APPELLATE CIVIL.

Before Sir Guy Rutledge, Kt., K.C., Chief Justice, and Mr. Justice Brown.

1927

Feb. 29.

THE OFFICIAL ASSIGNEE AND TWO OTHERS
v.
N.P.A.K. CHETTYAR FIRM.*

Presidency-Towns Insolvency Act (III of 1909), sections 17, 52 (2) (a) 56—Transactions of insolvent before his discharge, with bona fide dealers when binding on Official Assignee—Fraudulent preference, burden of proof of.

In 1912 **S** was adjudicated an insolvent. He did not obtain any discharge and went on doing business in partnership and in speculating in landed property. The partnership was dissolved in 1922 and the 2nd and 3rd appellants filed a suit against **S** in June 1923 claiming a large sum as due to them in respect of the partnership. They also obtained an attachment before judgment in July 1923 on certain immoveable properties of **S**. These properties were mortgaged to the respondents who subsequently by an agreement of sale dated 27th April 1923 became purchasers of the said properties in satisfaction of their debts, the agreement was registered on 15th August 1923 and two days later the respondents obtained a registered conveyance of the properties. On 4th October 1923, **S** was again adjudicated insolvent. The respondents claimed the properties free from any claim by the Official Assignee and the other appellants.

Held, that a transaction between an undischarged insolvent and a third party who in good faith without knowledge of the insolvency and before the intervention of the Official Assignee has completed it giving full consideration for what he purports to buy from the insolvent, is binding on the Official Assignee. *Held*, also that on the facts of the case there was no fraudulent preference in favour of the respondents, the agreement being the result of pressure on their part, without any collusion, and that the onus of proof of fraud lies on the person who alleges it.

Alimahmad Abdul Hussein v. *Vadilal Devchand*, (1919) 43 Bom. 890 ; *Chote Lal* v. *Kedar Nath*, (1924) 46 All. 565; *Cohen* v. *Mitchell*, [1890] 25 Q.B.D. 262 ; *Dasarathy Sinha* v. *Mahamulya Ash*, (1920) 47 Cal. 961 ; *Nripendra Nath Sahu* v. *Asutosh Ghose*, (1914) 19 C.W.N. 157—*followed*. *Ma Phaw* v. *Maung Ba Thaw*, 4 Ran. 125 ; *In re New Land Development Association and Gray*, [1892] II Ch.D. 138—*distinguished*.

S. N. Sen—for Appellants.
Leach—for Respondents.

---

* Civil Miscellaneous Appeal No. 244 of 1925, from the Original Side in Insolvency Case No. 203 of 1923.

1927

THE OFFICIAL ASSIGNEE AND TWO OTHERS v. N.P.A.K. CHETTYAR FIRM.

The facts of the case are set out in the judgment dated the 23rd November 1925 of the Original Side which was delivered by—

CUNLIFFE, J.—This is a petition within the Insolvency jurisdiction of this Court put forward in the following circumstances :—

M. A. Salam was first adjudicated insolvent in Rangoon in the year 1912. His liabilities were then stated to have been Rs. 12,000. Shortly after this adjudication he entered into a business in partnership with others for the purpose of taking up and carrying out Government Supply Contracts. He put no capital to this business ; but it is said, that from the very first year he derived large profits from his share in the concern. He stated on oath that shortly after entering this business he paid all his creditors in full, but that in fact he never applied for his discharge. He appears to have expended large amounts on a somewhat curious combination of running a stable of racing ponies and gifts to charity. In addition to these activities he commenced from the year 1920 to speculate in real property. He bought town lots and town houses, and in all the transactions which he undertook he made his purchases in the name of his wife Zainab Bi Bi, a purdanashin lady. In almost all of these speculations the money for each purchase was borrowed from a Chetty Firm, but the interest on any loan was paid not in the name of the wife but in Salam's name from his own current banking account. At the end of 1922, or the beginning of 1923, a somewhat ambitious venture was entered upon by the purchase and subsequent rebuilding of Nos. 46 and 47, Mogul Street ; but, about this time Salam appears to have become on bad terms with his partners and indeed to have become also somewhat lower in his financial positions.

Rumours of a possible future crash came to the care of the members of the Chetty Firm of N.P.A.K. who had advanced various sums previously to Salam and who were the lenders in the 46 and 47, Mogul Street deal. The actual mortgage deed with reference to these premises was executed on the 25th of November 1921. Having regard to the suspicions entertained by the Chetty Firm, a meeting was held between the Firm's representative, Salam, Zainab Bi Bi and legal advisers, and an additional agreement was entered into that, in consideration of further loans, Salam and his wife agreed to transfer to the Chetty Firm the title deeds and legal property in Nos. 46 and 47, Mogul Street. On the 17th of August a formal conveyance was made by Salam and Zainab Bi Bi of 46 and 47, Mogul Street in favour of the Chetty Firm in accordance with the agreement at the April interview. In October 1923, Salam again became insolvent.

In these circumstances the N.P.A.K. Firm petitioned the Court for a declaration claiming the following reliefs :—

(1) a declaration that Zainab Bi Bi purchased in her own name from her own moneys or alternatively that the husband purchased the properties in her name with her money for her benefit and advancement and thereby she has become the owner of all the said properties ;

(2) that the series of transactions above referred to are binding on the interest of the said Zainab Bi Bi ; on the interest of M. A. Salam and on the Official Assignee ;

(3) that the series of transactions having been entered into by the insolvent as one of the parties thereto, the said transactions are valid and operative even against the insolvent and do not offend any of the provisions of the Insolvency Act ;

1927

THE OFFICIAL ASSIGNEE AND TWO OTHERS v. N.P.A.K. CHETTYAR FIRM.

(4) for a declaration that the Official Assignee has no interest or claim against the properties conveyed to the petitioners.

There were three respondents to the petition : (i) Hajee Rahimatulla Hajee Abdulla, (ii) Hajee Tar Mohamed Tayoob and (iii) the Official Assignee. The first two respondents intervened and represented by counsel were heard, having filed a joint written statement. But the Official Assignee was not represented before the Court.

Whilst denying most of the averments in the petition and denying that the petitioners are entitled to the declarations for which they pray, the intervenors contended that the properties were benami in Zainab Bi Bi's name and the insolvent in most of these dealings was in fact, the beneficial owner of the properties and that the said properties must be handed over to the Official Assignee as assignee of the insolvent's estate.

The first point, therefore, which has to be decided is, whose property in law were the particular houses in Mogul Street ? I have come to the conclusion that the beneficial ownership of these properties was always in the insolvent. It is true that they were placed in his wife's name. It is true that he took the precaution to obtain a power of attorney from her to act on her behalf ; but the interest on the mortgage loans of this and on the previous transactions was, in the main, paid out of the insolvent's current account. The evidence of the representative of the Chetty Firm convinced me that, throughout, the Chetties relied upon Salam to carry out his bargain to keep up his payments and finally to repay the different sums advanced. The eyes of the Chetties were always kept upon the manner in which Salam's financial affairs were prospering or the reverse.

An attempt was made to show that the foundation of the whole of these transactions came from an advance of Rs. 12,000 made by Zainab Bi Bi to her husband in the form of cash said to have been entrusted to her by a brother who had lived in her house in Rangoon but who afterwards went to Calcutta and there died. I reject this evidence which was put forward by Salam, in my view, for the purpose of misleading the Court. I am strengthened in my opinion that all these properties were purchased by Salam under his wife's name for his own use when I consider that each one was highly speculative, and that Salam was well-known as a man devoted to speculation and gambling.

What legal effect then derives from the agreement made in April and executed in August upon these two valuable properties in respect of the Official Assignee and any other creditor? It is a well-known principle of Bankruptcy Law that both in the United Kingdom and in British India, *bonâ fide* transfers of property before the actual insolvency takes place, provided, they are for valuable consideration and provided further, as far as British India is concerned, that, at the time of the transfer, no notice of the presentation of any insolvency petition, either by or against the debtor, has been brought to the notice of those who benefit by such transfers are valid. If fraud is alleged the onus of proving the fraud lie heavily upon those persons who put the suggestion forward.

It was stated by the learned Judges in the well-known case of the *Official Assignee of Madras* v. *T. B. Mehta & Sons* (1), that to bring a transaction within section 56 of the Presidency-Towns Insolvency Act (a section with which we are concerned in this case) the

(1) 42 Mad. 510.

1927

THE OFFICIAL ASSIGNEE AND TWO OTHERS v. N.P.A.K. CHETTYAR FIRM.

transaction must have been entered into with the dominant view of preferring a particular creditor. There are similar sections which need not here be referred to in detail in the English Bankruptcy Acts, and it is quite clear to me that if on examination one finds that the particular creditor who has received the benefit under the transaction which is sought to be set aside, has, on his own initiative, commenced pressing and forcing the insolvent to complete and fulfil his obligation, applying a form of duress, than it can never be said that such a position of affairs is brought about by the insolvent with a view to preferring that particular creditor. On the actual facts of this case I am convinced that a preference to the Chetty Firm or indeed to any creditor was the last thing which would have entered Salam's mind. The whole of his evidence showed me that he was struggling to make a profit by the sale of Nos. 46 and 47, Mogul Street after they had been remodelled and re-equipped, and he was striving as strongly as he was able to raise money up till the very last to free these properties from incumbrance and to carry on still further his career in speculation.

A further argument was put forward on behalf of the interveners by Mr. Sen that, on the strength of two English cases, to wit *In re New Land Development Association and Gray* (1) and also another case, *Official Receiver* v. *Cooke* (2) the corresponding rule in the British Bankuptcy Acts has been held not to apply in analogous circumstances to transactions involving real property. The first decision was one of the late Mr. Justice Chitty's and was a variation of the rule laid down in the case of *Cohen* v. *Mitchell* (3). The rule laid down in that case was stated by Lord Esher, M.R.,

(1) [1892] II Ch.D. 138. (2) [1906] II Ch.D. 661.
(3) [1890] 25 Q.B.D. 262.

on a principle deduced from the earlier authorities on this point. It runs as follows :—

"Until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him *bonâ fide* and for value in respect of his after acquired property whether with or without knowledge of the bankruptcy are valid against the trustee."

Chitty, J., replying on the strict wording of the Act distinguished in *In re New Land Development Association and Gray* between "property" and "real property" mainly as the Court of Appeal, subsequently suggested on the ground that a title to such real property ought not to be forced upon a purchaser on the principles of equity because, in all probability, the title would be a defective one and bound to be attacked by litigation. It would be repugnant in the view of the Court of Appeal on principles respected by the Courts of Chancery to force such a title upon any purchaser.

Neville, J., in the second case of the *Official Receiver* v. *Cooke*, (1), followed the ruling in *In re New Land Development Association and Gray* (2), as confirmed by the Court of Appeal but with some doubt and he refused to exclude, on the basis of real property, personal estate consisting of leaseholds.

I have been informed by learned counsel that this doctrine of exclusion of real property laid down in the cases I have mentioned has been rectified in a recent amendment to the Bankruptcy Acts in Great Britain ; but I regret that I have not been able to verify the reference from my note. Be that as it may, however, I do not think that such an exclusion was ever contemplated or even given effect to by a Court in British India.

(1) [1906] II Ch.D. 661. (2) [1892] II Ch.D. 138.

1927

THE OFFICIAL ASSIGNEE AND TWO OTHERS v. N.P.A.K. CHETTYAR FIRM.

In the case of *Alimahmad Abdul Hussein Vohora* v. *Vadilal Devchand Parikh* (1), the general principles of transferance for value and *bonâ fide* before the intervention of an Official Assignee were given effect to without comment in relation to both moveable and immoveable property.

Various other cases could be cited but I am convinced, as I have said, that the principle of the exclusion of real property in England has never applied in British India probably because the deed of transfer of immoveable property is not regarded and has never been so regarded in British India with the amount of sanctity which the old Courts of Chancery did so regard such transactions in days gone by.

Accordingly I shall give effect to the petitioners' prayer as follows :—

(1) that the series of transactions in suit are binding on the Official Assignee and the interveners in favour of the petitioners ;

(2) that the series of transactions in suit are valid and operative against the insolvent and did not offend any material section of the Presidency-Towns Insolvency Act ; and

(3) that the Official Assignee has no interest or claim against the properties conveyed to the petitioners, nor have the interveners.

The petitioners are entitled to their cost of this hearing.

The Official Assignee and the creditors preferred an appeal. The judgment of the Appellate Bench was delivered by—

RUTLEDGE, C.J., AND BROWN, J.—This is an appeal from the Original Side of this Court in its Insolvency

(1) (1919) 43 Bom. 890.

jurisdiction in which it held that certain transactions, including a conveyance of certain immoveable property to the respondents by the insolvent and his wife, were valid as against the Official Assignee. There is a cross-objection that the trial Court was wrong in holding that insolvent's wife Zainab Bee Bee was a benamidar of the property in dispute.

The insolvent M. A. Salam was first adjudicated an insolvent in 1912 and the balance of his assets was about Rs. 12,000. It is clear that he never obtained any discharge for this insolvency. He alleges that he paid his creditors in full but of this there is no corroboration, and one would have expected, if he had, that he would have applied for and obtained his discharge. He entered into partnership with the 2nd and 3rd appellants carrying on business as Government supply contractors and he seems to have made some money in this business. After the Great War he seems to have engaged in speculating in real property. Purchases were made in his wife's name with money for the most part borrowed from Chettyar firms. Each transaction was outside the partnership business. The partnership was dissolved on the 16th November 1922 and the 2nd and 3rd appellants filed, on the 26th June 1923, Civil Regular No. 337 of 1923, claiming a large amount as due to them from Salam, and, on the 6th July 1923 obtained attachment before judgment of, *inter alia*, the properties with which we are concerned in the present suit. The respondents held registered mortgages over the properties, Nos. 46, 47 and 56, Mogul Street, and had entered into an agreement of sale dated the 27th April 1923 whereby they became the purchasers of these properties the consideration being the amounts owing on the mortgaged properties, plus interest, plus unsecured debt, owing to the respondent firm.

1927

THE OFFICIAL ASSIGNEE AND TWO OTHERS v. N.P.A.K. CHETTYAR FIRM.

RUTLEDGE, C.J., AND BROWN, J.

It is admitted that this agreement of sale required registration and that it was only registered on the 15th August 1923, or some five weeks after the attachment before judgment. And, on the 17th August 1923, a sale deed of the properties mentioned in the agreement of sale was duly executed and registered. By Civil Miscellaneous Case No. 187 of 1923 the respondent firm applied for removal of attachment on the 2nd October 1923, and, on the 4th October 1923, Salam was adjudicated insolvent on his own petition. We may note that the 2nd and 3rd appellants had also applied for his adjudication.

It has been contended for the appellants that the agreement of sale not having been registered at the time of the attachment cannot effect the validity of the attachment. On this point, in our opinion, section 47 of the Indian Registration Act is conclusive for a registered document speaks from the time of its execution and not from the time of its registration.

It has been further urged on behalf of the appellants that the conveyance of these properties to the respondent firm constituted a fraudulent preference and as such void under section 56 of the Presidency-Towns Insolvency Act. No doubt the conveyance of the 17th August 1923 was within three months of the insolvency but the agreement of sale of the 27th April 1923, which is the important document in the case, was over five months before the insolvency, and we agree with the learned trial Judge that this agreement was the result of pressure from the respondent firm and not due to collusion on the part of the insolvent with a view to defeat and defraud his late partners or other creditors.

We agree with the Calcutta High Court that under this section the onus of proof rests on the

party alleging that the transfer is fraudulent [see *Nripendra Nath Sahu* v. *Asutosh Ghose* (1)].

Another question arises for determination in this case. As we have seen Salam was adjudicated an insolvent in 1912 and never received his discharge under that insolvency, and it was argued on behalf of the appellants that, by section 17 of the Presidency-Towns Insolvency Act, the property of the insolvent wherever situated shall vest in the Official Assignee, and that, by section 52 (2) (*a*), the property of the insolvent shall comprise, *inter alia*, of all such property as may be acquired by or devolve on him before his discharge. The words of the sections in their natural meaning are perfectly clear, but, as the learned trial Judge observes, the English Courts in a long line of cases, which have been summed up in the leading case of *Cohen* v. *Mitchell* (2) lay down that until the trustee intervenes all transactions by a bankrupt after his bankruptcy with any person dealing with him *bonâ fide* and for value in respect of his after-acquired property whether with or without knowledge of the bankruptcy are valid against the trustee.

It is true that in the *New Land Development Association* case (3), the Court of Appeal upheld the decision of Mr. Justice Chitty that this rule did not apply to real property. We observe, however, that, by the English Bankruptcy Act, 1914, section 47 (1), the Legislature has adopted the rule in *Cohen* v. *Mitchell* (2) and applied it to real as well as to personal property. The rule has been adopted by most of the High Courts in India. No doubt the decisions were under the Insolvency Act of 1848, such as Indian Law Reports 8 Calcutta, page 556 and Indian Law Reports 16 Bombay, page 452. Indian Law Reports

(1) (1914) 19 C.W.N. 157. (2) [1890] 25 Q.B.D. 262.
(3) [1892] II Ch.D 138.

1927

THE OFFICIAL ASSIGNEE AND TWO OTHERS v. N.P.A.K. CHETTYAR FIRM.

RUTLEDGE, C.J., AND BROWN, J.

43 Bombay, page 890, 47 Calcutta, page 961 and 46 Allahabad, page 565, adopt the rule. In the Bombay case a Bench and in the Calcutta case the present Chief Justice, then Mr. Justice Rankin, held that the rule applied to immoveable as well as to moveable property. In the case of *Ma Phaw* v. *Maung Ba Thaw* (1), a Bench of this Court held that, by reason of the word "forthwith" in section 28 (4) of the Provincial Insolvency Act, the principle of *Cohen* v. *Mitchell* (2) could not be applied to that case. They also held that even if the principle were applied it would not avail the insolvent as the transaction seem to be neither *bonâ fide* nor for value. The word "forthwith" does not occur in the Presidency-Towns Insolvency Act; so the present case can be easily distinguished from *Ma Phaw*'s case. We confess that we are reluctant to read into the Act something which is neither express nor arises by necessary implication. We admit that it would be inequitable to render void all transactions between an undischarged insolvent and third parties who, in good faith without knowledge of the insolvency, have given full consideration for what they purported to purchase from him. We can also see that the extension of the rule in this country, where fraud is rampant and very easy to conceal, may, in many cases, result in creditors being deprived of their just rights.

In view, however, of the weight and unanimity of decisions of the various High Courts of India applying the rule, we do not feel justified in refusing to follow it. On this point also we concur with the learned trial Judge.

One point only remains to be considered and that is that the learned trial Judge was wrong in holding

(1) (1926) 4 Ran. 125.

that Zainab Bee Bee was merely a benamidar on behalf of the insolvent. We have carefully considered the evidence on this point and we are satisfied for the reasons given in the order appealed from that the decision of the learned trial Judge on this point was correct. The appeal, although in views of our decision on the other points, this question does not arise, is accordingly dismissed with costs. The case was a heavy one and we allow 20 gold mohurs per day for two days.

APPELLATE CIVIL.

Before Sir Guy Rutledge, Kt., K.C., Chief Justice, and Mr. Justice Brown.

MAMOOJEE MOOSAJEE AND OTHERS
v.
N. M. MEERA MOIDEEN BROS.

Presidency-Towns Insolvency Act (III of 1909), section 29 (4), Rule 154 of the Insolvency Rules of the High Court—Court cannot alter substance of composition scheme—Court must reject scheme, even if approved by majority of creditors, on public grounds.

Held, that according to Rule 154 of the Insolvency Rules of the High Court, it has no power to vary the substance of a composition scheme submitted to it for approval or rejection. The Court has therefore no power to substitute the Official Assignee for the trustee proposed in the scheme for its administration.

Held, further, that the interests of the creditors and their wishes are not the sole concern of the Court in questions of approving schemes of composition; the Court ought to regard the interests of the public and of commercial morality. If the insolvent's conduct is fraudulent or grounds exist for framing charges against him, a composition scheme ought not to be approved.

In re Beer, [1913] 1 K.B. 628; *Ex-parte Reed*, 17 Q.B.D. 244—*followed.*

Dantra—for Appellants.

Patel and *Sen*—for Respondents.

RUTLEDGE, C.J., AND BROWN, J.—This is an appeal from an order of the Original Side of this Court

---

* Civil Miscellaneous Appeal No. 210 of 1925.