

The Official Assignee Vs. S. Padmalakshmi

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Court : Chennai

Decided On : Mar-12-1975

Reported in : (1975)2MLJ86

Appellant : The Official Assignee

Respondent : S. Padmalakshmi

Advocate for Def. : Mr. M. S. Venkatarama Iyer

Judgement :

S. Mohan, J.

1. This is an application for declaring the payment of Rs. 38,692-62 by the insolvents to the respondent, made on 17th July, 1972, fraudulent and void against the Official Assignee.

2. In this report dated nth November, 1974, the Official Assignee has stated as follows:

The insolvents (S. A. Manicka Mudaliar and M. Arunachalam), who were carrying on business in groundnut, were adjudicated on their own petition and the order of adjudication is dated 28th July, 1972. The insolvents filed a schedule of affairs. On an investigation into the accounts, it was found that the insolvents had, within three months prior to the date of filing the petition for adjudication, preferred the

respondent and paid the debt due to her, viz., Rs. 38,692-62 on 17th July, 1972, within 10 days prior to the filing of the petition for adjudication. These payments were made in discharge of the following borrowings of the insolvents from the respondent: 10-1-1969 Rs. 10,000 8-2-1969 Rs. 5,000 3-3-1969 Rs. 10,000 17-9-1969 Rs. 12,015

All these total up to Rs. 37,015, which, together with interest comes to Rs. 38,692. It is submitted that this was a voluntary preference, there being no pressure of any sort from the respondent and, therefore, must be deemed to be fraudulent and void as against the Official Assignee. Hence, this petition.

3. In the counter statement of the respondent, it is stated that she was born on 24th April, 1952. There were moneys belonging to her, which were invested in mortgages, etc. While she was a minor, her father had taken and utilised the money belonging to her. Thus, he had committed breach of his duty, which he owed to her as his ward, and made it appear as if it was a loan given to him. At the time of marriage on 14th September, 1969, she was given a dowry of Rs. 10,008, and notwithstanding the marriage, she continued to live with her father. Her husband died on 10th October, 1971, leaving behind the respondent and a female child, Renuka, and at that time, her father was in financial difficulties. The mother and brother of the respondent took the father to task for having improperly utilised the moneys, and, therefore, he, in reparation, paid to her under insistence, Rs. 38,692.62 on 17th July, 1972. What her father had done was a clear breach of trust, since, her moneys in his hands were held by him in trust. If that be so, there was no question of any debt. It is relevant to submit that her father had paid within two months prior to the date of insolvency, a sum of Rs. 1,45,000 to several unsecured creditors. Therefore, even assuming that to be a debt, the payments were in the course of the usual business and it cannot be called fraudulent preference of one creditor to another. It is only because the father realised the gravity of the breach committed to her, more so, by reason of the insistence of the mother and the brother, the money was paid. Therefore, it is not correct to state that there was no pressure. Hence, the petition is liable to be dismissed.

4. In his further report, dated 23rd December, 1974, the Official Assignee states that the respondent became a major on 24th April, 1970, and afterwards the insolvent-father ceased to be a guardian. No efforts were made either by the respondent's husband or by the respondent herself after her marriage and after she attained majority to get back the moneys from her father. It is, therefore, clear that the respondent had acquiesced in the loan taken by her father. From the standpoint of the estate, the money that was lent by the respondent was a mere loan and could be treated only as such. In any event, there appears to be no breach of trust made by the insolvent, when he took the loan from the respondent.

5. Evidence was tendered on behalf of the Official Assignee through P.W. 1, the Sub-Accountant, in his office, through whom the various amounts lent to the insolvents were marked as Exhibits P-1 and P-2. In cross-examination, an extract was put to the witness to show that a sum of Rs. 1,45,000 was paid to the various creditors and he admitted that all those entries were correct.

6. The respondent was examined as R.W. 1. She speaks to the fact of her marriage and the dowry given to her at the time of the marriage and also the unauthorised taking away of the money belonging to her. In cross-examination, as to how she got the money, she states that as and when there were auspicious functions like Ear-boring ceremony, Cradle ceremony, etc., she was given presents, which were handed over to her mother, who lent those amounts on interest and all the moneys were kept by the mother, with a view to purchase a house property for her. Asked as to the circumstances under which, she was paid money on 17th July, 1972, she deposes that her uncle, Kannappa Mudaliar and her aunt, came and demanded money from her father, which they had lent to him, and her mother, fearing that her father would use the money belonging to the respondent, immediately, counted the amount which was kept in the almirah and it was found that there was a deficit and the father was questioned. He admitted having taken the money. But, he would state that he had only invested the same in the business and he would repay it and accordingly, it was repaid.

7. R.W. 2 is the mother of the respondent. She adds in her testimony, after narrating the circumstances under which the money came to be paid, that it was

only after a quarrel that the daughter having lost her husband, had some moneys to her credit, which was reserved for purchase of a house property, and that the husband had improperly taken away that money.

8. In cross-examination, she states that no accounts were maintained for the lending of moneys of the daughter and the huge amount was kept in the almirah and not in the bank, since it was intended for the purchase of a house for the daughter.

9. In this state of pleadings and evidence, Mr. M. S. Venkatarama Iyer, learned Counsel for the respondent raises the following submissions : (1) The relationship being fiduciary in character, there is no question of any debt, and consequently, relationship between the insolvent and the respondent cannot be termed as that of a debtor and a creditor. In support of this decision, he cites *Ex parte Taylor In re Goldsmid* 18 Q.B.D. 215, *Sharp v. Jackson* (1819) Appeal Cases 419, *In re, Lake* *Ex parte Dyer* (1901) 1 Q.B.D. 710, and the passages occurring in *Halsbury's Laws of England*, Fourth Edition, Volume 3, page 498, para. 911 and page 501, para. 916.

(2) This is a case in which the guardian lends to himself and where he appropriates the money belonging to the minor, it would amount to a breach of trust. In support of this submission, he relies on the decision in *Kathoom Bi v. Abdul Wahab Sahib* : AIR1939 Mad313 , *Labhu Ram v. Bhag Mal* (1920) 54 I.A. 326 and *Radhakishen v. Secretary of State* A.I.R. 1972 Sind. 181.

(3) Where a person discharges an obligation in the nature of a trust, it is not with a view to prefer, and therefore, Section 56 of the Presidency Towns Insolvency Act, cannot apply.

10. The learned Official Assignee submits as under:

(1) This is a case of a fraudulent preference and all the requisite conditions of Section 56 are satisfied, and the bona fides of the respondent is immaterial. The fraudulent nature is evident from the list of assets wherein, under Schedule A, it is seen that all the debts were contracted in the year 1972. A perusal of that will

make it clear that none of the creditors was paid while only relations were preferred for payment out. (2) There is no question of trust here, since there is no vesting of the property and none of the ingredients required under Section 3 of the Trusts Act is present in this case, and consequently, the relationship is only of a debtor and creditor. In support of these two submissions, he relies on the ruling in *Sithalinga v. Ardhanari Chetty* : (1939)1MLJ745 , and also the passage, occurring in *Williams' on Bankruptcy*, Eighteenth Edition (1968), page 390.

11. I will now proceed to consider the merits of their respective submissions.

12. It is important to ascertain the nature of relationship because that will have a great bearing in deciding whether Section 56 of the Presidency Towns Insolvency Act is applicable or not. That section reads as follows:

(1) 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 favour 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 official assignee. (2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the insolvent.

13. According to Mr. M.S. Venkatarama Iyer, the relationship is only that of a trustee and a co-trustee.

14. Lord Esher, M.R., held in *Ex parte Taylor*--'In re, Goldsmid 18 Q.B.D. 295:

With regard to the payment of the 3000 1 cheque, the relation of debtor and creditor did exist between the bankrupt and Taylor. The bankrupt was in a position in which exposure would have, at least, been infamy to him, and it was very likely to lead him into extreme danger. He was actually threatened with a criminal prosecution before a Magistrate. Can we, under these circumstances, say that, when he made the payment, he made it with a view of preferring Taylor, rather than with the sole view of getting rid of the exposure with which he was

threatened, and which would have been ruin to him in character as well as in money. So far from differing from the conclusion of Cave, J., I think the bankrupt cared no more for Taylor than for any other creditor, but that he acted solely with the view of saving himself from exposure, infamy, and danger. I do not think there was any fraudulent preference.

With regard to the other ground, the execution of the deed of the 23rd of March, the bankrupt had been guilty of a gross, and perhaps a fraudulent, breach of trust, and an application was made to him by Taylor, his co-trustee, to replace the trust money which had been lost. I do not say that threats were made use of, but great pressure was put on him. The relation of debtor and creditor did not exist between the parties. The relation was only that of trustee and co-trustee, honest trustee and defaulting trustee.

Again Lindley, L.J., held at page 301:

A cestui que trust is not a creditor of his trustee, nor is a trustee a creditor of his co-trustee. In neither case do the parties stand in the relation of debtor and creditor.

If this be the correct position, Mr. M. S. Venkatarama Iyer is right in his submission that the payment of the moneys to the respondent was not with a view to prefer.

15. The same line of reasoning was taken in *Ex parte Stubbins--In re, Wilkinson* (1881) 17 Ch. D. 58, wherein it was held:

If a debtor on the eve of bankruptcy voluntarily makes good trust money which he has misapplied, the payment cannot be set aside as a fraudulent preference of the trust estate.

16. The following remarks of Rigby, L.J., occurring in *In re, Lake ex parte Dyer* (1901) 1 Q.B. 710, are also apposite.

How is a trustee a debtor? Can he be sued at common law? I do not see how he can be a 'debtor', for the money he is fraudulently dealing with is, at law, his own money. No doubt he can be called upon to replace the money, but that must be by

a suit in equity, not at law. Notwithstanding the high authority of the statement that has been referred to, I confess I do not understand it.

17. In the leading case of the House of Lords in *Sharp v. Jackson* (1899) A.C. 419, Earl of Halsbury L.C., referred to *Ex parte Taylor* 18 Q.B.D. 295, and ultimately held at page 426 as follows:

My Lords, it becomes unnecessary to raise other questions which have been disposed of before. It has been suggested that there was a proposition which could be maintained, as to which I confess I entertain grave doubts whether any decision goes to that extent, namely, that the relation between a cestui que trust and a trustee who has misappropriated the trust fund is not that of debtor and creditor. That it may be something more than that is true, but that it is that of debtor and creditor I can entertain no doubt. As that question has been mooted and brought before your Lordships' House as one question for decision here, I certainly have no hesitation in saying that in my opinion no such proposition can properly be maintained, and that although there are other and peculiar elements in the relation between a cestui que trust and a trustee, undoubtedly the relation of debtor and creditor can and does exist.

The other four learned Law Lords did not refer to this.

18. The following passage occurring in Halsbury's Laws of England, Fourth Edition (Volume 3) at page 498 (Para. 911) may be usefully referred to:

911. Act done must be in favour of creditor or surety.--For a transaction to constitute a fraudulent preference, the act must have been done in favour of a creditor, or a surety or guarantor for the debt due to that creditor and not in favour of any other person. Where, therefore, an act is done by a debtor with a view of benefiting himself, and a creditor or surety thereby obtains a benefit not shared by the debtor's other creditors, then, even though all the other elements of fraudulent preference are present, the transaction cannot be set aside on the ground that the creditor or surety in fact derives an advantage.

Where a defaulting and insolvent trustee replaces money or property forming part of the trust estates which he has abstracted or taken, this does not amount to a payment or transfer to a creditor within this provision of the bankruptcy law.'

'916. Other circumstances negating intention to prefer.--It is not necessary to prove pressure, if there are other circumstances which suffice to rebut the presumption of fraudulent intention, and to suggest that the act complained of was not done with the view to prefer.. that he desired to make reparation for a past wrong, as by restoring trust money which he had misappropriated.

Re Wilkinson, ex parte Stubbins (1881) 17 Ch.D. 58, Re Goldsmid, ex parte Taylor (1886) 18 Q.B.D. 295, Re Hutchin-son, ex parte Ball (1887) 35 W.R. 264, Sharp v. Jackson (1889) A.C. 419 , Re Lake, ex parte Dyer (1901) 1 K.B. 710, Cf. Radcliffe v. Abbey Road and St. John's Wood Permanent Building Society (1918) 87 L.J.Ch. 557, Re Eric Holmes (Property) Ltd. (1965) Ch. 1052 : (1965) 2 All E.R. 33.

Again paragraph 917 at page 502 states:

917. Circumstances Inadequate to Negative Intention to Prefer.--In order to negative an intention to prefer, it is not sufficient to prove that the debtor was moved by a mere sense of honour, Sharp v. Jackson (1889) A.C. 419, Cutts (a bankrupt), ex parte Bognor Mutual Building Society v. Trustee in Bankruptcy (1956) All E.R. 537 : (1956) 1 W.L.R. 728, or a sense of duty or of moral obligation, or that he acted from motives of kindness or of gratitude.' Crosby v. Crouch (1809) 2 East. 256, Bills v. Smith (1865) 34 L.J.Q.B. 68, Re Ramsay, ex parte Deacon (1913) 2 K.B. 80.

19. On this basis, it is contended by the learned Counsel for the respondent, Mr. M. S. Venkatarama Iyer, that the following passage occurring in 'The Law of Insolvency in India' by Mulla, Second Edition, (1958) at page 627 is wrong, since the actual decision of the House of Lords does not hold so:

The relation of a trustee who had misappropriated a trust fund and his cestui que trust is that of debtor and creditor. 'Although there are other and peculiar elements in the relation between a cestui que trust and trustee, undoubtedly the relation of

debtor and creditor can and does exist.

20. It is the argument of the learned Official Assignee that *Ex parte Taylor*, *In re Goldsmid* 18 Q.B.D. 295 is not the correct law and it has actually been overruled by the House of Lords, as seen from the observations made in *Sharp v. Jackson* (1899) A.C. 419, (which I have extracted above).

In re Lake ex parte Dyer (1901) 1 Q.B.D. 110, need not be considered at length since the remarks of 'Rigby, L.J. came to be made in answer to the argument of the counsel, and that was not the actual decision in that case.

21. I am unable to agree with the (learned Official Assignee that *Ex parte Taylor*. *In re Goldsmid* 18 Q.B.D. 295 has been overruled by the House of Lords. To my mind it appears that the observations of Earl of Halsbury, L.C. at page 426 were only by way of obiter, and this perhaps led Rigby, L.J., to make those remarks in *In re Lake ex parte Dyer* (1901) 1 Q.B.D. 110.

22. No doubt Williams on Bankruptcy (Eighteenth Edition (1968) at page 390 states:

Section 92 of the 1869 Act, and Section 4 .(sic) the 1883 Act, applied to transactions between a debtor and persons who were in the strict sense his creditors. Thus, a person who had entrusted a bankrupt with money for a specific purpose was not a creditor within the section, and a defaulting trustee was a 'debtor' neither of his cestui que trust, nor of his co-trustee'. But this was disapproved by Lord Halsbury, L.C. in *Sharp v. Jackson* (1899) A.C. 419.

But, I do not think that is the correct appreciation of the legal position. On this basis, the passage in 'The Law of Insolvency in India' by Mulla, at page 627 (extracted above) must be held to be not reflecting the correct position.

23. The decision in *Ex parte Stubbins In re Wilkinson* 17 Ch.D. 58, also lends support to the conclusion that if there has been an entrustment and if there is a relationship of a trustee and co-trustee, the discharge of that obligation by the trustee cannot amount to a fraudulent preference.

24. This conclusion alone is not sufficient to dispose of the case, since there remains the other question whether such relationship of a trustee and co-trustee does exist here. It is, in this connection, that the decision in *Kathoon Bi v. Abdul Wahab Sahib* : AIR1939 Mad313 .

On their own showing respondents 1 to 3 were the guardians of the appellant and the minor's property being in their hands, they must account in full..1 to 3 We hold that respondents were in the position of trustees and are liable to account to the appellant for her half share in the profits out of the business.

becomes very relevant.

25. Likewise in *Labhu Ram v. Bhag Mal* (1920) 54 I. A. 926, it was held:

The relationship between a guardian and his ward is very similar to the relationship existing between a trustee and his beneficiary.

A guardian stands in a fiduciary relation towards his ward and is not allowed make any profit out of his office.

26. However, the learned Official Assignee would try to distinguish these two cases by stating that the guardian cannot in any sense be called a trustee within the meaning of Section 3 of the Indian Trusts Act, and merely because the relationship is a fiduciary one, it does not mean that there is a trust. He seeks to support his submission on the basis of the decision in *Sithalinga v. Ardhanari Chetty* : (1939)1MLJ745 , which has held thus:

The conclusion seems to be therefore irresistible that a guardian although he occupies a fiduciary position is held to be debarred from acquiring immovable property on behalf of his ward. The only standard by which he has to be judged is that of a prudent man who is acting carefully with his own money. If a guardian is found to have acted according to this standard he must be held to have done all that was required of him.

27. It may be correct to state that the 'trust' as contemplated under Section 3 of the Indian Trusts Act, does not arise in this case. But, it has to be remembered that

there are certain obligations in the nature of a trust as dealt with under Chapter 9 and this will undoubtedly be a case wherein there is an obligation in the nature of a 'trust' and the argument of the learned Official Assignee overlooks this important aspect. If this be the position, the decision in *Sithalinga v. Ardhanari Chetty* : (1939)1MLJ745 , does not lend support to the contention of the learned Official Assignee.

28. I am unable to agree with the learned Official Assignee when he states that there was actually no entrustment to the father, as seen from the evidence of R. Ws. 1 and 2 and in so far as it is admitted that the father has stealthily removed the amount belonging to the daughter, the father is none other than the 'common thief'. This argument ignores the position that the father is the natural guardian and it is in the evidence of R.W. 2 that he was taken to task for having improperly taken away the money belonging to the daughter, which was kept without investment in order to purchase a house for the daughter.

29. I am equally unable to accept the argument of the learned Official Assignee that there was no pressure on the father to pay this amount and the Court should not base its conclusion on sympathies, merely because the respondent is a young widow, barely having had only about 2 years of matrimonial bliss, that too with a daughter to look after.

30. Sympathetic considerations may prevail with the Court where it is a matter of discretion. But, here it is not on sympathies, I decide. In law, there is an obligation in the nature of a trust, where the father is obliged to discharge that obligation and to make good the breach of trust, it will be far-fetched to contend that he was paying the amount with a view to prefer. It is not the material pressure alone that matters. The evidence of both R.Ws. 1 and 2 points out that the father was taken to task and the quarrels became a daily feature on account of the taking away of the money by the father, which admittedly belonged to the daughter. Only with a view to clear his conscience and in reparation of the injury done to the daughter, whose cup of sorrow was already full at the loss of her husband, the father made good the payment. Under these circumstances, to contend that there was no pressure, is something which I cannot appreciate. Nor again, could it be deemed

to be fraudulent within the meaning of Section 56 merely because the repayment was done to the daughter with the moneys borrowed from creditors. That only shows that he was anxious to shield himself from the accusation that he was an evil father, adding to the woes of a bereaved daughter. If this be the position, the fact that Rs. 10,008 was paid as dowry to the daughter at the time of marriage and after the marriage the father had no right of guardianship does not, in any way, affect my decision. The reason I hold so is that it is in the evidence of R.W. 1 that even after the marriage, the daughter continued to live with father.

31. Thus, on careful consideration of all the above, I come to the conclusion that this application is liable to be dismissed and. it is accordingly dismissed. There will be no order as to costs.

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