APPELLATE CIVIL.

Before Sir William Ayling, Officiating Chief Justice, and Mr. Justice Odgers.

1921, October 24.

THE OFFICIAL ASSIGNEE OF MADRAS, APPELLANT,

v.

S. R. M. M. R. M. VALLIAPPA CHETTI AND ANOTHER, RESPONDENTS.*

Presidency Towns Insolvency Act (III of 1909), ss. 52 (2) (c) and 57—Goods pledged—Possession with pledgee—Charge on equity of redemption—Goods in the order and disposition of the insolvent—Validity of charge—Transfer for consideration—Good faith.

An insolvent pledged certain goods with A and three weeks prior to the adjudication created a charge on the equity of redemption in favour of B, without the knowledge or consent of A or notice to him. On an application by the Official Assignee for a declaration that the charge in favour of B was not valid as the goods were "in the order and disposition of the insolvent" *held* that an equity of redemption is not "goods" within the mischief of section 52 (2) (*c*) of the Presidency Towns Insolvency Act.

A transfer from the insolvent for valuable consideration is protected under section 57 of the Act if the transferee has taken in good faith, that is, without knowledge of an act of bankruptcy committed by the insolvent.

AN APPEAL from the judgment and order of Mr. Justice KUMARASWAMI SASTRI passed in the exercise of the Ordinary Original Jurisdiction of the High Court, in Insolvency Petition No. 6 of 1919.

This was a notice of motion taken out by the Official Assignee "for an order that the letter, dated 21st December 1918, executed by the fourth insolvent" to the garnishees "may be declared fraudulent and void and inoperative against the Official Assignee." The facts

* Original Side Appeal No. 81 of 1920.

are set out in the judgment and the only portion of the Official Assignee's report which is material is as follows:

"The acts of Bankruptcy on which the Order of Adjudication proceeds are:

(*a*) that on 8th January 1919 the debtors expressed their inability to pay their debts in full at a meeting of the creditors held at the request of the debtors;

(*b*) that they are giving fraudulent preferences by transferring their stock in trade;

(*c*) that there is a warrant of arrest subsisting against them.

Among the fraudulent preferences is one, dated 10th December 1918. I therefore submit that the insolvency relates back to that date and the letter, dated 21st December 1918, is not binding on me."

The Advocate-General (*C. P. Ramaswami Ayyar*) for appellant.

A. Krishnaswami Ayyar and *M. Subbaraya Ayyar* for respondents.

ODGERS, J.—This is an Appeal from the judgment of KUMARASWAMI SASTRI, J., who disallowed the application of the Official Assignee to treat a certain letter of charge given by the firm of Appachi Chetti & Sons (who were adjudicated on 15th January 1919) to certain Nattukottai Chettis as (1) a fraudulent preference under section 59 of the Insolvency Act; (2) within the order and disposition portion of section 52 of the Insolvency Act; (3) as within section 55 of the Insolvency Act as being without consideration. The learned Judge found against the Official Assignee on all these points and he appeals. Certain bales were pledged in October 1918 by the insolvent firm to Egappa Chetti to whom the former owed Rs. 1,35,000. These bales were deposited with the pledgee and the validity of this pledge is in no way

ODGERS, J.

OFFICIAL ASSIGNEE, MADRAS v. VALLIAPPA CHETTI. — ODGERS J.

questioned by the learned Advocate-General who appeared for the Official Assignee. The question is as to the balance remaining after the pledgee has taken his debt out of the money realized by sale of the bales pledged to him. The insolvent purported to create a second charge in favour of two Nattukottai Chettis on the same bales by means of a certain letter set out in the judgment of the learned Judge. This letter is dated 21st December 1918, and runs as follows:

"As we have given the bales belonging to us, that is the goods mentioned in the list herewith given as security for Rs. 1,35,000 which is the principal due up to this date on the account of debit and credit transactions already carried on with T. T. Egappa Chetti of this place and the interest thereon, we shall sell the goods mentioned therein according to the bazaar price and pay the entire amount and the interest to the aforesaid Egappa Chettiyar and the goods which are likely to remain after fully discharging the amount due to him have been given by us as security for the balance of principal Rs. 12,800 and interest due by us to S. R. M. M. R. M. Valliappa Chettiyar out of you and for the principal Rs. 13,750 and interest due after deducting the amount paid in respect of the promissory note for Rs. 15,000 executed and given by one M.R.Ry. Muttukumara Chetti to K. M. L. Kumarappa Chettiyar. If the aforesaid bales are not sold and delay is caused we have given them to you as second security also. Until T. T. Egappa Chettiyar's debt and your vagairas' debt are discharged out of these bales we shall not take the money."

It is not contended by the learned Advocate-General that this letter does not create a valid charge, but it is said that owing to the power of sale having been left in the insolvents (we are not told if Egappa Chetti knew of or assented to this and we should think it extremely unlikely) by the letter of charge, the Nattukottai Chettis have allowed "goods" belonging to themselves to be in the possession, order or disposition of the insolvents, under such circumstances that the latter is the reputed

owner thereof. In other words, the second charge though the property of the Nattukottai Chettis is to be taken away from them and the value of it applied for the benefit of the general body of creditors.

The only point argued before us of the three set out above was (2). The first question therefore for decision is, premising that the insolvents only dealt with what was left after their pledge to Egappa, i.e., the equity of redemption, did the second charge-holders leave that equity of redemption at the disposal of the insolvents so as to incur forfeiture (for that is what it is) of their charge within the mischief of section 52 (2) (*c*). It was first contended by the Advocate-General that the matter might fall within section 52 (2) (*a*) also, as being property belonging to the insolvents but (*a*) includes only what really is the insolvents' property ; in this case, the value of the goods minus the value of the two charges created on it—in other words, the second equity of redemption which is in fact valueless to the Official Assignee who for any practical advantage to accrue must bring the case under clause (*c*) and thus recover the benefit of the second charge. The learned Advocate-General being thus confined to clause (*c*) it was necessary for him to argue that the equity of redemption disposed of by the insolvents by way of second charge but left at their disposal by the owners thereof was "goods" within the meaning of that clause. In support of this contention he first relied on section 76 of the Contract Act where in the chapter on sale of goods it is said "In this Chapter the word 'goods' means and includes every kind of moveable property." Reference was also made to two cases : *Franklin* v. *Neate*(1) where it was held that in spite of the pledge the pawner still has a property in the goods pledged, which property he can sell subject of course to

(1) (1844) 13 M. & W., 481.

OFFICIAL ASSIGNEE, MADRAS v. VALLIAPPA CHETTI.

ODGERS, J.

the "special property" (as it is called) vested in the pledgee. This is an undisputed proposition and does not carry the case further than to furnish legal authority for the insolvents to create a second charge on the pledged bales. The second case was *Ex-parte Roy Re Sillence*(1) where it was held that the bankrupt could not create a lien (as claimed by his creditor) over certain horses as the latter were not his. They were, however, in his order and disposition by consent of the true owner.

In my opinion this case is totally different from the present. It is not contended that the goods, or that the equity of redemption in the goods after they were pledged, did not belong to the insolvents and they were not at perfect liberty to deal with those goods or that equity of redemption as they pleased, subject to the pledgee's right. At most the case decides that the possession of a depositor claiming a lien is for the purposes of this clause the possession of the insolvents. On the other hand it has been held in *Greening* v. *Clark*(2), and *Webb* v. *Whinney*(3), that the possession of a pawnee is not the possession of the insolvent pawner. So also in *Lincoln Wagon and Engine Co.* v. *Mumford*(4), it was said by STEPHEN, J. :

"If one person deposits a chattel with another, and borrows money upon that chattel, it cannot be said that it is in the possession or apparent possession of the person creating such a charge upon it."

So much for the question of the respective rights of the pledger and pledgee in the goods pledged. I return to the question as to whether the equity of redemption in these goods pledged is itself included in the definition of "goods" in clause (*c*). Mr. Krishnaswami Ayyar for the respondents, points to the analogies in section 41 of the

(1) (1877) 7 Ch.D., 70.
(2) (1825) 4 B. & C., 316.
(3) (1868) 18 L.T., 523.
(4) (1879) 41 L.T., 655.

Transfer of Property Act and section 108 of the Contract Act. They are both instances of "holding out" by the true owner and he contends that the case under clause (*c*) is the same. There must, in the sections cited, be an express or implied representation by the true owner that the ostensible owner is authorized to deal with the land or goods, as the case may be. It is said the same applies here. It must be "goods," actual, tangible, concrete, things, not intangibles, such as an equity of redemption. It is clear that in Chapter IX on Bailment in the Contract Act "goods" must have this significance. In this connexion the proviso to the clause is important :

"Provided that things in action other than debts due or growing due to the insolvent in the course of his trade or business shall not be deemed goods within the meaning of clause (*c*)."

Thus debts of the specified character are expressly excepted from "things in action" which are not to be deemed "goods."

It has been held that shares and share certificates are not "goods" : *Lalit* v. *Haridas*(1). The judgment of FRY, L.J., in *Colonial Bank* v. *Whinney*(2), contains a valuable *resumé* of the development of the law as to "things in action." The question there was whether shares in a Company were choses in possession or in action and he decided that shares are choses in action. The other Lords Justices decided the other way, but their decision, was reversed by the House of Lords in *Colonial Bank* v. *Whinney*(3), where at page 441, Lord FITZGERALD said :

"It seems to me, on a careful examination of the section and provision, that the intention of the legislature was to narrow very much the operation of the 'order and disposition' clause so as to confine it to such goods as might be in the order and disposition of the bankrupt, 'in his trade or business' and, save in the case of 'debts due to the bankrupt in the

(1) (1916) 24 C.L.J., 335. (2) (1885) 30 Ch.D., 261, 285.
(3) (1886) 11 App. Cases, 426.

OFFICIAL ASSIGNEE, MADRAS v. VALLIAPPA CHETTI.

ODGERS, J.

course of his trade or business' to exclude all those incorporeal rights which are not visible or tangible or capable of manual delivery or of actual enjoyment in possession, in its ordinary sense, and which, if denied, can be enforced only by action or suit."

This extract contains and supports the very position contended for by Mr. Ramaswami Ayyar and I see no reason to doubt its applicability to the clause in question which is taken word for word from section 44 of the Bankruptcy Act of 1883, corresponding to section 38 of the English Bankruptcy Act, 1914, on which the case of the *Colonial Bank* v. *Whinney*(1), was decided: see also on this point, *The Mercantile Bank of India, Ltd., Madras* v. *The Official Assignee, Madras*(2). These considerations seem to me to clearly conclude the matter on this point against the appellant and I have no hesitation in holding that an equity of redemption is not "goods" within the mischief of clause (*c*).

The learned Advocate-General, however argued another point. On 12th April 1920, the Official Assignee moved before the Judge in insolvency for an order declaring that a certain transfer of goods made on 12th December 1918 by these same insolvents in favour of A. R. A. Swaminatha Pillai was fraudulent and void under section 56 of the Presidency Towns Insolvency Act. This was dismissed on 30th July 1920, but was subsequently on 3rd May 1921 reversed on Appeal. The transfer was thus an Act of Insolvency under section 9 (1) (*c*) of the Act. It is contended that by the operation of section 51 (*b*) this act of insolvency must relate back to the 12th December 1918 and that as the second charge in this case was given on 21st December 1918 it is invalid as it is an attempted disposition of the insolvent's property after his property had become vested in the Official Assignee.

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(1) (1886) 11 App. Cases, 426. (2) (1916) I.L.R., 39 Mad., 250, 262.

The answer to this contention is found in section 57 (*c*) which *inter alia* provides that any transfer by the insolvent for valuable consideration is valid (subject to the provisions of the Act as to the evidence of certain transfers, and preferences, as to which there is now no question in this case) provided that it takes place before the Order of Adjudication and that the person with whom such transaction takes place has not at the time notice of the presentation of any Insolvency Petition by or against the debtor.

The rejoinder by the appellants to this is that bona fides is required under the section and reference is made to *The Mercantile Bank of India, Ltd., Madras* v. *The Official Assignee, Madras*(1). There, it was held that a creditor who entered into a transaction with his debtor with the knowledge that that debtor had committed an act of bankruptcy at the time the transaction was entered into cannot claim the benefits of section 57. Is there any such evidence here? I can find none nor was it contended that such existed. It is not disputed that the debt to the Chettis was an actual debt subsisting at the date of the second charge in their favour. The only way in which bona fides was raised was in so far as it was involved in the issue of fraudulent preference which was found against the Official Assignee by the learned Judge and not argued before us on Appeal. This point must therefore be also decided against the appellant.

The result is that the judgment of the learned Judge in Insolvency was right and must be affirmed and the Appeal dismissed with costs.

AYLING, OFFG. C.J.—I agree.

AYLING, OFFG. C.J.

V. Varadaraju Mudaliyar, Attorney for appellant.

M.H.H.

(1) (1916) I.L.R., 39 Mad., 250, 262.