APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

1935

Dec. 19.

OFFICIAL ASSIGNEE, RANGOON

v.

SUBALA DASI.*

*Insolvency—Transfer by insolvent within two years of insolvency—Official Assignee's application to set aside transfer—Onus of proof—Extent of onus—Two elements of the transaction—*Bonâ fides *and valuable consideration—Official Assignee disproving either element—Presidency-Towns Insolvency Act (III of 1909), s. 55.*

Under the provisions of s. 55 of the Presidency-Towns Insolvency Act where the Official Assignee seeks to set aside a transfer made by the insolvent the onus of proof lies upon him. But if the Official Assignee proves that the transfer was made within two years of the insolvency and also that it was made either not *bonâ fide* or without valuable consideration he is entitled to obtain an order setting aside the transfer. In order that a transfer may be excluded from the operation of the section there are two essential elements in the transaction that must be proved (1) that it was made *bonâ fide*, and (2) that it was made for valuable consideration. If the Official Assignee has disproved one of these essential elements the transfer does not contain both the elements, and therefore the transfer falls to be set aside under s. 55.

Pope v. *Official Assignee, Rangoon*, I.L.R. 12 Ran. 105—*referred to.*

K. C. Sanyal for the appellant.

Doctor for the respondent.

PAGE, C.J.—In this case the Official Assignee of the estate of A. C. Basu, who was adjudicated insolvent on the 1st November, 1932, claims the right to set aside two transfers made by the insolvent to Subala Dasi *alias* Golapala, (1) a mortgage of a house and premises at Thingangyun dated the 31st January, 1931, and (2) a deed of sale of the same premises of the 31st May, 1932. The learned trial Judge, Braund J., dismissed the application upon the ground that he was not satisfied that the Official Assignee had discharged the burden that lay upon him of proving

* Civil Misc. Appeal No. 65 of 1935 from the order of this Court on the Original Side in Insolvency Case No. 224 of 1932.

1935

OFFICIAL ASSIGNEE, RANGOON v. SUBALA DASI.

PAGE, C.J.

that the transfers, or either of them, were not made *bonâ fide* and for valuable consideration.

Now, section 55 of the Presidency-Towns Insolvency Act runs as follows:

"Any transfer of property, not being a transfer made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, shall, if the transferer is adjudged insolvent within two years after the date of the transfer, be void against the official assignee."

Under that section it is provided that a transfer by the insolvent within two years of the insolvency is void as against the Official Assignee representing the estate of the insolvent. It is further provided, however, that certain transfers shall be excluded from the ambit of the section: (1) those made before and in consideration of marriage, and (2) those made to a purchaser or incumbrancer in good faith and for valuable consideration.

Now, it is common ground and obvious that if the *onus* lay upon the transferee it would have been incumbent upon her to prove that each of these transfers was made both *bonâ fide* and for valuable consideration, these being the two elements requisite for its exclusion from the section. I have on several occasions stated that in my opinion the *onus* ought to be laid under the section upon the transferee because, as soon as the Official Assignee has proved that the transfer under consideration was made within two years of the insolvency, it appears to me plain that it should be made incumbent upon the transferee to prove those facts which will entitle him to claim that the transfer to him was not within the section. It is now settled, however, by two decisions of the Judicial Committee of the Privy Council that under section 55 as it stands the *onus* lies upon the Official Assignee and not upon the transferee.

Now, to what extent does the *onus* lie upon the Official Assignee? The learned trial Judge has stated that in his opinion it was necessary for the Official Assignee to prove that a transfer made within two years of the insolvency was made either not *bonâ fide* or without valuable consideration. I respectfully agree with the view expressed by Braund J. as to the construction of section 55. As I have stated in order that such a transfer should be excluded from the operation of the section there are two essential elements in the transaction that must be proved (1) that it was made *bonâ fide*, and (2) that it was made for valuable consideration. In my opinion if the Official Assignee proves that the transfer was made within two years of the insolvency and also that it was made either not *bonâ fide or* without valuable consideration he is entitled to obtain an order setting aside the transfer, upon the ground that it has been proved that the transfer under consideration does not contain both the elements that are requisite for its validity as against him, and therefore that it falls to be set aside under section 55. In my opinion the construction which we are disposed to put upon section 55 is in accordance with the ruling of the Judicial Committee of the Privy Council in *Pope* v. *Official Assignee, Rangoon* (1). In that case it was common ground, both in the Court of Appeal at Rangoon and also before the Privy Council, that valuable consideration had been given by the transferee for the transfer, and if the construction which is urged before us on behalf of the respondent is correct it would follow that the sole question which was tried and determined in the Appellate Court and in the Privy Council, namely, whether

(1) (1933) I.L.R. 12 Ran. 105.

1935

OFFICIAL ASSIGNEE, RANGOON v. SUBALA DASI.

PAGE, C.J.

the transferee took *bonâ fide*, would have been immaterial, and it would have been a work of supererogation to decide it. On the other hand, if the view that we take of the meaning and effect of section 55 is correct it would follow that although in *Pope* v. *Official Assignee, Rangoon* (1) it was common ground that one of the two elements, namely consideration, was present the Official Assignee would be entitled to succeed if he proved that the transfer had not been taken by the transferee *bonâ fide*. Indeed, if the construction for which the respondent contends were to be accepted a fraudulent debtor would have no difficulty in evading the provisions of section 55, because all that he need do would be to make a transfer of his property to an infant relative, and then file forthwith his petition to be adjudicated insolvent. That could never have been the intention of the Legislature, and in my opinion it is not the meaning and effect of section 55.

Now, how does the matter stand upon the facts? The decision of Braund J. at the trial proceeded upon the footing that the story presented on behalf of the respondent was in substance correct, and I respectfully agree that if the respondent's story could be accepted the result would be that the Official Assignee had failed to substantiate his claim that the transfers were void under section 55. I cannot persuade myself, however, with all due deference, that the story narrated by the witnesses who gave evidence for the respondent is credible. In my opinion to any one familiar with the customs and habits of the community to which the parties in this suit belong it must appear wellnigh inconceiv-

(1) (1933) I.L.R. 12 Ran. 105.

able that the persons concerned should have acted in the way that it is alleged that they did.

[His Lordship then set out the respondent's case, discussed the evidence, and held that the story of the respondent that she had money and jewellery which was handed over to the insolvent and that in satisfaction of this debt she obtained a conveyance of the insolvent's property was incredible. Further, in his Lordship's opinion, the evidence adduced by the Official Assignee was reliable and destroyed the case presented on behalf of the respondent. His Lordship continued :]

Now, the *onus* lies upon the Official Assignee to prove either that the transfers in dispute were not *bonâ fide* or that they were made without consideration. In the present case there has been evidence produced on both sides, and therefore the question of *onus* is not of so much importance. Upon a consideration of the evidence adduced on the one side and on the other in my opinion the Official Assignee has proved that there was no valuable consideration given by the respondent for either of the transfers which were made to her, and therefore, in my opinion, both the transfers must be set aside as against the Official Assignee.

For these reasons the appeal is allowed, the order from which the appeal is presented set aside, and an order will be passed setting aside the mortgage of the 31st January, 1931, and the sale deed of the 31st May, 1932, as against the Official Assignee. The Official Assignee is entitled to his costs in both Courts. At the hearing before Braund J. the appellant is entitled to costs, advocate's fee

1935

OFFICIAL ASSIGNEE, RANGOON v. SUBALA DASI.

PAGE, C.J.

20 gold mohurs, and as regards the costs of the appeal the advocate's fee is fixed at ten gold mohurs.

MYA BU, J.—As it appears to me highly desirable to state our views as to the interpretation to be placed on the rule regarding the burden of proof laid down by their Lordships of the Privy Council in *Official Assignee of the Estate of Cheah Soo Tuan* and *Khoo Saw Cheow* (1) in cases under section 53 of the Provincial Insolvency Act, or section 55 of the Presidency-Towns Insolvency Act, I venture to add a few words to the already exhaustive judgment of my Lord the Chief Justice. In that case their Lordships ruled that the *onus* was upon the Official Assignee to prove that a conveyance which he is seeking to set aside was not made in good faith and for valuable consideration. Before this ruling was brought to the notice of this Court, this Court, in common with some of the other High Courts in India, had been proceeding upon the footing that the *onus* with reference to both the elements, namely, valuable consideration and good faith, lay on the transferee. It was upon that footing that the Privy Council case of *Official Receiver* v. *P.L.K.M.R.M. Chettyar Firm* (2) was dealt with by this Court as well as by the Court of first instance. In that case the Court of first instance, having laid the *onus* upon the transferee, held upon the evidence that the transferee failed to discharge the burden that lay upon him, while this Court on appeal held that upon the evidence the transferee had discharged that burden. In the course of their judgment their Lordships of the Privy Council observed

"the view taken in the District Court in this case as to the burden of proof was wrong. The *onus* was wrongly laid on the respondents; it was on the Official Receiver."

(1) L.R. (1931) A.C. 67. (2) (1930) I.L.R. 9 Ran. 170.

It is, however, not easy to ascertain from these two cases whether the *onus* lay on the Official Receiver with reference to both the elements or with reference to only one of such elements, or, in other words, whether the Official Assignee in order to succeed must establish the absence of both or one only of such elements. Facility for the ascertainment of this question is, however, supplied by the later case of *Pope* v. *Official Assignee, Rangoon* (1), in which only one of the two elements, namely good faith, was in question, consideration not being in dispute. It was stated in the judgment of Lord Thankerton, after setting out the provisions of section 55 of the Presidency-Towns Insolvency Act, that:

> "The sole question in the case is whether the deed of sale was a transfer 'in good faith and for valuable consideration' within the meaning of section 55, and it is clearly for the respondent to establish the contrary in order to succeed in his application."

citing *Official Receiver* v. *P.L.K.M.R.M. Chettyar Firm* (2). The case of *Pope* v. *Official Assignee, Rangoon* (1) therefore shows that in spite of the way in which the rule as to burden of proof is stated in *Official Assignee of the Estate of Cheah Soo Tuan* and *Khoo Saw Cheow* (3) and in *Official Receiver* v. *P.L.K.M.R.M. Chettyar Firm* (2) proof of the absence of one of the elements was enough to support the Official Assignee's case, because if it were not so and the Official Assignee must establish the absence of both the elements it would not have been necessary in *Pope*'s case, where consideration was not disputed, to consider evidence or materials upon which the question of good faith turned. Moreover, a perusal of either

(1) (1933) I.L.R. 12 Ran. 105. (2) (1930) I.L.R. 9 Ran. 170.
(3) L.R. (1931) A.C. 67.

1935

OFFICIAL ASSIGNEE, RANGOON v. SURAJA DASI.

MYA BU, J.

section 53 of the Provincial Insolvency Act or section 55 of the Presidency-Towns Insolvency Act appears to be sufficient to fill one with the impression that whereas for the validity of the transaction two ingredients, namely good faith and valuable consideration, must exist, the absence of one would be sufficient to invalidate the transaction. These sections declare that a transfer is voidable at the instance of the Official Assignee if the transferor is adjudged insolvent within two years of the date of the transfer, but when the transfer is one made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, then it is not so voidable. If absence of both good faith and valuable consideration is required to render a transaction voidable, then a transaction such as a gift, which according to the operative part of the section referred to above must be void and not saved as one of the transfers mentioned in the section, will have to be allowed to stand if good faith of the transferee could not be challenged, and, as pointed out by my Lord the Chief Justice, a gift to a minor relative made on the eve of insolvency will be immune from being assailed on behalf of the general body of creditors when obviously such a transaction should not be allowed to stand. Again, if in addition to proof of absence of good faith proof of absence of consideration is needed to render the transaction void, it would be amazing to find the Legislature leaving a wide room for a person on the eve of insolvency to make an indefeasible transfer of his property for valuable consideration to a person who takes with the full knowledge that the transferor was acting with intent to defraud his creditors or to defeat or delay their claims. For all these reasons I am at one with my Lord the

Chief Justice that the rule laid down by the Privy Council under consideration does not mean that the Official Assignee must discharge the burden of proving absence of both good faith and valuable consideration, but he must discharge the burden of proving the absence only of one of these elements, in order to succeed.

As regards the facts it is abundantly clear that the Official Assignee has not only discharged the burden of proving absence of consideration but also proved absence of good faith. The evidence adduced on behalf of the Official Assignee and the great mass of evidence adduced on behalf of the transferee can be properly appraised only if there is steadily borne in mind the highly improbable and unlikely basis of the story told on behalf of the transferee as to her possession of means for making the loans or advances in consequence of which the mortgage of January 1931 came into being. If a young Bengalee Hindu widow was possessed of jewellery and the sum of money which she is alleged to have possessed in 1926 it is impossible to believe that she would have thought of leaving her home and coming over to Rangoon apparently for no settled purpose. Immediately after her arrival she fell into the hands of men who do not appear to have any scruples in their dealings with women of loose character. As against this highly improbable story as to how she happened to be in possession of jewellery and money out of which she could make the loans and advances there is evidence on behalf of the Official Assignee to show that she was but an ordinary dancing girl who had been here long before 1926, and whose means of livelihood was nothing but as a dancing girl and by entertaining young men. This evidence is quite sufficient to show that she could not have

1935

OFFICIAL ASSIGNEE, RANGOON v. SUBALA DASI.

MYA BU, J.

been a person in such a position as to be in possession of means to enable her to make the loans and advances which she alleged. This story acquires much support from the description of the life that this young woman, clearly, was leading in connection with Chatterjee and Basu shortly after her alleged arrival here in 1926, and bearing in mind the most unlikely basis upon which her story is built and the probability supporting the story told in the evidence adduced on behalf of the Official Assignee the conclusion that the transaction was without consideration is fully justified. As soon as we find that the transaction was without valuable consideration an irresistible inference will arise from this fact as well as from the relationship of the parties, whether respectably married to each other or not will not make the slightest difference, that the transaction was brought about in collusion with one another. And therefore the practical effect of the finding that there was no consideration is, in the circumstances of this case, sufficient to raise the inference, and such an inference to my mind is absolutely irresistible, that the transaction was brought about with intent to defraud or delay the creditors of A. C. Basu who subsequently became insolvent and who was at the time in very bad financial circumstances.

In the result I concur in the judgment of my Lord the Chief Justice.