

E.N.A. Samu Patter Vs. F.H. Wilson, the Official Assignee of V.M. Appachi Chetty and Sons

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Court : Chennai

Decided On : Sep-07-1922

Reported in : 73Ind.Cas.532

Judge : Walter Schwabe, C.J. and ;Wallace, J.

Appellant : E.N.A. Samu Patter

Respondent : F.H. Wilson, the Official Assignee of V.M. Appachi Chetty and Sons

Judgement :

Walter Schwabe, C.J.

1. This is a motion by the Official Assignee in the Insolvency of V. M. Appachi Chetty & Sons, that a transaction of 9th December 1918 under which security was given to the present appellant, Samu Patter, called the Garnishee, for Rs. 43,668-5-11 should be set aside as a fraudulent preference or in the alternative, on the ground that it was not a bona fide transaction in that it offends against the Laws of Bankruptcy.

2. The matter came before Phillips, J' and it was tried in the following manner. The Official Asignee's report was read and the affidavits filed on behalf of the Garnishee were re ad presumably and then the deponents thereto were put into the witness-box and cross-examined on behalf of the Official Assignee; then the

bankrupt was called by the Official Assignee and nominally examined but really cross-examined on his behalf; then two further witnesses were called on behalf of the Official Assignee and a speech was made on behalf of the Garnishee and Counsel for the Official Assignee replied. In my judgment the procedure is not correct, and if it is the usual procedure it should be altered. The onus is originally on the Official Assignee. A motion of this kind with witnesses against the bankrupt should be tried practically as if it were an action. The case should be opened on behalf of the Official Assignee, and his report read, at any rate, as if it were a pleading. Whether it is admissible as prima facie evidence of the facts under Rule 117 of the Bankruptcy Rules is a matter which I should wish to consider when the point arises. The evidence to be called on behalf of the Official Assignee must be called in its proper place. If it is an evidence that can be properly reserved to be used to rebut the evidence given on behalf of the Garnishee it can be so reserved. The Official Assignee can, of course, if he so pleases, put in the respondents' affidavits and rely upon them. When he has closed his case, the case for the respondent should be opened, the affidavits, if not already in, read at the examination-in-chief of the deponents, supplemented with the leave of the Judge by oral evidence. If notice has been given for them to attend they can, then, and not till then, be cross-examined. Further evidence, can, with permission, be given on the Garnishee's behalf, and evidence in proper cases in rebuttal may be then called and the closing speeches made. The insolvent may be called as a witness by either party; if called, although usually considerable latitude is given, he must be examined by the party calling him and not cross-examined, unless he has shown himself hostile and permission is given to cross-examine. The other side can, of course, cross-examine him.

3. The procedure in the present case was, in my judgment, irregular in that the Garnishee and his witnesses were examined before the completion of the Official Assignee's case. The Garnishee, like any other defendant, is entitled to hear the case he has to meet, and the Official Assignee, like any other plaintiff, has to make out his case, before the Garnishee can be called upon to answer it. The Official Assignee has this advantage that he has the Garnishee's case before him on oath and can, if he wishes, use the Garnishee's affidavit as evidence, This matter is of considerable importance as it is the practice how far this practice is right, I do not

discuss now, to proceed by motion in practically all cases by the Official Assignee against strangers.

4. Turning to the questions in dispute in this case, it is to be observed, that the Official Assignee's report was directed mainly to establishing the second point, and not to establishing fraudulent preference; and though the two points were kept alive until the end and the learned Judge decided both in favour of the Official Assignee, the second point being, as far as I can understand, that the Garnishee obtained this security by promising to advance money to the insolvent and then did not carry out that promise properly; and that, therefore, the transaction is a fraud on the Bankruptcy Law, I have failed to discover on what principle of law the decree on this point was based, and it is enough to say that, although he had a decree in his favour on the point, the learned Advocate-General refused even to argue in support of it.

5. This leaves the question of fraudulent preference. Section 36 of the Presidency Towns Insolvency Act avoids the transfers of property or payments made by any person unable to pay his debts as they become due from his own money in favour of any creditor with a view of giving that creditor a preference over the other creditors, if such person is adjudged insolvent on a petition presented within three months after the date thereof. In this case the insolvent was undoubtedly unable to pay his debts as they became due from his own money and in giving the security in question he preferred the Garnishee over the other creditors. But the question remains whether he did so with a view of giving that preference. This has been explained to mean, looking at the mind of the bankrupt at the time, was the dominant view try give a preference to a particular creditor? See *Sharp v. Jackson* 6 Manson 264 : 15 T.L.R. 418; *Official Assignee of Madras v. T.B. Mehta & Sons* 49 Ind. Cas. 968 : 42 M. 510 (1919) M.W.N. 293. If his real object was to continue trading or to save himself from serious consequences or if he was really induced to make the payment or to give the security by the pressure of the creditor and those who were the dominant factors in his mind and the desire to prefer and the giving of the preference were incidental only, the preference is not a fraudulent preference within the meaning of the section. The insolvent, the Garnishee and his son, the Bills Manager of the Madras Bank, who negotiated the matter on his

father's behalf, have all been called, as witnesses and all treated by the Trial Judge as unreliable. Two agents or managers of the insolvent also gave evidence and their evidence was accepted by him. Looking at all the evidence and treating it all, except that of the last witness as suspicions and to be carefully scrutinized, I think the real relevant facts are that the insolvent was seriously involved by reason of the fall in the market price of piece-goods in Madras in September 1918, such fall being increased on the signing of the Armistice in November and was being pressed by his creditors in Bombay and else where. The hutidis which he had given to the Garnishee had been dishonoured, a very serious matter for a trader and there were other pressing claims. He had large quantities of piece-goods under mortgage-bonds and other persons and unless the market recovered he was hopelessly insolvent. But I am convinced that he believed that the market was going to recover. Whether he had reasonable grounds for the belief is to my mind immaterial. On December the 4th, his brother who had a similar business filed his petition. The Garnishee was getting very anxious as he was owed about Rs. 46,000 and was totally unsecured. About December the 3rd, there was an interview at Madras at which he pressed for payment or security and promised that, if he was secured, he would render further assistance to the insolvent by making further loans. About that date, the insolvent left Madras on private affairs. The bankruptcy of his brother made the Garnishee still more anxious and he sent his son, the Bills Manager of the Madras Bank, on a night's journey to Velampalayam to interview the insolvent and try to get from him payment or security. I am satisfied at the ensuing interview, the son pressed very hard for payment or security and probably also threatened to take action, which would have had the effect of bringing the insolvent down, if he was not satisfied. I have no doubt that the bankrupt was speaking the truth when he said that the son would not have gone away without a promise of security. I am also satisfied that at that time the bankrupt was doing all that he could to avoid bankruptcy and to carry on his business until the market righted itself. Further, the son held out great inducement to the insolvent by promises, perhaps somewhat vague, that if his father was satisfied he would not only induce his father to make further advances but would also use his influence with Madras Bank to induce them to render financial assistance to the insolvent.

6. I agree with the argument of the learned Advocate-General that if all this amounts to a request for a preference, and a promise that if a preference is given, help will be forthcoming not to enable the insolvent to continue his business but either merely to stave off the bankruptcy for a short while or to assist in reinstating him after the bankruptcy it would be right to say that the dominant view was to prefer, and further I think that such a transaction might probably be set aside as a fraud on the Bankruptcy Law. But if the real intention and hope was to avoid bankruptcy altogether, then I think, that was the dominant view, and the preference merely incidental. The pressure also had a considerable bearing on the insolvent's action.' I have little doubt because he must have known that if he did not keep this particular creditor quiet, the fact of the bills being dishonoured had only got to be made public to bring about immediate bankruptcy. In my judgment, the true view in this case is that the dominant view was to keep this particular creditor quiet and to get assistance from him and his son to enable the insolvent to keep going and to avoid bankruptcy altogether; but this is borne out by the fact that the insolvent proceeded to keep other pressing creditors quiet by payment or security and to carry on business as far as possible in the ordinary way for a month, when he called his creditors together and tried to persuade them to allow him to go on still further, a proposal which would have been accepted but for the refusal of certain Bombay creditors. Within two months the market had righted itself sufficiently to have enabled the business to be carried on and possibly he would have become entirely solvent but, of course, it was too late.

7. I think that on the evidence that the Garnishee did not give a liberal interpretation to his promise of further help, and he got payment of Rs. 5,000 of his debt in a manner which does not commend itself to me. But as I find that the dominant motive was not to give a preference to the Garnishee, this motion ought to have been dismissed with costs. It follows that this appeal will be allowed with costs here and below.

Wallace, J.

8. I agree. In this case I consider the following facts established by satisfactory evidence, and affording the only reasonable conclusions on that evidence:

(i) that from October 1918 onwards the Garnishee Samu Patter was nervous about his commitment with his debtor, Muthukumara Chetty and was become annoyed (see letter of 30th October 1918,) on his continual delay in meeting his obligations to Mm, amounting to Rs. 43,000;

(2) that on the 3rd December 1918, he became so anxious that he left Palghat in search of his debtor, and when he did not find him at his place of business at Tirupur, followed him up to Madras and interviewed him there for some days probably pressing for payment, but not succeeding in getting any very definite arrangement made;

(3) that on 4th December 1918, his debtor's brother a partner in a separate but similar firm went insolvent;

(4) that the Garnishee probably became more importunate, and insisted, as he says, on cash payments , or if that was not possible, on some security for his debt;

(5) that when the debtor left on 7th December 1918 for Tirupur, the Garnishee sent his son, Narayana Aiyar, to continue the pressure on him and his son then clearly, as stated by the debtor himself, got him to agree to give security for his father's debt, made him understand that unless he got a letter to the debtor's agent in Madras arranging for the security, he would not leave him, and himself made some promise that he 'would get his father, in consideration "of this security, to advance the debtor some cash to enable him to stave off the more pressing of his creditors in Bombay;

(6) that while no definite figure of advance was then fixed upon, the debtor in his letter (now lost) to his Madras agent must have mentioned such a promise of advance and probably suggested to his agent to stand out for Rs. 25,000;

(7) that his agent Vijayaraghavachari, when he received this letter, accordingly did so, demanding from Samu Patter an advance of Rs. 25,000 for the Bombay creditors, but was put off by Samu Patter, who said, not that there was no undertaking by him to advance money, but that he would pay some advance after the business of the pledge was carried through;

(8) that in order to get his security on December 10th, 1918, the Garnishee had to take over from the Indian Bank a loan of one lakh on pledged goods;

(9) that when Vijayaraghavachari found out that in Maya Nadar's deal on 9th December 1918, the Garnishee himself had benefited to the extent of Rs. 5,000 by having a hundi to the amount drawn by him on his debtor honoured, he indignantly called on the Garnishee to make good his promised advance;

(10) that the Garnishee finally in pursuance of the undertaking given by his son, on 13th December 1918 did advance Rs. 15,000 on a pro-note signed by the debtor and another, a substantial merchant, which money was remitted by the debtor to Bombay creditors;

(11) that the debtor was able to carry on his business till 8th January 1919, when Bombay creditors put him into the Insolvency Court, though his Madras creditors were willing to wait;

(12) that there is, until we come to the matter of this pledge, no suggestion that the debtor's methods of business were underhand or that his failure was due to any unscrupulous or fraudulent methods but solely to the slump in the piece-goods prices at the time, and that the failure might have been avoided if prices had recovered;

(13) that it was then difficult for any one to decide whether prices would or would not recover, while the Madras creditors were willing to give the debtor time to allow them to recover, and it is apparent that the piece-goods were not considered valueless or the Garnishee would not have incurred a further debt of one lakh on them.

9. On these facts I have to decide whether the Official Assignee has established a proof that the security given by the debtor to the Garnishee one month before his insolvency was a fraudulent preference under Section 56 of the Presidency Insolvency Act.

10. It appears to me clear on these facts that the debtor's firm on 16th December 1918 was not hopelessly insolvent; that the debtor was genuinely endeavouring to

carry on, was trying to raise money to satisfy the more importunate creditors in Bombay, and that the Madras creditors were willing that he should so carry on. It appears to me further that the security secured by the Garnishee was definitely in consideration of a promise by the Garnishee's son to persuade his father to advance the debtor money, not for himself, but for his Bombay creditors, i.e., to assist in tiding him over the crises and that as a matter of fact that promise was carried out later by the Garnishee.

11. I cannot accept the learned Advocate-General's contention that the advance of Rs. 15, 000 had nothing to do with the security given to the Garnishee. The fact that he was amply secured for that advance cannot affect the view that the debtor had already a promise of an advance when he agreed to the Garnishee's previous debt being secured, and I do not think that the Garnishee would have advanced a further sum even on adequate security to a man *ex hypothesi* hopelessly insolvent, unless he had some previous consideration therefor.

12. Nor can I agree that the debtor was hopelessly insolvent, and, therefore, the preference given to Samu Patter must have been actuated by some ulterior motive to prefer him at the expense of other creditors, though no doubt he was unable to pay from his own money his debts as they fell due. I have shown that even a month later than the date of the giving of the security, the Madras creditors were willing to give the debtor a chance of recovery. This fact, viz., that the debtor was trying to keep his feet, coupled with the following, that the propelling force towards this arrangement came from the Garnishee, that the debtor had given the security in return for some definite promise of advance to enable him to stave off the Bombay creditors, and that he used the advance for that very purpose, and not for himself, that no close connection of friendship or anything but a long business relationship is found as between the debtor and the Garnishee, people of wholly different castes, lead me to conclude that the giving of the security was induced in the mind of the debtor by pressure from the Garnishee, and by a promise that, if he gave it, he would obtain some money to enable him to stave off the threatened insolvency. These, to my mind, were the dominant motives in the debtor's mind, not any idea of conferring a favour on the Garnishee at the expense of his creditors but rather a real and genuine hope that in the outcome the giving of the

security to this Garnishee would result in the recovery of his business to the It re fit of all his creditors.

13. The law on the point is clear, see Sharp v. Jackson (1899) App. Cas. 419 : 68 L.J. Q.B. 866 and the Official-Assignee of Madras v. T.B. Mehta & Sons 49 Ind. Cas. 968 : 36 M.L.T. 190 , where the dominant motive is not to prefer one creditor at the expense of the rest. Section 56 has no application and the obligation incurred by the debtor is lawful and must be upheld in a Court of Law.

14. I, therefore, agree that the appeal must be allowed with costs here and below, (costs in the original Court to be on the higher scale).

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