

APPELLATE CIVIL—FULL BENCH.

Before Sir Owen Beasley, Kt., Chief Justice, Mr. Justice
Cormish and Mr. Justice Pandrang Row.

1935,
April 24.

KAKU CHENCHURAMANA REDDI (PETITIONER),
APPELLANT,

v.

PALAPU ARUNACHALAM (RESPONDENT), RESPONDENT.*

Provincial Insolvency Act (V of 1920), sec. 9 (1) (c)—Period of three months mentioned in—If, a period of limitation or a condition—General Clauses Act (X of 1897), sec. 10.

On 29th June 1931, the re-opening day after the Court's vacation, a petition for adjudication was presented basing the same on an act of insolvency alleged to have occurred on 28th February 1931. The three months' period expired on 28th May 1931, when the Court was closed.

Held, that the period of three months fixed in section 9 (1) (c) of the Provincial Insolvency Act is not a period of limitation but is a condition to an adjudication, and accordingly an act of insolvency which has occurred more than three months prior to the presentation of the petition is not available as a ground of adjudication.

Narayana Ayyar v. Official Receiver, South Malabar, Calicut, (1933) 39 L.W. 449, overruled. Ex parte Games. In re Bamford, (1879) 12 Ch. D. 314, followed.

APPEAL against the order of the District Court of Nellore, dated 27th September 1932, and made in Insolvency Petition No. 20 of 1931.

K. Kuppuswami for appellant.

P. Chandra Reddi for respondent.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.

BEASLEY C.J.—This civil miscellaneous appeal raises an important and interesting question of

*Appeal Against Order No. 101 of 1933.

law. The appellant here presented a petition praying that the respondent should be adjudicated an insolvent under the Provincial Insolvency Act. The chief act of insolvency alleged in the petition was the execution of a sale deed on 28th February 1931 in favour of a close relative of the respondent. This act of insolvency admittedly occurred more than three months before the date of the presentation of the petition which was dated 29th June 1931. The three months' period ended on 28th May 1931, but that was during the lower Court's vacation and the petition was accordingly presented on the re-opening day. The question is whether the period of three months stated in section 9 (1) (c) of the Provincial Insolvency Act is a period of limitation or a condition precedent. The learned District Judge rightly states that this is a question which is not easy of solution. He, however, felt himself bound by the judgment of SPENCER J. in *Aiyapparaju v. Venkatakrishnaya*(1), and held that the three months stated is a condition precedent to the filing of a petition and is not a period of limitation. The section in question, namely, section 9 of the Provincial Insolvency Act reads as follows :—

“(1) A creditor shall not be entitled to present an insolvency petition against a debtor unless . . . (c) the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition.”

It was contended here and in the lower Court by the petitioner that sub-clause (c) provides a period of three months from the occurrence of the act of insolvency relied upon within which the petitioner can present a petition and therefore

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(1) (1922) 44 M.L.J. 303.

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that period is a period of limitation. Much reliance was placed by the appellant's counsel on a decision of KRISHNAN PANDALAI J. in *Narayana Ayyar v. Official Receiver, South Malabar, Calicut*(1). There, the respondent, the Official Receiver, filed a petition under sections 4, 53 and 54 of the Provincial Insolvency Act against the appellant to declare his mortgage invalid as a fraudulent preference. The mortgage was executed on 13th March 1924 and the insolvency petition was presented on 16th June 1924 on the re-opening of the Court after vacation, i.e., more than three months from the date of the mortgage. The Subordinate Judge held that section 10 of the General Clauses Act applied to extend the time given by section 54. The District Judge held that there was no warrant for such extension as the three months mentioned in section 54 is not a period of limitation. In second appeal, KRISHNAN PANDALAI J. held: (i) that section 10 of the General Clauses Act would not, by the proviso to that section, apply to provincial insolvency proceedings after the amendment of the Limitation Act in 1922 by the insertion of section 29 (2); (ii) that section 4 of the Limitation Act applies though the effect is the same as if section 10 of the General Clauses Act applied; (iii) that an insolvency petition which by section 9 (1) (c) of the Act should be presented within three months of the act of insolvency—in that case the mortgage—would, if three months expired as it did there during the vacation of the Court, be validly presented on the re-opening of the Court; (iv) that the period of three months mentioned in section 54 is a period

of limitation and not a condition precedent incapable of extension and a valid presentation under section 9 of the Act is valid for the purposes of the whole Act ; and (v) that the appellant's mortgage was hence made within three months before the presentation of the petition and therefore it had to be considered whether in other respects it amounted to a fraudulent preference. With great respect to the learned Judge, I am unable to agree with his conclusion that section 54 provides a period of limitation. A transfer which is a fraudulent preference is also an act of insolvency upon which a petition for adjudication can be founded and section 54 is, as regards the period of three months, in my view, quite definite. It means that, if, within three months from the date of the transfer, a petition for adjudication is presented upon which the debtor is subsequently adjudicated an insolvent, the transfer is liable to be impeached as a fraudulent preference. As such, it is also an act of insolvency. A debtor making such a transfer knows that he is, within three months from the date of his transfer, liable to have a petition in insolvency presented against him ; the transferee-creditor knows that he is running a risk within those three months of having the transfer set aside thereafter as a fraudulent preference under the Insolvency Act ; and I see no warrant for supposing that after the expiry of the three months the debtor and the creditor are to be subject any longer to their respective risks. As soon as the three months' period had expired, the transaction ceases to be impeachable under the Insolvency Act, and in my view therefore the transfer ceases on that day to be an act of

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insolvency. The object of the Act is to prevent a debtor on the eve of his insolvency from intentionally preferring a creditor to his other creditors. The Act specifies a period of three months. KRISHNAN PANDALAI J., however, is of the opinion that it can be more than three months, namely, that it can be some period just short of three months, *plus* the vacation of the Court in whose jurisdiction the debtor is. He thinks that any other view would lead to an impossible result because in certain cases it would cut down the period of three months from the date of insolvency beyond which period no insolvency petition could be presented. He regards this as unreasonable. I do not see that it is as unreasonable as extending the period beyond that stated in the Act which would have the result of extending the risk of the debtor and of the transferee-creditor beyond that stated in section 54. The conclusion reached by KRISHNAN PANDALAI J. can only be reached by looking forward from the date of the act of insolvency and giving a creditor three months' time from that date in which to present his insolvency petition. On the other hand, I am of the view that section 9 (1) (c) is a condition precedent to the filing of the petition, that is to say, the petitioning creditor must, on the day when he presents his petition, have in view some act of insolvency which the debtor has committed within the preceding three months. He has to see on that date, and on that only, what acts of insolvency are available to him ; and he cannot make use of any act of insolvency which has been committed outside the period of three months, as that ceased to be an act of insolvency.

The English case of *Ex parte Games. In re Bamford*(1) appears to me to be in point. There, THESIGER L.J. on page 324 says :

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“With regard to the other point, I will assume with *Mr. Winslow* that the execution of the deed was an act of bankruptcy and might have been set aside as an act of bankruptcy if any creditor had availed himself of it in sufficient time. But no creditor did avail himself of it, and the time for doing so has passed by. What, then, is the position of things under the bankruptcy law? It appears to me that no consequence whatever can follow from an act of bankruptcy of which the creditors might have availed themselves if they had applied in time, but of which they did not avail themselves as an act of bankruptcy within the time limited by the *Bankruptcy Act*. This point was really decided by *Lord Justice Giffard* in *Allen v. Bonnett*(2), where he said (at page 582): ‘It appears to me to follow from this section. . . that where there is a deed which cannot be set aside under the statute of *Elizabeth*, or generally as fraudulent—including in the term a fraudulent preference—but solely and only as being an act of bankruptcy, the lapse of twelve months before any fiat issues validates that which would otherwise be impeachable; and that, if a given transaction of this description cannot be treated as a ground for adjudication, it cannot be treated as having the consequences of an act of bankruptcy in any sense or for any purpose.’”

The view there expressed is that the act of the debtor and his transaction are validated as soon as the period stated has expired. Taking a fraudulent preference as an act of insolvency, for the reasons I have already stated, section 9 (1) (c) does not provide a period of limitation. If it does not do so in the case of one act of insolvency, it cannot do so in relation to any act of insolvency. I am not impressed with another argument addressed to us, namely, that, where a person is under any Act in force entitled to do something, that person is not to be prevented from exercising that

(1) (1879) 12 Ch. D. 314.

(2) (1870) L.R. 5 Ch. 577.

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act by, as in this case, the closing of the Court for the vacation, because, in my opinion, general principles such as this cannot alter an act which by statute is defined as an act of insolvency, namely, a fraudulent preference of a creditor within three months of the presentation of an insolvency petition. For these reasons, I am of the opinion that the lower Court's decision was correct, and this civil miscellaneous appeal must be dismissed with costs.

CORNISH J.

CORNISH J.—I agree. I think the language of the Act itself makes it clear that section 9 fixes the conditions and not a period of limitation to a creditor's right to present an insolvency petition. Section 7 provides that, "subject to the conditions specified in this Act", if a debtor commits an act of insolvency, an insolvency petition may be presented by a creditor and the Court may on such petition adjudicate the debtor insolvent. The conditions are specified in section 9, which says, in sub-section 1 (c), that a creditor shall not be entitled to present a petition against a debtor

"unless the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition".

So that, according to the terms of the Act, the debtor's act of insolvency is the foundation of the creditor's right to present a petition to have the debtor adjudicated; and unless the act of insolvency took place within three months before the presentation of the petition it will not serve to support the petition. This is the effect of the ruling in *Ex parte Games*. *In re Bamford*(1). Again, in *In re Maund*. *Ex parte Maund*(2), where it was sought to amend a petition by adding

(1) (1879) 12 Ch. D. 314.

(2) [1895] I.Q.B. 194.

creditors after more than three months from the date of the act of bankruptcy, it was held that the amendment could not be made, because the Court had no power to make a person a petitioning creditor on any other ground than was prescribed by the Act itself, viz., by section 6 (c) of the Bankruptcy Act, 1883. This section, it may be observed, is similar to section 9 (1) (c) of the Provincial Insolvency Act. Then, if, as these authorities decide, an act of insolvency ceases after the lapse of three months to be a valid ground of adjudication, it cannot be made so by section 10 of the General Clauses Act. This section adopts and declares the equitable rule that, when a fixed period is given for doing a certain act and the party bound to do it within that time is prevented by the act of the Court itself in being closed on the crucial date, the party may do the act on the Court's re-opening day. But no period is fixed by the Insolvency Act for presenting an insolvency petition. What the Act provides is that a creditor shall not be entitled to present a petition grounded upon an act of insolvency which occurred more than three months before, which is quite a different thing from saying that a petition may be presented within three months from, the commission of an act of insolvency.

PANDRANG ROW J.—I agree with my Lord the CHIEF JUSTICE.

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G.R.
