APPELLATE CIVIL.

Before Sir William Phillips, Kt., Officiating Chief Justice, and Mr. Justice Anantakrishna Ayyar.

1927, August 29.

THE OFFICIAL ASSIGNEE OF MADRAS, APPELLANT,

v.

S. M. SHEIK MOIDEEN ROWTHER, RESPONDENT.*

Presidency Towns Insolvency Act (III of 1909)—ss. 55 and 56—Insolvent transferring all his property to a simple creditor without providing for other creditors—Knowledge of transferee—Good faith and consideration—Onus.

If a person in insolvent circumstances transfers all his properties to one of his creditors solely for a past debt, without providing for his other creditors to whom he was heavily indebted, by means of an antedated deed of transfer, and the transferee, a relation of the transferor, takes the transfer knowing all the circumstances, he is not a transferee in good faith within the meaning of section 55 of the Presidency-Towns Insolvency Act (III of 1909) and his transfer is liable to be cancelled under the section if the transferor is adjudged insolvent within two years of the transfer. The onus of proving that a particular transfer effected by the insolvent is void as against the Official Assignee under section 56 of the Act is on the Official Assignee, whereas the onus of proving good faith and valuable consideration in a case coming under section 55 is on the transferee.

APPEAL from the judgment of the Hon'ble Mr. Justice BEASLEY in the exercise of the Ordinary Original Insolvency Jurisdiction of the High Court in I.P. No. 110 of 1924 in Application No. 423 of 1924.

The facts are given in the judgment.

O. Thanikachelam Chettiar for appellant.

K. Krishnaswamy Ayyangar for respondent.

* Original Side Appeal No. 106 of 1926.

JUDGMENT.

S. M. Mohamed Rowther was adjudicated insolvent on 31st March 1924 on a petition filed on 17th March 1924 by a creditor Chengalvaraya Chettiar. The Official Assignee of Madras applied to have a sale deed, dated 27th October 1923 and a deed of transfer of mortgage, dated 11th November 1923 executed by the insolvent in favour of the garnishee (S. M. Sheik Mohidin Rowther) declared void under section 55, or in the alternative under section 56 of the Presidency-Towns Insolvency Act. The learned Judge having dismissed the application, the Official Assignee has preferred this appeal.

The insolvent was carrying on business as a commission agent at Madras. He had a branch shop in Tinnevelly. In 1923 the insolvent was largely indebted. He was indebted to the garnishee to the extent of about Rs. 20,000 in May 1923, and he had executed in favour of Chengalvaraya Chettiar a promissory note on 1st October 1923 for Rs. 30,000 the amount having been advanced to the insolvent between 25th June and 30th September 1923. The garnishee is the paternal uncle of the insolvent and the sale deed Exhibit IV executed by the insolvent in favour of the garnishee comprised all the immovable properties of the insolvent. It was also alleged that the properties comprised in the sale deed were worth very much more than Rs. 10,000, the consideration mentioned in the sale deed. Under Exhibit V, dated 11th November 1923, the insolvent transferred for Rs. 775 to the garnishee the mortgage rights of the insolvent in certain immovable properties in Tinnevelly, the principal amount of the mortgage being Rs. 500. It was also alleged that Exhibit IV was not executed on the date it bears (27th October 1923) but that it was executed only about the 20th December 1923, the date of registration; finally it was

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alleged that the garnishee was aware of insolvent's indebtedness to Chengalvaraya Chettiar and others and that Exhibit IV was taken with full knowledge of the fact that it comprised all the properties of the insolvent and that the same was a fraudulent transaction and void as against the Official Assignee. The learned Judge in dismissing the application concluded his judgment as follows:—

"The Official Assignee has not in my view discharged the burden on him of showing that the sale was not *bona fide*; it clearly was in my view for valuable consideration and the only way in which the *bona fides* of the transaction might have been impeached was by showing that for some reason or other the execution of the sale deed was not on the date it bears. That as I have said the Official Assignee has failed to prove. The Official Assignee having failed to show that the sale was not for valuable consideration and that it was not *bona fide* this application must be dismissed with costs."

On behalf of the appellant the following main contentions were raised by his learned counsel:—

1. That the deed of sale was not executed at Pettai, a suburb of Tinnevelly, on 27th October 1923, the date mentioned in the document, but that it was antedated and executed only about the time of its registration at Tinnevelly on 20th December 1923.

2. The consideration mentioned in the document Rs. 10,000 is grossly inadequate, the properties being really worth about Rs. 20,000.

3. The amount due to the garnishee at the time was only about Rs. 7,000 and the recital in the document that more than Rs. 10,000 was due to the garnishee from the insolvent at the time is false and fraudulent.

4. That the document Exhibit IV could not be said to have been executed in good faith and consequently the transaction is void as against the Official Assignee, under section 55 of the Presidency Towns Insolvency Act.

5. That the case is also one of fraudulent preference coming within section 56 of the Act and consequently the transfer is void as against the Official Assignee.

Before discussing the questions raised by the appellant it would be convenient to state that the *onus* of proving that a particular transfer effected by the insolvent is void against the Official Assignee under section 56 of the Act is on the Official Assignee, whereas the *onus* of proving good faith and valuable consideration in a case coming under section 55 would be on the garnishee. This was admitted before us by the learned Counsel on either side appearing in the case, and we think the decisions of this Court in *The Official Assignee of Madras* v. *Sambanda Mudaliar*(1), and of the Calcutta High Court in *Nripendra Nath Sahu* v. *Ashutosh Ghose*(2) and *Nilmoni Choudhuri* v. *Bashanta Kumar Banerji*(3) and *The Official Assignee of Bengal* v. *The Yokohama Specie Bank, Ltd.*(4) fully support the position.

[Their Lordships then discussed the evidence and held as follows :—]

On the whole, we have come to the conclusion that Exhibit IV was not executed on 27th of October 1923 but that it was antedated by the parties thereto.

As regards the second and third points namely the value of the properties covered by Exhibit IV and repayment of Rs. 15,000 to the garnishee by the insolvent, we are not satisfied that the appellant has proved his contentions on these heads . . . In the face of the statement made by Kadir Mohidin Rowther that the documents Exhibits IV and V were executed on the 11th of November 1923, we hold that the Official Assignee is not entitled to relief under section 56 of the

(1) (1920) I.L.R., 43 Mad., 739.
(2) (1914) 19 C.W.N., 157.
(3) (1914) 19 C.W.N., 865.
(4) (1924) 29 C.W.N., 374.

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Act, but we hold that he is entitled to the relief that he seeks under section 55.

[After discussing the evidence their Lordships proceeded as follows :—]

We hold that the garnishee knew when he took Exhibit IV that the insolvent was indebted to Chengalvaraya Chettiar to the extent of Rs. 30,000 and also to some others and that he (insolvent) had no other properties. Knowing all this the garnishee took an assignment of all the insolvent's properties and antedated the sale-deed, knowing full well that what was being done was in fraud of the insolvency law. He cannot be said to have acted in good faith in the circumstances of the case.

The learned counsel for the respondent argued that the present case does not come under section 55 of the Presidency Towns Insolvency Act. Under that section any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or encumbrancer in good faith and for valuable consideration shall if the transferor is adjudged insolvent within two years after the date of the transfer be void against the Official Assignee. It will be noticed that it is only in favour of purchasers and encumbrancers in good faith and for valuable consideration that the exception is made. In the present case the respondent has proved valuable consideration, but he has to prove good faith also. The respondent's counsel argues that the expression "good faith" in the section means only that the transaction should not be a sham one or one in which there is a resulting trust in favour of the insolvent, and he contends that as neither of those two objections could be urged in the present case, the transaction is binding on the Official Assignee. We are unable to accept that contention. Absence of good

faith could be proved by showing that the transaction was a sham one, or that there was a resultant trust in favour of the insolvent, but the same could be proved by other circumstances also. If an insolvent transfers in favour of one of his creditors who happens to be his relation all his properties knowing that he is in insolvent circumstances and unable to pay his other creditors to whom he owes much more than the debt due to the transferee and the transferee also being fully aware of all the above circumstances, and in concert with the insolvent, brings into existence such a transfer deed, and antedates the same, and takes such sale deed for a debt due to him without any contemporaneous advance or other promise to help the insolvent to carry on his business, then we have no doubt that the transaction could not be said to have been entered into in good faith, and the same should be held to be void against the Official Assignee under section 55 of the Act. The cases referred to by the respondent, *Hakim Lal* v. *Mooshahar Sahu*(1) and *Musahar Sahu* v. *Lala Hakim Lal*(2) are cases that were decided under section 53 of the Transfer of Property Act and not under the Insolvency Act. In fact at page 1015 of 34 Calcutta, it is observed as follows:—

> "It is well settled that in the absence of a bankruptcy act, a debtor may make preference amongst his creditors even to the extent of transferring all his property to one creditor to the exclusion of the others."

Note the words "*in the absence of a bankruptcy act.*" The Privy Council also in *Musahar Sahu* v. *Lala Hakim Lal*(2) at page 524 makes a similar observation. At page 524 it is said:

> "As matter of law their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy

(1) (1907) I.L.R., 34 Calc., 999. (2) (1916) I.L.R., 43 Calc., 521.

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applies, there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts."

In fact we have cases arising under the Insolvency Act where it has been held that under similar circumstances the transfer would be void as against the Official Assignee. In *The Official Assignee of Bengal* v. *Yokohama Specie Bank, Ltd.*(1), SANDERSON, C.J., and BUCKLAND, J., held that an assignment executed in favour of one of the creditors of the insolvent of all the properties of the insolvent without any contemporaneous advance, was void against the Official Assignee when the transferor was adjudicated insolvent within two years after the date of the transfer. Finding that the transferee had knowledge of the state of affairs of the assignor at the time of the assignment, the Court held that the transfer was not in *good faith* within the meaning of section 55 of the Act. Mr. Justice BUCKLAND was of opinion that in considering the effect of transactions of such a nature the facts must be considered in the light of the law of bankruptcy, the object of which is to ensure rateable distribution of an insolvent's property among his creditors, and that a transaction which may in other circumstances be free from all taint would become an offence when it is established that it contravenes the law of bankruptcy. BUCKLAND, J., further remarked that

"though the bank (transferees) may have acted honestly in the popular sense they cannot be deemed to have acted in good faith within the law of insolvency, however honestly they may have endeavoured and thought they were justified in endeavouring to secure the property of the insolvent as security for their own debt."

We may also refer in this connexion to a passage in the Privy Council decision reported in *Khoo Kwat*

(1) (1924) 29 C.W.N., 374.

Siew v. *Wooi Taik Hwat*(1) at page 231, where Lord HOBHOUSE observed as follows:—

"The well-known rule of law is that if a trader assigns all his property, except on some substantial contemporaneous payment, or some substantial undertaking to make payment *in futuro*, that is an act of bankruptcy and is void against the creditors and the assignee, simply because nothing is left with which to carry on his business, whereas, if he receives substantial assistance, something is left to carry on the business."

In *Jukes, In re, Official Receiver, ex parte*(2), WRIGHT, J., remarks as follows:—

"I think it is quite clear that the debtor committed an act of bankruptcy in parting with the whole of his property to one of his creditors to satisfy a past debt . . . I cannot help thinking that if a creditor of a debtor takes the whole, or substantially the whole, of the property of his debtor in payment of a past debt, and knowing that there are other creditors, he cannot be said to be acting in good faith."

See also *The Official Assignee of Bombay* v. *Sundarachari*(3).

The onus of proving good faith, it has been held, is on the transferee. *The Official Assignee of Madras* v. *Sambanda Mudaliar*(4) and *The Official Assignee of Bengal* v. *Yokohama Specie Bank, Ltd.*(5). It will depend on the circumstance of each case whether good faith has been proved or not. Having regard to the facts found by us in this case, we are of opinion that the transactions impugned in this case were not executed in good faith and we accordingly allow the appeal and declare that the deed of sale, dated 27th October 1923 (Exhibit IV), and the deed of transfer, dated 11th November 1923 (Exhibit V), are void against the Official Assignee. The garnishee would be entitled to prove, as a simple creditor, in respect of the amount

(1) (1892) I.L.R., 19 Calc., 223 (P.C.). (2) [1902] 2 K.B., 58 at 60.
(3) (1927) I.L.R., 50 Mad., 776. (4) (1920) I.L.R., 43 Mad., 739.
(5) (1924) 29 C.W.N., 374.

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that he may be found entitled to get from the insolvent. The garnishee should pay the taxed costs on the Original Side scale of the Official Assignee both in the appeal and before the learned Judge (including the costs of the commission).

K. Ramachandra Chetti, Attorney for appellant.

V. Varadaraja Mudaliyar, Attorney for respondent.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Cornish.

1927, August 2.

DHANABAKKIYAMMAL (PETITIONER), APPELLANT,

v.

THANGAVELU MUDALIAR AND OTHERS (RESPONDENT AND OTHERS—EXECUTORS), RESPONDENTS.*

Indian Succession Act (XXXIX *of* 1925), *sec.* 301—*Administrator-General's Act* (V *of* 1902)—*Judicial Trustees' Act* (59 *and* 60 *Vic., Ch.* 35)—*Application under sec.* 301 *for removal of executor—Duty of Court to inquire—Remedy of petitioner—Suit for removal, whether necessary and competent—Sec.* 301, *construction of the word "may" in—Remedy by suit or application.*

Where an application is made to the High Court, under section 301 of the Indian Succession Act (XXXIX of 1925) for the removal of an executor, the Court ought to enquire into the allegations made by the petitioner and ought not to dismiss the petition without any kind of enquiry on the ground that the matter required the taking of a considerable quantity of evidence and that another remedy by way of suit was open to the petitioner.

Section 301 of the Indian Succession Act, 1925, reproduces section 4 of the Administrator-General's Act (V of 1902), which

* Original Side Appeal No. 124 of 1926.