
(1925) 12 MAD CK 0007
In the Madras High Court

T.R. Ramaswami Aiyangar

APPELLANT

Vs

The Official Receiver of Coimbatore

RESPONDENT

Date of Decision : 07-12-1925

Acts Referred:

Provincial Insolvency Act, 1920 — Section 53

Citation : AIR 1926 Mad 672 : (1926) 23 LW 734

Hon'ble Judges : Wallace, J;Madhavan Nair, J

Bench : Full Bench

Judgement

Wallace, J.—This is an appeal against the order of the Lower Court setting aside a mortgage in favour of the appellant u/s 53 of the

Provincial Insolvency Act on a petition by a petitioning creditor dated 12th July, 1920. This very alienation by mortgage was held to be an act of

insolvency and adjudication followed thereon. The mortgage was dated 10th April, 1920 and was for Rs. 6,000, and the consideration was four

prior debts of a total sum of Rs. 2,500, which the mortgagee undertook to discharge, and a cash payment of Rs. 3,500. It is found by the learned

Judge, and it is not disputed here, that two of the debts amounting to Rs. 1,000 were genuine and were paid by the mortgagee. The Judge holds

that the Rs. 3,500 cash was never paid. He records no clear finding as to the nature of the document, viewing it at one time as a sham and at

another time as a fraudulent preference. He has set it aside in toto.

2. The first point for consideration is whether the Rs. 3,500 cash was paid. I agree with the Lower Court that the appellant, on whom the onus lay,

has not proved the payment. There are various suspicious circumstances. The document recites that the money was paid in cash on the date of the

document, and the evidence of the appellants, witnesses P.W.'s ,1, 2 and 3 is that the whole sum was paid at once 35 notes of Rs. 100 each but

the appellant himself deposed that he got Rs. 3,500 by cashing a Rs. 10,000 hundi at the Bank of P.W. 4. The bank books, however, show that

only Rs. 3,100 was paid to the appellant on the date of the document, and the balance not till the next day so that, the appellant's account of how

he got the full sum of Rs. 3,500 to pay the whole amount on the date of the document is not true. Further, although the document was not

registered until 31st May, 1920, no separate voucher was taken from the insolvent for the Rs. 3,500. Nevertheless the appellant handed over the

document to the insolvent for registration. He has claimed that it was in his own possession up till the day of registration and filed Ex. V to support

his statement. But, as the District Judge has shown, a good deal of suspicion attaches to Ex. V and it has been in fact not proved by the writer of it.

Further the appellant says that he noted the payment of Rs. 3,500 in his diary and accounts. He has produced neither of these documents. Also he

did not obtain any encumbrance certificate, while, as a matter of fact, there was an undischarged prior encumbrance on the property. The appellant

is a banker and is used to dealing cautiously on the applications for money, and usually in the case of his own bank demands, collateral security for

all advances. It is very difficult to believe that he would have parted with a sum of Rs. 3,500 in such a careless fashion. I am not, therefore,

prepared to differ from the learned Judge in holding that the Rs. 3,500 was not paid. It is further clear from the evidence of the appellant and that

of the insolvent that the appellant was aware that the insolvents were in financial straits. Under this mortgage the latter disposed of all their

property, and, along with the prior mortgage on the property, the property, was mortgaged up to the hilt. I think the proper conclusion is that this

Rs. 3,500 was not paid and that the object of inserting the same in the document was to secrete this money for the insolvent's benefit. The four

debts mentioned in the document are genuine debts and two of these were paid. The appellant says that he refrained from paying the other two

because the insolvency petition was presented.

3. I have now to consider the effect of these findings. I do not think that it can be concluded that the insolvent had the dominant idea of cheating his

other creditors by preferring the creditors of these four debts. It is thus not properly a case of fraudulent preference u/s 54 of the Provincial

Insolvency Act, but I think it can be got u/s 53. As already pointed out the District Judge has held this mortgage to be the act of insolvency and the

adjudication was based on this conclusion. That adjudication is not now before us and I take it that this finding stands, namely, that the document is

one got up by the insolvents to repeal and delay creditors, of whom the petitioning creditor was one. The alienee in such circumstances no doubt is

faced with this handicap: that it is not open to him to attack that finding, but on the other hand, to attract the operation of Section 53 of the

Provincial Insolvency Act, it is not in terms necessary that the document should be to defeat or delay creditors. It is sufficient if it was a transfer not

in good faith or not for valuable consideration. It is open therefore to the alienee to escape the operation of the S. by showing good faith and

payment of valuable consideration. Now, this alienee has paid valuable consideration to the extent of Rs. 1,000; but considering that the intention

of the document was to secrete a much larger part of the insolvent's estate from his creditors it is impossible to hold that the mere payment of Rs.

1,000 will avail to make the document one taken in good faith. A document cannot be partly in good faith and partly not. The dominant intention

underlying the document is what has to be looked at, and, in this case, that intention was to deceive and defraud creditors. It is therefore a

document taken not in good faith and liable to be declared void against the Official Receiver. There is therefore no reason to disturb the order of

the District Court setting it aside.

4. The appellant contends that, even so, he is entitled to stand in the shoes of the creditors whose debts he has discharged. One of these was a

simple money debt and the other was a mortgage debt. We have been referred to certain rulings u/s 53 of the Transfer of Property Act. In

Chidambaram Chettiar Vs. Sami Aiyar alias Arunachalam Aiyar and Others, it was held that a transfer to defeat creditors is wholly void even if it is

in part for valuable consideration and that it cannot be upheld even to the extent to which it is supported by consideration. But the upholding

contended for and negatived in that case was an upholding as an assignment. In Palamalai Mudaliar v. The South Indian Export Company (1909)

20 MLJ 211 after a mortgage had been paid off, the alienee was given a charge on the property to the extent of the payment: and the same

principle was acted upon in Chinna Pitchiah v. Pedakotiah (1911) 36 Mad. 29 Loorthi Odayar v. Gopalaswami Aiyar (1923) 46 M L J 125 and

Rajani Kumar Das v. Gana Kishore Shaha (1908) 35 C 1051. The general principle applicable to cases u/s 53 of the Provincial Insolvency Act, I

think. is this: the assignment, as an assignment, void; but, for money genuinely paid in discharge of genuine debts, the alienee will stand in, the shoes

of these whom he has paid. In the case of a mortgage debt paid off, the transfer will not operate as a mortgage at all, not even to the extent of the

amount paid, but the alienee will be entitled to rank in the schedule of secured creditors to the extent of his payment. Consequently, I think the

proper method of disposal by the Official Receiver is that the appellant should be allowed to rank in the schedule of secured creditors to the extent

of the amount paid by him to discharge the mortgage, and as an unsecured creditor to the extent of the amount paid by him to discharge the

unsecured debts; and I would direct that this be done.

5. I would give the appellant roughly proportionate costs on his success and direct that he receive one-third of the costs throughout and pay two-

thirds of the costs throughout.

Madhavan Nair, J.

6. I entirely agree. The learned District Judge has held that the alienation in favour of the appellant should be set aside u/s 53 of the Provincial

Insolvency Act, but he has also found that the appellant has paid a sum of Rs. 1,000 thereby discharging two prior debts of the insolvent, namely,

(1) Rs. 500 due to one Sinnakkal under a mortgage, Ex. II, and, (2) Rs. 500 due to the Bank under Ex. III. I agree with my learned brother that

the evidence in the case fully supports these conclusions. It is argued that the sum of Rs. 1,000 having been paid, the alienation in favour of the

appellant should be upheld at least to the extent it is supported by consideration, and in this connection, some decisions u/s 53 of the Transfer of

Property Act dealing with transfers made with intent to defeat or delay creditors were referred to in the course of the argument. In Chidambaram

Chettiar v. Sami Aiyar (1906) 16 M L J 327 confirmed by the Privy Council in Chidambaram Chettiar v. Srittivasa Sastrial (1914) 26 M L J 473

it was held that a transfer intended to defeat creditors is wholly void as an assignment though it is in part supported by valuable consideration; but

this does not mean that the alienee is not to get any credit for the debt that he may be found to have actually discharged. In *Palamalal Mudaliar v.*

The South Indian Export Company (1909) 20 M L J 211 an alienee who paid a portion of the consideration by discharging a valid mortgage

previously binding on the property alienated was given a charge on the property to the extent of his payment. This principle is recognised in *Loorthi*

Odayar v. Gopalaswami Aivar (1923) 46 M L J 125 though this decision covers a wider ground. Applying the principle of these decisions, I think

that though the assignment as an assignment is void u/s 53 of the Provincial Insolvency Act, the alienee is entitled in so far as he has paid off the

mortgage debt due to Sinnakkal to rank in the schedule of secured creditors to the extent of payment; and, in so far as he has paid off the debt due

to the Bank, to rank as an unsecured creditor. I agree with my learned brother that the Official Receiver should be directed to dispose of the

claims of the appellant as regards these two debts on this basis. I also concur in the proposed order as to costs.