

(1916) 02 MAD CK 0037
In the Madras High Court

Mr. V.G. Anantarama Aiyar (Receiver)	APPELLANT
Vs	
Yussufji Oomer Sahib	RESPONDENT

Date of Decision : 11-02-1916

Acts Referred:

Provincial Insolvency Act, 1920 — Section 36

Citation : 36 Ind. Cas. 903 : (1916) 31 MLJ 133

Judgement

1. This appeal and the connected appeals Nos. 323 and 325 of 1914 are appeals against the orders of the District Judge of South Malabar

dismissing petitions u/s 36 of the Provincial Insolvency Act presented by the Receiver asking the Court to annul certain mortgages which were

executed by one Abdul Kadir Sahib in favour of the respondent. The facts are somewhat complicated. Abdur Kadir Sahib who was trader in

Calicut was adjudged an insolvent by the District Court of South Malabar on 17-8-1910 on an application made by his creditors. On 13-7-1910

the insolvent had executed a simple mortgage Ex. C for Rs. 6,119-3-0 in favour of the Respondent Oomer Sahib in respect of certain properties in

Calicut. Oomer Sahib's brother had married the insolvent's sister. The document recites that it was executed in pursuance of the award made by

two arbitrators in June 1910.

2. Mr. Rosario contends that the learned District Judge ought to have held that u/s 36 of the Provincial Insolvency Act the onus of proving that a

mortgage executed by an insolvent within two years of his being adjudged as such was made in good faith and for valuable consideration and was

therefore binding on the Receiver, was on the mortgagee. We think this contention is correct. See Nilmoni Choudhuri v. Bashanta Kumar Banerji

(1914) 19 C.W.N. 865 and C.M.A. 209 of 1914. However this may be, all the evidence being before the court the question of burden of proof is

not of great importance. The respondent's account of the circumstances under which the mortgage Ex. C came to be executed is shortly as

follows:--Abdul Khadir, the respondent and the latter's brother Kojappa, who has married Abdul Kadir's daughter and had by her two

daughters, were trading together in Madras, Colombo and Bundur. The partnership was dissolved on the death of Kojappa which took place

apparently some time in 1907. A document of dissolution of partnership Ex. I was executed on 21-5-1910. On 23rd April and 21st May 1910

two Muchilikas Ex. VI and VII were executed by Abdul Kadir, the respondent and the heirs of Kojappa in favour of two persons named Syed

Mahomed and Ahmed Mohideen examined as respondent's 2nd witness, who were appointed arbitrators to settle the accounts of partnership. Ex.

VI was signed by Abdul Kadir, the respondent and the father of Kojappa as his heir ; Ex. VII by a wakil named Ismal as agent of Kojappa's

widow and one Ummar Sahib as agent of Kojappa's mother. The execution of the second muchilika was, it is said, rendered necessary by the fact

that Kojappa's widow and mother had not joined in executing Ex. VI. It is alleged that an award was passed on 1st July 1910. According to

respondent's evidence the accounts were examined by the arbitrators who found that the assets of the firm amounted to Rs. 1,30,000 and odd.

This was put up to auction among the parties and purchased by Abdul Kadir for Rs. 1,12,500. The substance of the award was that Abdul Kadir

was to take all the assets of the firm and pay the respondent Rs. 10,276 and odd and the heirs of Kojappa Rs. 17,696 and odd after making

certain deductions. Abdul Kadir was to execute a mortgage for Rs. 6,119-3-0 over his properties in Calicut in favour of the respondent, the

amount being payable by Abdul Kadir in eight annual instalments. In satisfaction of the amount due to the heirs of Kojappa, Abdul Kadir was to

execute two mortgages for Rs. 12,353 and Rs. 10,000 respectively in favour of the daughters of Kojappa, his grand children and his daughter

Kojappa's widow.

3. It appears from the evidence of Mr. Shama Row, the respondent's 3rd witness a High Court Wakil practising in Madras who acted for the

respondent, that owing to disputes between the latter and Abdul Kadir he advised them to dissolve the partnership and a deed of dissolution was

drawn up. The respondent appears to have been dissatisfied with the award, his chief objection being that the amount of Rs. 6,000 and odd due to

him was made payable in eight instalments. (See Ex. C). Mr. Shama Row sent a notice Ex. II to the arbitrators impugning the validity of the award

and also notices Ex. III to the debtors of the firm not to pay the amounts to Abdul Kadir. The differences between the parties were, however,

amicably settled and on 17-9-10 Abdul Kadir and the respondent entered into a fresh partnership deed which provided that in addition to the

mortgage Ex. C certain houses belonging to Abdul Kadir should be transferred to the respondent in order to satisfy fully his claims to his share in

the partnership. Ex. V. an unsigned typed document is said to be a copy of an English translation of the award which was drawn up in Tamil. Ex. V

was produced by the respondent. According to the arbitrator the Vakil Ismail made an English translation of the award and was asked to send a

copy to each of the parties. The witness says that the original of Ex. V was prepared on the same day as Ex. I which is dated 21-5-10 and was

delivered the same day to Mr. Ismail. The original award is not produced and it is, we think, very doubtful whether Ex. V is really a true

translation of the award and whether certain portions are not subsequent interpolations. It is unlikely that the parties would have wanted an English

translation of the award. There seems to be, however, no doubt from Mr. Shama Row's evidence that an award was made and that Ex. C was

executed in pursuance of the terms of the award. Mr. Rozario has drawn our attention to certain suspicious circumstances in connection with the

award. He suggests that the whole proceedings were a farce and that Abdul Kadir knowing that he was on the brink of insolvency, in collusion

with the respondent arranged to transfer all the Immovable properties in Madras and Calicut to the Respondent, his daughter and grandchildren.

Some of the provisions in the award are certainly curious. One would have expected the partners to divide the properties, outstanding etc., equally

instead of which Abdul Kadir took over the whole of the outstanding consisting principally of book debts. Respondent's 2nd witness admits that

the only Immovable properties which Abdul Kadir had in Madras were a house in Saidapet and a mortgage of Rs. 1,450 over another house and

that these were set apart for the respondent's share and that respondent and his father insisted on Abdul Kadir paying cash or giving security on

Immovable property as he had no properties anywhere except in Calicut. On the other hand, there is nothing to show what the value of the book

debts and outstandings of the firm was at the time ; nor is there any evidence that the respondent knew that Abdul Kadir was involved

circumstances at the time. The respondent apparently insisted on getting a share of the partnership assets of the firm. The respondent and Abdul

Kadir were not on good terms at the time is borne out by the fact that in July 1912 Abdul Kadir made a complaint Ex. XII against the respondent

to the Commissioner of Police, as well as by the recitals in Ex. IV. If the intention of the parties had been to defeat the claims of the other creditors

by executing documents in favour of the respondent and the insolvent's daughter and grandchildren, it is difficult to understand why they should

have gone through the elaborate farce of making reference to arbitrators, consulting vakils and bringing into existence a bogus award, There is one

other circumstance on which Mr. Rozario relies and it is this : The respondent states that he looked into the original titledeeds when the mortgage

was executed and that the documents were with him at the time. In order to contradict this evidence the cashier of the Bank of Madras, Calicut,

was examined to prove that the four title-deeds for the properties in Calicut were deposited by Abdul Kadir with the Bank on the 25th October

1909 and that the latter did not take them back till 1st August 1910, that is, subsequent to the execution of Ex. C. The respondent's statement that

the title-deeds were referred to must therefore be false. The District Judge observed that it is not proved that the documents referred to by the

Cashier relate to the lands mortgaged, as the witness cannot give particulars of the document. The District Judge has, however, overlooked the fact

that the Bank took an extract Ex. D. from the title-deeds, one of which relates to the plaint property, when they were returned to Abdul Kadir.

The point is, however, of no great importance, as Abdul Kadir may well have kept copies of the title-deeds. It is pointed out that the respondent

did not in his evidence state whether he accepted the mortgage Ex. C. and, if so, when. The witness ought, undoubtedly, to have been questioned

on this point, but there is no reason, we think, to suppose that he did not accept the transfer. The insolvent whose evidence would have thrown

light on the case could not, it appears, be examined, as it was not found possible to secure his attendance, but no inference adverse to the

respondent can we think be drawn from the circumstance. There are certainly suspicious features in the case but on the whole we see no reason to

differ from the conclusion arrived at by the District Judge that the mortgage was taken bona fide and that there was valuable consideration for the

document which was executed in satisfaction of the amount due to the respondent out of the assets of the partnership.

4. Mr. Rozario contends that Ex. C, having been attested by only one witness is invalid u/s 59 of the Transfer of Property Act and cannot operate

as a charge. We are unable to agree with the District Judge that the balance of authority is in favour of holding that a document such as Ex. C. may

operate as a charge even if it be technically invalid as a mortgage. The District Judge has apparently overlooked the fact that the decision in

Neelakantam Iyer v. Madasami Thevan (1906) 17 M.L.J. 39 to which he refers was not followed in Samoo Pattar v. Abdul Sammad Sahib ILR

(1908) M. 337 where it was held that an instrument which is invalid u/s 59 of the Transfer of Property Act as a mortgage cannot operate to create

a charge u/s 100 of the Transfer of Property Act. See also Royzuddi Sheik v. Kali Nath Mookerjee ILR (1906) C. 985. The question whether a

mortgage such as Ex. C is invalid as a mortgage is not, however, one which it is necessary for the Court to consider in deciding whether a transfer

is void u/s 36 of the Provincial Insolvency Act. The appeal is dismissed with costs out of the Insolvent's estate.