

(1957) 02 MAD CK 0010
In the Madras High Court

Sri lakshmi and Co. Coffee Works

APPELLANT

Vs

T.R. Swaminatha Iyer

RESPONDENT

Date of Decision : 13-02-1957

Acts Referred:

Provincial Insolvency Act, 1920 — Section 28, 28(7)

Citation : AIR 1958 Mad 126 : (1957) 70 LW 636 : (1957) 2 MLJ 398

Hon'ble Judges : Ramanswami Gounder, J

Bench : Single Bench

Judgement

Ramanswami Gounder, J.—This appeal arises out of O.P. No. 32 of 1953 filed by a creditor, Srinivasa Ayyar, for the purpose of declaring

as invalid the mortgage executed in favour of another creditor, Swaminatha Ayyar, in execution of a decree which he had obtained against the

debtor in O.S. No. 99 of 1952. That Swaminatha Ayyar is the respondent in this appeal, and so far as his debt is concerned, there is no

controversy. The debt was owing to the respondent, Swaminatha Ayyar, on a promissory note which the debtor, Venkatesa Ayyar, had executed

in his favour on 31st January, 1952, for a sum of Rs. 1,500. The consideration for that promissory note is proved by the evidence, particularly by

the counterfoil of the cheque which was issued by Swaminatha Ayyar. But, what happened subsequently was this. Alleging that the debtor had

entered into an agreement with him for the execution of a mortgage as a security for the debt, the creditor, Swaminatha Ayyar, filed O.S. No. 99

of 1952, on the file of District Munsif's Court, Tanjore, for the specific enforcement of that agreement. By the time that suit was filed, it would

appear that, about the middle of April, 1952, on the Tamil New Year's day, apparently because he was worried by his debts, the debtor

Venkatesa Ayyar, disappeared from the town and I am told that he has not been heard of since then. Naturally, therefore, that suit was not

contested; and so an ex parte decree for specific performance was passed in favour of Swaminatha Ayyar on 30th June, 1952.

2. The petitioner, Srinivasa Ayyar, as stated above, claimed to be another creditor of the debtor, Venkatesa Ayyar. According to his case, he was

standing surety for various sums of money borrowed by the debtor from other persons, and as a surety he had discharged some of these debts and

in that respect he claimed certain monies amounting to Rs. 6,962, which was acknowledged by the debtor, in the accounts of Srinivasa Ayyar. He

also claimed further sums as due to him in the same way to the extent of Rs. 2,398-12-3; but there was no acknowledgment signed by the debtor

for that amount.

3. Thus, it will be seen that both the parties, namely Srinivasa Ayyar, the present appellant, on the one hand, and Swaminatha Ayyar, the

respondent, on the other, were creditors of the debtor, Venkatesa Ayyar. There were also other creditors.

4. One of the creditors filed I.P. No. 3 of 1952, against the debtor in the Sub-Court, Tanjore, on 14th July, 1952, and the debtor was adjudged

an insolvent by an order, dated 16th December, 1952. In the meantime, in execution of the decree in O.S. No. 99 of 1952, the creditor,

Swaminatha Ayyar, got a mortgage executed in his favour by the Court as the debtor defaulted to comply with the terms of the decree. That

mortgage was executed on 22nd October, 1952, that is, between the date of the insolvency petition and the date of adjudication. It is that

mortgage that is now in question and it was for a declaration that that mortgage was not binding on the estate that the present appellant filed his

petition.

5. It will be seen that the mortgage was executed in execution of the decree in O.S. No. 9 of 1952, and the decree itself was obtained on the foot

of an oral agreement said to have been entered into by the debtor to execute a mortgage as a security for the promissory note debt of Rs. 1,500.

As stated above, that suit was not contested, because the debtor made himself scarce, and there was an ex parte decree. The contention of the

petitioner in the Courts below was that the agreement to execute a mortgage

was false, that the decree was fraudulent and collusive, and that therefore the mortgage was not binding on the estate. The learned trial Judge accepted those contentions and held that the agreement to execute a mortgage was false and that therefore the mortgage was not binding on the estate. But, on appeal, the learned District Judge took a different view and held that the agreement was true; and he therefore ordered the dismissal of the petition. Against that order, the present appeal has been filed.

6. On the question of fact as to the truth of the alleged oral agreement, I have been taken through all the evidence and the circumstances of this case, and I am not in a position to say that the conclusion reached by the learned District Judge was perverse or so unreasonable on the evidence as to justify my interference, though I feel bound to state that I feel considerable suspicion about the genuineness of that agreement. If I am dealing with this matter as a first appeal, in all probability, I would not be agreeing with the conclusions of the learned Subordinate Judge. However as I am not convinced that the conclusion reached by the learned District Judge was perverse or unreasonable on the evidence, I am not interfering with that finding of fact. So, I will have to dispose of this appeal on the assumption that the agreement was true and the decree obtained on the foot of that agreement in O.S. No. 99 of 1952 was one binding on the estate and, therefore, on the Official Receiver.

7. Even so, the question is whether the mortgage executed by the Court on behalf of the debtor, and not by the Official Receiver, can be regarded as binding on the estates. The learned Counsel for the respondent contended that because the decree was earlier than the filing of the insolvency petition, and it was only because of that decree that the mortgage was executed, it cannot be affected by the supervening insolvency. But that argument ignores the fact that the decree itself does not create the mortgage rights. The decree only enabled the creditor, Swaminatha Ayyar, to obtain a mortgage. And then from whom did he obtain that mortgage? No doubt, it was the Court that executed the mortgage, and it may also be u/s 28 of the Provincial Insolvency Act that the property vested in the Court. Even so, it should not be forgotten that the mortgage was executed by the Court, not as the custodian of the debtor's properties in the insolvency, but only as representing the debtor under the decree. By that time

he had become divested of the estate by reason of the operation of Section 28(7), which provides that an order of adjudication shall relate back to and take effect from the date of the presentation of the petition on which it is made. The result, therefore, is that the adjudication took effect as from 14th July, 1952. It was only after that date that the mortgage was executed in October, 1952. The mortgage was not executed by the Official Receiver, or by the Court as representing the estate in the insolvency. It was executed by the Court only as representing the debtor under the decree, that is to say, the mortgage must be dealt with on the same footing as if it had been executed only by the debtor. It may be, as was contended, that this decree is binding on the estate, it may also be that it is capable of being executed against the Official Receiver and he may be compelled in execution to execute a mortgage. But that has not happened so far. It may be open to the creditor, Swaminatha Ayyar, even now to compel the Official Receiver to execute a mortgage in execution of that decree; and if he takes such steps it will certainly be open to the appellant as well as the Official Receiver to raise their contentions in regard to such execution. All those questions are left open and, for the present, it is enough to state that the mortgage, which must be regarded as a mortgage executed by the debtor after his adjudication, cannot be binding on the estate.

8. On this short ground, this mortgage must be declared to be not binding on the estate. So, the appeal is allowed, and the order of the learned

District Judge is set aside, and the order of the learned Subordinate Judge restored with costs throughout.

9. Leave to appeal refused.