

ORIGINAL CIVIL.

*Before Mr. Justice Chari.*IN THE MATTER OF THE ESTATE OF
P. A. MOHAMED GANNY, DECEASED.*

1927

Mar. 9.

Insolvency, administration in—Setting aside a transfer made by administrator—Presidency-Towns Insolvency Act (III of 1909), section 110—Action under sections 36 (5) and 56 to be at the instance of the Official Assignee—Sections 36, 55 and 56 whether applicable to administration in insolvency—Insolvency Court whether competent to declare void transfers in administration in insolvency—Remedy of creditor on Official Assignee refusing to take action to set aside transfer by insolvent—Section 86.

Held, that transfers made by the administrator of the estate which was administered in insolvency can be set aside only under section 110 of the Presidency Towns Insolvency Act.

Held, further, that such transfers cannot be set aside by the Insolvency Court under section 7, which is not applicable to administration in insolvency and that the only remedy is by way of a regular suit.

Held, further, that action under sections 36 (5) and 56 of the Act must be taken by the Official Assignee, no creditor being competent to act.

Held, that if the Official Assignee refuses to move to have the transfers set aside the creditor's relief is by way of appeal to the Insolvency Court under section 86 and not by way of an application for leave to apply to have the transfer set aside.

Scemle :—Sections 36, 55 and 56 of the Presidency Towns Insolvency Act are not applicable to administration in insolvency.

Ex-parte Official Receiver re Gould, 19 Q.B.D. 92 ; *In re Surajmal*, 26 C.W.N. 803 ; *Kolhapore v. Port Commissioners*, 4 Ran. 157 ; *Re Hewitt*, 15 Q.B.D. 159 ; *Sitaram v. Haribax*, 30 C.W.N. 914 ; *The Mercantile Bank of India v. The Official Assignee*, 39 Mad. 350—referred to.

Halker—for the petitioning creditor.

CHARI, J.—The matter before me for disposal is an application by one S.P.S.T.M. Myappa Chettyar for leave to apply to this Court to set aside a sale deed. A perusal of the proceedings shows that the petitioning creditor has been extremely ill-advised and has from the very beginning misconceived his remedies. The facts are as follows : P. A. Mohamed Ganny died

* Insolvency Case No. 92 of 1925.

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in September 1923. One Abdul Rahman obtained letters of administration to his estate. On the 20th May 1925, by which time it may be reasonably assumed that the estate had been fully administered, the petitioning creditor filed an application to this Court for the administration of the estate of the deceased in insolvency. To support an application for this purpose it is unnecessary to allege any act of insolvency and it is sufficient if the Court is satisfied that it is reasonably probable that the estate of the deceased is insufficient to meet the debts of the deceased. The petitioning creditor, however, alleges an act of insolvency in his application and strangely the act alleged is not the act of the deceased, who stands in the position of the insolvent, but a transfer of immoveable property by the administrator, presumably in the course of the administration. The object of the application is perfectly obvious and it is not to get the assets left by the deceased rateably distributed since the assets had by that time disappeared but to get this particular transfer of property dated the 23rd March 1925 set aside. I cannot imagine, for reasons which I shall shortly give, a more absurd course than the one pursued by the petitioning creditor, a procedure which is entirely ineffective for the purpose he had in view. The proper thing for him to do is to avoid the transfer under section 90 of the Probate and Administration Act which was then in force, if the transfer was effected without leave of the Court, and if it was effected with such leave but the proceeds had been misapplied, to file a suit for maladministration against the administrator joining therein his sureties. However that may be, on the 7th of July 1925 an order was passed by this Court for the administration of the estate of the deceased in insolvency. On the 3rd of November 1925 the petitioning creditor applied for the examination of two persons

under section 36 of the Presidency-Towns Insolvency Act. That application ought to have been rejected as section 36 of the Act does not apply to cases where the estate of a deceased person is being administered in insolvency. (So held in England in respect of sections 27 and 125 of the Bankruptcy Act of 1883, corresponding to sections 36, 108 and 109 of the Presidency-Towns Insolvency Act. *Re Hewitt* (1) and see *Kolhapore v. Port Commissioners* (2). See also as to the weight to be attached to the English rulings in these cases *The Mercantile Bank of India, Ltd. v. The Official Assignee, Madras* (3). The Insolvency Registrar did not notice the distinction between an ordinary insolvency and the administration of the estate of a deceased person in insolvency and issued summons to the persons mentioned in the application. Certain witnesses were as a matter of fact examined. The advocate of the petitioning creditor then asked the Official Assignee to take steps to set aside the transfer under section 56 of the Act. The Official Assignee after careful consideration refused to do so by a letter dated 3rd January 1927. The Official Assignee concludes that letter by saying: "It is open to your client to take proceedings himself." This means nothing and cannot give the petitioning creditor a right which the law has not given him. On the 12th January 1927 the petitioning creditor filed an application to the Court to annul the sale dated the 23rd of March 1925. That application is headed as being made under sections 56 and 36 of the Act. Under neither section is it open to a creditor to file such an application. Section 36 (5) specifically provides that the Court may act "on the application of the Official Assignee" while section 56 makes the payments and transfers referred to in that

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(1) 15 Q.B.D. 159.

(2) (1926) 4 Ran. 157.

(3) (1916) 39 Mad. 350.

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section "fraudulent and void as against the Official Assignee" and clearly contemplates the avoidance of such transfers and payments by the Official Assignee [see *In re Surajmal* (4) and *Sitaram v. Haribax* (5)]. On my pointing out to the learned advocate that such an application does not lie, he withdrew the same and in view probably of an obiter contained in the judgment of Mr. Justice Greaves in *Surajmal's* case files the present application praying the Court to grant him leave to apply for getting the sale dated the 23rd March 1925 set aside.

There is more than one objection to the entertain- ment of this application and each of them is fatal. Firstly, though there are no direct Indian rulings on the point, it is a matter of extreme doubt whether sections 36, 55 and 56 of the Act apply to cases where the estate of a deceased is being administered in insol- vency. There are two English rulings which show that sections 36 and 55 of the Act are inapplicable [*Re Hewitt* (1) and *Ex parte Official Receiver re Gould* (6)] and by parity of reasoning section 56 is equally inapplicable. Secondly, both sections 55 and 56 of the Act refer to the avoidance of payments and transfers made by the insolvent himself, who, if there is any insolvent at all in such cases, must be deemed to be P. A. Mohamed Ganny, the deceased. They have no application to a transfer made by a person other than the insolvent. Moreover there is a special section, 110 of the Act, dealing with transfers by legal representatives, obviously because the other sections are clearly inapplicable. In cases of transfers or payment by the legal representative of a deceased, the first clause of section 110 makes such

(4) 26 C.W.N. 803.

(5) 30 C.W.N. 914.

(6) 19 Q.B.D. 92.

representative liable to the Official Assignee when the payment or transfer has been made after notice of presentation of application to administer the estate in insolvency. The second clause of the section provides that "save as aforesaid (*i.e.* in the first clause) nothing in section 108 or section 109 or this section (*i.e.* section 110) shall invalidate any payment made, act or thing done in good faith by the legal representative". It may be assumed, though the section is also capable of a different construction, that the remedies open to the Official Assignee or a creditor in the case of *mala fide* transfers or payments are left unaffected by that section. I now come to the third and most formidable difficulty in the way of the petitioner. Assuming that it is open to the Official Assignee or a creditor to avoid the sale under one or other of the sections of the Act, under what provision of law has the Insolvency Court power to adjudicate in the matter? The only provision of law which gives the Insolvency Court jurisdiction to decide on questions arising between the Official Assignee (or a creditor of the insolvent) and a stranger to the insolvency is section 7 of the Act. A full bench of this Court has held that that section does not apply to cases where the estate of a deceased person is administered in insolvency. It therefore follows that whatever rights the Official Assignee or a creditor may have must be enforced by a regular suit and that this Court, as an Insolvency Court, has no jurisdiction to adjudicate on the question.

As regards the point whether, if section 56 is applicable, a creditor on the Official Assignee's refusal to take action, can with the leave of the Court apply to set aside a payment or transfer, I am clearly of opinion that a creditor cannot even with such leave, make such an application. The point did not arise in the case decided by Mr. Justice Greaves. He merely said that

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even if such an application lies, there was nothing in that case to show that the Official Assignee had refused to take action. My conclusion is based on the following consideration. A voluntary transfer of property, e.g., a gift to wife or child and a voluntary payment to a particular creditor are not *ab initio* illegal or invalid. On the occurring of insolvency, such payments and transfers, in certain cases, are made *void against the Official Assignee*. They are therefore valid and operative till avoided by the Official Assignee and the option of avoiding the transfer is given to the Official Assignee. If the Court entertains an application by a creditor to set aside such transfers, whether with or without the leave of Court, it is, in effect, delegating to him the right given by the Act to the Official Assignee. This, in my opinion, the Court has no power to do. The creditor is not however without any remedy in such cases. As soon as the Official Assignee refused to take action, it was open to the creditor to appeal to the Court against that decision under section 86 of the Act. The Court could then have reversed or modified his decision and compelled him to take action, if necessary.

I may add that if such an appeal had been preferred, I would in this case have confirmed the Official Assignee's decision. He could not, as I have held above, have moved the Insolvency Court to set aside the sale and he moreover come to his decision after a careful consideration of all the aspects of the case.

The application is therefore dismissed.