

(1947) 11 MAD CK 0026
In the Madras High Court

Sakhamuri Peraya and Others

APPELLANT

Vs

Nimmaraju Kondayya and Others

RESPONDENT

Date of Decision : 28-11-1947

Acts Referred:

Citation : AIR 1948 Mad 430 : (1948) ILR (Mad) 872 : (1948) 61 LW 283 :
(1948) 1 MLJ 290

Hon'ble Judges : Horwill, J

Bench : Division Bench

Judgement

Horwill, J.—On 10th August, 1931, the plaintiff in O.S. No. 69 of 1943, here-after referred to as the plaintiff, and the fifth defendant in O.S. No. 69 of 1943, hereafter referred to as the fifth defendant, executed a sale deed, Ex. D-3, for Rs. 8000 in favour of the first defendant (in O.S. No. 69 of 1943). Rs. 1100 were paid in cash, and the remaining Rs. 6,900 were to be paid before the Sub-Registrar at the time of the registration. As the plaintiff and the fifth defendant were not willing to have the document registered, the first defendant on 24th November, 1931, presented the document before the Sub-Registrar for compulsory registration. It was subsequently registered on 1st December, 1931. In the meanwhile, on 18th November, 1931, I.P. No. 119 of 1931, was filed by a creditor to adjudicate (the fifth defendant an insolvent. He was so adjudged on 3rd September, 1932. Proceedings were then instituted by the Official Receiver to have the alienation evidenced by Ex. D-3 set aside. It was declared void against the Official Receiver u/s 53 of the Provincial Insolvency Act by the Subordinate Judge, but in appeal to the District Judge the sale was set aside u/s 4 of the Act, the order u/s 53 being cancelled. The matter was brought up to the High Court in C.R.P. No. 1664 of 1943; but when that petition came before King, J, the attention of the learned Judge was drawn to the circumstance that the fifth defendant had entered into an arrangement with his creditors and that the adjudication had been annulled u/s 35, on 26th August, 1944. Without deciding the case on its merits, King, J., held that the petition was unnecessary and dismissed it. O.S. No. 69 of 1943 was filed by the plaintiff on 6th August, 1943

for the recovery of the unpaid purchase money. The first defendant prayed for a set-off of the amount due to him as mesne profits for the period he was kept out of possession. A few days later, on 10th August, 1943, the first defendant filed O.S. No. 73 of 1943 for possession and future mesne profits. O.S. No. 73 of 1943 was decreed in favour of the first defendant. O.S. No. 69 of 1943 was also decreed, the set-off being allowed to the extent of three years' mesne profits, the remainder of the claim being held to be barred by limitation. The plaintiff and the 5th defendant have filed joint appeals against these decrees, and the first defendant has filed a Memorandum of Cross-Objections with regard to the disallowance of mesne profits beyond the three years immediately preceding the suit.

2. The first defendant's main argument is that for the purpose of insolvency proceedings the date of the sale must be deemed to be 1st December, 1931, the date of the compulsory registration and not 10th August, 1931, the date on which Ex. D-3 was executed. Then since the adjudication, dated back to 18th November, 1931, the date on which I.P. No. 119 of 1931 was presented, the alienation took place during the course of the insolvency proceedings and was therefore void; because u/s 28 of the Provincial Insolvency Act the property had vested in the Official Receiver.

3. The authority for the argument that in insolvency proceedings the date of the transaction must be deemed to be the date of the registration and not the date of sale, despite the provisions of Section 47 of the Registration Act, is based on the judgment in Venkadari Somappa Vs. The Official Receiver of Bellary, , of Madhavan Nair and Stodart, JJ., who had to consider a case where the registration had taken place within three months of the insolvency, but where the execution of the sale deed was said to have been more than three months before the date of insolvency petition. The question that fell for decision was whether a petition u/s 54 would lie. They held that the transfer was not complete until it was registered and relying on the wording of Section 54 of the Act that a transfer by way of mort-gage is deemed fraudulent and void if executed within three months from the date of execution, said:

If he (the insolvent) does so (presents the instrument for registration) and the instrument & registered, he is doing something which is void if an insolvency petition is presented within three months.

4. The learned Judges then went on to consider the argument of Mr. Somayya that since the transferee had presented the deed for compulsory registration, the act of registration was not the act of the transferor. They said:

Can it be said that the transferor does not convey the property when the registration which is an essential part of the conveyance is effected against his will? We think not. But if the transferor conveys the property he must be held to have done everything necessary to the conveyance. The registration therefore is in effect the act of the transferor. Practically speaking when he has duly executed

the document and with the intention that it should be registered has delivered it to the transferee--who is entitled to present it for registration--he has irrevocably consented to the registration, and when on account of his subsequent denial of execution the document is ultimately registered u/s 75 of the Registration Act, that registration must be held to have been effected on his behalf and with his consent.

5. With respect, we feel that although it is true when the transferor executed the document, he intended that the document should be registered; yet he did not contemplate that the registration would be delayed until some time within three months of the presentation of an insolvency petition. In this case, as in the case before those learned Judges, the transferor was not a party to the registration. He had executed the deed more than three months before the insolvency petition was filed at a time, as far as we know, when he had no reason to expect that a creditor would file an insolvency petition against him. Although, therefore, he knew that the document would have to be registered, yet he had no reason to think that it would not be registered until within three months of the filing of an insolvency application. However that may be, the learned Judges did not purport to lay down the general proposition that Section 47 of the Registration Act was not meant to apply to any transaction which was the subject of insolvency proceedings, the learned Judges merely considering the question whether if the registration took place within three months of the filing of an insolvency application, an application u/s 54 of the Provincial Insolvency Act would lie.

6. Even if we assume that the sale took place during the course of the insolvency proceedings, we do not agree with the learned advocate for the appellant that the transaction was void for all purposes, merely because u/s 28 of the Insolvency Act the property vested in the Official Receiver. Admittedly, there is no statutory prohibition against the sale of property by an insolvent after insolvency proceedings have been initiated; and so the argument can only proceed on the basis that the insolvent had no property with which he could deal. The vesting of the property in the Official Receiver is for the benefit of the creditors; and so does not purport to affect transactions between the insolvent and other persons, except in so far as they affect the administration of the insolvent's estate for the benefit of the creditors. As far as the parties to the transaction are concerned, they are binding on them. The effect of an alienation by the insolvent was considered by a Bench of the Allahabad High Court in *Rup Narain Singh v. Har Gopal Tewari* ILR (1933) All. 503, which purported to follow another decision of the same Court in *Shyam Sarup v. Nand Ram* ILR (1921) All. 555, and the learned Judges there pointed out that there being no statutory prohibition to such a transfer it is binding on the parties.

7. The validity of such a transfer has also been upheld upon an interpretation of Section 37 of the Provincial Insolvency Act as to the effect of an annulment of the adjudication. The matter has come before this Court on many occasions, the first being as early as *Ramasami Kottadiar and Others Vs. Murugesu Madali and*

Others, , which was followed in Kothandarama Routh and Another Vs. Murugesu Mudali and Another, . Those decisions were at a time when the law governing insolvency was the Indian Insolvency Act, 11 and 12, Victoria, 1848. The learned Judges relied inter alia on the use of the words " null and void " in that statute. In subsequent legislation those words have not been used; but we find no reason to think that the effect of the later statutes was any different from what it was at the time when Ramasami Kottadiar and Others Vs. Murugesu Madali and Others, and Kothandarama Routh and Another Vs. Murugesu Mudali and Another, , were decided. The effect of the present Section 37 has been considered by Beasley, C.J., in Lingappa v. Official Receiver of Bellary (1937) 47 L.W. 366, King, J., in Dharmasamarajayya Vs. Sankamma and Others, , and Somayya, J., in Ratnavelu Chettiar by mother and guardian Madhuravalli Ammal and Another Vs. Franciscu Udayar and Others, , and the learned Judges have held that the effect of the annulment of the adjudication relates back to the date of the adjudication and is as if no adjudication had taken place, except as regards the acts of the Court and the Official Receiver which are validated by that section. Section 37 says:

Where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done, by the Court or receiver, shall be valid; but, subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the Court may, by order in writing, declare.

Somayya, J., very pertinently points out in Ratnavelu Chettiar by mother and guardian Madhuravalli Ammal and Another Vs. Franciscu Udayar and Others, , that if the annulment was not to have retrospective effect, there would be no need for the Clause validating acts done by the Court or by the Receiver, as they would be valid; because they were done at a time when the insolvent had been adjudicated and before the adjudication had been annulled; and so had jurisdiction to do the acts they did. If, however, the annulment were to date back to the date of adjudication, it would, unless validating clauses were introduced, have the effect of setting at naught all that they had done to disturb the rights in property created by the Court and the receiver.

8. It further seems to us that Section 43 of the Transfer of Property Act can be evoked by the first defendant; for at the time when the sale was executed, the insolvent had every reason to believe that he had title to the property and he in fact, together with the plaintiff, purported to transfer the whole title to the first defendant. If on account of subsequent insolvency proceedings, title could not be conveyed, then, by virtue of Section 43, the first defendant became entitled to the property as soon as the insolvency proceedings had been annulled and title restored to the fifth defendant. On this point, Mr. Ramachandra Rao has referred to the decision of Beasley, C.J., and Bardswell, J., in The Official Assignee of Madras and Another Vs. Sampath Naidu, , where the learned Judges considered whether an alienation made by a reversioner conveyed title to the transferee

upon the reversioner's subsequently becoming entitled to the property. It had been held in two decisions of this Court i.e, *Alamanqyakunigari Nabi Sab v. Murukutti Papiiah* (1915) 29 M.L.J. 733, and *Muthuswami Pillai v. Sandana Velan* (1926) 53 M.L.J. 218, that title would pass to the transferee; but *Beasley, C.J.*, and *Bardswell, J.*, held that such a transaction offended the provisions of Section 6 (a) of the Transfer of Property Act, because all that the reversioner had to convey was a spes successionis. It made no difference, they thought, that the reversioner purported to convey more; for to hold otherwise would enable parties to overcome the obstacle of Section 6 (a) of the Transfer of Property Act and to convey what could not by that section be conveyed. The learned Judges realised that the illustration of Section 43 of the Transfer of Property Act suggested that such a transfer would be good; but they held that the illustration was bad law. Even if the *The Official Assignee of Madras and Another Vs. Sampath Naidu*, , was rightly decided, it can certainly be dis-tinguished from the transfer now under consideration. The parties to Exhibit D-3 certainly had no intention of avoiding the prohibition in Section 6 (a) of the Transfer of Property Act. At the time when Ex. D-3 was executed, the insolvent not merely had a spes successionis but, with the plaintiff, full right and title to the property which they sought to convey by that document. If, because of the subsequent insolvency proceedings, the fifth defendant was unable to convey any title, title would pass to the transferee as soon as the obstacle was removed and the fifth defendant re-obtained title to the property.

9. With regard to the appeal against the decree in O.S. No. 6g of 1943, it is further argued on behalf of the plaintiff and the fifth defendant that the lower Court ought not to have allowed the set-off. Some of the arguments of Mr: Ramachandra Rao cannot be heard, because they were not raised in the memorandum of appeal; . but there remains for consideration the contention that the claims for mesne profits and for the unpaid purchase money did not arise out of the same cause of action. The cause of action in the suit arose because the sale had not been given effect to, in that the consideration for the sale had not been paid. Effect had further not been, given to the sale, because possession was not allowed to remain in the hands of the transferee and was subsequently retained by the transferor. That gave rise to the first defendant's claim for mesne profits. Both claims therefore arose because the sale had not been given effect to. We can therefore see no obstacle to the set-off on this ground.

10. Another argument is that the decree that was passed was a joint decree in favour of the plaintiff and the fifth defendant, whereas the set-off could be against the plaintiff alone; for mesne profits could not be granted against the fifth defendant, who had not himself obtained possession, his share of the property having been enjoyed by the Official Receiver. We find, however, that although it is true that the Official Receiver obtained possession of the fifth defendant's share of the land, the proceeds were utilised for discharging the debts of the creditors and thereby enabling the fifth defendant to enter into a composition with them. The fifth defendant therefore derived the same benefit

from the land as if he had enjoyed it directly. So in equity the first defendant was entitled to ask that the mesne profits from the fifth defendant's half share of the land, as well as from the plaintiff's half share, should be set-off against the amount due to the plaintiff and the fifth defendant by way of unpaid purchase money and subsequent interest.

11. It is argued that the mesne profits decreed by the lower Court were estimated: in an arbitrary manner and not based on any sound principles. Although the passages read out to us from the judgment perhaps suggest that this was so, we find that there was a considerable body of evidence bearing on this question; and we are not prepared to say that the lower Court did not arrive at the figure of Rs. 30 an acre on materials before it.

12. A memorandum of Cross-Objections has been filed by the plaintiff against the disallowance by the lower Court of mesne profits beyond a period of three years, despite the fact that it allowed interest to the plaintiff and the fifth defendant from the date of the transaction. The ordinary rule is that a counter claim can only be allowed if it is not barred by time. Certain exceptions are recognised, such as in accounts between a trustee and cestui que trust or where the claim arises out of mutual accounting. Such an exception has been made to claims arising out of a mortgage where the value of the mesne profits has to be taken into account to ascertain what is due under the mortgage deed; but we are not prepared to extend the recognised exceptions to the relations between a vendor and a vendee. It is true that since the plaintiff sought to enforce his vendor's lien, the decree will bear some resemblance to a mortgage decree; but the relationship between the parties is altogether different from that between a mortgagor and a mortgagee.

13. A slight modification of the decree is however necessary. It has been pointed out that the suit was not a simple money suit and that the decree has declared a charge. The charge however existed even before the suit was filed and so was not created by the decree. A preliminary decree should therefore have been passed, giving time to the first defendant to pay the amount decreed.

14. The appeals are therefore dismissed with costs, one Advocate's fee, except that the decree of the lower Court will be modified by drawing it up in the form of a mortgage decree, giving the first defendant six months from this day in which to pay the sum due. The Memorandum of Cross-objections is dismissed with costs.