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(1965) 01 KL CK 0003

High Court Of Kerala

Case No: Civil Revision Petition No. 709 of 1963

Official Receiver, Palghat District	APPELLANT
Vs	
Kutilingal Itty''s son, Krishnan Perinhanam Amsom and Desom, Chowghat Taluk	RESPONDENT

Date of Decision: Jan. 4, 1965

Acts Referred:

- Evidence Act, 1872 - Section 101, 104, 114
- Provincial Insolvency Act, 1920 - Section 53, 54

Citation: AIR 1965 Ker 156

Hon'ble Judges: T.C. Raghavan, J

Bench: Single Bench

Advocate: T.S. Venkiteswara Iyer and R.S. Plapilly, for the Appellant; C.S. Anandhakrishna Iyer, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

T.C. Raghavan, J.
This is a case where the learned District Judge of Palghat has reversed a fairly well considered decision of the learned Subordinate Judge of Ottappaiam, in a proceeding under sections 53 and 54 of the Provincial Insolvency Act on grounds which are untenable in law and wrong on facts.

2. Kunhimamu, the mortgagor under Ex. B 1, which is sought to be annulled by the Official Receiver, was having business in Ceylon. The respondent, who is a neighbour of Kunhlmamu in his native village in Malabar, was also Having business in Ceylon. They were admittedly friends from childhood and were also having dealings with each other. In 1053 Kunhimamu was in financial difficulties in Ceylon and a suit was instituted against him in the District Court of Colombo by Narayanan

and summons was served on him on 12th November. Other suits were also filed against him in Colombo and at least one of them was decreed in August, The suit filed by Narayanan was also decreed in December. Kunnimamu then came to Malabar and Narayanan also returned home. The latter filed a suit in the court at Ottappalam based on his decree in the Colombo suit and obtained a decree thereon on 12th January 1954. Kunhimamu executed Ex, B l, a mortgage for its. 7,000/-, in favour of the respondent on 31st December 1053 and four other alienations, Exs. A 14 to A 17, on 9th January 1954 in favour of his wife and others, thus disposing of all his properties; Narayanan then filed I. F. no. 1 of 1954 on 1st March 1954; and Kunnlmamu was adjudged Insolvent. In the meantime, the respondent filed O. S. No. 43 of 1950 on his mortgage impleading the Official Receiver as well. The latter contended that the mortgage was not supported by consideration and was intended to delay or defraud the creditors of the Insolvent. This plea was rejected by the trial court as well as the appellate court; but, the latter observed that the decision would not debar the Official Receiver from starting proceedings to annul the mortgage. Consequently, the Official Receiver filed the application for annulling Ex. a l and Exs. A 14 to A 17, The respondent objected; and the Insolvent''s wife also filed objections. But, the latter did not prosecute her defence, with the result that the respondent alone pursued the defence. The Subordinate Judge of Ottappalam annulled all the transactions Including Ex. B 1; but, on appeal by the respondent, the District Judge has reversed that decision. The Official Receiver has come up in revision.

3. There are a few propositions of law which are established and cannot be disputed. The first is that in an annulment proceeding the onus is on the Official Receiver to prove that the conveyance was not made in good faith and for valuable con sideration. The next proposition is that if the alienation was itself one of the acts of insolvency set up and on which the insolvent was adjudicated, still the decision is not res Judicata as to whether the alienation was a bona fide transaction supported by considera tion. Similarly, another established proposition is that the Official Receiver can get the alienation annulled, If he proves that there was no considera tion for the transaction or that the consideration was so inadequate as to raise the presumption of want of good faith; or alternatively, if he proves that though there was valuable consideration, there was want of good faith in the sense that the trans feree, knowing all the circumstances of the transfe ror who had since been adjudged Insolvent, entered into the transaction with a view to screening his assets from the Receiver, Again, even if the transferor was wanting In bona fides, the crucial question still is whether the transferee was wanting to bona fides. Ail theee principles are laid, down to the supreme Court in N. Subramania Iyer Vs. The Official Receiver, Quilon, . Yet another proposition to be borne in mind is laid down, again by the Supreme Court, in Kundan Lal Rallaram v. Custodian, Evacuee Property, Bombay, AIR 1961 SC 1316. The Supreme Court observes that the parana "burden of proof" has two meanings: one, the burden of proof as a matter of law and pleadings; and two, the burden of establishing a case -- the farmer is fixed as a

question of law en the basts to the pleading and is unchanged during the entire trial, while the latter is not constant, but shifts as soon as a party adduces sufficient evidence to raise a presumption in his favour. The Supreme Court proceeds that the evidence required to shift the burden need not necessarily be direct evidence, i.e. oral or documentary evidence or admissions the the opposite party; it may comprise circumstances evidence or presumptions of law or fact. That means that if relevant evidence is withheld is one party, the court Is entitled to draw the presumption u/s 114 of the Evidence Act against that party to the effect that, If produced, the same evidence will be unfavourable to him.

4. In the case before me, the (sic) lacks in bona fides on the part of the insolvent. In beyond any doubt; for, he returned from Ceylon after two decrees were passed against him and when other litigations were still pending against him and entered Into transactions covered by Ex. 1 1 and EXS. A14 to A17 disposing of ail his properties Ex. B1 was on 31st December 1953 and Exs. A 11 to A 17 were all on 9th January 1954, The aliences under Exs. A 14 to A 17 have not even chosen to contest the petition by the official Receiver. But, as pointed out by the Supreme Court, the curcial question still is whether the respondent knew about the involved circumstances of the insovent and whether the transaction was with such knowledge so that it can be fairly presumed that the transaction lacked in bona fides even on the part of the respondent.

5. In considering this question, the District Judge has attached all Importance to the onus of proof of the Official Receiver. The District Judge seems to think that this onus remained unchanged during the trial and It never shifted to the other side. Again, the District Judge observes in two or three places in his judgment, for instance, paragraphs 9 and 14, that the Official Receiver has not even taken care to take steps for compelling the respondent to produce his accounts and that there was no duty on the latter to produce the same in court. In fact, the Official Receiver filed a petition requesting the court to compel the respondent to produce his accounts; and that Is I. A. No. 1218 of 1961. The respondent filed an affidavit in that petition to the citect that the accounts were not preserved by him. The local agent of the respondent was examined in the insolvency proceeding and his deposition is Ex. A 12. The same agent has been examined in this proceeding as R. W. 1. Ex. A 12 shows that the accounts of the respondent Which were Kept by the agent were then in existence ana that the agent cent only extracts thereof to tne respondent in Ceylon. But, when tne agent has been examined in this proceeding, what he says is that the originals of the accounts were sent to Colombo and tne respondent has not preserved them; To the same effect is the averment in the counter-affidavit in I. A. No. 1219 of 1981. in the insolvency proceeding Itself the validity and the bona fides of the mortgage under Ex, B 1 were questioned. The petitioning creditor, Narayanan, averred that that transaction was also an act of Insolvency which was accepted by the insolvency court. If the accounts of the respondent were then in existence, it is Impossible to think that after the validity of Ex. B 1 and the payment

of consideration thereunder were questioned, the respondent would not have preserved them. It is fairly obvious therefore that if the accounts are produced, they Will not support the case of the respondent; and the court is entitled to draw this presumption u/s 114 of the Evidence Act.

6. Admittedly, the respondent was available in his native village when the present proceeding was going on, in spite of that, he was not examined and only his agent was put in the box. The best person to speak about the bona fides and honesty of the respondent in entering into the transaction was himself; and he did not enter the box.

7. There are several other circumstances also, as rightly pointed out by the Subordinate judge, which show that the transaction was not bona fide or honest, or even that it was not supported by consideration. The consideration recited in the document is Rs. 7000/- and that is constituted of Rs. 1,500/- to be paid to a Velandi under a promissory note executed by the Insolvent on 19th April 1952, another Rs. 1,000/- to be paid towards a promissory note for Rs. 4.000/-an favour of an Ettath Narayanan on 23rd April 1952, another Rs. 1,500/- to be paid to an Appu Master on a promissory note of 10th March 1951, Rs. 2,000/- to be paid to another Kunhinnl Master under a promissory note of 10th October 1951 and a cash payment of Rs. 1,000/- for completing the construction of a shop building. The Kunhunni Master of this document is the same as the Kunhunni, the alienee, in Ex. A16. The document recites that the principal amounts alone under tne three promissory notes to Velandi, Appu Master and Kunnunni Master be paid, because the interest on the documents had already been paid. Regarding tne Rs. 1000/- to be paid to Ettath Narayanan, the recital is that the amount has to be paid towards the principal and interest payable on the promissory note for Rs. 4,000 to him. The further recital is that the promissory notes have to be taken back and registered receipts for the payments have also to be taken, Exs. B3, B5 and Ex. B7 are the registered receipts taken from Velandi, Appu Master and Kunhunni Master respectively. The promissory notes do not show any endorsement of payment of interest. If interest were paid as recited in Ex. Bl, normally It can be expected that endorsements of such payments appeared on the promissory notes. Moreover, Ex.Bl was on 31st December 1953 and the payments of amounts under the promissory notes were on 18th January 1954 on two of them and on 11th January on the third. No interest for the Interim period from 31st December appears to have been paid either. These are strong circumstances indicating that these promissory notes might not be genuine. 1 may add that the wording of Ex. B 2, B 4 and B 6 and the ink and the peri used will also rouse strong suspicion that all these three documents might in all probability have been written up at the same time with the same pen by the insolvent. 1 hasten to make it clear that this is only a strong suspicion, which, by Itself, may not be of much consequence, but, taken along with the other circumstances, will only go against the genuineness of the promissory notes.

8. Another important circumstance is that even, Rw. 1, the agent of the insolvent, admits that the money for the stamp papers was paid by the respondent. This is quite unusual; for, the expen ses of a mortgage are normally met by the mort gagor and not by the mortgagee. Again, the stamp papers for Ex. B 1 appear to have been purchased in different names. One of them is in the name of the insolvent, purchased on 30th December 1953; three others of the same date are taken in the name of a Kesavan, who is a carpenter working under the insolvent; and the fifth one, dated 8th December, stands in the name of a Lonappan and that from another stamp vendor. Why these are so Is not ex plained by the respondent.

9. Yet another circumstance which has been noted as suspicious even by the District Judge is that the respondent had to get another sum of Rs. 2,000/- from the Insolvent and that amount was not included in the mortgage, though the properties mortgaged were admittedly much more valuable than Rs. 7,000/-. The suggestion of the Official Receiver, which has considerable force, is that this amount might probably be really due; that If it was included in the mortgage, the transaction might be questioned as a fraudulent preference; and that to avoid such a plea it was not included. I am Inclined to agree with this, since no satisfactory explanation is forthcoming from the respondent on this matter.

10. In a case like this, where a transfer challenged as fraudulent is shown to have taken place Immediately after the insolvent had been served with summonses in some suits and after one or two decrees had been passed against him, and that the transfer is one of four or five transfers by Which he got rid of all his immovable properties, and when the other alienations had been practically admitted to be fraudulent ones, the circumstances certainly require a very full explanation by the transferee to avoid the inference of fraudulent transfer: vide U Ba Saing v. Ma Shein, AIR 1936 Kang 506, This decision also lays down that in a proceeding to set aside a fraudulent transfer under me insolvency Act, the burden of proof is on the official Receiver; but, such burden can only be discharged by showing circumstances from which strong Inference can be drawn that the transfer impugned was made either mala fide or in the absence of valuable consideration. The decision proceeds to lay down that where the Official Receiver discharges the prima facie burden which lay upon him, it is for the transferee to explain the case which gave so many and so obvious grounds for suspicion, and to show that there was in fact an explanation for the transfer which the court could deem to be satisfactory.

11. The District Judge, as already stated, has proceeded on the basis that the burden of proof is something which does not shift to the alienee at any time; that Pw. l, the agent of the petitioning creditor, is Incompetent to prove consideration or bona fides; that the Official Receiver did not go into the witness box; that the Official Receiver did not take steps to compel the production of the respondent''s accounts; and that the Official Receiver did not examine the payees under the promissory notes, Exs. b2, B4 and B6. None of these grounds is good: at least one of them is

also erroneous on facts. I am not able to see how, if Pw. l was not a competent witness, the examination of the Official Receiver would have improved matters. The Official Receiver can rely on the circumstances; and the circumstances considered hereinbefore are quite strong.

12. A decision of Vivian Bose, J. may be apt in this connection; and that Is Ktsangopal Hariram v. Umrao Kesheo Rao, AIR 1938 Nag 216. The learned Judge observes:

"It has to be borne in mind that the fraudulent nature of the transaction in insolvency cases can scarcely ever be proved by direct evidence. The petitioning creditor or the Receiver has to rely on circumstantial evidence in most cases, and usually that is to be found only in the conduct of the parties. It is therefore more than ever the duty of the court carefully to examine all the surrounding circumstances; and in any case If a Judge considers that the burden of proof lies on a particular party, it is incumbent on him at least to examine the facts on which that party''s case is based." In another part of the Judgment appears:

"All that the learned Judge has done has been to seize hold of a rule of law about the burden of proof -- a rule which incidentally loses most of its significance when there Is evidence for consideration -- and then to seize hold of two or three superficial points in the case and rest content with that."

13. 1 may point out one more fact before I conclude, which shows to what extent the District Judge is prepared to go. The certified copy of a passport issued to the insolvent, Ex. A 3, was produced to show that the insolvent was in Ceylon on the date of Ex. B6. The District judge does not rely on this, as it was not properly proved; and the Judge accuses the Official Keceiver that he did not attempt to summon any person competent to prove it. He proceeds further and observes that the promissory note could have been executed in Colombo and sent to Kunhunl Master Even the respondent had no such case. The District Judge would have done better if he paid more attention on the facts and circumstances of the case Instead of bestowing all attention on the Official Receiver and what he failed to do.

14. As the result of the foregoing discussion, I set aside the decision of the lower appellate court and restore that of the trial court. The Official Receiver will get his costs in this Court and in the lower appellate court from the respondent. The order of the trial court regarding costs will also stand.