
(1918) 02 MAD CK 0014
In the Madras High Court

T.V. Sankaranarayana Aiyar

APPELLANT

Vs

Alagiri Aiyar and Others

RESPONDENT

Date of Decision : 18-02-1918

Acts Referred:

Presidency Towns Insolvency Act, 1909 — Section 51
Provincial Insolvency Act, 1920 — Section 36

Citation : (1918) 8 LW 281 : (1918) 35 MLJ 296

Hon'ble Judges : Sadasiva Aiyar, J;Oldfield, J

Bench : Full Bench

Judgement

Oldfield, J.—The question is whether the adjudication as insolvent referred to in Section 36, Provincial Insolvency Act, is to be treated as

made on the actual date of the order of adjudication or with reference to Section 16(6) on the date of the presentation of the petition in which the

insolvency originated. I have had the advantage of reading my learned brother's judgment and I can give my reasons for agreeing with him shortly.

2. The important point is, I think, that the application of Section 16(6) is not subjected to any explicit restriction. It no doubt stands as part of the

section relating to the order of adjudication and its immediate consequences not as a separate provision, like S.43 of the English Act of 1883 and

Section 51 of the Presidency Towns Insolvency Act. But neither that nor the detailed comparison relied on by respondents between the provisions

of the Provincial Act inter se and with those of the other Acts referred to goes far towards supporting their contention that Section 16(6) affects

only the provisions as to the date, from which the insolvent's property vests in the Court or receiver not those relating to avoidance of his dealings

with it. It has not in my opinion been shown that there is any scheme of the,

Provincial Act, which entails any particular interpretation of Section 36, with which alone we are concerned and with which alone I desire to deal. The only acceptable presumption, which has been suggested to us, is against an interpretation such as respondents' which would allow the insolvent or the Court's delays to reduce the period before the petition, transfers during which are liable to be avoided. That presumption is entirely in accordance with the provisions of Section 47 of the English Act, under which that period ends, when the bankruptcy, as defined in Section 43, begins, independently of the date of the petition or time taken in its prosecution. Respondents' argument has been based mainly on the difference between the wording of Sections 36 and 37 of the Provincial Act and the inference that different dates for the end of the period were intended. That difference is perhaps due to adhesion to the wording of the corresponding English Sections 47 and 48, the fact being disregarded that, whereas in the former the reference to the bankruptcy as fixing the end of the period did provide a date different from that provided in the latter by reference to the presentation of the petition, the dates provided in Section 36 read with Section 16(6) and in Section 37 of the Provincial Act would be the same. But, whether that is so or not, I am not prepared to reject in favour of this inferential construction that which the unrestricted wording of Section 16(6) and the objects of the statute dictate. Next *Madhu Sardar v. Khitish Chendra Banerjee* ILR (1914) Cal. 289 and *Hemraj Champa Lall v. Ramkishan Ram* (1916) 2 Pat. L.J. 101 are relied on as supporting a restricted application of Section 16(6) since they negative its application to Section 34(1). But I concur with my learned brother in respectfully doubting the correctness of the reasons given for those decisions and I observe that (1) they go further than respondents' argument since respondents do not deny that Section 16(6) controls the vesting provisions of the act, of which Section 34 is one, and (2) the case of *ex-parte Fox* (1886) 17 Q.B.D. 4 referred to in the former supports a construction of the English Act similar to that claimed by appellant for the Provincial.

3. In these circumstances appellant's contention must be accepted and the appeal must be allowed, the lower court's order being set aside and the petition being remanded to it for re-admission and disposal with reference to the

other questions raised. Costs to date here and in the lower court will be costs in the case and will be provided for in the order to be passed.

Sadasiva Aiyar, J.

4. The receiver appointed in an insolvent petition No. 1 of 1913 by the District Court of Salem is the appellant before us. The material dates are;-

(1) On the 15th January 1913 a heavily involved debtor Samiudha Pillai assigned a pro-note of which he was the holder in favour of one Meikka

Pillai; (2) a creditor of Saminadha Pillai presented a petition on 7th March 1913 (within two months of the assignment) to adjudge Saminadha Pillai

an insolvent; (3) The District Court passed on this petition an order on 2nd December 1915 adjudicating Saminadha Pillai an insolvent. It will be

seen that this order was passed nearly three years after the assignment to Meikka Pillai by Saminadha Pillai and about If years after the petition of

the creditor (on which Saminadha Pillai was adjudged insolvent) was filed, though the filing itself of that petition was presented within two months

of the assignment; (4) On 6th November 1916, the receiver filed a petition u/s 36 of the Provincial Insolvency Act III of 1907 to annul the transfer

made by the insolvent on the 15th January 1913 on the ground that the transferor was "adjudged insolvent" on 7th March 1913, when the

creditor's petition to adjudge the transferor insolvent was filed. That date, 7th March 1913, was (as stated already) within two months of the date

of transfer, 15th January 1913, and was of course also within the two years mentioned in Section 36, though the order of adjudication itself was

passed on 2nd February 1915 more than two years from the date of the transfer (15th January 1913). The Receiver relied upon Clause 6 of

Section 16 of the Provincial Insolvency Act which states 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.

5. The learned District Judge following the view of the Judicial Commissioner of Oudh enunciated in (Jokhan Singh v. Deputy Commissioner,

Fyzabad (1911) 28 I.C. 924 held that the expression "" if the transferor is adjudged insolvent within two years after the date of transfer "" found in

Section 36 means "" if the order of adjudication of insolvency is passed within two years after the date of the trans-, fer "" and that, as the order was

passed more than two years after the date of the transfer in this case, Section 36

did not apply. He therefore dismissed the Receiver's application.

6. The contentions raised on behalf of the Receiver-appellant in this appeal are ably set out in grounds 3 to 8 of the Memorandum of Appeal as follows:

3. u/s 16, Clause 6 of the Act, the order of adjudication relates back to and takes effect from the date of presentation of the petition for

adjudication and the alienation being within two years from the latter date can be impugned and annulled u/s 36 of the Act.

4. The Receiver who represents the general body of creditors cannot apply u/s 36 before the order of adjudication on which alone the property of

the insolvent vests in him (vide Section 16, Clause 2) and therefore he cannot be prejudiced by the Court's delay and the length of the pendency of

the lilt which has culminated in the order of adjudication.

5. The learned Judge failed to note that Section 16, Clause 6, is enacted to fix the earliest possible date for the debtor's estate.

6. u/s 36 the alienation can only; be voidable against the receiver from the date to which u/s 16, Clause 6, his title relates back and not earlier. The

two sections ought to have been read together and applied in deciding the point arising in the case.

7. The view of the lower court as to the scope of the Section 36 is narrow and incorrect, as it would take away a large class of fraudulent and

secret alienations out of the Act while the very object of the Act is "to strike at them to protect the creditors.

8. The scheme of the Provincial Insolvency Act as well as the English Act as expressed by the framers as well as the reason of the thing and the

weight of authority is in favour of the view pressed for the appellant and the lower court ought to have accepted the same.

7. Having heard full arguments on both sides, I am satisfied that both on principle and convenience, the appellant's above contentions ought to be

allowed. Section 16 Clause 6 was clearly intended to enable the Receiver to get hold of all the properties of the insolvent for the benefit of all his

creditors as a. class so as to distribute whatever is realised from the properties; as equitably as possible among the said creditors. The English

Bankruptcy Law goes further as by Section 38 all the property belonging to the bankrupt at the commencement of the bankruptcy itself, that is, on

the date or the act of bankruptcy on which the creditors' petition was grounded (which act, however, u/s 4 of the Bankruptcy Act of 1914 must

be committed within three months before the date of the creditor's petition) became vested in the Receiver. The Receiver's title may, thus, under

the English Act, relate back to a period up to three months before the presentation of the petition, whereas, under the Indian Act, it could relate

back only to the date of the presentation of the petition.

8. Section 42 Clause 1 of the Bankruptcy Act of 1914 corresponding to Section 47 of the Bankruptcy Act of 1883 says that "any settlement of

property not being a settlement made before and in consideration of marriage, or made in favour of the purchaser or incumbrance in good faith and

for valuable consideration...shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void

against the trustee in the Bankruptcy, unless the parties claiming under the settlement can prove that the settlor was, at the time of making the

settlement, able to pay all his debts without the aid of the property comprised in the settlement". (The word "settlement" in the English Acts

includes conveyances and transfers-see Clause 4 of Section 42). Sub-Section 2 of Section 42 made even a settlement in consideration of marriage

void if made within two years before the date of the commencement of the bankruptcy. The words "becomes bankrupt" were held to mean

commits an available Act of bankruptcy," *Fawcett v. Fearne* 6 Q.B.D. 20 Ex parte Harris, *In re James* (1875) L.R. 19 Equity 253, and *In re Ries*

: Ex parte Clough (1904) 1 K.B. 451 per Wright J, Wright J's opinion being approved in *In re Hart*: Ex parte Green (1912) 3 K.B. 6 The Indian

law for the moffussil as enacted in Section 36 of the Provincial Insolvency Act omits the restriction found in Clauses 2 and 3 of Section 42 of the

English Bankruptcy Act even as regards contracts and transfers made in consideration of marriage and so far as regards transfers not in

consideration of marriage or made in favour of a purchaser in good faith and for valuable consideration reduces the ten years found in Section 42

Clause 1 of the English Bankruptcy Act to two years. Again while the English Act counts the ten years from before the settlor "becomes

bankrupt," that is, commits an available act of bankruptcy, the Indian Act makes the two years to commence from before the transferor is

adjudged insolvent.

9. By Section 51 of the Presidency Towns Insolvency Act of 1909, it is enacted that the insolvency of a debtor shall be deemed to have relation

back to and to commence at the time of the commission of the act of insolvency on which the order of adjudication is made against him or the time

of the first of the acts of insolvency (if there are more than one) committed by the insolvent within three months next preceding the dates of the

presentation of the insolvency petition. Thus Section 51 of 1909 Act follows the English law while Section 16 Clause 6 of the Provincial Insolvency

Act dates the effect of the order of the adjudication from the date of the petition. Section 52 Clause 2 of the Presidency Act makes all the property

of the insolvent vested in him at the commencement of the insolvency available to his creditors in insolvency. Section 55 of the same Act is worded

in a similar manner to Section 36 of the Provincial Insolvency Act. Having considered these provisions together, it is clear to my mind that the

Indian Legislature in its Act of 1907 enacted for the moffussil did not intend to depart from the principles of and the reasons for the provisions

made in the English Bankruptcy Act of 1883 (superceded by the English Act of 1914) except in matters of detail and except that the date of

presentation of the petition was substituted from which the Receiver was to calculate the period of two years mentioned in the Indian Act for the

date of the available Act of bankruptcy from which the ten years' period has to be calculated by the trustee in Bankruptcy under the English Act;

(while the English Act of 1883, Section 47, allows a donee to prove that the donor was able to pay all his debts without the aid of the gifted

property, the Indian Act does not allow such proof to support the gift; thus the indulgence given to the donee in the Indian Act by reducing the ten

years to two years is qualified by the refusal to allow him to prove that the donor was able to pay up his creditors and therefore did not intend

fraud against creditors in making the gift).

10. I find it difficult to believe that the right of the Receiver u/s 36 to avoid transfers was intended by the Legislature to be dependent upon the

pressure of work in the Insolvency Court or upon the cleverness of the insolvent in protracting the proceedings or upon the difficulty and delay in

serving notices on all the creditors before the passing of the order of

adjudication. Though the provision as to relation back in Clause 6 of Section 16 of the Provincial Insolvency Act is not enacted as a separate section while the analogous provision as to relating back is a separate Section (51) in the Presidency Towns Insolvency Act and the section as to relating back as to the trustee's title in the English Bankruptcy Act of 1883 is also a separate Section (43) of that Act, I think the intention of the Indian Legislature was that Section 36 and Section 16(6) should be read together and that the words ""the transferor is adjudged insolvent"" in Section 36 means ""the adjudication of insolvency against the transferor takes effect"" and not the order adjudicating that the transferor is insolvent is passed.

11. Reliance was placed by the respondents on the difference of language between Section 36 and Section 37 of the Provincial Insolvency Act in respect of the event from which the period before the transfer which the receiver wishes to annul has to be calculated. In Section 36, the expression is "" if the transferor is adjudged insolvent within two years after the date of the transfer,"" and in Section 37, the expression is ""if such person is adjudged insolvent on a petition presented within three months after the date thereof,"" (that is of the transfer etc). It must, however, be remembered that Section 37 relates to the fraudulent preference of a creditor and its language is adopted largely from Section 48 of the English Bankruptcy Act of 1883 wherein the relevant words are "" is adjudged bankrupt on a bankruptcy petition presented within three months after the date etc,"" The provisions of Section 36 however vary very largely as I have shown above from the analogous Section 47 of the Bankruptcy Act as regards the period, as regards the event from which the period has to be calculated to bar the Receiver and other minor matters and hence the Indian Legislature in framing its own language for Section 36 seems to have aimed at brevity and, as Section 16(6) precedes Section 36, to have considered the words "" adjudged insolvent "" to be sufficient as indicating that the date was the date from which the adjudication takes effect by the force of Section (16) 6. It is clear to my mind that a preferred creditor was intended to be more leniently dealt with than a voluntary, colourable, or fraudulent donee and hence while the former could escape Section 37 if his preference took place beyond the short period of three months before the date of the petition, the Receiver was given two years to attack a mere

gratuitous donees transfer. This object of the Legislature will be defeated in many cases if Section 36 is narrowly construed as contended for by the respondent. Suppose a creditor is preferred within three months before the presentation of the petition and there is also a voluntary gratuitous transfer within the same three months before the date of the petition; if the respondents contention is upheld the preferred creditor can be successfully attacked by the receiver u/s 37 even though the order of adjudication is passed more than two years after the transfer to the creditor while the fraudulent donee of the same date cannot be so attacked u/s 36.

12. (Though Section 42 of the English Bankruptcy Act of 1914 uses the words "void against the trustee in Bankruptcy" and though in that Section there is not found the expression "may be annulled by Court" found in Section 36 of the Provincial Insolvency Act, it has been held "even under the English statute that "void" means voidable. See Williams Bankruptcy Practice, 11th Edition, pages 289 and 290.)

13. Mr. T.M. Krishnaswami Aiyar for the respondents further relied upon certain decisions passed u/s 34 of the Provincial Insolvency Act. That section however uses the words "before the date of the order of adjudication" and it relates to the cases of creditors who had realised assets in execution before the date of the order of adjudication. It may be argued plausibly that the Legislature intended to favour creditors who realised assets through Court as against the receiver in insolvency and that it intended to make an exception in favour of such creditors by Section 34 notwithstanding Section 16(6). That seems to have been the reason of the decision in *Madhu Sardar v. Khitish Chandra Banerjee* ILR (1911) Cal.

289 in which case however, the respondent was not represented and in *Hem Baj Champa Lal v. Ramakrishnan Ram* (1916) 2 Pat L.J. 101.

Speaking for myself, I am doubtful as to the soundness of these two decisions and though they may be distinguished as decisions passed in respect of execution creditors who had realised assets through court and as based on the special language of Section 34 mentioning "the date of the order of adjudication," I am not inclined to support my view as to Section 36 on any such distinctions.

14. Lastly it, was argued that the Receiver is not without any remedy and that he

could bring a suit u/s 53 of the Transfer of Property Act. But as has been pointed out in Muhammad Habib Ullah v. Mushtaq Husain ILR (1916) All. 95 the person who is obliged to take up the task of bringing a suit u/s 53 of the Transfer of Property Act is in a much worse position than a receiver entitled to attack a transfer u/s 36 of the Provincial Insolvency Act in several respects such as the burden of proof and presumption of invalidity; and the Legislature clearly intended to favour the receiver in insolvency more than an ordinary creditor relying on Section 53 of the Transfer of Property Act.

15. In the result, I would allow the appeal and send the case back to the District Court for disposal of the other questions arising in the petition.

Costs hitherto incurred will be provided for in the fresh order to be passed.