

(1971) 07 MAD CK 0015

In the Madras High Court

Case No : I.P. No. 62 of 1964 and Application No. 3 of 1968

The Official Assignee, Madras

APPELLANT

Vs

Tehmina Dinshaw Tehrani and Another

RESPONDENT

Date of Decision : 26-07-1971

Acts Referred:

Presidency Towns Insolvency Act, 1909 — Section 55, 7

Provincial Insolvency Act, 1920 — Section 53

Transfer of Property Act, 1882 — Section 5, 53

Citation : AIR 1972 Mad 187 : (1971) 84 LW 876

Hon'ble Judges : Palaniswami, J

Bench : Single Bench

Judgement

Palaniswami, J.—The Official Assignee, Madras, has taken out this application by Judge's summons under S. 7 of the Presidency Towns

Insolvency Act (hereinafter referred to as the Act), to declare that the site at No. 3/2-A College Road, Nungambakkam, Madras and the building

put up thereon are the sole and exclusive property of Dinshaw K. Tehrani, the second respondent insolvent, that the deed of release dated 27-8-

1955 executed by the insolvent in favour of his wife, the first respondent, is sham and nominal and was not intended to confer any title upon the

first respondent and that the entire property vests in the Official Assignee and is available for the benefit of the creditors. In the alternative, the

Official Assignee has prayed that if it is considered necessary the deed of release may be set aside as fraudulent as against the creditors made with

the intention of defeating and delaying the creditors. The Official Assignee has also prayed for delivery of possession of the property. The second

respondent, who was engaged in the business of producing cinema films, was adjudged insolvent on his own application on 2-12-1964. He

admitted debts to the tune of Rs. 3,20,343-58. In the petition to adjudge him insolvent he stated that the property in question was purchased in the joint names of himself and his wife, that he had no beneficial interest therein, the same having been exclusively acquired out of his wife's own funds and that his name was included only nominally. The site originally belonged to one Md. Shansuddin Sahib. He conveyed it under the sale deed Ex. P-1 dated 5-7-1948 for Rs. 21,595-11-8 in favour of both the respondents. The endorsement made by the Sub-Registrar upon that registered sale deed says that on behalf of the two respondents one Purushotham handed over a crossed cheque drawn on the Chartered Bank of India in favour of the vendor for Rs.21,595-11-8. That cheque had been issued by late Advocate Ranghachari. After purchasing the site, a superstructure was put upon it. The two respondents jointly executed a simple mortgage deed on 12-7-1952 in favour of the Midland Insurance Co., for a sum of Rupees 25,000, for the purpose of the construction. On 27-8-1955, the second respondent insolvent executed the release deed Ex. P-3 in favour of his wife, the first respondent, reciting inter alia that the beneficial interest in the property exclusively belonged to the first respondent, that it was her money that was used for the purchase of the land, that the name of the husband insolvent was included in the sale deed for the purpose of convenience merely with a view to obviate the necessity of the personal attendance of the wife in interviewing the public authorities for mutation of names in the revenue registers, securing actual possession of the plot, effectuating sub-division etc., that it was not intended that the insolvent should have any manner of right, title or interest in the site, that the first respondent who had applied and received the necessary quota for purchase of steel requirements for the construction, that the first respondent was dealing with the property as her own that in view of the inconvenience which the wife was experiencing she pressed her husband to execute a proper deed of release and relinquishment and that in order to dispel the cloud of doubt upon the exclusive title of the wife, the husband executed the deed of release. After this release, the property came to stand solely in the name of the wife, the first respondent.

2. The case of the Official Assignee is that the insolvent had trouble with the Income Tax authorities for his unaccounted wealth, that the entire

consideration for the purchase of the plot was found only by the insolvent, that the insolvent's wife had no wherewithal to purchase the property, that with a view to put off the scrutiny by the Income Tax authorities, the insolvent included his wife's name in the purchase of the property, that the insolvent himself put up the construction out of his funds and out of the fund borrowed from Midland Insurance Co., that the property belonged exclusively to the insolvent, that in about 1955 the insolvent became, heavily involved when he had to meet the claims of several artists engaged in the films, that with a view to screen the property, he executed the release deed containing false recitals and that the first respondent wife has no manner of title to the property.

3. The respondents have filed separate counter-statements but putting forward the same contentions. The defence is that the plot was purchased exclusively with the funds of the first respondent, that the first respondent put up the superstructure with her own funds and dealt with the property as her own, that the first respondent discharged the debt borrowed from Midland Insurance Co., that the first respondent had moneys belonging to her having been given to her by her father, and had moneys borrowed from relations, that with those moneys the construction was put up and that the insolvent had no title to the property. The case of the Official Assignee with regard to the release deed is controverted and it is alleged that the release deed was executed only in recognition of antecedent title of the first respondent and that the insolvent never had any manner of title. It is also contended that the Official Assignee is not entitled to the reliefs asked for in this proceeding u/s 7 of the Act..... (Discussion of facts omitted)

19. From the facts discussed above, I conclude that at the time of the release, the second respondent was heavily involved in debts and that the release is not a bona fide transaction, but is one that was conceived with a view to put off the half share of the second respondent in the name of his wife, the first respondent, so that it may not be available for the creditors of the second respondent.

20. It is contended on behalf of the first respondent that the impugned transaction is one of release, that such a transaction cannot be called a "transfer" within the meaning of S. 53 of the Transfer of Property Act and that, therefore, the Official Assignee is not entitled to impugn the

transaction. Section 5 of the Transfer of Property Act defines the expression "transfer of property" as meaning an act by which a living person

conveys property in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons and

to transfer property"" is to perform such act. Section 53 inter alia provides:--

Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any

creditor s defeated or delayed.

Placing reliance upon the aforesaid definition of "transfer of property" and the expression "every transfer" occurring in Section 53, Mr.

Radhakrishnan, counsel for the first respondent, contended that release is not a "transfer of property" within the meaning of the Transfer of

Property Act and that, therefore, the impugned transaction is not hit by Section 53. I am unable to accept this argument. In this connection, the

following passage in the Law of Insolvency in India by Mulla, 2nd Edn. at page 601 is relevant:

The expression "voluntary transfer" in S. 52 is not limited to any particular form of alienation of his property by the debtor. The expression is wide

enough to cover all sorts of devices that may be practised or suffered by the debtor to deprive the creditors of the benefit of his property. Section

53 of the Provincial Insolvency Act refers to "any transfer" which includes a transfer made by a decree. A transfer made by a nominal transferee

from the insolvent can fall within the purview of the section and can be set aside where it can be gathered from the circumstances of the case that

the real transferor was the insolvent himself and that both the transfers were intended to be part of one transaction"".

The word "transfer" is defined in Section 5 with reference to the word "convey". This word in English law in its narrower and more usual sense

refers to the transfer of an estate in land; but it is sometimes used in a much wider sense to include any form of an assurance inter vivos. The

definition in Section 205(1)(ii) of the English Law of Property Act is:--

Conveyance includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of

property or of any interest therein by any instrument except a will.

This is a special definition adopted for the purposes of the Law of Property Act,

1925. The word "conveys" in S. 5 of the Indian Act is obviously used in the wider sense referred to above. That was the meaning given to the word "transfer" occurring in Section 53, while dealing with a transaction of gratuitous remission of debt due to the debtor, in *Lakshmiammal v. Srinivasa Iyengar*, AIR 1916 Mad 481. The Bench observed at page 482:--

The effect of a creditor voluntarily remitting the whole or a portion of a debt will be to put it out of the reach of his creditor just as much as a gift of the debt to a third person. In either case there is no consideration for the transaction and though Section 53 of the Transfer of Property Act will not apply in terms, the principles on which it is based will apply. It is not necessary u/s 53 that the transferor should reserve a benefit to himself, as gifts to a third party are as much voidable as other transfers. Supposing that the only property a person has is a large sum due to him from a relation of his and that he to defeat his creditors, remits the debt, is there any principle on which the case can be distinguished from one where he makes a gift of the debt to a third person? We think not. No authority has been cited for such a distinction being drawn, and it would open a wider door to fraud if the remission of a debt is placed on a different footing from a transfer.

Following this principle, it was held by Mockett, J. in *The Official Assignee Vs. A. Kanniah Naidu*, , while dealing with a case u/s 55 of the Presidency Towns Insolvency Act, that the expression "voluntary transfer" is wide enough to cover all sorts of devices that may be practised or suffered by an insolvent to deprive the creditors of the benefit of his property and that, as such, the remission of a debt without consideration amounts to a "voluntary transfer" within the meaning of Section 55 of that Act. I find that though the second respondent has chosen to execute a document styling it only as a release deed in favour of his wife, the transaction amounts to a "transfer" within the meaning of the Act and that the transaction is liable to be impugned in this proceeding.

21. Mr. Venkatarama Iyer, appearing for the Official Assignee, contended that even on the first respondent's own showing the money that was available with her represented the savings made by her out of the moneys given to her by her husband, the second respondent, for family expenses property of her husband and that any acquisition made with such saving should

be held to be the property of her husband. There is no evidence on this aspect. In support of the above argument, the learned counsel made elaborate citations of authorities. The argument of Mr. Venkatarama Iyer was on the basis of what the first respondent was said to have stated in the course of the public examination before the Official Assignee. My attention has not been drawn to any evidence on this aspect. The Official Assignee was frank enough to concede that there is no evidence on record in this enquiry on this aspect. It is, therefore unnecessary to refer to those authorities.

22. To recapitulate, the sale deed in respect of the site stands in the names of both the respondents. There is no positive evidence to show that the consideration was found either by the first respondent or by the second respondent. The construction was put up with the amount borrowed by both the respondents declaring themselves to be the owners of the property. In these circumstances, the apparent tenor of the document has to be given effect to and that it has to be held that each of the respondents is entitled to one half share in the property. The release deed was executed by the second respondent at a time when he was very heavily involved in debts. The attendant circumstances clearly show that the device of release was adopted to screen the half share of the second respondent from being proceeded against by his creditors. This release cannot affect the rights of the Official Assignee representing the creditors of the second respondent. The said release deed is hereby set aside as it is proved to have been executed with intent to defeat and delay the creditors of the second respondent. The Official Assignee is at liberty to take such action as he may be advised for working out his rights as regards the half share of the second respondent in the property. The Official Assignee is entitled to his costs in this application from the first respondent. Advocate's fee Rs. 200.

23. Application allowed.