

In Re: Rai Mohan Shaw and ors.

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SooperKanoon Citation : sooperkanoon.com/863972

Court : Kolkata

Decided On : Feb-17-1919

Reported in : AIR1919Cal103,53Ind.Cas.175

Judge : Rankin, J.

Appellant : In Re: Rai Mohan Shaw and ors.

Judgement :

Rankin, J.

1. This is a motion to have it declared that two mortgages executed by an insolvent are inoperative as against the Official Assignee. The insolvent in this matter is one Durga Charan Shaw, one of 16 persons against whom an adjudication order was made in this Court as being the partners in certain businesses carried on in Calcutta and. at Naraingunge under the styles of Haridas Gopal Kristo and Bhairab Chunder Khelter Mohan. In addition to these businesses it appears that the parties interested therein carried on private money lending businesses; how many of such businesses there were is not at all clear.

2. The acts of bankruptcy upon which the adjudication was founded, and of which in these proceedings the adjudication order is conclusive proof, relate to the two Calcutta businesses, and are, shortly, that the munib gomasthas, through whom these were carried on, had departed from their usual place of business on the 23rd June 1911, and that on the same date another gomastha had given a verbal notice

of suspension of payment. The petition was filed by a Calcutta creditor on the 26th June 1911, the adjudication order was obtained ex parte on the 5th July. The two mortgages are in fact dated respectively 5th and 8th Assar (Bengali year 1318), dates which I am told correspond to the 20th and 23rd June 1911. They are, therefore, on the very eve of the acts of bankruptcy established. The later mortgage was for Rs. 6,000 and was executed by the insolvent Durga alone. The respondent says that this mortgage has been paid off by a member of the family and that he is no longer concerned. In these circumstances, it has not been enquired into before me and beyond the fact that it was made and was for a fresh advance, I know little or nothing about it. The first mortgage was for Rs. 15,000; it was executed by Durga's wife and son in addition to himself. It purports to secure an antecedent debt Rs. 14,034, and a new advance of the balance, Rs. 966; it provides for interest at eight annas per cent. per month, the previous rate, according to the evidence, having been nine annas. The wife and son joined for the reason (as stated in the deed) that the mortgagee would not accept a mortgage of the building and tin sheds without the land on which they stand, and the wife and son mortgaged their interest in the Putni right.

3. Now as to this mortgage two things are clear; the respondent, who carries on a money-lending business, has adduced evidence of the reality of the debt of Rs. 14,034, he has produced his books of account, he has proved the dates and amounts of his advance, he has shown payments regularly every year of interest, and the Official Assignee very properly admits that the case must be taken on the footing that the antecedent debt has been established.

4. I am also satisfied that the further advance was made; the only comment that can be made on the antecedent debt is that the insolvent having paid the interest regularly, the money lent has been outstanding---as regards the bulk of it at least---for some 11 years, a fact which is not very surprising, as it is the business of the respondent to lend money, it no doubt suited him very well to leave it on loan as long as his interest was regularly paid.

5. In the second place, I have no evidence before me to the effect that the property mortgaged by the wife and son was not their own property or that it belonged in

any way to the insolvent. These two considerations are important points in the respondent's favour. Against him on the other hand I must take account of the fact that the insolvent and the respondent were relations, in the sense that the respondent's daughter had married the insolvent's son.

6. The Official Assignee claims to set aside the mortgage so far as it affects the property of the insolvent, and as this is a clear case of claim by a higher title than the insolvent himself would have possessed, the matter is properly brought forward by way of motion in the bankruptcy.

7. Now, there are three possible ways in which such a case may be framed: First---The mortgage may be said to be an act of bankruptcy under Section 9, sub-section (b), of the Presidency Towns Insolvency Act of 1903. If so, the title of the Official Assignee would relate back to the transaction by Section 57 and unless the respondent could bring himself within Section 57 (which is the protesting section), the mortgage would be void as regards the insolvent's property. If it were proved that the property mortgaged by the insolvent was his whole property, the question would arise whether the present advance of Rs. 966 was sufficient to save the transaction. There is, however, no evidence before me that the mortgage comprised the whole of his property; the only evidence is the other way. Even if I bring in the later mortgage of Rs. 6,000, the position is no better; the amount of the present advance then comes to something in the neighbourhood of Rs. 7,000. Treating the mortgage as comprising part only of the debtor's property, the law requires me to find an intention to defeat and delay creditors proved as a matter of fact before I can bring Section 9 (b) into force. On the other hand, apart' from the question of fraudulent preference which depends upon separate considerations and with which I will deal presently, there is no case here of any other fraud. There is, for example, no evidence whatever that the mortgage was made as a covinous or as a Benami transaction or for the purpose of defeating for the moment some form of execution. Section 9 (b), therefore, adds nothing to the case of the Official Assignee.

8. Secondly, in my opinion, the same is true of the voluntary transfer Section 55, which is relied upon in the Official Assignee's petition. If it were shown that this

was a voluntary transfer in the sense that it was not a transfer made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, then the transfer would be void. The protesting Section 57 does not apply, but if the transaction was entered into by the transferee in good faith, then Section 55 does not avoid it. Here, again, it is sufficient to say that, subject to the question of fraudulent preference, I can see no ground for disputing the good faith of either party, and the voluntary transfer Section is not really in point.

9. Thirdly, the only real issue upon the first mortgage is the issue under Section 56, whether the transfer was made by Durga with a view to giving the respondent preference over the other creditors. If this has to be answered in the affirmative, it matters nothing whether the respondent acted in good faith or not. Section 57 does not apply, and sub Section 2 of Section 56 does not apply either. The question is as to the dominant view of the insolvent at the time. For reasons which may just possibly be nobody's fault, I am enquiring now as to the insolvent's state of mind in 1911 nearly 8 years ago. There can be no doubt also that the onus of proving this sort of fraud is upon the person alleging it. However often the onus may shift from side to side upon proof of particular facts in the end, I have to be satisfied that the insolvent had this as his dominant view when he granted the mortgage. Now, if the debtor's real object was to procure a further advance for himself, or to satisfy the demands, or escape the pressure of the creditor, or if he had both these objects as the mainspring of his action, then the transaction is not fraudulent preference. The mere proof of a demand by the creditor is not in the least conclusive. A demand may be made, and yet the circumstances of the debtor may be such that the demand cannot be the explanation of the transfer. A debtor with numerous writs already issued against him which he has not attempted to satisfy cannot be supposed to be much influenced by the prospect of another; but if, in fact, it is all demand, or a threat to sue, or a threat of any sort, or a desire to avoid evil consequences to himself, that has brought about the transfer, the suggestion of fraudulent preference is ousted altogether. I am not speaking now of transfers of the whole debtor's property for an antecedent debt, which comes under Section 9 (b) and to which different considerations apply. Apart from that class of cases, the creditor is perfectly entitled to press for his debt and to take payment or security for it right up to the time when he has notice of an act of

bankruptcy or an adjudication order supervenes, Now, in this case, the fact of the fresh advance, and the fact that the wife and son joined to mortgage their own property, put much difficulty in the way of a case of a fraudulent preference. The fact of the later mortgage for another new advance of Rs. 6,000 (standing as it does by itself and without any evidence to attach it) is much more against such a case than in its favour. It seems to show that Durga was making the usual desperate efforts to struggle on.

10. I have not got, in this case, any evidence at all of the sort which the Court is accustomed to expect in 'fraudulent preference' cases as to other creditors having already instituted suits against, or served process on, the insolvent, or of demands by other creditors. The petitioning creditors' debt was not a judgment debt, and their petition reads as though they had continued dealing with the Calcutta firm right up to the day before the petition.

11. There is, too, the further fact that Durga at Naraingunge might or might not know immediately how bad the state of the other businesses had become; how sudden or how gradual the collapse was, and what finally precipitated the fall, are matters on which I have no evidence at all. How many of the 16, or perhaps it ought to be 11, partners were actively concerned in supervising the munib gomasthas of the Calcutta businesses I do not know. It was put in cross-examination to the Official Assignee's witness, Haridas Roy Chowdhury, that the Naraingunge business continued in fact sometime after the adjudication order. No confirmation or contradiction was given of the suggested fact and the matter was left there.

12. Now, in that position, the next thing I have to consider is the evidence under Section 36 of Lal Mohan Poddar. Now, Lal Mohan Poddar says, shortly, that at the time of the first advance the bankrupt was in need of money, but he does not accept the statement that the bankrupt was in difficulty. His evidence is as follows:

'The first talk about the mortgage of the 5th Assar was when we demanded payment of the money due to us. At the time (stopped). That was about a month before the execution of the mortgage. When we demanded for payment, Durga Charan made the proposal. He volunteered it. Up to that date he had never offered

to execute a mortgage. Before he made the proposal we had never asked him to execute a mortgage. When we demanded for payment he proposed we should execute a mortgage. He said I want farther anal and I propose to execute a mortgage for the whole amount. We refused to advance any further amount without a mortgage.'

Later, he said:

Durga Charan proposed to execute mortgage. We never wanted the mortgage. It was after we had demanded for payment.'

13. Now, upon that evidence being given, a rather amusing state of things supervenes. On that evidence if it is true, it is, of course, absolutely impossible to base a case of fraudulent preference at all. His case is that the creditor demanded payment from the debtor, that the debtor not only could not pay it but wanted a further loan and, therefore, he proposed that the mortgage should be executed. That is just as many miles away from a possible fraudulent preference case, if that be the truth, as are oases of threats of posting at a club, or of threats of evil consequence from the Criminal Law: but the respondent and his advisers seem to have taken fright at the fact that the witness, when he was cross examined, was induced to accept the expression 'he volunteered it.' There can be no doubt whatever what the witness means. He says that the suggestion was produced by two things, the demand for payment and his desire for a further loan. On that evidence, if it stood alone, I should have no hesitation in saying that there was no case of fraudulent preference here. But the respondent, for reasons which I really cannot appreciate, has made up his mind to throw over that witness altogether and to set up another case, namely, that the witness Kailash Chunder Poddar, having discovered that the insolvent firm was not meeting their bills as regularly as they should, went sometime before the mortgage was executed and proceeded to threaten the insolvent. He says that he threatened him with an attachment of his property, that he threatened to ruin him and that he said that he must pay down in cash on the spot and all that sort of thing. I am perfectly satisfied that those picturesque expressions on the part of Kailash Chunder Poddar are absolutely unfounded. I think that the respondent has abandoned what was really good

evidence in order to touch up a case which is inconsistent with his original case, is order to touch it up in a way that I cannot accept. In his affidavit Kailash Chunder Poddar says that the respondent, in addition to himself, threatened the insolvent. In his evidence he says that all the threats were made by himself, and in this case I think it extremely unlikely that a person, in the position of Kailash Chunder Poddar, would go and attempt to treat so roughly the insolvent who was a senior member of his master's family, namely, the father-in-law of his master's daughter. I think all that has been trumped up for the purpose of the case upon this motion, and I think that it has been very foolishly trumped up. It has been trumped up entirely, because the advisers of the respondent have foolishly taken fright at a phrase or two in the evidence of Lal Mohan Poddar, when his evidence was really perfectly sound and perfectly good from their point of view. The witness Kailash Chunder Poddar also tells me that Lal Mohan Poddar, his master's second son, was crazed. I can see from the notes of his examination that that is utterly untrue, and, therefore, although the Official Assignee seems to me to have come into Court with little or no case, the respondent has done his best to give him a case by throwing over the evidence of Lal Mohan Poddar and setting up an inconsistent case, a case which, as regards many points, I do not believe. That has been my only difficulty in dealing with this matter. I have to consider whether the right view to take is, that there must be something fishy about this transaction or the respondent would never have gone to the extent he has of producing this new kind of evidence and trying to throw over the evidence of his son, and that has given me a great deal of trouble. In the end, I have come to this conclusion. I think that, in enquiring into the state of the debtor's mind, as long as eight years ago, on evidence which relates to a deed where the wife and son joined as well as the insolvent, and where there was a fresh advance, it would be wrong of me, merely because I think that the respondent has foolishly endeavoured to support his case by exaggeration and untrue statements, to find him to the extent of depriving him of the mortgage for Rs. 15,000. My view of the facts is, that what Lal Mohan Poddar said is perfectly right in substance, with this exception that, as the debt had been outstanding for a long time, I am quite satisfied that the respondent knew that the business of Durga was getting into difficulties. Only on that supposition is there any explanation why a sudden demand, after all those years,

for payment of a security should have been made. I think that what has happened is the usual thing that a certain amount of tonching up, of manufactured evidence, is brought in into this case by the respondent although he has got a good case, and, therefore, what I am going to do is to find that I am not satisfied that this mortgage was made with the do minant view of preferring the respondent to uphold the mortgage; but to refuse to allow the respondent any costs of this motion.

14. It only remains to say a single word about the first mortgage. As regards that, before this motion was launched the respondent had by his son told the Official Assignee that that mortgage was paid off and that he claimed no interest in it. That being so, I cannot understand why the Official Assignee should be entitled to a declaration which implies that not only such a thing is trust, but also that the other person was assorting the contrary. There may be oases where you require a declaration in order to clear your title to land; in a proper case, it is possible to get that. It could not possibly be said that the respondent here, having stated before, the motion was launched that he had nothing to do with that mortgage, should be made to pay the costs of obtaining a declaration with which he had nothing to do. What I propose to do on that is this, that I shall recite in my order that the respondent, alleging the he is not now interested in the mortgage by reason of the fact that he has been paid off, the motion is dismissed, but no order as to costs.

15. Mr. Avetoom.---The Official Assignee to retain his costs of, and incidental to, this application out of the estate?

16. Court.---The ordinary practice is that he applies and obtains an order before he starts the motion and that order provides for his costs. If it has not been done, an application may be made later.