APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, and Mr. Justice Srinivasa Ayyangar.

THE OFFICIAL ASSIGNEE OF MADRAS (APPLICANT), APPELLANT,

1926, December 8.

v.

O.R.M.O.R.S. FIRM (GARNISHEE), RESPONDENT.*

Presidency Towns Insolvency Act (III of 1909), *sec.* 116—*Order of adjudication, based on certain acts of bankruptcy—Conclusiveness of the order as to character of the acts—Effect of order only as to acts furnishing grounds for adjudication—Order as to character of the acts, whether binding on transferees—Duty of Official Assignee to apply under the Act to set aside transfers, etc., comprised in the acts on which adjudication was based—Application by Official Assignee—Cause of action—Fraudulent preference—Conversion—Amendment.*

An order of adjudication, based on certain acts of the insolvent being regarded as acts of bankruptcy, is not conclusive as to the character of such acts in all its legal consequences; the decision as to the character of such acts, apart from its furnishing ground for adjudication as insolvent, is not binding on the parties affected thereby who have not had any opportunity of being heard in the matter; but the Official Assignee is bound to take the ordinary procedure prescribed by the Insolvency Act to set aside the fraudulent preferences and payments, if any, constituted by such acts on which the adjudication was founded.

The expression "duly made" in section 116 of the Presidency Towns Insolvency Act, construed.

Where an Official Assignee applied to recover an amount from a garnishee alleging a case of fraudulent preference but the facts proved showed a case of conversion, the Official Assignee was not entitled to amend his petition at a late stage, or to withdraw his application.

* Original Side Appeal No. 24 of 1926.

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Duty of Official Assignee, more than the lay public, in making such applications, to set out the exact grounds or cause of action properly and definitely, pointed out.

APPEAL from the judgment of Mr. Justice BEASLEY, passed in the exercise of the insolvency jurisdiction of the High Court in Application No. 197 of 1925 in Petition No. 316 of 1923.

The material facts appear from the judgment.

S. Doraiswami Ayyar for appellant.

Nugent Grant (with *B. C. Sankara Narayana*) for respondent.

JUDGMENT.

The Official Assignee of Madras who is the appellant in this case took out a garnishee application in the matter of the Insolvency of M. R. V. S. M. Doraiswami Chetti & Co., against the respondent firm, for an order declaring that a sum of Rs. 10,000 which belonged to the insolvents, came into the hands of the respondent firm and was a payment made by the insolvents when they were in insolvent circumstances and that the same was a fraudulent preference and asking for consequent reliefs.

Mr. Justice BEASLEY by whom the application was heard dismissed it with costs holding that what was proved by the Official Assignee at the hearing of the application could not possibly be held to constitute any payment by the insolvents by way of undue or fraudulent preference. The learned Judge also incidentally refused the application of the Official Assignee for amendment of the application or even the withdrawal of the application with liberty to make a fresh application. In brief the conclusion arrived at by the learned Judge was that the facts proved, established, if anything, only a conversion by the respondents of moneys belonging to the insolvents and that as there was no voluntary

payment by the insolvents, no question could possibly arise of any fraudulent preference. It may, to begin with, be observed that however summary such proceedings in insolvency may be and we might indeed say, because the proceedings are summary, it is incumbent on the Official Assignee making such applications to set out the exact ground or cause of action properly and definitely so as to give sufficient notice thereof to the other side. However much the vagueness of pleading by or on behalf of the lay public may be regarded as excusable, no similar reasons are available in the case of a law officer of the Crown like the Official Assignee.

Mr. S. Doraiswami Ayyar, the learned Counsel for the appellant, attempted to argue that the case really set up by the Official Assignee in the report on which the application was based was one of conversion, if not in the main, at least in the alternative. It is impossible to accede to such an argument. Apart altogether, from the terms of the notice of motion, the report of the Official Assignee leaves no doubt whatever that the case set up and sought to be made out by him was one exclusively of fraudulent preference. The report speaks of a member of the insolvent firm endorsing the hundies to the respondent firm ostensibly for collection and concludes by saying that the insolvents were great friends of the respondents, that the payment of the amount by the insolvents to the respondents was made at a time while the insolvents were heavily involved in debts and were unable to pay their debts in full, and that the payment was, therefore, a fraudulent preference and void against him. It has not been argued before us that, if the case set up by the Official Assignee should be regarded as one of fraudulent preference, the decision by the learned Judge was anything but right. The learned Counsel for the appellant did not argue that in the circumstances the learned Judge's order

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refusing any amendment or withdrawal of the petition especially at the stage when the case of both sides had been closed and also argued, could be regarded as wrong.

There was, however, a new point on which the case for the appellant was in the last resort strenuously pressed by his learned Counsel. The point was new, not only as not having been taken in the first Court before the learned Judge or even indicated in the grounds of appeal to this Court, but new also in the sense of its being entirely novel. We, however, allowed the point to be raised and argued having regard specially to its importance and the far reaching consequences of the correct view turning out to be as contended for on behalf of the Official Assignee.

The contention may be briefly set out as follows:— For an order of adjudication in insolvency some ground or grounds of insolvency have to be made out, and the order is based on such ground or grounds and the Official Assignee's title is by statute made to relate back to the date of the first of the acts of insolvency on which the order is founded. The adjudication of a person as a bankrupt affects his status and has been recognized to be a judgment *in rem.* As the adjudication itself is based on a decision with regard to the particular act or acts of insolvency, it follows that the adjudication comprises also the commission of the particular act or acts of bankruptcy and is binding on all the world including persons who are not parties to the order in the same manner and to the same extent as a judgment *in rem.* The order of adjudication therefore is as regards the particular act or acts of bankruptcy on which it is founded, an adjudication with regard to the commission thereof and is valid and binding on all the persons until set aside by any party interested.

The argument in this case was that the adjudication of the insolvent was based on the insolvent having committed an act of fraudulent preference with regard to the sum of Rs. 10,000 received by the garnishee, and that as the garnishee has not had the order of adjudication set aside, he is not entitled to be heard to argue that his receipt of the sum of Rs. 10,000 was not by way of fraudulent preference.

In the first place it must be observed that the act of a particular person when adjudged to be an act of bankruptcy has reference mainly to such act regarded as a ground for adjudication. As a person may hold several characters, so an act may also have several characters and when some act of the bankrupt is adjudged to be an act of bankruptcy it is in its character as a ground for adjudication and it does not necessarily follow that the adjudication extends to and comprises all the legal consequences in all the various aspects of the act. If such had been intended, the Insolvency Act would undoubtedly have provided for it.

It may further be observed that, if such consequences had been contemplated by the act, the sections which deal with the avoidance of voluntary transfers and fraudulent preferences and similar matters would have excluded from the necessity of such avoidance, by excepting the transfers, preferences, etc., which have already been made the ground of adjudication.

The result of the contention put forward by Mr. S. Duraiswami Ayyar would, in all cases where the adjudication is founded on alleged fraudulent transfers or preferences, be to adjudicate about such transfers and preferences finally and conclusively without even an opportunity to the parties thereby affected, to be heard in the matter. No doubt if it is clear from the statute that such a result was intended, the mere fact that the

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provision is unreasonable or unjust could not possibly affect the question. But we are not satisfied that there is any such clear indication in the Act. On the other hand section 116 which deals with the conclusiveness of the order of adjudication is in the following terms:—

"(1) A copy of the official gazette containing any notice inserted in pursuance of this Act shall be evidence of the facts stated in the notice.

(2) A copy of the official gazette containing any notice of an order of adjudication shall be conclusive evidence of the order having been duly made, and of its date."

It is significant that according to this section the conclusiveness is stated to be only with regard to the order having been duly made and of its date, and that as regards the other facts the notification is said to be only evidence of such facts.

It has not been proved in this case that the notification published in the official gazette comprised the ground of adjudication or the acts of bankruptcy, and even if it did, it follows that such notification would only have been evidence of the facts, not conclusive evidence.

The learned counsel for the appellant relied strongly on the decision of *Hawkins and another* v. *Duche and Sons and another*(1). That case is clearly distinguishable from the present because the order of adjudication in that case referred to the partnership, and the section speaks of the notification being conclusive evidence of the order of adjudication having been duly made. The observations of the learned Judge in the matter are clearly *obiter* and the learned Judge expresses himself not without doubt.

Mr. S. Duraiswami Ayyar also referred to the case of *Ex parte Learoyd, In re Foulds*(2). All that was decided in

(1) (1921) 37 T.L.R., 748. (2) (1878) L.R., 10 Ch.D., 3.

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that case was that an order of adjudication in bankruptcy was conclusive till set aside not only as to the order but also as to the acts of bankruptcy on which it was based. The judgment in that case cannot be regarded as deciding any question with regard to the necessity or otherwise of the Official Assignee or trustee seeking to set aside preferential alienations and payments made by the insolvent although the order of adjudication might have been founded thereon.

The learned counsel for the appellant also referred to the case of *Ex parte Tucker, In re Tucker*(1). That case refers only to the operation of the date of the act of bankruptcy on which the adjudication purports to be founded and the right of third parties affected thereby to have the same set aside. The date to which the title of the Official Assignee relates back, is a matter dealt with by the statute itself and therefore the case cannot be regarded as having any bearing on the question now before us.

The whole question really resolves itself into whether the legislature by the use of the expression "duly made" in section 116 contemplated not merely that the acts of bankruptcy on which the order of adjudication is founded should be regarded as acts of bankruptcy but also further to give such findings the legal consequences of a decision against the parties who have not had any opportunity of being heard in the matter. We consider that such an interpretation and such far-reaching consequences are not warranted by the mere use of the expression "duly made." We think it more reasonable to suppose that it is only in their character as acts of bankruptcy that the adjudication is said to be founded on them and that if the Official Assignee should, in

(1) (1879) L.R., 12 Ch. D., 308.

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such cases, also desire to obtain a decision against third parties, he should adopt the ordinary procedure indicated in the Act.

We have, therefore, come to the conclusion that the order of the learned Judge was right and the appeal fails and is dismissed with costs.

V. Varadaraja Mudaliar, Attorney for Appellant.

V. Krishnan, Attorney for Respondent.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Reilly.

1926, September 8.

SWAMINATHA ODAYAR (DEFENDANT), APPELLANT,

v.

SUBBARAMA AYYAR AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Transfer of Property Act (*IV of* 1882), *sec.* 55 (4) (*b*)—*Vendor's lien—Vendee executing a promissory note to a third party for the whole or part of purchase-money—Vendor's lien, whether extinguished—" Contract to the contrary," meaning of—Limitation Act* (*IX of* 1908), *sec.* 19—*Acknowledgment —Deposition—Acknowledgment, whether must be express or can be implied from facts and circumstances or as a matter of law.*

Where, at the instance of a vendor of immovable property, a promissory note was executed by the vendee to another person for the whole or part of the purchase-money, and both the vendor and the holder of the note sued to recover such amount personally as well as by sale of the property,

Held, that the holder of the note was the only person competent to sue on the note, whether he was beneficially entitled to the note or was a benamidar for the vendor:

* Appeal Suit No. 169 of 1924.