

The Official Receiver - - - - - - *Appellant*

v.

P. L. K. M. R. M. Chettyar Firm - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT RANGOON.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 25TH NOVEMBER, 1930.

Present at the Hearing :

LORD ATKIN.

LORD RUSSELL OF KILLOWEN.

SIR JOHN WALLIS.

[*Delivered by* LORD ATKIN.]

This is an appeal from a judgment of the High Court of Rangoon by which the Court on appeal from the District Judge in Bankruptcy reversed the decision of the District Judge in a matter which arose in the separate bankruptcies of a man named Maung Ba Than and his wife, Ma Ngwe Tin, who were engaged in some kind of commercial enterprise (not very clearly defined) in Kyauktan. The husband and wife were separately adjudicated bankrupt on the 28th November, 1897, on the petition of a petitioning creditor, a moneylender, who, in his petition, called attention to an alleged mortgage by the debtors in July of the same year. Shortly afterwards the Official Receiver was appointed Receiver, and a subsequent application was made by the Official Receiver to declare fraudulent the mortgage in question. The actual application was made under Section 53 of the Provincial Insolvency Act, 1920, which provided that :—

“ Any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or any encumbrancer in good faith and for valuable consideration shall, if the transferor

is adjudged insolvent, within two years after the date of the transfer be voidable as against the Receiver, and may be annulled by the Court."

The attack was levelled on a mortgage which was duly registered and which was a mortgage by a deed of the 7th July, 1927. In that mortgage the two debtors reciting that they wish to repay all debts due to Chettyar, borrow the principal sum of Rs. 30,000, from the present respondent, P. L. K. M. R. M. Chettyar, on a mortgage of their own properties. Then the premises are set out, which consist of a certain number of acres of paddy land and some other land, and the mortgage recites that, if there be default with respect to payment they will be sold, and it winds up by saying: "We the debtors agree to this and agree to take a mortgage on the aforesaid properties." The deed purported to be signed by five witnesses, and it was duly registered. It is endorsed by the sub-registrar as presented by Maung Ba Than, the male debtor, for P. L. K. M. R. M. Chettyar, and then the debtor and his wife, the two debtors that is, admitted execution, and they were duly identified, and the debtors duly admitted the receipt of the consideration. Now, when the case to annul this deed was heard, it was heard in the first instance by one District Judge, who was succeeded afterwards in the course of the hearing by the present Judge, Mr. Baguley, who eventually decided the case. Their Lordships think there can be no doubt that on that hearing and, indeed, in their opinion throughout the hearing all the parties were of opinion that the onus was on the transferee, the mortgagee, to show that the transaction was one within the words of the Act, "in good faith and for valuable consideration," and as a result the mortgagee first called his witnesses, and he gave evidence himself. He called the attesting witnesses, and he produced his books, and he said that the debtors had had transactions with him for some time, that they had been indebted in as much as Rs. 25,000 borrowed at different times, and the money was still outstanding earlier in the year, but that they had gradually paid off the whole sum that had been lent by him, and that they desired to borrow Rs. 30,000 on mortgage, that he had assented, and that he had collected from different sources sufficient money to pay the Rs. 30,000, and, on the 7th July the matter was carried out and the deed had been written by a writer. There was some discrepancy as to who had given the orders for writing this deed, but it had been duly executed by the debtors and it had been attested by witnesses then and there. The debtors then were paid the consideration money, which had taken some time to collect, and the deed was afterwards taken to be registered, and it was registered, and, in the meantime, it was taken to the office of a person who was particularly chosen as being a respectable witness, he being the bailiff of the local District Court, and he witnessed it and the parties then proceeded to registration. Then he produced his books, and his books showed that the

transactions had taken place in the early part of the year, as he enumerated them. The books showed the entry of this sum, and the creation of this mortgage deed, and the books also showed the gradual accumulation of the money which was required for the purpose of paying the Rs. 30,000, and they also showed that the daily cash balance of the mortgagee on this particular day was, at the end of the day, depleted by practically precisely the amount he said he had advanced to the debtor. His case was that, in addition to lending that money, when the parties returned from the registration officer they asked him for a further Rs. 10,000, which he gave them on a mere promissory note without any security, and this transaction was also entered in the books. The witnesses were cross-examined, and there is no doubt that they gave conflicting statements as to who precisely was present at any given time, where each of the transactions took place. In particular, the witness, who was the bailiff and was named Ba On, gave evidence to the effect that, though he had attested the document it was then only brought to him by the representative of the respondent, and he asked him to attest it, and he duly did attest it without the presence of the two debtors and without having their signatures acknowledged. So the trustworthy witness turned out to be less worthy of trust than he had originally been reputed to be.

Now the Receiver met this case by calling one witness only. He called the writer of the deed, and the writer of the deed contradicted two or three of the respondents' witnesses, because he said that he had written the deed in his own office or house, that he had been sent for by Chettyar on the morning when it was eventually executed, and that he himself never had been to the office or seen it executed or seen any of the attesting witnesses, though some of the witnesses said he was there.

The learned Judge, in consideration of all these circumstances, came to the conclusion that the circumstances were suspicious, and he attached importance to the fact that there was this large sum borrowed at one time, and that it was necessary to accumulate gradually sums sufficient to pay it, and he, not unnaturally, thought it was somewhat remarkable that, after the money had been borrowed and security provided, there was an unsecured loan of Rs. 10,000, and he attached considerable importance to the contradictions of the various witnesses of the facts stated in the agreements themselves, and he came to the conclusion that the defendants had not made out the case which they ought to have made out, and had not established that this was a *bona fide* transaction and one for value.

Now there are, no doubt, some remarkable circumstances in this case, and the witnesses also contradict one another to some extent ; but it does not appear to their Lordships that, even assuming the onus to be where the learned District Judge places it, he was right in coming to the conclusion that the respondents

did not discharge the onus that was upon them. The facts appear to be overwhelming that here there was a real transaction. The Chetty, the man that is who was in charge of the transaction, was the manager of the business, and could not be suggested to be the principal. He had duly recorded in the books, which were not challenged, a number of transactions, all of which bore out his story. He entered up the facts of the case, and he had shown in the books that he had advanced the money and he also showed in the books that he had borrowed money, obviously for the express purpose of being able to lend it to the debtors, and there was no affirmative evidence to the contrary, though no doubt some inference could be drawn from the fact that the witnesses had to some extent contradicted themselves. But the substance of the case is that no plausible method of carrying out the fraud, no plausible motive for such a fraud, was ever really put before the District Judge at all, and, indeed, it has not been put before their Lordships, and at the present moment it is not explained how it could be that these debtors, if they were minded to enter into a transaction which was not a *bona fide* one, should approach the manager of the branch business and induce him to enter into a series of forged entries in his books, because for every one of them he would eventually have to account to his principal.

That appears to their Lordships to be the substance of the case, and so regarding it their Lordships have no doubt that this transaction was a transaction which was proved to represent that which it purported to be—that is, the transaction of a real mortgage.

The case came before the High Court, and they took the view that their Lordships have expressed. Their Lordships cannot help feeling that perhaps in the High Court they expressed themselves rather too lightly in respect of the difficulties which the District Judge obviously had to deal with on the facts; in the result, however, their Lordships are of opinion that Mr. Justice Heald, who gave the judgment of the Court, took the right view of the transaction, and that it ought to have been treated by the trial Judge as a genuine transaction for value.

So far the case has been dealt with on the footing that the onus was in fact on the respondents, but since the case was on before the High Court in Rangoon the matter of onus has been decided in a case in which the judgment was delivered by this Board on the 29th July of this year, the case of an appeal from the Supreme Court of the Straits Settlements entitled *The Official Assignee of the Estate of Cheah Soo Tuan* against *Khoo Saw Cheow*. That case arose on Section 50 of Ordinance No. 44 as to bankruptcy, which appears to be in the same terms in substance as Section 53 of the *Provincial Insolvency Act*. The material words as cited in the judgment are :—“Any settlement of property not being . . . a settlement made in favour of a pur-

chaser . . . in good faith and for valuable consideration . . . shall if the settlor becomes bankrupt within two years after the date of this settlement be absolutely void as against the official assignee." The decision of the Board in that case was that the Judge had come to the wrong construction of Section 50 by throwing the onus on the transferee. Only one passage from the judgment of the Board need be read :—

"Their Lordships are of opinion (1) that the trial Judge was wrong in his construction of Section 50 of the Ordinance ; (2) that there was nothing in the admitted facts to shift the onus of proof to the respondent."

Their Lordships, therefore, feel bound to state that the view taken in the District Court in this case as to the burden of proof was wrong. The onus was wrongly laid on the respondents ; it was on the Official Receiver. It therefore follows that the decision given by the High Court was *a fortiori* correct, because it seems obvious that, if the onus was on the Official Receiver, he had not discharged the burden that was upon him.

At an earlier stage the petitioning creditor had petitioned the Court disputing the proof of the respondents on the ground that the mortgage and promissory notes were fraudulent and without consideration. It is clear that this petition was never the subject of any separate determination by the Court. It is obviously disposed of by the findings on the Official Receiver's petition.

Now the only other point that arises is a point that was raised on the Registration Act. Their Lordships have already called attention to the fact that the endorsement by the sub-Registrar upon the document recites that the document was presented for registration at 11 o'clock in the forenoon on the 7th day of July. Section 32 of the Registration Act provides that :—

"Every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper registration office : (a) by some person executing or claiming under the same, or in the case of a copy of a decree or order, claiming under the decree or order, or (b) by the representative or assign of such person, or (c) by the agent of such person, representative or assign, duly authorised by power-of-attorney executed and authenticated in manner hereinafter mentioned."

It has been decided by this Board in *Jambu Parshad v. Muhammad Aftab Ali Khan*, 42, I.A., at page 22, on appeal from the High Court at Allahabad that, where a document is presented for registration by an agent not authorised by a power-of-attorney, the registering officer has no jurisdiction to register it or to endorse thereon a certificate under Section 60, and the point is made that the endorsement shews that when the debtor presented this document for registration, he purported to act as agent, but, inasmuch as he did not prove that he had a power-of-attorney authorising him to act for the mortgagees, the registration is bad under the decision above cited. Now it may be that one

answer might be that there is no evidence in this case to show that the agent had no power-of-attorney, but, on the question of the person on whom the onus is in such a matter as that, their Lordships do not express any final opinion. except to say that, if the onus were on the Official Receiver in that matter, obviously he has not discharged it ; but in this particular case there seems to be a simple answer, and that is this : the sub-Registrar was called as a witness, and in cross-examination he said the document was presented to him by the debtor, and he said he wanted it registered. Now if that is so it would appear this document was duly presented for registration in accordance with Section 32 of the Registration Act by some person executing the same, and that the registration is entirely in order, and that the learned District Judge who decided this part of the case was quite right in the view he took. Even if the endorsement purported to show an invalid presentation there is nothing in the Act to prevent a person from showing that the endorsement made by the sub-Registrar was inaccurate, and proving the real facts.

It follows, therefore, with regard to this difficulty the point turns out to be a bad one, and there is no objection to be made on that footing.

Therefore, in their Lordships' judgment the appeal fails, and their Lordships will humbly so advise His Majesty. The appellant must pay the costs of this appeal.

In the Privy Council.

THE OFFICIAL RECEIVER

vs.

P. L. K. M. R. M. CHETTYAR FIRM.

DELIVERED BY LORD ATKIN.

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