

(1928) 09 MAD CK 0048
In the Madras High Court

Lakshmanaswamy Chetty, The Official Assignee

APPELLANT

Vs

V.K. Natesa Chetty

RESPONDENT

Date of Decision : 24-09-1928

Acts Referred:

Citation : 114 Ind. Cas. 840

Hon'ble Judges : Kumaraswami Sastri, J

Bench : Single Bench

Judgement

Kumaraswami Sastri, J.—This is an application by the Official Assignee to expunge the proof of respondent V.K. Natesa Chetty to declare that he, the respondent, has no mortgage or charge over the estate of the insolvent and that the alleged mortgage in favour of the said Natesa Chetty is fraudulent and void as against him, to direct the respondent to pay him Rs. 14,500 and Rs. 2,870 or such other sum as may be found due by Natesa Chetty on the taking of the accounts, for costs and other reliefs.

2. The facts of the case are shortly these:

3. A vesting order was made on the 1st of October, 1920. On the 22nd of November, 1919 the insolvent executed a promissory note for Rs. 5,000 in favour of the respondent and on the 8th of September, 1920, another promissory note for Rs. 2,500 and deposited certain deeds as security, these being deeds of mortgage executed by third persons. The Official Assignee in the usual course wrote for particulars of the claim when a claim was made to him and the claim was notified on the 22nd of October, 1920. A proposal was made by the respondent to the Official Assignee to realise the securities and pay the respondent what was due to him and the Official Assignee consented to that course. Decrees were obtained upon these securities by the Official Assignee and it was agreed between the Official Assignee and the respondent that these decrees should be assigned over to the respondent for the debt due to him and a sale-deed was executed on the 16th of December, 1923.

4. The sale-deed recites that the insolvent was indebted to the transferee in the sum of Rs. 7,500 and interest thereon due in respect of two promissory notes executed in his favour by the insolvent, one for Rs. 5,000 and the other for Rs. 2,500 carrying interest at the rate specified in the promissory notes, that to secure the amounts due on the promissory notes the insolvent created an equitable mortgage in favour of the transferee by the deposit of certain securities (which consisted of certain simple mortgage-deeds executed in favour of the insolvent as manager of the joint family consisting of himself and his two brothers) and that there is a sum of nearly Rs. 12,895 due to the transferee on the footing of the said mortgage.

5. It goes on to state that the Official Assignee admitted the claim of the transferee as such secured creditor and the transferee requested the Official Assignee to collect the amounts due on the mortgage on his behalf and pay over the same to him and that by an arrangement entered into between the parties it was agreed (with the consent of the insolvent's brothers) that the transferor (the Official Assignee) should realise the amounts due on the mortgage on his behalf and pay them to him, in consideration of the transferee paying the necessary expenses incurred, for such collection and the commission payable to the transferor.

6. It recites that the transferor obtained mortgage decrees on the several mortgage-deeds handed over to him by the transferee which are described in the schedule and that it was thought expedient to transfer those decrees to the transferee in consideration of the amount due to him.

7. Then the deed runs as follows: "Now this indenture witnesseth that in pursuance of the said arrangement and in consideration of the sum of Rs. 10,500 already payable to the transferee as aforementioned, the expenses incurred and the usual commission as arranged having been paid, the transferor hereby conveys, transfers and assigns absolutely to the transferee, all his rights and interests in the decree described in the schedule attached hereto the transferee will hereafter recover and realise the amounts of the decrees either by proceedings in execution or otherwise at his own expense, and responsibility and the transferor will have hereafter no manner of claim or right in the said decrees or against the several judgment-debtors under the decrees. The transferor shall deliver all the copies of the decrees to the transferee."

8. Then follows the usual covenant that no monies have been recovered by the transferor.

9. The schedule contains 11 decrees.

10. The present application is based on the ground that there was really no debt due to the respondent, that he fraudulently claimed monies which were not due and that the Official Assignee was by fraud induced to execute the sale-deed.

11. A preliminary objection is taken as to the maintainability of this application in

the Insolvency Court and it is argued that the proper remedy is by way of a regular suit.

12. There can be little doubt that if the matter had rested upon the proof of claim, it is open to the Official Assignee to come in at any stage and have the proof expunged and there would be no question of limitation. But in this case the matter has gone further and a sale-deed has been executed by the Official Assignee and these decrees transferred. If the vendee was a stranger and was not a creditor of the insolvent there can be little doubt that a suit would be the only remedy and it has been held that a sale by the Official Assignee or an Official Receiver is in no better position than by the insolvent himself [see *Cheda Lal v. Lachman Parshad* 37 Ind. Cas. 830 : 39 A. 267 : 15 A.L.J. 253, *Guntapalli Narasimhayya v. Malapati Veeraraghavulu* 42 Ind. Cas. 525 : 6 L.W. 694 : (1917) M.W.N. 857 : 41 M. 440. *Avanashi Chetti v. Muthukaruppan Chetti* 44 Ind. Cas. 885 : 7 L.W. 406 : 23 M.L.T. 319 : (1918) M.W.N. 345 *Mg Lu Mg v. Maung Pu* 23 Ind. Cas. 367 : 7 Bur. L.T. 10 : 7 L.B.R. 88].

13. The question is whether the fact that the person to whom the property is sold is a creditor of the estate makes any difference. I have not been referred to any section in the Insolvency Act which entitles the Court on an application under the Insolvency Act to set aside a sale-deed executed by the Official Assignee. I think the only remedy of the Official Assignee where he has parted with property by a registered sale deed is to have the sale-deed set aside by a regular suit.

14. It is argued that in this case as the Official Assignee has admitted the proof of claim, that makes a difference. I do not see what difference it makes. If an ordinary transferor of property discovers that no money was due to the transferee which formed the basis of consideration for the transfer, a suit for a simple declaration that no money was due would not lie. What the transferor should do to avoid the sale is to sue for a declaration that the sale-deed is not valid and it should be cancelled and if possession has passed, to sue for recovery of possession. The admission of the claim by the Official Assignee has, in my opinion, no greater effect than the admission by a party that money is due and which forms the basis of consideration for the transfer. I do not think the mere fact that the Official Assignee admits that a debt is due puts the case on a different footing than the admission of any other transferee that money was due which formed the consideration for the transfer.

15. Reference has been made to Rules 24, 25, and 26 of the Second Schedule to the Presidency Towns Insolvency Act as regards proof of claim and to a decision of this Court in the *Official Assignee of Madras v. Sambanda Mudaliar* 60 Ind. Cas. 205 : 43 M. 739 : 39 M.L.J. 345 : 28 M.L.T. 258. I do not think these rules touch the present question before me, namely, whether the Insolvency Court can on an application set aside the sale-deed even assuming that if the matter rested upon mere proof of claim and payment in pursuance thereof, I could cancel the proof and demand repayment. The decision in *Ex parte Harper*, *In re Tait* (1883) 21 Ch. D. 537 : 52 L.J. Ch. 117 : 47 L.T. 421 : 31 W.R. 152 does not go further.

It seems to me that where the matter has gone beyond that stage and a conveyance of property has been effected, the remedy is to have the sale-deed set aside.

16. In the present case the allegation is that the Official Assignee was induced to execute the sale deed by fraudulent representation that the debt was due by the insolvent to the respondent while no such debt existed.

17. I do not see why in a suit to set aside the document the Court should not go into the question whether that representation was true or false. As pointed out in the Official Assignee of Madras v. Sambanda Mudaliar 60 Ind. Cas. 205 : 43 M. 739 : 39 M.L.J. 345 : 28 M.L.T. 258 the admission of the Official Assignee that a debt was due does not amount to an adjudication by a competent Court.

18. The case is one of first impression. It seems to me that where the adequate and proper remedy would be to have the sale set aside on the ground of fraud or failure of consideration the Court ought not even if it has got power to give a simple declaration that consideration did not pass or no debt was due.

19. I refer the Official Assignee to a regular suit and decide nothing on the merits. The taxed costs of both sides will be paid out of the estate of the insolvent.