Rm. Nl. Ramaswami Chettiar and Others

Vs

The Official Receiver, Ramanathapuram at Madurai & Others

Civil Appeal No. 207 of 1955

(S. K. Das, A. K. Sarkar, K. Subha Rao JJ)

28.08.1959

JUDGMENT

SARKAR J. –

This appeal arises out of an application for execution of a decree for money and the only question is whether the application was made within the time prescribed by the Limitation Act.

The decree was passed in favour of one Venkatachalam Chettiar on May 9, 1935, against the appellants and certain other persons. On February 3, 1936, Venkatachalam Chettiar transferred the decree to his mother, Meenakshi Achi, by an assignment in writing never having tried to execute it himself. Soon thereafter, namely, on March 26, 1936 a creditor of Venkatachalam Chettiar presented a petition under the Provincial Insolvency Act (hereinafter referred to as the Act) for adjudicating him an insolvent on the ground that the transfer of the decree to Meenakshi Achi was a fraudulent preference and as such an act of insolvency. This petition remained pending for a considerable time and ultimately on January 7, 1939, an order was made on it adjudicating Venkatachalam Chettiar an insolvent. By that order respondent No. 1, the official Receiver of Ramanathapuram, was appointed the receiver in insolvency and the insolvent's estate vested in him. This order was based on the finding that the transfer of the decree by Venkatachalam Chettiar to Meenakshi Achi was a fraudulent preference and an act of insolvency. On January 26, 1942, the receiver made an application in the insolvency proceedings for an order annulling the transfer of the decree by the insolvent to Meenakshi Achi and on this application an order was made on April 9, 1943, under s. 54 of the Act annulling that transfer.

In the meantime, Meenakshi Achi had made two applications for execution of the decree as the assignee of it and a reference to them is necessary. The first of these applications was made on December 14, 1939, for an order recognising her as the assignee of the decree and for its execution against some of the judgment-debtors. This application was disposed of by an order made on September 27, 1937, recognising her right to execute the decree as the assignee and directing a certain compromise made presumably with the judgment debtors concerned, to be recorded. The terms of this compromise are not relevant for the purpose of the appeal. Thereafter, on August 2, 1940, Meenakshi Achi as the assignee of the decree made another application for its execution and this application was disposed of by an order made on September 30, 1940, dismissing it for default of prosecution. It will be remembered that it was after these applications and the orders thereon had been made that the order annulling the assignment of the decree to Meenakshi Achi was passed.

After the order annulling the transfer of the decree to Meenakshi Achi had been made, the receiver considering himself then entitled to the decree, made an application for its execution on September

27, 1943. It is this application which has given rise to the present appeal.

The executing court dismissed the application as having been made beyond the time prescribed by the Limitation Act. On appeal, the High Court at Madras set aside the order of the executing court and held that the application was within time. Some of the judgment-debtors have now come up in appeal to this Court. The appeal is contested by the receiver, the respondent No. 1. The other respondents among whom are the remaining judgment-debtors or their successors in interest, have not appeared.

Applications for execution like the present one are governed by art, 182 of the Limitation Act. That article provides a period of three years within which the application must be made. The article prescribes different points of time for different case from which the period is to commence running. The first point of time so prescribed is the date of the decree. The fifth point of time prescribed is expressed in these words :

(Where the application next hereinafter mentioned has been made) the date of the final order passed on an application made in accordance with law to the proper court for execution.....

The question for determination is whether the fifth point of time applies to the receiver's application for execution. If it does not, the application must be held to have been made out of time, while if it does, the application would not be barred by limitation.

The receiver contends that the two applications by Meenakshi Achi were "applications made in accordance with law to the proper court for execution" within the meaning of the article and his application was within time as it had been made within three years of the date on which the final order on Meenakshi Achi's last application was made.

It is said on behalf of the appellants that it view of the orders in the insolvency proceedings it must be held that she was not entitled to the decree on any of the dates on which she applied for its execution and that her applications were therefore incompetent and not in accordance with law.

The appellants put their contention in several ways. It is first said that the order annulling the assignment of the decree to Meenakshi Achi related back to the date of the assignment with the result that it has to be deemed as if she had never been entitled to the decree and that, therefore, the applications for execution by her were not competent and hence were not in accordance with law.

We think this contention is wholly unfounded. We will assume for the purpose of the present case that when an order is made under s. 54 of the Act annulling a transfer, the transfer stands annulled as from the date it was made. But even so, the transfer stands till it is annulled and therefore, till then, the transferee has all the rights in the property transferred. So long as the transferee had such rights he was competent to exercise them and such exercise would be legal and fully in accordance with law. The fact, if it be so, that the transfer on annulment, becomes void as from the date of the transfer cannot turn the exercise of a right under the transfer, made prior to the annulment and which was legal when made, illegal. Meenakshi Achi had hence full legal competence to execute the decree, till the transfer of it to her was annulled. Her two applications for execution of the decree were, therefore, fully in accordance with law when they had been made and that is all that art. 182 requires.

Next, it is said that the provisions of sub-ss. (2) and (7) of s. 28 of the Act make Meenakshi Achi's two applications for execution incompetent in law. These provisions have now to be considered.

Sub-section (2) says that upon the making of an order of adjudication the whole of the property of the insolvent shall vest in the receiver and sub-s. (7) says that an order of adjudication shall relate back to and take effect from the date of the presentation of the petition on which it is made. It is said that under these provisions, the assets of the insolvent in this case, including the decree under execution, became vested in the receiver on March 26, 1936, when the petition for adjudicating him an insolvent had been presented, and consequently, the two applications for execution by Meenakshi Achi which had been made after that date were incompetent and not in accordance with law.

It seems to us that this contention also is fallacious. These sub-sections cannot have the effect of vesting the decree in the receiver till its transfer to Meenakshi Achi had been annulled. Till then it was not a part of the insolvent's estate. The annulment, as we have earlier pointed out, was made under s. 54 of the Act. That section provides that certain transfers of property by the insolvent would be deemed fraudulent and void as against the receiver in insolvency and shall be annulled by court. It is obvious that a transfer liable to be annulled under this section remains a perfectly valid transfer till it is annulled. If it had become void automatically on an order for adjudication being made, there would be no need to provide for its annulment by court. It would follow that Meenakshi Achi was legally possessed of the decree and competent to apply for its execution till the transfer of the decree to her was annulled under s. 54.

It is then said that though it may generally be that a transfer liable to be annulled under s. 54 remains valid till it is annulled, that is not so where the transfer is the act of insolvency upon which the order of adjudication is founded, for, in such a case the order itself annuls the transfer. So, it is said that as the order of adjudication in this case was founded upon the transfer of the decree to Meenakshi Achi, that transfer became annulled on the order being made on January 7, 1939, and the second application for execution by Meenakshi Achi was incompetent. It is true that if this in the correct view, then the receiver's application for execution must be held to have been made beyond the time allowed, for, it had been made more than three years after the final order on the first application for execution by Meenakshi which is the only order on which the receiver can on this basis rely for resorting to the fifth point of time fixed by art. 182.

Now this argument is based solely on the decision of the Judicial Committee in Mahomed Siddique Yousuf v. Official Assignee of Calcutta [(1943) L. R. 70 I.A. 93] which it is said held that where a transfer is the act of insolvency on which the order of adjudication is founded, that order itself has the effect of annulling the transfer.

We think this case has been misunderstood. We find nothing in it to lead to the view that an order of adjudication founded on an act of insolvency constituted by a transfer of property amounting to a fraudulent preference, itself and without more annuls that transfer. That was a case decided under the Presidency-towns Insolvency Act. In that case one of the acts of insolvency on which the order of adjudication had been founded was a transfer by the insolvent of a certain decree in his favour to the appellant, which was held to have been a fraudulent preference. The transferee was not a party to the order of adjudication. The official assignee, that is, the receiver in insolvency, applied to have that transfer annulled. It was contended on behalf of the official assignee before the judge in insolvency in the High Court that the order of adjudication holding the transfer to be a fraudulent preference was conclusive and binding on the transferee though he was not a party to the insolvency petition. It was said that that had been held in Ex parte Learoyd [(1878) 10 Ch. D. 3] which turned on the English Bankruptcy Act, 1869, the terms of which were similar to the relevant provisions in the Presidency-towns Insolvency Act. The learned judge felt some difficulty in view of a decision of the Madras High Court to which it is unnecessary to refer, whether the principle of the English

decision applied to a case under the Presidency-towns Insolvency Act. He, therefore, went into the facts and came to the conclusion that the transfer amounted to a fraudulent preference and thereupon made an order annulling it. On appeal the appellate Judges of the high Court "expressed some doubt whether the intent to prefer was in fact proved; but they were both of opinion (following Ex parte Learoyd [(1878) 10 Ch. D. 3] that the order of adjudication was conclusive and could not be disputed." They held that this was so though the transferee was not a party to the order of adjudication. In that view of the matter the appellate Judges felt that there was a decision binding on the transferee that the transfer was void as a fraudulent preference and they thereupon annulled the transfer as a matter of course. The judgments in the High Court are reported in 45 C.W.N. 441. The transferee who was not a party to the insolvency petition, then asked for an extension of time to prefer an appeal from the order of adjudication but this was refused.

Then the matter was taken up to the Judicial Committee in further appeal. The Judicial Committee held that the appellate Judges of the High Court were right in their view that the principle of Ex parte Learoyd [(1878) 10 Ch. D. 3], applied to cases under the Presidency-towns Insolvency Act, but they thought that in the circumstances of the case the order of the appellate judges refusing to extend time for the transferee to appeal from the order of adjudication was not justified and set it aside and extended the time to appeal. In order, however, to make the order in the contemplated appeal, should it succeed, effective, they also set aside the order annulling the transfer though in their view it was "plainly right". This would appear from their observations at p. 99 of the report :

> "It is plain that an appeal against the adjudication order would be useless while the orders stand in this independent proceeding declaring the transfer void because of the adjudication order itself. On the other hand, the decision of the High Court avoiding the transfer is plainly right while the adjudication order stands and the appellant as a condition of the extension of time must pay, as he has offered to do, the costs thrown away."

And at p. 100 they said,

> "The order is without prejudice to the right of the official assignee, if he is so advised, to make a further application to have the transfer declared void."

It is therefore abundantly clear that all that the Judicial Committee held in Mahomed Siddique Yousuf's case [(1943) L.R. 70 I.A. 93] was that in a case under the Presidency-towns Insolvency Act, when the act of insolvency upon which an order of adjudication is founded is a transfer amounting to a fraudulent preference, the transferee cannot so long as the order of adjudication stands, question that finding, namely, that the transfer was a fraudulent preference and that, therefore, in an application by the official assignee to have that transfer annulled on the ground that it was a fraudulent preference, the order of adjudication is conclusive proof that the transfer was by way of a fraudulent preference and it was not open to the transferee to lead evidence to prove that the transfer was not a fraudulent preference. In such a case therefore the order of annulment had to be made as a matter of course on proof of the order of adjudication. The Judicial Committee did not hold that in such a case the order of adjudication itself annulled the transfer and no separate order of annulment was required for the purpose. In fact, it is obvious that they thought that separate order annulling the transfer would be necessary even in such a case for otherwise they would not have stated that "the decision of the High Court avoiding the transfer is plainly right" nor while setting aside the order annulling the transfer reserved the right of the official assignee, should the occasion arise, to make a further application to have the transfer declared void. The case therefore does not

support the proposition for which it has been cited. On the contrary, it clearly proceeds on the basis that even where the order of adjudication is based on an act of insolvency constituted by a transfer of property found to be a fraudulent preference, the the transfer stands till it is set aside. In our view, this is the correct position and nothing to the contrary has been brought to our notice.

An argument had been raised at the bar that under the Provincial Insolvency Act an order of adjudication has not that binding force which Mahomed Siddique Yousuf's case [(1943) L.R. 70 I.A. 93] held it had under the Presidency-towns Insolvency Act. It was said that this was so because the terms of the two Acts were dissimilar. We do not think it necessary to express any opinion on this question. We have discussed Mahomed Siddique Yousuf's case [(1943) L.R. 70 I.A. 93] only to show that it does not support the proposition for which it was cited. It is unnecessary for us to say whether it will govern a case under the Provincial Insolvency Act or what the effect of the dissimilarity pointed out in the terms of the two Acts is. That question is not before us.

There remains one other point to deal with. It is said that the official receiver was not entitled to take advantage of the applications for execution made by Meenakshi Achi as he had not been claiming under her but had actually claimed against her. This contention is equally unfounded. Article 182 does not say that no advantage of a previous application can be taken for the purposes of saving the bar of limitation, unless it had been made by a person under whom the applicant in a later application, which is said to be barred by limitation, claimed. All that the article contemplates is an application for execution of a decree made within three years of the final order on a previous application made in accordance with law for the execution of the same decree. That being so, we must reject this contention of the appellants also.

In view of what we have already said, it becomes unnecessary to deal with the other points raised at the bar.

In the result, we think that the appeal should be dismissed and we order accordingly. The appellant must pay the costs of this appeal.

SUBBA RAO J. –

This appeal raises a question of limitation. There is no dispute about the facts. On May 9, 1935, one Venkatachalam Chettiar obtained a compromise decree against the appellants and respondents 2, 3 and 4 and predecessors in interest of respondents 5 and 6 in A.S. No. 226 of 1930, on the file of the High Court of Madras. Under the decree the defendants were directed to pay the plaintiffs their a sum of Rs. 1,10,101-4-0 together with interest at 3 per cent. per annum in certain instalments, the last of the instalments being payable on May 30, 1942. The decree also provided that in the event of a default in payment of any one of the instalments, the entire decree amount would become payable. On February 27, 1937, one Visvanathan Chettiar obtained a decree against the said Venkatachalam Chettiar in O.S. No. 22 of 1936, on the file of the Court of Subordinate Judge, Devakottai, for a sum of Rs. 33,000. The suit ending in the above decree was filed on January 29, 1936. On February 3, 1936, Venkatachalam Chettiar executed a deed of assignment transferring the decree obtained by him in C.S. No. 14 of 1926 to his mother, Meenakshi Achi, for consideration. On March 26, 1936, Visvanathan Chettiar filed I.P. No. 10 of 1936 in the Court of Subordinate Judge, Devakottai, for adjudicating Venkatachalam Chettiar an insolvent on the ground that the transfer of the decree in favour of Meenakshi Achi was an act of insolvency. On December 14, 1936 the assignee, Meenakshi Achi, filed E.P. No. 37 of 1937 for recognition of the assignment in her favour and for execution of the decree. The judgment-debtors did not object either to the recognition of the

assignment of the decree or the execution thereof. The said Visvanathan Chettiar intervened in the execution petition and applied in E.A. No. 817 of 1937 for stay of execution of the decree on the ground that he had filed an insolvency petition against the decree-holder and also on the ground that the said assignment was nominal. The learned Subordinate Judge disallowed the objection of the creditor, recognised the assignment, and permitted the assignee-decree-holder to proceed with the execution of the decree. On September 27, 1937, a settlement was entered into between the assignee-decree-holder and the judgment-debtors and the said execution petition was closed. On January 7, 1939, Venkatachalam Chettiar was adjudicated insolvent on the ground that the assignment of the said decree by him in favour of his mother, Meenakshi Achi, was an act of insolvency, whereupon his properties vested in the first respondent, the Official Receiver, Ramanathapuram at Madurai. On August 2, 1940, the assignee-decree-holder filed another execution petition, E.P. No. 243 of 1940, and it was struck off on September 30, 1940. On January 26, 1942, the Official Receiver filed I.A. No. 20 of 1942 in I.P. No. 10 of 1936 in the Court of the Subordinate Judge, Devakottai, for setting aside the assignment, and by order dated April 9, 1943, the assignment was set aside by the Court on the ground of fraudulent preference within the meaning of s. 54 of the Provincial Insolvency Act, 1920, hereinafter called the Act. On September 27, 1943, the Official Receiver filed a fresh execution petition, E.P. No. 90 of 1944, for executing the decree. It was alleged by the appellants and the respondents 2 to 6, inter alia, that the said execution petition was barred by limitation on the ground that the two earlier execution petitions were not in accordance with law within the meaning of art. 182, cl. 5, of the Limitation Act. The Official Receiver contended that they were in accordance with law and therefore the present execution petition was in time. He further pleaded that the present execution petition was also saved from the bar of limitation by the payments made by the judgment-debtors to Meenakshi Achi, and that, in any event, the decree in respect of the last three instalments was not barred by limitation. The learned Subordinate Judge rejected the contentions of the Official Receiver and held that the execution petition was barred by limitation. The Official Receiver preferred an appeal against the said order of the Subordinate Judge to the High Court of Madras. Govinda Menon and Basheer Ahmed Sayeed, JJ., of the said High Court came to the conclusion that the earlier execution petitions were in accordance with law and, therefor, the present execution petition was within time. They also expressed the view that the payments made by the judgment-debtors to Meenakshi Achi were valid payments and therefore they also saved the bar of limitation. In any view, they found that the last two instalments were not barred by limitation. On their findings, the learned judges of the high Court set aside the order of the learned Subordinate Judge and remanded the execution petition to the Court of the Subordinate Judge, Devakottai, for taking steps in furtherance of execution. The present appeal to this Court was filed against the said order of remand.

Learned Counsel for the appellants contended that the execution petitions, E.P. No. 37 of 1937 and E.P. No. 243 of 1940, were not in accordance with law for the following reasons : (1) The order dated April 9, 1943, annulling the assignment of the decree by Venkatachalam Chettiar in favour of his mother, Meenakshi Achi, related back to the date of the transfer, i.e., February 3, 1936, and, therefore, E.P. No. 37, 1937, which was filed on December 14, 1936 and E.P. No. 243 of 1940 which was filed on August 2, 1940, were ineffective to save the bar of limitation, as on the dates they were filed Meenakshi Achi had no title in the decree; (2) the order of adjudication dated January 7, 1939, was based on the finding that the said assignment of the decree was an act of fraudulent preference and that the order related back to the date of the filing of I.P. No. 10 of 1936 on March 26, 1936, and, therefore, the two execution petitions filed thereafter were filed by a person without title, with the result that the said two petitions were not in accordance with law; (3) assuming that the said two execution petitions were in accordance with law, the Official Receiver

neither claims under, nor represents, the assignee-decree-holder, and, therefore, he has no locus standi to file the present execution petition; (4) payments made by the judgment-debtors to Meenakshi Achi, who had no title in the decree, could not save the bar of limitation; and (5) as Meenakshi Achi in her execution petitions, by exercising her option, claimed the entire decree amount, the Official Receiver cannot now claim that the last two instalments are within time.

At the outset it may be stated that it would be sufficient if was consider the objections of the appellants in regard to E.P. No. 243 of 1940, for, if that was not in accordance with law, the present execution petition would be barred by limitation. The validity of E.P. No. 37 of 1937 was also questioned on the same grounds of attack taken against the latter execution petition.

The relevant part of the Limitation Act in art. 182 and it reads :

#----------Description of Period of Time from which periodapplication Limitation begins to run----------For the execution Three years; or, 5. (where the applicationof a decree or where a certified next hereinafter mentionedorder of any Civil copy of the decree has been made) the date ofCourt not provided or order has been the final order passed onfor by article 183 registered, six an application made inor by section 48 years. accordance with law to theof the Code of proper Court for execution,Civil Procedure, or to take some step in aid1908. of execution of the decree or order.----------##

Under this article the latest execution petition should have been filed within three years from the date of the final order passed on an application made in accordance with law to the proper Court of execution. Taking first the second contention of the learned Counsel for the appellants, the question may be posed thus : Whether the execution petition, E.P. No. 243 of 1940, filed on August 2, 1940, by Meenakshi Achi after Venkatachalam Chettiar was adjudicated insolvent on January 7, 1939, was one in accordance with law ? If the order of adjudication of Venkatachalam Chettiar on the ground that the assignment of the decree made by him in favour of Meenakshi Achi was an act of insolvency ex proprio vigore annul the transfer in her favour, the execution petition filed by her after the said order of adjudication would not be one filed in accordance with law. On the other hand, if the assignment of the decree continued to be good till it was annulled on an application filed by the Official Receiver, which was done in the present case on April 9, 1943, the execution petition, subject to another argument that I would consider at a later stage, would be one filed in accordance with law. What then is the legal effect of such an order of adjudication ? The question in the main falls to be decided on a true construction of the relevant provisions of the Act. Section 6 of the Act defines the act of insolvency; it enumerates eight acts of insolvency, and one of them is a transfer made by a debtor which would be void as a fraudulent preference if he were adjudicated insolvent. Section 7 enables a creditor or a debtor to present an insolvency petition for adjudicating the debtor an insolvent. Section 9 lays down the conditions on which a debtor may petition. Section 13 prescribes the particulars a creditor has to give in his petition, and one of the particulars to be given in the act of insolvency committed by the debtor. When an insolvency petition is admitted, s. 19 provides that notice should be given to creditors in such manner as may be prescribed, and, when the debtor is not the petitioner, notice of the order admitting the petition should be served on the debtor. On the date fixed for hearing, the Court should require proof of the matters mentioned under s. 24 of the Act; it enables the Court to examine the debtor and the creditors and take the evidence adduced by them. After making the necessary enquiry, the Court may dismiss the petition or make an order of adjudication. On the making of the said order of adjudication, the whole property of the insolvent would vest in the Court or in the Receiver appointed under the Act, and the said property

becomes divisible among the creditors. Under sub-s. 7 of s. 28 the order of adjudication shall relate back to, and take effect from, the date of the presentation of the petition. Under s. 30 notice of an order of adjudication stating the name, address and description of the insolvent, the date of adjudication, the period within which the debtor should apply for his discharge and the Court by which the adjudication is made, should be published in the Official Gazette and in such manner as may be prescribed. It will be seen from the aforesaid provisions that till an order of adjudication is made, the person to whom the insolvent transferred his property does not come into the picture at all. The purchaser is neither a part to the proceedings nor any notice is given to him. It would, therefore, be contrary to all principles of natural justice to hold that the finding arrived at in regard to an assignment of a property by the insolvent in favour of a third party behind his back, is binding on him. If the legislature intended that the order should have that effect, it would have provided for personal, or, at any rate, public notice to the purchasers, or would have given in express terms such a binding effect; and the fact that it did not do so is a clear indication of the legislative intention that an incidental finding was not intended in have such a far-reaching effect.

On the other hand, the Act makes ample provision for setting aside such transfers. Sections 53 and 54 of the Act enable the Official Receiver to have voluntary transfers made within two years of the insolvency petition and that made in fraudulent preference of one creditor over another within three months from the date of the petition annulled by the Court. If the legislature intended to exclude a transfer constituting an act of insolvency from the operation of these provisions, it would have introduced a proviso to that effect. Therefore, unless such a transfer is duly annulled in the manner prescribed, the transfer would be valid.

That this is the intention of the legislature is also made clear by the other provisions of the Act vis-a-vis transfers. The Act provides for three stages : (1) Transfers made before the presentation of the insolvency petition; (2) transfers made after the presentation of the petition and before the order of adjudication; and (3) transfers made after adjudication. A transfer made after adjudication in not binding on the Receiver. A transfer by an insolvent after the filing of the petition is also not binding on the Receiver subject to a protection clause. A purchase in good faith under a sale in execution (s. 51(3)) and a transfer inter vivos in good faith for valuable consideration (s. 55) fall within the protected class of transactions. A transfer before the filing of the petition is binding on the Receiver unless it is annulled under ss. 53, 54 or 54-A of the Act. The scheme of the Act in regard to transfers clearly demonstrates that transfers before the filing of the petition are good unless they are annulled in the manner prescribed in the Act and even the doctrine of relating back of the order of adjudication does not reach them as they fall on the other side of the line. If it was the intention of the legislature that the said order by its own force should declare the transaction void, it would have fixed the date of the transfer as the datum line instead of the date of the filing of the petition. It appears to me that this was designedly done to give an opportunity to the party affected to defend his title when the Official Receiver filed an application to annul the transfer. Sections 53, 54 and 28 must be reconciled and they can be reconciled without doing violence to the language of the said sections if the order of adjudication is conclusive only in regard to the status of the insolvent it declares and the transfer, though it formed the basis of the adjudication, so far as the transferee is concerned, continues to be good till set aside.

Strong reliance is placed upon the judgment of the Judicial Committee in Mohamed Siddique Yousuf v. Official Assignee of Calcutta [(1943) L.R. 70 I.A. 93] in support of the contention that the finding that the transfer of the decree in favour of Meenakshi Achi was an act of insolvency was binding on the transferee, though she was not a party to the adjudication proceedings. That decision turned upon the relevant provisions of the Presidency-towns Insolvency Act, 1909, and the

corresponding provisions of the Bankruptcy Act of 1869. That decision cannot apply to a situation created under the Provincial Insolvency Act, unless the provisions of said Act are pari materia with those of the Presidency-towns Insolvency Act and the Bankruptcy Act. A comparative study of the three sets of provisions by placing them in juxtaposition will facilitate a better understanding of the problem.

#----------Bankruptcy Act, 1869 The Presidency-towns The Provincial Insolvency Act, 1909 Insolvency Act, 1920----------S. 10 : A copy of an S. 116 (1) : A copy of S. 30 : Notice oforder of the Court the Official Gazette an order ofadjudging the debtor containing any adjudication statingto be bankrupt shall notice inserted in the name, addressbe published in the pursuance of this and descriptionLondon Gazette, and Act shall be of the insolvent,be advertised evidence of the facts the date of thelocally in such stated in the notice adjudication, themanner (if any) as (2) : A copy of the period within whichmay be prescribed, Official Gazette the debtor shalland the date of containing any notice apply for hissuch order shall be of an order of discharge and thethe date of the adjudication shall Court by which theadjudication for the be conclusive adjudication ispurposes of this evidence of the made, shall beAct, and the order having been published in theproduction of a duly made, and of Official Gazette andcopy of the Gazette its date. in such other mannercontaining such as may beorder as aforesaid prescribed.shall be conclusiveevidence in alllegal proceedingsof the debtorhaving been dulyadjudged abankrupt, and of thedate of theadjudication.S. 11 : The S. 51 : The S. 28(7) : An orderbankruptcy of a insolvency of a of adjudicationdebtor shall be debtor, whether the shall relate backdeemed to have same takes place on to, and take effectrelation back to and the debtor's own from, the date ofto commence at the petition or upon the presentation oftime of the act of that of a creditor the petition onbankruptcy being or creditors, shall which it is made.completed on which be deemed to havethe order is made relation back to andadjudging him to be to commence at -bankrupt; or if thebankrupt is proved (a) the time of theto have committed commission of themore acts of act of insolvency onbankruptcy thanone, to have relationback and tocommence atthe time of the which an order offirst of the adjudication is madeacts of bankruptcy against him, orthat may be proved (b) if the insolventto have been is proved to havecommitted by the committed more actsbankrupt within of insolvency thantwelve months next one, the time of thepreceding the order first of the acts ofof adjudication; insolvency proved tobut the bankruptcy have been committedshall not relate to by the insolventany prior act of within three monthsbankruptcy, unless next preceding theit be that at the date of thetime of committing presentation of thesuch prior act the insolvency petition :bankrupt wasindebted to some Provided that nocreditor or creditors insolvency petitionin a sum or sums or order of adjudicationsufficient to shall be rendered invalidsupport a petition by reason of any act ofin bankruptcy, and insolvency committedunless such debt or anterior to the debtdebts are still of the petitioningremaining due at creditor.the time of theadjudication. S. 56(1) : Every S. 54(1) : Every transfer of property, transfer of property, every payment made, every payment made, every obligation every obligation incurred, and every incurred, and every judicial proceeding judicial proceeding taken or suffered by taken or suffered by any person unable to any person unable to pay his debts as they pay his debts as they become due from his become due from his own money in favour own money in favour of any creditor, with of any creditor with a view of giving that a view of giving that creditor a preference creditor a preference over the other over the other creditors, shall, if creditors, shall, if such person is such person is adjudicated insolvent adjudged insolvent on on a petition a petition presented presented within within three months three months after after the date the date thereof, be thereof, be deemed deemed fraudulent and fraudulent and void void as against the as against the Official assignee. receiver, and shall be annulled by the (2) : This section Court. shall not affect the rights of

any person (2) : This section making title in good shall not affect the faith and for valuable rights of any person consideration through who in good faith and or under a creditor for valuable of the insolvent. consideration has acquired a title through or under a creditor of the insolvent.----------##

With some difference in the phraseology, with which we are not concerned, ss. 116 and 51 of the Presidency-towns Insolvency Act are in terms similar to the corresponding sections, ss. 10 and 11, of the Bankruptcy Act. Section 10 of the Bankruptcy Act and s. 116 of the Presidency-towns Insolvency Act make the copy of the Official Gazette containing the order of adjudication conclusive evidence of the date of adjudication and the fact that the order of adjudication was duly made. But s. 30 of the Provincial Insolvency Act only enjoins that the notice of the order of adjudication with the necessary particulars should be published in the Official Gazette and in such manner as may be prescribed; but a copy of the said Gazette containing the said notification is not made conclusive evidence either of the facts mentioned therein or of the fact that adjudication has been duly made. Section 51 of the Presidency-towns Insolvency Act is in terms similar to that of s. 11 of the Bankruptcy Act, and under both the sections the insolvency of a debtor relates back to the time of the commission of the act of insolvency on which the order of adjudication has been made against him. But under s. 28(7) of the Provincial Insolvency Act, the order of adjudication relates back to and takes effect from the date of the presentation of the application on which it is made. Under s. 56 of the Presidency-towns Insolvency Act, transfer of a property in favour of a creditor with a view to give preference to him over other creditors shall be deemed fraudulent and void as against the Official Assignee, whereas under s. 54 of the Provincial Insolvency Act, the said transfer has to be annulled by the Court. There are, therefore, essential differences in the structure of the scheme between the three Acts in the matter of adjudication.

With this background let us look at the Privy Council decision in Mohomed Siddique Yousuf's case [(1943) L.R. 70 I.A. 93] to ascertain the basis of that decision. The facts in that case were : On January 20, 1939, the insolvent assigned to the appellant a decree obtained by him for consideration. On April 19, 1939, the petitioning creditor filed a petition in the High Court for the adjudication of the insolvent as such. One of the acts of insolvency alleged was the said assignment of the decree in favour of the appellant. On June 13, 1939, an adjudication order was made against the insolvent. No one appeared except the petitioning creditor, and the order recited that the insolvent had committed each of the acts of insolvency alleged in the petition. On November 23, 1939, the Official Assignee gave notice of motion in the Insolvency Court for a declaration that the indenture of assignment dated January 20, 1939, should be declared void as against the Official Assignee and that the traansfer should be set aside. The Judge in Insolvency held on the merits that the said transfer was void under s. 56 of the Presidency-towns Insolvency Act. On appeal the High Court held that the order of adjudication was conclusive evidence against the appellant that the assignment was a fraudulent preference, and on that ground it declared the transfer void. On further appeal, the Privy Council agreed with the High Court. Relying on the decision in Ex parte Learoyd [(1878) 10 Ch. D. 3] a decision on analogous provisions of the Bankruptcy Act, the Privy Council made the following observations at p. 98 :

> "The provisions of the Presidency-towns Insolvency Act, 1909, are also in similar terms, and their Lordships feel no doubt that the principles of the English decision are as valid in India as in England. No doubt it is anomalous that a decision affecting the right of a third party should be conclusively determined against him in his absence, and even without notice to him, but the words of the section and the importance of maintaining the status of the debtor as determined by an order of

> adjudication, and the necessity of securing the stability of the administration of the debtor's estate once his status has been fixed, have been justly held to outweigh the consideration of hardship to the private citizen."

But the Privy Council came to the conclusion, on the facts that a case was made out for the High Court for excusing the delay in preferring the appeal against the order of adjudication. On that view they set aside the order of the High Court and made the following observations for its guidance, at p. 99 :

> "It may be that if the appellant takes advantage of the extension of time and appeals, the High Court may adopt the procedure in Ex parte Tucker [(1879) 12 Ch. D. 308] and content themselves with striking out the act of bankruptcy complained of, and leaving the official assignee to make a fresh application without themselves determining the facts."

This decision decides three points, namely : (i) having regard to the express provisions of the Presidency-towns Insolvency Act, and for maintaining the status of the debtor and the stability of the administration of his estate, the decision affecting the rights of a third party though made behind his back, would be binding on him; (ii) an appeal can be entertained against the order of the adjudication at the instance of the transferee, and, if necessary, by excusing the delay in preferring the appeal; and (iii) in such an appeal, the High Court may strike out one of the acts of insolvency, i.e., the transfer in favour of the appellant, and leave it to the Official Assignee to make a fresh application. Though the principles underlying the relevant provisions of the Act were expounded, the decision mainly rested on the express provisions of the Presidency-towns Insolvency Act. Nor did the Privy Council hold that when there was an order of adjudication on the basis of an act of insolvency, there was no necessity on the part of the Official Assignee to take out an application for setting aside the transfer constituting the act of insolvency. Though it is not very clear, it appears to me that what the Privy Council stated was that in such an application the decision on the transfer forming part of the order of adjudication is conclusive evidence of the invalidity of the transfer. To put it differently, in such an application the Official Assignee need not prove afresh that the transfer was a fraud on creditors or an act of fraudulent preference. That decision was mainly based upon Ex parte Learoyd [(1878) 10 Ch. D. 3], which in its turn was founded upon the interpretation of ss. 10 and 11 of the Bankruptcy Act - sections corresponding to ss. 116 and 51 of the Presidency-towns Insolvency Act. A scrutiny of that decision therefore, will disclose the raison d'etre of the decision of the Privy Council. There, on August 30, 1877, an insolvent executed in favour of George Payne a bill of sale of his household furniture etc., by way of security for consideration. The goods remained in the apparent possession of the mortgagor until January 1, 1878, when Payne removed them. On January 3, 1878, a bankruptcy petition was presented against the insolvent by a creditor, relying upon an alleged act of bankruptcy, namely, that the insolvent, being a trader, departed from his dwelling-house on December 31, 1877. On January 3, 1878, an order of adjudication was made on the petition upon proof of the said act of bankruptcy, and that order was advertised in the usual way in the London Gazette. On January 8, 1878, the goods removed by Payne were sold on his behalf. The trustees in the Bankruptcy claimed the proceeds of the sale, and the Judge of the County Court ordered the payment. On appeal Bacon, C.J., allowed the appeal on the ground that it had not been established that there was an act of insolvency before Payne took possession of the goods. On further appeal, the Court of Appeal set aside the judgment of Bacon, C.J., on the ground that by virtue of ss. 10 and 11 of the Bankruptcy Act, 1869, "a bill of a sale holder is conclusively bound by the adjudication so long as it stands, and cannot dispute that the act of bankruptcy on which the adjudication professedly proceeded was in fact committed," and that the trustee's title related back to

that act of bankruptcy James, L.J., after a brief survey of the historic background of the Bankruptcy Act, based his judgment mainly on the construction of the provisions of ss. 10 and 11 of the Bankruptcy Act. The learned Judge observed at p. 8 :

> "A man cannot be 'duly' adjudged a bankrupt, unless the great requisite of all exists, that he has committed an act of bankruptcy. That is the capital offence of which he must have been guilty before he can be 'duly' adjudged a bankrupt. That he has been 'duly' adjudged a bankrupt, necessarily involves the previous commission of an act of bankruptcy. The mere fact that an adjudication has been made could have been proved without the aid of sect. 10. That section may, however, only involve this, that some act of bankruptcy had been committed before the adjudication was made. But then comes sect. 11, which has no operation at all as between the bankrupt and the trustee. The bankrupt has no rights whatever; all his rights have been transferred to the trustee. The mere fact that sect. 11 is dealing with the relation back of the trustee's title, shews that it is dealing with the rights of third persons, and not merely with the rights of the bankrupt and persons indebted to him.... Then sect. 11 goes on to provide that, by way of enlargement of the trustee's title, he may go behind the act of bankruptcy on which the adjudication was founded, and may, under certain circumstances and subject to certain limitations, prove that other earlier acts of bankruptcy have been committed, and if this is done the trustee's title is to relate back to the earliest act of bankruptcy which is proved to have been committed within twelve months before the adjudication. This, however, is to be proved by evidence, whereas the act of bankruptcy on which the adjudication is founded is proved by the production of the adjudication itself. It seems to me to be impossible to evade the words of these sections."

Baggallay, L.J., also, after emphasizing on the words "duly made" in s. 10 of the Bankruptcy Act, remarked on the scope of s. 11 thus, at p. 10 :

> "But then comes sect. 11, which, I think, if more was needed, makes the adjudication conclusive on third persons that the act of bankruptcy on which it was founded was really committed."

Thesiger, L.J., also said much to the same effect, at p. 11 :

> "We start, therefore, with this, that we are bound to hold conclusively that a 'due' adjudication was made on the 3rd January. It must, therefore, have been founded upon a proper act of bankruptcy. Then sect. 11 goes still further, and it is important to compare it with the provisions contained in the prior Bankruptcy Acts. Sects. 234 and 235 enabled third persons to dispute the act of bankruptcy upon giving notice of their intention so to do. That provision is swept away by the Act of 1869, and in language clear and distinct the Legislature has said by sect. 11 that 'the bankruptcy of a debtor shall be deemed to have relation back to and to commence at the time of the act of bankruptcy being completed on which the order is made adjudging him to be bankrupt."

From the aforesaid extracts from the judgments, it is manifest that the decision turned upon the express provisions of ss. 10 and 11 of the Bankruptcy Act. Under s. 10 of that Act, the gazette containing the order was conclusive evidence that the order of adjudication was duly made on the

basis of an act of insolvency and s. 11 fixed the datum line for the commencement of the trustee's title from the act of bankruptcy. The former section made the order of adjudication conclusive against third parties and the latter section vests the title of the property concerned in the official receiver from the date of the act of insolvency. This judgment, therefore, cannot be applied to an Act which differs in all respects from the relevant provisions of ss. 10 and 11 of the Bankruptcy Act on the basis of which that judgment was given. In the Provincial Insolvency Act, neither the order of adjudication is conclusive evidence that it has been duly made, nor the trustee's title dates bank to the act of insolvency on which the adjudication is founded. I am, therefore, of the view that neither the decision in Ex parte Learoyd [(1878) 10 Ch. D. 3] based on the provisions of the Bankruptcy Act, 1869, nor the Privy Council decision in Mahomed Siddique Yousuf v. Official Assignee of Calcutta [1943 L.R. 70 I.A. 93] based upon the provisions of the Presidency-towns Insolvency Act, has any bearing in construing the relevant provisions of the Provincial Insolvency Act. A similar view was expressed by a Full Bench of the Madras High Court in The Official Receiver, Guntur v. Narra Gopala Krishnayya [I.L.R. 1945 Mad. 541] and by a Full Bench of the Nagpur High Court in D. G. Sahasrabudhe v. Kila Chand Deochand & Co., Bombay [I.L.R. 1947 Nag. 85]. Both Courts held that the decision of the Privy Council did not apply to a case under the Provincial Insolvency Act and that a transferee, who was not a party to the adjudication proceeding, could contend in subsequent proceedings for annulment that his transfer was good notwithstanding that the order of adjudication was based on the alleged transfer as being an act of insolvency. I accept the correctness of the said two decisions. If so, it follows that the order of adjudication made in the present case did not by its own force divest the title of Meenakshi Achi and vest it in the official receiver and that she continued to be the transferee of the decree at the time when she filed the second execution petition, E.P. No. 243 of 1940.

For the same reasons, when E.P. No. 37 of 1937, was filed, Meenakshi Achi had subsisting title to the decree under the transfer deed dated February 3, 1939, and, therefore, the said execution petition was also in accordance with law.

The next argument of the learned Counsel for the appellants is that the order of the Insolvency Court dated April 9, 1943, related back to the date of the transfer i.e., February 3, 1936, and that by the order of annulment, the transfer became void from its inception with the result that on the dates when the Execution Petitions Nos. 37 of 1937 and 243 of 1940 were filed Meenakshi Achi had no title to the decree, and, therefore, the said petitions were not filed in accordance with law. The answer to this contention depends upon the true legal effect of the order of annulment of the transfer on the ground of fraudulent preference. That part of s. 54 of the Provincial Insolvency Act so far relevant to the present enquiry reads thus :

S. 54(1) : "Every transfer of property.... in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the receiver, and shall be annulled by the Court.

(2) : This section shall not affect the rights of any person who in good faith and for valuable consideration has acquired a title through or under a creditor of the insolvent."

It is clear from the provisions of this section that a transfer of property by a debtor before insolvency in favour of a creditor giving him preference over other creditors is not absolutely void. As between the transferor and the transferee, the title in the property conveyed passed from one to the other, but it is liable to be annulled at the instance of the receiver. This is because the Insolvency

Act confers on the official receiver a title superior that of the insolvent enabling the former to get it annulled in the interest of the creditors. Sub-section 2 of that section also indicates that the transfer is not void ab initio, for under that sub-section the rights of any person, who in good faith and for valuable consideration acquired title through or under a creditor of the insolvent, are protected. If the transfer was ab initio void in the sense that it is a nullity, all the depending transactions should fall with it. Emphasis is laid upon the word "void" in s. 54(1) of the Act, but the said word in the context can only mean voidable, for it is made void only against the receiver and requires to be annulled by the Court. It follows from the aforesaid premises that such a transfer is valid till annulled in the manner prescribed by the provisions of the Provincial Insolvency Act.

The legal effect of annulling a transfer under s. 53 of the Act was considered by a Division Bench of the Madras High Court in The Official Receiver, Coimbatore v. Palaniswami Chetti [(1925) I.L.R. 48 Mad. 750]. In that decision, Devadoss, J., observed as under at p. 758 :

> "But till such a declaration is made by the Insolvency Court under section 53, the transaction is good and the mortgagee could proceed with the suit or with the execution of his decree against the insolvent's property."

Wallace, J., elaborated thus, at p. 764 :

> "Section 53 implies an attack by the Official Receiver on behalf the general body of creditors, and the remedy which he is entitled to get on proving his case is that the transfer is voidable against him and may be annulled by the Court..... It does not really affect the relationship of the transferor and transferee as mortgagor and mortgagee. For example, if the property is sold by the Official Receiver, and the creditors and costs are fully paid out of the proceeds and there is a surplus remaining, that surplus belongs prima facie to the transferee and not to the transferor, and is his unless the transferor has by appropriate proceedings established his right to it..... The relationship between the mortgagor and mortgagee remains unaffected by any proceedings under section 53, and the mortgagee is entitled therefore to enforce his mortgage against the mortgagor except so far as proceedings under section 53 may have held the property mortgaged an assets of the mortgagor at the disposal of the general body of creditors."

The observations of the learned Judges establish two propositions : (i) that the transaction inter se between the debtor and transferee is good; and (ii) it is not binding on the Official Receiver so far as it is necessary to protect the interests of the creditors. The decision in Amir Ahmad v. Saiyid Hasan [(1935) I.L.R. 57 All. 900] is also one laying down the legal effect of s. 53 of the Act. The learned Judges made the following observations in that case, at p. 903 :

> "It seems quite clear that if a transfer made by a debtor is wholly fictitious and bogus and no interest in the property passes to the transferee, then the transfer is void ab initio and subsequent transferees can never be protected because the foundation of their title does not exist..... On the other hand, if the transfer made by the debtor was not wholly fictitious and bogus but the intention of the parties was that property should is fact passed to the transferee, then the result would depend on whether the transferee was a purchaser in good faith and for valuable consideration, or not. The transfer for the time being is valid, though it is voidable at the option of the receiver, and it is discretionary with court to annul it under section 53 of the Provincial

Insolvency Act."

The said observations will apply mutatis mutandis to a situation under s. 54 of the Act. Indeed, a Division Bench of the Nagpur High Court in Rukhmanbai v. Govindram [(1935) I.L.R. 57 All. 900], in the context of s. 54 of the Act, stated to the same effect thus at p. 275 :

> "The wording of the section (s. 54) thus very clearly indicates that a transfer of the nature mentioned therein is voidable as against the receiver and is not void ab initio and may be annulled by the Court..... It is thus clear from the section that till the transfer is actually annulled by the Court it remains a valid transaction."

The aforesaid discussion yields the following result : (1) a transfer by a debtor of his property before insolvency in favour of a creditor with a view to giving him preference over other creditors conveys a valid title to the transferee; (2) under circumstances mentioned in s. 54 of the Act, it is voidable against the receiver; (3) when it is annulled by the Court on the ground of fraudulent preference, the property vests in the official receiver, who can administer it in the interest of the creditors; and (4) even after the transfer is annulled, it continues to be good between the transferor and transferee, and in a contingency of any balance remaining of the sale proceeds after the creditors are fully paid, the transferee would be entitled to the same.

Two lines of decisions have been relied upon by the learned Counsel for the appellants. The first one holds that in the case of conflicting claims to an estate, the claimant ultimately declared to be the owner thereof by the final Court cannot rely, to save the bar of limitation, upon a petition filed by the rival claimant to execute the decree pertaining to the estate at the time the title was in his favour; and the other decides that when a transfer is set aside on the ground of fraudulent preference, the official receiver can claim to recover mesne profits from the transferee of the property of an insolvent from the date of the transfer. The first line of decisions turns upon the principle that a defeated claimant had no title to the property at the time he filed the application, for the effect of the final decree is that the said claimant had no title at any time, and the second line of decisions is founded on some equitable doctrine. There are also decisions taking the contrary view. It is not necessary in this case either to go into that question or attempt to resolve the conflict. As I have held that in the case of a transfer in fraud of creditors or by fraudulent preference, the transfer is good till set aside by the Court, the transferee would have title to file the execution petition before the transfer was set aside.

The third contention of the learned Counsel for the appellants is a weak one. It is said that the official receiver does not claim under Meenakshi Achi, and, therefore, he cannot rely upon the execution petition filed by her to save the bar of limitation. There is a fallacy underlying this argument. The question for decision is not whether the official receiver claims under Meenakshi Achi, but whether the execution petitions filed by her were in accordance with law. If as I held, at the time the previous execution petitions were filed, Meenakshi Achi had a valid title to execute the decree, the execution petitions filed by her would certainly be in accordance with law within the meaning of art. 182(5) of the Indian Limitation Act. I, therefore, reject this contention.

In view of the aforesaid conclusions arrived at by me, the last two contentions based on payments of instalments do not arise for consideration.

In the result, the appeal fails and is dismissed with costs.

Appeal dismissed.

</html