
(1954) 02 MAD CK 0037

In the Madras High Court

Case No : Second Appeal No's. 1801 of 1947 and 134 of 1947

M.O. Abdul Rahim Rowther and Others

APPELLANT

Vs

Swaminatha Odayar and Others

RESPONDENT

Date of Decision : 04-02-1954

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 100, Order 21 Rule 101, Order 21 Rule 103, Order 21 Rule 63, Order 21 Rule 98
Limitation Act, 1963 — Article 11A
Madras Estates Land (Amendment) Act, 1909 — Section 3
Madras Estates Land Act, 1908 — Section 3(15), 3(2), 3(5), 6, 6(1)
Madras Hindu Religious Endowments Act, 1926 — Section 40
North Western Provinces Tenancy Act, 1901 — Section 19
Provincial Insolvency Act, 1907 — Section 36, 37
Provincial Insolvency Act, 1920 — Section 4, 53
Transfer of Property Act, 1882 — Section 53, 65A, 65A(2), 66

Citation : (1955) ILR (Mad) 744

Hon'ble Judges : Subba Rao, J;Panchapakesa Ayyar, J

Bench : Division Bench

Advocate : R. Swaminatha Ayyar, for second and third Appellants, for the Appellant; T.M. Krishnaswami Ayyar, K. Srinivasan for first, fourth to sixth and ninth Respondents, V.V. Srinivasa Ayyangar and V. Devarajan for thirteenth to twentieth Respondents, for the Respondent

Judgement

Subba Rao, J.—The main questions raised are common Subba Rao, J. to both these appeals. For convenience of reference, we shall adopt the ranks given to the parties in Original Suit No. 19 of 1939 on the file of the Court of the Subordinate Judge, Kumbakonam, out of which this Second Appeal arises.

2. Naduppadugai Melpathi, in which the plaint schedule lands are situated, is one of the 199 villages forming part of the property of the Raja of Tanjore. In 1799 the then Raja agreed to cede the collection of the revenues and the administration of justice to the East India Company. But he continued to be in possession till his death. On his death the above 199 villages were taken possession of by the Crown in 1856 by an act of State. Some years later, in

1862, these 199 villages were granted to the heirs of the late Raja. In respect of the Tanjore Palace Estate, an interpleader suit was filed, being Original Suit No. 3 of 1919, on the file of the District Court. The suit village, along with others, was allotted under the final decree for partition to Vasudeva Sahib burdened with a charge for a sum of Rs. 30,000. On 29th December 1925, Vasudeva Sahib leased the property to one Nallappa Odayar who is claimed by the Plaintiffs to be their benamidar. Vasudeva Sahib sold the village among others to one Subramania Chetty under a sale deed, dated 12th March 1928. On 3rd June 1929, Subramania Chetty leased it to Plaintiffs 2 to 5 and another Arumuga for three years. On 2nd July 1930, Vasudeva filed Insolvency Petition No. 10 of 1930 on the file of the Court of the Subordinate Judge for adjudication and he was adjudicated an insolvent on 27th October 1930. On 29th August 1932, the Plaintiffs took another lease deed in respect of the suit lands from Subramania Chetty for a period of seven years. The Official Receiver, in whom the estate of Vasudeva vested, filed Original Petition No. 261 of 1933 on the file of the Subordinate Judge on 21st November 1933, for setting aside the sale effected by the insolvent in favour of Subramania Chetty. To that application the Plaintiffs were not made parties. On 28th August 1936, the Subordinate Judge set aside the alienation on the ground that Subramania Chetty was not a bona fide purchaser for full consideration. Out of the total consideration of one lakh, it was found that only Rs. 27,916-12-3 presented true debts and to that extent, Subramania Chetty was allowed to rank as a simple creditor. Subramania filed an appeal to the District Court against the said order, being Civil Miscellaneous Appeal No. 43 of 1936. By an order, dated 14th April 1938, the learned District Judge confirmed the order of the Subordinate Judge. Pending that appeal the Plaintiffs took another lease deed, dated 10th November 1937, from Subramania for a period of ten years. A revision petition filed in the High Court against the order of the District Judge was dismissed. In execution of the charge decree in Original Suit No. 3 of 1919, the suit village along with others were brought to sale and purchased by the first Defendant on 23rd December 1938. The sale was confirmed on 28th June 1939. Before the first Defendant took delivery of possession, the Plaintiffs filed the suit Original Suit No. 19 of 1939, for a declaration of their occupancy rights in the suit lands and for a permanent injunction against the first Defendant from interfering with their possession. That suit was dismissed on 11th November 1940, on the ground that the civil Court had no jurisdiction. The Plaintiffs appealed to the District Court, being Appeal Suit No. 1 of 1941. Pending that appeal, the first Defendant took delivery through Court on 14th December 1940. The Plaintiffs filed Execution Application No. 30 of 1941 for redelivery of the lands under Order XXI Rules 100 and 101, Code of Civil Procedure; but the said execution application was dismissed. They filed Original Suit No. 28 of 1942 on the file of the Subordinate Judge, Kumbakonam, for setting aside that order. That suit was dismissed by the learned Judge on the ground that it was not maintainable as their rights were negatived in Original Suit No. 19 of 1939. He also found that the decision in the previous suit to the effect that the civil Court had no jurisdiction to entertain the

claim of the Plaintiffs would be res judicata. On those two findings he dismissed the suit. The Plaintiffs preferred Appeal Suit No. 134 of 1947 against the decree of the Subordinate Judge in Original Suit No. 28 of 1942 dismissing the same. Against the decree and judgment in Original Suit No. 19 of 1939 dismissing the suit on the ground that the civil Court had no jurisdiction, an appeal, Appeal Suit No. 1 of 1941, was filed to the District Court. The District Court upheld the finding of the lower Court in regard to the question of jurisdiction but vacated the other findings for the reason that the Subordinate Judge who had no jurisdiction was not competent to decide on the merits. In the result, he directed the plaint to be returned for presentation to the proper Court. Against that order, a second appeal was filed to the High Court. The High Court held that a civil Court had jurisdiction to entertain a declaratory suit in respect of occupancy rights involving the consequential relief of injunction. In that view it remanded the appeal for decision upon all the other issues. After remand, the District Judge held that the Plaintiffs are ryots entitled to occupancy rights and gave the declaration and injunction asked for. The second Defendant who purchased half a share in the village preferred Second Appeal No. 1801 of 1947 against that decree.

3. The main arguments were addressed in Second Appeal No. 1801 of 1947. If the second appeal is allowed, the first appeal would automatically be dismissed, for in that eventuality the Plaintiff's rights of occupancy would be negated. If the second appeal is dismissed, it would be necessary to dispose of another point peculiar to that appeal, namely, whether a suit for setting aside a summary order under Order XXI, Rule 103, of the Code of Civil Procedure, will be maintainable after a suit for declaration of the Plaintiff's rights was filed and dismissed earlier. It would be convenient therefore to dispose of the second appeal first.

4. Learned Counsel for the Appellant raised before us three points:

(i) the village of Naduppadugai Melpathi is not an estate within the meaning of Section 3(2)(d) of the Madras Estates Land Act as amended by Act XVIII of 1936;

(ii) the Plaintiffs have not acquired occupancy rights under the Statute; and

(iii) the first Defendant being a purchaser in execution of a charge decree, acquired title to the suit village free from the earlier encumbrances created on it and therefore the lease of 1932, which is the basis for the claim of occupancy rights under the Statute, would not bind him and the Plaintiffs holding under that lease did not acquire occupancy rights.

5. The first question is, whether the village of Naduppadugai Melpathi is not an estate as defined under the Madras Estates Land Act (I of 1908). Section 3(2)(d) defines an "estate" as

any inam village of which the grant has been made, confirmed or recognized by the British Government, notwithstanding that subsequent to the grant, the village has been partitioned among the grantees or the successors in title of the grantee or grantee--.

Before the amendment, the sub-section read as follows:

Any village of which the land revenue alone has been granted in inam to a person not owning the kudiwaram thereof, provided the grant has been made, confirmed or recognized by the British Government or any separated part of such village.

Under the amended section, therefore, an inam village granted, confirmed or recognised by the British Government would be an estate even if both the warams were given in inam to the grantee. The question is whether the suit village was an inam village granted by the British Government to the Tanjore Raja. The learned District Judge observed:

With regard to the argument relating to the character of the suit village itself, there was really no serious demur to the findings of the learned Subordinate Judge that the village was an "estate" by virtue of the decisions referred to by him.

But, before us, it was contended that the village was not an estate within the meaning of the said definition.

6. To appreciate the contention, some relevant facts may be recapitulated. The plaint schedule lands are situated in the aforesaid village which is one of the 199 villages forming part of the property of the Raja of Tanjore. In the year 1856, the said villages were taken possession of on behalf of the Crown as an act of State. Some years later, in 1862, they were granted to the heirs of the late Raja by the British Government. It is argued that the said villages were the private property of the Raja and that the British Government only restored the property to his successors and there was no question of any grant of the said villages in inam to the successors. But the nature and character of the grant fell to be considered by a Full Bench of this Court in *Sundaram Ayyar v. Ramachandra Ayyar* ILR (1917) Mad. 389 (F.B.) in connection with another village in the group called Ullikadai. The question before the Full Bench was whether the said village was an "estate" within the meaning of Section 3(2)(d) of the Madras Estates Land Act (Act I of 1908). To ascertain whether that village was an estate or not within that definition, it was necessary to consider two questions: (i) whether the Tanjore Estate comprising the said village among others was granted in inam by the Government and (ii) whether in respect of the said village, only land revenue had been granted in inam to a person not owning the kudivaram thereof. Adverting to the first question, Wallis, C.J. made the following remarks at page 397:

The presumption therefore is that it was the intention of the Legislature to apply the provisions of the Act to the numerous villages constituting the Tanjore Palace Estate, though it is of course necessary to show that they come within one or other of the classes of the definition. The villages in question formed part of the territories of the Raja of Tanjore as to which he agreed by the treaty of 1799 to cede the collection of the revenues and the administration of justice to the East India Company. By some arrangement come to at the time the Company

refrained from enforcing its rights under the treaty to the revenue of these villages, and they remained in the enjoyment of the Rajas until the death of the last Raja when his territories were taken possession of on behalf of the Crown by an Act of State. It was expressly decided in *The Secretary of State in Council of India v. Kamachee Boye Sahaba* (1858) 7 M.I.A. 476 that these villages, forming the so-called private estate of the Raja, then became the property of Government and some years later they were granted as a matter of grace and favour to the heirs of the late Raja, as held by this Court in *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba* (1868) 3 M.H.C.R. 424, 444. It is admitted that the kudivaram right in the suit village, and in almost all the other villages, does not belong to the estate; and these villages are therefore villages of which the land revenue alone has been granted by the British Government to persons not owning the kudivaram right, and they therefore come within the Clause (d) if they can be said to have been granted "in inam" within the meaning of the section.

Sadasiva Ayyar, J., with some hesitation, and Seshagiri Ayyar, J., wholeheartedly, agreed with the opinion expressed by the Chief Justice. This decision, therefore, is a direct authority for the position that all the villages pertaining to the Tanjore Palace Estate were granted in inam by the Government to the heirs of the Tanjore Raja. It is not disputed that the suit village is one of those villages. But it is contended that this decision should be confined only to the particular village and that it was so construed by a subsequent decision in *Srinivasa Ayyar Vs. Nallamuthu Padayachi*, . In that case the question was whether another village of the same group was an estate. The learned Judges, having regard to the evidence, accepted the findings of the Subordinate Judge to the effect that, what was granted by the Government was of both the warams. They pointed out that the decision in *Sundaram Ayyar v. Ramachandra Ayyar* ILR (1917) Mad. 389 (F.B.) applied to only one village in the estate. This decision does not say that the view of the Full Bench, that all the villages were granted in inam by the Government to the then Raja was wrong. Nor does it say that the Full Bench did not decide that point. Indeed the judgment proceeded on the assumption that the village would be an estate if only one waram was granted to a person not owning the kudivaram thereof. But, on the facts of that case they found that both the warams were granted. The scope of the decision of the Full Bench in *Sundaram Ayyar v. Ramachandra Ayyar* ILR (1917) Mad. 389 (F.B.) has been stated by another Divisional Bench of this Court in *Jagannatha Pillai v. Ramanathan Chettiar* (1938) M.W.N. 1284. The question in that case was whether the village in question was an estate within the meaning of Section 3(2) (d) of the Estates Land Act as it then stood. The learned Judges held that under the circumstances the suit village which was one of the 200 villages comprised in the Tanjore Palace Estate was an "estate" within the meaning of Section 3(2)(d) of Act I of 1908. When it was urged before them that the scope of the Full Bench should be confined only to the village, the subject-matter of that case, the learned Judges negatived that contention and observed as follows at page 1285:

It may be noted that the learned Judges, who made the order of reference, considered the question before them an important one, as the decision in that particular suit might affect the entire Tanjore Palace Estate. Accordingly the reference was in these terms:

whether the Tanjore Palace Estate is an estate within the meaning of Section 3(2) of the Madras Estates Land Act (I of 1908).

Wallis, C.J., who dealt with the matter at page 397, observed thus;

It is admitted that the kudivaram right in the suit village, and in almost all the other villages, does not belong to the estate; and these villages are therefore villages of which the land revenue alone has been granted by the British Government to persons not owning the kudivaram right.

He answered the question in the affirmative and in this Seshagiri Ayyar, J. concurred. But Sadasiva Ayyar, J. confined his answer only to the particular village in question. There can be no doubt that the finding is a general finding in regard to the whole estate. Whether the learned Judges were right or wrong in so deciding, it is not for us to consider.

It was so understood by Krishnan, J. in *Nallamuthu Padayachi v. Srinivasa Ayyar* (1924) M.W.N. 378, though sitting with Oldfield, J. he took the contrary view. The decision in *Srinivasa Ayyar Vs. Nallamuthu Padayachi*, proceeds on the assumption made by the learned Counsel for the tenant that the Raja owned both the warams in the village. But the question has since become academic in view of the recent inam legislation. Therefore, if the Full Bench decision is to be given full effect to, there can be only one answer in this case and that is the village is an estate;...

We respectfully agree with the aforesaid observations. In *Jagadeesam v. Kuppammal* ILR (1946) Mad. 687 another Divisional Bench of this Court, consisting of Wadsworth, O.C.J, and Koman, J., expressed much to the same effect at page 700:

It is not really necessary for us to determine whether or not the village of Kaduveli, including the hamlet of Ponavasal, formed an estate under the Madras Estates Land Act, as it stood before the amendment of 1936. The Full Bench which decided *Sundaram Ayyar v. Ramachandra Ayyar* ILR (1917) Mad. 389 (F.B.) answered in the affirmative the question whether the Tanjore Palace Estate was an estate under the Madras Act I of 1908. This decision has in some cases been distinguished on the ground that only one village was then under the consideration of the Court; but in terms the answer of the Full Bench appears to include the whole of the estate. There is much to be said for the view that, when the grant is considered as a whole, it must be regarded as a grant of the land revenue to a person not owning kudivaram in the land, although it can be shown that in the case of individual lands in the estate the kudivaram interest which had been previously owned by the Raja was included in the rendition to his heirs.

Whatever be the effect of the application of the Madras Act I of 1908 to this estate, all doubt is removed by the passing of the Amending Act in 1936.

At page 689, the learned Judges traced the history of the Tanjore Palace Estate at some length and pointed out that the seizure of the estate was an act of State and that the subsequent grant was to the heirs of the Raja as an act of grace and justice. It is therefore clear that the Full Bench certainly governs the question raised and that decision is binding on us. We hold that the village in question is an estate within the meaning of the Madras Estates Land Act.

7. Point 2.--The next question is whether the Plaintiffs have acquired occupancy rights under the Statute in the suit lands. The argument of Mr. Bhashyam, the learned Counsel for the Appellant, may be put thus:

8. u/s 6 of the Madras Estates Land Act, as amended by the third amendment Act of 1936, a ryot in possession on 30th June 1934 acquires rights of occupancy in the holding. The alienation in favour of Subramania was set aside u/s 53 of the Provincial Insolvency Act on 28th August 1936. When it was set aside, the alienation would be void either from the date of the alienation, or from the date when the application was made for adjudicating Vasudeva Sahib as insolvent, i.e., either 12th March 1928 or 2nd July 1930. With the alienation fell the lease executed by the Plaintiffs, as it was dependent upon the alienation. The result was, that the Plaintiffs would be trespassers from the date of the lease in their favour and continue to be so on the crucial date. Even, if the alienation was not void from its inception, it would be ineffective from the date of the application u/s 53 of the Provincial Insolvency Act. From that date, the Plaintiffs were trespassers or, at any rate, were not holding on the crucial date under the landholder, i.e., the receiver or the purchaser, the first Defendant. As the Plaintiffs were not holding the plaint-schedule lands as ryots on 30th June 1934, they could not acquire occupancy rights. Learned Counsel for the Respondents met the argument as follows: An alienation by an insolvent prior to the adjudication is only voidable at the instance of the Official Receiver. Even against him it is valid till set aside. Till annulled, the property alienated does not form part of the assets vested in the receiver. If set aside, the order relates back only to the date of the application. The Official Receiver in the present case did not take any interest after the sale was set aside and therefore the first Defendant who was a purchaser in execution of a charge decree and whose rights were not in any way affected by the insolvency law cannot take advantage of the order made at the instance of the receiver. The sale of the village by Vasudeva Sahib in favour of Subramania was binding on him. Even if he could take advantage of it, the sale was only voidable and the lease given by Subramania at a time when he was the legal owner and landholder was certainly valid and binding on the Official Receiver and the first Defendant, particularly when the lessees were not made parties to the application for setting aside the sale. In any view, even if the Plaintiffs ceased to be lessees from the date of the application, it would not affect their right under the Estates Land Act, as Section 6 read with explanation 1

confers a right of occupancy on every person who held a land as a ryot prior to the Act and continued to be in possession of such land at the commencement of the Act.

9. At the outset it will be convenient to clear the ground. Some argument was advanced on the basis that the Official Receiver had no interest in these proceedings and the dispute was only between the lessees from Subramania and a third party purchaser. But the sale proceedings in execution of the decree in Original Suit No. 3 of 1919 show that the Official Receiver was made a party to the said proceedings and therefore the first Defendant acquired also the interest of the Official Receiver in the said properties. It follows that, if the alienation was not binding on the Official Receiver, it would equally be not binding on the first Defendant.

10. The first question that arises is, what is the scope and the legal effect of an order by the insolvency Court setting aside an alienation made by an insolvent u/s 53 of the Provincial Insolvency Act. The relevant provisions of the Provincial Insolvency Act may now be read :

Section 53: Any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer 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.

Mariappa Pillai v. Raman Chettiyar ILR (1918) Mad. 322, 326 was a decision of a Divisional Bench of this Court on the interpretation of Sections 36 and 37 of the Provincial Insolvency Act (Act III of 1907). Section 36 of Act III of 1907 corresponds to the present Section 53 of the Provincial Insolvency Act. Under that section, the transfer in the circumstances mentioned in the section was made void against the receiver, and not voidable as in the present section. Notwithstanding the difference, the learned Judges held that the transfer was valid till set aside. At page 326, Sadasiva Ayyar, J. observed as follows:

I therefore agree with my learned brother that a transfer falling u/s 36 of the Provincial Insolvency Act remains valid till set aside by the Insolvency Court at the instance of the Receiver.

A Full Bench of this Court in Chidambaram v. Sellakumara ILR (1942) Mad. 1 (F.B.) expressed much to the same effect in respect of a transfer voidable u/s 53 of the Transfer of Property Act. At page 3, the learned Judges stated:

In a case where a debtor alienates his property under circumstances which render it voidable by the creditors u/s 53 of the Transfer of Property Act, the alienation is binding on the debtor. If avoided by the creditors who alone can do so, and there is a surplus, it goes to the vendee. The title to the property continues to be in the vendee subject only to the rights of the creditors. When, after such an alienation, the debtor is adjudged an insolvent, it is clear that the

property itself does not vest in the Official Receiver.

It will be seen from the aforesaid passage that the property alienated does not vest in the Official Receiver till he seeks to set aside the alienation u/s 53 of the Provincial Insolvency Act. A Divisional Bench of the Nagpur High Court in *Rukhmanbai v. Govindram* ILR 1946 Nag. 273 at 275 laid down that a transfer falling u/s 53 was not void *ab initio* but was merely voidable and was valid until annulled by Court. The question in that case was whether the person in possession under such a voidable transaction was liable for mesne profits until the passing of an order annulling the transfer. At page 275, the learned Judges pointed out:

It will not be out of place here to point out that Section 53, Provincial Insolvency Act, was amended to make the meaning clear by using the word "voidable" in place of the word "void" which was used in the previous Act.

The wording of the section thus very clearly indicates that a transfer of the nature mentioned therein is voidable as against the Receiver and is not void *ab initio* and may be annulled by the Court. The section gives the Court a discretion to annul it. An application for annulment can be made only after adjudication and not before, and only if the Receiver chooses to avoid it and not otherwise, and even if the Receiver chooses to avoid it there is a further condition u/s 53, viz., that it will be void only if the Court declares it so.

The Allahabad High Court in *Amir Ahmad v. Saiyid Hasan* ILR (1935) All. 900 expressed the same view. There the question was whether a transferee from a transferee would come under the provisions of Section 53. The learned Judges, Sulaiman, C.J. and Bennet, J., observed at page 903, as follows:

The transfer for the time being is valid, though it is voidable at the option of the receiver, and it is discretionary with the Court to annul it u/s 53 of the Provincial Insolvency Act. But so long as the transfer has not been avoided by the receiver and not annulled by the Court, the title vests in the transferee even though he may not have acted in good faith and might not have paid full consideration. Such a transfer can however be annulled, that is to say, declared to have ceased to be binding on the receiver. The annulment, however, cannot be equivalent to a declaration that it was void from the very beginning.

11. The scope of Section 53 of the Provincial Insolvency Act as interpreted by the aforesaid decisions may be stated thus. A transfer of property made by an insolvent two years prior to the filing of the petition to be adjudged insolvent is only voidable. The property so transferred does not vest in the Official Receiver; but within two years the Official Receiver may apply for setting aside that sale. It is incumbent on him to establish that the sale was not in good faith and for valuable consideration. If so much is proved, it is in the discretion of the Court to annul the sale, in which case it is not binding on the receiver. It follows that the sale is valid till set aside.

12. The next question is whether Section 53 can be invoked in the case of a transferee from the transferee. This question directly arose in the case of Amir Ahmad v. Saiyid Hasan ILR (1935) All. 900 already referred to. At page 906 the learned Judges stated the legal position thus:

But as the annulment made by the Court does not date back to the original transfer and can, at the very most, date back to the date of the application for insolvency, it would follow that a second transfer against a second transferee, who took the second transfer before the application for insolvency was made, cannot be annulled u/s 53 of the Act; but if it is either absolutely void from the very beginning or is voidable u/s 53 of the Transfer of Property Act, it can be declared to be void or avoided either in a separate suit or in a proceeding u/s 4 of the Provincial Insolvency Act.

A Divisional Bench of this Court consisting of Ramesam and Madhavan Nair, JJ., made some observations in connection with this question in (Gunturu) Pullayya and Another Vs. Official Receiver of Kistna and Others, though the said observations were obiter. Ramesam, J. said at page 274:

What the learned Judges seem to have meant in that case Ponnammam v. District Official Receiver, Tinnevely (1925) 97 I.C. 918 was that later transactions by the transferee cannot be questioned on a ground peculiar to themselves and independent of the attack in the main transaction but surely there can be no objection to holding that if the sale deed by the insolvent was not bona fide the further transactions by the transferees also fall to the ground along with it.

Later on the learned Judge proceeded to say:

I am inclined to agree with the opinion of Seshagiri Iyer, J., and even if it can be really said that later transactions by the transferees from the insolvent cannot be considered in a petition u/s 53 they cannot be considered only on grounds peculiar and not as consequential on the main transaction.

Madhavan Nair, J., who was a party to the earlier decision in Ponnammam v. District Official Receiver, Tinnevely (1925) 97 I.C. 918 explains the scope of Section 53 vis a vis a transferee from a transferee, as follows at page 275:

In the present case the transactions in question including the alienations made by the transferee from the insolvent are all attacked as links in a chain of fraudulent and connected transactions intended to screen the property from the claims of the creditors, so that while the transaction in favour of Respondent 4 is attacked what is really attacked is the original alienation made by the insolvent himself. Viewed in this light the alienation made by the insolvent cannot be considered apart from the alienation in favour of Respondent 4.... Though Section 53 of the Act may not strictly apply, in a proper case I think the Court has jurisdiction u/s 4, Insolvency Act, to declare the transactions invalid.

Though the observations of Ramesam, J. appear to be rather wide, what the

learned Judges in effect stated was that if both the transactions are part of a scheme of fraud and they are liable to be attacked on the same grounds, they could be set aside u/s 53 of the Act, or in any view u/s 4 of the Provincial Insolvency Act. But they expressly made it clear that a transfer from a transferee cannot be set aside if the grounds for setting aside are not connected with the earlier transaction. It is not necessary to express our preference to either of the views expressed by the learned Judges of the Allahabad High Court or to the observations made by the Judges of the Madras High Court, for in this case the transferee from the transferee was not made a party to the application for setting aside the alienation. It cannot be argued that though it may be permissible to set aside, a transfer from a transferee prior to the application for adjudication u/s 53 of the Provincial Insolvency Act, the transfer automatically falls to the ground even though the subsequent transferee is not made a party to the application.

13. It is therefore clear that if a transfer is set aside u/s 53 of the Provincial Insolvency Act, it becomes ineffective only from the date of application for setting it aside, and that it cannot affect the rights of transferees from the transferee prior to that date who were not made parties to the application. The Plaintiffs in the present case became tenants of Subramania under a lease deed, dated 29th August 1932, for seven years. As they were not made parties to the application, their rights under the lease deed remain unaffected, for at the time the lease was executed Subramania had certainly the legal competency to lease out the lands. The District Judge in his judgment says:

It has not been contended even for a moment, nor is there anything in the material or recorded evidence to support the contention, that the Plaintiffs were not bona fide transferees for valuable consideration.

14. In view of this finding it is manifest that the Plaintiffs were in possession of the suit lands as ryots on the crucial date, i.e., 30th June 1934. If so, it cannot be disputed that they acquired occupancy rights u/s 6 of the Madras Estates Land Act.

15. But it is contended that a ryot is

a person who holds for the purpose of agriculture, ryoti land in an estate on condition of paying to the landholder the rent which is legally due upon it

and that, in the present case, on the crucial date the Plaintiffs were not holding the lands under the first Defendant who was the landholder on the date. This legal position is said to follow from the fact that the transfer in favour of Subramania was set aside and that neither the Official Receiver nor the first Defendant could be called the successor in interest of Subramania. But it appears to us there is a fallacy in this argument. Though the first Defendant cannot legally be called the successor in interest to Subramania as he is not claiming under him, in our view he would be the landholder, as in law, the sale in favour of Subramania must be deemed to have been set aside subject to the rights of

the Plaintiffs under the lease deed. Section 3(5) of the Madras Estates Land Act, defines "landholder" to mean,

A person owning an estate or part thereof and includes every person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner or his predecessor-in-title or of any order of a competent Court or of any provision of law.

The first Defendant certainly owns the estate and as the lease is binding on him, the transfer must be deemed to have been set aside only subject to the lease. As the owner of the estate, he is entitled to collect the rent. He is therefore clearly a landholder within the meaning of Section 3(5) of the Madras Estates Land Act. The decisions cited by the learned Counsel for the Appellant in support of his contention appear to us to be beside the point. They are cases where the lessee had no title at the inception of the tenancy by reason of a subsequent decision or he had a right to give a lease only for a limited period. *Pattabhirama Reddi v. Balarami Reddi* ILR (1945) Mad. 250 (F.B.) is a case where, notwithstanding the existence of de jure trustees, persons purporting to act as trustees in fraud of the rights of the lawful trustees gave a lease of the properties and the Full Bench held that such persons were not "landholders" within the meaning of the Act. It may be mentioned that this decision has been overruled by the Judicial Committee in *Pattabhirama Reddi v. Balarami Reddi* ILR (1950) Mad. 959 (P.C.). The Judicial Committee did not lay down any new principle of law, but on the facts held that the de facto trustees in that particular case, having regard to the provisions of Section 40 of the Madras Hindu Religious Endowments Act, must be deemed to be trustees competent to give lease of the lands. Second Appeals 688 and 689 of 1943 were appeals from a case where by reason of the confusion of boundaries, the owner of a village gave a lease of the properties; but it turned out subsequently that the lands leased out fell within the boundaries of the other village. It was also a case of want of title. The Supreme Court in *Mahabir Gope and Ors. v. Harbans Narain Singh and Ors.* (1952) S.C.R. 776 held that a mortgagee cannot create an interest in mortgaged property which would enure beyond the termination of his interest as mortgagee. This conclusion was arrived at on the basis of the principle that a person cannot transfer or otherwise confer a better title on another than he himself has. That is a case where the lessor executed a lease deed to enure beyond the period of the mortgage. But in the instant case, at the time the lease was executed, Subramania Chetty had a complete title in the property, and therefore had the legal competency to lease the said lands just like any other owner can do. By a subsequent decision of the insolvency Court his legal competency to give a lease at the inception of the tenancy was not affected and therefore the leasehold interest acquired by the lessees under him was also not affected thereby.

16. Assuming that the lease became void or ineffective from 21st November 1933, the date of the application for setting aside the alienation in favour of Subramania, we are of opinion that the said fact cannot prevent the Plaintiffs

from acquiring occupancy rights under the Madras Estates Land Act. On the aforesaid assumption, Plaintiffs were tenants of Subramania, at any rate up to 21st November 1933. Thereafter they continued to be in possession. Section 6 of the Madras Estates Land Act confers occupancy rights on ryots under certain circumstances. The section as amended by the Third Amendment Act of 1936 reads:

Subject to the provisions of this Act, every ryot now in possession or who shall hereafter be admitted by a landholder to possession of ryoti land situated in the estate of such landholder shall have a permanent right of occupancy in his holding.

Explanation 1.--For the purpose of this sub-section, the expression "every ryot now in possession" shall include every person who, having held land as a ryot, continues in possession of such land at the commencement of this Act.

Explanation 2.--In relation to any inam village which was not an estate before the commencement of the Madras Estates Land (Third Amendment) Act, 1936, but became an estate by virtue of that Act, or in relation to any land in an inam village which ceased to be part of an estate before the commencement of that Act, the expressions "now" and "commencement of this Act" in this sub-section and Explanation 1 shall be construed as meaning the thirtieth day of June 1934, and the expression "thereafter" in the sub-section shall be construed as meaning the period after the thirtieth day of June 1934.

The village in question became an estate by reason of the Third Amendment Act of 1936. Section 6(1) in the light of Explanations (1) and (2) may be read as follows:

Subject to the provisions of this Act, every ryot in possession on the 30th day of June 1934 and every person who, having held land as a ryot, continues in possession of such land on that date, or who shall after the said date be admitted by a landholder to possession of ryoti land situated in the estate of such landholder shall have a permanent right of occupancy in his holding.

The Plaintiffs were admitted as tenants on 21st November 1933 and they continued to be in possession of the plaint schedule lands at the commencement of the Act, namely, 30th June 1934. But it is said with some force that the Plaintiffs could not have been ryots as defined under the Act before the commencement of the Act as the village in question had become an estate only by reason of the Third Amendment Act of 1936. "Ryots" has been defined by Section 3(15) of the Act as

a person who holds for the purpose of agriculture ryoti land in an estate on condition of paying to the landholder the rent which is legally due upon it.

It is pointed out that the village was neither an estate nor the Plaintiffs were ryots, nor their lands were ryoti lands in an estate. While appreciating the force of this argument we cannot accept it in view of the decision of the Judicial

Committee in Yerlagadda Mallikarjuna Prasad Nayudu v. Somaya ILR (1918) Mad. 400 (P.C.). There the Respondents held certain lands under a muchilika, dated 28th July 1907, given by them to the Appellant by which they agreed to hold the lands, described as kamatam or private lands, until 30th April 1908 for the purpose of cultivation. The Respondents however held over after the expiration of the lease, not only without the consent of the Appellant, but contrary to his wishes and intention and contrary also to the terms of the muchilika. The Madras Estates Land Act (Madras Act I of 1908) came into force on 1st April 1908. The Appellant filed a suit to eject the Respondents and recover possession of the lands which he claimed as his private lands. The defence was that they were ryoti lands in which the Respondents had occupancy rights u/s 6(1) of the Act and the explanation thereto added by the amending Act (Madras Act IV of 1909). At page 405 their Lordships observed:

As a fact, the Defendants continued in possession of the ryoti lands in suit after the 30th April 1908 not only without the consent of the Plaintiff, but contrary to his wishes and expressed intentions, and contrary to the terms of Clause 8 of the muchilika of the 28th July 1907. The Appellant's contention as to the effect of the explanation to Sub-section (i) of Section 6 is, in the opinion of their Lordships, unsound and untenable. The Defendants had held the lands from the 28th July 1907 until the 30th April 1908 for the purpose of agriculture on condition paying to the Plaintiff, the landholder, the rent legally due upon the lands. The lands were ryoti lands, as has been found by each Court below, and the Defendants were, in fact, continuing in possession of the land at the commencement of Madras Act I of 1908, although such continuing in possession was without the consent and was contrary to the wishes of the Plaintiff. The construction of Sub-section (i) of Section 6 of Madras Act I of 1908 as amended by Section 3 of Madras Act IV of 1909 is too plain for argument.

This decision, in our view, directly applies to the present case for explanation 2 only substitutes different dates for the commencement of the Act. In other respects the analogy is complete. The village of Ayyanki in the Privy Council case, and indeed the entire zamindari wherein it is situated, became an estate within the meaning of the Act after the Madras Estates Land Act became law on 1st July 1908. So too, the village of Naduppadugai Melpathi became an estate on 30th June 1934. If the ryot inducted before 1st July 1908, who continued to be in unlawful possession on the date when Act I of 1908 became law acquired occupancy rights, on the same principle the Plaintiffs who became lessees before the Third Amendment Act became law but continued to be in unlawful possession at the time when that Act came into force would acquire occupancy rights. The criticism levelled, namely, that the Plaintiffs were not ryots and the village was not an estate prior to the Act would equally apply to the tenants in the Privy Council case. Presumably the Privy Council applied the definition of an "estate", "ryot" and "ryotiland" given in the Act to the pre-existing state of affairs. That decision was given in the year 1918 and it stood the test of time. With great respect we follow the decision and hold that even on the aforesaid assumption,

the Plaintiffs have acquired occupancy rights in the suit lands.

17. Point 3.--Even so it was argued that the lease, dated 29th August 1932, whereunder the Plaintiffs were put in possession was not binding on the first Defendant, the purchaser, in execution of the charge decree. Some material facts may be restated. In the partition suit, Original Suit No. 26 of 1912 on the file of the Additional Subordinate Court, Tanjore, between the sharers of the private property of the late Raja of Tanjore, a preliminary decree was passed on 1st July 1918. An appeal was preferred against the decree to the High Court which was decided on 24th January 1924. Subsequently the interim final decree, dated 16th September 1925 was made, whereunder Vasudeva Sahib was allotted the suit properties along with others. The final decree made on 27th February 1926 adjusted the rights of the parties by granting a charge on the properties allotted for the payment of over Rs. 30,000 to the Defendants 1 and 2 in that suit (Senior and Junior Prince of Tanjore). One Appavoo Chetty, decree-holder in Original Suit No. 126 of 1933 on the file of the District Munsif's Court, Tanjore, attached in Execution Petition No. 82 of 1934 this charge decree in favour of Defendants 1 and 2 in Original Suit No. 3 of 1919. Other creditors also attached it. A receiver was appointed to realise the attached decree. The said receiver brought the property to sale. The sale was held on 23rd December 1938 and the first Defendant purchased the properties in execution of that charge decree. He being a purchaser in enforcement of a charge created before the lease, it is said that he acquired the property free from the lease executed in favour of the Plaintiffs. This argument was based upon Section 65-A of the Transfer of Property Act. It reads:

65-A(1) Subject to the provision of Sub-section (2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.

(2)(a) Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage.

It is contended that the lease in the present case was not made in the ordinary course of the management of the property and therefore it would not be binding on the charge-holder or the purchaser in enforcement of that charge. In support of that contention reliance is placed upon a judgment of the Supreme Court in Raja Kamakshya Narayan Singh Bahadur Vs. Chohan Ram and Another, . The question in that case was whether the mortgagor in possession has power to lease the mortgaged property. In that case the lease granted was a permanent lease. After considering the case law on the subject, Their Lordships made the following observations at page 16:

The question whether the mortgagor in possession has power to lease the mortgaged property has got to be determined with reference to the authority of the mortgagor as the bailiff or agent for the mortgagee to deal with the property

in the usual course of management. It has to be determined on general principles and not on the distinction between an English mortgage and a simple mortgage or on considerations germane to Section 66 of the Transfer of Property Act. Having regard therefore to the position that Section 66 has no application to leases of the mortgaged property, the decision of Jenkins, C.J., in *Balmukund Ruyia v. Motilal Barman* (1915) 20 C.W.N. 350 and the other cases following that line of reasoning do not govern the question before us.

While we are on this subject we would like to emphasise that it is for the lessee if he wants to resist the claim of the mortgagee to establish that the lease in his favour was granted on the usual terms in the ordinary course of management. Such a plea if established--and it must not be overlooked that the burden of proof in this matter is upon him--would furnish a complete answer to the claim of the mortgagee. If the lessee failed to establish this position he would have certainly no defence to an action at the instance of the mortgagee.

The question therefore is whether the lease, dated 29th August 1932, was given by Subramania Chetty in the usual course of management. On this question the Respondents are under a handicap. Though in paragraph 17 of the written statement it was stated that "rights alleged to have occurred to the Plaintiffs by the acts of any of the intermediate owners cannot avail as against the charge created by the decree in Original Suit No. 3 of 1919", the question that the leases given by Subramania Chetty offended Section 65-A of the Transfer of Property Act was not specifically raised. This question was not argued in either of the two Courts below. Indeed the learned District Judge observed in his judgment that

it has not been contended even for a moment, nor is there anything in the material or recorded evidence to support the contention, that the Plaintiffs were not bona fide transferees for valuable consideration.

We are not therefore justified in allowing the Appellants to raise this plea. Even otherwise we are satisfied on the evidence on record that there are no merits in the contention.

18. The lease deeds, Exhibits A and A-1 of the years 1929 and 1932, show that the lands were of the extent of 429 acres 51 cents and out of it a large extent had to be brought under cultivation. One of the conditions in Exhibit A-1 was that the tenants would cut and improve the inam poramboke land of the estate at two acres per head and make them suitable for cultivation and that they themselves shall have the roofed houses put up by them on the estate land. P.W. 3 in his evidence says that a large extent of land was not fit for cultivation and had to be brought under gradually. Exhibit A was for a period of three years and Exhibit A-1 was for a period of seven years. We cannot, therefore say, having regard to the nature and the extent of the land and the undertaking given by the lessees to bring the land under cultivation, that the lease for a period of seven years was not one given in the ordinary course of management of the property.

19. Even if the lease for seven years was bad as contravening the provisions of Section 65-A of the Transfer of Property Act, in our view it would not materially affect the result in this case. The Supreme Court was only considering the question of the validity of a permanent lease executed by the mortgagor and they held that was bad because it offended the principle subsequently embodied in Section 65-A of the Act. But in this case even if the lease for seven years offended the provisions of Section 65-A of the Act, the lessees would be tenants from year to year for they were inducted into possession by Subramania Chetty, the then landholder, as his tenants and they continued to be in possession on the date when the Third Amendment Act came into force. As the Plaintiffs held the lands as ryots under Subramaniam Chetty and continued to be in possession of the land at the commencement of the Act, they have acquired rights of occupancy under the statute. In *Pramatha Nath Bhattacharjya v. Sashi Bhooshan Banerji* ILR (1937) 2 Cal. 181, though a permanent lease created by the mortgagee was held to be invalid, the learned Judges held that the tenants acquired a right to cultivate the lands for the period during which the mortgage was subsisting and u/s 21 of the Bengal Tenancy Act, acquired a right of occupancy. In *Mt. Aziz Fatma Vs. Mukund Lal and Others*, , though it was held that the lease executed for twenty years pending a suit was not binding on the mortgagee, it was held that, as the mortgagor was the landholder at the time when he granted the lease to the Defendant and it was his duty to arrange for the cultivation of the land, the Defendant acquired tenancy right in the lands u/s 19 of the Agra Tenancy Act. These two decisions, therefore, proceed on the principle that, even though the particular lease was not binding on the mortgagee, the persons inducted by the landholder were tenants and therefore acquired rights of occupancy under the aforesaid two acts. So too, in this case the lease deed might have been bad and not binding on the mortgagee; but the Plaintiffs were tenants and continued to be in occupation till the crucial date and therefore they acquired rights of occupancy:

20. It is then contended that the learned District Judge erred in giving a decree in respect of 196 acres 99 cents. The learned Judge in paragraph 6 of the judgment says.

With reference to the extent of properties in relation to which the reliefs have to be granted, both parties now agree that this extent may be taken as acres 196 cents 99 and that no commission is necessary in this respect.

Having made the concession, it would not be open to the Appellants to attempt to reopen the same.

21. Coming to the first appeal, it is not necessary to cover the ground again for the main points raised therein are the same that were dealt with above. On the said findings there would be no substance in this appeal either. But the learned Counsel appearing for the first and second Defendants raised a technical plea that the suit would not be maintainable as the Original Suit No. 19 of 1939 involving the question of title was dismissed. The relevant facts may be briefly

stated-Original Suit No. 19 of 1939 filed by the Plaintiffs for a declaration of their occupancy rights and or permanent injunction against the first Defendant was dismissed on 11th November 1940. The Plaintiffs preferred an appeal to the District Court, being Appeal Suit No. 1 of 1941. The first Defendant took delivery through Court on 14th December 1940. When the Plaintiffs filed Execution Application No. 30 of 1941 for redelivery under Order XXI, Rules 100 and 101, Code of Civil Procedure, it was dismissed. The Plaintiffs filed Original Suit No. 28 of 1942 for setting aside the summary order. It was contended by the learned Counsel for the Appellant that, if the said suit was not filed, the summary order would become final and therefore he had to file the suit notwithstanding the fact that he had filed an earlier suit raising the same dispute. The aforesaid order dismissing the petition was made under Order XXI, Rules 100 and 101, Code of Civil Procedure. Order XXI, Rule 103, says:

Any party not being a judgment-debtor against whom an order is made under Rule 98, Rule 99 or Rule 101 may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit (if any), the order shall be conclusive.

Prima facie, therefore, the order would become conclusive if a suit had not been filed to set aside the order within the time prescribed, i.e., one year under Article 11-A of the Limitation Act. The rule does not in terms mitigate its rigour by providing that such suit need not be filed when another suit for a declaration of the right claimed and rejected in the application was already filed and pending. In the analogous circumstances when a claim under Order XXI, Rule 63, was rejected and when a suit was not filed, the Full Bench of this Court in *Seethamma v. Kotareddi* ILR (1950) Mad. 101 (F.B.) held that it was necessary to set aside the claim order within the time prescribed. In that case the decree-holder in Original Suit No. 527 of 1930 attached six items of property along with a few others in Execution Petition No. 383 of 1935. When the property was posted for sale, the mother of the judgment-debtor intervened and claimed in an application that she had been given a maintenance charge over these six items in a suit brought by her for that purpose, Original Suit No. 349 of 1932, on the file of the District Munsif's Court, Ellore. Four days before the execution application was filed, the decree-holder and another filed a suit, Original Suit No. 231 of 1936, representing the general body of creditors for a declaration that the charge decree obtained by the mother of the judgment-debtor was collusive and not binding on the creditors and that the property already purchased was not liable for her maintenance. When the claim application came up for hearing, that was dismissed on the ground that the decree-holder informed the Court that he had filed the original suit already. Original Suit No. 231 of 1936 went up to the High Court and it was finally held that items 1 to 6 were liable for maintenance. When the mother filed her execution application for enforcing the maintenance decree, the purchasers filed Original Suit No. 91 of 1943 for a declaration that, as the mother did not file a suit within one year for setting aside the claim order, she cannot execute her decree. That contention was accepted by the Full Bench.

It would be seen that in that case, at the time when the mother filed the claim petition and it was dismissed, the right to execute the decree for maintenance was in issue in an independent suit filed by the creditor, and that it was finally disposed of only by the High Court long afterwards. Though the claimant was not the Plaintiff but a Defendant in that suit, it cannot on principle make any difference, for the right, the subject-matter of the claim was in issue in that suit. Notwithstanding that fact, the Full Bench held that she lost her rights because she did not avail herself of the statutory right within one year by filing a suit for setting aside the order on the claim petition. We are bound by the Full Bench. The same principle applies in the present case. Though the Plaintiffs' earlier suit was dismissed and an appeal was pending, they were bound to file a suit under Rule 103. Otherwise the summary order made under Rule 101 would have become final and their appeal against the decree in the earlier suit would have become infructuous. The suit therefore was maintainable.

22. In the result, Second Appeal No. 1801 of 1947 is dismissed with costs of the contesting Respondents and Appeal Suit No. 134 of 1947 is allowed with costs.