
(1937) 11 MAD CK 0007
In the Madras High Court

Venkadari Somappa

APPELLANT

Vs

The Official Receiver of Bellary

RESPONDENT

Date of Decision : 25-11-1937

Acts Referred:

Provincial Insolvency Act, 1920 — Section 53, 54

Citation : AIR 1938 Mad 801 : (1938) 48 LW 522 : (1938) 2 MLJ 362

Judgement

1. The appeal is against the order of the learned District Judge of Bellary, passed in insolvency declaring void a mortgage executed by the insolvent

in favour of the appellant. The Official Receiver attacked this mortgage both under Sections 53 and 54 of the Provincial Insolvency Act. The

learned District Judge however declared it void on another ground, namely, that it was completed after the insolvency petition had been presented

and after the appellant had come to know of that fact. On the face of it the mortgage-deed was executed on the 5th March, 1933. It was

presented for registration on the 27th June in the office of the Sub-Registrar. The mortgagors denied registration and the Sub-Registrar held an

enquiry and finally refused to admit the document to registration. On appeal to the District Registrar the latter directed the document to be

registered and this was finally done on the 11th December, 1933, under the provisions of Section 75 of the Indian Registration Act (XVI of 1908).

Meanwhile on the 28th August, 1933, the mortgagors had presented their insolvency petition and they were adjudicated on the 11th January, 1934.

Admittedly the appellant knew of the presentation of the Insolvency petition when he was conducting proceedings under Sections 73 to 75 of the

Registration Act to get the document registered. The learned District Judge held that this mortgage was effected between the date of the

presentation of the petition and the date of adjudication, that it was in favour of a man who at the time knew of the filing of the petition and that it

was therefore liable to be set aside. It is hardly necessary for us to say that on the facts assumed by the learned District Judge he was clearly right.

Transfers effected after the petition has been filed are if the transferor is ultimately adjudicated insolvent void as against the Official Receiver. That

is the effect of Section 28, sub-Ss. 2 and 7 of the Provincial Insolvency Act. And it would obviously be absurd if an insolvent could effectively

transfer his property after he had filed his petition and thus deprive the Court of its power to administer the property for the benefit of the whole

body of creditors. Section 55 of the Act protects a transferee for valuable consideration who takes the transfer without knowledge of the

pendency of the insolvency petition - which was not the case here. But the learned District Judge as the basis of his finding assumed that the date of

registration, was the 11th December, 1933, the date when the document was registered u/s 75(2) of the Indian Registration Act. We think

however that he should have applied the provisions of Section 75(3) to the case. That sub-section is:

Such registration [that is, registration effected by the order of the District Registrar u/s 75 (2)] shall take effect as if the document had been

registered when it was first duly presented for registration.

2. The mortgage in this case must therefore be deemed to have been registered on the 27th of June. And on the 27th June, no insolvency petition

had been presented. The insolvency petition was as we have said presented on the 28th August. On this footing the case is merely an example of

the case where the Official Receiver prays for the annulment of a transfer effected before the filing of the insolvency petition.

3. Now since the transfer cannot be regarded as void for the reasons stated by the learned District Judge, it remains to be considered whether it

can be avoided u/s 53 or Section 54 of the Provincial Insolvency Act. It so happens that the learned District Judge has, viewing the transaction as

a contract to mortgage, taken up for consideration the question whether it was entered into with the intention of preferring the mortgagee over the

other creditors of the insolvent. He has come to the conclusion that it was so intended. There is therefore sufficient material before us to enable us

to come to a conclusion on the point, namely, whether this transfer should be deemed fraudulent and void as against the Receiver. The two points

we have to consider are:

1. Was the mortgage effected with the intention of giving the mortgagee a preference over the other creditors, and

2. Was it effected within the three months next preceding the presentation of the insolvency petition.

4. Before examining these points however it should first be explained why the learned District Judge having found that there was no mortgage prior

to the insolvency petition thought it necessary to adjudicate the case u/s 54. He did so because he thought that the document executed on 5th

March, 1933, even if it had never been registered could have been put forward by the appellant as against the Official Receiver as the basis of a

motion to compel the Official Receiver to complete a contract to mortgage. The learned District Judge says in para. 5 of his judgment:

If the mortgage was set aside for the reasons given above (that is, because it was effected during the pendency of the insolvency petition) it would

still be open to the counter-petitioner to apply to the Court to instruct the Official Receiver to complete the contract to mortgage. Evidence has

therefore been let in order to avoid further proceedings, etc.

5. Now the learned District Judge in the first place appears to have overlooked the fact that regarded as a contract to mortgage the document

executed on the 5th March, 1933, was immune from attack u/s 54. The Insolvency Petition was as we have said presented on 28th August. The

only transactions that could have been avoided u/s 54 were transactions effected on or after the 28th of May, that is, within the three months next

preceding the filing of the petition. But apart from that we wish to observe that in our opinion that it was not open to the appellant to set up the

document of the 5th March as a contract to mortgage. We note in passing that the appellant in his formal answer to the Official Receiver's petition

never raised this question nor has he done so in his grounds of appeal to this Court. We would also note that the existence of such a contract

would be no bar to the Official Receiver selling the property though it might furnish a cause of action in a suit for specific performance. The

existence of such a contract does not constitute a danger which the Official

Receiver is bound to forestall by an application u/s 54.

6. Was the document executed on the 5th March a contract to mortgage which the mortgagee could enforce? The learned District Judge has as we

have said held that it was, and we think that he was wrong. It is well-settled law in this Presidency that an unregistered document of transfer is not

of itself sufficient to support a suit for specific performance of an agreement to transfer. If an instrument is executed in my favour, which is, in terms,

and is intended to be, a transfer of immovable property then provided it is a document which is required to be registered I must in order to give it

validity get it registered by employing the procedure laid down in the Registration Act. It is not open to me to ignore the provisions of the

Registration Act and, treating, the instrument as a contract to transfer - which it is not - compel the transferor to execute a formal transfer - which

he has already done. That is the effect of Mantri Venkataswami Vs. Padda Krishnayya, , which was recently followed and affirmed in

Satyanarayana v. Chinna Venkatarow (1925) 50 M.L.J. 674 : ILR 49 Mad. 302. In the latter case Coutts-Trotter, C.J., said:

I should have thought it very vicious method of construction to say that a document which purports to be one thing is to be allowed to be treated as

a valid document of a different order altogether.

7. Mr. Somayya for the appellant contends that the new proviso to Section 49 of the Indian Registration Act has changed all that.

8. Section 49(c) is

No document required to be registered shall be received as evidence of any transaction affecting any immovable property comprised therein unless

it has been registered.

9. And the new proviso is:

Provided that an unregistered document affecting immovable property and required to be registered may be received as evidence of a contract in a

suit for specific performance or as evidence of part performance of a contract for the purpose of Section 53-A of the Transfer of Property Act.

10. But that is not the same thing as saying that the unregistered instrument is itself the contract. In the present case it is not established that any

separate agreement to mortgage was entered into prior to the execution of the mortgage deed, to prove which, the mortgage deed might have been

tendered in evidence.

11. We are now ready to examine the substantive question which we think arises for decision, namely, whether this mortgage is one which should

be annulled u/s 54 of the Provincial Insolvency Act. Two points as we have said arise, (1) was it, as the learned District Judge has held, a

preference of the appellant over the other creditors and executed with that intention and (2) was it effected within three months next preceding the

presentation of the insolvency petition. The second point presents some difficulty. The date of execution was the 5th March, 1933 and the date of

registration was the 27th June. If the former date is taken as the date of the transfer then the transfer cannot be impugned u/s 54. And Mr.

Somayya contends that by the operation of Section 47 of the Indian Registration Act it is the date of execution which must be taken as the date of

the transfer. That section is,

A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or

made and not from the time of its registration.

12. Applying this principle to alienations of property made by dishonest debtors in anticipation of insolvency we get the somewhat anomalous

position that the debtor can register such transfers of his property to-day and file his petition to be adjudicated insolvent to-morrow and the

alienations, however, fraudulent they may be within the meaning of Section 54, cannot be attacked under that section if they were executed more

than three months ago. For the respondent it is argued that prior to registration there was no transfer and nothing for the Court to annul. To which

however the learned Counsel for the appellant replies that a person who has obtained an executed document from the debtor is justified in

believing that it cannot be set aside when three months have elapsed and no insolvency petition has been filed; and in that belief, can proceed to

have it validated by registration.

13. The short question is, for the purpose of Section 54 of the Provincial Insolvency Act is the transfer to be regarded as having been made on the

date of execution of the document or on the date of its registration. After mature consideration we have come to the conclusion that the date of the

transfer is the date of registration and that for the purpose of this section the

transfer cannot be ante-dated by the operation of Section 47 of the Indian Registration Act. By the definition in Section 5 of the Transfer of Property Act a "transfer of property" is "an act by which a living person conveys property". And by Section 59 when the transfer is a mortgage securing Rs. 100 and upwards it can be effected only by a registered instrument signed by the mortgagee and attested by at least two witnesses. Using the words of Section 54 of the Provincial Insolvency Act, when we say that a transfer by way of mortgage is "deemed fraudulent and void" we must mean that it is the act of conveyance constituted by the registration of a duly executed instrument, which is void. But if the registration is void there is no question of Section 47 of the Indian Registration Act operating to validate the document as from the date of execution. The matter we think is clear if it is remembered that it is the act of the transferor which is liable to be deemed fraudulent and void u/s 54 of the Provincial Insolvency Act, and that that Act includes the registration of the instrument either by the transferor presenting it for registration himself or delivering to a person who is competent to present it u/s 32 of the Registration Act. If he does so and the instrument is registered, he is doing something which is void if an insolvency petition is presented within three months, provided that is to say the transfer is intended to prefer the transferee over other creditors. And if the registration goes, there is no transfer. It follows we think that such instruments of transfer can be impeached u/s 54 of the Provincial Insolvency Act if the registration is effected within the three months next preceding the presentation of the insolvency petition.

14. As against this position, Mr. Somayya for the appellant advances the argument that in the facts of this particular case the act of registration is not the act of the transferor. Here it will be remembered the transferors denied execution and the document was finally registered u/s 75 of the Indian Registration Act. We do not think however that this makes any difference. Let us look again at the definition of transfer in Section 5 of the Transfer of Property Act. Transfer means "an act by which a living person conveys property." Can it be said that the transferor does not convey the property when the registration which is an essential part of the conveyance is effected against his will? We think not. But if the transferor

conveys the property he must be held to have done everything necessary to the conveyance. The registration therefore is in effect the act of the transferor. Practically speaking when he has duly executed the document and with the intention that it should be registered has delivered it to the transferee - who is entitled to present it for registration - he has irrevocably consented to the registration, and when on account of his subsequent denial of execution the document is ultimately registered u/s 75 of the Registration Act, that registration must be held to have been effected on his behalf and with his consent.

15. We must add that the view we have taken of the application of Section 54 to transfers of this kind, namely, where the date of execution is

more, and the date of registration is less, than three months before the presentation of the insolvency petition is not without authority. One of us

sitting as a single Judge came to the same conclusion as we have come to know in the case of Muthiah Chettiar v. Official Receiver of Tinnevely

District (1932) 64 M.L.J. 382. The finding on this point is as follows:

In a case like the present up to the date of registration there can be no valid transfer...under Section 59 of the Transfer of Property Act. If the time

was to run from the date of execution of the document the object of Section 54 (of the Provincial Insolvency Act) could easily be frustrated. A

dishonest insolvent has only to date such fraudulent transfers with a date more than three months prior to the filing of the petition and then they

cannot be avoided u/s 54.

16. Then a similar point was decided by a Bench of this Court in Iswarayya v. Subbanna (1934) 67 M.L.J. 380. There the question was whether

an insolvency petition presented by a creditor could be founded on a transfer which had been executed more than, but registered less than, three

months before the presentation of the petition. That judgment also was delivered by one of us, the same Judge who decided the case previously

cited. The finding is:

Ex. C in the present case cannot be considered an act of insolvency unless a valid transfer of property was made by that document and such a

valid transfer could be said to have been made only when the document was registered. In our opinion therefore the act of insolvency can be

considered to have taken place on 13th February, 1930 (the date of registration

of the document).

17. Mr. Somayya contends that these decisions have been overruled in the Full Bench case Kaku Chenchuramana Reddi Vs. Palapu

Arunachalam, . But that case dealt with quite a different point. The question there was whether an insolvency petition presented by a creditor on

the opening day after the recess of the Court could be founded on a transfer which had become more than three months old during the recess.

There was no question there of a conflict between the date of execution and the date of registration as constituting the date of the transfer for the

purpose of Section 9 (1)(c) of the Provincial Insolvency Act. On the contrary the learned Chief Justice in stating the facts of the case said:

This act of insolvency admittedly occurred more than three months before the date of the presentation of the petition. (Page 795.)

18. Lastly we have to consider whether the learned District Judge's finding on the merits of the case can be supported. It is true as we have

explained that he treated the transaction not as a valid mortgage but as a contract to mortgage which could be enforced against the Receiver. But

his findings of fact apply equally to the transaction considered as a completed mortgage.

19. The learned District Judge has very fairly summed up the evidence on the point in paragraphs 6 and 7 of his judgment. In January, 1933, a

creditor of the Insolvents had filed suits and attached their property. The Insolvents saw that their property was going to be brought to sale and that

there were many other creditors whom they could not hope to pay. It was in these circumstances that the mortgage was executed to the appellant

in March for Rs. 10,000 of which Rs. 9,201 represented money already due or alleged to be due to the appellant. The learned Counsel for the

appellant points out that the property mortgaged was by no means all the property of the insolvent and that there was other property which has

realised Rs. 12,000. This is true. But the debts admitted to proof amounted to Rs. 51,240. Besides the Rs. 9,200 odd alleged to be due to the

appellant, claims to the extent of Rs. 42,000 had to be satisfied. It has not been suggested that the value of the unmortgaged property, namely, Rs.

12,000 plus the value of the equity of redemption of the mortgaged property consisting of lands and a house comes to anything like Rs. 42,000.

On the contrary it is in evidence that at the Official Receiver's sale the price fetched per acre of land was between Rs. 35 and Rs. 40. At the

higher figure the value of the lands alone which were comprised in the mortgage would be only Rs. 4,860, and it is not likely that the house which

was also included in the mortgage would be worth more than Rs. 6,000. Little if anything therefore remained out of the equity of redemption of the

mortgaged property to meet the claims of the other creditors. The mortgage did in fact operate to the substantial detriment of the latter. Mr.

Somayya however contends that there is nothing to show that it was intended by the insolvents to have this effect but that on the contrary it was

executed to stave off a suit which the appellant threatened to file against the insolvents and a notice of suit dated 9th February, 1933 (Ex. VII) is

relied on to show that the appellant was pressing the insolvents to pay their debts. On the other hand it is in evidence that the appellant is a friend

of the insolvents. Why should the insolvents execute a mortgage to this appellant merely on the threat of a suit rather than to the creditor (P.W. 2)

who had already filed suits against them and who had actually secured an attachment of some of their property? It appears to us that the motive

behind the mortgage was to give the appellant a preference over the other creditors. So far therefore we are in agreement with the learned District

Judge. There are sufficient materials on the record for us to find that for the reasons stated by the learned District Judge this mortgage is u/s 54 of

the Provincial Insolvency Act void and must be annulled.

20. This finding we think is sufficient to dispose of this appeal which is accordingly dismissed with costs. We observe however that the Receiver

had moved the Court to annul the mortgage not only u/s 54 of the Provincial Insolvency Act but also u/s 53, namely, as being a voluntary transfer

voidable under that section. Paragraph 4 of his petition is:

The insolvents with a view to defraud the creditors and shield the property...have executed a mortgage for Rs. 10,000 in favour of the counter-

petitioner.... The mortgage is nominal and not supported by consideration.

21. And again in paragraph 5:

Even if the recitals about the consideration are true the mortgage is void as it was intended to show fraudulent preference to one creditor.

22. The Receiver therefore asked the Court to annul the mortgage on the

alternative ground that it was not a transfer made in favour of an incumbrancer in good faith and for valuable consideration. The Court did not take up this question for consideration, namely, the question of the reality of the consideration. It left it to be decided by the Receiver when the counter-petitioner came in with proof of his debts u/s 33 of the Act.

See the direction at the end of the learned Judge's judgment:

The counter-petitioner may prove before the Receiver for whatever may be due to him.

23. We do not think it necessary considering that it is nearly two years since this order was passed to send the case back to the District Court for the point to be tried and decided there, nor is there in the appellant's Memorandum of Appeal any indication of a desire that we should do so.

Appellant merely states therein that the case should have been considered as falling u/s 53 only and since there was no evidence to prove a case under that section the transaction should be upheld. But we think that if the learned District Judge had not allowed the Receiver's petition on other grounds he would have required the Receiver to proceed with his proof on this part of the case, namely, that the recitals of consideration in the document were false. It appears to have been agreed at the trial that this question should be left to be decided at a later stage when the counter-petitioner tendered his proof of the alleged debts which form the bulk of the consideration. We do not think that this procedure has prejudiced the appellant and we do not therefore remit the case.

24. The Letters Patent appeal is against an order of our learned brother Menon, J., refusing to stay the sale by the Receiver of the mortgaged property. In the light of our substantive decision that appeal also must fail. It is dismissed.