(1937) 10 BOM CK 0020

Bombay High Court

Case No: Second Appeal No. 93 of 1936

Balubhai Mohanlal		APPELLANT
	Vs	
Kalyanji Nichhabhai		RESPONDENT

Date of Decision: Oct. 6, 1937

Acts Referred:

- Provincial Insolvency Act, 1920 - Section 53, 55

Citation: AIR 1938 Bom 449 : (1938) 40 BOMLR 884

Hon'ble Judges: Rangnekar, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Rangnekar J.

1. This appeal arises out of an application made by the receiver of the estate of one Mohanlal who had been adjudged insolvent on February 23, 1929, on his own application made on August 7, 1928. Theobject of the application was to set aside a partition of the joint family estate effected by Mohanlal and his four minor sons on January 4, 1927, u/s 53 of the Provincial Insolvency Act.

2. The learned First Class Subordinate Judge held that the onus of proving that the partition was not made in good faith, or that there was no consideration for it, was upon the receiver. He then considered the evidence led by the receiver on this point. Three witnesses were examined on behalf of the receiver, one of them being the insolvent himself. The insolvent stated in his evidence that as he wanted to do satta business and had lost eight to ten thousand rupees and wanted money to do business, his wife and some of his relatives intervened in the matter in order to prevent him from ruining his sons by his business and persuaded him to partition the family property. Accordingly, a partition deed was executed, his separated brother Nanabhai acting as guardian on behalf of the minor sons. There is nothing, therefore, in this evidence to show that there was any want of good faith either in

the guardian or in the transferees. The remaining two witnesses had no knowledge of the circumstances under which the partition deed was executed. It seems to me to be clear that, upon this evidence, the learned Judge ought to have non-suited the receiver at once. But he proceeded to consider further the evidence led on behalf of the minors and he came to the conclusion that the partition was a bona fide partition and that there was no fraud and it was for good consideration and that the transaction was real and not a mere cloak for retaining a benefit to the father.

3. The receiver appealed to the District Judge of Surat. The learned appellate Judge came to a different conclusion and held that the partition was not a bona fide transaction. In the result, therefore, the learned appellate Judge reversed the judgment of the First Class Subordinate Judge and set aside the transaction as one coming u/s 53 of the Provincial Insolvency Act.

4. Now, although the issue raised by the learned District Judge is substantially in the form in which it was raised by the trial Court, there is not the slightest doubt that the whole of the judgment is vitiated by the fact that, in his opinion, in a case coming u/s 53 of the Provincial Insolvency Act, the onus lay upon the transferees and not upon the receiver. This is what he says :

Under the Insolvency Act, every transaction which an insolvent enters into within two years previous to his insolvency is treated as prima facie invalid and the burden is on the insolvent or the alienee to show that the transaction impeached is a valid and bona fide one. Both good faith and valuable consideration have to be proved.

This observation was made by the learned Judge in spite of the fact that a decision of the Privy Council in Official Receiver v. P.L.K.M.R.M. Chettyar Firm (1930) L. R. 58 IndAp115 : 33 Bom. L. R. 867, was expressly relied upon by the First Class Subordinate Judge at the very commencement of his judgment in considering the question of onus. In that case it was held that in an application preferred by the official receiver u/s 53 of the Provincial Insolvency Act, 1920, to annul a transfer of property by the insolvent, the onus probandi is not on the transferee but upon the official receiver to establish that the transaction was not bona fide and for value and was in consequence voidable as against him. This decision was quoted by the learned First Class Subordinate Judge in his judgment. The decision in Official Receiver v. P.L.K.M.R.M. Chettyar Firm was followed in the case of Pope v. Official Assignee (1933) L.R. 60 IndAp 362 : 36 Bom. L.R. 137. The head-note runs as follows :-

Where a receiver appointed under the Presidency-towns Insolvency Act, 1909, seeks to set aside u/s 55 of the Act a transfer for consideration made by the insolvent within two years of the insolvency, it is for him to prove that the transferee was not a purchaser in good faith. If the transaction was a real and not a fictitious one, it is not brought within the section unless the receiver proves that the transferee knew that the transferor was insolvent when the transfer was made, even where the

transfer was of the whole of the available assets....

The rest of the head-note is immaterial. It may be said that Section 55 of the Presidency-towns Insolvency Act is exactly similar in terms to Section 53 of the Provincial Insolvency Act. Upon this ground, therefore, the judgment seems to be wrong, and, apart from anything else, it must be set aside.

5. The learned Judge has referred to certain facts in support of the conclusion to which he came. In my opinion, even the combined effect of these facts is not sufficient to displace the onus resting on the applicant.

6. The property in the hands of Mohanlal was joint and ancestral, he having obtained it at a partition made in 1921 between himself and his brother Nanabhai. The four minor sons would become entitled to four-fifths of that property on a partition between them and their father. The property was, at the earlier partition, valued at Rs. 1,13,000 ; four-fifths of that would be roughly Rs. 90,000 and this is the valuation of the property allotted to the minors at the partition now challenged. There was no evidence as to whether the property in the hands of Mohanlal was worth more. The fact that the Immovable property was valued in the later partition deed at lesser value by about Rs. 4,000, instead of going against the bona fides of the partition, supports the applicants. Similarly, the fact that the ornaments were valued at the same figure as at the time of the earlier partition, shows nothing. The sons were entitled to about Rs. 90,000. This was made up of the Immovable property valued at Rs. 41,000, ornaments valued at Rs. 5,000 and a promissory note for Rs. 45,000 passed by Mohanlal in their favour. Mohanlal having gone insolvent, the promissory note is practically worthless, so that the sons really got much less than they were entitled to.

7. In both the Courts below it was not argued, and indeed it could not be argued, that there was no consideration for the partition. The only question was whether there was want of good faith. The most important circumstance, however, which is relied upon before me, and which seems to have impressed the learned Judge, is the fact that Mohanlal, at the time, had considerable debts. The learned Judge has put down the debts at Rs. 71,000. There was absolutely no direct evidence about these debts before the learned Judge, excepting the schedule filed by the insolvent, and that schedule shows that there were debts to the extent of Rs. 32,796 only at the date of the partition. Out of this sum, there is one item of Rs. 25,696-14-0 regarding which a suitwas then pending in this Court, both against Mohanlal and his sons, and that suit terminated in a compromise, by which the guardian of the sons agreed to pay Rs, 10,000 to the applicant in the case. As to these debts, however, there was no evidence before the Courts that they were known to even the guardian of the minors. Apart from that, the transaction was real, there was good consideration, and therefore the mere fact that Mohanlal had some debts at the time does not negative the good faith of the transferees. What is necessary to show is that the transferees knew that the transferor was insolvent, which is quite a

different proposition. Not a question was put to the: guardian of the minors on this point. There was no evidence that the guardian of the minors was acting in bad faith. In my opinion, therefore, on a careful consideration of all the circumstances, it is impossible to accept the finding of the learned District Judge.

8. Apart from that, there is a serious difficulty in the way of the receiver, and the difficulty is this : It is clear law that the receiver, or the official assignee, u/s 53 of the Provincial Insolvency Act, or Section 55 of the Presidency-towns Insolvency Act, has to prove not that the insolvent was acting fraudulently or in bad faith, but he has to prove that either the transferee or the purchaser gave no value or consideration for the transfer, and if there is consideration for the transfer, then the receiver has to prove that there was no good faith on the part of the transferee. It is not necessary that both parties to the transaction should act in good faith. Mere fraud on the part of the insolvent is not enough. What is required under the section is the fraud or want of good faith on the part of the transferee, and this is the point which the learned Judge seems to have missed.

9. Now, in this case, the transferees were the minor sons of the insolvent. There is no evidence that any of them took any part in the transaction, and in law they would be incapable of doing so. The transaction was between the insolvent and the guardian of the minors. There is no evidence that the guardian was guilty of bad faith. Assuming, however, that he was, the difficult question arises whether the fraud of the guardian would be deemed to be the fraud of the minors u/s 53. There is no authority cited before me in support of this contention. As I have said, there is no evidence to show that the guardian was acting fraudulently and was not acting in good faith. The circumstances were perfectly plain. Here was a man, who wanted to do satta business ; on his own admission, he had lost Rs. 10,000 and nothing was more natural than a desire on the part of the mother of these four unfortunate children and their relatives to safeguard the rights of the minors, and, if with that view a sort of family arrangement is brought about, merely because the father happens to be involved in debts, I find it difficult to hold that the transaction was a fraudulent transaction. In a somewhat analogous case, to which Mr. Desai referred, of Re Tetley, Ex Parte Jeffrey v. Tetley (1896) 3 MB. & W. C. 321, it was held-

Where a settlement is made to defeat and delay creditors, the Court will not impute notice of the fraud to a purchaser or incumbrancer for valuable, consideration under it, e.g. a mother of the settlor, merely because the solicitor who has acted for her is privy to the scheme.

And Lord Esher, in his judgment, observed (p. 322) :-

Mr. Reed has displayed his usual courage, but what his argument comes to is this, that you can be fraudulent by deputy : in other words, that if you employ a person and he acts fraudulently, you are infected with the fraud.

That seems to me to be exactly applicable to the facts of this case.

10. I think, therefore, the judgment of the learned District Judge must be set aside and that of the trial Judge restored with costs throughout.