## ORIGINAL CIVIL.

*Before Lort-Williams J.*

SURYA KUMAR NAIK

*v.*

BIJAY K. HAZRA.*

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*July* 6, 8, 21.

*Insolvency—Mortgage subsequent to act of insolvency—Validity of mortgage—Ordinary civil Court, if may decide question of validity—Transactions protected under s. 57, if must be* bona fide—Bona fide, *Meaning of—Presidency-towns Insolvency Act (III of 1909), ss. 51, 57.*

Questions arising under s. 57 of the Presidency-towns Insolvency Act can be decided only by the insolvency Court and not by the ordinary civil Court.

*Official Assignee of Bombay* v. *Sundarachari* (1) applied.

Where the mortgagor has been adjudicated insolvent, the mortgagee is bound to join the Official Assignee in the suit on the mortgage and the proper course for the Official Assignee in such a case is not to resist the plaintiff's claim for a mortgage decree but to reserve his right to apply to the Court in insolvency and ask it to declare the mortgage void as against him on the ground that it was not made *bona fide* but with the object of defeating the provisions of the Insolvency Act.

Sections 51 and 57 of the Presidency-towns Insolvency Act present an anomaly which the legislature will have to deal with when opportunity offers. But the argument that s. 57 applies only to transactions carried out between the date of presentation of the petition and that of the adjudication is clearly untenable.

Whether it is permissible, regarding Indian statutes, to refer to a marginal note of a section for the purpose of construction or not, the English rule that protection is given only to *bona fide* transactions must apply to s. 57 of the Presidency-towns Insolvency Act.

If the words *bona fide* are to be incorporated in s. 57, the only meaning which can be given to them is absence of knowledge of the presentation of an insolvency petition.

*Mercantile Bank of India, Ltd., Madras* v. *Official Assignee of Madras* (2) dissented from.

*Bhagwan Das and Company* v. *Chuttan Lal* (3) approved of.

ORIGINAL SUIT.

The facts of the case are fully set out in the judgment.

*N. C. Chatterjee* and *Arun K. Roy* for the plaintiff. This Court has not any jurisdiction to go

*Original Suit No. 1494 of 1935.

(1) (1927) I. L. R. 50 Mad. 776. (2) (1913) I. L. R. 39 Mad. 250.
(3) (1921) I. L. R. 43 All. 427.

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into the question of the mortgage being avoidable by the Official Assignee under the special provisions of the bankruptcy law. The Insolvency Act creates a special forum which has exclusive jurisdiction to try questions arising under the provisions of that Act, *Mariappa Pillai* v. *Raman Chettiyar* (1).

The right of a mortgagee to enforce his security is not at all affected by the Insolvency Act; *vide* s. 17 of the Presidency-towns Insolvency Act. Sections 55 and 56 of the Act does not enable the Official Assignee to challenge the validity of a mortgage in a suit on the mortgage or to get a stay of such a suit. *Official Receiver, Coimbatore* v. *Palaniswami Chetti* (2). Any question as to the invalidity of a transaction that may be raised by the Official Assignee can be determined only by the insolvency Court and not by the ordinary civil Court. *Official Assignee of Bombay* v. *Sundarachari* (3).

Under the Presidency-towns Insolvency Act all transactions are protected so long as there is no notice of the presentation of an insolvency petition. In this respect the provisions of the Indian Act are different from those of ss. 45 and 46 of the English Bankruptcy Act of 1914, which require that there should be no notice of any available act of insolvency. The words "*bona fide*" in the marginal note to s. 57 of the Indian Act makes no difference, a transaction is *bona fide* so long as there is no notice of the presentation of a petition in insolvency by or against the debtor. *Bhagwan Das and Company* v. *Chuttan Lal* (4).

*B. C. Ghose* and *P. N. Banerjee* for the Official Assignee. The English cases show that defences such as have been put forward in this suit may be put forward, in civil actions, by the trustee in bankruptcy and the civil Court has adjudicated upon them. The Official Assignee should have the right to

(1) (1918) I. L. R. 42 Mad. 322.
(2) (1925) I. L. R. 48 Mad. 750.
(3) (1927) I. L. R. 50 Mad. 776.
(4) (1921) I. L. R. 43 All. 427.

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raise these issues both as defence to a mortgage suit and by way of a substantive application to the insolvency Court. It is entirely a matter of discretion for the Court trying the mortgage suit as to whether it would go into the question of validity of the mortgage. In this case the High Court adjudicated the mortgagors insolvent and all the facts relating to the insolvency are available, so there is no difficulty in considering the question of validity of the mortgage in suit.

Under the Presidency-towns Insolvency Act, only transactions carried out between the date of presentation of the petition in insolvency and that of the adjudication order come within the purview of s. 57.

The Indian Act is wholly based on the English Bankruptcy Act, so s. 57 of the Presidency-towns Insolvency Act should be read as the corresponding section of the Bankruptcy Act. Both sections have the words "*bona fide*" in the marginal note and in England it has been held that none other than *bona fide* transactions are protected. Hence, if the mortgagee who had notice of an act of bankruptcy of the mortgagor is not protected. *Ponsford, Baker & Co.* v. *Union of London and Smith's Bank, Limited* (1). This view is supported by the fact that an order for adjudication under s. 51 of the Presidency-towns Insolvency Act relates back to the date of the commission of the act of bankruptcy. Although between the date of the act of bankruptcy and the date of the order of adjudication a debtor may deal with his property, he cannot give good title to a transferee who had notice of the act of bankruptcy.

*N. C. Chatterjee* in reply.

*Cur. adv. vult.*

LORT-WILLIAMS J. This is a mortgage suit against the first three defendants and the Official Assignee of Calcutta in respect of a mortgage dated April 20, 1934. The suit was instituted on August 6, 1935,

(1) [1906] 2 Ch. 444, 452.

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and the plaintiff had to join the Official Assignee as a defendant owing to the provisions of O. XXXIV, r. 1 of the Code of Civil Procedure, the first three defendants having been adjudicated insolvent on May 10, 1934.

The suit is undefended by the first three defendants, but the Official Assignee has filed a written statement in which he denies the mortgage, and says that at the time when the mortgage suit was instituted the defendants were insolvent and that this was well-known to the plaintiff, and that the transfer was not made in good faith or for valuable consideration, but was collusive and fraudulent; and he submits that it is void as against him.

The relevant dates are as follows:—

On April 13, 1934, the defendants told a number of their creditors that they were unable to meet their obligations until they had got in certain dues owing to them. On the 15th April, there was a larger meeting of the creditors at which the defendants stated that they were unable to pay their debts and made an offer of a composition. On the same day the defendants approached the plaintiff and asked for a loan of Rs. 4,000 saying that they were in urgent need of money for the purposes of their business and in order to meet their business dues. Between this date and the 20th April, the plaintiff inspected the property offered as security, and his attorney made the necessary enquiries and searches and found that the property was unencumbered and that a previous mortgage had been paid off. The plaintiff having agreed to lend the money the mortgage deed was executed on the 20th April and Rs. 4,000 in four currency notes of Rs. 1,000 each, were paid to these defendants by the plaintiff's attorney. The petition upon which the defendants were adjudicated insolvents was dated 27th April and they were adjudicated on the 10th May. In December, the Official Assignee wrote to the plaintiff asking for inspection of his

mortgage deed, and this was sent to him and returned with a request that the plaintiff should apply to the Court for sale of the mortgage property by the Official Assignee. The plaintiff objected to a sale by the Official Assignee and nothing further was done until August 5, 1935, when an order was made under s. 36 of the Presidency-towns Insolvency Act for the examination of the plaintiff. On the next day the present suit was filed. A subsequent application was made for stay of the proceedings under s. 36 pending the hearing of this suit, and a stay was granted.

Evidence has been given by the plaintiff to the effect that he had no knowledge of the insolvent condition of the defendants. He had known this firm approximately for 44 years, and knew them as rich men carrying on a prosperous business, with a good financial position, and with considerable properties in their native place. He acted *bona fide*, believing that the money was required by them for the purposes of their business. Three witnesses were called on behalf of the Official Assignee, and stated that the plaintiff was actually present at the meetings with the creditors on the 13th and 15th April, and took part in the proceedings and made an offer on behalf of the defendants.

The first point raised by counsel on behalf of the plaintiff was that the matters raised by the Official Assignee in his written statement were within the exclusive jurisdiction of the insolvency Court, and that they could not be agitated in this Court in the mortgage suit. He referred to s. 17 of the Presidency-towns Insolvency Act which provides that upon an order of adjudication being made the property of the insolvent shall vest in the Official Assignee, and thereafter no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall, during the pendency of the insolvency proceedings, commence any suit or legal proceeding except with the leave of the Court: provided that this section shall not affect the power of any secured creditor to

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realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed.

He also referred to the case of the *Official Assignee of Bombay* v. *Sundarachari* (1), in which it was decided that any question as to the invalidity of a transaction raised by the Official Assignee under the special provisions contained in ss. 55 and 56 of the Presidency-towns Insolvency Act can be determined only by the insolvency Court constituted under the Act, and not by the ordinary civil Court, and where a situation arose, such as has arisen in the present case, a decree ought to be given to the mortgagee, leaving it open to the Official Assignee to apply to the insolvency Court to set aside the transaction as void against him. This was a decision regarding ss. 55 and 56 of the Act: but in my opinion it applies equally to questions arising under s. 57, as in the present case, and I am satisfied that the decision is correct, and that matters such as the Official Assignee has sought to agitate in the present case can only be decided by the insolvency Court. The plaintiff was bound to join the Official Assignee as a defendant, and the proper course for the Official Assignee would have been, not to resist the plaintiff's claim for a mortgage decree, but to reserve his right to apply to the Court in insolvency and ask it to declare the mortgage void as against him, on the ground that it was not made *bona fide* but with the object of defeating the provisions of the Insolvency Act.

Learned counsel appearing for the Official Assignee referred me to a number of English cases in which the Courts considered the question, and decided that the jurisdiction of the Bankruptcy Court was not exclusive regarding these matters, and that it was, in each case, a matter for the discretion of the Court. But those cases were decided upon applications to stay proceedings either in one Court or the other.

(1) (1927) I. L. R. 50 Mad. 776.

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All that those cases decided was that the civil Court need not necessarily stay suits which had been instituted in that jurisdiction simply because questions arose which would probably be more conveniently dealt with under the bankruptcy jurisdiction, or *vice versâ*.

The conclusion to which I have arrived on the preliminary point is enough to dispose of the case, but as the whole matter has been argued before me at considerable length, and as evidence was given on behalf of the Official Assignee, it will perhaps be convenient for me to state my opinion on the points raised, and this may obviate the necessity for further proceedings against the plaintiff in the insolvency jurisdiction.

Section 51 of the Presidency-towns Insolvency Act provides that the insolvency of a debtor shall be deemed to have relation back and to have commenced at the time of the commission of the act of insolvency on which an order of adjudication was made, or, if the insolvent is proved to have committed more acts of insolvency than one, at the time of the commission of the first of the acts of insolvency proved to have been committed by the insolvent within three months next preceding the date of the presentation of the insolvency petition. The title of the Official Assignee commences at the date of the commencement of the insolvency, which, in the present case was the 13th April, when the defendants first told their creditors that they were unable to meet their obligations. But, in spite of these provisions of insolvency law, certain transactions are protected, and s. 57 *inter alia* provides that any transfer by the insolvent for valuable consideration, provided that it takes place before the date of the order of adjudication and that the person with whom such a transaction takes place has not at the time had notice of the presentation of any insolvency petition, shall not be invalidated by any provisions in the Act, and it is clear that the plaintiff comes within the terms of this proviso, because the

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mortgage was executed prior to the order of adjudication, and the plaintiff could have had no knowledge of the presentation of any insolvency petition at that time, because no insolvency petition was presented till the 27th April.

Sections 51 and 57 of the Presidency-towns Insolvency Act doubtless present an anomaly which the legislature will have to deal with when opportunity offers. The English Bankruptcy Act upon which the major part of the Indian Insolvency Acts is based, in the analogous sections, provides that the title of the trustee in bankruptcy shall begin from the first act of bankruptcy committed, and that the protection afforded by s. 45, which is analogous to s. 57 of the Presidency-towns Insolvency Act, shall be available provided that the transfer took place before the date of the receiving order, and that the transferee had not at the time notice of any available act of bankruptcy committed by the bankrupt. In the English Act, therefore, the two sections, relevant to this point, are consistent, whereas the analogous sections in the Indian Acts are inconsistent. This matter has been dealt with in Mulla's Law of Insolvency, 1st Ed., at p. 23, and the learned annotator seems to think that this inconsistency between the sections was introduced in the draft of the bill owing to misapprehension (see p. 460 of the same edition).

The argument raised on behalf of the Official Assignee, that s. 57 applies only to transactions carried out between the date of the presentation of the petition and that of the adjudication, is in my opinion clearly untenable; the legislature could not have been intended to restrict the provisions of the section in such a way.

Nevertheless, it has been argued by the learned counsel for the Official Assignee that these considerations did not dispose of the matter because the marginal note to s. 57 refers to protection of *bona fide*

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transactions, and he argued that although the section itself does not contain any such restriction it must be interpreted in the same way as the analogous English sections have been interpreted. So that the advantage of the section cannot be claimed on behalf of the plaintiff unless the transaction was carried out *bona fide*. As pointed out in Mulla's Insolvency Law, at p. 455, the analogous section of the earlier English Bankruptcy Acts contains the words "*bona fide*" or "good faith." Such words are omitted from s. 49 of the Act of 1883, and the words "*bona fide*" were put into the marginal note, just as they have been in the Indian Insolvency Acts. Nevertheless, there are English decisions to the effect that the words "*bona fide*" must be taken to be part of the section, and this in spite of the fact that, according to English law, the marginal note is not part of the section and cannot generally be looked at to explain the section.

Now, the Indian sections, clearly, are founded upon the analogous English sections, and in my opinion the same rule must apply. Whether it is permissible, regarding Indian statutes, to refer to a marginal note for the purpose of construction, was considered by me in the case of *Abdul Hakim* v. *Fazu Miya* (1) wherein I gave reasons for thinking that the decision in the Privy Council case of *Balraj Kunwar* v. *Jagatpal Singh* (2) might have to be reconsidered by Their Lordships at some future time on account of the different procedure regarding the passing of bills by the legislature of the country.

I desire again to draw the attention of the Government to this anomaly, which is a source of uncertainty and inconvenience in the interpretation of several Indian statutes, and I recommend that a suitable section should be inserted in the General Clauses Act making the position clear.

The only question which remains, therefore, is one of fact, whether the plaintiff in the present case

(1) (1934) I.L.R. 62 Cal. 266.

(2) (1904) I. L. R. 26 All. 393; L. R. 31 I. A. 132.

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acted *bona fide*. In spite of the English decisions and in spite of the fact that I have held that those decisions are applicable to the analogous sections of the Indian Insolvency Acts, I find some difficulty in understanding what the words "*bona fide*" mean in this connection, and I gather from the decision of Mr. Justice Bigham (as he then was) in the case of In re *Dunkley & Son*, Ex parte *Waller* (1) that he experienced a similar difficulty. But I am quite certain that the meaning given to these words in the case of *Mercantile Bank of India, Limited, Madras* v. *Official Assignee of Madras* (2) cannot possibly be supported, and I agree with the observations by the learned author of Mulla's Insolvency Law, p. 460, to the effect that this decision is erroneous. In that case, the Court held that knowledge of the transferee of an act of insolvency committed by the transferor was alone sufficient to prove bad faith. In any event that case is distinguishable from the present case, because in that case the creditor took possession of the debtor's goods by virtue of a letter of lien given by the debtor to secure past and future loans advanced. Really, therefore, it was in the nature of a voluntary transfer to the creditor, no money being paid, at the time of the transfer to, or on behalf of, the debtor.

The English decision seems to be that anything done contrary to the policy of the bankruptcy law is sufficient to show bad faith. If so, what is the bad faith in the present case? There can be no question, on the evidence, that the consideration was paid to the debtor, and the Rs. 4,000 on payment became the property of the Official Assignee. Moreover, the property mortgaged, subject to the repayment of the money lent, is the property of the Official Assignee by virtue of his right to the equity of redemption.

I cannot conceive how, in a case like the present where the money was actually paid by the mortgagee

(1) [1905] 2 K. B. 683. (2) (1913) I. L. R. 39 Mad. 250.

to the debtor, it can be contended that what he did was not done *bona fide*. I am inclined to agree with the attempted definition of these words given by the learned Judges of the Allahabad Court in the case of *Bhagwan Das and Company* v *Chuttan Lal* (1) in which the Court said that the appellants were within the protection of s. 55 of the Act, which protects all transactions, unless of course they are in themselves acts of insolvency or fraudulent preferences, entered into with the insolvent by third persons for valuable consideration and *bona fide*, namely, *bona fide* in the sense that the person with whom such transaction takes place had not, at the time, notice of the presentation of any insolvency petition by the debtor.

On the whole, I think that, if the words "*bona fide*" are to be incorporated in the section, the only meaning which can be given to them is absence of knowledge of the presentation of an insolvency petition. I can find no evidence of this knowledge on the part of the plaintiff in this case, and with regard to the oral testimony I have no hesitation in accepting the plaintiff's version, and I do not believe that the witnesses called on behalf of the Official Assignee were truthful witnesses. Two of them were obviously interested parties, being themselves creditors of the insolvent, and the evidence of the third witness was for other reasons unsatisfactory. The statements of the two other witnesses that they had come to Court and given their evidence without any prior contact with either the Official Assignee or his attorney, and without having given any deposition or written statement, are statements which are obviously untrue and which affect the value of the rest of their evidence.

As I have already said these opinions on fact and law which I have expressed are only given for the convenience of the parties, and for the saving of costs, and in the hope that they will obviate the necessity

(1) (1921) I. L. R. 43 All. 427.

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of taking any further action in the insolvency Court against the plaintiff.

For the reasons given in the earlier part of my judgment there must be a decree in favour of the plaintiff in terms of the prayer of the plaint, with costs.

In view of the fact that the whole of the argument took place and the evidence was adduced upon the points raised in the defence filed by the Official Assignee, the costs must be paid by him, and he may reimburse himself out of the estate.

*Suit decreed.*

Attorneys for plaintiff: *G. C. Chunder & Co.*

Attorneys for defendant: *Fox & Mandal.*

S. M.