordance with the facts and circumstances specifically relating thereto and on the materials and evidence brought on the record in this regard. True it is that fraudulent motive or design is not capable of direct proof in most cases and it can only be inferred. In the very nature of things, fraud is secret in its origin or inception and in the means adopted for its success. Still it is well settled that, however suspicious a transaction may be, the court''s decision must rest not upon suspicion, but on legal grounds established by legal testimony (vide Mina Kumari v. Bijoy Singh, [1917] 40 IC 242 . The Judicial Committee in the case of Rai Bishun Chand v. Mst. Asmaida Koer ILR [1884] All 560 was considering a case where a Hindu father made a gift of the ancestral property to his grand-children with the assent of his son to screen the property from Subsequent creditors. It was held in that case that such an intention was not fraudulent and

may be carried into effect by honest means. In the case of Maya Debi and Others Vs. Sm. Rajlakshmi Debi and Others, a Bench of the Calcutta High Court was considering the genuineness of a gift made by a father in favour of his son at a time when the donor was heavily in debts. Evidence had come on record that the donee was mutated and rents were paid by him. It was held that unless it was established by evidence that the payment was made by the donee as an agent acting on behalf of the donor, the deed must be held to be valid and the existence of indebtedness was not conclusive to prove that the gift was a benami transaction.

37. In support of the argument Mr. Prem Lall placed reliance upon two more decisions of the Judicial Committee, namely, AIR 1927 22 (Privy Council) and AIR 1932 13 (Privy Council) to show that in the case of a gift by a husband to his wife, where other evidence, such as the handing over of the deed of gift by the husband to the wife and mutation of her name had come, but the other evidence showed that the husband continued to manage the property himself or used to live with his wife, would not invalidate the gift as the act of the husband in reference to the property must be regarded as being on his wife''s behalf and that in order to make the gift invalid in law, it did not require an actual vacation by the husband and actual taking of possession by the wife. No doubt, both the cases were under the Mahomedan law, but I venture to say that this principle must apply with equal force also in the case of a gift by a Hindu husband.

38. It is not disputed, and is also evident from the materials on the record referred to above, that during the period 1944-45, when the loans were incurred, the Raja was in affluent circumstances and he was so also when the deed of gift was executed. No evidence has been led in this case to show that he was in an embarrassed circumstance on account of the loans incurred by him beyond his means. The facts which militate against the fraudulent intention of the transaction in question are, in my view, very much glaring and the evidence adduced on behalf of the official liquidator is so poor, vague and scanty that it does not go beyond creating a merely thin shadow of suspicion. In the overdraft account also, on December 23, 1949, much after the execution of the deed of gift, the Raja had secured the outstanding dues by executing a registered deed of assignment of his right to receive money from the Jharkhand Mines & Industries Ltd. to the extent of Rs. 2,00,000 and the company did, in fact, pay Rs. 1,35,000 on account of the said assignment.

39. The second loan of Rs. 8,000 was also properly secured by pledging more than 18,000 shares of Messrs. Bokaro & Ramgur Ltd., which the bank had willingly accepted as a marketable and valuable security. Even three years thereafter, that is, two years after the deed of gift, when there was depreciation in the value of the said securities, the Raja furnished additional security to the extent of Rs. 2,50,000 by executing a proper registered deed of assignment on December 23, 1949. Rs. 60,000 was realised by the bank by sale of 3,000 shares only. It is not the case of the official liquidator that the said securities were

bogus. True it is that subsequently the bank failed to realise its dues out of the securities, but that is an event which had taken place several years after the deed of gift over which the Raja had no control. The period of time with respect to which the intention to execute this document is concerned, that is in 1947, the bank was sufficiently secured and securities were furnished and some payments were also made for several years subsequent to the execution of the deed of gift. In my opinion, it is evident that if things would have gone well, the bank might have succeeded in realising its dues from the securities and various other valuable properties of the Raja himself and there could be no possible reason for him to think that the bank might have to fall upon the properties in question for the realisation of the loans which were sure to remain unsatisfied out of the securities or otherwise. There seems to have been a complete turnover in the situation on account of the vesting of the estate of the Raja on the enforcement of the provisions of the Bihar Land Reforms Act and the attitude of the two companies whose securities were furnished earlier.

40. In view of the principles laid down in the above authorities, I feel inclined to take the view that the circumstance that the donor was indebted in the year 1947 and was also found living with the donee at times, who is none else than his wife, or even that he looked after the repairs of the palace sometimes, might be suspicious circumstances against him, but were not so coercive and conclusive as to overthrow the various other circumstances appearing in this case in support of the genuineness of the transaction.

41. Thus, having considered the entire case in all its aspects, the weight and worth of the evidence adduced by the parties in support of their case, the contentions raised by their learned counsel and the principle laid down in the various authorities cited at the Bar, in my considered opinion, the official liquidator could not successfully discharge the burden of proof that lay upon him to establish that the deed of gift was a sham transaction and the so-called elements of suspicion that have been suggested on his behalf are not sufficient to hold that the deed of gift was a mere cloak, and not real.

42. I would, accordingly, allow the application of the Rani and hold that the official liquidator is not entitled to proceed against the Padma Palace in execution of the decree against the Raja. In the circumstances of the present case, however, I shall make no order as to costs.

