

PRIVY COUNCIL.

MUSAHAR SAHU

v.

LALA HAKIM LAL.

P.C.³
1915

Nov. 8, 9, 22

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Transfer of Property Act (IV of 1882) s. 53—Debtor and Creditor—Suit to set aside deed as being void as delaying or defeating creditors—Deed made on good consideration—Preference by debtor to one creditor rather than another where debtor retains no benefit for himself.

In this appeal their Lordships of the Judicial Committee upheld the decision of the High Court, which is reported in I. L. R. 34 Calc. 999, at page 1003.

The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors for the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor, and leave another unpaid.

In re Moroney (1) and *Middleton v. Pollock* (2) followed.

When it was found that the transfer impeached was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor, it followed that no ground for impeaching it lay in the fact that the plaintiff (appellant), who also was a creditor, was a loser by payment being made to the preferred creditor—there being in the case no question of bankruptcy.

APPEAL 10 of 1912 from a judgment and decree (3rd April 1907) of the High Court at Calcutta which reversed a judgment and decree (30th July 1904) of the Court of the Subordinate Judge of Mozufferpur.

The plaintiffs were appellants to His Majesty in Council.

* Present: VISCOUNT HALDANE, LORD PARMOOR, LORD WRENBURY, SIR JOHN EDGE, AND MR. AMEER ALI.

(1) (1887) L. R. 21 Ir. 27.

(2) (1876) L. R. 2 Ch. D. 104, 108.

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The main questions for determination on this appeal were (a) whether the sale and conveyance of certain properties to the respondents by the defendant Kishun Benode Upadhyaya (a judgment-debtor of the appellants) by a deed of 2nd September 1901, was liable to be set aside as being a fictitious transaction executed in fraud of the appellants; (b) whether a suit could be maintained to set aside the deed as being in fraud of creditors under section 53 of the Transfer of Property Act (IV of 1882); and (c) whether the conveyance was void or voidable under section 53 of that Act.

The facts are sufficiently set out in the report of the case in the High Court (MOOKERJEE and HOLMWOOD JJ.) which will be found in I. L. R. 34 Calc. 999.

On this appeal,

B. Dube, for the appellants, contended that the conveyance to the respondent, Hakim Lal, dated 2nd September 1901 was part of a fraudulent and collusive conspiracy to which the respondents were parties. The two *kobalas* executed on that date were parts of one transaction, and if one of them, as had been held by both the Courts below, was fictitious and not made for good consideration, the other one, as being part of the same transaction, must be void also. It was executed in bad faith with the intention of delaying and defeating the creditors. The fact that the deed was made for good consideration did not make it valid, if it was not *bonâ fide*, but made for the purpose of defeating the appellant's claim: *Cadogan v. Kennett* (1). Merely giving a good consideration was not conclusive evidence of good faith; and the onus was on the respondents of showing that the deed was made *bonâ fide*. That was not proved, and the deed was, it

(1) (1776) 2 Cowp. 432, 434.

was submitted, liable to be set aside under section 53 of the Transfer of Property Act (IV of 1882). [VISCOUNT HALDANE referred to the case of *Middleton v. Pollock* (1). Here the debtor has not retained any benefit for himself. Giving priority or preference to one creditor rather than another is immaterial.]

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A. M. Dunne, for the respondents, was not called upon.

The judgment of their Lordships was delivered by

LORD WRENBURY. On the 2nd September 1901 Kishun Benode executed two *kobalas* or conveyances, the one to Kamta Prashad and the other to Hakim Lal. They were conveyances of certain lands, the parcels in the second deed being much more numerous than those in the first deed. Kamta Prashad was the nephew of Ram Aotar Lal, a brother of Hakim Lal. He was a minor and Ram Aotar Lal was his guardian.

The plaintiff, Musahar Sahu, was at this date a creditor of Kishun Benode. He had on the 14th December 1900 sued for the debt and on the 5th January 1901 had presented a petition for security by way of attachment before judgment. On the 11th February 1901, Kishun Benode had made an affidavit that he did not intend to transfer any of his properties, and accordingly on the 11th February 1901 the petition was dismissed.

In this state of facts the two *kobalas* were executed by the debtor on the 2nd September 1901.

On the 5th December 1901 the plaintiff obtained judgment in his action for Rs. 12,695-10 and costs. The defendant did not appear at the trial. On the 21st December 1901, Kishun Benode applied for a rehearing, but on the 2nd August 1902 that application

(1) (1876) L. R. 2 Ch. D. 104, 108.

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was dismissed by default. In the interval, viz., on the 11th June 1902, the transferees had obtained an order for registration of their names in respect of the properties transferred.

Under these circumstances two suits were brought to set aside the *kobalas* on the ground that within section 53 of the Transfer of Property Act IV of 1832, the transfers were made with intent to defeat or delay the creditors of Kishun Benode.

The Subordinate Judge set aside the first *kobala* on the ground that no consideration was paid, that a debt of Rs. 6,335 therein alleged to be due to Kamta Prashad was fictitious, that the transfer was made gratuitously, and that the transfer was made with intent to defraud. An appeal was dismissed with costs, and this decision is not questioned before this Board.

As regards the second *kobala*, there are concurrent findings that the consideration for this deed was real and not fictitious. The Subordinate Judge nevertheless decided in favour of the plaintiff. Upon appeal this decision was reversed, and the second *kobala* upheld. From that decision the plaintiff has brought this appeal.

The appellant has not argued that the law is wrongly laid down in the judgment of the High Court. His contention is that the two deeds of the 2nd September 1901 form really one transaction, and that the second *kobala* must fall with the first.

As matter of law their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy applies there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts. The law is, in their Lordships' opinion, rightly stated by Palles, C. B., in

Re Moroney (1) where he says :—

“ The right of the creditors taken as a whole is that all the property of the debtor should be applied in payment of demands of them or some of them, without any portion of it being parted with without consideration or reserved or retained by the debtor to their prejudice. It follows from this, that security given by a debtor to one creditor upon a portion of or upon all his property, although the effect of it or even the interest of the debtor in making it, may be to defeat an expected execution of another creditor, is not a fraud within the statute, because notwithstanding such an act, the entire property remains available for the creditors or some or one of them, and as the statute gives no right to rateable distribution, the right of the creditors by such act is not invaded or affected.”

The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid: *Middleton v. Pollock* (2). So soon as it is found that the transfer here impeached was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor it follows that no ground for impeaching it lies in the fact that the plaintiff who also was a creditor was a loser by payment being made to this preferred creditor—there being in the case no question of bankruptcy.

The argument presented to their Lordships has in substance been that the transaction of the 2nd September 1901 was one transaction: that (i) Kamta Prashad, the nephew, the minor and ward, and (ii) Hakim Lal, the uncle of Kamta and brother of Ram Aotar Lal, the minor's guardian, are for the purpose not distinguishable as independent transferees, that from the 11th February 1901 until after the 11th June 1902 Kishun Benode was praying for time, and that this fact and the fact that the former *kobala* was

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ficentious and fraudulent show that the latter *kobala* was fraudulent also. Their Lordships do not accept this contention. The *kobala* in favour of Hakim Lal must stand or fall on its own merits. The concurrent finding that the consideration for the deed was real reduces the case to one in which the debtor has preferred one creditor to the detriment of another, but this in itself is no ground for impeaching it under the section even if the debtor was intending to defeat an anticipated execution by the plaintiff.

Their Lordships will humbly advise His Majesty that the appeal should stand dismissed with costs.

Appeal dismissed.

Solicitors for the appellants : *T. L. Wilson & Co.*

Solicitors for the respondents : *Watkins & Hunter.*

J V. W.