N. Subramania Iyer

Vs

The Official Receiver, Quilon

Civil Appeal No. 165 of 1953

(B. P. Sinha, B. Jagannath Das, P. Govinda Menon JJ)

24.05.1957

JUDGMENT

SINHA J. -

This appeal by special leave is directed against the concurrent orders of the Courts below allowing the Official Receiver's application under s. 35 of Travancore Regulation VIII of 1090 (= 1915), to which we shall refer in the course of this judgment as the Insolvency Regulation, for annulling the usufructuary mortgage (Ex. I) for Rs. 75,000 dated August 18, 1924, executed by a number of persons who may now be conveniently described as the insolvents. The main question for determination in this appeal on behalf of the transferee is whether the transaction in his favour is within the third exception to s. 35 aforesaid. (In this judgment we shall use the dates with reference to the Gregorian Calendar equivalent to the dates maintained under the Malayalam Calendar).

In order to appreciate the arguments in this appeal it is necessary to state the following facts. Koya Kunju was a flourishing merchant at Quilon carrying on trade in piece goods, yarn, provisions etc. He died in or about the year 1921 leaving him surviving his widow, two sons and two daughters, who jointly carried on the ancestral business through the eldest son under a power of attorney. They added to the family business a tile factory and an oil mill. In June-July 1924 the sons approached the appellant's father, who was a flourishing money-lender living about fifty to sixty miles away from Quilon at a place called Mankompu. He agreed to advance the sum Rs. 75,000 on the usufructuary mortgage of certain immovable properties in and near Quilon belonging to the family, for the purpose of carrying on their trade and business after his two sons had made certain enquiries at Quilon about the status and means of the borrowers and whether the transaction would be worth their while. After a draft had been made at the instance of the creditor, the mortgage bond and a lease deed granting a lease of the mortgage properties to the mortgagors themselves bearing the same date, namely, August 18, 1924, were executed and registered by the heirs aforesaid of Koya Kunju. The purpose of the loan is stated in the document to be the family necessity, namely, carrying on trade etc. In lieu of interest on the Rs. 75,000 advanced at the rate of nine per cent. per annum for a period of three years the mortgaged properties, namely, buildings, fields and cocoanut orchards etc., were said to have been delivered to the mortgagee who in his turn granted a lease back to the mortgagors on payment of a stated sum by way of annual rents, viz., Rs. 6,750, equivalent to interest at nine per cent. on the principal sum advanced. It was also stipulated in the lease deed that if rent was in arrears for two years, the lessees would surrender the properties to the lessor and accrued arrears of rent also would be a charge on those properties. It is common ground that the mortgaged properties were unencumbered at the date of the transaction, but soon after a hypothecation deed in favour of a third party named Kadir Moideen Rowther was executed on August 30, 1924, for the sum of Rs. 78,859-15-0, hypothecating the equity of redemption in respect

of the properties mortgaged to the appellant and certain other properties. The second bond which will hereinafter be called the hypothecation bond, to distinguish it from the usufructuary mortgage bond in question, was admittedly executed to liquidate the outstanding debts due to the hypothecatee himself in respect of dealings in cloth, yarn and iron goods between the parties to that transaction. It appears that those two parties were having dealings in those commodities from about the year 1911. Hence they were very well known to each other on account of their business dealings, whereas the mortgagee in respect of the usufructuary mortgage bond in question was a complete stranger to the family of the mortgagors. On September 15, 1924, one of the business creditors of the family of the mortgagors, S. M. Sheikh Mohideen Rowther, made an application in the District Court of Quilon for adjudicating them as insolvents. He impleaded the mortgagors, the five heirs aforesaid of Koya Kunju. Amongst the acts of insolvency were mentioned the transactions between the insolvents and the appellant and the hypothecation bond aforesaid. In his affidavit in answer, the first counter petitioner for himself and as agent of the other members of the family admitted their joint trading business and the debts incurred by his firm. He also admitted the debts due under the usufructuary mortgage bond in question and the hypothecation bond aforesaid and ended by saying that the debts of the counter petitioners including the debts covered by the said usufructuary mortgage bond and the hypothecation bond amounted to two and a half lakhs of rupees and that their assets were worth not less than seven lakhs of rupees. He denied that they had committed any acts of insolvency or had done anything to delay or defeat their creditors and expressed their readiness to pay the debts due to the petitioning creditor. A number of other creditors also made similar applications for adjudicating the mortgagors as insolvents. All those proceedings appear to have been consolidated and the District Judge by his orders dated August 29, 1927, adjudged the counter petitioners insolvents. About the contents and effect of this order of adjudication something more will have to be said in the course of this judgment while dealing with the most important question of law raised by the learned counsel for the Official Receiver. By his orders dated October 19, 1924, the District Judge appointed the Official Receiver as the interim receiver in respect of the insolvent's properties to take immediate possession thereof. The interim receiver, Sri V. N. Narayana Pillai, made a report to the court on February 11, 1925, stating inter alia that the total yield of the properties mortgaged to the appellant could be estimated at Rs. 1,600 per year and that the insolvents were not prepared to continue in possession of the mortgaged property at a rent of Rs. 6,750 as stipulated in the lease deed aforesaid; and that, therefore, the mortgaged property was not expected to fetch an income equivalent to nine per cent. on the mortgage bond as stipulated. The rent having fallen in arrears over two years, the mortgagee instituted a suit against the mortgagors, impleading the Official Receiver also for recovery of arrears of rent with interest, as also for recovery of possession of the mortgaged property; and the suit appears to have been decreed for the reliefs prayed for. Since then the mortgagee appears to have been in direct possession of the property. It does not appear that in that suit any question as to the want of consideration or of bona fides of the mortgage bond was raised either by the mortgagors themselves or by the Official Receiver.

It was on March 28, 1928, that the Official Receiver made his application to the court praying "that the court may be pleased to declare the transfers described in schedule A, void as against your petitioner". Schedule A comprised the usufructuary mortgage bond aforesaid and the lease deed, as also the hypothecation bond for Rs. 78,859-15-0. It is remarkable that no allegations of fact bearing on the bona fides of the transactions impeached are made in respect of the mortgage bond in question. After stating the insolvency proceedings and the fact of the execution of the deeds in schedule A and that the insolvency petition on which the order of adjudication was passed had been filed in court within two years after the dates of transfer, the only relevant statement made in the petition is para. 4 to the following effect :

> "That the said transfers are void as against your petitioner under ss. 35 and 36 of the Insolvency Regulation."

This petition of the Official Receiver was opposed by the mortgagee's son, N. Krishna Iyer, on his father's behalf, chiefly on the ground that the mortgage was a bona fide transaction for valuable consideration which was not affected by the Insolvency Regulation, that there was a misjoinder of parties and causes of action, apparently objecting to the Receiver filing a single petition in respect of the usufructuary mortgage deed and the hypothecation bond; and that it was barred by limitation and estoppel. A number of issues were raised on July 24, 1929, the most important of them being the first issue to the following effect :

> "Whether the otti and lease deeds impeached by the Receiver were executed in good faith and for valuable consideration ?"

Other issues related to the formal issues in bar of the proceedings. before the learned District Judge (Mrs. Anna Chandy) a preliminary objection was raised on behalf of the Receiver to the effect that in view of the decision of the Judicial Committee of the Privy Council in Mahomed Siddique Yousuf v. Official Assignee of Calcutta [(1943) L.R. 70 I.A. 93.], the matter was res judicata between the parties and the order of adjudication could be questioned only by an appeal against it, which had not been done. The learned Judge gave effect to that objection and held that the transferee was precluded from agitating the matter and that his only remedy was by way of appeal against the order of adjudication. This point has been very prominently raised by the learned counsel for the respondent, the Official Receiver, at the forefront of his arguments and will have to be dealt with at the proper place. The learned Judge held on the merits that Ex. I, the usufructuary mortgage bone, was not for the full consideration stated in the deed but that only Rs. 20,000 had been paid to the mortgagors and that in any event the transaction did not represent a bona fide transfer. As the hypothecation bond is not the subject matter of this appeal, it is no more necessary to follow the course of the proceedings in respect of that transaction. The Receiver's application was therefore allowed, both on the ground of incompetency of the transferee to challenge the adjudication order and on the finding that it was a "fraudulent transfer". On appeal by the mortgagee, the learned Judges of the High Court disagreed with the trial Judge and held that the decision in Mahomed Siddique Yousuf's case [(1943) L.R. 70 I.A. 93.] could not stand in the way of the appellant and that the entire consideration of Rs. 75,000 had been proved to have been paid to the mortgagors but agreed with the trial Judge in holding that the transaction was not made in good faith in the sense that it had not been entered into with due care and attention. In the result the appeal was dismissed. The transferee prayed for a certificate of fitness to appeal to this Court, but the High Court refused that application. The appellant then moved this Court and obtained special leave to appeal.

A number of points were raised on behalf of the appellant and at the threshold of the arguments it was contended, and in our opinion rightly, that the courts below had erred in throwing the burden on the transferee of proving affirmatively that the transaction impeached, namely, the usufructuary mortgage bond dated August 18, 1924, was supported by good faith and valuable consideration. The Judicial Committee of the Privy Council laid it down in the case of Official Assignee v. Khoo Saw Cheow [[1931] A.C. 67.], that upon a true construction of the Bankruptcy Ordinance of the Straits Settlements, s. 50, sub-s. (3), which in terms is similar to the provisions of s. 35 of the Insolvency Regulation, the onus is upon the Official Assignee to prove that a conveyance which he was seeking to set aside was not made in good faith and for valuable consideration. In that case the trial Judge had ruled that the onus of proof lay upon the transferee and had set aside the transaction upon

failure of proof led by the transferee. On appeal it was held that the trial Judge had misdirected himself as to the onus and that as the result of the misdirection was very serious in that it had coloured the whole outlook as to the facts and had substantially prejudiced the appellant's case a retrial was necessary. The Privy Council affirmed the decision of the Appeal Court and dismissed the Official Assignee's appeal, the respondent-transferee not appearing before the Judicial Committee. In the same year the Judicial Committee followed the aforesaid precedent in the case of Official Receiver v. P.L.K.M.R.M. Chettyar Firm [(1930) L.R. 58 I.A. 115.], which was a case under the Provincial insolvency Act, 1920. On a consideration of the provisions of s. 53 of the Act their Lordships reaffirmed the proposition laid down in the earlier case of that very year reported in Official Assignee v. Khoo Saw Cheow [[1931] A.C. 67.]. Their Lordships examined the terms of s. 53 and s. 50 of Ordinance No. 44 of the Straits Settlements dealt with in that previous decision and came to the conclusion that they were in substance the same. The third decision of their Lordships of the Privy Council to the same effect is reported in Pope v. Official Assignee, Rangoon [(1933) L.R. 60 I.A. 362.]. This case went up in appeal from a decision of the Rangoon High Court under the provisions of s. 55 of the Presidency Towns Insolvency Act. In this case their lordships observed further that if the transaction impeached was a real and not fictitious one, the receiver could not be said to have brought the case within the section unless he proved that the transferee know that the transferor was insolvent at the time the transfer was made, even though the transfer was of the entire assets of the transferor. These three decisions of the Judicial Committee settled the law in this country contrary to what had been the concensus of judicial opinion previously, that the initial burden of proving that the transaction impeached had not been made in good faith and for valuable consideration lies on the party seeking to set aside the transaction. The learned counsel for the respondent was not able to adduce any reasons to the contrary and it must therefore be taken that it is settled law in insolvency proceedings that the burden of proof lies on the Official Assignee or Receiver who challenges the transaction. In this case, as already pointed out, the issue framed in terms laid the burden of proof on the transferee, the appellant. He led the evidence recording of which began on November 21, 1930, and the evidence of his witnesses, C.P.Ws. 1 to 7 was recorded between November 21, 1930 and November 20, 1932, on different dates. C.P.W. 8, one of the insolvents, appears to have been examined in the interest of the second mortgagee, that is to say, in support of the hypothecation bond. He was cross-examined on behalf of the petitioning creditor, as also of the appellant. He was examined and cross-examined in February and March 1933. It was then for the first time that it was alleged on behalf of the mortgagors that only Rs. 20,000 out of Rs. 75,000 secured under the mortgage in question had actually been paid and that the remaining Rs. 55,000 had so far remained unpaid. More will have to be said about this aspect of the case later. C.P.W. 10, one of the other mortgagors was examined on the same lines as his brother, C.P.W. 8. C.P.W. 12 is the younger brother of S. K. Kadir Moideen Rowther, the second mortgagee, who had taken the hypothecation bond. He was examined on October 9, 1935. Curiously enough, nothing appears to have happened until the first Official Receiver, V. N. Narayana Pillai, aged 64 years, was examined as C.P.W. 13 on November 29, 1943. It was he who had started the annulment proceedings in respect of the mortgage bond in question. His evidence and conduct of the proceedings will have to be dealt with presently. We have pointed out the extremely dilatory way in which the proceedings in the Insolvency Court were conducted. The annulment proceedings commenced in 1928 and were determined by the Court of first instance by its orders dated October 19, 1944.

For a period of more than sixteen years the annulment proceedings were kept hanging. For whose benefit it does not appear. We would fain believe that this extremely dilatory way of dealing with litigation involving the business community is not a habit in that part of the country and that the

present case is only an exception. On appeal the High Court has noticed the delay but without any apparent disapproval. We have not been able to discover any reasons, valid or otherwise, for this callous disregard of public time and litigants' interest.

Realising that the annulment proceedings had taken a dubious course on an issue wrongly throwing the onus of proof on the transferee, the learned counsel for the Receiver sought to support the order annulling the encumbrance on the short ground that the matter was res judicata between the Receiver and the incumbrancer on the authority of the decision of the Privy Council in Mahomed Siddique Yousuf v. Official Assignee of Calcutta [(1943) L.R. 70, I.A. 93.]. That was an appeal from the Calcutta High Court in a case arising under the Presidency Towns Insolvency Act, III of 1909. In that case the Judicial Committee, following the well established rule in England as laid down in the leading case of Ex parte Learoyd In re Foulds, has held that the order of adjudication based on the allegation that one of the several acts of insolvency was the impugned transfer was conclusive against the transferee in subsequent proceedings taken by the Official Assignee to set aside the transfer by virtue of s. 116, sub-s. (2) of the Presidency Towns Insolvency Act, 1909. Their Lordships have pointed out in the course of their judgment that the provisions of the Presidency Towns Insolvency Act then before their Lordships were in terms similar to those of the Bankruptcy Act of 1869 which had been repeated in the subsequent Acts of 1883 and 1914. They also point out that it is rather anomalous that the decision should adversely affect a party who was not before the court when the adjudication order was made. But they held that the words of the statute and the requirements of public policy in relation to adjudication proceedings were enough to outweigh any considerations of hardship to individuals. On this view they affirmed the decision of the Calcutta High Court and overruled that of the Madras High Court in Official Assignee of Madras v. O.R.M.O.R.S. Firm [(1926) I.L.R. 50 Mad. 541.]. Naturally very strong reliance was placed by the learned counsel for the respondent-Receiver on that case. It was argued that as the order of adjudication dated August 29, 1927, had with reference to the transaction in question, amongst others, held that the debtors had committed acts of insolvency by executing the deed (Ex. I) with a view to defeat or delay their creditors, it was no more an open controversy and the findings then recorded were conclusive in the present proceedings. There are, in our opinion, insurmountable difficulties in the way of the respondents on this aspect of the case. It was stated by the petitioning creditors that the counter petitioners (insolvents) had executed the usufructuary mortgage bond in question and the hypothecation deed in respect of almost all their properties with a view to defeat or delay the other creditors. Issue 5 was raised in these terms :

> "Have the defendants committed acts of insolvency as alleged in the petition ?"

and the finding of the court was that those were acts of insolvency "with intent to defeat or delay their creditors." It is said that these findings are res judicata between the Receiver and the appellant. Even so, there is no finding that the transferee was privy to such acts. It was not necessary to find at that stage, and it has not in terms been found, that the transaction impugned in this case was not bona fide so far as the transferee is concerned or without consideration - matters which directly arise for determination in the annulment proceedings leading up to this appeal. Hence, even assuming that the rule laid down by their Lordships of the Judicial Committee in Mohomed Siddique Yousuf v. Official Assignee of Calcutta [(1943) L.R. 70 I.A. 93.] in a case arising under the Presidency Towns Insolvency Act, applies to a case like the present governed by the Insolvency Regulation, which follows more closely the Provincial Insolvency Act and not the Presidency Towns Insolvency Act, the present controversy is not barred by any finding in the order of adjudication. In this appeal we are concerned with the bona fides of the transferee. Nor has it been found that there was no valuable consideration for the mortgage. Hence, without pronouncing on the applicability of the decision

aforesaid of the Judicial Committee it must be held that the question under s. 35 is still open.

Having disposed of the preliminary questions raised on behalf of the parties, we have now to determine the main question in controversy, namely, whether it has been proved that the usufructuary mortgage bond dated August 18, 1924, was not made in good faith and for valuable consideration. Section 35 of Travancore Regulation VIII of 1090 (= 1915) is in these terms :

> "Any transfer of property not being -
>
> (i) a transfer made before, or at, and in consideration of, marriage,
>
> (ii) or a transfer made to, or for, the wife or children of the transferor of property that has accrued to the transferor in consideration of the marriage or in right of his wife,
>
> (iii) or a transfer made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, shall, if the transferor is adjudged insolvent within two years after the date of the transfer, be void against the receiver, and may be annulled by the Court."

This section is equivalent to s. 36 of the Provincial Insolvency Act (III of 1907) and to s. 53 of the Provincial Insolvency Act (V of 1920), except for the addition of the second exception which was apparently added in the Travancore law to make it in consonance with local laws relating to devolution of family property, and secondly that the word "void" in the last clause of the section in the Insolvency Regulation and in s. 36 of the Provincial Insolvency Act of 1907 has been changed into "voidable". Regulation VIII of 1915 aforesaid has been replaced by Travancore Regulation VIII of 1108 (1932). Section 53 of the latter has taken the place of s. 35 of the former and is exactly in the same terms except for the fact that the word "void" has been changed into "voidable", thus bringing the Regulation of 1932 in line with the Act of 1920.

It is not necessary for the purposes of this case to go into the question of whether any legal significance attaches to the change of the word "void" into "voidable". The legislative history of the law relating to annulment of transfers or incumbrances made or created by a person who has since been declared insolvent, indicated above, shows that the law in the united State of Travancore and Cochin was the same as the law in what used to be called British India. The question now is, has the Receiver on whom the burden of proof lay, as show above, been successful in discharging that burden. It has not been argued before us by the learned counsel for the Receiver that the courts below were not in error in discussing the evidence and deciding this controversy on the basis that the burden lay on the transferee to prove that the transfer in his favour was bona fide and for consideration. If the burden lay on the transferee, he would have to show not only that he paid some consideration but that he paid valuable consideration and that that consideration was paid bona fide. As to what is the legal import of "bona fide" will be discussed presently. But we are in this case proceeding on the law so far settled in this country after the decisions aforesaid of the Privy Council that the burden lies on the Receiver. The contrary proposition has not been pressed upon us and we need not therefore pronounce upon that. If the burden lay on the Receiver, in our opinion, his application for annulment can be allowed on proof either that there was no consideration for the transaction or that the consideration was so inadequate as to raise the presumption of want of good faith. Alternatively, the Receiver may also succeed on showing that though there was valuable consideration for the transaction impeached, there was want of good faith in the sense that the transferee knowing all the circumstances of the transferor who had since been adjudged an insolvent

entered into the transaction with a view to screening the assets of the insolvent from the Receiver in whom the insolvent's property vests for the benefit of the creditors. Such will be mostly cases of benami transactions in favour of some relative of the insolvent or a person in whom he has full confidence that he will hold it ultimately for the benefit of the insolvent or persons in whom he may be interested. Or it may be that a person finding himself over head and ears in debts wishes to convert his assets into liquid assets with the collusion or connivance of the transferee. In both cases the intention clearly is to shield the assets against the claims of creditors and in such cases, though the transfer may have been for consideration, either adequate or otherwise, but having been entered into with a view to defraud or delay the creditors, the transferor and the transferee sharing the common intention, the transaction must be annulled and the assets must be brought into the common hotchpot for the benefit of the insolvent's creditors.

Though the learned District Judge held that only Rs. 20,000 has been paid by the mortgagee to the insolvents and Rs. 55,000 out of Rs. 75,000, the stated amount of the mortgage money, had remained unpaid, the High Court has found that the entire consideration passed. If this finding is correct, then the fact that such a large amount had been paid by the mortgagee would take him a long way to success in proving the bona fides of the transaction. But it has been argued by the learned counsel for the respondent-Receiver that that finding is not correct. It has been strenuously argued on behalf of the respondent that the mortgage bond in question was without consideration. The Official Receiver had also filed a memorandum of objections in the High Court challenging the correctness of the finding by the learned District Judge that Rs. 20,000 had as a matter of fact been paid to the transferors. As on the question of consideration the two courts below have materially differed in their conclusions, the question is open before us. We have, therefore, to examine how far the transaction in question was for valuable consideration. Before advancing this large sum of money the creditor had deputed his two advocate sons, C.P.Ws. 1 and 2, to make enquiries into the antecedents of the persons who had applied for the loan and as to whether they were financially sound and otherwise desirable persons to deal with. The two young men who had just entered upon their legal career went and stayed with a relation of theirs who has been examined as C.P.W. 6, Venkitarama Iyer Ramakrishna Iyer, who was at the relevant dates posted as Assistant Excise Commissioner at Quilon. This gentleman being interested in the welfare of the family of the intending lenders, claims to have made confidential enquiries from respectable merchants at Quilon and told his two young guests that the borrowers were persons of position and good business reputation and that they had ample unencumbered properties on the security of which advance up to a lakh of rupees could be made. The two sons of the mortgagee having satisfied themselves that the proposed mortgagors were persons of good status in society and sound financial position reported to their father who on the strength of the reports by his sons agreed to lend Rs. 75,000 on a first mortgage of properties reportedly worth more than at least a lakh of rupees. The mortgagee also examined himself as C.P.W. 7. The father and the two sons have given evidence in support of their case that out of the Rs. 75,000 agreed to be advanced on the mortgage when some of the mortgagors went with the registered document to the mortgagee's place, Rs. 55,000 was paid in cash to them on the basis of the receipt (Ex. LIV) dated August 20, 1924. The remaining Rs. 20,000, according to the evidence, was paid later. Those payments were made in six instalments between September 1, and September 9, 1924, as evidenced by receipts (Exs. LVII and LVIII) and endorsements on letters, Exs. LIX(a), LXI(a), LXIV(a) and LXV(a). All these payments are also supported by the corresponding entries in the books of account regularly kept by the mortgagee and proved in court as Exs. LXVII to LXXII series. Of the six instalments paid as aforesaid, some of them were paid to the mortgagors' creditors and some of those creditors have been examined. C.P.W. 4 admits having received Rs. 2,500 and endorsed receipt of the same, Ex. LIX(a). C.P.W. 3 similarly speaks of

having received Rs. 1,500 and endorsed receipt of the same, Ex. LXIV(a) and is corroborated by his accountant, C.P.W. 9, who proves the ledger and day book, Exs. LXXX and LXXXI. Thus we have not only the evidence of the mortgagee and his relations but also of third parties, creditors of the insolvents, proving the passing of consideration. The case does not rest only upon oral testimony. It is amply corroborated by contemporaneous entries in books of account maintained by the lender himself and by third parties who have been paid by him on account of the mortgagors. This considerable body of oral and documentary evidence is supported by the admissions of the mortgagors, not in the mortgage bond itself which stand rebutted, but by a series of admissions of receipt of the entire consideration money in the several receipts and endorsements made by some of them. All this voluminous evidence has been very carefully considered by the learned Chief Justice at pages 31 to 34 of the judgment of the High Court. We need not repeat all that has been said by the High Court for recording the finding that it was constrained to differ from the conclusions of the learned District Judge and to hold that Ex. 1 "is fully supported by consideration". As already indicated, neither the mortgagors themselves nor the Official Receiver in their pleadings made out a case that the transaction was unsupported by consideration or that the consideration paid was not full amount shown in the document as having been advanced or that a much smaller sum like only Rs. 20,000 had been actually paid. It has been shown above with reference to the dates of the examination of witnesses that C.P.Ws. 1 to 7 had been examined and their evidence recorded between November 21, 1930, and November 20, 1932. Until that date it was not even suggested to those witnesses in cross-examination that only Rs. 20,000 had been paid and no more. For the first time on February 4, 1933, when one of the mortgagors was examined as C.P.W. 8, it was alleged that only Rs. 20,000 had been received by the mortgagors, which amount they paid to their creditors. C.P.W. 10, the second of the mortgagors, was examined on June 12, 1933. He does not in any way improve the Receiver's case that the transaction was without consideration. He does not even say that only Rs. 20,000 out of the consideration stated in the mortgage bond had been received by the mortgagors. Lastly, the then Receiver himself was examined as C.P.W. 13 on November 29, 1943. This gentleman, who is described in the judgments below as one of the leading advocates, does not appear to have taken his duty as a Receiver very seriously. He does not appear to have examined the insolvents themselves or their books of account carefully to find out the exact financial position of his trading family. He seems to suggest in his evidence that at the material dates the Quilon Bank was functioning and that the insolvents "did not get additional accommodation in the said bank or the other hundi shops during 1099" (1923-24). These statements, to put it mildly, are disingenuous. In the first instance, they would suggest that the insolvents had borrowings from the Quilon Bank or other hundi shops and secondly that their financial position was so embarrassed that the said bank or other hundi shops had refused to give them any further advance of money. As a matter of fact, it is nobody's case that the insolvents had at any time any dealings with the Quilon Bank. We know from the evidence that the insolvents owed to the Imperial Bank anything between Rs. 30,000 to Rs. 40,000. Either a portion or the whole of the dues of the Bank have been liquidated. The evidence is not specific. One of the mortgagors claims to have paid a portion of the Imperial Bank's dues by selling ornaments of the ladies of his family, thereby directly suggesting that no portion of the mortgagee's money was utilised for payment of the dues of the Imperial Bank. The High Court rightly refused to accept the mortgagors' belated attempt to prove by their bare testimony that any amount out of the consideration of the mortgage bond in question had remained unpaid. The Receiver's evidence was directed mostly to making statements suggesting that the mortgagee had not made such enquiry about the financial position and status of the mortgagors as a reasonable man of business would do. He has not made any definite statement that the mortgage bond in question was without consideration. In cross-examination he has been constrained to admit that he did not remember to have examined the mortgagor who was in charge of the business (first

counter petitioner). He admits that it is usual for an Official Receiver to examine the insolvent. He has said further that he did not consider it necessary to examine the insolvents regarding the subject-matter of the petition for annulment. He also admitted that he had not examined any of the accounts to see whether the insolvents had received the entire consideration of the mortgage in question, and that "the mortgagee Nilakanta Iyer is a very rich man. My information is that the insolvents had no dealings with him before the insolvency". He was also questioned as to the insolvents' dealings with the Imperial Bank and he gave the very vague answer that he was not sure as to what amount was due to the bank. He also admitted that had never seen the mortgagee under Ex. I, nor had he asked him anything in connection with the mortgage, and that the mortgagee had obtained a decree and in execution of the said decree he took delivery of the property which was in his possession as Receiver. According to him, the properties covered by the usufructuary mortgage bond and the hypothecation bond would be worth about a lakh and a half rupees. It would thus appear from the statements of the Receiver himself as C.P.W. 13 examined about 19 years after the insolvency proceedings began, that he had not made such enquiries as he was bound to make as Official Receiver.

From what has been said above there cannot be the least doubt that if the burden lay on the Receiver to prove that the transaction in question was without consideration, he has hopelessly failed to discharge that burden. We are prepared to go further and say that even if the burden were on the transferee to show affirmatively that he had paid the full consideration, we would have no hesitation in confirming the findings of the High Court on this part of the case which have been arrived at after a very full and fair consideration of the evidence on the record, pro and con, though there is very little evidence adduced in support of the allegation that the mortgage bond in question was without consideration or full consideration.

The finding on the question of consideration being entirely in favour of the appellant-mortgagee, the only other serious question which remains to be considered is whether the transaction was bona fide. We have already indicated that it is settled law not only of the Insolvency Acts in England but also in this country that it is not necessary in annulment proceedings to prove that the transferor who has been subsequently adjudged an insolvent should have been honest and straightforward in the matter of the transaction impeached. If he was really so, there would not be much difficulty in coming to the conclusion that the transaction as a whole was bona fide. Even if the mortgagors were wanting in bona fides and assuming that to be so in the present case, the crucial question still remains to be answered. Unless it is found that the transferee was wanting in bona fides in respect of the transaction in question, he cannot be affected by the dishonest course of conduct of the transferor. Has it been shown by the evidence on the record that the mortgagee was a party or privy to the dishonest intentions of the mortgagors in so far as they may have intended to defeat or delay their creditors by executing the mortgage bond ? The courts below, and particularly the High Court, have taken the view that the mortgagee had failed affirmatively to prove his bona fides. This conclusion is based upon the consideration that the General Clauses Act (II of 1072) = (1897), in cl. (6) of s. 2 provides that "Nothing is said to be done or believed in good faith which is done or believed without due care and attention." Applying this definition of "good faith" to the present case, the High Court came to the conclusion that the mortgagee has not proved that the mortgage transaction was entered into with "due care and attention". The United State of Travancore and Cochin Interpretation and General Clauses Act (VII of 1125) = (1950) repeats the same definition which appears to have been takes from the definition of the term from the Madras General Clauses Act (I of 1891). The definition of "good faith" in the Indian General Clauses Act (X of 1997) is in these terms :

> "A things shall be deemed to be done in good faith where it is in fact done honestly,

whether it is done negligently or not."

The High Court was of the opinion that if the definition of "good faith" contained in the Indian General Clauses Act quoted above were to apply to the case, different considerations might arise. But the definition of that term as quoted above in the Travancore-Cochin Act is different. Applying that definition to the present case, the High Court's conclusion was that the appellant-mortgagee had not shown due care and attention while entering into the transaction. In this connection it is necessary to determine whether the High Court was right in applying the test aforesaid in determining the question of bona fides. We have to find which of the two tests, the one laid down in the General Clauses Act of Travancore-Cochin or the other laid down in the Indian Act, is more appropriate to proceedings in insolvency. Act II of 1070 (1897), even as Act VII of 1125 (1950), contains the following saving clause -

"Unless there be something repugnant in the subject or context." As a matter of fact, these words or words to similar effect are to be found in all General Clauses Acts. The question, therefore, naturally arises whether there is anything in the subject or context of the Insolvency Regulation which is repugnant to the idea of applying the test of due care and attention. The law of insolvency aims at a just and equal distribution of the assets of a person, who has suffered loss in trade or business or otherwise, amongst his creditors whose debts are provable under the law; and provides a machinery for expeditious disposal of his assets amongst those entitled. The law is calculated to advance the interest of the business community. On the one hand, it protects the creditors by compelling the insolvent to place all his assets at the disposal of the court without concealing any of his assets. Similarly it protects the interests of an honest alienee or an honest secured creditor of the insolvent. On the other hand, it protects an honest debtor from harassment by creditors who may take simultaneous proceedings for realization of their debts from their common debtor even by sending him to civil prison. It is necessary for the promotion of trade and commerce that an honest debtor should be released from his multifarious obligations as soon as his assets have been placed at the disposal of the court for the benefit of his creditors. It also lays down penal provisions for punishing a dishonest debtor. It also makes provisions for saving the debtor and his creditors from the unscrupulous conduct of persons who may have entered into unconscionable bargains with a person who is financially involved. The law of insolvency is aimed against a dishonest debtor but not necessarily against a debtor who has suffered loss in his trade or business as a result of transactions which may not have been done with due care and attention. Business sometimes is an adventure and very often involves risks which cannot be easily foreseen even by persons of common prudence. Annulment proceedings are aimed at transactions between a debtor who has become insolvent and a creditor who, knowing the true state of the debtor's crashing business, has taken undue advantage of the embarrassed financial position of the debtor. In view of these considerations, in our opinion, the test of honesty is more appropriate than the test of due care and attention. It may be added that a General Clauses Act is enacted in order to shorten language used in parliamentary legislation and to avoid repetition of the same words in the course of the same piece of legislation. Such an Act is not meant to give a hide-bound meaning to terms and phrases generally occurring in legislation. That is the reason why the definition section contains words like "Unless there is anything repugnant in the subject or context." Words and phrases have either a very narrow significance or a very wide significance according as the context and subject of the legislation requires the one or the other meaning to be attached to those words or phrases. The books contain many illustrations showing that the same words have been used in different senses in different contexts. The significance attaching to the expression "good faith" in the Travancore-Cochin General Clauses Act is in terms of the definition of that phrase in the Indian Penal Code and in the Indian Limitation Act. The Indian General Clauses Act applies to all legislation after the coming

into effect of that Act. The definition of "good faith" in the Indian General Clauses Act would have been applicable to the Indian Limitation Act also but the legislature in its wisdom has given a special definition of "good faith" different from the one in the Indian General Clauses Act advisedly. The India Penal Code which came into existence earlier than the Indian General Clauses Act contains its own definitions to serve its own special purposes. The Travancore-Cochin General Clauses Act, 1950, of course, applies by virtue of s. 2 to all enactments then in force or passed after the commencement of the Act unless there was anything repugnant in the subject or context. Hence it cannot be said that the definition of "good faith" as contained in the General Clauses Act of 1950 must apply in the same sense to every piece of legislation to which it may apply irrespective of the subject or the context. The Insolvency Regulation is on the same lines as the Provincial Insolvency Act and therefore must be understood in the same sense. If that is the correct approach to the law of insolvency, a secured creditor who has advanced money to a debtor honestly, even though he may not have taken all due precautions, would not come within the mischief of s. 35. It must, therefore, be held that the test of good faith as laid down in the law generally applicable to Indian Statutes is more appropriate to proceedings under the insolvency law. That being so it must also be held that the courts below have approached the question of bona fides from a wrong standpoint and have applied a wrong test.

Having come to the conclusion that honesty is the test to be applied in judging the bona fides of the creditor, a secured creditor in this case, we have to see how far he has satisfied that test. In this connection it has to be remembered that it is common ground that the mortgagee had absolutely nothing to do with the mortgagors before the mortgage transaction was concluded. There is no blood relationship or any other kind of relationship which could be urged as the motive for entering into a dishonest transaction in the sense that the creditor had joined hands with the debtors in screening the property against the claims of the latters' creditors. It may be that the debtors were financially involved; but there is no evidence on the record even to suggest that the mortgagee was aware or apprised of their true financial position. We have no doubt in our mind that if the mortgagee had the least suspicion that he would have to face a prolonged litigation to realise his money from the debtors, he would have been the last person to enter into the transaction in question. He was certainly interested in earning good interest on his capital. But that is not the same thing as saying that he had entered into a dishonest deal with persons who were about to crash in their business. It is also noteworthy that the insolvent's ancestor had died only about three years before the transaction in question. During this period of three years they had added to their business by having a tile factory and an oil mill. That is not the conduct of a family which was about to crash. It may be that they were much too ambitious to become rich quickly. But it has not been suggested or found that they had indulged in unscrupulous dealings in the way of their business. At least that was not their reputation at about the time the mortgage transaction was entered into. Otherwise C.P.W. 6, the Assistant Commissioner of Excise, the mortgagee's relation, would certainly not have advised them, being their well wisher, to enter into a hazardous transaction. We have not been shown any evidence which could lead us to believe that the insolvents' reputation at that time in the way of their trade and business was anything but sound, notwithstanding the ipse dixits of the receiver, the last witness, examined 19 years after the proceedings had started. It is very easy to be wise after the event. But there were no indications until August 1924, so far as the mortgagee is concerned, that he was dealing with a party who was about to crash. Whatever may have been the intentions or the course of conduct of the insolvents, there is nothing to attribute that intention or course of conduct to the mortgagee. His evidence, as also of his two sons who helped him in entering into this transaction, has impressed us as truthful and straightforward.

Assuming that the courts below were right in applying the test of due care and attention, what is

there to show that the mortgagee was wanting in that respect ? Being a complete stranger to the family of the borrowers, he deputed his young lawyer sons to makes such enquiries as they could from persons who were expected to know them and their business dealings and after satisfying themselves that the borrowers had a good reputation and had unencumbered properties of much greater value than the sum proposed to be advanced, the mortgage transaction was finalized. It must be remembered in this connection that even the test applied to a lender while lending money to the karta of a joint Hindu family does not insist upon the creditor seeing to the application of the funds advanced. In the instant case the borrowers represented to the creditor that they required funds in the way of their business. Their enquiry yielded the information that they had borrowings to the extent of Rs. 30,000 to Rs. 40,000 and outstanding claims against their debtors to a much larger extent. That is the state of affairs in a normal trading family. The fact that all their immovable properties worth, according to the Receiver, more than a lakh and a half rupees till then were unencumbered was another indication of the apparent solvency of the family. But it has been argued on behalf of the respondent that the mortgagee was put on his enquiry by the very fact that the debtors' account books disclosed debts against them. Therefore, it is said, the mortgagee should have pursued his enquiry further. It was suggested that the business houses in the town of Quilon and the Quilon Bank itself should have been contacted in order to ascertain the financial position of the debtors. It has already been pointed out that they had no business dealings with that Bank. The mortgagee's sons have deposed that they made enquiries of respectable persons named, as also of two leading hundi houses which may have been expected to know about the financial position of the borrowers' family. It was further argued that it was not specifically stated in the mortgage bond itself that the money was intended for payment to creditors specifically named. Ordinarily a trading firm has no fixed list of its creditors or its debtors. It is always a floating list. Hence when it was said that money was being borrowed with a view to carrying on the business of the trading family, that was comprehensive enough to include the necessity of paying the outstanding debts of the firm. Unless the lender had reasons to suspect that the money was not intended for carrying on the business of the firm but was meant to corner the same with a view to defeating or delaying creditors, it would not ordinarily be the look-out of the lender dealing at arm's length to try to pry into the business secrets of the borrower. In our opinion, therefore, it was not necessary for the lender either to insist upon a list of the borrower's creditors to be specifically mentioned in the deed or upon paying the money directly to those creditors. That would be throwing too great a burden on a lender honestly dealing with a trading family and it would be equally an irksome thing for a trading family to be dealt with on those terms. It cannot, therefore, be said that the lender had not shown such care and attention as a reasonable person in those circumstances would do. The learned counsel for the respondent further pointed out certain discrepancies in the statements in the mortgage deed and in the oral evidence adduced by the mortgagee as pointing to the conclusion that the lender had not been careful and cautious and was therefore wanting in good faith. Those are very speculative arguments which cannot be the foundation for a finding that the Receiver had succeeded in disproving good faith. In this connection it was also pointed out that there was no satisfactory evidence as to how the lender raised Rs. 55,000 which he paid soon after the registered mortgage bond was delivered to him. There is evidence in the shape of an entry in the passbook in the name of the mortgagee issued by a respectable hundi shop in Alleppey, Ex. LXVI (a), showing that Rs. 40,000 was withdrawn by him on August 19, 1924, just the day previous to the date of payment of Rs. 55,000. It is the mortgagee's case that he paid the sum of Rs. 55,000 to the mortgagors with the amount of Rs. 40,000 thus withdrawn to which was added Rs. 15,000 which he had with him already. There is no reason to doubt the truth of this version which has been accepted by the High Court. It must, therefore, be held that the evidence adduced by the mortgagee apart from the question of burden of proof has affirmatively proved the passing of consideration for the mortgage and that there are no

circumstances which could throw any suspicion on the bona fides of the transaction.

It had been argued on behalf of the appellant that his case had been seriously prejudiced by the joint trial, so to say, of the issue relating to his transaction with the one relating to the hypothecation bond dated August 30, 1924. It was also argued that the mortgage bond in question had been executed and registered and given effect to beyond two years from the date of adjudication and that therefore this transaction could not be brought within the mischief of s. 35 of the insolvency Regulation. In view of our findings on the other and more direct and important issues it is not necessary to pronounce upon these additional grounds urged on behalf of the appellant.

In view of our findings on the main issues in the case, the appeal must be allowed, the judgments and orders of the courts below annulling the usufructuary mortgage bond in question set aside and the transaction held banding on the estate of the insolvents. It follows that the lease back to the mortgagors being a part of the same transaction is equally binding on the estate of the insolvents. The appellant is entitled to his costs throughout, to come out of the estate in the hands of the Official Receiver who must pay his own costs.

Appeal allowed.

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