

(1913) 10 MAD CK 0002
In the Madras High Court

Zainab Bee

APPELLANT

Vs

The Official Assignee of Madras

RESPONDENT

Date of Decision : 17-10-1913

Acts Referred:

Citation : 24 Ind. Cas. 513

Hon'ble Judges : Arnold White, C.J; Oldfield, J

Bench : Division Bench

Judgement

Arnold White, C.J.—This is an appeal from a judgment of Mr. Justice Bakewell, sitting in insolvency on two applications which by consent

were heard together. The first was an application dated the 4th May 1912 by the Official Assignee in the insolvency of a firm carrying on business

as P.M. Enayattulla Sait & Co. He asked by his notice of motion that there should be at declaration that a certain sale-deed dated the 1st October

1910 executed by the insolvent in favour of his wife, who is the appellant before us, is void as either a fraudulent preference u/s 56 or a voluntary

transfer u/s 55 of the Insolvency Act. The other application was an application by the appellant in which she asked that the insolvent should be

declared trustee on her behalf with respect to a sum of Rs. 21,000. It is conceded by Mr. Chamier that there has been some misapprehension as

regards the amount, and that it ought really to be Rs. 14,000. The notice of motion by the appellant also asks that the sale-deed in question should

be declared valid and binding on the Official Assignee. In the course of the argument of this appeal the claim to the relief asked for in the

appellant's notice of motion has not been pressed, and the real contest has been with reference to the question whether the order of the learned

Judge made on the motion of the Official Assignee of the 4th of May was right.

2. The sale-deed in question was executed on the 18th October 1910. The order of adjudication was made, on a creditor's petition, on the 21st

of November 1910. It is, as I have said, by the insolvent in favour of his wife. It recites that certain moneys of the wife came into the hands of the

insolvent, that these moneys were placed on account with the insolvent's firm (now insolvent) and that out of these moneys the insolvent had

received on his own account for cultivation business and other purposes mentioned in the recital a sum of Rs. 7,000 which sum the deed states he

was liable to pay his wife. This sum of Rs. 7,000 is the alleged consideration for the sale-deed. Having regard to the fact that the transaction I took

place shortly before the insolvency and also to the relations between the parties, the onus is of course upon the appellant to show that the

transaction is one which should be allowed to stand. With : regard to this portion of onus Lord Justice. Williams in *In re Lake, Ex parte Dyer*

(1901) 1 Q.B. 710 : 70 L.J. K.B. 390 : 84 L.T. 430 : 49 W.R. 291 : 8 Manson, 145 : 17 T.L.R. 296., makes these observations : If a man on the

eve of bankruptcy makes a payment to a particular creditor, the presumption immediately arises that he makes that payment with the dominant

view of giving, a preference to that creditor over his other, creditors. There is no need for any evidence that that view was expressed in so many

words by the bankrupt : it is a presumption which would arise from the transaction". Now, in this case it is not disputed that a Sum of Rs. 25,000,

which was the wife's separate property was deposited by the insolvent with his firm. It is admitted that of this sum the wife has had for her own

purposes a sum of, Rs. 4,000, that leaves a balance of Rs. 21,000 and the wife's case is that her husband appropriated, the sum of Rs. 7,000.

This Rs. 7,000 is said to be the consideration for the sale-deed. As regards this Rs. 7,000 Mr. Chamier said that the transaction for which, the Rs.

7,000 purported to be the consideration was re-entered into to make good a breach of trust on the part of the insolvent, and he relied on the

decision of the House of Lords in *Sharp v. Jackson* (1899) App. Cas. 419 : 15 T.L.R. 418., and that of the Court of Appeal *In re Lake, Ex parte*

Dyer (1901) 1 Q.B. 710 : 70 L.J.K.B. 390 : 84 L.T. 430 : 49 W.R. 291 : 8 Manson, 145 : 17 T.L.R. 296. Then, as I understood his argument,

he contended that even if , the relation between the insolvent, the husband, and the wife was not that of trustee and cestui que trust, there was at

any rate a contractual obligation on the part of the insolvent to pay the wife money which belonged to her, which the husband had made use of, and

on that ground, he said, the transaction should be upheld. In this connection he referred us to the case of *In re Vautin*, *Ex parte Saffery* (1900) 2

Q.B. 325 : 69 L.J.Q.B. 703 : 82 L.T. 722 : 48 W.R. 652 : 7 *Mauson*, 291. There was also some discussion with reference to *In re Bryant*, *Ex*

parte Bryant (1895) 1 Q.B. 420 : 64 L.J.Q.B. 417 : 14 R.K 192 : 72 L.T. 133 : 2 *Manson* 37 : 59 J.P. 196. Mr. Chamier contended that the

decision in that case was not applicable here for the reason, amongst others, that that was a case which had reference to a question of undue

preference for the purposes of the discharge section of the Bankruptcy Act and not to any question of fraudulent preference. No doubt these are

interesting questions of law, but they only arise, and it is only necessary for us to consider them, if in fact the insolvent at the time he executed the

sale-deed in question was liable to his wife, either as trustee, or by reason of some contractual obligation, to the extent of Rs. 7,000. This question

of fact seems to be the question which we ought to deal with first.

3. The learned Judge does not deal with it until he comes to the end of his judgment. He deals with the question of pressure (this has not been

relied on in this Court) and he attaches considerable importance to the change of front on the part of the appellant or her advisers. Speaking for

myself, I do not know there is very much in that--I suppose a party is entitled to set up as many defences as may be available when a transaction

of this sort is impugned. Of course the matter is of importance (and this is the point of view from which the learned Judge considered it) because, if

the evidence with regard to the alleged pressure is obviously false, and the learned Judge comes to the conclusion it is, that goes to throw doubts

upon the genuineness of the transaction. In dealing with this question of fact the learned Judge says that no question was asked and no attempt was

made to distinguish the Rs. 4,000 which admittedly the wife has spent and the Rs. 7,000 which according to her case was drawn and made use of

by the husband without her authority. The learned Judge does not find in so many words that no money were due by the insolvent to the appellant

at the date of the sale, but I think it is clear that that was the conclusion which he came to. So we have first to consider whether there is evidence to

show that at the time of the sale-deed the husband was pecuniarily liable to the wife with regard to that, as in the case of an alleged fraudulent

preference there can be no doubt the onus lies heavily on the appellant.

4. Now, what is the evidence? The first piece of evidence available is an affidavit put in by the appellant on the 21st August 1911 in support of her

proof as an ordinary creditor for Rs. 14,000 only. She says that this sum is due to her after giving credit for properties conveyed to her in part

satisfaction of the debt. Her claim is against the firm. There is no reference to the fact that a sum of Rs. 7,000 was due to her when the sale-deed

was executed to her by the insolvent, and I do not know that this affidavit carries us much further. The next piece of evidence is to be found in an

affidavit made by the appellant on the 3rd September 1912 in answer, I think I am right in saying, to an affidavit made in support of the Official

Assignee's notice of motion on the 3rd May. The appellant in her affidavit, after allegations which, go to show pressure upon the husband in

connection with this transaction, says in paragraph 11, thereupon my husband said that he had used Rs. 7,000 of my money for his own purposes,

that he would transfer his properties to me for the said amount and accordingly he sold all his properties to me in October 1910 for a sum of Rs.

7,000 which is a little more than the market value and. I had to accept the said valuation fixed by my husband." That is an allegation as to

something which, the deponent said, the insolvent had said to her.

5. As regards the oral evidence I think. I am right in saying that the only evidence with regard to the matter is a statement by the insolvent, who was

examined with reference to the two applications before the Court. All that the insolvent said with reference to this matter is : I have taken Rs. 7,000

and spent it." There is some other evidence which has a more or less remote bearing on the question, but the only direct evidence with regard to

that matter is to be found in the statement to which I have referred. That statement is not cross-examined to. Then there are the accounts Exhibit II.

It is not quite clear how Exhibit II was put in evidence. It is an extract from the appellant's ledger account kept by the insolvent's firm. In that

account we find a certain debit for Rs. 780 and another for Rs 2,908. Mr. Chamier

suggested that those two items make up the Rs. 4,000 which admittedly the wife had spent, and that the rest of the items relate to expenditure by the husband on his own account and (to put the matter shortly) in fraud of his wife. As regards the nature of the items, they do not necessarily suggest that they were items of expenditure by the insolvent for his own purposes. Still less do they indicate that they were items of expenditure incurred by the insolvent without the knowledge or the acquiescence of his wife. Mr : Grant suggested, this account is not only consistent with the drawings having been made by the wife, but that it was only inconsistent with the view that the drawings were made by the husband. There is no question that the account stands in the name of the wife. To my mind there is nothing in the account itself to indicate that the items indicate drawings of money by the insolvent in fraud of his wife. Mr. Chamier has suggested that other evidence was available, and that if we looked at the day-books from which these entries in the ledger account were taken, we should find indicated the nature of items of expenditure and he asked us even at this stage to look into these day-books. I do not think we should be justified in doing that. It was apparently not thought necessary when the motions were heard to place further evidence before the Court in the matter of the accounts than is to be found in the extract from the ledger. I should think it probable that, even if we looked into the day-books, they would throw no more light on the question than is to be found in the extract from the ledger. I think that practically is all the evidence which the appellant put forward for the purpose of discharging the onus which rested upon her.

6. We have been told of certain criminal proceedings, and some suggestion was made that evidence given oh Commission by the present appellant in the criminal proceedings should be considered by us for the purpose of this appeal. I do not think we can do this. The general statement made by the insolvent that he had had Rs. 7,000 of his wife's money was not cross-examined to and Mr. Chamier asks us, because it was not cross-examined to, to accept it as true. As I understand the law and the practice, there is no hard and fast rule. The general practice is to cross-examine to a statement if it is material, which is not accepted. But in this case the onus being heavily on the appellant, and the appellant's Counsel

apparently not being prepared to go farther than putting to his witness a very general question with regard to the Rs. 7,000 and not taking upon

himself to take the witness through the accounts and attempting to show that at any rate some items mentioned in the accounts represented

improper expenditure as against the wife by the insolvent, --in these circumstances I am not prepared to say that Mr. Grant was not right in the

attitude which he adopted. I think he was entitled to say that, as the other side have not dared, to go farther than they have done, It was not

incumbent on him to cross-examine on this question, and that in the circumstances of this case, it must not be taken that he accepted the statement

in examination-in-chief." The conclusion I have come to on the facts is that the evidence does not establish that at the time this transaction was

entered into, there was in fact any pecuniary liability on the part of the husband towards his wife. That being so, the questions of law to which I

have referred do not arise for consideration.

7. There are two other matters with regard to which I would like to say a word. There is the question of Commission. An application was made on

behalf of the wife for her examination on Commission, (It is not suggested that she could have been cross-examined in open Court). The application

was made on the 9th of September and the learned Judge said in his order "the garnishee" (i. e., the appellant) "was served with notice on the 28th

June. Her husband who received it has not filed his schedule for two years. No explanation is forthcoming for the delay in making this application,

and it appears to me that it is merely dilatory in view of the fact that the garnishee matter is fixed for the first instant". The learned Judge accordingly

dismissed the application. The first instant is the date on which the notice of motion taken out by the appellant was made returnable. If the

appellant's application had been the only application in the matter there would be nothing to suggest unreasonable delay : the notice of motion of

the 6th September was made returnable on the 9th and the date fixed for hearing was the 1st. But the Official Assignee's notice of motion was

taken out as far back as the 4th of May 1912. It is true the long vacation intervened, but it appears that on July the 19th the appellant retained a

solicitor. There was a change of solicitors, and her present solicitor was not retained until August the 29th. Making due allowance for the change of

solicitors, it seems to me, having regard to the fact that the appellant must have been aware that her evidence on Commission was quite as

necessary for the purposes of the Official Assignee's application as it was for her own later application, I am not prepared to say that the learned

Judge was wrong in declining to allow a Commission to issue at the stage when the application was made.

8. The other matter with regard to which I would like to say a word is with regard to the issue of a warrant of arrest. This warrant was directed to

issue immediately after the insolvent had given evidence before the Court with reference to the two applications with which the Court was dealing.

The learned Judge's order in reference to this matter is, a warrant will issue for the arrest and detention of the insolvent, Abdul Rahiman Saheb, in

the Civil Jail unless he gives security this day in the sum of Rs. 10,000 for his appearance on 30th September 1912 and for his filing his schedule on

or before that day. Insolvent is committed to the custody of the bailiff, in Court to be lodged in Civil Jail and produced on 30th September 1912.

Bond of S. Mahomed Hussain in Rs. 10,000 in favour of Registrar of High Court may be accepted". The warrant was not executed because the

bond was given. The order does not state the sections of the Act under which the order was made. We have looked into the minute-book : that

does not help us much. It says : "Mr. Grant applies under sections 34 and 35 and asks for the arrest of the insolvent". There must be a slip

somewhere, because Section 35 has reference to "redirection of letters." Such slips are unfortunate, especially in relation to matters which concern

the liberty of the subject. We feel some difficulty as to whether the order was u/s 33 or Section 34. My learned brother has just called my

attention to the fact that Section 34 is the only section which authorises the issue of a warrant.

9. Section 33 gives power to commit for contempt of Court whenever the insolvent fails to discharge the duties which the section imposes on him

for the purpose of assisting the Official Assignee in the realisation of the property. Section 34 gives power to issue a warrant where there is reason

to believe that the insolvent is absconding or is about to abscond etc. Mr. Grant now tells us that, so far as his recollection goes--and there is

nothing on the record which helps us in the matter--he asked that a warrant should issue on the ground that the insolvent by reason of his not

having filed the schedule was embarrassing the proceedings in the insolvency within the meaning of Section 34, Sub-section 1, paragraph (a). We

may point out that u/s 24(3) of the Act, power is given to the Court, on the application of the Official Receiver or any creditor, to make an order

for the committal of the insolvent to prison if he fails without reasonable excuse to comply with the requirements of the section as to the preparation

and submission of his schedule. It has not been argued that the making of the order for committal in itself was bad and there is no appeal against it

(I do not know whether an appeal would lie). I do not desire to say anything with regard to this particular case, because we are not dealing with

the order of committal and as a matter of fact the warrant was never executed and because I fully realise that in regard to this particular case, the

learned Judge may very well have been in possession of facts which are not within our knowledge or possibly which we have overlooked. He was

familiar with the whole course of proceedings in this case and we are not. But I would like to make this general observation. It does not seem to be

convenient that an oral application to commit should be made, incidentally, in the course of proceedings which have nothing to do with the question

whether an insolvent ought, to be committed to prison, especially where an insolvent is present in Court as a witness. The policy of the law is

indicated clearly in Section 135 of the CPC : Where any matter is pending before a tribunal having jurisdiction therein ***** the parties thereto *

* * * shall be exempt from arrest under civil process other than process issued by such tribunal for contempt of Court while going to or attending

such tribunal"" etc. The only exception is : nothing shall enable a judgment-debtor to claim exemption from arrest under an order for immediate

execution or where the judgment-debtor attends to show cause why he should not be committed to prison in execution of a decree"". It is not

suggested in this case that the order was made by way of execution of a decree obtained against the insolvent. The only other instance, so far as I

know, in which a power similar to that given under the Insolvency Act is given, is u/s 476 of the Code of Criminal Procedure. Sections 33 and 34

of the Insolvency Act are taken from Sections 24 and 25 of the English Act. At any rate as regards orders made u/s 24 of the English Act, that is

order for committal for contempt, a special procedure is provided by the English Rules. Rule 85 says that the application must be supported by an

affidavit. Rule 86 requires the Registrar to fix the time and place for the Court to hear the application and provides that the notice should be

personally served not less than three days before the day fixed for hearing. We have no express rules corresponding to the English Rules in these

matters, but speaking generally it seems to me it is not desirable that orders for committal should be made except upon a formal application,

especially when the insolvent is in attendance as a witness. I recognize that the facts of this particular case may be of a very special character, but I

have thought it desirable to make these general observations.

10. Mr. Chamier has urged before us on appeal that the effect of this order for the issue of a warrant was to terrorise his witnesses. He has

suggested that if the order had not been made, at any rate one of the witnesses, Enayattulla Sait, the head of the firm, would have been prepared to

give evidence in support of the applicant's case. That of course is only a suggestion. If it were well founded one would have thought there would

be little difficulty in our being furnished with an affidavit by Enayattulla.

11. As regards the insolvent, Abdul Rahiman himself, the order was not made until his evidence was concluded, and I do not see any reason to

suppose that he would have said more than he did in support of his wife's case if an order for his committal had not been made. If we thought that

there was anything like failure of justice, then no doubt we should be prepared to allow further evidence to be taken, but we do not think so or

direct further inquiry. For the reasons set out above it seems to me that the appellant has failed to make out her case on the facts and the appeal

will be dismissed. Speaking for myself, I had some doubt as to the question of costs. However we have considered the matter carefully and the

conclusion we have come to is that there, is no sufficient reason for departing from the ordinary rule that the appeal should be dismissed with costs.

The costs as to the appeal may be taxed as on the original side scale and there will be a, certificate for two Counsel. Oldfield, J.--I agree.