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HYANDA MEAH v. ANAMALE CHETTYAR.

MYA BU, J.

in the proceedings before the appellate Court which passed the order of acquittal and, therefore, I hold that there is no sufficient ground for interference by this Court in revision with the order of acquittal passed by the appellate Court.

The application is dismissed.

APPELLATE CIVIL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Leach.

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Aug. 13.

MA HTWE *v.* MAUNG PU (RECEIVER).*

Insolvency—Order of adjudication based on act of fraudulent preference—Receiver's application to set aside transfer—Transferee's right to show transaction not fraudulent preference—Receiver's application to annul transfer for want of consideration—Rule in Ex parte Learoyd*—Provincial Insolvency Act (V of 1920), ss. 53, 54.*

An order of adjudication under the provisions of the Provincial Insolvency Act based on an act of the insolvent which the Court holds to be one of fraudulent preference does not preclude the transferee from showing that the transaction did not constitute a fraudulent preference when the Receiver seeks to set aside the transfer under s. 54 of the Act. The order of adjudication does not of itself operate to set aside the transaction. Likewise it is open to the Receiver to prove that there was no consideration and to have the transaction avoided under s. 53 and not under s. 54. Having regard to important differences in the wording of the English Act and the Provincial Insolvency Act the rule in *Ex parte Learoyd*, 10 Ch.D. 3 cannot be applied in a case under the Indian Act.

Official Assignee of Madras v. *O.R.M.O.R.S. Firm*, I.L.R. 50 Mad. 541—*referred to.*

S. Datta for the appellant.

N. M. Cowasjee for the receiver.

LEACH, J.—Ma Dwe Hla, the sister of the appellant, was adjudicated an insolvent on the 26th June 1931 under the provisions of the Provincial Insolvency Act. A week before, she had transferred most of her property to the appellant and this was made the basis

* * Civil Misc. Appeals Nos. 43 and 45 of 1936 from the order of the District Court of Hanthawaddy in Civil Misc. Case No. 33 of 1934.

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of the application. There were two petitions, one by the S.R.M.A.R. Chettyar Firm and the other by S.S.K.R. Karupan Chettyar. In both of these petitions it was alleged that the transaction was made without consideration, with intent to defraud the insolvent's creditors. In the alternative it was pleaded that the transaction amounted to a fraudulent preference. The learned District Judge, without recording a specific finding on the question whether there was consideration for the transfer or not, held that it constituted an act of fraudulent preference and, accordingly, passed an order of adjudication. The insolvent appealed unsuccessfully. This Court held that the present appellant was a creditor and agreed that the transaction constituted a fraudulent preference.

The order of adjudication did not in itself operate to set aside the transaction, and it was necessary for the receiver in insolvency to apply to the Court for an order of annulment, which he did. He did not, however, confine his claim to the order on the ground that there had been a fraudulent preference. This was his second plea. In the first place he asked that the transfer be set aside on the ground that no consideration had passed. The learned District Judge again found that the transaction constituted a fraudulent preference and, on this ground, passed an order of annulment. The appellant has appealed against that finding, and there is a cross-appeal by the receiver, who contends that the learned District Judge should have held that the transaction was not a fraudulent preference, but a transfer without consideration in fraud of the creditors. The cross appeal has, of course, been filed with the object of preventing the appellant proving as a creditor should she endeavour to do so.

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There can be no doubt that the transfer in favour of the appellant was fraudulent. The evidence shows that the insolvent did transfer to the appellant substantially all her property. This was done at a time when the insolvent was heavily indebted and was being pressed by her creditors. On the 12th June 1931, a fortnight before the transfer, S.S.K.R. Karupan Chettyar wrote demanding payment of what was due to him, threatening to file a suit if no settlement were made within five days. Three days after she had conveyed most of her assets to the appellant, the insolvent caused a letter to be written to her creditors, stating that " owing to depression in paddy price " she was not in a position to pay anything to them, apart from interest. A more palpable fraud it is hard to imagine. Ma Htwe's appeal must, therefore, be dismissed.

The cross appeal raises a more difficult question, as the receiver desires to go behind the judgment on which the order of adjudication was based. It is conceded on behalf of the receiver that the order of adjudication constitutes a judgment *in rem*, but it is said that he is at liberty to show that the transfer was without consideration, without affecting the order of adjudication. In *Ex parte Learoyd* (1) it was held that, by virtue of sections 10 and 11 of the Bankruptcy Act, 1869, an adjudication of bankruptcy is, so long as it stands, conclusive as against a third person, and that the act of bankruptcy, on which the adjudication was professedly founded, was in fact committed, and the title of the trustee relates back to that act of bankruptcy. The question whether the rule in *Ex parte Learoyd* (1) could be applied to a case under the Presidency-

(1) (1879) 10 Ch.D. 3.

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Towns Insolvency Act, has been discussed. The Madras High Court in *The Official Assignee of Madras* v. *O.R.M.O.R.S. Firm* (1) took the view that the rule does not apply, but this decision has been criticized (2). There are, however, important differences in the Provincial Insolvency Act and in my opinion the rule in *Ex parte Learoyd* (3) cannot be applied in a case under that Act. Section 53, which deals with transfers without consideration within two years of the insolvency, states that such a transfer shall be voidable (not void) as against the receiver and may be annulled by the Court. Section 54, which deals with fraudulent preferences, provides that a transfer of this nature shall be annulled by the Court. Section 54 (*a*) then goes on to say that the petition for annulment may be made by the receiver, or, with the leave of the Court, by any creditor who has proved his debt and who satisfies the Court that the receiver has been requested and has refused to make such a petition. Further proceedings are, therefore, necessary under the Provincial Insolvency Act. It is not disputed that the appellant had a right to show, if she could, that the transaction did not constitute a fraudulent preference, and it is, therefore difficult to see why the receiver should be precluded from showing that the transaction was something even worse than a fraudulent preference. I am of opinion that the receiver is entitled to show, if he can, that there was no consideration and to have the transaction avoided under section 53 and not under section 54. But it does not follow that he has established his case.

The deed under which the insolvent's properties were conveyed to the appellant states that the

(1) (1927) I.L.R. 50 Mad. 541. (2) See Sir Dinshah Mulla's "Law of Insolvency" p. 533.

(3) (1879) 10 Ch.D. 3.

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consideration was a total sum of Rs. 6,325, money owing by the insolvent to the appellant. The appellant precluded herself from appearing and leading evidence because she failed to comply with an order for payment of costs. She did not appear when the case was fixed for hearing, but was allowed to come in later and give evidence on payment of the costs thrown away. She did not pay these costs, and, therefore, the case was decided *ex parte*. It is, however, for the receiver to prove that there was no consideration, and the only witness whom he called on this point was Karupan Chettyar, who stated that the appellant was never in a position to lend a large sum of money to the insolvent. His evidence, however, shows that she had credit with Chettyars, that her husband owned about 240 acres of land and that she had 65 acres of her own. I am not prepared to hold, in the face of this evidence, that the insolvent owed nothing to the appellant, especially in view of the decision of this Court in the appeal arising out of the order of adjudication that the appellant was in fact a creditor. The cross appeal will, therefore, also be dismissed. This, however, does not mean that the appellant is entitled to rank as a creditor for the amount stated in the deed of transfer. She will have to prove that the money was in fact due to her, and the receiver will have an opportunity of challenging her proof.

GOODMAN ROBERTS, C.J.—I have read the judgment of my learned brother with care, and agree with it.