

S.R.M.C.T.S.S.P.A. Chettyar Firm - - - - - *Appellants*

v.

U On Maung - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT RANGOON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 8TH JULY, 1940

Present at the Hearing :

LORD RUSSELL OF KILLOWEN.

SIR LANCELOT SANDERSON.

MR. M. R. JAYAKAR.

[*Delivered by M. R. JAYAKAR.*]

The question raised by this appeal is whether a mortgage by deposit of deeds made in favour of the appellants within two years of an adjudication in insolvency under circumstances mentioned below was voidable against the respondent (the receiver of the insolvent's estate) under section 53 of the Provincial Insolvency Act, 1920. The District Court held that it was not voidable, and the appellate Court that it was.

The material portion of section 53 is as follows:—

“Any transfer of property not being a transfer made . . . in favour of a purchaser or incumbrancer in good faith and for valuable consideration, shall, if the transferor is adjudged insolvent on a petition presented within two years after the date of the transfer, be voidable as against the receiver and may be annulled by the court.”

The insolvent, L. M. R. S. M. Somasundaram Chettyar, carried on business as Chettyar at Kyaikto in the district of Thaton in Burma. In 1931, he left Burma for India. The business was then carried on by his son-in-law Swaminathan, under a power of attorney dated 29th June, 1928 (exhibit 3a). In May, 1932, Swaminathan also went to India, leaving the business in charge of the insolvent's son Valliappa, who was then a minor under the age of 18 years.

The appellants' firm carried on the business of money lending at Rangoon. Between 1928 and 1931, the insolvent was their agent, and for a period before 1928, and again for a period after 1931 (which includes the times material to this appeal) their agent was one Arunachalam.

On 13th April, 1933, the insolvent owed to the appellants' firm the sum of Rs.25,942.13.6. On that date, one Nagalingam, an employee of the insolvent's firm, handed over to Arunachalam documents of title to about 560

acres of land owned by the insolvent and valued at Rs.67,000, and also registered mortgage deeds valued at Rs.12,000, making a total value of Rs.79,000. This is the transaction in issue in the appeal.

On 26th September, 1933, a petition for the adjudication of the insolvent was presented by a creditor in the District Court of Thaton, and on 14th August, 1934, an order of adjudication was made against the insolvent. In an inventory filed in the court thereafter, the insolvent's properties were shown as of the total acreage of 739, and of the value of Rs.106078.3.0. The list of debts owed to him were of the total amount of Rs.66907.7.9. Thus his total assets were of the estimated value of Rs.172985. His total liabilities, on the other hand, were shown as of the value of Rs.178655. In the list of creditors the appellants' firm was shown as a creditor, claiming as security for the debt owing to it (Rs.25942.13.6) an equitable mortgage of the lands and mortgage bonds mentioned above.

On 10th May, 1935, the respondent was appointed receiver of the insolvent's property under section 59 of the Act, and on 26th August, 1935, the respondent instituted the present suit in the District Court of Thaton by a petition praying that the appellants' mortgage might be held null and void. He alleged that at the date of the mortgage, the insolvent was not in Burma and was not duly represented by an agent; that the mortgage was a fraudulent and a sham transaction entered into by collusion between Arunachalam and Nagalingam with a view to defeat and delay other creditors; that the mortgage was not validly created and was void, and if it was created in Rangoon, it was equally void, as the mortgagor did not create it and his agent Nagalingam was not duly authorised by a proper power of attorney. The respondent's petition did not expressly raise the issue that any authority to create the mortgage which the insolvent might have given to Nagalingam was terminated by the insolvent's subsequent insanity, which existed at the material date. It appears, however, that both parties led evidence about the insolvent's state of mind.

By their written statement the appellants denied the allegations of law and fact made in the petition, except that they admitted that the title deeds in issue were in deposit with them and that the insolvent was not in Burma at the time. Evidence was led on both sides, some of which was on commission.

On 5th December, 1936, the District Judge decided in favour of the appellants, holding that the evidence did not show that the transfer was either fraudulent or without consideration. He disallowed the allegation of insanity on the ground that it was not taken in the receiver's petition, and held that the evidence was not sufficiently strong in its favour. He further held that Nagalingam was the agent of the insolvent and deposited the deeds under a power of attorney obtained from Swaminathan, authorising him to do so. Their Lordships have derived very little help from the judgment of

the District Judge, which is a mere abstract of the depositions, and contains no discussion of the evidence or of the reasons which led him to his conclusions. This may be due to the fact that, as the High Court observes, the judge was ill at the time, suffering from a nervous breakdown, and had soon to be relieved of his duties. Some of the important witnesses were examined on commission and he had not the benefit of hearing their evidence given, nor of an argument addressed in open court by the respondent's counsel, who submitted only a written note, which, the judge said, it was difficult for him to understand.

The respondent filed an appeal to the High Court at Rangoon, and Goodman Roberts C.J., who delivered the judgment of the court, set aside the order of the District Court. He held that though the burden of proof lay on the receiver, he had discharged it by showing that Nagalingam had no power to make the transfer; that the alleged power of attorney in his favour was not proved, and that even if Nagalingam had authority to make the transfer, it was terminated by the insanity of the insolvent. He further held that the evidence clearly showed that Arunachalam had stepped in to manage the insolvent's business when there was no effective manager, taking good care that creditors in whom he was interested should be given security and the rest excluded, and that Nagalingam, who was a mere debt-collecting clerk, was "seized upon to go through the farce of pretending to execute" the mortgage, and that there was an entire absence of good faith. The High Court accordingly passed a decree setting aside the order of the District Court and declaring that the mortgage was null and void against the respondent. From this decree, an appeal has been preferred to His Majesty in Council.

The questions which arise for decision are, first, whether it is proved that Nagalingam had authority to make the transfer. The appellants urge that the onus of disproving this lay on the respondent, who, on the other hand, contends that the properties transferred admittedly belonged to the insolvent, and were found to be in the possession of the appellants. The latter, therefore, had to prove how they had come by them, as against the respondent, who was trying to secure them as belonging to the insolvent's estate. The appellants' possession of the said properties did not necessarily indicate that they held them under a valid title, which had to be made out by affirmative evidence. The onus, therefore, it was urged, lay in the first instance, on the appellants to prove their title to the said properties.

Their Lordships think that there is great force in this contention. There was nothing in the shape of a memorandum of deposit or any document indicating how and when the deeds had come into the possession of the appellants. Their possession was obtained at a time and under circumstances showing that the insolvent himself could not have delivered them, and, as this was clearly established by the evidence, the appellants could retain the deeds only by showing that they had obtained them

from someone acting on behalf of the insolvent and under his authority. The only person alleged to have had this authority was Nagalingam and, though he was available as a witness and was present in court, he was not called by the appellants to give evidence. An alleged power of attorney given to him by Swaminathan on 30th June, 1928, was relied upon, but there is no satisfactory evidence that such a power of attorney existed or was operative at the material date. The evidence shows that the document, if it existed, would be with Nagalingam. It was alleged on the appellants' behalf that the document was with the insolvent in India, but of this there is no satisfactory proof. A notice to produce the document was served upon the son of the insolvent, but it was not produced. Secondary evidence was therefore given of the contents of the alleged power by calling one Mr. Daniel, a lawyer, who had occasion, in connection with the case of another client, to examine the contents of the alleged power. He clearly stated that the power which was shown to him did not give to Nagalingam any right to mortgage the property. The witness Karuppan also produced a document (exhibit K), which he stated was a copy of the alleged power given to Nagalingam. Exhibit K is dated 30th June, 1928, a day later than the date of exhibit 3a, and the number 28 which it bears identifies it with the document mentioned in exhibit 6 (certified copy of the extract from the register of powers) on which the appellants rely. On an examination of the contents of exhibit K, however, it is clear that it gives no authority to make a mortgage of the insolvent's property. To meet this difficulty, Arunachalam, called for the appellants, relied in his evidence on another document, exhibit 3b, which he said was an exact copy of Swaminathan's power (exhibit 3a) made on the same date, namely 29th June, 1928. This is obviously incorrect, because it is clearly stated at the bottom of exhibit 3b that the copy was made on 27th April, 1933.

It is thus clear that the power of attorney by which Swaminathan is alleged to have given authority to Nagalingam to make the mortgage on 13th April, 1933, has not been proved. Besides, the existence of such a power in 1928 would be totally inconsistent with exhibit 2a (read along with exhibit 1a) which is a letter written by Swaminathan on 12th May, 1932, stating that as he was leaving for the country by the next day the letter was given as an authority to Nagalingam to carry on debit and credit transactions as per instructions.

Their Lordships are, therefore, of opinion that, in the absence of such a power, the mortgage in question must fail. The appellants argued that the absence of this power made no difference, because the evidence clearly showed that Nagalingam was managing the insolvent's business and that Swaminathan, who had authority under exhibit 3a to appoint a substitute, exercised the authority by giving oral instructions to Nagalingam to make the mortgage. It is hardly necessary to observe that this view cannot be sustained on the wording of exhibit 3a. By that document the insolvent

gave power to Swaminathan to appoint a substitute and not to authorise a stranger orally to mortgage the insolvent's property.

There is a further difficulty in the appellants' way, caused by the alleged insanity of the insolvent at the material date. If it existed, then, under section 201 of the Indian Contract Act (1872) it would terminate any authority previously given. Their Lordships have examined the evidence and they think that there is satisfactory proof to support the finding of the High Court that the insanity existed at the material time. The witness Kadiresan, examined on the respondent's behalf, states, and their Lordships see no reason to doubt his testimony, that the insolvent was insane in February, March and April, 1933. This is corroborated by other evidence, including that of a medical witness (No. 17) who attended the insolvent between the 7th and 11th of March, 1933, and found him insane and violent. There is also an affidavit sworn by the insolvent on 3rd October, 1933, in which he states that he suddenly became insane and remained so for about six months, and even at the date of the affidavit he was not completely free from the effects of insanity. Lastly, there are exhibits C.1 and C.2, the Commissioner's report and memo dated 14th March, 1933, made in the course of the insolvency proceedings, initiated against the insolvent by another creditor at Devacottai, in which it is clearly stated that the insolvent's wakil informed the Commissioner on 11th March that the insolvent, who was to be examined as a witness, was suffering from mental derangement and could not, therefore, be examined.

The insanity is denied by Arunachalam, who was called as a witness on behalf of the appellants. Before commenting on his evidence, it is material to observe that this witness occupied a very dubious position in these proceedings. Though he was an agent of the appellants' firm from and after 1931, it appears from the evidence that, at or about the material time, he was also in effective control and management of the insolvent's firm and practically in a position to dominate its affairs. In support of this view, there is enough evidence on the record, some of which may be briefly noticed. Witnesses Nos. 13, 15 and 16 examined before the court on behalf of the receiver, and witnesses Nos. 18, 19 and 20 examined on commission, clearly testify to the dominating position which Arunachalam held in connection with the conduct of the insolvent's business at or about the material times. Their testimony is corroborated by a letter (exhibit E) written by Arunachalam to Nagalingam on 17th September, 1933, directing him, with reference to another creditor of the insolvent's firm, to show the creditor the accounts and bring and deliver at Rangoon, by way of security, a good document acceptable to him. The petitioning creditor in his evidence states that this letter was given to him and this also accords with the probabilities. Arunachalam denied that he gave such a letter. On such denial, the respondent asked the court for an order calling

upon the appellants to produce the press copy book of correspondence from April, 1932, to December, 1933. The judge made the order but the press copy book was not produced on the ground that the book was in India. There is another letter which confirms the above view, namely exhibit 1 (English translation 1a) which has already been referred to in another connection. It is the letter written by Swaminathan giving directions to Nagalingam to carry on debit and credit transactions as per his instructions. Arunachalam admits that the draft of this letter is in his handwriting, and Swaminathan states that he wrote this letter under the instructions of Arunachalam. If, as this evidence shows, Arunachalam was in effective control and management of the insolvent's business at the material date it is futile to contend that he was ignorant of the debtor's insanity or insolvency.

The third question relates to the good faith of the transaction. Here also their Lordships agree with the finding of the High Court. On this question, it is not easy to disregard the fact that the disputed transaction was not an isolated one but formed one of a series, and further, as the judgment of the High Court states, a relationship existed between Arunachalam and the appellants and also between him and the creditors preferred in some of the other transactions. Apart from this, there is enough evidence to prove that the transaction was a collusive one between Arunachalam and Nagalingam. Even if the fact is ignored that for a debt of Rs.25,942 the appellants obtained title deeds to property worth Rs.79,000, the method in which the transaction was brought about is amply suggestive of bad faith and also of the fact that Arunachalam, though aware of the insolvent condition of the debtor, took care to conceal it from the other creditors. The denials of Arunachalam in this behalf are palpably false and on one or two points on which he could have easily admitted the truth he has prevaricated. Their Lordships, therefore, prefer to accept the testimony of Subramaniam and Kadiresan that when they asked for securities from the insolvent's firm as regards their dues, Arunachalam assured them, apparently on behalf of the insolvent, that there was no need to fear and that the matter would be settled. Arunachalam appears to have been examined virtually to deny all matters which were adverse to the appellants' claim, and has proved himself unworthy of credit. His version about having exhibits 3a and 3b before him at the same time and his copying the one from the other, to which reference has already been made, has to be rejected having regard to the dates. Further, his own version of the manner in which the title deeds in question were obtained exposes the true nature of the transaction. Briefly stated, his evidence is that on one and the same day, from morning till evening, all the documents were handed over to him in three lots. He had not looked into the accounts and other matters relating to the documents, although the ledgers were produced by Nagalingam.

Nagalingam came alone, without the insolvent's son. Arunachalam never saw the properties at the time of taking the deposit. He took whatever deeds he thought to be good, and returned the rest. This was done in the kitchen room. He never enquired what the debts were which the insolvent owed to other creditors. He only asked for his firm's (appellants') dues, without ascertaining what the assets and the liabilities of the insolvent were. He had not ascertained them even at the date of his cross-examination (4th July, 1936).

It is clear from this evidence that by the use of his dominating position he seized the title deeds, with the view of taking hold of as much property as he could get, regardless of the solvency of the debtor or the claims of the other creditors, whom he put off by a false assurance that their money was safe. Such a transaction must be held to be entirely devoid of the element of good faith, which is a necessary ingredient of the provisions of section 53 of the Act.

Their Lordships are, therefore, of opinion that, on each of these grounds, the transaction in dispute must fail. The decree of the High Court will, therefore, be confirmed, and the appeal dismissed. The appellants will pay the respondent's costs of this appeal.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council

S.R.M.C.T.S.S.P.A. CHETTYAR FIRM

v.

U ON MAUNG

DELIVERED BY M. R. JAYAKAR

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