

MAHARAJA OF PITHAPURAM v. RAMA RAO. WALLACE, J. appeal does not therefore lie. It would be well if in the trial of the suit this question of jurisdiction be tried and decided as a preliminary issue. We therefore dismiss the appeal but make no order as to costs.

K.B.

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri
Mr. Justice Devadoss.

1927,
February 16.

THE OFFICIAL ASSIGNEE OF BOLNISI BRAY
(SECOND DEFENDANT), APPELLANT,

v.

OBLA KUNA MUNA SUNDARACHARI AND OTHERS¹
(PLAINTIFFS AND FOURTH DEFENDANT), RESPONDENTS.*

Mortgage—Suit for sale in a Sub-Court—Suit against Official Assignee and insolvent mortgagor—Transaction, fraudulent under sec. 53 of Transfer of Property Act—Presidency Towns Insolvency Act (III of 1909), ss. 4, 7, 55 and 56—Jurisdiction of Sub-Court to determine question under sec. 55 of the latter Act—Special Act—Special forum, Insolvency Court—Provincial Insolvency Act (V of 1920), ss. 53 and 54—Jurisdiction of Civil Courts to determine questions raised under either Act.

Any question as to the invalidity of a transaction, raised by the Official Assignee under the special provisions contained in sections 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.

The principle of the decisions holding that only Insolvency Courts have jurisdiction to determine questions under sections 53 and 54 of the Provincial Insolvency Act, should be applied to cases falling under sections 55 and 56 of the Presidency

* Appeal No. 85 of 1925.

Towns Insolvency Act: *Mariappa Pillai v. Raman Chettiar*, (1919) I.L.R., 42 Mad., 322, and *Official Receiver, Coimbatore v. Palaniswami Chetty*, (1925) I.L.R., 48 Mad., 750, followed.

OFFICIAL
ASSIGNEE,
BOMBAY,
v.
SUNDAR-
CHARI.

Where, therefore, in a suit for sale on a mortgage instituted in a Sub-Court against the Official Assignee and others, the Court found that the transaction was not voidable under section 53 of the Transfer of Property Act, the Court had no jurisdiction to determine, at the instance of the Official Assignee, whether it was void as against him under section 55 of the Presidency Towns Insolvency Act, but a decree should be given to the mortgagee, leaving it open to the Official Assignee to apply to the Insolvency Court to set aside the transaction if he could show that the case fell within section 55 of the latter Act.

APPEAL against the decree of A. V. RATNAVELU PILLAI, First Additional Subordinate Judge of Madura, in Original Suit No. 1923 (Original Suit No. 201 of 1922 on the file of the Subordinate Judge of Madura).

The material facts appear from the judgment.

Advocate-General (T. R. Venkatarama Sastri) with *K. Bashyam Ayyangar* for appellant.—The Presidency Towns Insolvency Act does not confer on the Insolvency Court exclusive jurisdiction to avoid transactions. So Civil Courts also have jurisdiction to annul or determine the validity of a transaction under sections 55 and 56. The defendant need not take legal proceedings to set it aside, but can impeach it as a defendant: see the decision in S.A. No. 360 of 1916. See also *Ramaswami Chettiar v. Mallappa Reddiar*(1), a decision under section 53 of the Transfer of Property Act. The unreported decision in S.A. No. 360 of 1916, is, however, dissented from in *Mariappa Pillai v. Raman Chettiar*(2). The decisions under sections 53 and 54 of the Provincial Insolvency Act are not applicable to cases falling under sections 55 and 56 of the Presidency Towns Insolvency Act; the language of these latter sections is different in material respects: the word used in sections 55 and 56 of the latter Act is “void” and not “voidable” as in the former Act, and the words “may be annulled by the Court” used in the former Act are omitted in the latter Act. The sections are merely declaratory of rights and leave the jurisdiction of Courts unspecified and unaffected.

(1) (1920) I.L.R., 43 Mad., 760.

(2) (1919) I.L.R., 42 Mad., 322.

OFFICIAL
ASSIGNEE,
BOMBAY,
v.
SUNDARA-
CHARI.

C. V. Anantakrishna Ayyar for respondents.—The Presidency Towns Insolvency Act gives exclusive jurisdiction to Insolvency Courts to set aside transactions under sections 55 and 56 of the Act. The Insolvency Act is a special Act and creates a special forum for taking proceedings under the Act. See sections 3, 4 and 7 of the Act. The Act confers exclusive jurisdiction on Insolvency Courts for the exercise of the powers conferred by the Act. The provisions of sections 53 and 54 of the Provincial Insolvency Act are similar to sections 55 and 56 of the Presidency Towns Insolvency Act, though the language is slightly different.

JUDGMENT.

This appeal arises out of a suit to recover Rs. 27,666-6-9 with costs and further interest allowed to be due on a mortgage executed on 1st November 1921 by the first defendant in favour of the plaintiffs. The first defendant was adjudicated an insolvent in the Bombay High Court in March 1922. The date of adjudication does not appear, but it was some time between the 7th and the 15th of March 1922. The Official Assignee of Bombay is the second defendant in the suit. The third defendant, the Madura Mills Company, were the lessees of the mortgage properties; but their lease expired and they have disclaimed all interest, so that it is unnecessary to consider them any further.

First defendant dies after suit and his widow has been brought on record as his legal representative. The Official Assignee who contested the suit raised several defences. The first was that no money was due on the mortgage as no consideration was paid. The second was that the mortgage was executed really *benami* for the first defendant (insolvent) and therefore conferred no right on the plaintiffs. In paragraph 7 of his written statement it was stated that the first defendant was adjudicated an insolvent in the Bombay High Court and that the mortgage, having been

executed within two years prior to adjudication and not being *bona fide* and without any consideration, is void as against the Official Assignee under section 55 of the Presidency Towns Insolvency Act. Paragraph 8 runs as follows:—

“ Some of the creditors of the insolvent have moved this defendant to apply to the Bombay High Court under the above-said section for getting the suit hypothecation deed annulled, and this defendant intends to apply under the above section, as soon as possible as the Bombay High Court has re-opened on the 8th January 1922 after the Christmas holidays.”

Paragraph 9 is as follows:—

“ As this defendant intends to make an application to the Bombay High Court under section 55, this defendant prays that this Court may be pleased to post this suit to a date two months hence so as to enable this defendant either to get it stayed till the disposal of the application or to get it transferred to the Bombay High Court to be tried along with the application.”

No application was made. The issues raised were:—

1. Is the plaint bond true, valid and supported by consideration? or
2. Is it only a nominal transaction intended to defraud first defendant's creditors?
3. To what relief, if any, are plaintiffs entitled?

The Subordinate Judge on a careful consideration of the evidence and the accounts filed came to the conclusion that the plaint mortgage was fully supported by consideration and that it was not a nominal transaction intended to defraud first defendant's creditors. No issue was raised as to whether, even if there was consideration, the transaction could be void as falling within section 55 of the Presidency Towns Insolvency Act, being within two years of the adjudication and not being *bona fide*, probably because this matter was reserved as mentioned in the written statement, to the Bombay

OFFICIAL
ASSIGNEE,
BOMBAY
v.
SUNDARA-
CHARI.

High Court. The Subordinate Judge having found that the transaction was not benami, and was for consideration, considered the provisions of law applicable in the suit as framed before him whether, under section 53 of the Transfer of Property Act, on the finding that there was consideration, the fact that preference was given to one creditor over another would make the transaction void or voidable in a suit between the mortgagor and the mortgagee. He relied on the decision of the Privy Council in *Musahar Sahu v. Lala Hakim Lal*(1). On appeal the learned Advocate-General did not argue that the document was not supported by consideration. The only point as regards consideration which he said was suspicious and which requires scrutiny was item 10. As regards this item, the Subordinate Judge deals with it at page 19 of his judgment. The account book of the mortgagee and the day book and ledger of the mortgagor agree as regards the amount, but the way in which the money was appropriated differs. We cannot, on this circumstance alone, without any further evidence and also in view of the fact that there was a settlement of accounts which is not impeached before us, hold that this item has not been proved. Admittedly the amount was received and a difference in the entries between the book of the mortgagor and that of the mortgagee would not make the debt not due. For the purpose of the appeal we have to treat it on the footing that this document is fully supported by consideration. If the case was to be decided under section 53 of the Transfer of Property Act without reference to the Insolvency Act, we think the Subordinate Judge was right in holding that the transaction could not be said to be void on the ground that it was intended to defeat or

(1) (1916) I.L.R., 43 Cal., 521.

defraud creditors. All we can hold on the evidence is that one creditor was more diligent than others in getting a security for the money due to him. The main ground of argument put forward by the learned Advocate-General was that the Subordinate Judge was wrong in thinking that the question of *bona fides* ought to be decided only with reference to the Transfer of Property Act and not with reference to section 55 of the Presidency Towns Insolvency Act. His argument is that in dealing with the question with reference to the Insolvency Act we must take all the circumstances into consideration, and we must see whether the man was at that time really in involved circumstances unable to meet his debts and whether this is not a transaction which is a fraudulent preference in favour of one creditor putting the property out of reach of the general body of creditors in favour of one who had at the date of the transaction no special reason for getting the preference. He points out that it is not shown that any money was borrowed for the purpose of the business to be conducted, that the actual lending of the money stopped at the settlement of the accounts in 1919, that subsequently till we come to the date of the transaction we find only interest being credited in the book and then on the date of the transaction a small sum of Rs. 500 is shown as paid in cash for the bond and Rs. 150 for the stamp expenses and that there is no evidence that this Rs. 500 was paid for any business or anything that would indicate the *bona fides* of the transaction. He also points out that admittedly there were other dealings between the mortgagor and the mortgagee which on the books produced in Court showed that moneys were due by the mortgagee to the mortgagor at the date of the execution of the mortgage. No doubt these sums were unascertained and had to be ascertained by looking into

OFFICIAL
ASSIGNEE,
BOMBAY
v.
SUNDABAI-
CHARI.

OFFICIAL
ASSIGNEE,
BOMBAY
v.
SUNDARAM
CHARL.

the accounts. But he points out that between 1919, the date of the settlement, and the date of the mortgage there was ample time to look into the accounts especially as dealings stopped shortly after 1919 and that where a person who is unable to pay his debts chooses to execute a mortgage in favour of one creditor without looking into the accounts which show that some amount is due to him from the creditor and without setting off the amount due to him against the amount due by him, the transaction could not be prima facie said to be bona fide especially when the mortgagee was a partner with the plaintiff with regard to the unsettled accounts. It is argued by Mr. C. V. Ananthakrishna Ayyar for the respondent that considerations based upon the voidability of a transaction under section 55 of the Presidency Towns Insolvency Act cannot be gone into by any Court except an Insolvency Court constituted under the Presidency Towns Insolvency Act and the Subordinate Judge had no jurisdiction to declare the transaction voidable under section 55. So far as the decisions under the Provincial Insolvency Act are concerned, it has been held that no Court except an Insolvency Court having jurisdiction could declare a transaction voidable under section 53 of the Provincial Insolvency Act. This is clear from the decision in *Mariappa Pillai v. Raman Chettiyar*(1), and the decision in *The Official Receiver, Coimbatore v. Palaniswami Chetti*(2). The latest decision, 48 Mad., 750, goes so fully into the question that it is unnecessary for us to do anything further than to refer to the decision as laying down the law on the subject so far as the Provincial Insolvency Act is concerned. Our attention was drawn to an unreported decision in S.A. No. 360 of 1916; but

(1) (1919) I.L.R., 42 Mad., 322.

(2) (1925) I.L.R., 48 Mad., 750.

this decision was dissented from in *Mariappa Pillai v. Raman Chettiyar*(1) and we are not prepared to follow it. The question therefore is whether the same principle has to be applied when the case falls under the Presidency Towns Insolvency Act.

OFFICIAL
ASSIGNEE,
BOMBAY
v.
SUNDARA
CHARI.

The main argument of Mr. Bhashyam Ayyangar is that in section 53 the concluding words are "be voidable as against the receiver and may be annulled by the Court," and section 54 also contains the words "be deemed fraudulent and void as against the receiver, and shall be annulled by the Court." Whereas in section 55 of the Presidency Towns Insolvency Act the words are "be void against the Official Assignee" and in section 56 the words are also "and void as against the Official Assignee." He argues that, as the words are different, the two sections 55 and 56 can only be declaratory leaving the jurisdiction unaffected thus enabling him to raise the question in all Courts when he wants to avoid a transaction specified in those two sections. He refers us to *Ramaswami Chettiar v. Mallappa Reddiar*(2), which is a Full Bench decision of this Court dealing with section 53 of the Transfer of Property Act where it was held that a representative suit was not necessary and the right was retained to any creditor if the case fell within the scope of that section and that the same principle has to be applied to a case under the Insolvency Act. We do not think that the omission of the words "may be annulled by the Court" in sections 55 and 56 makes any difference in dealing with the provisions of the Presidency Towns and Provincial Insolvency Acts. We cannot distinguish the two decisions 48 Mad. and 42 Mad. on this ground. The Presidency Towns Insolvency Act constitutes a

(1) (1919) I.L.R., 42 Mad., 322.

(2) (1920) I.L.R., 43 Mad., 760.

OFFICIAL
ASSIGNEE,
BOMBAY
v.
SUNDARA-
CHARI.

special tribunal or forum for the determination of questions arising under the Act. The Courts having jurisdiction in insolvency under this Act are the High Courts of Judicature at Fort William, Madras, Bombay and Rangoon and the Court of the Judicial Commissioner of Sindh. Section 4 says,

“All matters in respect of which jurisdiction is given by this Act shall be ordinarily transacted and disposed of by or under the direction of one of the Judges of the Court, and the Chief Justice or (Judicial Commissioner) shall from time to time assign a Judge for that purpose.”

Section 7 of the Act says—

“Subject to the provisions of this Act, the Court shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.”

We think that the language is clear and that when a special forum is constituted by a special Act, questions arising under that Act must, in the absence of anything to the contrary in the Act or any other enactment, be determined by the forum constituted by the Act, so that any question as to the voidability of a transaction in so far as it is raised by the Official Assignee under the special provisions of that Act has to be determined by the Court constituted by that Act which would have jurisdiction to determine that question. Sections 55 and 56, we may point out in this connexion, are special provisions relating to insolvency and it is only in insolvency that these transactions can be impeached as voidable, if they do not fall under section 53 of the Transfer of Property Act, so that a transaction not falling under the Transfer of Property Act can only be avoided by sections 55 and 56 of the Presidency Towns

Insolvency Act. It is therefore difficult to say that on principle there is any reason to draw any distinction between the provisions of the Provincial and the Presidency Towns Insolvency Acts in so far as questions falling exclusively within sections 55 and 56 of the Presidency Towns Act and sections 53 and 54 of the Provincial Act are concerned. This being so, we think that the Subordinate Judge had no jurisdiction to go into the question as to whether on the facts the transaction would be void under section 55. We think the correct procedure is for the Official Assignee to move the Bombay High Court under this section for an order. As we are of opinion that the Subordinate Judge has no jurisdiction to go into this question there can be no plea of *res judicata*, or any difficulty on the Official Assignee, though a party to the suit, moving the Bombay High Court.

OFFICIAL
ASSIGNEE,
BOMBAY
v.
SUNDARA-
CHARI.

In these circumstances, we think that the only course is to affirm the decree of the Subordinate Judge and to hold that the mortgage was executed for consideration and was not benami for the mortgagor, leaving it open to the Official Assignee to apply to the Bombay High Court to set it aside if he could show that the case falls within section 55. As the Subordinate Judge had no jurisdiction to go into that question we in appeal have equally no jurisdiction to give any opinion on the contention of the Advocate-General which may or may not be right.

The result is the appeal fails and is dismissed with costs to be paid by the Official Assignee out of the assets of the insolvent.

K.R.
