
(1927) 08 MAD CK 0035
In the Madras High Court

The Official Assignee of Madras

APPELLANT

Vs

S.M. Sheik Moideen Rowther

RESPONDENT

Date of Decision : 29-08-1927

Acts Referred:

Presidency Towns Insolvency Act, 1909 — Section 56

Citation : AIR 1927 Mad 1013 : (1927) ILR (Mad) 948 : (1927) 26 LW 665 :
(1927) 53 MLJ 890

Judgement

1. S.M.K. Mohamad Rowmer was adjudicated insolvent on 31st March, 1924, on a petition filed on 17th March, 1924, by a creditor

Chengalvaraya Chettiar. The Official Assignee of Madras applied to have a sale deed, dated 27th October, 1923, and a deed of transfer of

mortgage, dated 11th November, 1923, executed by the insolvent in favour of the garnishee (S. M. Sheik Moideen Rowther) declared void u/s

55, or in the alternative u/s 56, of the Presidency Towns Insolvency Act. The learned judge having dismissed the application, the Official Assignee

has preferred this appeal.

2. The insolvent was carrying on business as a commission agent at Madras. He had a branch shop in Tinnevely. In 1923 the insolvent was largely

indebted. He was indebted to the garnishee to the extent of about Rs. 20,000 in May 1923, and he had executed in favour of Chengalvaraya

Chettiar a promissory note on 1st October, 1923, for Rs. 30,000, the amount having been advanced to the insolvent between 25th June and 30th

September, 1923. The garnishee is the paternal uncle of the insolvent and the sale deed, Ex. IV, executed by the insolvent in favour of the

garnishee comprised all the Immovable properties of the insolvent. It was also alleged that the properties comprised in the sale deed were worth

very much more than Rs. 10,000, the consideration mentioned in the sale deed. Under Ex. V, dated 11th November, 1923, the insolvent

transferred for Rs. 775 to the garnishee the mortgage rights of the insolvent in certain Immovable properties in Tinnevely, the principal amount of

the mortgage being Rs. 500. It was also alleged that Ex. IV was not executed on the date it bears (27th October, 1923), but that it was executed

only about the 20th December, 1923, the date of registration; finally it was alleged that the garnishee was aware of the insolvent's indebtedness to

Chengalvaraya Chettiar and others and that Ex. IV was taken with full knowledge of the fact that it comprised all the properties of the insolvent

and that the same was a fraudulent transaction and void as against the Official Assignee. The learned Judge in dismissing the application concluded

his judgment as follows:

The Official Assignee has not in my view discharged the burden on him of showing that the sale was not bona fide; it clearly was in my view for

valuable consideration and the only way in which the bona fide of the transaction might have been impeached was by showing that for some reason

or other the execution of the sale deed was not on the date it bears. That as I have said the Official Assignee has failed to prove. The official

Assignee having failed to show that the sale was not for valuable consideration and that it was not bona fide, this application must be dismissed

with costs.

3. On behalf of the appellants the following main contentions were raised by his learned Counsel.

1. That the deed of sale was not executed at Pettai a suburb of Tinnevely on 27th October, 1923, the date mentioned in the document, but that it

was antedated and executed only about the time of its registration at Tinnevely on 20th December, 1923.

2. The consideration mentioned in the document Rs. 10,000 is grossly inadequate, the properties being really worth about Rs. 20,000.

3. The amount due to the garnishee at the time was only about Rs. 7,000 and the recital in the document that more than Rs. 10,000 was due to the garnishee from the insolvent at the time is false and fraudulent.

4. That the document Exhibit IV could not be said to have been executed in good faith and consequently the transaction is void as against the

Official Assignee u/s 55 of the Presidency Towns Insolvency Act.

5. That the case is also one of fraudulent preference coming within Section 56 of the Act and consequently the transfer is void as against the

Official Assignee.

4. Before discussing the questions raised by the appellant it would be convenient to state that the onus of proving that a particular transfer effected

by the insolvent is void against the Official Assignee u/s 56 of the Act is on the Official Assignee, whereas the onus of proving good faith and

valuable consideration in a case coming u/s 55 would be on the garnishee. This was admitted before us by the learned Counsel on either side

appearing in the case, and we think the decisions of this Court reported in *The Official Assignee of Madras Vs. G. Sambanda Mudaliar*, and the

Calcutta High Court reported in Nripendra Nath Sahu v. Ashutosh Ghose (1914) 19 CWN 157 and Nilmoni Choudhuri v. Bashanta Kumar

Banerji (1914) 19 CWN 865 and The Official Assignee of Bengal v. Yokohama Specie Bank, Ltd. 29 CWN 374 fully support the position.

5. Before discussing the evidence in the case we should mention that the insolvent died in January 1924, without filing any schedule of assets and

liabilities. His account books have not been produced. Kadir Moideen Rowther, the fourth witness examined on behalf of the Official Assignee

was formerly a gumastah of the insolvent. He has deposed that the garnishee is the heir of the insolvent and that all the accounts of the insolvent had

been handed over to the garnishee. The garnishee was examined by a Commissioner in Tinnevely, as also his witnesses including an attestator to

Exhibit IV, and the garnishee's accountants Sebastian Pillai and Velayudan Pillai. Under ordinary circumstances the garnishee as well as his

accountants, though residents of Tinnevely, would have to be examined in Court in Madras, which would have been more satisfactory than their

examination by a Commissioner at Tinnevely. It would appear that applications were made to the High Court first to have some witnesses (other

than the garnishee and his accountants) examined on commission and subsequently for similar examination of the accountants and the garnishee

also. None of the witnesses examined by the Commissioner at Tinnevely were cross-examined on behalf of the Official Assignee--the Official

Assignee not having succeeded in his attempts to have the proceedings before

the Commissioner adjourned. On the 24th of December, 1925, the Commissioner sent a registered notice to the Official Assignee appointing 2nd January, 1926, for examination of the witnesses. The Christmas holidays intervened and though the Official Assignee wired to the Commissioner on 29th December, 1925 to postpone the enquiry, the Commissioner replied by wire on 30th December, 1925 that, as the time for return of the Commission was 4th January, he adjourned the inquiry to 4th January? 1926, and the District Munsif ordered extension only for the examination of the garnishee till 9th January, 1926. Thus only the garnishee was cross-examined on behalf of the Official Assignee before the Commissioner. In the circumstances one is not surprised to find gaps in the evidence and there are circumstances appearing in the case on which more light could probably have been thrown had the garnishee and his accountants been examined before the learned Judge in Madras. These circumstances have to be kept in view in discussing the evidence adduced in the case.

6. The first question is whether the sale deed, Ex. IV"", was executed on the date it bears--that is, on 27th October, 1923. It is admitted that the insolvent was in Madras on 26th October, 1923, he having attended the Madras Presidency Magistrate's Court on that day.

7. The case for the garnishee is that the insolvent left Madras on the evening of the 26th October, 1923, by the Boat Mail, (which leaves Madras at about 8 p. m.) and reached Tinnevely Railway Station in the evening of the 27th at about 6 p.m. and went straight to Pettai (which is about 3 miles from the station) and that the sale deed was written in the handwriting of the insolvent himself on the night of the 27th soon after his arrival at Pettai. It is said that the insolvent left Tinnevely for Madras on the morning of the 28th, saying that he had a criminal case in Madras to attend to, and reached Madras on the morning of the 29th October. It is admitted that the criminal case was to be heard only on or about the 12th

November. It is difficult to believe that after a tedious railway journey of about 22 hours the insolvent would have undertaken the engrossing of the sale deed in his own handwriting soon after his arrival at Pettai, and in the night of the 27th. It looks rather strange that he is said to have left Tinnevely on the morning of the 28th for Madras without staying at Tinnevely

for registering the document, more especially as nothing necessitating his presence at Madras in such a hurry is proved. The sale deed is written on several sheets of paper and would evidently have taken some considerable time to write. It is also difficult to believe why the insolvent did not stay in Tinnevely and register it on the 28th. When pressed with the question as to how he was able to have the document executed at Tinnevely on the night of the 27th, the garnishee explained that the stamp paper for the sale deed had been purchased on the 16th October, 1923, and the draft sale deed had been prepared two weeks before the stamp was purchased. Thus the draft sale deed was according to the garnishee prepared about the 2nd October, 1923 and given to him by the insolvent. The statement about the draft cannot be believed inasmuch as nothing regarding the same was mentioned either in the correspondence that passed between the garnishee and his gumastah Sebastian Pillai or in the notice issued by the garnishee's pleader to the insolvent. (See Ex. IX, dated 21st October, 1923, Ex. X, dated 22nd October, 1923, and Ex.VIII, dated 24th October, 1923). The absence of any mention of the agreement to sell (said to have been entered into between the insolvent and the garnishee on the 2nd October, 1923) and of the draft sale deed in the above correspondence makes it clear that the story about a draft having been already prepared on the 2nd October, 1923, and handed over to the garnishee by the insolvent is probably false. On the other hand we have evidence of witnesses who say that the insolvent was in Madras on all the three days 26th, 27th and 28th of October. Kadir Mohidin Rowther who was a gumastah of the insolvent states that both the deeds in question, Exs. IV and V, were executed at Madras, on the 11th of November, 1923. It is urged that the statement of the witness could not be relied on, since the other statement made by the witness about the repayment of Rs. 15,000 to the garnishee by the insolvent out of the amounts borrowed by the insolvent from Chengalvaraya Chettiar is obviously false, but this is certainly not proved, as the insolvent's accounts have not been produced. But we have got the evidence of an apparently respectable and disinterested witness, Rangaswamy Aiyangar, the first witness examined on behalf of the Official Assignee. Rangaswamy Aiyangar is an auditor in the Accountant General's Office, Madras, drawing a pay of

Rs. 170 a month. He was a friend of the insolvent and his evidence shows that the insolvent was at Madras on the 26th, 28th and the 29th of

October. It is admitted that the insolvent sold his horse and carriage at Madras on the 29th of October. (See the receipt Ex. B, dated 29th

October, 1923.) The 2nd witness states that he saw the insolvent at Triplicane on the 26th of October, between 8 and 9 in the morning.

Chengalvaraya Chettiar who purchased the horse and the carriage also states that he saw the insolvent at Madras on the 27th, 28th and 29th of

October. There is no sufficient reason for disregarding this oral evidence in the circumstances. The learned Judge was evidently under some

misapprehension when discussing the question whether it was possible for the insolvent to leave Madras on the night of the 26th October for

Tinnevely and be at Tinnevely on the 27th, and at the same time be at Madras on the 28th. He seems to assume that the insolvent could have

been at Madras on the 28th and yet be at Tinnevely on the night of the 27th. Having regard to the distance between Madras and Tinnevely and

the time necessarily taken for the journey by train, there could be no basis for such an assumption. There are two attesting witnesses to Ex. IV, one

of whom is dead, and the other Peer Mohidin Rowther has been examined as garnishee's 8th witness. He is evidently rich, but as deposed to by

Kadir Mohidin Rowther, the garnishee is a brother-in-law of the said attesting witness--the garnishee having married the sister of Peer Mohidin.

Having regard to all the circumstances we find it difficult to resist the conclusion that the document, Ex. IV, was not executed on the date it bears

and that the garnishee's story about the date and place of its execution cannot be believed. It is important to note that the garnishee's account

books, Ex. XXI series, do not contain any contemporaneous entries relating to the purchase of stamp paper on the 16th of October, or about the

sale deed having been executed on the 27th of October. In the usual course of business, credit should have been given to the insolvent on the 27th

of October for Rs. 10,000 mentioned as the consideration for sale deed, Ex. IV, if it had been executed and delivered to the garnishee on the date.

It is admitted that it was only on the 20th December, the date on which Exs. IV and V were registered, that entries were made of the expenses

relating to stamp paper and giving credit for the consideration showed in Exs. IV and V, namely the amounts of Rs. 10,000 and 775 respectively.

No doubt, the entries on the 20th of December state that credit is to be given for these amounts as and on the 27th of October and the 11th of

November, respectively. There is absolutely no explanation as to why these entries were not made on the respective dates as they should have

been in the usual course of business. Thus the entries in the garnishee's own books seem to us to corroborate the oral evidence that Ex. IV was

not executed on the 27th October. It is to be regretted that the insolvent's account books are not before the Court. On the whole we have come

to the conclusion that Ex. IV was not executed on the 27th of October, 1923, but that it was antedated by the parties thereto.

8. As regards the 2nd and 3rd points namely the value of the properties covered by Ex. IV and repayment of Rs. 15,000 to the garnishee by the

insolvent, we are not satisfied that the appellant has proved his contentions on these heads, though having regard to the fact that on 15th June,

1921 the garnishee was prepared to take properties covered by the first and 2nd schedules only of Ex. IV as security for Rs. 10,000 and seeing

that the value of the properties covered by 3rd schedule of Ex. IV is about Rs. 2,400, it is possible that the properties included in Ex. IV were

worth more than Rs. 10,000 in 1923. But the evidence on record is not definite enough to us to say that the price of Rs. 10,000 mentioned in Ex.

IV is grossly inadequate. It does not seem that this portion of the case as regards valuation of the property was properly pressed before the learned

Judge. Otherwise it is difficult to understand the following observation of the learned Judge:

The evidence on behalf of the garnishee is evidence taken on commission and it goes to show that the property was worth at least equal to the

consideration set out in the sale deed and this evidence has not been contradicted in any way.

Ex. VI is not referred to by the learned Judge in his judgment. As regards the repayment of Rs. 15,000 it is spoken to only by Kadir Mohidin

Rowther, gumastah of the insolvent; and though having regard to the evidence given by that witness materially in favour of the garnishee in one

important respect (we refer to the statement by the witness that Exhibits IV and V were executed on the 11th of November, 1923, which would

be more than three months prior to the creditor's petition), it could not be said that the witness was inimical to the garnishee, yet on the whole we

are not prepared to differ from the learned Judge on this point. We accordingly find against the appellant on points 2 and 3 mentioned above.

9. In the face of the statement made by Kadir Mohidin Rowther that the documents were executed on the 11th of November, 1923, we hold that

the Official Assignee is not entitled to relief u/s 56 of the Act, but we hold that he is entitled to the relief that he seeks u/s 55.

10. The garnishee and the insolvent were near relations, the garnishee being the paternal uncle of the insolvent. The insolvent had a branch shop at

Tinnevely where the garnishee was carrying on his own business. Though the garnishee had transactions with the insolvent on a large scale some

years previously, the subsequent dealings were only on a comparatively small scale. The garnishee was anxious in 1921 to take security, but did

not take steps to complete the security bond, Ex. VI, being assured by the insolvent that the amount would be repaid from the collections of a chit

fund. The garnishee admitted that in 1923 on account of certain rumours the garnishee came to know that the insolvent's representations were not

true. The garnishee also (Para. 6 of the garnishee's counter affidavit) admitted that all the properties were included in the sale-deed, Ex. IV.

Though the garnishee stated in his deposition that he did not ask the insolvent whether he had any liabilities, we have no doubt that the garnishee

had full knowledge of the insolvent's liabilities at the time. We have found that the document Ex. IV was antedated. The garnishee took an

assignment not only of all the Immovable properties of the insolvent, including dwelling houses, but he took also an assignment of the mortgage

rights possessed by the insolvent in respect of a mortgage for the principal sum of Rs. 500 and interest (Ex. V). If the garnishee's case about the

draft sale-deed is respected, then it is clear that after executing a promissory note to Chengalvaraya Chettiar on 1st October, 1923 for Rs. 30,000

the insolvent agreed to sell all the properties to the garnishee for Rs. 10,000 on the very next day namely the 2nd of October. The garnishee's

clerk was sent to Madras to gather information about the state of the insolvent's business and it is impossible to believe that the garnishee did not

know that the insolvent was heavily indebted in Madras. There is evidence that the insolvent owed moneys to two other creditors in addition to Rs.

30,000 that he owed to Chengalvaraya Chettiar. No doubt no schedule of assets and liabilities has been filed, the insolvent being dead. In the

circumstances of the case we are inclined to think that the garnishee has got possession of the account books of the insolvent and has withheld the production of the same; the said account books, if produced, would have been of very great use in the decision of this case. When confronted with the question as to whether he would have taken the sale deed Ex. IV if he had known that the insolvent was indebted to Chengalvaraya Chettiar in the sum of Rs. 30,000, the garnishee stated that, even if he had known that the insolvent had other debts, he would have purchased the property as his debts should be realised. We hold that the -garnishee knew when he took Ex. IV that the insolvent was indebted to Chengalvaraya Chettiar to the extent of Rs. 30,000 and also to some others and that he (insolvent) had no other properties. Knowing all this the garnishee took an assignment of all the insolvent's properties and antedated the sale deed--knowing full well that what was being done was in fraud of the insolvency law. He cannot be said to have acted in good faith in the circumstances of the case.

11. The learned Counsel for the respondent argued that the present case does not come u/s 55 of the Presidency Towns Insolvency Act. Under that section any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or encumbrancer in good faith and for valuable consideration shall if the transferor is adjudged insolvent within two years after the date of the transfer be void against the Official Assignee. It will Be noticed that it is only in favour of purchasers and encumbrancers in good faith and for valuable consideration that the exception is made. In the present case the respondent has proved valuable consideration, but he has to prove good faith also. The respondent's Counsel argues that the expression "good faith" in the section means only that the transaction should not be a sham one or one in which there is a resulting trust in favour of the insolvent, and he contends that, as neither of those two objections could be urged in the present case, the transaction is binding on the Official Assignee. We are unable to accept that contention. Absence of good faith could be proved by showing that the transaction was a sham one, or that there was a resulting trust in favour of the insolvent, but the same could be proved by other circumstances also. If an insolvent transfers in favour of one of his creditors to whom he owes much more than the debt due to the transferee and

the transferee also being fully aware of all the above circumstances and in concert with the insolvent, brings into existence such a transfer deed,

and antedates the same, and takes such sale deed for debt due to him without any contemporaneous advance or other promise to help the

insolvent to carry on his business, then we have no doubt that the transaction could not be said to have been entered into in good faith, and the

same should be held to be void against the Official Assignee u/s 55 of the Act. The cases referred to by the respondent, *Hakim Lal v. Mooshahar*

Sahu ILR (1907) C 999 and *Hakim Lal*, are cases that were decided u/s 53 of the Transfer of Property Act and not under the Insolvency Act. In

fact at page 1015 of *Hakim Lal v. Mooshahar* *Sahu* ILR (1907) 999.

It is well-settled that in the absence of a Bankruptcy Act, a debtor may make preference amongst his creditors even to the extent of transferring all

his property to one creditor to the exclusion of the others.

Note the words "In the absence of a Bankruptcy Act!" The Privy Council also in *Musahar Sahu v. Lala Hakim Lal* (1915) LR 43 IA 104 : ILR 43

C 521 : 30 MLJ 116 makes a similar observation. At page 524 it is said:

As a matter of law their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy applies, there is nothing to

prevent a debtor paying one creditor in full and leaving others unpaid, although the result may be that the rest of his assets will be insufficient to

provide for the payment of the rest of his debts.

In fact we have cases arising under the Insolvency Act where it has been held that under similar circumstances the transfer would be void as against

the Official Assignee. In *The Official Assignee of Bengal v. Yokohama Specie Bank, Ltd.* (1924) 29 CWN 374, *Sanderson, C.J., and Buckland,*

J., held that an assignment executed in favour of one of the creditors of the insolvent of all the properties of the insolvent without any

contemporaneous advance was void against the Official Assignee when the transferor was adjudicated insolvent within two years after the date of

the transfer. Finding that the transferee had knowledge of the state of affairs of the assignor at the time of the assignment, the Court held that the

transfer was not in good faith within the meaning of Section 55 of the Act. Justice Buckland was of opinion that in considering the effect of

transactions of such a nature, the facts must be considered in the light of the law

of Bankruptcy, the object of which is to ensure rateable

distribution of an insolvent's property among his creditors "and that a transaction which may in other circumstances be free from all taint would

become an offence when it is established that it contravenes the law of Bankruptcy. Justice Buckland further remarked that

Though the bank (transferees) may have acted honestly in the popular sense, they cannot be deemed to have acted in good faith within the law of

Insolvency, however honestly they may have endeavoured and thought they were justified in endeavouring to secure the property of the insolvent

as security for their own debt.

We may also refer in this connection to a passage in the Privy Council decision reported in *Khoo Kwat Siew, v. Wooi Taik Hwat* (1891) LR 19

IA 15 : ILR 19 C 223 where Lord Hobhouse observed as follows:

The well-known rule of law is that, if a trader assigns all his property, except on some substantial, contemporaneous payment, or some substantial

undertaking to make payment in futuro, that is an act of bankruptcy, and is void against the creditors and the assignee, simply because nothing is

left with which to carry on his business, whereas, if he receives substantial assistance, something is left to carry on the business.

In *Jukes in Re : Official Receiver ex parte* LR (1902) 2 KB 58, Wright J., remarks as follows:

I think it is quite clear that the debtor committed an act of bankruptcy in parting with the whole of his property to one of his creditors to satisfy a

past debt.... I cannot help thinking that if a creditor takes the whole, or substantially the whole, of the property of his debtor in payment of a past

debt, and knowing that there are other creditors, he cannot be said to be acting in good faith.

See also *The Official Assignee of Bombay Vs. Obla Kuna Muna Sundarachari and Others*, .

12. The onus of proving good faith, it has been held, is on the transferee. The *Official Assignee of Madras Vs. G. Sambanda Mudaliar*, and The

Official Assignee of Bengal v. Yokohama Specie Bank, Ltd. (1924) 29 CWN 374. It will depend on the circumstance of each case whether good

faith has been proved or not. Having regard to the facts found by us in this case, we are of opinion that the transactions impugned in this case were

not executed in good faith and we accordingly allow the appeal and declare that the deed of sale, dated 27th October, 1923, and the deed of transfer, dated 11th November, 1923 (Ex. V), are void against the Official Assignee. The garnishee would be entitled to prove, as a simple creditor, in respect of the amount that he may be found entitled to get from the insolvent. The garnishee should pay the taxed costs on the O.S. scale of the Official Assignee both in the appeal and before the learned Judge including the costs of the commission.