

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

1918,
October 31
and
November 6.

MARIAPPA PILLAI (THIRD DEFENDANT), APPELLANT,

v.

RAMAN[CHETTIYAR AND THREE OTHERS (PLAINTIFF AND DEFENDANTS 1 AND 2), RESPONDENTS.*

Provincial Insolvency Act (LII of 1907), sec. 86—'Void' in meaning of—Exclusive jurisdiction of Insolvency Court to avoid transfers falling under the section.

A transfer of property falling under section 36 of the Provincial Insolvency Act remains valid unless and until set aside at the instance of the Official Receiver. The word 'void' in that section means only 'voidable'. It is only the Official Receiver and not anybody else, e.g., a purchaser from him, that can get such a transfer set aside.

After an adjudication in insolvency the only Court that has jurisdiction to annul a transfer voidable under the Law of Insolvency is the Court of Insolvency and no other Court can adjudicate upon the voidable character of such a transfer in any other proceeding, e.g., a suit, either at the instance of a plaintiff or of a defendant.

SECOND APPEAL against the decree of A. EDGINGTON, the District Judge of Tinnevely, in Appeal No. 514 of 1916, preferred against the decree of T. N. KRISHNAMURTI VAJAPUR, the Additional District Munsif of Tinnevely, in Original Suit No. 80 of 1914.

The facts are given in the judgment of SPENCER, J. The third defendant preferred this Second Appeal.

T. M. Krishnaswami Ayyar and *B. Vinayaga Rao* for the appellant.

T. R. Venkatarama Sastri and *G. R. Sivaramakrishna Ayyar* for the second respondent.

SPENCER, J.

SPENCER, J.—The plaintiff is the wife of the second defendant. She purchased the suit property from him on 5th August 1912, the consideration for the sale being the debt to her which he had incurred for meeting the expenses of a certain litigation between himself and his father for which he had pledged his wife's jewels. The first defendant was a creditor of the second defendant and brought Original Suit No. 324 of 1913 in the Court of the District Munsif of Tinnevely against him and got

* Second Appeal No. 1941 of 1917.

the suit property attached before judgment. The plaintiff put in a claim petition but it was dismissed on 2nd December 1913. On a debtor's petition presented in the District Court on 15th September 1913, the second defendant was on 12th December 1913 declared insolvent. The Official Receiver sold the suit property by auction on 31st July 1914 and the third defendant purchased it.

The plaintiff brought this suit to establish her title and has been successful in the lower Courts in obtaining a declaration of her title, both the Additional District Munsif and the District Judge finding that the sale by plaintiff's husband in her favour was a genuine one for good consideration. They also held that the sale by the Official Receiver was a nullity for want of a vesting order, citing the opinion of MOORE, J., in *Official Receiver of Trichinopoly v. Somasundaram Chettiar*(1). The proceedings in which the second defendant was adjudicated insolvent are not in the records of this Second Appeal. Assuming that those proceedings were regular and that under section 16 (2) (a) of the Provincial Insolvency Act the insolvent's property by the order of adjudication *ipso facto* became vested in the Official Receiver, there are other obstacles in the way of the third defendant, who purchased the property from the Official Receiver and is the appellant in this Second Appeal. The defect in his title consists in the admitted fact that the transfer of the suit property by the insolvent to the plaintiff has not been annulled by the Court of Insolvency either under section 36 or section 37 of the Provincial Insolvency Act. 'The Court' in sections 36 and 37 signifies the Court exercising jurisdiction under that Act (see the definition in section 2 (g) of the Provincial Insolvency Act) which in the present case was the District Court. I am of opinion that no Court has the jurisdiction to annul, as such, a transfer amounting to a fraudulent preference or a voluntary transfer made within two years of the adjudication, except a Court exercising insolvency jurisdiction in proceedings which have been instituted to declare the debtor, who made the transfer, insolvent by a petition duly presented under the Act. In *Gandla Veeramma v. Ramaswamiah Garu*(2) it was held by PHILLIPS and KRISHNAN, JJ., that a Receiver appointed by a Court of Insolvency

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(1) (1916) 20 M.L.J., 415. (2) Second Appeal No. 360 of 1916 (unreported).

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could bring a regular suit in another Court to set aside a transaction under section 36 of the Provincial Insolvency Act, but with due respect, I feel doubt whether that decision was right. I do not think that a special statutory provision whereby District Courts and certain other Courts are invested by notification of the Local Government under section 3 (1) with the power among other powers of invalidating certain defined transactions of insolvents should be extended to all Courts of original jurisdiction whether notified under this Act or not. Otherwise conflicts might arise between the decision of a Court sitting in Insolvency and the judgment of another Court exercising ordinary original jurisdiction. Transfers of this kind, if they do not fall under section 53 of the Transfer of Property Act, would, in the absence of any provision to the contrary, be valid transfers.

I further agree with the view taken in *Hemraj Champa Lall v. Ramakrishnan Ram*(1) and in *Kauleshar Ram v. Bhawan Prasad*(2) that it is the Official Receiver who must set the Court in motion to annul a transfer under section 36 or 37. These sections speak of such transfers as being 'void against the Receiver', not void against all the world.

On the analogy of the English Bankruptcy Act, it has been laid down in three decisions of this Court that 'void' in section 36 of the Provincial Insolvency Act and in the corresponding section 55 of the Presidency Town Insolvency Act means 'voidable' (see *Khan Sahib Bangi Abdul Khadar Sahib v. The Official Assignee of Madras*(3), *Sankaranarayana Aiyar v. Alagiri Aiyar*(4) and *Official Receiver of Trichinopoly v. Somasundaram Chettiyyar*(5)).

An additional reason was given by my learned brother in the latter case, viz., that the Act makes the intervention of the Court necessary, which would not be so if such a transfer were void *ab initio*. It has been held by another Bench of this Court in *Ussum Kussim Sait v. Palat Muhammad Koya*(6), that even the word 'void' in section 37 of the Provincial Insolvency Act only means 'voidable' although that section leaves the Court no discretion in the matter, by declaring that every transfer of

(1) (1917) 38 I.C., 369 (Patna).

(3) (1914) M.W.N., 247.

(5) (1916) 30 M.L.J., 415.

(2) (1917) 42 I.C., 845 (All.).

(4) (1918) 8 L.W., 281.

(6) (1917) 38 I.C., 321 (Mad.).

property which amounts to a fraudulent preference 'shall be annulled by the Court,' the words in section 36 being 'may be annulled.' It is enough for this appeal that 'void' in section 36 means 'voidable.' The appellant's pleader citing the Full Bench case of *Lakshmi Doss v. Roop Lalul*(1) argues that he should be allowed to raise the voidability of the transaction in plaintiff's favour as an equitable defence in this suit, and further contends that the Official Receiver when he sold the insolvent's property by auction sufficiently indicated his intention of exercising his discretion towards the avoidance of the sale to the plaintiff.

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But that is not enough. The transfer has not been annulled by the Insolvency Court. The appellant cannot be allowed for the purposes of this suit to stand in the shoes of the Official Receiver, an officer of Court, who has not been made a party, and to raise a defence involving the decision of a point which it is only within the jurisdiction of a Court dealing with the estate in insolvency to decide.

Moreover the transfer to the plaintiff, looked at from the point of view of section 36, is not a voluntary transfer, as both Courts have found that there was consideration for it. For the application of section 37, it was not made within three months of the presentation of the petition on which the adjudication was made. Even regarded as a transfer in fraud of creditors, it could, under the authority of *Palaniandi Chetty v. Appavu Chettiyar*(2) and *Subrahmania Ayyar v. Muthia Chettiyar*(3), only be avoided by a suit instituted for the purpose of having it set aside.

The Appeal therefore fails from every point of view and is dismissed with costs.

SADASIVA AYYAR, J.—The Full Bench decision in *Lakshmi Doss v. Roop Lalul*(1) (which is binding on me sitting in a Division Bench) should not, in my opinion, be extended so as to enable a defendant to raise an equitable defence if the Court before whom it is raised would not have jurisdiction to entertain a suit if brought by the defendant to obtain the relief of cancellation based on the right put forward as the basis of the equitable defence.

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(1) (1907) I.L.R., 30 Mad., 169 (F.B.).

(2) (1916) 30 M.L.J., 565.

(3) (1918) I.L.R., 41 Mad., 612 (F.B.).

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Such an equitable defence may be successfully pleaded in some cases even though a suit to obtain the relief based on the facts on which the defence is based may be barred by limitation, but I do not think that where the right to grant such a relief is, by statute law, vested in a special tribunal, the defence could be pleaded before another tribunal not vested with such power. I therefore agree with my learned brother that a transfer falling under section 36 of the Provincial Insolvency Act remains valid till set aside by the Insolvent Court at the instance of the Receiver and that the voidability of the transfer could not be pleaded as a defence in any Court till it is so set aside. I might further add that in this case there is nothing to show that the Receiver Gopala Ayyar knew of the transfer and elected to avoid it. It is the Receiver alone that could so elect and not a purchaser from him. Hence assuming that an order of annulment by the Court at the Receiver's instance is unnecessary and that the Receiver's unilateral declaration of intention to avoid will suffice, there is nothing to indicate that even such a declaration of intention existed in this case. The Receiver's act of selling the property to the third defendant is no proof of such intention in the absence of evidence that the Receiver had even knowledge of the alienation to the plaintiff. A man cannot intend to destroy a thing of whose existence he is unaware.

I do not wish to enter upon a consideration of the difficult question whether the Full Bench decision in *Lakshmi Doss v. Roop Lal*(1) can be reconciled with the principle of the recent Full Bench decision in *Subrahmania Ayyar v. Muthia Chettiar*(2) in which it was held that a defendant cannot set up the voidability under section 53, Transfer of Property Act, of an alienation made in the plaintiff's favour in fraud of creditors till such alienation is set aside actually by a decree passed in a regular suit, especially in view of even more recent decisions which held that even a single creditor could maintain such a suit brought in his own individual interest and not necessarily on behalf of all the creditors.

N.R.

(1) (1907) 1 L.R., 30 Mad., 169 (F.B.).

(2) (1918) 1 L.R., 41 Mad., 612 (F.B.).