Malini Ayyappa Naicker (Now Dead) ... vs Seth Manghraj Udhavdas Firm By Managing ... on 13 February, 1969

Equivalent citations: 1969 AIR 1344, 1969 SCR (3) 698, AIR 1969 SUPREME COURT 1344

Author: K.S. Hegde

Bench: K.S. Hegde, S.M. Sikri, R.S. Bachawat

PETITIONER:
MALINI AYYAPPA NAICKER (NOW DEAD) THROUGH L.R. ETC. ETC.

Vs.

RESPONDENT:
SETH MANGHRAJ UDHAVDAS FIRM BY MANAGING PARTNER CHATHURBHUJ

DATE OF JUDGMENT:
13/02/1969

BENCH:
HEGDE, K.S.
BENCH:
HEGDE, K.S.
SIKRI, S.M.
BACHAWAT, R.S.

CITATION:
1969 AIR 1344 1969 SCR (3) 698
1969 SCC (1) 688

ACT:
Provincial Insolvency Act, 1920, s. 75(1), first proviso--Power of High Court to satisfy itself that an appeal was decided by the District Court "according to law"- Scope of.

HEADNOTE:
The petitioning creditor in an insolvency proceeding sought annullment of two mortgages, one for Rs. 15,000/- in favour of the appellant in C.A. 845 and another for Rs. 10,000/- in favour the appellant in C.A. 846. The mortgages were dated November 4, 1950 and were registered on November 6, 1950. The insolvency Court held that the- mortgages were not supported by consideration and were executed with a view to

screening some of the properties of the insolvents 'from their creditors. It therefore, annulled the mortgages under section 53 of the Provincial Insolvency Act. The District Judge, in appeal, reversed the findings of the trial court but the High Court, acting under the first proviso of section 75(1) of the Act, set aside the judgment of the District Judge and restored that of the Insolvency Court.

in an appeal to this Court by special leave, it was contended on behalf of the appellants (i) that the High Court while acting under the first proviso of section 75(1) to satisfy itself "that an order made in any appeal decided by the District Court was according to law" had no power to disturb the findings of fact reached by the appellate court; the jurisdiction of the High Court is a very limited one and not more than that conferred on it by sub-section 100(1) C.P.C.; and (ii) that the conclusions of the High Court were unsustainable on the evidence on record.

HELD: (i) The legislature did not confer on the High Court 'under the first proviso to s. 75(1) of the Act an appellate power nor did it confer on if a jurisdiction to reappreciate the evidence on record. While exercising that power the High Court is by and large bound by the findings of fact reached by the District Court. If the legislature intended to confer power on it to reexamine both questions of law and fact it would have conveyed its intention by appropriate words as has been done under various other statutes. A wrong decision on facts by a competent court is also a decision according to law. [701 D]

A decision being "contrary to law" as provided in s. 100(1)(a) of the Code of Civil Procedure is not the same thing as a decision being not "according to law" as prescribed in the first proviso of s. 75(1) of the Act. The latter expression is wider in ambit than the former. It is neither desirable not possible to give an exhaustive definition of the expression "according to law". The power given to the High Court under the first proviso to s. 75(1) of the Act is similar to that given to it under s. 25 of the Provincial Small Causes Courts Act. [701 F]

Bell & Co. Ltd. v. Waman Hemraj, (1938) 40, Bom. L.R. 125; Hari Shankar v. Rao Girdhari Lai Chowdhury, [1962] 1, supp. S.C.R. 399;

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Official Receiver, Kanpur and Anr. v. Abdul Shakur [1965] 1 S.C.R. 254; referred to and explained.

(ii) On the evidence, the findings of the District Court on the payment of consideration were correct findings of fact and the High Court could not have interfered with the same. However, one payment in respect of the mortgage in C.A. 845 was not proved and the mortgage was therefore only valid to the extent of Rs. 10,5001-.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 845 and 846 of 1963.

Appeals by special leave from the judgment and order dated January 17, 1958 of the Madras High Court in Civil Revision Petitions Nos. 981 and 982 of 1956.

S. V. Gupte and R. Thiagarajan, for the appellants (in both the appeals).

Naunit Lal, for the respondents Nos. 1(c) and 17 (in C.A. No. 845 of 1963) and respondents Nos. 1 (c) and 16 (in C.A. No. 846 of 1963).

The Judgment of the Court was delivered by Hegde, J. These appeals arise from an insolvency proceeding wherein one Ponnayya Konar and his sons were adjudicated as insolvents. In the said proceeding the petitioning creditor sought to get annulled two mortgages one for Rs. 15,000 (Exh. A-1) executed by the insolvents in favour of Ayyappa Naicker, the appellant in Civil Appeal No. 845 of 1963 and the other for Rs. 10,000 (Exh. A-2), the subject matter of Civil Appeal No. 846 of 1963, in favour of one Srinivasa Naicker, the father-in-law of the aforementioned Ayyappa Naicker. The said Srinivasa Naicker is dead and the appeal is being prosecuted by his legal representatives. Both those mortgages are dated November 4, 1950 and they were registered on November 6, 1950. The Insolvency Court held that those mortgages were not supported by consideration and that they were executed with a view to screen some of the properties of the insolvents from their creditors. It accordingly annulled those mortgages under S. 53 of the Provincial Insolvency Act (hereinafter referred to as the Act). In appeal the learned District Judge reversed the findings of the trial court. He came to the conclusion that those mortgages were fully supported by consideration and that they were genuine transactions. The High Court acting under the 1st proviso to S. 75(1) of the Act reversed the judgment of the learned District Judge and restored that of the Insolvency Court. These appeals have been brought against the decision of the High Court after obtaining special leave from this Court.

The learned Counsel-for the appellants challenged the decision of the High Court primarily on two grounds. According to him the High Court while acting under the 1st proviso to S. 7 5 (1) of the Act had no power to disturb the findings of fact reached by the appellate court. Next he contended that the conclusions of the High Court are unsustainable on the evidence on record. The learned Counsel for the contesting respondents supported the decision of the High Court. The two principal questions that arise for decision in these appeals are (1) was the High Court within its jurisdiction in interfering with the findings of the learned District Judge that the impugned transactions are bona fide transactions and that they were supported by consideration and (2) are the conclusions reached by the High Court correct on the facts and circumstances of the case ? It would be convenient to take up first, the question as to the scope of the powers of the High Court under the 1st proviso to S. 75 (1) of the Act. That section reads :

> "The debtor, any creditor, the receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction by a Court

subordinate to a District Court may appeal to the District Court, and the order of the District Court upon such appeal shall be final :

Provided that the High Court, for the purpose of satisfying itself that an order made in any appeal decided by the District Court was according to law, may call for the case and pass such order with respect thereto as it thinks fit :

Provided further, that any such person aggrieved by a decision of the District Court on appeal from a decision of a subordinate Court under section 4 may appeal to the High Court on any of the grounds mentioned in sub- section (1) of section 100 of the Code of Civil Procedure, 1908."

According to Shri S. V. Gupte, learned, Counsel for the appellants the jurisdiction of a High Court under the 1st proviso to s. 75(1) is a very limited one, the same being not more than that conferred on it by sub-s. (1) of S. 100 of the Code of Civil Procedure. In support of his contention he invited our attention to the scheme of S. 75(1) of the Act. He urged' that sub-s. (1) of S. 75 prescribes that the decision of the District Court in appeal is final and the finality conferred on the decision of the District Court is subject to a very limited scrutiny by the High Court. We were further told that the power conferred on the High Court under the 1st proviso to S. 75(1) is only a revisional power, which power in its very nature is narrower in compass than an appellate pow&. According to him the power conferred under the 1st proviso to s. 75(1) of the Act is co-extensive with that given to the High Court under s. 100(1) (a) of the Code 'of Civil Procedure.

On the other hand Mr. Naunit Lal, learned Counsel for the respondent urged that the High Court under the 1st proviso to s. 75(1) of the Act has an extensive power and that power is very much wider than the power conferred on it under s. 100(1) (a) of the Code of Civil Procedure; the power of the High Court under the 1st proviso to s. 75 (1) of the Act to call for the case to satisfy itself that the order made by the District Court was according to law and pass such other order in respect. thereto as it thinks fit includes within itself the right to examine whether the District Court had taken into consideration all the material evidence and whether it had properly assessed that evidence. We are of the opinion that the extreme contentions advanced on either side cannot be accepted. Quite clearly the legislature did not confer on the High Court under the 1st proviso to s. 75 (1) of the Act an appellate power nor did it confer on it a jurisdiction to reappreciate the evidence on record. While exercising that power the High Court, is by and large bound by the findings of fact reached by the District Court. If the legislature intended to confer power on it to reexamine both questions of law and fact it would have conveyed its intention by appropriate words as has been done under various other statutes. A wrong decision on facts by a competent court is also a decision according to law. For these reasons we cannot accept the, contention of Mr. Naunit Lai that the power conferred under the 1st proviso to s. 75 (1) of the Act enables it to de novo examine the findings of fact reached by the District Court. A decision being "contrary to law" as provided in s. 100(1)

(a) of the Code of Civil Procedure is not the same thing as a decision being not "according to law" as prescribed in the 1st proviso of s. 75(1) of the Act. The latter expression is wider in ambit than the former. It is neither desirable nor possible to give an exhaustive definition of the expression

"according to law". The power given to the High Court under the 1st proviso to s. 75(1) of the Act is similar to that given to it under s. 25 of the Provincial Small Causes Courts Act. Explaining the scope of the latter provision Beaumont, C.J. (as he then was) in Bell & Co., Ltd. v. Waman Hemraj (1) observed:

> "The object of s. 25 is to enable the High Court to see that there has been no miscarriage of justice, that the decision was given according to law. The section does not enumerate the cases in which the Court may (1) [1938]40 Bom. L.R. 125.

L10Sup./69-10 interfere in revision, as does s. 115 of the Code of Civil Procedure, and I certainly do not propose to attempt any exhaustive definition of the circumstances which may justify such interference; but instances which readily occur to the mind are cases in which the Court which made the order had no jurisdiction or in which the Court has based its decision on evidence which should not have been admitted, or cases where the unsuccessful party has not been given a proper opportunity of being heard, or the burden of proof has been placed on the wrong shoulders. Wherever the Court comes to the conclusion that the unsuccessful party has not had a proper trial according to law, then the Court can interfere. But, in my opinion, the Court ought not to interfere merely because it thinks that possibly the Judge who, heard the case may have arrived at a conclusion which the High Court would not have arrived at."

The said statement of the law was accepted as correct by this Court in Hari Shankar v. Rao Girdhari Lal Chowdhury(1). We think the same applies squarely to the 1st proviso to s. 7 5 (1) of the Act.

In support of his contention Mr. Gupte placed considerable reliance on the decision of this Court in Official Receiver, Kanpur and Anr. v. Abdul Shakur and Ors. (2) wherein this Court held that the High Court in exercise of its power under the 1st proviso to s. 75 (1) of the Act is incompetent to disturb the findings of fact reached by the District Court and further the question whether a statutory presumption was rebutted by the rest of the evidence on record was also a question of fact which again was not open to be reviewed by the High Court. Shah, J. who spoke for the Court observed thus at p. 259.

> "The District Court inferred from the facts found that the statutory presumption under s. 118 of the Negotiable Instruments Act had been weakened and the burden which lay upon the insolvent was discharged and it was not open to the High Court exercising jurisdiction under s. 75(1) proviso 1, nor even under proviso 2 of the Provincial Insolvency Act to set aside the judgment of the District Court, for it is well settled that the question whether a statutory presumption is rebutted by the rest of the evidence is a question of fact."

It may be remembered that Shah, J. was also a party to the decision in Hari Shankar's, case(2), We see no conflict between (1) (1962) 1 Supp. S.C.R. 933.

(2) [1965] 1 S.C.R. 254.

the two decisions. The former decision enumerates some of the circumstances under which the High Court can interfere while considering whether the decision under review was made according to law. All that is laid down in Abdul Shakur's case(1) is that the High Court is not competent to disturb a finding of fact reached by the District Court even' if in reaching that finding it was required to take into consideration a statutory presumption.

We shall now proceed to examine the facts of this case bear- ing in mind the principles set out above.

We shall first set out the undisputed facts. The respondent Ponnayya Konar was a well to do person. He had one rice mill at Kivalur and another at Sirkali. He also had landed properties in Sirkali and Tuticorin. He was having money dealings with the family of Sreenivasa Naicker from about the year 1925 Under the original of Exh. B-1, a registered deed of Othi dated 28th September, 1925, he had borrowed a sum of Rs. 30,000 from Rangappa Naicker, the father of Srinivasa Naicker. On October 5, 1930 the said deed was renewed by the execution of a simple mortgage deed by Ponnayya Konar and his sons in favour of Rangappa Naicker. Under the registered mortgage deed dated 13th January, 1942 (Exh. B-4 is its copy), tile insolvents had borrowed from Ayyappa Naicker Rs. 20,000 out of which he discharged some of the debts due to Rangappa Naicker. Ayyappa Naicker was himself a rich man. Under the partition deed entered into in his family on October 30, 1936 (Exh. B-3) he got a cash of Rs. 52,000 and lands measuring 250 acres. The debt due to Ayyappa Naicker under the deed dated 13th January 1942 was discharged by payment of Rs. 5,000 and interest on 3rd April, 1948 and Rs. 15,000 and interest on the 28th March, 1949, as can be seen from Exhs. B-5 and B-6.

The case of the mortgagees is that when Exh. A-1 and A-2 were executed they were unaware of the fact that the insolvents had got into financial difficulties by then. The learned District Judge has accepted this plea and the learned Judge of the High Court has not come to a contrary conclusion.

There was no relationship between the insolvents and the mortgagees. In fact they belong to different communities. The insolvents are Hindus and the mortgagees are Christians. They also live at different places. The insolvents were residing at Sirkali and the mortgagees at Tuticorin, a place which is at a considerable distance from Sirkali. According to the mortgagees the circumstances under which Exh. A-1 and A-2 came to be executed are as follows (1) [1965] 1 S.C.R. 254.

In about the beginning of 1950 Ponnayya Konar approached Srinivasa Naicker for a loan of Rs. 30,000. Srinivasa Naicker told him that he and his son-in-law Ayyappa Naicker together would lend him a sum of Rs. 25,000 on the mortgage of his properties at Tuticorin. But as they did not have the entire sum of Rs. 25,000 in their hands at that time, a sum of Rs. 10,000 was paid to Ponnayya Konar on April 28, 1950 and a promissory note was taken for that amount. (Exh. A-11). In the beginning of September, 1950 Ponnayya Konar sent his son Arulappan with the letter (Exh. B-7) to get some more money. Accordingly another sum of Rs. 5,000 was paid on September 8, 1950 and the pronote (Exh. A-12) was taken from Arulappan. They agreed to pay the balance amount promised to be advanced at the time of the execution of the mortgage deeds. The mortgage deeds were got written up and executed on 4th November 1950. Therein it was recited that they were

executed for cash consideration. It was thought that the mortgagees would be able to pay the balance amount before the registration of the documents on November 6, 1950. But by that time they were not able to get together the entire amount that remained to be paid. On the date of the registration Ayyappa Naicker paid to the mortgagors only a sum of Rs. 4,500 another sum of Rs. 500 was adjusted towards the interest due on the sum of Rs. 15,000 previously advanced in April and September. The remaining sum of Rs. 5,000 was paid in two instalments, a sum of Rs. 1700 through Amirthan, the 3rd son of Ponnayya Konar on January 7, 1951 and the remaining sum of Rs. 33,00 again through Amirthan on February 10, 1951.

In the insolvency proceedings on the application of the petitioning creditor, a commissioner to search the house of the insolvents and seize their books of account and other relevant records was appointed. After search the Commissioner seized from the house of the insolvents several account books (ledgers as well as day books) as well as A- 1 1 and A- 1 2 which were found punched and defaced. Exhs. A-11, A-12 as well as several of the entries in the ledger and day books were marked by consent in the proceedings from which these appeals have arisen. Hence their genuineness is not open to question.

It is most unlikely that those documents were got up by the insolvents and kept in their house, depending on the off chance of a court commissioner searching their house and seizing them, so that they may serve as corroborating evidence in support of the impugned mortgages. If Exh. A- 11 and A-12 as well as the entries in the account books were intended to support the claim tinder Exhs. A-1 and A-2, the most natural course would have been to draw up the mortgage deeds in such a way as to take assistance from them. In that case the mortgage deeds would not have recited that they were executed for cash consideration. Further Exhs. A-11 and A-12 would have been left in the possession of the mortgagees. We are convinced that the version put forward by the mortgagees is substantially true. The original agreement between the parties was to take mortgages of the Tuticorin properties for cash consideration. 'The intermediate steps taken were necessitated by the fact that mortgagees were not able to get together in one, lump the required amount. The promissory notes Exhs. A-11 and A-12 were taken as stop gap arrangements. The recitals in the mortgage deeds accord with the original agreement between the parties. That was likely to be the reason why the promissory notes Exh. A-11 and A-12 were returned to the parties. The entries in the account books of the insolvents reflect the transactions as they took place. If they were bogus entries made to support Exhs. A-1 and A-2, a receipt of Rs. 25,000 in cash on 4th November 1950 would have been shown therein. The learned District Judge correctly thought that the account entries in question had a great deal of intrinsic value. On the other hand the insolvency court and the High Court unnecessarily allowed themselves to be influenced by the apparent contradiction appearing between the recitals in Exhs. A-1 and A-2 and those in Exhs. A-11, A-12 and the account entries.

One other circumstance which had weighed with the High Court in holding that Exhs. A-1 and A-2 do not represent genuine transactions is that in their pleadings the mortgagees have struck to their case that cash consideration passed under Exh. A-1 and A-2 and this the Court thought was a deliberately false plea. The learned District Judge had carefully considered this circumstance but was of opinion that the same was of no consequence. We think that the High Court had attached undue importance to that circumstance. The issue before the parties at the time of the pleadings was

whether the mortgages in question were supported by consideration or not and not the manner in which that consi- deration was paid. In their plea the mortgagees were merely adhering to the tenor of the mortgage deeds. From the facts stated earlier, it is clear that the mortgagees at all stages proceeded on the basis that Exhs. A-1 and A-2 were executed for cash consideration, the other steps taken by them being merely incidental.

The last and by far the most important circumstances that appears to have influenced the High Court was the failure of the mortgagees to produce their account books. This circumstance was carefully considered by the District Judge. He held that the adverse,- inference that could be drawn from that circumstance was rebutted by the other evidence available in the case. It was open to him to do so. His finding on this point is also a finding of fact and by no means a wholly unreasonable finding. The High Court could not have interfered with the same. From the above discussion it follows that generally speaking we shall come to the details of consideration presently-the findings of the District Court as regards the payment of consideration under Exh. A-1 and A-2 are findings of facts and they were not open to review by the High Court.

This takes us to the various items of consideration said to have passed under Exhs. A-1 and A-2 and the proof thereof. The District Court has held that the entire consideration mentioned in those documents has passed. We have now to see whether its finding in respect of the various items of consideration is supported by legal evidence. The challenge to the payment of consideration under Exhs. A-1 and A-2 made by the petitioning creditor includes a challenge to the passing of the various items of consideration said to have passed. Ordinarily the burden of proving that a document impeached under s. 53 of the Act is not supported by consideration is on the party who challenges its validity. That is so because the party who stands by the document can take advantage of the admission made by the insolvent in the document in question., But in this case the mortgagees themselves do not stand by the recitals in the documents as regards the manner in which consideration was paid. Therefore it is for them to prove the passing of consideration. Hence we have to see how far they have succeeded in proving the same.

We shall first take up Exh. A-2, the mortgage deed executed in favour of Srinivasa Naicker. It is said that the consideration payable under that mortgage was paid in the following manner:

> Rs. 5,000 under promissory note Exh. A-11; Rs. 1,700 paid in cash on 7-1-1951 and Rs. 3,300 also paid in cash on 10-2-1951; The receipt of the aforementioned sums is entered in the day book and edger of the insolvents. The relevant entries amount to an admission on the part of the insolvents of having received the amounts mentioned therein. We have earlier considered the authenticity of those account books. The evidence of the mortgagees as regards the payment of consideration is strongly corroborated by the entries in the insolvents' account books. It was open to the learned District Judge to rely on them. Hence his finding as regards the validity of- the mortgage under Exh. A-2 must be held to be final. So far as the consideration for Exh. A-1 is concerned it is said to have been made up of--
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> (i) a sum of Rs, 10,000 advanced under Exh. A-11;

(ii) Rs. 500 the interest due under Exh. A- 11 and A-12;

and

(iii) Rs. 4,500 paid on 6-11-1950.

The receipts of the various sums mentioned above excepting the sum of Rs. 4,500 said to have been paid on 6th November 1950, are entered in the day book and the ledger of the insolvents. Hence to that extent the finding of the learned District Judge is unassailable. So far as the payment of Rs. 4,500 said to have been made on November 6, 1950 is concerned no corresponding entry in the day book or the ledger had been proved. This important circumstance was not noticed by the learned District Judge. He proceeded on the basis that the account entries support the payment of that item as well. The evidence of Ayyappa Naicker as regards that payment is necessarily interested. The only other evidence on that point is that of P.W. 2, the Registrar who registered Exhs. A-1 and A-2. He is a relation of the insolvents. He did not endorse that payment in Exh. A-1, though he knew that he was required to do so under the rules. We are also surprised how he could have remembered that fact after several years. Had the learned District Judge's attention been drawn to the fact that there is no documentary evidence in proof of the payment of that item it is highly doubtful whether he would have held in favour of the mortgagee as regards the payment of that item. After going through the evidence bearing on the point we are not satisfied that the payment of that amount is satisfactorily proved.

In the result Civil Appeal No. 846 of 1963 is allowed and the judgment and decree of the High Court is set aside and that of the District Court restored. Civil Appeal No. 845 is allowed in part i.e. the mortgage Exh. A-1 is held to be valid to the extent of Rs. 10,500 and interest thereon. In the circumstances of the case we direct the parties to bear their own costs in all the courts.

R.K.P.S, C.A. 845/63 allowed in part.
C.A. 845/63 allowed in part.