

(1892) 09 MAD CK 0004
In the Madras High Court

N. Subbaraya Pillai

APPELLANT

Vs

Coo. Vythilinga Padayachi and Another

RESPONDENT

Date of Decision : 16-09-1892

Acts Referred:

English Bankruptcy Act, 1883 — Section 23(2)

Citation : (1893) 3 MLJ 30

Judgement

1. On the 25th of April 1887 the firm of Coo. Vythilingam & Co., and Coo. Vythilingam (1st defendant) personally, were adjudicated bankrupts

by the Bankruptcy Court of Mauritius, and a. Mr. Newton was appointed by the court manager and receiver of the bankrupt's property.

2. On the 23rd May 1887 Rangasami and three others, members of the firm of Coo. Vythilingam & Co., were adjudicated bankrupts, and Mr.

Newton was appointed receiver.

3. On the 22nd July 1887 a meeting of creditors was called by Mr, Newton under the presidency of the judge in Bankruptcy and the creditors by

a majority in number and three-fourths in value passed the following resolutions : (1) that a composition of 50 cents in the Rupee be accepted in full

satisfaction of the debts in principal and costs, due to the creditors of the bankrupts, exclusive of all privileged costs and preferential claims which

are to be paid in full, and on condition that the two orders of adjudication of 25th April and 23rd May last be annulled by the court ; (2) that such

composition be paid in eight equal monthly instalments ; (3) that the security of V. Subbarayan & Co., (plaintiff's firm) be accepted for the

payment of the above composition, and that, in consideration of such security, all the joint and separate estate, effects and property, both real and

personal, of the firm of Coo, Vythilingam & Co., and of the individual members thereof, situated in Mauritius and in India, be assigned to

Subbarayan & Co., and (4) that N. Subbarayan (plaintiff), the managing member of the firm, be appointed trustee to recover and realize all the

estate, effects and property, assigned as aforesaid, and to carry out the above arrangement.

4. Mr. Newton, as trustee of the property of the bankrupts, accepted the above composition, subject to the approval of the court,

5. The same day a deed (Exh. T) was drawn up and executed by Mr. Newton on the one part, Subbarayan & Co., on the other part, and the

bankrupts on the third part, giving effect to the above resolutions. This deed of composition was approved by the court, the orders of adjudication

of bankruptcy were annulled and it was ordered that all the estate and property of the bankrupts both in Mauritius and in India be vested, in N.

Subbarayan who was appointed trustee to carry out the said composition with full power to recover and realize all the said estate and property.

6. The plaintiff has instituted the present suit to obtain possession of (1) nuncha and punja lands, houses and gardens, (2) jewels, cattle, vessels &c,

(3) Rs. 10,000, outstandings, (4) value of produce of lands and (5) debts.

7. The Subordinate Judge of Kumbakonam gave the plaintiff a decree for the movables and a declaration of title to items Nos. 195 and 200, but

dismissed his claim in other respects. Plaintiff appeals.

8. It is first urged on behalf of the appellants that the Subordinate Judge is in error in holding that plaintiff cannot rest his claim on the order of the

Bankruptcy Court of Mauritius set forth above. The respondents support the judgment of the Lower Court on the ground that after annulling the

adjudication, the Bankruptcy Court was functus officio, and had no jurisdiction to pass any further order vesting the property of the bankrupts in

plaintiff, as the consequence of the order was to remit the bankrupts to their former status. We observe that the direction was part of the final order

passed by the Court of Bankruptcy in the matter of the bankruptcy of Coo. Vythilingam & Co, and the partners of that firm and that it was

competent to that court to give directions for the due execution of the composition-deed when annulling the adjudication of bankruptcy. Section 23

(2) of the English Bankruptcy Act of 1883 is as follows :--"" If the court approves

the composition, it may make an order annulling the bankruptcy and vesting the property of the bankrupt in him or in such other person as the court may appoint." We agree however with the Subordinate Judge that for the purpose of deciding this question, the Court of Bankruptcy at Mauritius must be taken to be a foreign court, and that no order passed by it could operate to transfer the ownership of immovable property in British India. The settled rule of law is that such transfer is governed by the *lex loci rei sitae*, and until a deed of transfer is effected in accordance with such law, the immovable property remains vested in the bankrupt. We are not however to be understood as deciding that the Court of Bankruptcy cannot compel the bankrupt when within its jurisdiction to execute in favor of the trustee such a deed as will in accordance with the formalities of the local law render the order of the court effectual.

9. As regards the plaintiff's claim so far as it rests on the composition-deed (Exh. T) which has been admitted in evidence in this Court by our

order on C. M. P. No. 399 of 1890, the question raised for our decision is whether it is a composition-deed or a conveyance in the sense in which

the word is used by the Subordinate Judge. If it is a conveyance, the document would, require registration, and the suit must fail for want of it. We

are however unable to agree in the opinion of the Subordinate Judge that the document is a conveyance and not a composition-deed. His remark

that the bankrupts were not parties to it is clearly inaccurate for they signed the deed. The creditors were duly represented not only by Mr.

Newton, but also by the plaintiff who guaranteed the payment of 50 per cent which the creditors had agreed to accept in full liquidation of their

claims. Mr. Newton was a necessary party to the deed, as it was executed during the pendency of the bankruptcy proceedings, and without his

concurrence and the sanction of the court the property could not have been transferred by the bankrupts. We consider that in order to decide the

above question, we should have regard more to the substance of the transaction than to its form. The transaction substantially amounts to a transfer

of their property by the debtors for the benefit of their creditors and the intervention of Mr. Newton does not in our judgment alter the real nature

of the transaction. As a composition-deed the document has been duly stamped as provided by Section 31, Act I of 1879, and a composition-

deed is by Section 17 (e) of the Registration Act (III of 1877) exempted from registration. We are therefore of opinion that Bxh. T is valid as a composition-deed.

10. Another question urged upon us by the respondents' counsel is that the Subordinate Judge should have recorded a finding on the 4th issue,

whether the value of the property already entrusted to plaintiff was more than sufficient for the discharge of the debts of the bankrupts. It is

contended on the other side that no such finding is necessary inasmuch as the decision of the Subordinate Judge is supported by that of the

Bankruptcy Court in Mauritius, which adopted the principle laid down in *Ex parte Wilcochs v. Willochs*, reported in 44 L. J Bk 13. Our attention

has been drawn by the other side to the case of *Bolton v. Ferro* 14 Ch. D 171, and *Gooke v. Smith* 45 Ch. D 38, and it is argued that the

assignment of the estate to plaintiff was not absolute but conditional, that it was made not for the benefit of plaintiff but as security for the payment

of creditors and that a resulting trust in favor of the debtors must be implied. The case of *Bolton v. Ferro*, is not really in point because that was a

case of composition prior to bankruptcy, and the question was whether a creditor who had entered into a contract whereby in consideration of the

present payment of a composition on the rest of his debt was entitled subsequent to the receipt of the amount of composition to the full benefit of

his security. The court (Bacon V.C.) decided in the negative and held that the surplus belonged to the estate of the debtor. In the course of his

judgment, however, he remarked :--"" If this had been a bankruptcy the trustee would have been entitled to the full benefit of the pledge."" The same

learned judge decided *Ex parte Wilcochs v. Willochs*. In that case the debtor alleging that he had no means of paying his debts submitted his

schedule to his creditors who accepted a composition of two shillings in the pound. One Davies then took upon himself the burden and liability of

paying the composition and as consideration for that the creditors, who were entitled to the whole of the debtor's property, and the debtor agreed

that all the assets of the debtor should be held by him. Bacon V. G. held that no resulting trust appeared in the deed and that it would be

inconsistent with the transaction. But this decision was virtually overruled by the decision of the Court of

11. Appeal in *Cooke v. Smith* (supra) in which it was held that although a deed, whereby debtors assigned the business and property of the firm to trustees upon trust, contained no ultimate declaration of trust for the assignors in case the property was more than enough for the payment of the debts, still, the object being the payment of debts, the transaction did not amount to a sale, but there was a resulting trust of any surplus in favor of the assignors. The remarks of Fry, L. J. are expressly applicable to this case. Referring to the deed executed in that case he said :--""Is it a deed by which a firm and their creditors agreed upon a certain mode of settling the debts and nothing more--in which case there would plainly be a resulting trust for the benefit of the assignors--or is it a deed by which the firm sold their business to their creditors, or a deed by which they agreed to give up their business by way of satisfaction and accord to their creditors, in either of which two cases it is of course plain that the creditors, and they alone, are the owners ?"" What was the object of the deed in this case ? It was a deed for the benefit of creditors and the presumption is that it was intended to pay their debts and nothing more. No doubt a surplus was not contemplated but it cannot have been intended that should the debts be paid in full and a surplus remain that should pass to the guarantors. As soon as the debts are not paid in full, the intention of the parties is fulfilled and there is a trust for the assignors. In this view we consider it necessary to ask the Subordinate Judge to return a finding on the 4th issue.