

# RANGOON HIGH COURT

U. On Maung

Vs

Maung Shwe Hpaung

(Baguley and Mosely, JJ.)

12.07.1937

## ORDER

### **Baguley and Mosely, JJ.**

1. This is an appeal by a receiver in insolvency against an order passed by the Additional District Judge, Thaton, refusing to set aside a transfer made by two insolvents. In the application filed in the original proceedings, no section of the Provincial Insolvency Act is mentioned, but it seems clear that the application was made for the transfer to be voided either under Section 53 or Section 54, whichever the Court might think most applicable. The Additional District Judge found that the respondents had proved that the transfer was honestly made for good consideration, which would of course have been a good reply to an application made under Section 53. The question of whether the transfer could have been voided under Section 54 was not dealt with. In appeal before us it was argued that the transfer should have been voided under Section 54 because, although it was executed on the 11th June 1935 and the application for insolvency was filed on the 18th September 1935, more than three months later, the document was not registered until the 25th September 1935, actually after the filing of the application for insolvency. It was argued that this case is covered by the published ruling in *U. Ba Sein v. Maung San<sup>1</sup>* and if we agree with this ruling there is little doubt but that the appeal would have to be allowed. Unfortunately, we do not find ourselves in agreement with this ruling, and for that reason we refer this matter to such Full Bench as the Honourable the Chief Justice may decide. Where we differ from the published judgment is with regard to the passage on p. 266 where, after quoting the relevant portion of Section 54, Provincial Insolvency Act and Section 59, Transfer of Property Act, the judgment goes on to state:

No legal interest in the property passes from the mortgagor to the mortgagee except upon registration of the deed. The provisions of Section 47, Registration Act, do not in our opinion run counter to this proposition, for although that section throws back the commencement of the operation of the document, when registered, to the date of the execution, it does not pretend to lay down that where an instrument which affects Immovable property requires to be registered, title in the property passes before registration is effected.

2. With this, as it stands, we are in entire agreement, but the point here is not the date on which title to the property passes, but the date with effect from which title in the property passes, and what Section 47, Registration Act, says is that the document shall operate from the date of execution. If the document operates from the date of execution, we do not understand how it can be said that the date of transfer is anything except the date of the execution of the transfer, and Section 54, Provincial Insolvency Act, says that the transfer of property shall be deemed fraudulent and void against the receiver if such person is adjudged insolvent on a petition presented within three months after the date of the transfer of the property. That is what we hold the section to mean. "When it says "every transfer of property...shall, if such person is adjudged insolvent in a petition presented within three months after the date thereof..." the word "thereof" must mean "of the transfer," and the date of the transfer must be the date of its execution, as, if subsequently registered, the transfer takes effect from the date of execution. One can well imagine apt words for expressing the meaning attributed to the section by our brothers, e.g. "after the transfer is completed," but in our opinion such words have not been used, and with respect, we do not consider, that the fact that the wording used may sometimes cause hardship is a good reason for giving it a strained interpretation. This is an evil, if evil it is, for the Legislature to cure. However, as we cannot decide the ease in a contrary sense to the published ruling of a Bench of this Court, we refer to a Full Bench the question: Does the period of three months referred to in Section 54, Provincial Insolvency Act, begin to run from the date of execution of the transfer or from the date on which it is registered, if it is a transfer that requires registration?

## OPINION

**Roberts, C.J. –**

3. The question which has been referred for the decision of the Full Bench is as follows:

Does the period of three months referred to in Section 54, Provincial Insolvency Act, begin to run from the date of execution of the transfer or from the date on which it is registered, if it is a transfer that requires registration?

4. Section 54, Sub-section (1), Provincial Insolvency Act, runs as follows:

Every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favor 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.

5. Now, in the present case the meaning of the word "after the date thereof" in Section 54(1), Provincial Insolvency Act, has been called in question. Under Section 59, Transfer of Property Act, where the principal money secured is one hundred rupees or upwards, a mortgage, other than a mortgage by deposit of title-deeds, can be effected only by a registered instrument; but when it is so effected, the provisions of Section 47, Registration Act, come into play. Section 17,

Registration Act, deals with documents which shall be registered, but there is nothing in Section 47, which shows that it only relates to Section 17 of the Act, and it would seem to relate to any requirement of registration made by any other statute for the time being in force. It is dear that in Section 59, Transfer of Property Act, the word 'registered' points to the Registration Act itself, and by Section 4, Transfer of Property Act, Section 59 of that Act is expressly directed to be read as supplemental to the Registration Act itself. The requirement of registration of a document is, in my opinion, an evidentiary requirement an unregistered transfer is inchoate and is ineffective until registered. But it nevertheless exists and when registered operates from the date of its execution.

6. Our attention has been called to the decision in *U. Ba Sein v. Maung San*<sup>2</sup> It is true that it is there stated that Section 47, Registration Act, does not pretend to lay down that where an instrument which affects Immovable property requires to be registered, title in the property passes before registration is effected: none the less, title passes on registration, and though the transfer is inchoate until registered, once registered, the title must be deemed to have passed upon the date upon which the mortgage was made. The learned Judge who tried the case to which I have referred thought that, if the date of execution of the deed were to be the date of the commencement of the period, the insolvent in collusion with the creditor to whom he was giving a preference over other creditors might secretly execute a mortgage, and refrain from registering it till after the period specified in Section 54, Provincial Insolvency Act; and a Madras decision to which we have been referred approaches the question from the same point of view. In *Muthiah Chettiar v. Official Receiver of Tinnevely*<sup>3</sup> Madhavan Nair, J. says: "if the time was to run from the date of the document, the object of Section 54 could easily be frustrated." This method of approaching to a solution of the question is a dangerous one. If the period of time is to run from the date of registration only, as the learned Advocate-General in Ms argument pointed out to us, the door would be left open to fraud just as much, if not more, as if the date were the date of execution. If the decision in *U. Ba Sein v. Maung San*<sup>4</sup> be right, it would seem that a fraudulent transfer registered after the petition was presented could not be set aside, for if the date of the transfer is to be the date of registration, Section 54 could, it would seem, have no application. In my opinion a consideration of the effect of the answer to this question does not really assist in coming to any conclusion as to the right answer. In *Kalyanasundaram Pillai v. Karuppa Mooppanar*<sup>5</sup>, Lord Salvesen quoted with approval the decision of a Full Bench of the Bombay High Court in *Atmaram Sakharam v. Vaman Janardhan*<sup>6</sup> and pointed out that the decision there was correctly expressed in the headnote:

Where the donor of Immovable property has handed over to the donee an instrument of gift duly executed and attested, and the gift has been accepted by the donee, the donor has no power to revoke the gift prior to the registration of the instrument.

7. See also *Venkatasubba Shrinivas v. Subba Rama*<sup>7</sup> and further decisions there cited. It appears from the judgment of Lord Salvesen that while registration is a necessary solemnity in order to the enforcement of a gift of Immovable property, it does not suspend the gift until registration actually takes place; nor does registration depend upon the consent of the donor, but is the act of an officer appointed by law for the purpose who is obliged to register the deed if the necessary formalities have been complied with. In my opinion, the requirement of registration is a requirement of form only: the Act looks not to the reality of the agreement between the parties

but to the form in which that agreement is expressed: once the form has been supplied, the reality of the transaction receives acknowledgment. And, accordingly, in my opinion, the period of three months referred to in Section 54, Provincial Insolvency Act, begins to run from the date of execution of the transfer provided it has been properly registered within the specified time.

**Baguley, J.**

8. I agree with the answer to this question proposed by my Lord the Chief Justice in his judgment. It seems to me that the principle laid down by the Privy Council in *Venkatasubba Shrinivas v. Subba Rama A.I.R. 1928 P.C. 86(Supra)* and *Kalyanasundaram Pillai v. Karuppa Moopananar*<sup>8</sup>, is conclusive. I would like, however, to emphasize the fact that the question before us only deals with Section 64, Provincial Insolvency Act. In *Muthiah Chettiar v. Official Receiver of Tinnevely A.I.R. 1933 Mad. 185(Supra)* and *Lakshmi Chand v. Kesho Ram*<sup>9</sup> two cases that were mentioned in argument, it appears to have been assumed that the same considerations would apply with regard to the date of transfer in Section 54 and in Section 9, Sub-section (1)(c), Provincial Insolvency Act. The wording of the two sections is quite different and different considerations might apply with regard to the two sections. I would therefore like to reserve my opinion as to whether the same considerations would necessarily apply in considering limitation with regard to Section 9(1)(c).

**Spargo, J.**

9. I agree with my Lord the Chief Justice's answer to the question referred. Section 47, Registration Act, lays down that a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made and not from the time of its registration. Clearly, if a document purporting to transfer title did not require registration, it would commence to operate from the time of its execution. That then is the date of the transfer and is therefore the date thereof in the words of Section 54, Provincial Insolvency Act, although it be registered later.

**Cases Referred.**

<sup>1</sup> A.I.R. 1934 Rang. 216

<sup>2</sup> A.I.R. 1934 Rang. 216

<sup>3</sup> A.I.R. 1933 Mad. 185 at p. 385

<sup>4</sup> A.I.R. 1934 Rang. 216

<sup>5</sup> AIR 1927 PC 42 : 1927-25-LW 336 at p. 95

<sup>6</sup> A.I.R. 1925 Bom. 210

<sup>7</sup> A.I.R. 1928 P.C. 86

<sup>8</sup> AIR 1927 PC 42 : 1927-25-LW 336

<sup>9</sup> A.I.R. 1935 Lah. 565