A

RASUL BANI

v.

OFFICIAL RECEIVER

[COURT OF APPEAL, 1968 (Gould V.P., Hutchison J.A., Marsack J.A.), 2nd, 18th October] B

Civil Jurisdiction

Practice and procedure—application under Bankruptcy Ordinance—argument limited to sections of Ordinance—grounds argued rejected by court—application granted under statute 13 Eliz. 1, c.5—breach of principle that a party must know case he has to answer—Bankruptcy Ordinance (Cap. 37—1955) ss.44 (1), 46, 97 (1)—(Fraudulent Conveyances) 13 Eliz. 1, c.5 (Imperial). C

Bankruptcy—application by Official Receiver to declare transfer void under ss.44 (1) and 46 of Bankruptcy Ordinance—(Cap. 37)—decided by court on ground not relied upon or argued—breach of principle that a party must know the case he has to answer.

D

The Official Receiver applied to the Supreme Court for a declaration that a transfer of lease by a bankrupt before his bankruptcy was void. In his application and argument the Official Receiver relied only upon sections 44(1) and 46 of the Bankruptcy Ordinance but the judge in the Supreme Court found that he had established no case under either section: he held, however, that the transfer of lease was void by virtue of the provisions of the statute 13 Eliz. 1, c.5 (Fraudulent Conveyances) and granted the application. On appeal — E

Held: 1. The wide powers of the court in bankruptcy proceedings do not absolve the court from the necessity of being guided by the recognised forms of procedure, particularly those which safeguard the interests of justice by ensuring that a party knows fully the case he has to answer.

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2. The questions which arise and affect the matter of proof under section 44(1) of the Bankruptcy Ordinance and the statute 13 Eliz. 1, c.5 are not identical.

3. All that was relied upon by the applicant and all that the respondent in those proceedings had to answer were particular provisions of the Bankruptcy Ordinance, and the judge was in error (without re-opening the case) in deciding the matter upon an issue not before him. G

Case referred to: *Chalmers v. Ayodha Prasad* (Ap. No. 9 of 1960 — unreported).

Appeal from a decision of the Supreme Court on an application under sections 44(1) and 46 of the Bankruptcy Ordinance.

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S. M. Koya for the appellant.

R. L. Regan for the respondent.

The following judgments were read:

A GOULD V.P.: [18th October, 1968]—

This is an appeal from a judgment of the Supreme Court of Fiji in proceedings brought by the Official Receiver in the bankruptcy of one Jasoda, claiming a declaration that a certain transfer of lease by the bankrupt, of land known as Koronibalei, was "void as against the applicant as such trustee under the Bankruptcy Ordinance." The proceedings were com-
B menced on the 16th July, 1967, by way of notice of motion. Jasoda had filed her own petition in bankruptcy on the 23rd September, 1960, and was adjudged bankrupt on the 21st September, 1963.

On the 5th August, 1959, one Kuar Singh obtained judgment against Jasoda for £62.15.5 and caused a writ of *fieri facias* to be issued against her property. The transfer of lease which is challenged in these proceedings, was registered in the office of the Rgistrar of Titles on the 13th
C August, 1959; it was in favour of Rasul Bani (wife of Abbas Ali) who was the respondent in the Supreme Court proceedings and is the present appellant. It should be indicated here that no copy of the actual transfer of lease was put in evidence before the learned judge in the Supreme Court; a certified copy thereof which was admittd by this court, discloses that the document bears a typed date "July" but no entry for the day of the month, and contains an acknowledgement of the receipt of
D consideration in the sum of £150. There is an endorsement of the approval of the Native Land Trust Board dated the 11th August.

When proceedings were commenced in the Supreme Court counsel for the Official Receiver said that the application was based upon sections 44 (1) and 46 of the Bankruptcy Ordinance (Cap. 37). When the court pointed out that section 46 applied only if the petition in bank-
E ruptcy was presented within three months after the date of the transaction being challenged, counsel limited his grounds to section 44 (1), under which certain categories of settlements may be avoided as against the trustee in bankruptcy.

The evidence called for the Official Receiver was meagre. In essence it was limited to the Bailiff's account of his visit to the land in question,
F which was then occupied by Jasoda, with the intention of executing the writ of fieri facias, on the 13th August, 1959. Jasoda told him that her lease was at her solicitor's office and promised either to hand it over or pay the money on the following day. The Bailiff appeared to regard himself as having seized the lease, but, however that may be, when he met Jasoda on the following day the document was not handed over. The record of the debtor's statement and examination on oath in
G the bankruptcy proceedings was put in evidence by counsel and contained a statement that she had transferred the lease to the respondent for £150 which (so the statement continued) Jasoda then owed her.

The evidence for the respondent was limited to her own testimony. She said that the lease was transfered to her but that she herself knew virtually nothing about the transaction: it was her husband who had
H advanced money to Jasoda and who was in control of everything. She had herself a house on the land and was living there with her children. Though stated to have been in court the husband, Abbas Ali, was not called as a witness.

On this evidence the learned judge held that a settlement within the meaning of section 44 (1) of the Bankruptcy Ordinance had not been proved. There is no challenge in this appeal to that finding and the matter would presumably have ended there, but the learned judge went on to consider whether the transfer was impeachable by virtue of the provisions of the statute 13 Eliz. 1, c.5, which contains provisions against fraudulent conveyances. Having considered the evidence he held that the transfer of lease was void by virtue of those provisions. The present appeal is brought by Rasul Bani.

As is well known, the court has wide powers in bankruptcy proceedings. Section 97 (1) of the Bankruptcy Ordinance, for instance, gives it power to decide all questions of priorities, and "all other questions whatsoever, whether of law or fact . . . which may arise . . . or which the court may deem it expedient or necessary to decide for the purpose of doing complete justice." Nevertheless, the existence of such a jurisdiction in the court does not absolve the court from the necessity of being guided by the recognised forms of procedure, particularly those which safeguard the interests of justice by ensuring that a party knows fully the case he has to answer. Mr Koya, for the appellant, called the court's attention to the case of *Chalmers v. Ayodha Prasad* (Appeal No. 9 of 1960 — unreported) where authorities on the necessity for and effect of pleadings are set out. The present proceedings were by way of motion in which of course there are no pleadings, but the principle is the same; counsel for the Official Receiver confined his application to a certain section of the Bankruptcy Ordinance and that was all the respondent in those proceedings was called upon to answer.

That the matter is not academic can be illustrated from the judgment under appeal. The learned judge said that the essential feature of a settlement is that the transfer should have been made for the purpose of settling the property on someone, or at least of preserving it for the enjoyment of another person. That is not the question under the statute 13 Eliz. 1, c.5 where the main question is the intent to delay, hinder or defraud creditors. In that question the presence or absence of consideration is important and will have an important effect on the onus of proof. While the evidence of Rasul Bani as to her building of a house and residence on the property may have been deemed by her legal advisors to be sufficient on the issue before the court, it may not have been so if they had been aware that they had to deal with the statute of 13 Elizabeth 1 c.5. The learned judge made adverse comment on the failure to call Abbas Ali as a witness but it is conceivable that similar reasons applied there. The production before this court of a copy of the transfer of lease in question (which ought to have been before the Supreme Court also) shows that in some respects material facts were not before the learned judge, and further illustrates the necessity of strict adherence to the issues which are properly before the court.

I think, with all respect to an otherwise very careful judgment, that the learned judge was in error in this respect. He might, in his discretion, have called the parties before him again for the framing of the further issue and have reopened the case, but as the matter stands, he has decided something which was not before him for decision, and his finding, speaking in general terms, is really a nullity. For the reasons I have given,

therefore, I would allow the appeal and set aside the judgment and orders in the Supreme Court — the appellant to have the costs of this appeal and in the Supreme Court. All members of the Court being of the like opinion, it will be so ordered.

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HUTCHISON J.A.:

I concur.

MARSACK J.A.

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I also concur.

Appeal allowed.