Privy Council Appeal No. 54 *of* 1942

Mahomed Siddique Yousuf – – – – – – *Appellant*

v.

The Official Assignee of Calcutta – – – – *Respondent*

Same – – – – – – – – – – *Appellant*

v.

Same and Another – – – – – – – – *Respondent*

Consolidated Appeals

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH MARCH, 1943

Present at the Hearing:

LORD ATKIN
LORD THANKERTON
LORD CLAUSON
SIR GEORGE RANKIN
SIR MADHAVAN NAIR

[*Delivered by* LORD ATKIN]

This is a consolidated appeal from two orders of the High Court at Calcutta, one dismissing an appeal from the Judge in Insolvency and the other refusing to extend the time for appealing against an adjudication order made against one Ali Mohamed Hashim who will hereafter be called the insolvent. As a result of their Lordships' decision in this case the facts may have to be considered afresh in the Indian Courts, and it is desirable therefore to state the details as summarily as possible so far as they are relevant at the present time. In 1938 the insolvent had a claim for damages against a firm with whom he had dealings in shares, and by a written agreement of March 30th, 1938, between the appellant and the insolvent the former agreed to advance money for the costs of the contemplated suit and to assist in the conduct of it, for which services he was to receive half the monies recovered after deducting the advances. On April 1st, 1938, the suit was instituted and on January 19th, 1939, was decreed for Rs.6750 and interest. On January 20th, 1939, by indenture of assignment, the insolvent assigned to the appellant the said decree in consideration *inter alia* of his discharge of all liabilities under the agreement of March 30th, 1938, and Rs.1000 then paid to him in cash. This is the assignment which is the subject of the first order of the Appellate Court above referred to. Meantime, on November 8th, 1938, one Hamid Haji Umer, hereinafter called the petitioning creditor, had filed a suit against the insolvent for money due from the insolvent in respect of share transactions in which the plaintiff had acted as his broker. On April 5th, 1939, the suit was decreed for Rs.15789.10.0. On April 19th, 1939, the petitioning creditor filed a petition in the High Court for the adjudication

of the insolvent as an insolvent. The petition alleged several acts of insolvency. One of these was that the insolvent on January 20th, 1939, executed the deed of assignment to the present appellant of the decree of January 19th, 1939, with the intention of preferring the present appellant over other creditors. On April 25th, 1939, the petitioning creditor obtained *ex parte* the appointment of the official assignee as interim receiver of the decree of January 19th, 1939; correspondence with the appellant followed in which on April 29th he was supplied with a copy of the petition for adjudication. In May the appellant instituted proceedings in execution of the decree, and an order was made that the judgment debtor pay the money into Court, which he has done, and that it be not withdrawn except with the leave of the Insolvency Court. On June 13th, 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. In August the appellant applied in the Insolvency Court for leave to take out the decretal money then in court. Leave was given subject to leave being obtained in the suit. The appellant then applied for similar leave in the suit. This application was opposed by the official assignee, and on August 31st, 1939, an order was made to which their Lordships attach importance. It was that the appellant was to be entitled to withdraw the amount on furnishing security. If the official assignee made any application on the first insolvency day after the reopening of the Court, then the application was to abide the result thereof. If no application were made then the order was to be made as asked for. In pursuance of this order the official assignee on November 23rd, 1939, gave notice of motion in the Insolvency Court for a declaration that the indenture of assignment dated January 20th, 1939, be declared void as against the official assignee and that the transfer be set aside. This is the motion which is the subject matter of the present proceedings.

Judgment on the motion was not given until July 25th, 1940. The learned Judge dealt with two points taken by the official assignee. In the first place, it was said that the transfer having been found to be an act of insolvency in the order of adjudication could no longer be alleged by the transferee not to be void on that ground. In the second place, it was said that apart from the effect of the adjudication order the evidence showed that in fact it was a fraudulent preference. The learned Judge inclined to accept the first contention, which was based on the well known case of *ex parte Learoyd* (1879, 10 Ch. D. 3), but appreciating that there was authority to the contrary in India in the decision of the Madras High Court *Official Assignee of Madras* v. *O.R.M.O.R.S. Firm*, I.LR., 50 Mad. 541 (1926), would not express a final opinion on the point. On the facts, however, in evidence before him he found the intent to prefer proved. In the Appellate Court the case took a different turn. Both Judges expressed some doubt as to whether the intent to prefer was in fact proved: but they were both of opinion (following *ex parte Learoyd*) that the order of adjudication was conclusive and could not be disputed. Their Lordships entertain no doubt that this decision was correct. *Ex parte Learoyd* is well established in England: it was decided on the language of the Bankruptcy Act, 1869: both the relevant sections have been repeated in the Acts of 1883 and 1914 and the decision has taken its place as a leading case on this part of the law. 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. Their Lordships are of opinion, therefore, that the decision of the Madras High Court reported in 50 Madras was incorrect and must be taken to be overruled.

But the third party who is placed in this anomalous position is of course not without redress. His remedy is to appeal as a person aggrieved against the adjudication order which has so far determined his rights. This being the sole remedy is one which justice demands that the Courts should carefully protect: and if an extension of time for appealing is reasonably required such extension should be granted *ex debito justitiae*, to use the words of James L.J. in *ex parte Tucker*, 12 Ch. D. 308 (1879). The time for appealing from an adjudication order under the Indian Limitation Act is 20 days: but a general power of extension of time is given by s. 5 of the Act. At a late stage of the hearing in the Appellate Court the appellant no doubt finding that the Court was disposed to decide the case on the more technical ground which the Judge in the Insolvency Court had not thought fit to accept, applied for leave to extend the time for appealing, but the application was rejected as belated. In the opinion of their Lordships this application should have been granted. It may be that the appellant had notice of the terms of the petition and subsequently of the acts of bankruptcy established in the adjudication order. But at that time, as is plain from Panckridge J.'s judgment, there was room for doubt in India whether the doctrine of *ex parte Learoyd* applied: and the appellant and his legal advisers cannot be said to have acted unreasonably in challenging the issue as they promptly did by applying to execute the decree. It would appear to have been a complete answer to have said that the appellant's title was conclusively avoided by the adjudication order. It is from this point of view that the order of the Court of August 31st, 1939, becomes important. The appellant was given leave to withdraw the decretal amount then in Court unless the official assignee filed an application on the next insolvency day. This must mean, or would reasonably be understood to mean, an independent application to have it established that the transfer was void as a fraudulent preference: and this is the application that was made and is now before the Board. The learned Judge in the Insolvency Court put on one side the *ex parte Learoyd* point and dealt with the case on the merits. It seems to their Lordships impossible to say that the appellant was acting unreasonably in assuming throughout the course of the present proceedings right up to the Court of Appeal that though the *ex parte Learoyd* point had been taken he was really concerned to defend the assignment on the facts then disclosed in evidence. If this be so, it does not appear that he should be deprived of a right which he could originally claim *ex debito justitiae* to have the time for appealing extended so as to get rid if possible of a decision made in a proceeding to which he was not a party. Their Lordships think, therefore, that the appeal should succeed. 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. 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* 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 however is a matter entirely for them. The appeal must be allowed and the orders of the Judge in Insolvency and the Appellate Bench must be set aside. The appellant must in accordance with his offer pay the costs of the present application in both courts. On payment of the costs his time for appealing will be extended for two months from the arrival of the order of the Privy Council in the High Court. 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. The respondents must pay the costs of this appeal.

(25525) Wt. — 160 4/43 D.L. G. 338

In the Privy Council

MOHAMED SIDDIQUE YOUSUF

v.

THE OFFICIAL ASSIGNEE OF CALCUTTA

SAME

v.

SAME AND ANOTHER

DELIVERED BY LORD ATKIN

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