

OFFICIAL
ASSIGNEE,
MADRAS
v.
SUEYA-
KANTHAMMAL.
LEACH C.J.

Court's order, I am of opinion that they are liable to be committed for contempt. In view of the fact that the learned Judge did not pass an order against them, I think, however, that they may be given a short period to vacate the premises. My learned brother agrees with the views I have expressed and we pass this order: The respondents will vacate the premises known as No. 45 Guruvappa Chetty Street, Chintadripet, Madras, by Monday, 9th May 1938, failing which they will be committed to prison for a fortnight for contempt of Court. The Official Assignee is entitled to his costs, which we fix at Rs. 100.

G.R.

APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and Mr. Justice
Madhavan Nair.*

1938,
April 4.

V. R. KM. KUMARAPPA CHETTIAR (PETITIONER),
PETITIONER,

v.

K. M. V. R. CHIDAMBARAM CHETTIAR AND ANOTHER
(RESPONDENTS), RESPONDENTS.*

*Provincial Insolvency Act (V of 1920), sec. 35—Adjudication
order passed without jurisdiction—Annulment of—Power
of Court.*

Section 35 of the Provincial Insolvency Act empowers a Judge sitting in insolvency to annul an adjudication when it is clear that on the materials before the Court at the time the order of adjudication was passed it had no jurisdiction to pass the order. The section leaves the Court no discretion in the matter.

PETITION under section 75 of the Provincial Insolvency Act, praying the High Court to revise the decree of

* Civil Revision Petition No. 1297 of 1937.

the District Court of Ramnad at Madura in Civil Miscellaneous Appeal No. 39 of 1936, preferred against the order of the Court of the Subordinate Judge of Devakottai, dated 23rd March 1936 and made in Interlocutory Application No. 338 of 1935 in Insolvency Petition No. 40 of 1934.

V. Ramaswami Ayyar for petitioner.

V. Rajagopala Ayyar for first respondent.

Second respondent was not represented.

The JUDGMENT of the Court was delivered by LEACH C.J.—On 22nd January 1935, P. L. S. P. L. Palaniappa Chettiar, the second respondent, was adjudicated an insolvent on the petition of K. M. V. R. Chidambaram Chettiar, the first respondent, by the Subordinate Judge of Devakottai. The adjudication was based on a transfer of immovable property, dated 23rd February 1934, which was said to constitute a fraudulent preference. The petition for adjudication was filed on 3rd July 1934, that is, more than three months after the transaction. Therefore the transaction, even if it constituted a fraudulent preference, could not be made the basis of an insolvency petition by reason of section 9 (1) (c) of the Provincial Insolvency Act. The reason given for filing the petition beyond three months was that the Court was closed for the summer vacation and it was not possible to file it before 3rd July 1934, but the fact the Court was closed made no difference as a Full Bench of this Court has pointed out: *Chenchuramana v. Arunachalam*(1). That was a case where the petition was filed on 29th June 1931, the re-opening day after the Court's vacation and the act of insolvency was a deed of sale said to have been executed fraudulently on 28th February 1931. The Court considered that the period of three months fixed by

(1) (1935) I.L.R., 58 Mad. 794 (F.B.).

KUMARAPPA section 9 (1) (c) of the Provincial Insolvency Act was
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 LEACH C.J. to an adjudication and consequently where the alleged
 act of insolvency had taken place more than three
 months prior to the presentation of the petition it
 could not be set up as a ground for adjudication.

Before the second respondent was adjudicated by the Subordinate Judge of Devakottai, an adjudication order had been passed against him, by the District Court of Tharrawady of Burma and his estate in Burma was being administered in insolvency by that Court. On 7th November 1935, the present petitioner applied to the Subordinate Judge of Devakottai for an order cancelling the adjudication. The application was made under section 35 of the Provincial Insolvency Act which provides that where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full¹, the Court shall, on the application of the debtor, or of any other person interested, by order in writing, annul the adjudication. The petitioner is a creditor and his object in seeking the annulment of the adjudication by the Subordinate Judge of Devakottai was to ensure that the proceedings in Burma should not be interfered with. The learned Subordinate Judge granted the application and annulled the adjudication in view of the decision in *Chenchuramana v. Arunachalam*(1). From that order there was an appeal to the District Judge who considered that the Subordinate Judge was wrong in annulling the adjudication; his reason being that the order adjudicating the insolvent might have been wrong, and was wrong in the light of *Chenchuramana v. Arunachalam*(1), but there

(1) (1935) I.L.R. 58 Mad. 794 (F.B.).

was no appeal and, therefore, it ought not to be disturbed. Accordingly he reversed the order of the Subordinate Judge. The order of the District Judge now comes before us on an application for revision.

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In the first instance the application came before BURN J., but it was placed before a Bench because the learned Judge was doubtful whether section 35 of the Provincial Insolvency Act gave authority to a Judge sitting in insolvency to revise, on the ground of want of jurisdiction, his own order or an order of a predecessor adjudicating a person insolvent. If on the materials before the Court at the time the order of adjudication was passed it is clear that the Court had no jurisdiction to pass the order, section 35 clearly empowers the Court to annul the adjudication. It is true that the Provincial Insolvency Act does not confer upon the Court the wide powers given by section 8 of the Presidency-towns Insolvency Act which allows the Court to review, rescind or vary any order made by it under its insolvency jurisdiction, but section 35 is sufficient for the purpose of this case and leaves the Court no discretion in the matter. The corresponding section in the Presidency-towns Insolvency Act is section 21 in which the word " may " is used, and therefore gives the Court a discretion.

What we have to ascertain in this case is whether the Court acted without jurisdiction when it passed the order of adjudication. The answer must be that it did. More than three months had elapsed from the date of the alleged fraudulent transfer to the date of the presentation of the petition and these facts were before the Court. There being no act of insolvency on which an adjudication order could be passed the Court had no jurisdiction to adjudicate.

A point which was not taken in the lower Courts has been taken before us and we will deal with it.

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LEACH C.J. When the case was in the list for hearing on 18th March 1938 it was postponed at the instance of the Advocate for the respondent as he wished to set up that there were other grounds for adjudication than the alleged fraudulent preference. All the necessary papers are now before us and it does appear that in paragraph 5 of the petition the first respondent did allege that the second respondent had, with a view to defeat and delay his creditors, secreted his jewels and movable properties and had "absented himself from the reach of his creditors." But in the next paragraph there was the definite allegation that the second respondent had given a fraudulent preference in favour of one P. L. P. P. V. R. Veerappa Chettiar on 23rd February 1934, and in paragraph 7 it was stated;

"The said transfer is an act of insolvency and as this Hon'ble Court was closed in May and June this application is filed to-day."

The prayer for adjudication then followed. Paragraph 7 clearly shows that the act of insolvency relied on was the alleged fraudulent preference, but as the adjudication order was passed by consent, the learned Advocate for the respondent says that it should be deemed to be based also on the allegations in paragraph 5 of the petition. He is in difficulty here, because in the counter-affidavit which his client filed in opposition to the petition under section 35 of the Provincial Insolvency Act his client said (paragraph 8):—

"I submit that as the respondent in Insolvency Petition No. 40 of 1934 has been adjudicated as an insolvent upon a definite act of insolvency and upon the admission of the respondent, it is not now open to the present applicant to question or set aside that order."

On his own showing the adjudication was upon one definite act of insolvency. The only definite act of

insolvency was the fraudulent preference set out in paragraph 6 of the petition for adjudication. More-
over, not a word was said in the Subordinate Judge's Court about other acts of insolvency and in the memorandum of appeal to the District Court it was not alleged that the order of the Subordinate Judge's Court was bad because there were other acts of insolvency. In these circumstances we are unable to regard the adjudication as being based on other grounds than that of a fraudulent preference. The adjudication being on that ground alone and the transfer attacked having taken place more than three months before the presentation of the petition, the Court had, as I have already said, no jurisdiction to pass the order of adjudication.

For these reasons the petition will be allowed and the order of the District Court set aside. It follows that the adjudication is annulled; but this order will, of course, not affect the insolvency proceedings in Burma. The petitioner is entitled to his costs here and in the Court below.

A.S.V.

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