

(1935) 06 CAL CK 0028
In the Calcutta High Court

Ratan Chand Jahwirlal and Another

APPELLANT

Vs

Pramatha Nath Guha and Others

RESPONDENT

Date of Decision : 20-06-1935

Acts Referred:

Penal Code, 1860 (IPC) — Section 390

Citation : AIR 1935 Cal 650

Hon'ble Judges : Nasim Ali, J;Henderson, J

Bench : Full Bench

Judgement

Nasim Ali, J.—This appeal arises out of a proceeding under the Provincial Insolvency Act. Takatmull Nahata and Prithiraj Nahata, who were carrying on business under the name and style of Firm Mulcanchand Chauthumull of Calcutta, (respondents 2 and 3, hereinafter called Nahatas) used to advance goods on credit to Akshoy Chand, Prithiraj Begwami (respondents 4 and 5, hereinafter called Begwanis) who had been carrying on business from a long time as general merchants under the name and style of firm Akhoy Chand Prithwiraj Begwani at Sherpur and Jhinaigati in the District of Mymensingh. By the end of 1985 Sambat, corresponding to March or April 1928. the dues of the Begwanis to the Nahatas having exceeded Rs. 21,000 the latter refused to supply goods to the Begwanis on credit until their dues were paid off. The Begwanis were unable to pay off the debt of the Nahatas with the result that the dealings of the Nahatas with the Begwanis came to an end by the end of 1985 Sambat. The Begwanis then approached the appellants (hereinafter called Suranas) who agreed to advance goods on credit. The Begwanis however did not then disclose to the Suranas their indebtedness to the Nahatas. During the years 1986 and 1987 Sambat the Begwanis carried on business with the Suranas. They made certain payments to the Nahatas from time to time during these years. At the end of 1987, that is, the middle of April 1931, the Begwanis became indebted to the Suranas to the extent of Rs. 18,000, and the debt due to the Nahatas was reduced to Rs. 16,000 by payments made in 1986 and 1987 Sambat. At that time the Suranas came to know for the first time that the Begwanis were heavily

indebted to the Nahatas. Certain letters were written to the Begwanis by the appellants' officer Poune Chand Sethia who brought about the dealings of the appellants with the Begwanis. On 19th May 1931, the Begwanis executed a simple mortgage bond in respect of the buildings and land of their firm in the district of Mymensingh in favour of one of the Suranas for a consideration of Rs. 2,000 and sold to the Suranas their stock-in-trade in, their shops and the outstanding debts due to them for Rs. 4,000. The goodwill of the firm however was not sold. On 4th June 1931 the Nahatas filed a suit against the Begwanis in the Bikanir High Court for recovery of Rs. 16,667 odd and obtained an order for attachment before judgment of all the immovable properties of the Begwanis in Bikaner State and also a mortgage bond in favour of one of the Begwanis. This suit was decreed on confession on 21st July 1931. The Begwanis on the next day, that is, on 22nd July 1931, assigned the attached mortgage bond in favour of the Nahatas. In the meantime, on 6th June 1931, Poune Chand Sethi removed the goods purchased by the Suranas from the mortgaged premises to another shop. A criminal case was thereupon started against him at the instance of the Begwanis u/s 390, I.P.C. On 26th June 1931, the Suranas instituted a suit in Sujanagar Court within the Bikanir State against the Begwanis and attached before judgment the immovable properties of the Begwanis which were already attached by the Bikanir High Court. On 28th June 1931 Akhoy Chand Begwani was arrested before judgment at the instance of the Suranas. He was however released on security on 1st July 1931. On 8th August 1931 the Nahatas applied to the District Judge of Mymensingh for adjudging the Begwanis insolvents under the provisions of the Provincial Insolvency Act. On 26th September 1931 the adjudication order was made and respondent 1 was appointed receiver. On 2nd January 1932 the Suranas applied for annulment of the order of adjudication. That application however was rejected on 25th January 1932. The schedules of creditors in which the names of the Nahatas and Suranas only were entered was prepared on 17th March 1933. On 28th March 1933 the receiver applied to the learned Judge to annul the transfers in favour of the Suranas. The latter filed their objection to the said petition on 11th May 1933. On the same day the Suranas filed an application before the Judge for expunging the debt of the Nahatas from the schedule. The Nahatas filed their objection to the same on 29th May 1933. On 2nd June 1933 the receiver filed another application before the learned Judge for annulling the assignment of the mortgage bond in favour of the Nahatas and for certain other reliefs. The learned Judge heard all these applications together and by his order dated 22nd January 1934 the transfers in favour of the Suranas were annulled u/s 54 of the Act and the debt of the Nahatas was reduced to Rs. 500. He however did not pass any definite order so far as the application of the receiver against the Nahatas is concerned. Hence the present appeal by the Suranas. The Nahatas have also filed a cross-objection.

2. I shall deal with the application of the Suranas for expunging the debt of the Nahatas from the schedule u/s 50 of the Act. The case of the Suranas is that the claim of the Nahatas was fully satisfied on 22nd July 1931 by the assignment of

a mortgage bond and by payment of Rs. 4,000 in cash and gold to them by the insolvents in pursuance of an arrangement. (His Lordship then examined the evidence on this point and held that the appellants had failed to prove that the claim was fully satisfied and proceeded). Now I will come to the application of the receiver for annulling the transfers in favour of the Suranas. It appears that the receiver submitted a report to the learned Judge on 23rd December 1932 in which he stated that these transfers were benami transactions. The learned Judge however on 8th March 1933 directed him to apply under Sections 53 and 54, Provl. Inso. Act, for annulling these transfers. On 28th March 1933 the receiver, as has been already stated, applied to the learned Judge to annul these transfers under Sections 53 and 54 of the said Act. The objections to the said petition were filed by the Suranas on 11th May 1933. On 29th June 1933 the receiver wanted to amend his application by inserting another ground of attack, namely that the transactions were benami transactions. This amendment was allowed by the Court. Additional written statement was filed by the Suranas on 8th July 1933 and two additional issues were framed on that day. The new ground of attack however was not pressed by the receiver before the learned Judge though the insolvents whom he examined as witnesses stated that the transfers were mere benami transactions. It was also not pressed before us by the learned Counsel for the receiver.

3. As regards the receiver's prayer to annul the transfers under Sections 53 and 54 of the Act the matter stands thus: The allegations of the receiver in connexion with his case u/s 53 are contained in the second paragraph of his petition. His case apparently is that the Suranas were not purchasers as in good faith as they purchased the stock-in-trade and other assets of the insolvents' business for Rs. 4,000 although the real value of the goods sold was about Rs. 20,000. The Suranas denied these allegations in their petition of objection. When the matter came up for hearing before the learned Judge the Suranas wanted to adduce evidence about the value of the goods purchased by them, but the learned Counsel appearing on the other side objected to the taking of any evidence on the question of valuation on the ground that it was immaterial. The learned Judge therefore did not allow the Suranas to give any evidence about the valuation. The receiver also did not give any evidence on this point. It further appears from the judgment of the learned Judge that Dr. Sudhish Ch. Roy, who admittedly appeared before the learned Judge for the receiver as well as the Nahatas, and who also appeared before us on behalf of the receiver, argued the case before the learned Judge on the footing that the transactions were only fraudulent preferences within the meaning of Section 54 of the Act. Under these circumstances the learned Judge proceeded to consider whether the transactions in question were fraudulent preferences within the meaning of Section 54, Provincial Insolvency Act, which is in these terms:

Section 54.-(1) Every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor,

with a view to giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the receiver and shall be annulled by the Court; (2) this section shall not affect the rights of any person who in good faith and for valuable consideration has acquired a title through or under a creditor of the insolvent.

4. It is admitted in this case that there had been preference in fact of the Suranas over the Nahatas by these transfers. It is also admitted that at the time of the transfers, the insolvents were unable to pay their debts in cash and the transfers were effected within three months from the date of the presentation of the insolvency petition. The dispute between the parties is about the view or object which led the insolvents to make these transfers. Now, in the case of *Sime, Darby & Co. Ltd. v. Official Assignee of the Estate of Lee Pang Sing* 1923 PC 77, their Lordships of the Judicial Committee observed as follows:

The question to be determined is one of fact was the dominant motive actuating the debtor in making the transfer a desire to prefer the particular creditor or was it of a different character? As the solution of this question involves an inquiry into the state of a man's mind, and as it must very seldom be the case that there is direct evidence on the point, the decision generally depends on the inference properly to be drawn from the circumstances attending the transfer as established by the evidence. A word or two must be said on the onus of proof. In their Lordships' opinion, the onus is on the assignee; he has to show that the case is within the statute. A good deal was said in argument as to the shifting of the onus at particular points in the development of the case, but when all the circumstances have been ascertained so far as the parties have thought fit to ascertain them, discussion on this point becomes immaterial and the decision must be come to on the whole of the circumstances so ascertained, and the question of onus only becomes important if the circumstances are so ambiguous that a satisfactory conclusion is impossible without resort to it.

5. In *Smith v. Pilgrip* (1876) 2 Ch D 127 it was observed:

A debtor must not of his own mere motion, without pressure or application, give a security to a creditor on the eve of bankruptcy, and if he does, that is a fraudulent preference. But if there be any pressure or negotiation for a security on the part of the creditor, then the fact that the creditor knows the debtor to be in embarrassed circumstances is no objection to the validity of the security.

6. In this case the receiver examined the insolvents to prove what was their intention in effecting these transfers. (After examining the evidence of Akshoy Ch. Begwani, his Lordship proceeded.) The learned Judge has observed that the evidence in this case does not show satisfactorily that at that time the insolvents expected any immediate danger from the Nahatas. The real danger to their business at the time came from the Suranas who were threatening them to sue unless some arrangement was made for their money. The arrangement agreed

upon at first was that all the properties of the insolvents would be transferred to the Suranas and that they would continue to advance goods to them as before, provided the business was carried on under a new name. The insolvents however did not agree to transfer the Bikanir properties and to change the name of their firm. They thought that if all the properties were transferred to the Suranas and the business were not carried on under the old name, the Nahatas would start proceedings against them as soon as they would come to know of the transfers as well as the change in the name of the firm and would bring about the ruin of the firm. Under these circumstances they thought that the best course was to transfer a portion of their property in favour of the Suranas to induce them to stay their hand for the time being. They therefore executed a mortgage of their immovable properties in Bengal and did not sell them outright. They did not sell their Bikanir properties. They did not sell the goodwill of the business. The evident object was to relieve themselves from the pressure of the Suranas to carry on their business as before under the old name and to pay the creditors gradually. The very fact that they transferred only a portion of the properties which has not been shown to be a substantial portion of their assets would go to show that they were not actuated by any feeling of bounty towards the Suranas. They simply did what their self-interest dictated them to do, namely to make the best possible arrangement under the circumstances for saving their business.

7. The learned Advocate-General placed much reliance upon certain passages in the evidence of Poune Chand to show that immediately before the transfers in question the Suranas refused to advance goods on credit to the insolvents and consequently the insolvents knew that they could not continue their business and their dominant motive therefore could not have been as suggested by the Suranas. But the fact remains that the insolvents did not transfer the goodwill of their firm. They did not sell the shop buildings. They still entertained the hope of continuing the business even if the Suranas were unwilling to advance any further goods to them on credit for the time being. It may be that they were hoping against hope. Poune Chand in his evidence stated as follows:

On the day of execution of the two documents Akshoy Chand said that he would not start a new firm; that he would sell the Bikanir properties and so settle the claims of both Suranas and Nahatas; that the firm Akhoy Chand Prithwiraj Begwani would continue to do business.

8. If the Suranas immediately before these transfers refused to advance goods that would not help to create a desire in the insolvents to prefer them. The refusal of the Suranas to advance goods immediately before the transfers naturally caused disappointment to them and could not therefore lead them to entertain feelings of bounty towards the Suranas. The insolvents stated that their main object was the saving of their business. The receiver failed to prove any circumstances which would go to show that the motive was something else. The evidence given by the Suranas also does not establish that the dominant motive was a desire to prefer them. The facts and circumstance of this case indicate that

in making these transfers the insolvents were not actuated by any desire to prefer the Suranas.

9. The learned Counsel appearing for the receiver as well as the Advocate General appearing for the Nahatas pressed for a remand for a finding of the learned Judge on the question whether these transfers were hit by Section 53, Provincial Insolvency Act. I have already indicated that they did not press their cases u/s 53 before the learned Judge and they did not allow the Suranas to adduce any evidence on this question. Under these circumstances it would not be fair to allow the receiver to adduce fresh evidence in this case in support of the allegation that the properties were sold at a very inadequate price which certainly would be good evidence to show want of good faith on the part of the Suranas. The learned Advocate-General also attempted to show from the materials on the record that the Suranas were not transferees in good faith. There is no reliable evidence on the record from which it can be said that the goods were sold at a very inadequate price. From the petition of the Receiver it is clear that the receiver relied on this ground for the purpose of showing that the Suranas were not transferees in good faith. No other fact was alleged in the petition in support of the receiver's claim for annulment of the transfers u/s 53. There is nothing also on the record to show that by the transfers in question a substantial portion of the assets of the insolvents became unavailable to the Nahatas.

10. The mere fact that they secured a mortgage of a portion of the insolvent's property and a sale of certain goods and certain outstanding debts for satisfaction of their just dues would not go to show that they were not transferees in good faith. It is not disputed and it cannot be disputed that the onus is upon the receiver to prove the want of good faith. The receiver as I have already stated did not adduce any evidence in support of his case. The evidence adduced by the Suranas indicates that though originally they wanted a transfer of all the properties of the Suranas, ultimately they agreed to be satisfied with the transfers under discussion. The Suranas evidently agreed to that arrangement simply to enable the insolvents to carry on their business and, if possible, to pay of their debts gradually. It may be that the insolvents were hoping against hope but that does not necessarily go to show want of good faith on the part of the Suranas. They were quite willing to accommodate the insolvents for the time being and not to ruin their business provided some security was given for their debt. In these circumstances I am not prepared to hold that the receiver in the present case has succeeded in establishing want of good faith on the part of the Suranas.

11. The application of the receiver for annulling the transfers in favour of the Nahatas and for reduction of their debt now remains to be considered. It appears however that this application was not abandoned by the receiver before the learned Judge. The learned Counsel appearing for the receiver stated that the receiver did not abandon this petition and that he wanted to press it. The learned

Judge however did not consider this application at all, as he was of opinion that the claim of the Nahatas was fully satisfied by the assignment and the payments which were alleged to have been made by the insolvents to the Nahatas. The result therefore is that the application of the receiver remains undisposed of. Under these circumstances the only course left is to direct the learned Judge to dispose of the application according to law.

12. The result therefore is that both the appeal and the cross-objections are allowed in part. The application of the receiver for annulling the transfers in favour of the Suranas is dismissed. The application of the Suranas for expunging the debt of the Nahatas is also dismissed and the learned Judge is directed to hear the application of the receiver filed on 22nd June 1933 according to law. Parties will bear their costs throughout. The Nahatas, however, will recover from the Suranas half of the costs of the interpreter which have been paid by them in the trial Court.

Henderson, J.

13. I agree that both the appeal and the cross-objection must be allowed. The third application which was one by the receiver against the Nahatas has not been disposed of with the result that none of the parties interested are in a position to appeal. In those circumstances the only reasonable course open to us is to direct the learned Judge to dispose of it according to law. The subject-matter of the cross-objection is the application filed by the Suranas against the Nahatas in which they contended that nothing is due from the insolvents to the Nahatas and that the name of the Nahatas should be removed from the schedule of creditors. The learned Judge decided this application in favour of the Suranas with the result that he came to the conclusion that the entire claim of the Nahatas had been satisfied on adjustment before the petition for insolvency was filed; further inasmuch as the adjudication order was made on a petition filed by the Nahatas, he held that by res-judicata a debt of Rs. 500 must have been due when the petition was filed. The result was that while he held that in fact nothing was due to the Nahatas, he held that by res-judicata Rs. 500 was due to them. My learned brother has pointed out the difficulties of attempting to reconcile the story of full satisfaction with the conduct not only of the Nahatas but also of the insolvents themselves. When the Suranas put forward such an improbable story I should require very cogent evidence supported by witnesses whose trustworthiness could not seriously be challenged, before I could agree to accept it. Now when both the creditors and the debtors say that a claim has not been settled, it is a very strong thing for a third person, who knows nothing about it, to come and say that in fact it was settled. This is what the Suranas however attempted to do in this application and they have attempted to establish it by evidence of a most flimsy character. The story is that a claim of about Rs. 18,000 had been settled in full by the assignment of a mortgage for Rs. 3,000 by payment of Rs. 2000 in cash and by transfer of gold to the value of another Rs. 2,000. A certain amount of evidence to prove the transfer of the gold was

produced. There was practically no evidence to prove payment in cash and the assignment of the mortgage is not disputed. One witness was examined to prove the alleged adjustment.

14. Now the receiver took quite a different view with regard to these transactions. He never contended that the claim of the Nahatas had been settled in full. His case was that they had not given credit for a sum of Rs. 4,000 and he has asked that their claim be reduced to that extent. That question is the subject matter of the application which is still undisposed of and it would clearly be most undesirable if we were to express any opinion with regard to the evidence on the point; fortunately it is not necessary to do so. Mr. Bose argued that if we were to accept the evidence that ornaments, the value of which has not been properly ascertained, were melted down and the gold handed over to the Nahatas, we ought to draw from that the conclusion that the story of full settlement is true. I have no hesitation in rejecting such an argument. If evidence of a part payment is to be accepted as evidence of settlement in full, it would be unnecessary to prove payment of cash or transfer of gold. It might just as well be argued that the admitted assignment of the mortgage was itself proof of the adjustment. It is obvious that in order to succeed on this application, the Suranas must do one of two things. They must either prove that the claim of the Nahatas has been paid in full or they must prove that the Nabatas agreed to accept a smaller sum in full satisfaction. They do not even pretend that the claim was paid in full and the evidence to prove adjustment is transparently worthless.

15. The learned Judge relied upon the evidence of the goldsmiths. That evidence was certainly important in dealing with the receiver's application; but with great respect to the learned Judge I must say that he has omitted to notice that mere evidence of a part payment cannot possibly support an inference that the claim has been fully settled. The evidence to prove this rests upon the deposition of Mohipal alone; he is a man of the Suranas and is clearly not independent. He does not even pretend that he has any personal knowledge of the making of the settlement or what the terms agreed upon were. He merely proves a statement by the insolvent Prithwiraj to the effect that the claim had been fully settled by assignment of the mortgage bond, payment of Rs. 2,000 and transfer of some gold ornaments, the value of which was not mentioned. Now it is quite clear that if this, the statement by the insolvent, was to the effect that the claim of Rs. 18,000 was settled at Rs. 7,000 it would not be admissible in evidence at all. On the other hand, if it was meant to mean that the assignment of the mortgage, cash and the ornaments were of sufficient value to discharge the claim in full, it is quite inconsistent with the appellants' case.

16. Prithwiraj himself has given evidence that the story is entirely false and that the claim was never settled. The appellants therefore seek to establish their story of an adjustment by the statement of a man who, if Mohipal was speaking the truth, made one statement to Mohipal and an absolutely contradictory statement on oath in Court. It is quite obvious that evidence of this kind cannot

be accepted as sufficient to establish the absurd story which the Suranas have asked us to believe.

17. My learned brother has very fully dealt with all the circumstances which have to be considered in dealing with the appeal and it will not be necessary to say very much. The question for our determination is mainly whether the learned Judge was right in annulling the transfers in favour of the appellants as a fraudulent preference. The receiver was directed to enquire into the matter and he came to the conclusion that the transfers were not transfers at all, but mere benami transaction, the properties still remaining with the transferors. On receipt of the report the learned Judge directed the receiver to file an application under Sections 53 and 54 which he accordingly did. At a later stage he amended his petition by asking for a declaration u/s 4, in the event of it being found that the transactions were benami. At the time of the trial he produced evidence to prove that the transactions were sham transactions. He produced no evidence to prove that the transactions were liable to be annulled under Sections 53 and 54. If the learned Judge had accepted the evidence, he would certainly have been justified in giving the receiver a declaration to the effect that the transfers were benami, that the property was still the property of the insolvents and that he was entitled to take possession of it. But inasmuch as there was no evidence at all to support the alternative and the inconsistent application, it should have been then and there dismissed. The learned Judge held, that the transactions were not benami, but that the transfers were void u/s 54. The result is that the receiver in this Court is in a very difficult position. He does not contend that the transactions were benami and he offered no evidence to support the finding of the learned Judge. All that he has been able to do is to attempt to point out here and there some passages in the evidence given by the appellants' witnesses and ask us to say that the case is really one of fraudulent preference.

18. For some years the insolvents carried on business in Sherpur which was financed by the Nahatas in the sense that they supplied articles on credit. As time went on, the position of the insolvents became difficult and the Nahatas pressed for payment. The result was that the insolvents ceased to carry on business with the Nahatas and instead secured goods on credit from the Suranas. They entirely suppressed the fact that they had a debt of a considerable sum due to the Nahatas. It is therefore not surprising that a crisis arose when the Suranas suddenly discovered that the debts of the Nahatas had not been paid. It is only natural that on coming to learn of this, the Suranas should insist that something must be done and this discovery was in fact the proximate cause of these transfers; thus there can be no question that the transfers were made under pressure.

19. I am also satisfied that the motive of the insolvents was to save their business. There is no reason why they should have preferred to pay the Suranas rather than the Nahatas and the only explanation of the transfers is that they were doing so in the interest of their business. The actual transfers were the

result of somewhat protracted negotiations. Not only is there the evidence of Poune Chand, but there are also letters which were written by Poune Chand while the negotiations were actually going on. It is perfectly clear from those letters that the Suranas were not particularly anxious to supply goods on credit, but they were willing to do so provided the insolvents were unsuccessful in getting goods from anybody else; not only were they willing, but they did actually do so. It is thus clear that the Suranas were also of opinion that the best way of getting their dues was to insure that the business of the insolvents should go on, if possible.

20. There is only one fact which would suggest that these transactions were not genuine. It may be said that the transfer of the stock-in-trade was a peculiar method of helping a business to carry on. But while this factor might support the receiver's case that the transactions were benami it certainly would not support a case of fraudulent preference. My learned brother has dealt with this matter and I need only shortly say that the goodwill of the business and the premises were not transferred. It was undoubtedly the intention of both the Suranas and the insolvents that the business should be carried on and neither of them had the slightest idea that an insolvency petition was going to be filed. It was this action of the Nahatas and not the action of the Suranas or insolvents that brought the matters to a head. I am therefore clearly of opinion that the transfers were made by the insolvents under pressure in order to save their business and that the receiver's application ought not to have been allowed.

21. On behalf of the Nahatas the learned Advocate-General asked us to annul the transfers u/s 53. We are not prepared to say that such a case has been made out. The circumstances in connexion with these, transfers which we have already indicated, in no way suggest that the Suranas were guilty of bad faith. The receiver's application was based upon an alleged inadequacy of price: This clearly would not affect the mortgage in the slightest degree. The Suranas wanted to produce evidence to show that they paid a fair and proper price. They were not allowed to do so and there was a petition by the other side that the price was immaterial. There can be no question that a case under S, 53 was abandoned at the trial and there is absolutely no evidence on the record which would entitle us to annul the transfers on that ground.