

(1995) 06 KL CK 0006
In the High Court Of Kerala
Case No : C.R.P. 1772 of 1994

Irudukavil Thankamma and Others

APPELLANT

Vs

Official Receiver

RESPONDENT

Date of Decision : 12-06-1995

Acts Referred:

Provincial Insolvency Act, 1920 — Section 54, 56

Citation : (1995) 06 KL CK 0006

Hon'ble Judges : B.M. Thulasidas, J

Bench : Single Bench

Advocate : M.C. Sen, for the Appellant; O.V. Radhakrishnan for Respondent 1, for the Respondent

Judgement

B.M. Thulasidas, J.—Petitioners are respondents 4 to 11 in I.A. No. 885 of 1981 in I.P. No. 1 of 1973 filed by the Official Receiver, the first respondent herein, against one Irudukavil Krishnan, who is the brother-in-law of the first revision petitioner. The said Krishnan who was the first respondent in the I.P., and the second respondent his brother, are dead and the revision petitioners are the wife and children of the second respondent. The above I.A. was filed to annul the transfers made by the first respondent - insolvent in favour of the second respondent in respect of the petition schedule properties. The first respondent conducted a public examination of the insolvent and found that the transactions by the insolvent in favour his brother were made with dishonest intention to defeat his creditors. It was also found that the sale deeds were executed for nominal consideration, that possession had not passed to the transferee and that the insolvent himself was in possession. The application was dismissed by the trial court, which held that consideration for the transaction was not inadequate and the transfers made on the basis of Ext. B1 agreement dated 7.3.1966 were legal and valid. In appeal, the court below upheld the contentions of the first respondent and reversed the order of the trial court. The said order is under challenge in this revision petition. It was submitted that the findings and conclusions of the court below are not legal and proper. It should have noted that

in the wake of the failure to execute the sale-deeds as per Ext. B1, the second respondent transferee sent a notice to the insolvent and as a result of mediation the impugned sale-deeds were executed. The consideration paid was adequate and the transactions were bona fide. There was a charge upon the properties, which was discharged by the assignee. The insolvent had only fractional interest in some of the properties and that he did not try to make them out of the reach of his creditors, as alleged. The impugned order is unsustainable and he has prayed that it may be set aside.

2. Heard.

3. The brief facts are these: I.P. No. 1 of 1973 of the Sub Court, Tirur was filed on 14-6-1973 and the petitioner was declared insolvent. He was permitted to apply for discharge within six months from the date of the order. The Official Receiver had taken delivery of the properties of the insolvent. It was while the application for discharge was pending that the first respondent filed the present application, on the conclusion of the public examination conducted as per the order of the insolvency court. By three sale-deeds the insolvent had purportedly transferred his interests in respect of 7 items of properties to his brother, Arumugham. The first item is 50 cents, second 84 cents, the third 32 cents, the fourth 1.75 acre the fifth 2 acres 60 cents, sixth 48 cents and the seventh 26 cents. In the objection filed to the petition it was contended inter alia that the petition was barred by limitation, that, public examination conducted by the receiver on 20.6.1981 was against the direction of the Court, that the transfers were not fraudulent as alleged, that there was proper consideration, that they were executed bona fide and did not deserve to be annulled.

4. Section 54 of the Insolvency Act reads as follows:

Avoidance of voluntary transfer:-

Any transfer of property not being a transfer made before and in consideration of marriage or made in favor of a purchaser or encumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged insolvent on a petition presented within two years after the date of the transfer, be voidable as against the receiver and may be annulled by the court.

5. It is clear that subject to the exceptions mentioned, transfers made by the insolvent two years prior to the filing of the I.P. alone are voidable as against the Receiver and may be annulled by the court. The impugned deeds, Exts. A2 to A4, were made in 1969 and the insolvency petition was filed only in 1973. It is admitted that the deceased Krishnan filed I.P. No. 2 of 1970 before the Sub Court, Manjeri and it was during its pendency there that I.P. No. 1 of 1973 was filed before the Sub Court, Tirur. I.P. No. 2 of 1970 was returned by the Sub Court, Manjeri for presentation before proper court. Indeed, there could be no representation since I.P. No. 1 of 1973 had already been filed and was pending. It is not possible to agree that I.P. No. 1 of 1973 was in continuation of I.P. No. 2 of 1970. Legally these are two independent proceedings though in both identical

reliefs had been claimed. A petition filed before a court without jurisdiction will have no legal effect. The presentation of the petition means presentation before a court having jurisdiction to entertain and to adjudicate upon it, which, in this case is the Sub Court, Tirur. The impugned sale deeds were made in 1969. The present I.P. was filed only in 1973. The deceased first respondent was adjudged insolvent by order dated 31.1.1981 and as directed he applied for discharge by I.A. No. 848 of 1981 within six months of the order. It was subsequent to that the Official Receiver filed the present I.A. for annulment of the sale deeds made by the insolvent in favour of the second defendant.

6. The appellate court has observed:

But regarding S.55 and S.56, such a plea of limitation is not relevant. The right of the receiver to seek annulment is not based on the plea of limitation as contained in S.16 (S.56) of the Act. It is a general right which a receiver is getting on the basis of information he gets while he is holding the property on receivership, or while he is the receiver.

The petition was filed u/s 56 of the Act for annulment of the transfers u/s 54 of the Act, It was perhaps assumed that such transfers were voidable. In regard to void or sham transactions, there is no question of setting them aside, invoking Section 54 of the Act, in which event the date of the transactions may not be quite relevant. Sham transactions have no legal existence in law. I am in general agreement with the observations of the court below as regards the maintainability of the petition filed for annulment. But then the assumption that a period of limitation is provided for such application is untenable. Obviously Section 54 of the Act had been misconstrued/misinterpreted. On the facts of this case, however, it can be said that the first respondent made the application u/s 4 of the Act and that Section 54 of the Act has no relevance at all.

7. We are concerned with the validity of the three sale deeds marked as Exts. A2 to A4. According to the first respondent/official receiver, deceased insolvent who was an abkari contractor owed large amounts which he defaulted and in order to defeat his creditors he assigned his properties in favour of his brother, who was the second respondent to this petition. The assignments were made for nominal consideration and were sham and fictitious. It was however contended that the insolvent had agreed to assign his properties in favour of his brother as per Ext. B1, that they were not conveyed in terms thereof, that notice was sent demanding assignment and later on the intervention of mediators the insolvent executed the assignment deeds. Ext. B1 is with respect to 7 items of properties, which were subsequently sold: Item 1 is stated to be the absolute property of the insolvent, which he had obtained as per Document No. 939/66. The sale deed was produced by the first respondent, which is dated 24th May, 1966. On the date of Ext. B1 the first respondent had not obtained right to item No. 1 of Ext. B1. Its inclusion in the agreement was therefore not justified. That lends credence to the case of the first respondent that Ext. B1 was got up subsequently to give strength to the sale deeds. The evidence of RW-1 also in

my view was of no avail to sustain the case of the insolvent or the second respondent. The appellate court has rightly observed that the recitals in the documents were not decisive being self-serving. Indeed it is doubtful whether the second respondent could have paid the amounts to the insolvent as mentioned in the sale-deeds. Substantial properties were purportedly sold for a throw-away price. Indeed, in Ext. B1 there are recitals to indicate that the insolvent did not in fact desire to transfer the properties absolutely, and, only wanted to protect them from the reach of his creditors. There is hardly any evidence to show that as per the sale-deeds the second respondent got possession of the properties. The observations in paragraph 15 of the impugned judgment seem to be quite justified. In my view, the insolvent had not parted with possession of the properties, which, were in his possession and enjoyment. The agreement and the sale-deeds are sham and fictitious meant to defeat the creditors of the insolvent.

I affirm the impugned judgment and dismiss the revision.