

(1952) 07 MAD CK 0002

In the Madras High Court

Case No : Appeal No. 187 of 1947

Mohammad Hussain Sahib and Others

APPELLANT

Vs

Karutha Syed Mohammad Rowther and Others

RESPONDENT

Date of Decision : 29-07-1952

Acts Referred:

Provincial Insolvency Act, 1920 — Section 37

Citation : (1952) 65 LW 1107

Hon'ble Judges : Mack, J; Govinda Menon, J

Bench : Division Bench

Advocate : A. Srirangachari and V.V. Ramadurai, for the Appellant; A.C. Sampath Iyengar, N.S. Raghavan, V. Seshadri, K.S. Ramamurthi, R. Ramamurthi, R. Gopalaswamy Iyengar and S. Rajaraman, for the Respondent

Final Decision : Dismissed

Judgement

1. This is an appeal by the plaintiffs in O. S. No. 53 of 1945 on the file of the Court of the Subordinate Judge of Coimbatore against the dismissal

of the suit on the ground that the plaintiffs have no right to institute the suit. Though as many as 12 issues were framed by the learned Subordinate

Judge, the decision depended on the preliminary question regarding the right of the plaintiffs to institute the suit on the ground that they had a cause

of action. The learned Subordinate Judge found that the plaint did not show that the plaintiffs had an existing cause of action and therefore

dismissed the suit.

2. The plaintiffs are the sons and daughters of one Muhammad Ismail Sahib who died on 25-2-1943 and the present suit is brought for the

recovery of possession of the properties mentioned in the plaint from defendant 1 who was an alienee of those properties as well as from other

defendants who claimed to be the subsequent transferees for consideration from defendant 1. There are no less than 30 defendants to the suit and

most of them contest the plaintiffs' claim to any relief. This Muhammad Ismail Sahib was at one time a man of means. On 17-7-1926, a sale deed

was executed by him in favour of defendant 1 of some properties belonging to him for a sum of Rs. 22,000. On the very same day he executed a

usufructuary mortgage deed with regard to the rest of his properties in favour of the same defendant 1 for a sum of Rs. 4000. Though the

properties were situated within the registration sub-district of Erode, it so happened that those two documents were registered by the Sub-

Registrar of Aravakurichi in Trichinopoly district. How the documents got registered in that district was that an item of property, over which

Muhammad Is-mail Sahib had no title but admittedly situated within the jurisdiction of Aravakurichi Sub-Registrar's office, was added to the

schedule of each of the documents and therefore that Sub-Registrar was clothed with jurisdiction to register those documents. It is common ground

that the vendor or the mortgagor in the case had no title to those properties.

3. While matters were in that stage, nearly a year later on 24-8-1927 a creditor of Muhammad Ismail Sahib filed I. P. No. 215 of 1927 on the file

of the Sub-Court, Coimbatore, to adjudicate Muhammad Ismail Sahib an insolvent. This petition was enquired into by the insolvency Court and on

8-12-1927 Muhammad Ismail Sahib was adjudged an insolvent and whatever properties that he possessed at that time vested in the Official

Receiver who took charge of the estate. Whether the properties covered by the sale deed and the mortgage deed vested in the Official Receiver or

not we cannot say because there is no definite evidence as to what exactly vested in him. After this, the Official Receiver filed I. A. No. 440 of

1930 before the subordinate Judge, Coimbatore, under Sections 4 and 53, Insolvency Act to annul the sale deed executed by the insolvent in

favour of defendant 1 as well as to declare that the usufructuary mortgage executed by the insolvent in favour of defendant 1 was not valid and

binding on him. The vendee and the mortgagee contested this application and the matter was enquired into at some length by the learned

Subordinate Judge. The first point which came up before him for consideration was whether the sale and the mortgage deeds executed by the

insolvent without receiving consideration and the second point that was considered was whether the said deeds were void under the Registration

law; the third point was whether the said deeds were liable to be annulled for the reason alleged by the petitioning creditor. The learned

Subordinate Judge was of the opinion that the two documents were supported by consideration and were real and genuine documents not intended

to defeat or delay the creditors. His finding is contained at the end of Para. 13 of his judgment marked in this case as Ex. D-1 to the effect that the

alienations evidenced by Exs. II and III were for valuable consideration and that they had taken effect. On the question as to whether there was a

fraud upon the registration law the learned Subordinate Judge held that there was no fraud. In para. 16 of his judgment the learned Subordinate

Judge found that the sale deed and the mortgage deed were executed in good faith and for valuable consideration and that the insolvent had no

idea at the time of the execution to defraud or defeat any of the creditors of the insolvent. This was taken up in appeal to the District Court where

the learned District Judge held that since the documents were registered by the Sub-Registrar of Aravakurichi by the inclusion of a property which

was not intended to be transferred and upon which no title was intended to be impressed, it cannot be held that the documents were valid in view

of the Privy Council decision in -- AIR 1934 157 (Privy Council) . On this ground the decision of the Subordinate Judge was reversed and it was

held that the sale and mortgage deeds were not valid and binding on the Official Receiver. The alienees took up the matter in second appeal to this

Court and in the decision reported in -- Karutha Syed Muhammad Rowthar Vs. Official Receiver and Another, , Pandrang Row J. followed the

Privy Council decision in AIR 1934 157 (Privy Council) agreed with the District Judge and held that the alienations would not bind the Official

Receiver at all.

4. Subsequent to this I. A. No. 858 of 1937 was filed by the purchaser of two items of property from defendant 1, the vendee, for annulling the

adjudication. This was enquired into at great length and the learned subordinate Judge passed an order dated 14-3-1941 and marked in this case

as Ex. D-2. He came to the conclusion that the original petitioning creditor Kadirsa Rowther had no right to present the insolvent petition I. P. No.

215 of 1927 as the debt in his favour was not true; nor did the insolvent commit any act of insolvency by trying to defeat or delay the creditors.

The Subordinate Judge was of the opinion that the insolvency application was the result of collusion and that the adjudication was practically by

consent made with ulterior purposes. The gist of the learned Judge's order was that both the insolvent and the petitioning creditor colluding

together brought forward the insolvency application to get the debtor adjudicated insolvent and by practising fraud upon the Court the adjudication

order was obtained. Upon this, the application by the purchaser was allowed and the collusive adjudication was annulled on 14-3-1941. It may be

mentioned that the insolvent resisted the annulment of the adjudication order. There was an appeal against the order of the Subordinate Judge

which was confirmed and in the second appeal the orders of both the Courts were confirmed.

It is after this that the alleged insolvent died on 25-2-1943. The present suit was filed in 1945 two years after the death of Muhammad Ismail Sahib

by his own sons and daughters for the recovery of possession of the properties sold and mortgaged from the original as well as subsequent alienees

on the ground that after the annulment of the adjudication evidenced by Ex. D-2 the properties reverted back to the insolvent and therefore the

alienees were bound to restore the property to the insolvent. The learned Subordinate Judge found that the finding contained in Ex. D-1 that these

documents were executed in good faith and for valuable consideration must be deemed to have become conclusive and final. In addition, he

referred to two decisions of this Court in -- Dharmasamarajayya Vs. Sankamma and Others, and -- Ratnavelu Chettiar by mother and guardian

Madhuravalli Ammal and Another Vs. Franciscu Udayar and Others, to the effect that when an insolvency is annulled by an order of Court u/s 37,

Provincial Insolvency Act all proceedings taken as a result of that insolvency get wiped off and the situation is as if there had been no insolvency at

all and the parties are relegated back to the position which they would have occupied but for the insolvency. On these grounds, the Subordinate

Judge found in the present suit that the plaintiffs are not entitled to institute the suit and dismissed the same. This appeal is against that decree.

5. The question for consideration which has been elaborately argued by Mr. Srirangachariar for the appellants is whether as a result of the

annulment of the insolvency by Ex. D-2 the two deeds namely the sale deed and the mortgage have also got annulled with the result that the properties became revested in Muhammad Ismail Rowther. Mr. Srirangachariar argues that by the decisions of the High Court declaring that the sale and mortgage deeds are not binding on the Official Receiver, the alienations should be deemed to have been held to be nonexistent and therefore the title has got revested in the insolvent by the annulment of the insolvency. If that is so, the question regarding the binding nature of the transactions on the ground that they were not supported by consideration cannot now be gone into because the judgment of the learned Subordinate Judge has been reversed in appeal. It may be that the lower Court in the present case has stated in rather wide terms what the effect of the finding of the Subordinate Judge was in dismissing the application to declare the two documents not binding on the official Receiver. But, in our opinion, the fact that the finding of the Subordinate Judge would not now become conclusive cannot help the appellants for this reason that if as a result of the annulment of the insolvency on the ground that it is a collusive transaction, it would be as if there is no insolvency, the situation would be the same as if no steps had been taken to get the mortgage and the sale deeds set aside. In -- *Vadde Venkataswami and Another Vs. Bommaraju Venkata Subbayya and Others*, this Court has held that a vendor of Immovable property cannot be allowed to plead or to take advantage of the invalidity of the registration on his sale deed on the ground that by the inclusion of a particular item of property in the document and getting the document so registered in an office where otherwise it could not have been registered a fraud on the registration law was committed in which he participated. It was also held that as a general rule a plaintiff cannot plead his own fraud or illegal act as a basis of his claim or as a necessary step towards the success of his claim; his position in that matter is not made better by showing that the defendant has joined him in the fraud or illegal act or by the fraud or illegal act not being pleaded but coming to light in the course of the trial of the suit or even in the hearing of an appeal.

6. What then is the effect of the order Ex. D-2 by which the insolvency was annulled on the ground that there was collusion between the alleged

creditor and the insolvent? There can be no doubt that fraud vitiates all transactions and when once fraudulent decree has been set aside, it is as if

there has been no decree at all. In -- "Bandon v. Becher", (1835) 6 E. R. 1517 (F), the following are the observations :

A sentence is a judicial determination of a cause agitated between real parties, upon which a real interest has been settled; in order to make a

sentence there must be a real interest, a real argument, a real prosecution, a real defence, a real decision. Of all these requisites not one takes place

in the case of a fraudulent and collusive suit; there is no Judge but a person invested with the ensigns of a judicial office is misemployed in listening

to a fictitious cause proposed to him; there is no party litigation, there is no party defendant, no real interest brought into question"".

Following these observations it seems to us that in the collusive proceedings which culminated in the adjudication of Muhammad Ismail Sahib there

is no real controversy between the parties and there was nothing which the Court decided. The proceedings before the Court were a make-believe

and a sham fight. Such being the case the annulment of the adjudication would result in this, namely, that all transactions that have taken place and

all proceedings that would have been gone through during the pendency of the insolvency would be completely wiped off. If that is so, then the

decision by which the sale and the mortgage deeds were declared invalid also became null and void, with the result that the documents remain in

the same position as they had been but for the Insolvency- We may also refer to the Black's judgment page 1031 with regard to the effect of fraud

and collusiveness.

7. In our opinion by the circumstance that the insolvency proceedings have been annulled all actions done and all proceedings taken during such

period also get annulled and the proceedings by which the deeds have been declared void have also been got annulled.

Another way of looking at the question is that even if it cannot be said that the entire proceedings have been wiped off, still the plaintiffs who claim

under the insolvent cannot take advantage of a decision obtained by the Official Receiver declaring the sale and the mortgage deeds not valid and

binding. The plaintiffs are not the persons who have succeeded to the rights of the official Receiver, because the Official Receiver represents not

only the insolvent but also the creditors. We may also refer in this connection to the observations of the learned Subordinate Judge in annulling the insolvency that no creditor seems to have proved his debts in the insolvency from the beginning; and that the insolvent admitted after executing these documents that his debts had already been discharged. In this view also it has to be held that the entire proceedings were make-believe transactions. In our opinion, the learned Subordinate Judge was right in holding that the plaintiffs have no subsisting cause of action against the defendants. The transactions took place more than 20 years ago and the properties have passed from one party to the another; and third parties have acquired title in them. Though we do not want to rest our decision on the ground that the suit is barred by limitation we think that it cannot be said that the plaintiffs have proved that they have a right to institute the suit.

8. The appeal fails and is dismissed with costs (one set).