

(1995) 10 MAD CK 0069
In the Madras High Court
Case No : C.M.S.A. No. 15 of 1986

R. Appachi

APPELLANT

Vs

Official Receiver Periyar District, Erode, Palaniammal and
Chandran 4 others Minor respondents 3 to 7 represented by
court guardian Sri N. Veeraraghavan, Advocate Bhavani

RESPONDENT

Date of Decision : 11-10-1995

Acts Referred:

Limitation Act, 1963 — Section 2(a), 2(b)
Provincial Insolvency Act, 1920 — Section 10, 45, 53, 54

Citation : (1995) 10 MAD CK 0069

Hon'ble Judges : Jayasimha Babu, J

Bench : Single Bench

Advocate : C. Harikrishnan, S. Subbulakshmi and V. Sitharaman, for the
Appellant;

Final Decision : Allowed

Judgement

Jayasimha Babu, J.—The appellant is the purchaser of a site situated in the village Nandagoundanpalayam, Gobi Taluk, Erode District, under a sale deed dated 25.3.1976. The vendor was one M.P. Nachimuthu who was subsequently declared as insolvent on 14-9-1977. The Official Receiver filed an application on 4-7-1981 for setting aside the sale. That application was supported by an affidavit of one Velayudham who was the creditor who had instituted Insolvency Petition No. 43/76 to declare Nachimuthu as insolvent. In that affidavit, he has stated that the Insolvency Petition was based on the fact that the said Nachimuthu had sold the property to the appellant herein on 25-3-1976 for a sum of Rs. 1,000/- and that action of the said Nachimuthu was treated as an act of insolvency, for the purpose of the insolvency petition. The court of the first instance, namely Subordinate Judge's Court, Erode allowed the application so filed by the Receiver which was numbered as I.A. No. 229/81 in I.P. No. 43/76. The appeal against the said order of the Subordinate Judge, Erode to the District Judge, Erode in CM. A. No. 8/85 proved unsuccessful and the appellant now before this Court impugned

the judgment of the courts below.

2. Learned Counsel for the appellant contended that the courts below have grossly erred in law in not holding that the petition filed by the Official Receiver was beyond the period of limitation prescribed under Article 137 of the Limitation Act, that they had failed to keep in view the distinction between Section 53 and Section 45 of the Provincial Insolvency Act, that they had wrongly thrown the burden of proof upon the appellant herein and that they had omitted to notice that in the affidavit filed in support of the application of the Receiver there was no allegation of fraud against the appellant.

3. In the trial court, the appellant had examined himself. The insolvent was not examined nor was the Official Receiver. The petitioning creditor was examined as a witness. The trial court as also the lower Appellate Court held that the petition of the Receiver was not barred by Limitation as Article 181 of the Limitation Act 1908 had been held to be inapplicable to such proceedings by the courts. The courts below also held that the sale was not a bonafide one. To reach that conclusion, the courts relied on the fact that the appellant/petitioning creditor as also the Insolvent were the residents of the same village and it was presumed that they were aware of each other's activities. The court also held that consideration had not passed because the scribe of the document and the witnesses had not been examined. This approach of the courts below was criticised by the counsel for the appellant as being one which sought to draw conclusion on surmises rather than on the basis of concrete evidence.

4. As rightly pointed out by the counsel, the fact that the sale deed had been registered was not in dispute. In fact, the petition itself was for the purpose of having the sale set aside. The necessity for examining the scribe and the witnesses in this context did not arise. The fact that consideration had been passed in a sum of Rs. 1,000/-, had been averred by the creditor himself in the affidavit filed in support of the application of the Official Receiver. The allegation made by the Official Receiver through the credit. tor that the appellant was aware of the debt due to the creditor even prior to the sale, had been denied by the appellant. There was no other material available before court from which it could reasonably draw an inference that the appellant was aware of the debt and that he had purchased the property with a view to delay and defraud the creditors.

5. Reliance placed by the courts below on the provision of the repealed Limitation Act, cannot be sustained after the enactment of Limitation Act, 1963. It is the provision of that Act which the courts were required to apply. The Supreme Court in the case of The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma, pointed out differences in language between Limitation Act, 1908 and Limitation Act 1963 in the definition of "applicant" and "application" contained in Section 2(a) and Section 2(b) of the Limitation Act, 1963. The Court at paragraph 21 of the judgment held that the changed definition of the words "applicant" and "application" contained in Section 2(a) and 2(b) of this Act,

indicates the object of the Limitation Act to include petitions, original or otherwise, under Special Laws. The Court also held as under:

The interpretation which was given to Article 181 of the 1908 Limitation Act on the principle of *ejusdem generis* is not applicable with regard to Article 137 of the 1963 Limitation Act. Article 137 stands in isolation from all other articles in Part I of the third division.

6. The Court thereafter concluded by stating as under:

The conclusion we reach is that Article 137 of the 1963 Limitation Act will apply to any petition or application filed under any Act to a civil Court.

The Court in that case dealt with a matter which arose out of a petition filed under the provisions of the Telegraph Act. The provisions of the Telegraph Act contemplate determination by a District Judge of payment of compensation payable u/s 10 of the Act and the Court adverted to the other provisions of the Act in order to bring out the fact that the matter brought before the District Judge was brought before the Judge concerned as a civil court and not as a Special Tribunal.

7. Section 53 of the Provincial Insolvency Act which deals with the avoidance of the voluntary transfer, provides for the annulment of a transfer covered by that provision if such proceedings had taken place within two years of the date of adjudication of the transferor as an insolvent. Section 54 of the Provincial Insolvency Act provides for deeming fraudulent transfers made by the insolvent as void and annulment by the Court. The matters are to be brought before Court for the purpose of declaring transaction as void by way of an application. The application to be so filed, will have to be filed within the period of Limitation prescribed in Article 137 of the Limitation Act, and the period specified therein is the period of three years when the right to apply accrues.

8. On the evidence of the instant case, it is clear that the right to apply for having the transaction in favour of the appellant annulled accrued, when the vendor was declared as insolvent. The creditor who filed the Insolvency Petition was fully aware of this transaction as he himself has averred that it is this very transaction which constituted the foundation of the insolvency petition as an act of insolvency. The application to set aside the sale therefore ought to have been filed within a period of three years from the date on which the vendor of the appellant was declared as insolvent. The trial court was therefore in error in holding that the petition for setting aside the sale in favour of the appellant, was not barred by limitation. The lower Appellate Court did not even go into that question although the same had been raised as one of the grounds in the appeal filed by the appellant. Even if one is to proceed on the aversion that despite the flaws in the assumption for the evidence by the court below, their finding that the petitioner was not a bona fide purchaser, could be upheld, nevertheless the application itself being barred by Limitation, the impugned orders cannot be sustained. The application filed by the Official Receiver for setting aside the sale

in favour of the petitioner therefore has to be dismissed. Accordingly, the judgments and decrees of the courts below are set aside and the application of the Official Receiver for setting aside the sale is dismissed and the Appeal is allowed.