APPELLATE CIVIL.

Before Holmwood and Newbould JJ.

1915

Aug. 23.

NRIPENDRA NATH SAHU

v.

ASHUTOSH GHOSE

AND

GOPINATH MANDAL

v.

ASHUTOSH GHOSE.*

Fraudulent Preference—State of mind of maker—Intention—Receiver—Onus—Provincial Insolvency Act (III of 1907) s. 37.

The question whether there has been a fraudulent preference depends not upon the mere fact that there had been a preference but also on the state of mind of the person who made it. It must be shown not only that he has preferred a creditor but that he has fraudulently done so. It depends upon what was in his mind. For this purpose it is not true that the debtor must be taken to have intended the natural consequences of his acts. One must find out what he really did intend.

Dicta of Lord Halsbury in *Sharp* v. *Jackson* (1) followed.

It is not necessary to threaten criminal proceedings to constitute pressure. The threat of civil suits is enough. If it is established that the transaction was the result of real pressure brought to bear by a creditor on his debtor, it cannot be deemed as a spontaneous act.

The onus is on the Receiver to show that it was an outcome of a fraudulent preference.

APPEAL (No. 3 of 15) by Nripendra Nath Sahu, creditor, petitioner.

Appeal (No. 6 of 1915) by Gopinath Mandal, creditor, petitioner.

* Appeals from Original Orders, Nos. 3 and 6 of 1915, against the order of H. P. Duval, Additional District Judge of 24-Parganas, dated Dec. 8, 1914.

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In these matters Babu Ashutosh Ghose, Receiver in bankruptcy to the estate of Nilratan Mandal and others, who had been declared insolvent, sought to set aside three mortgage deeds on the ground that they were void as against him under section 37 of the Provincial Insolvency Act. A petition for insolvency was filed against Nilratan Mandal and his brothers by a creditor on 19th February 1912. On 4th December 1911, the brothers had executed a mortgage for Rs. 9,000 of some of their immoveable properties in favour of Nripendra Nath Sahu, and on 27th December 1911 and 14th February 1912 they executed two other mortgages, one for Rs. 6,000 and another for Rs. 10,000, in favour of Gopinath Mandal. The first mortgage was registered on the 13th February 1912, and the two others on 18th February 1912. In respect of both these creditors the mortgages were given as security for money borrowed before on hand-notes. After recording evidence the District Judge of 24-Parganas, on 30th January 1913, declared all these transactions void as against the Receiver under section 37 of the Act. The mortgagees thereupon appealed to the High Court which remanded the case directing the District Judge to take further evidence and decide the question according to the following principles—(i) That the debtor at the date of the transaction must be unable to pay from his own money his debts as they fall due. (ii) The transaction must be in favour of a creditor or of some persons in trust for a creditor. (iii) The debtor must have acted with a view to give such creditor a preference over his other creditors. (iv) The debtor must be adjudged an insolvent on an insolvency petition presented within three months after the date of the transaction sought to be impeached. The Additional District Judge of Alipore, by his judgment dated 8th December 1914, again set aside these transactions

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as against the Receiver. Nripendra Sahu and Gopinath Mandal then preferred the present two appeals to the High Court.

Mr. Caspersz, *Babu Jnanendranath Sarkar* and *Babu Bhupendra Nath Bose*, for the appellant in A. O. D. No. 3 of 1915.

Sir Rashbehary Ghose and *Babu Panchanan Ghose*, for the appeallant in A. O. D. No. 6 of 1915.

Babu Umakali Mukherji, *Babu Bipin Behari Ghose* and *Babu Khetra Gopal Banerjee*, for the respondent in both appeals.

Cur. adv. vult.

HOLMWOOD AND NEWBOULD JJ. These two appeals arise from an order made on remand by the learned Additional District Judge of the 24-Parganas in an insolvency matter. It appears that Babu Ashutosh Ghose, the Receiver in bankruptcy to the estate of Nilratan Mandal and others, sought to set aside three mortgage deeds on the ground that they were void against him under section 37 of the Provincial Insolvency Act. The insolvency proceedings were started by one Kissen Chand Kesori Chand, a creditor of Nilratan Mandal, for Rs. 2,500 at the instigation, it is said, of Mr. Palit, a second creditor, for Rs. 45,000 odd who had advanced Rs. 5,000 to Gopinath Mandal, the appellant in appeal No. 6, to give to Nilratan his brother-in-law on a note of hand dated the 1st March 1911. It further appears that Gopinath had advanced Rs. 12,000 on a note of hand dated the 17th June 1911 and Rs. 2,000 on a note of hand dated the 1st December 1911, both of which sums he had borrowed from Dr. Satya Charan Mookerjee, the next heaviest secured creditor of Nilratan.

In appeal No. 3 the appellant Nripendra Nath Sahu, a distant connection of the insolvent, had

advanced four sums on hand-notes in July 1911, namely, Rs. 2,500 on the 11th July, Rs. 2,500 on the 20th July, Rs. 2,000 on the 21st July and Rs. 2,000 on the 26th July, making a total of Rs. 9,000. A stamp paper was purchased on July 26th, the date of the last transaction, for Rs. 45 for the purpose, it is alleged, of engrossing a mortgage security for this Rs. 9,000. Interest was to run on the hand-notes at the rate of 12 per cent. per annum. On the 4th December 1911, a mortgage deed for this Rs. 9,000 was executed by Nilratan and his four brothers, one of them a minor under his guardianship, in favour of Nripendra Nath Sahu. This was a second mortgage of the property already mortgaged to Nripendra's father, Upendra Nath Sahu, who had had continuous transactions with Nilratan's firm for years.

On the 27th December Nilratan executed a mortgage deed for Rs. 6,000 in favour of Gopi Nath. It is stated in the evidence to have been on account of the hand-note for Rs. 5,000 above referred to after making accounts. It is further stated that Rs. 3,000 was paid in cash to Gopi Nath in the beginning of February and that the balance Rs. 10,000 formed the subject of another mortgage on the 14th February 1912. The mortgage for Rs. 6,000 was the third mortgage of the land already mortgaged to Nripendra and Upendra. The mortgage for Rs. 10,000 was the second mortgage of the lands already mortgaged to Mr. Palit for Rs. 45,000 odd.

Now, the only question that arose in this litigation was whether these three mortgage-bonds fell within the meaning of section 37 of the Provincial Insolvency Act. At the first hearing, the learned Additional Judge held that they did. On appeal, Mr. Justice Mookerjee and Mr. Justice Beachcroft remanded the case setting out clearly the law on the subject for the Judge's guidance and formulating four conditions as essential

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to bring a transfer of the insolvent's property within the section. As to two of these, namely, the 2nd and the 4th that the transaction must be in favour of some creditor and that the debtor must be adjudged an insolvent on an insolvency petition presented within three months after the date of the transaction sought to be impeached, there was never any doubt. The two points the learned Judge had to consider in the light of the judgment of this Court in remand were whether the debtor at the date of the transaction was unable to pay from his own money his debts as they fell due, and, secondly, whether the debtor had acted with a view to give any creditor a preference over his other creditors so as to render the transaction fraudulent and void as against the receiver. Now, the Receiver in his oral evidence says that he found the liabilities to be Rs. 1,92,576, from an inspection of the books, on the 4th December 1912, while he gives an account of the assets which is not very intelligible without a reference to the accounts themselves. From these we find that the landed property was sold for Rs. 1,30,950, besides Rs. 10,257 which had to be paid in by the minor brother on partition as balance of his excess share. This makes Rs. 1,41,207. The stock-in-trade was Rs. 13,499-1, the cash balance Rs. 767-14 and the book debts Rs. 37,056-10-6. This makes a total of Rs. 1,92,530-9-8 or within Rs. 46 of the liability as alleged by the Receiver. But the appellants have given us a total liability of Rs. 1,80,000 by detailed figures from the books. And the Receiver, on whom the onus lay, has not taken the trouble to show what debts had actually fallen due on the 4th December and the order in which they fell due. The words "as they become due" in the section seem to have been ignored both by the Receiver and by the lower Court. It is true, he says they only borrowed Rs. 15,000 on *hundis* after

the 18th of Agrahayan that fell due after the last mortgage on the 14th February 1912. But the accounts show a large outstanding of *hundis* of much earlier dates and there is nothing to show when they fell due.

Be that as it may, although it is clear that the insolvent had not money in his hands sufficient to meet the liability on the 4th December 1911 having only Rs. 767-14 in cash, and, on the authority of *In re Washington Diamond Mining Co.* (1), the fact that the debtor has money locked up which may be available at a later period for the payment of debts, cannot be considered for the purpose of excluding the debtor from falling within the category of bankrupt; "yet," says Vaughan Williams J, "when you come to deal with the question whether the payment was made with the view of giving the creditors a preference it is quite obvious that one cannot for that purpose leave out of consideration the fact, if it was a fact, that the directors might well anticipate that they would be able to get in moneys of the Company in sufficient time to render it extremely improbable that they would be driven to a liquidation of the Company's affairs by a winding up; because it is much less likely that the directors would seek to give a preference to creditors in such a case than it would be in a case where the condition of the Company was such that it must have been plain to the directors themselves that a stoppage of payment or winding-up was inevitable." It has been pointed out to us that the decision of Vaughan Williams J., which was in that case that there was no fraudulent preference, was upset in the Court of Appeal on the ground that a Company stands in a different position to an individual, who has since become bankrupt, by reason of the Companies Act, 1862, and it was found as a fact that the directors were

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guilty of a misfeasance, but the *dictum* of Vaughan Williams J. as regards the propriety of taking into consideration the unliquidated assets of the debtor on the question of intention was not questioned. We may, therefore, find that the condition (i) was not fulfilled and need not be further adverted to. But that condition (iii), the second question before the learned Judge, and before us in appeal, depends on considerations which do not seem to have been adequately weighed by the learned Judge. As was pointed out by Lord Halsbury in *Sharp* v. *Jackson* (1), the first thing to be considered is the question of fact—what were the reasons why the deeds were executed ? and in this connection he expressed his entire and absolute agreement with the following remarks of Lord Esher: "The question whether there has been a fraudulent preference depends not upon the mere fact that there had been a preference but also on the state of mind of the person who made it. It must be shown not only that he has preferred a creditor but that he has fraudulently done so. It depends upon what was in his mind. It has been argued that the debtor must be taken to have intended the natural consequences of his acts. I do not think that this is true for this purpose. I think one must find out what he really did intend. The recitals in the deed seem to show what was really his object." Now, applying this to the case before us, we have the fact that the assets covered, or possibly more than covered, the liabilities, that the intention was to secure debts payable on demand by the security of a mortgage which would relieve the pressure on the debtor's ready-cash and so put him in a better position to pay his debts, as they become due, with his own money. There was no idea of insolvency

(1) [1899] A. C. 419, 421.

certainly up to the time of Mr. Palit's visit on the 7th February. This the learned Judge seems to have realized in a passage towards the end of his judgment. On the principles, therefore, laid down above there is nothing to bring the mortgage in appeal No. 3 or the first mortgage in appeal No. 6 within section 37 of the Act.

If we went into the further considerations of pressure on the debtor and of previous understanding, the facts would equally compel us to find in favour of the appellants. There was pressure in the threat of civil suits. The learned Judge was mistaken in thinking that it was necessary to threaten criminal proceedings to constitute pressure. It appears, from the argument before us, to have been based on a misreading of the remarks of Jessel M. R. in *Ex parte Hall* (1). As Mookerjee J. pointed out that if it is established that the transaction was the result of real pressure brought to bear by a creditor on his debtor it cannot be deemed as a spontaneous act, and the deeds recite such pressure.

As to previous understanding, we think in appeal No. 3 the purchase of the stamp paper by the debtor on the 26th July for Rs. 45, the exact sum necessary for Rs. 9,000 mortgage, shows clearly that there was such an understanding. We think that an oral agreement to mortgage sufficient property to cover the debt, is sufficiently specific to constitute an agreement within the meaning of the English authorities cited in the judgment of this Court on remand. One of those at least was a "prior voluntary promise." There does not appear to have been any understanding in the case No. 6, though the parties were brothers-in-law, but there was pressure. In *Ex parte Lancaster in re Marsden* (2), it was held that the argument

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"you must infer that this man suffered judgment to be recovered and execution to go against him for the purpose of preferring his father-in-law" was a view for which there was no kind of support. It was not an act of bankruptcy to give in to a clamorous creditor even if he be your brother-in-law. It is not the duty of the debtor invariably to resist him. It is very much like "bounty," as it is called by Lord Esher, when he does it for his brother-in-law. But the onus is on the Receiver to show that it was an outcome of a fraudulent preference and this, in the case of the mortgages of the 4th and the 27th December 1911, we think, he has entirely failed to discharge.

As regards the mortgage of the 14th February 1912, we cannot see that there was any preference either. Kissen Chand's debt of Rs. 2,500 did not fall due till the 17th February 1912. Mr. Palit's demand for money on the 7th February 1912 had been met by payment of Rs. 471 odd as interest. He was not entitled to anything but interest. No other creditor was pressing. Gopinath was threatening with a suit. Nilratan's idea was to save himself and not to give preference. Suspicion is not enough in these cases as was pointed out by Cotton L. J. in *Ex parte Lancaster* (1) cited above. The mortgage of the 4th December 1911 had been registered the day before. Gopinath wanted his deed of the 27th December to be registered and another deed to cover the balance of his dues. Both were registered on the 15th February 1912. The learned Judge seems to think that there was something suspicious in the delay in registration. On the contrary if Nilratan had suspected that the deeds of the 4th December 1911 and the 27th December 1911 would be impugned, he would have hastened to register them

(1) (1883) 25 Ch. D. 311.

But for the first time in argument by the respondents' vakil in this Court a sinister suggestion was thrown out that the deeds of December were ante-dated and that they were all got up in February 1912 after Mr. Palit's visit. There is no evidence of this; and the case has passed through the hands of the Judge in the lower Court twice and of two Judges of this Court in appeal without such a thing being hinted at. Mr. Palit's visit appears from the evidence oral and documentary to have been to demand money and for nothing else. If he secretly got Kissen Chand to file the petition of the 19th February two days after his debt of Rs. 2,500 had become due, that is all the more reason for holding that Nilratan certainly could not have suspected any such act beforehand. All the persons who said that Nilratan had refused them security and said he had no money refer to a period beyond three months. The latest is the 18th November 1911 and the petition is dated the 19th February 1912. There is no reason to doubt the genuineness of the advances made by Nripendra and Gopinath. They were held genuine by this Court before remand, and Gopinath's are strongly corroborated by his transactions with Mr. Palit and Dr. Satya Charan Mookerjee. The circumstances of Nilratan are shown on the record to have been slightly better in February than they were in December. We do not think that any distinction can be made as against the mortgage of the 14th February 1912.

The result is that the appeals are decreed and the applications of the Receiver dismissed. The appellants are entitled to their costs out of the estate in each case throughout.

G. S. *Appeal allowed.*