
(1977) 12 MAD CK 0040
In the Madras High Court
Case No : O.S. Appeal No. 79 of 1977

Shah Sukraj

APPELLANT

Vs

The Official Assignee, Madras

RESPONDENT

Date of Decision : 20-12-1977

Acts Referred:

Presidency Towns Insolvency Act, 1909 — Section 55

Citation : AIR 1978 Mad 197 : (1978) ILR (Mad) 211 : (1978) 91 LW 118

Hon'ble Judges : Natarajan, J;Ismail, J

Bench : Division Bench

Advocate : T.R. Srinivasa Iyengar, for the Appellant; Party in person, for the Respondent

Final Decision : Dismissed

Judgement

Ismail, J.—This is an appeal against the order of Ramaprasada Rao J. dated 8-7-1977 and made in Appn. No. 355 of 1977 in I. P. No. 31 of 1967. One R.A. Khaleel was adjudged insolvent by an order of this court dated 23-12-1970 in I. P. No. 31 of 1967 filed by two creditors of the said R.A. Khaleel. The act of insolvency alleged was that on 9-3-1967, the said Khaleel conveyed 12-89 acres of lands to the appellant herein, with intent to defeat and delay the creditors, for a grossly low sum of RS. 43000. The appellant herein, who is the transferee, was also impleaded as a party to the main petition, namely, the second respondent. Ganesan J., who disposed of the insolvency petition came to the conclusion that the debtor had committed an act of insolvency, within the scope of Section 9(b) of the Presidency Towns Insolvency Act, hereinafter referred to as the Act. namely, "A debtor commits an act of insolvency, if, in (the States) or elsewhere, he makes a transfer of his property or of any part thereof with intent to defeat or delay his creditors." The learned Judge, after elaborately considering the evidence, recorded the following findings—

(1) On a fair consideration of the entire evidence, he had no hesitation in coming to the conclusion that the lands had been deliberately undervalued and sold for

an inordinately low price.

(2) The lands in question were worth not less than Rs. 70000 on the date of the sale and to that must be added a sum of not less than Rs. 7000 for the value of the crops standing on the land.

(3) The appellant herein entered into this transaction with a view to help the debtor out of his financial difficulties and to screen his only property from the reach of his creditors.

(4) The transfer should have been made for an extra consideration of not less than Rs. 25000 and the document was conveniently registered at Madras presumably with a view to screen the transaction from the knowledge of the creditors.

(5) The transaction in question, though registered, had been brought about secretly and collusively by the debtor with the appellant and others with intent to defeat and delay the second petitioner in the main petition and other creditors. Against this order of adjudication, the appellant herein filed O. S. A. 6 of 1971 before this court and the said appeal came to be disposed of by Kailasam C. J. and Ramanujam J. by judgment dated 26-7-1976. The learned Judges held that on the materials it was not possible for them to take a different view from the one taken by Ganesan J. that they were inclined to agree with the learned Judge that there was considerable material to show that the price mentioned in the sale deed could not represent the fair or market price of the property sold thereunder and that once it was found that the property had been undervalued, it would lead to an inference, that the debtor intended to defeat or delay payment to the creditors by entering into that bargain. Thereafter the learned Judges stated as follows -

"Learned counsel for the appellant would, however, contend that, even though the debtor might have had an intention to defeat or delay payment to the creditors, no such intention has been attributed to the appellant and that therefore the transaction in his favour cannot be avoided. He referred to the decision of the Supreme Court in N. Subramania Iyer Vs. The Official Receiver, Quilon, , in support of his submission that, unless the transferee is found to have colluded with the debtor, the transaction in his favour cannot be held to be void u/s 55 of the Presidency Towns Insolvency Act. We are, however, concerned in this appeal only with the question whether the transaction entered into by the debtor with the appellant is an act of insolvency or not, and not, with the question whether the transaction would fall u/s 55 or not. It is sufficient for our purpose to deal with the question whether the transaction between the debtor and the appellant amounts to an act of insolvency and we are clear, on the material on record, that the transaction amounts to an act of insolvency and that the order of adjudication passed by the learned Judge based on such a finding is correct. The appeal is therefore dismissed."

After the disposal of the O. S. Appeal the Official Assignee filed an application,

Appln. No. 768 of 1976, for recovery of possession of the property dealt with under the sale deed dated 9-3-1967 from the appellant herein. The appellant took up the plea that the Official Assignee could not merely apply for recovery of possession and that he had to file an application u/s 55 of the Act for the purpose of avoiding the transfer. Thereafter, the Official Assignee filed Appln. No. 355 of 1977 u/s 55 of the Act. In that application, the report of the Official Assignee merely referred to what happened previously, namely, the proceedings in I. P. 31 of 1967 and O. S. A. No. 6 of 1971 and the findings thereon. In paragraph 3 of the report, the Official Assignee stated-

"It is therefore submitted that the order of adjudication dated 23-12-1970 and confirmed in O. S. A. 6 of 1971 holding that the transfer is fraudulent and made in collusion with the respondent herein (appellant in the present O. S. A.) having been made in the presence of the respondent herein is binding on him and therefore the respondent has no defence to this application",

2. The appellant herein filed his counter affidavit and the matter came to be disposed of by Ramaprasada Rao J. under the impugned order. The learned Judge, after referring to the findings of Ganesan J. and the conclusion of the Bench which disposed of the O. S. Appeal, extracted the following passage from the order of Ganesan J.:--

"R. Ws. 1 and 2 have disclaimed real knowledge about the details of the sale transaction. R. W. 2 claims to have, acted merely at the behest of the advocate and RW 1 claims to have evinced interest in the sale only a day before the transaction".

After the above extract, the learned Judge proceeded to state:--

"These findings, which were not challenged earlier, and not even before me, give a well instructed mind a reasonable impression that the transferee avoided the box because it was convenient for him to do so. Such a deliberate avoidance of responsibility in a litigation like this, wherein the court is called upon to find the intention of the transferee, is such conduct which has to be cautiously judged and conclusions arrived at thereafter. This is a case in which the learned counsel for the transferee himself would say that even if a sum of Rs. 25000 or more has passed behind the legitimate field of activity, yet, that would not reflect upon the intention of the parties. I am afraid that I am unable to share the view. This is because if the parties intending to conclude the bargain, discuss over the details and in the course of such a conference as between them come to the conclusion that a certain thing which ought to not to be done in law, could be done and the bargain concluded, then that is an indicia of the intention and lack of bona fides of the parties including the transferee of the property which is the subject matter of the discussion in such a conference. Taking all these circumstances into consideration and having regard to the impression gained by Ganesan J., which were not in fact disturbed by the Division Bench, I am of the view that there was a common intention as between the transferor, viz., the debtor and the

transferee, who Is the respondent in this application to deliberately undervalue the property so that the screened consideration may be kept out from the creditors and they be deprived of the benefit therefrom".

It is on this finding and the reasoning that the learned Judge ordered Appln. No. 355 of 1977 as prayed for, subject to the adjustment of the equities and stated that no orders were necessary in Appln. No. 788 of 1976 in view of his decision in Appln. No. 355 of 1977. The learned Judge also directed the transferee to deliver possession of the property within three months from the date of the order, it is this order that is challenged before us.

3. Mr. T.R. Srinivasa Iyengar, learned counsel for the appellant, contends that having regard to the decision of the Supreme Court in *N. Subramania Iyer Vs. The Official Receiver, Quilon*, holding that unless a transferee is found to have colluded with the debtor, the transaction cannot be held to be void u/s 55 of the Act, the burden was on the Official Assignee to plead and prove that the transferee had the scheme of defeating or delaying the creditors of the debtor, or, in other words, the transferor and the transferee had the common intention to defeat or delay the claims of the creditors of the debtor, and that in this particular case the Official Assignee had neither alleged nor proved any such intention on the part of the transferee.

4. It is unnecessary for us to consider whether the reasoning of the learned Judge (Ramaprasada Rao J.) for allowing the application filed by the Official Assignee, namely Appln. No. 355 of 1977, was right or not, in view of the decision of the Supreme Court in *Rm. NI. Ramaswami Chettiar and Others Vs. The Official Receiver, Ramanathapuram At Madurai and Others*, . Before us, the Official Assignee relied on the decision of the Privy Council in *Mahomed Siddique Yousuf v. Official Assignee of Calcutta*, which in turn followed the decision of the English Court in *Ex parte Learoyd In re Foulds* (1879) 10 Ch D 3. According to the Official Assignee, once a debtor is found to have committed an act of insolvency u/s 9(b) of the Act, the very transfer which constituted the act of insolvency need not be separately adjudicated upon as coming within the scope of Section 55 of the Act and that the fact of adjudication itself would invalidate the transfer. The Official Assignee contended that that was the reason why he filed originally an application merely for recovery of possession, that once the appellant had raised an objection that he should file an application u/s 55 of the Act, he filed the application in question and that it does not in any way affect or alter the legal position that for getting rid of the transfer which constituted the act of insolvency, he need not independently allege and prove that the transferee shared such 3 common intention with the transferor and it is enough if the transferee was adjudged insolvent on that particular act of insolvency. We are of the opinion that this contention appears to be sound, having regard to the decision of the Supreme Court in *Rm. NI. Ramaswami Chettiar and Others Vs. The Official Receiver, Ramanathapuram At Madurai and Others*, referred to already. The Supreme Court elaborately considered the decision of the Privy

Council referred to above which itself was based on the decision in *Ex parte Learoyd In re Foulds*, (1879) 10 Ch D 3, and after such consideration laid down (at p. 73 of AIR SC) -

"It is therefore abundantly clear that all that the Judicial Committee held in *Mahomed Siddique Yousuf v. Official Assignee of Calcutta*, was that in a case under the Presidency Towns Insolvency Act, when the act of insolvency upon which an order of adjudication is founded is a transfer amounting to a fraudulent preference, the transferee cannot so long as the order of adjudication stands, question that finding, namely, that the transfer was a fraudulent preference and that, therefore, in an application by the Official Assignee to have that transfer annulled on the ground that it was a fraudulent preference, the order of adjudication is conclusive proof that the transfer was by way of a fraudulent preference and it was not open to the transferee to lead evidence to prove that the transfer was not a fraudulent preference. In such a case, therefore, the order of annulment had to be made as a matter of course on proof of the order of adjudication. The Judicial Committee did not hold that in such a case the order of adjudication itself annulled the transfer and no separate order of annulment was required for the purpose. In fact, it is obvious that they thought that a separate order annulling the transfer would be necessary even in such a case for otherwise they would not have stated that "the decision of the High Court avoiding the transfer is plainly right" nor while setting aside the order annulling the transfer reserved the right of the Official Assignee, should the occasion arise, to make a further application to have the transfer declared void. The case, therefore does not support the proposition for which it has been cited. On the contrary, it clearly proceeds on the basis that even where the order of adjudication is based on an act of insolvency constituted by a transfer of property found to be a fraudulent preference, the transfer stands till it is set aside. In our view this is the correct position and nothing to the contrary has been brought to our notice." (underlining is ours)

5. Subba Rao, J. who concurred with the majority decision by a separate judgment also took the same view. Consequently this decision is authority for the proposition that so far as the provisions of the Act are concerned, once a particular transfer has been found to be an act of insolvency and the adjudication is based on that transfer, though it is necessary for the Official Assignee to file a separate application to avoid the transfer, the moment such an application has been filed, the annulling of the transfer must follow as a matter of course on proof of the order of adjudication itself without anything more. In other words, an order of adjudication itself does not annul the transfer; a separate order on an application made by the Official Assignee is necessary for annulling the transfer, but once such an application is made, the order of annulling follows as a matter of course on proof of adjudication itself. In the present case, as we have pointed out already, the transferee was impleaded as a party to the insolvency petition and it was he who preferred an appeal against the adjudication and failed. In such a context, in view of the decision of the Supreme Court, we are clearly of

the opinion that on proof of adjudication, the Official Assignee was entitled to have the order annulling the transfer on his filing the application, namely, Appln. No. 355 of 1977.

6. Mr. T.R. Srinivasa Iyengar, learned counsel for the appellant, contended that having regard to the reservation made by the Bench in O. S. Appeal, such a consequence cannot flow. We have already extracted the relevant passage in the judgment of the appellate Bench. It is true that the Judges of the Appellate Bench pointed out that they were concerned only with the question whether the transaction entered into by the debtor with the appellant was an act of insolvency or not and not with the question whether the transaction would fall u/s 55 of the Act or not. If we may say so with respect, the Bench could not have said anything else because the appeal itself was only against the order of adjudication and in such an appeal the court was concerned only with the question whether the debtor had committed an act of insolvency, namely, in the particular case u/s 9(b) of the Act or not and the court was not concerned with anything else. Therefore, the reservation made by the appellate Bench can be construed as indicating the procedure to be followed and not dealing with any method of proof or burden of proof. The question we are called upon to consider did not arise before the learned Judges and therefore we cannot construe the reservation made by the Bench as imposing an obligation on the Official Assignee to allege and prove afresh that the transaction in question fell within the scope of Section 55 of the Act.

7. Under these circumstances, we dismiss the appeal and uphold the conclusion of Ramaprasada Rao, J, though for the reasons given by us.

8. The learned counsel for the appellant put forward one other submission, namely, that the learned Judge has directed the appellant to hand over the property to the Official Assignee subject to the equities which have to be adjudged upon by the Official Assignee and contends that the equities cannot be adjudged upon by the Official Assignee and they have to be adjudged by the Court itself, as the Official Assignee himself was a party to the proceedings. The Official Assignee obviously can have no objection to the equities being adjudged by the Court. Consequently the only change we would like to make in the order of Ramaprasada Rao, J. is that the equities between the parties will be adjudged by the Insolvency Court, itself. Subject to this change, the appeal is dismissed, as already stated. There will be no order as to costs. The appellant will have six months' time to deliver vacant possession of the land.