

In Re: Gobardhan Seal

In Re: Gobardhan Seal

SooperKanoon Citation : sooperkanoon.com/876670

Court : Kolkata

Decided On : Feb-02-1916

Reported in : 34Ind.Cas.435

Judge : Lancelot Sanderson, C.J., ;John Woodroffe and ;Asutosh Mookerjee, JJ.

Appellant : In Re: Gobardhan Seal;srimati Lakhi Priya Dassi

Respondent : ;srimati Rai Kissori Dassi and anr.

Judgement :

Lancelot Sanderson, C.J.

1. This was a petition by Sreemutty Rai Kissori Dassi that certain transfers should be set aside and should be held to be void as against the Official Assignee.
2. The petitioner was the mother-in-law of the insolvent, and the transfers in question were, first of all, a conveyance by the insolvent to his wife which was dated the '9th of November 1911, and, secondly, a conveyance from the insolvent's wife dated the 12th of October 1912 to the appellant, who is the sister-in-law of the insolvent, she being the wife of the insolvent's brother.
3. Now, apparently the mother-in-law, the petitioner, filed a suit against the insolvent in the Small Cause Court for its. 1,942 on the 7th of September 1911. The proceedings in that suit occupied a considerable time, as far as I understand, and the judgment was not in fact obtained until the 23rd of February 1912. On the

27th of February 1912, the insolvent against whom the judgment was obtained filed his petition, and he was adjudicated an insolvent on the same date. In the meantime the insolvent had, as I have already stated, on the 9th of November 1911 purported to convey his share in the property in question to his wife.

4. Now, the learned Judge who heard this petition, after hearing the evidence, came to the conclusion that that conveyance was a fictitious one, to use his own words (at page 94, he says), Taking all the evidence into consideration, I am of opinion that the sale by the insolvent to the wife was a fictitious sale. I understand him to mean by that, that the transaction was intended to be nothing more than a blind, that the insolvent never intended to pass the property to his wife, that he intended to retain the property and through his wife to retain control over it, and in that sense it was a fictitious transaction. On the face of it, it was a conveyance to the wife, but in fact it was no conveyance at all.

5. On the evidence, I think the learned Judge was quite justified in coming to that conclusion. I am not going through the evidence; it is unnecessary for me to do that; it was read out yesterday by the learned Counsel for the appellant, and commented upon by him and also by the learned Counsel for the respondent. Therefore, the position was this I(sic) at on the 27th of February, immediately before the adjudication, the property in his share of the premises in question remained in him, because, as I have already said, this so-called sale was entirely a fictitious transaction. The result was that the property vested in the Official Assignee as soon as the adjudication took place.

6. What happened afterwards is that on the 12th of October 1912, the insolvent's wife purported to sell the one-third share in the premises to the appellant, the sister-in-law of the insolvent. Now, the learned Judge has held that that transaction also was a fictitious transaction. I am not prepared to go as far as that upon the evidence. I think there are certain elements which make me hesitate in finding that that transaction was a fictitious one, as for instance, there is the fact that somewhere near Rs. 3,000 had to be found by the person who was put forward as the purchaser, namely, the appellant. There is no doubt whatever, as far as I can see, that there was a mortgage upon the premises, that the mortgagee was in no

way connected with the insolvent or his wife or the purchaser he was a total stranger and that upon the sale by the insolvent's wife to the appellant that mortgage was paid off to the extent of Rs. 1,150. (sic) In addition to that, within two or three days after this transaction, a house was bought for Rs. 1,700 in the name of the insolvent's wife, and the vendor of that property was a man, whose name was Babu Kali Kumar Pyne; and, there again, I cannot find any trace that Babu Kali Kumar Pyne was in any way connected with the insolvent, his wife or the purchaser. Therefore, it must be taken that the vendor of that property and the mortgagee, who were total strangers to these parties, were paid the sum of Rs. 2,850, and it is difficult for me on those facts to come to the conclusion that this second transaction was a fictitious transaction. Therefore, if it were necessary for me to come to a definite conclusion, I should be inclined to say that this transaction has not been proved to be a fictitious transaction. However, for the purpose of my judgment I will assume that it was not a fictitious transaction and that it was a bona fide purchase by the appellant. But even assuming that conveyance to be a bona fide conveyance and assuming that the purchaser had no notice. I am only assuming that in her favour-I am bound to say that I think there are facts which would give rise to very serious consideration as to whether the appellant, the purchaser, who was the sister-in-law of the insolvent, did not know all about the circumstances under which the first transaction took place. I say even upon the above-mentioned assumption I still think that the conveyance of 12th October 1912 cannot be upheld as against the Official Assignee, and for this reason: Inasmuch as the first transaction, namely, that of the 9th of November 1911, has been rightly held to be a fictitious transaction and nothing more than a fictitious transaction, the property vested in the Official Assignee. Section 57 of the Presidency Towns Insolvency Act provides:

Subject to the foregoing provisions with respect to the effect of insolvency on an execution and with respect to the avoidance of certain transfers and preferences, nothing in this Act shall invalidate in the case of an insolvency (a) any payment by the insolvent to any of his creditors; (b) any payment or delivery to the insolvent; (c) any transfer by the insolvent for valuable consideration; or (d) any contract or dealing by or with the insolvent for valuable consideration:

Provided that any such transaction takes place before the date of the order of adjudication and that the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor.

7. Therefore, in order to make any of the above-mentioned transactions with the insolvent, which takes place after the presentation of an insolvency petition by or against the debtor, valid, two things are necessary: (1) The transaction must take place before the date of the order of adjudication, and (2) the person with whom the transaction takes place must have no notice of the petition.

8. Now, I will assume that the lady in question had no notice, but it is quite clear that the transaction in this case, namely, of the 12th of October 1912 took place after the order of adjudication : and, therefore, in my opinion, it cannot be held to be a valid conveyance as against the Official Assignee, because it must be taken in this case that the transaction of the 12th October 1912 was in effect a transaction between the insolvent himself and the appellant. Now, the cases which Mr. James has quoted do not seem to me to be really relevant to this question; provided that it is once recognized that the first transaction, namely, of the 9th of November 1911, was nothing more than a fictitious transaction, and the second transaction must be regarded as between the insolvent himself and the appellant on the other.

9. The case upon which Mr. James has placed the greatest reliance is *In Re: Slobodintiky, Ex parte Moore* (1003) 2 K.B. 517 : 72 L.J.K.B. 883 : 89 L.T. 190 : 19 T.L.R. 616 : 52 W.R. 156, 10 Hanson 341 and the judgment of Mr. Justice Wright at page 524. The conveyance in that case was by Slobodinsky to a Company. Mr. Justice Wright in the first instance had to consider the effect of that conveyance, just as we have to consider the effect of the conveyance to the wife. The learned Judge in this case has held that the transaction was a fictitious transaction, and I agree with him. Now, what Mr. Justice Wright held in that case was that the conveyance to the Company was a fraudulent conveyance liable to be set aside on certain events happening; still, it was a conveyance by which it was intended by the debtor to pass the property, and a conveyance which would pass property to

the Company until the conveyance was set aside. He says: This having been a fraudulent conveyance or transfer of the debtor's property so far as he was concerned, how does the law stand? One case which the trustee might make might be that the Company was an entirely sham Company, that it was really the debtor himself, and that the conveyance to the Company ought not to stand inasmuch as it was in substance a conveyance to himself. I am not, however, prepared to go that length and to say that I think this was entirely a sham Company. It seems to me that Millinsky's business was a genuine one, and the bona fide transfer of his business to the Company and his presence on the board are elements that go some way to show that there was an independent Company. There are also some bona fide shareholders who hold some 665 shares. I think there was some prospect of the success of the Company, and that it was not a mere fiction.' If he had held that it was a mere fiction, I gather from his judgment that it would not be necessary for him to consider the other points which he did in that case. It has been held in the present case that the conveyance which purported to be made by the insolvent to his wife was a mere fiction, and, therefore, that distinguishes the present case from Slobodinsky's case (1903) 2 K.B. 517 : 72 L.J.K.B. 883 : 89 L.T. 190 : 19 T.L.R. 616 : 52 W.R. 156, 10 Manson 341, on which so much reliance has been placed.

10. Another case, *In Re: Hart; Ex parte Green* (1912) 3 K.B. 6 : 81 L.J.K.B. 1213 : 107 L.T. 368 : 56 S.J. 615 : 28 I.L.R. 482., that was cited raises a different question. The facts, broadly speaking, were these: A certain gentleman Mr. Hart, who was a Director of a Company, transferred, as far as we know perfectly bona fide, some shares of the Company to his daughter Miss Hart, on the 14th of October 1909. On the 13th of April 1910, his daughter sold these shares to Miss Lomas for good consideration, and Miss Lomas had no notice of the act of bankruptcy committed by Mr. Hart. But in the meantime Mr. Hart had on the 31st of March 1910 committed an act of bankruptcy, and there was a receiving order on the 22nd April 1910.

11. I draw attention to that date because that date was not only after the voluntary settlement by Hart to his daughter, but it was after the sale by the daughter to the appellant. There was a great distinction between that case and the present. In

Hart's case (1912) 3 K.B. 6 : 81 L.J.K.B. 1213 : 107 L.T. 368 : 56 S.J. 615 : 28 I.L.R. 482 there was a voluntary settlement which passed the property or was intended to pass the property to his daughter, and the transaction which passed the property to the claimant Miss Lomas was between Miss Lomas on the one hand and Miss Hirt on the other. In the present case the transaction must be taken to have been between the claimant, Mr, James' client, on the one hand, and the insolvent on the other hand, because the conveyance of the 9th of November 3 911 was nothing more than a fictitious transaction, the property remaining in the insolvent until the adjudication.

12. For these reasons, I do not think this case is covered by those two decisions. I think it is clear that inasmuch as the conveyance of the 12th of October 1912 was not made until after the adjudication of insolvency, which took place on the 27th of February 1912, that transfer ought to be set aside, as against the Official Assignee.

13. I have only one word to add and that is this : Mr. James says that it is very hard upon the purchaser. It may be; but on the other hand, one has to remember that this estate is in insolvency, and there are creditors, and the rights of the creditors have to be considered just as much as the rights of the purchaser of this particular property: and it seems to me that if we were to hold contrary to the above conclusion we might as well have no insolvency laws at all, because all that would be necessary for the insolvent to do would be to imitate the conduct of the insolvent in this case, and he would then be able to defeat the claims of any creditor or creditors whom he wished to damage.

14. For these reasons, I think this appeal should be dismissed with costs.

Woodroffe, J.

15. The conveyance by the insolvent to his wife was clearly a benanii. It may be a question whether the judgment under appeal can be supported in so far as it holds that the sale to Srimati Lakhi Priya was fictitious in the sense of benanii. There are grounds for thinking that it was an arrangement made in pursuance of the original benami with a view to defeat and delay the creditor, the respondent. It is not

necessary, however, to determine this question, as the second conveyance which was really that of the insolvent, having taken place after the adjudication, cannot stand. It was sought to be effected after the title to the insolvent's property had vested in the Official Assignee. I am myself not disposed to think that the party who took under this conveyance was unaware either of the previous benami or of the insolvency, for it is to be observed that the parties are all related to one another and not strangers. There is, therefore, in my opinion, no hard case here as alleged. But in any case the conveyance is not protected, having been made after the adjudication.

16. I agree, therefore, that the appeal should be dismissed with costs.

Mookerjee, J.

17. This is an appeal from a determination by Mr. Justice Chaudhuri that the title claimed by the appellant cannot prevail as against the Official Assignee. The disputed property is the share of the insolvent in his dwelling house. On the 9th November 1911 he executed a conveyance in favour of his wife in respect of this share. On the 12th October 1912 the wife executed a conveyance in respect of the same property to the present appellant. In the interval, there had been dealings with the property by the wife who on the 16th May 1912 executed a mortgage, and on the 7th June following executed a deed of further charge thereon; these incumbrances were discharged on the 12th October 1912. The adjudication in insolvency was made on the 27th February 1912.

18. The case for the appellant is that she acquired a good title to the property, because she acquired it in good faith and for consideration from the wife of the original owner, who had effectively divested himself of all interest therein before his adjudication as an insolvent. Mr. Justice Chaudhuri has found upon the evidence that the conveyances of the 9th November 1911 and the 12th October 1912 were both fictitious transactions. The correctness of the finding as to the true nature of the first of these deeds is, I think, unimpeachable. No consideration passed from the wife to the husband at the time when the conveyance was executed and registered. The deed was, besides, executed at a time when the

transferor was in a state of considerable pecuniary embarrassment. Indeed, a suit had already been instituted against him on the 7th September 1911 by his mother-in-law in the Calcutta Small Cause Court for recovery of a large sum of money; she subsequently obtained a decree against him on the 25th February 1912, and now impeaches the title of the appellant as a nominal transferee. As regards the conveyance of the 12th October 1912, however, I am not prepared, upon the record as it stands, to adopt the conclusion of the Trial Judge. The evidence makes it plain that some consideration was paid by the purchaser to the vendor on the basis of this conveyance, and the money was apparently applied, partly in discharge of the debt due to the encumbrancer Norendra Krishna Mitra, and partly in payment to one Kali Kumar Pyne, who sold a house to the wife of the insolvent on the 14th October 1912. There is nothing to indicate that the transactions with Norendra Krishna Mitra and Kali Kumar Pyne were not perfectly genuine. The question consequently arises, in what way is the position of the appellant affected by the fact that the lady who transferred the disputed property to her was the holder of a nominal conveyance from her husband.

19. Mr. Langford James has contended that the position of the wife under the nominal conveyance of the 9th November 1901 is analogous to that of a person who accepts a voluntary settlement under the law of England. In my opinion, this view cannot possibly be sustained. It is well settled that when there is a fictitious transaction with regard to a property, no title passes, notwithstanding the execution and registration of the documents; the transaction may fittingly be described as essentially a mask of the real ownership. In this case, notwithstanding the execution of the conveyance by the insolvent in favour of his wife, he continued to be the owner of the property; he never intended to divest, and, consequently, never did, in fact or in law, divest himself of the ownership thereof. There is ample authority for the position that a benamidar is in no sense an owner of the property. For instance, the Judicial Committee observed in the case of *Musammatt Thukrain Sookraj hoowar v. Government* 14 M.L.A. 112 : 2 Sar. P.C.J. 705 : 20 E.R. 728 that the real owner may sue the ostensible owner to establish his title and to recover possession. This view can be maintained only on the hypothesis that the title has never passed from the real owner under the conveyance executed by him. Conversely, it was held by the Judicial Committee in

the case of *Ramnnugra Narain v. Mahamndtir Kunwar* 12 B.L.R 453 : 3 Sar. P.C.J. 277, 3 Supp. Vol. 149 that if the holder of the deed attempts to enforce his apparent title against the real owner, the latter may establish the real nature of the transaction and thus successfully defend himself against an unfounded claim It has further been ruled by the Judicial Committee that the creditors of the real owner may seize the property in satisfaction of their claim against him on the assumption that he has never divested himself of his title thereto: *Musadee Mahomed Cazum Sherazee v. Meerza Ally Mahomed Shoostry* 6 M.I.A. 27 : 8 Moo. P.C. 90 : 1 Sar. P.C.J. 489 : 19 E.R. 11 : 14 E.R. 35 : 97 R.R. 38 and *Abdul Hye v. Mir Mohammed Mozaffer Hosscin* 11 I.A. 10 : 10 C. 616 : 8 Ind. Jur. 157 : 4 Sar. P.C.J. 500. Conversely, it has been ruled that if the creditor of the nominal owner attempts to seize the property as his, the real owner is competent to intervene and stop the execution: 3; 14 M.I.A. 112 : 2 Sar P. C.J. 705; 20 E.R. 728. *Tara Soonduree Debee v. Oojul Monee Dossee* 14 W.R. 111. The true position, thus, is that notwithstanding the execution of the conveyance of the 9th November] 911, the husband still continued to be in fact the owner of the property. What then was the legal effect of the adjudication order passed on the 27th February 1912? The property, by operation of law, vested in the Official Assignee. Consequently, when we turn to the conveyance of the 12th. October 1912, executed by the wife in favour of the appellant, the inference becomes irresistible that she did not acquire any title, as she took her conveyance from a person who herself had no title whatsoever. It may be conceded, as repeatedly ruled by the Judicial Committee *Ram Coomar Koondoo v. John* 11 B.L.R. 46 (P.C.) : 18 W.R. 168 : I.A. Sup. Vol. 40, *Mahomed Mozuffer Hossein v. Kishori Mohun Roy* 22 I.A. 129 : 22 C. 909 and *Luchmun Chunder Geer Gossain v. Kalli Churn Singh* 19 W.R. 292], that if the property had still continued with the husband, the appellant might have established a good title by estoppel against him on proof that she was a bona fide purchaser for value without notice of his secret title. It is not suggested that there was anything in the conduct of the Official Assignee himself which would make the equitable doctrine of estoppel applicable against him; consequently, there is no room for application of the class of cases of the type of *Troughton v. Gitley* (1766) *Ambler* 629 at p. 630 : 27 E.R. 408, *In Re: Rawbone's Trust* (1857) 3 K. & J. 476 : 112 R.R. 243 : 69 E.R 1197 : 26 L.J.Ch.

588 : 3 Jur. (N.S.) 837 Tucker v. Hernaman (1853) 4 De G.M. & G. 395 : 102 R.R. 186 : 22 L.J. Ch. 791 : 17 Jur. 723 : 1 Sm. & G. 394 : 43 E.R 561. Engleback v. Nixon (1875) 10 C.P. 645 : 44 L.J.C.P. 396 : 32 L.T. 81, Wadling v. Oliphant (1875) 1 Q.B.D. 145 : 45 L.J.Q.B. 173 : 33 L.T. (N.S.) 837 : 24 W.R. 246, Ex parte Bolland, In Re: Dysart (1878) 9 Ch.D. 312 : 47 L.J.B.. 74 : 38 L.T. 693 : 26 W.R. 807, and Ex parte Cooper, In Re: Green (1878) 39 L.T. 260. Consequently, the only question we are called upon to consider is, whether the title by estoppel which might have been claimable against the owner by reason of his conduct may, after his adjudication, be claimed equally as against the Official Assignee by a person whose title has accrued after the adjudication order. In my opinion the answer must be in the negative. If the contention of the appellant were to prevail, the fundamental policy of the bankruptcy laws would be defeated. The policy is that as soon as an adjudication order has been made, the entire estate of the insolvent should vest in the Official Assignee for the benefit of his creditors. In a limited sense, the Official Assignee may be deemed the representative of the insolvent; but he cannot, for all purposes, be regarded as his successor-in-interest; for the property is vested in him with a view to paralyse the hand of the insolvent, who becomes by operation of law incompetent to deal with the estate to the detriment of his creditors. If the appellant were to succeed in her contention, the result would follow that although the insolvent himself could not possibly convey a good title to her after the adjudication order, yet it was open to him, through the medium of his nominal transferee, to effectuate the same fraudulent purpose. It would be lamentable if the beneficent object of the bankruptcy laws were permitted to be circumvented by so transparent a device.

20. The contention of the appellant is, I may add, in no way assisted by the cases discussed in the course of argument, namely, In Re: Vansittart, Ex parte Brown (1893) 2 Q.B. 377 : 62 L.J.Q.B. 279, In Re: Brail, Ex parte Norton (1893) 2 Q.B. 381 : 5 E. 440 : 69 L.T. 323 : 41 W.R. 623 : 0 Morrell 166, In Re: Carter and Kenderdine's Contract (1897) 1 Ch 776 : 66 L.J.Ch. 408 : 76 L.T. 476 : 45 W.R. 484 : 4 Manson 34, In Re: Slobodinsky, Ex parte Moore (1903) 2 K.B. 517 : 72 L.J.K.B. 883 : 89 L.T. 190 : 19 T.L.R. 616 : 52 W.R. 156, 10 Manson 341, In Re: Hart, Ex parte, Green (1912) 3 K.B. 6 : 81 L.J.K.B. 1213 : 107 L.T. 368 : 56 S.J. 615 : 28 I.L.R. 482., and In Re: Branson, Ex parte Moore (1914) 3 K.B. 1086 : 83

L.J.K.B. 1673 : 30 T.L.R. 604. These decisions are distinguishable on two obvious grounds. In the first place, the persons who claimed protection there as against the trustee in bankruptcy derived their title from a person who had acquired a real title from the insolvent under a voluntary settlement. In the case before us, the person from whom, the appellant claims title was at no time, in law or in fact, the owner of the disputed property. In the second place, the title of the persons, who were afforded protection, had accrued before the receiving order was made. In the case before us, the title of the appellant accrued after the adjudication order had been made, and was in essence a title derived from the insolvent himself.

21. Finally Section 57 of the Presidency Towns Insolvency Act, to which reference has been made, does not avail the appellant, in the absence of both the elements requisite to make that provision applicable. In the first place, the title of the appellant was not acquired before the order of adjudication was made. In the second place, it is not shown that the title was acquired without notice. It is reasonably plain, in all the circumstances disclosed in the evidence, that the appellant was aware of the circumstances of the insolvent and cannot be deemed a purchaser without notice; and there can be no question that unless she is a purchaser in good faith, she cannot be afforded protection in insolvency proceedings [Ex parte Rabbidge, In Re: Pooley (1878) 8 Ch.D. 367 : 38 L.T. 663 : 26 W.R. 646, In Re: Badham, Ex parte Palmer (1893) 10 Morrell 252 : 69 L.T. 356 : 5 R. 521, Shears v. Goddard (1896) 1 Q.B. 406 : 65 L.J.Q. B. 344 : 74 L.T. 128 : 44 W.R. 402 : 3 Manson 24, In Re: Jukes, Ex parte Official Receiver (1902) 2 K.B. 58 : 71 L.J.K.B. 710 : 50 W.R. 560 : 86 L.T. 456 : 9 Manson 249 and In Re: Dunkley & Son, Ex parte Waller (1905) 2 K.B. 683 : 74 L.J.K.B. 963 : 93 L.T. 248 : 21 T.L.R. 707 : 54 W.R. 171 : 12 Manson 364.

22. On these grounds I hold that the order made by Mr. Justice Chaudhuri must be affirmed and this appeal dismissed with costs.