

Court and they will humbly advise Her Majesty to affirm its decree and to dismiss this appeal.

Appeal dismissed.

Solicitor for the appellant— Mr. R. T. Tasker.

RAMALINGAM
PILLAI
*,
VETHILINGAM
PILLAI.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

H. W. BROWN AND ANOTHER (CREDITORS), APPELLANTS,

v.

T. J. FERGUSON (JUDGMENT-DEBTOR), RESPONDENT.*

1893.
March 22, 23.
April 7.

Civil Procedure Code—Act XIV of 1852, s. 351—Insolvency—Mortgage to secure a barred debt since renewed—Fraudulent preference—Voluntary transfer.

On 1st January 1886 a partnership theretofore existing between A and B was dissolved and the deed of dissolution provided, *inter alia*, for the execution by B, on demand, of a mortgage on the Plantation house (then subject to a subsisting mortgage in favour of the Agra Bank) to secure the repayment of a debt due by the firm to the trustees of A's marriage settlement. A suit against the firm was pending at the date of the deed of dissolution, and it was dismissed by the Court of first instance and an appeal was preferred to the High Court. Before the appeal came on for hearing the debt to A's trustees was barred by limitation, but A by a letter consented to pay it, and the trustees demanded the execution of the mortgage as agreed on and offered to pay off the Bank. Shortly afterwards, viz., in December 1888, the appeal came on in the High Court, which held that the appellant's claim was valid and called on the Court of first instance for a further finding. On 2nd January 1889 B executed a mortgage of the Plantation house in pursuance of the above agreement, and in June the trustees paid off the Bank. In April the High Court in the above appeal passed a decree for the appellant. In consequence of this decree B became involved in pecuniary difficulties: in October he found himself insolvent and ceased to carry on business, and in February 1890 he applied under Civil Procedure Code, s. 344, to be declared an insolvent. His application was opposed by the holders of the High Court decree on the ground that the mortgage of 2nd January 1889 had been executed with the object of defeating their claim:

Held, that the execution of the mortgage of January 1889 afforded no reason for rejecting the application under Civil Procedure Code, s. 351, since it was supported by consideration and did not amount to an act of fraudulent preference, not being a voluntary transfer.

Butcher v. Stead, L.R., 7 Eng. and Ir. App., 839, followed.

* Appeal against Order No. 97 of 1891.

H. W. BROWN APPEAL against the order of A. Thompson, Acting District Judge of South Malabar, on insolvency petition No. 97 of 1890.-
 T. J. FERGU-
 SON.

The petition was preferred under Civil Procedure Code, s. 344, by one of the judgment-debtors in original suit No. 67 of 1885 on the file of the District Court of South Malabar and the prayer was that the petitioner be declared an insolvent under Civil Procedure Code, s. 351. The petition was opposed by the decree-holders under the circumstances stated in the judgment of the High Court.

The District Judge granted the application, and the opposing creditors presented this appeal against his order.

Mr. W. S. Gantz for appellants.

Wilson and King, Attorneys, for respondent.

JUDGMENT.—In appeal No. 82 of 1887 on the file of the High Court Mr. Tomlinson's representatives obtained a decree against Messrs. Hinde and Ferguson on 26th April 1889 for Rs. 17,349-0-5 with interest at 12 per cent. per annum from 29th April 1882 to date of the decree, and with further interest at 6 per cent. per annum till date of payment. He obtained also a declaration that he was entitled to one-fourth of the future profits which might be derived from certain mining rights called the Aliel Concession. In execution of the decree Tomlinson's representatives attached certain movable properties by civil miscellaneous petition No. 16 of 1890, and on the 28th February 1890, Mr. Ferguson applied under section 344 of the Code of Civil Procedure to be declared an insolvent. He fixed his liabilities at Rs. 3,20,390-1-11 and his assets at Rs. 2,19,679-7-6 up to the 11th February 1890. Three of his creditors, viz., Mr. Tomlinson's representative, Mr. Brown, Messrs. Oakes and Company, and Messrs. Vest and Company opposed his application. The District Judge, after considering their objections, made an order under section 351 declaring Mr. Ferguson to be an insolvent. Hence this appeal.

In the Court below appellants relied in support of their appeal on three grounds of objection, viz., (i) that the balance-sheet prepared for the year ending 30th June 1889 as compared with respondent's statement of liabilities and assets annexed to his petition disclosed a discrepancy to the extent of one lakh of rupees, (ii) that undue preference was shown to Messrs. Arbuthnot and Company by paying them Rs. 10,599-11-2 subsequently

to June 1889, and (iii) that respondent executed a mortgage jointly with his partner and co-defendant Mr. Hinde in favour of the trustees of the wife of the latter over the Plantation house property, which is part of his assets, after the result of the appeal to the High Court had been ascertained and in order to defeat the judgment-creditors.

H. W. BROWN
v.
T. J. FERGUSON.

As regards the first objection, the Judge considered respondent's explanation unsatisfactory, but he was satisfied that the statements made in his petition were substantially true. As for the second objection the Judge accepted respondent's explanation as sufficient, and as for the third objection, he held that the mortgage was executed *bona fide*, though subsequent to the decree in pursuance of previous negotiations and that the mortgage was not liable to be treated as a transaction designed to defraud or delay the judgment-creditors.

As regards the first objection, we are of opinion that the Judge is right in declining to attach weight to it. As observed by him, respondent is only bound under section 351 to show that the statements contained in his application are substantially true and we are referred to no specific evidence indicating that such is not the case. Appellants' counsel draws our attention to the discrepancy between the balance-sheet ending 30th June 1889 and the statement of assets and liabilities contained in his petition. But the Judge has noticed this discrepancy, and after considering the explanations given by the insolvent and after investigating the accounts, he has come to the conclusion that the statements in his petition are substantially true. The discrepancy is only material for the purpose of testing the correctness of those statements and not otherwise. As regards the contention that, in view of the discrepancy, respondent's accounts should be carefully scrutinized, again, no grounds are shown for considering the scrutiny instituted by the Lower Court to be defective.

The second ground of objection is that undue preference was shown to Messrs. Arbuthnot and Company. It rests on the ground that in the balance-sheet A ending 30th June 1889 a sum of Rs. 10,599-11-2 is entered as due to Messrs. Arbuthnot and Company, whereas it does not appear as a liability in respondent's present schedule. His explanation is that on June 29th two bills on England, amounting to £950, were forwarded to Messrs. Arbuthnot and Company, that the payment was, however, not

H. W. BROWN entered in the books until July 2nd, as the exact equivalent in Indian money had to be ascertained from Arbuthnot and Company, and that the payment left a balance of Rs. 1,099-11-2 which is accounted for by several extracts from the account D. The Judge accepted the explanation as satisfactory and we see no reason to come to a different conclusion.

T. J. FERGU-
SON.

The next ground of objection is that the mortgage executed in favour of the trustees of Mrs. Hinde in respect of the Plantation house is fraudulent, and the facts from which this contention arises are shortly these:—respondent and one Mr. Hinde carried on business as merchants in co-partnership in London and in this Presidency under the style of Hinde and Company. It was agreed between them in July 1883 that the partnership was to continue for a period of seven years, but that it might be dissolved by either partner giving six months' notice to that effect. It appears from exhibit XII that Mr. Hinde gave notice on 21st November 1884 of his intention to determine the partnership as from 30th June 1885, that the firm was then indebted to the trustees of the marriage settlement of Mr. Hinde in the sum of Rs. 47,539-11-11 with interest thereon at 9 per cent. per annum, and to the sisters of Mr. Hinde in the sum of £800 together with interest thereon, and that these two sums had been invested or otherwise employed in the Indian business of the partnership. With reference to this debt, the deed of dissolution bearing date 1st January 1886 provided, *inter alia*, for the execution by Ferguson, if required, of a mortgage of the Plantation house in favour of Richard Hinde to secure its repayment. This property had already been mortgaged to the Agra Bank (Limited), which had thereon a lien for a sum not exceeding Rs. 30,000. Mr. Ferguson executed a mortgage in favour of the trustees of Mrs. Hinde as a security for the debt due to them on the 2nd January 1889 and the trustees paid off the Agra Bank and obtained an assignment of the prior mortgage on 8th June 1889. It is stated by Mr. Ferguson that he found himself in October 1889 to be insolvent and ceased from that date to carry on business except such as was necessary for the upkeep of the several estates with which he was concerned. We may here refer to original suit No. 67 of 1885 instituted by Tomlinson against Hinde and Ferguson on a contract by the latter to give the former 25 per cent. of the profits that might be made from the exercise of mining rights over the properties of one Aliel Nair called the Aliel

Concession, which rights Tomlinson alleged he had secured to them. In June 1885 a disagreement arose between Tomlinson and the firm of Hinde and Company. In September 1885 Tomlinson brought his suit, and on 8th October 1886 the District Court of South Malabar dismissed it with costs. From this decision Tomlinson preferred an appeal and the High Court considered his claim to be valid and called for a finding on 18th December 1888, and finally decreed it, as stated already, on the 26th April 1889. This decree was, according to Ferguson, the cause of his insolvency, as he could, after that, get no accommodation from other firms and consequently could not raise money to carry him over that year. He admits that he telegraphed the result of the appeal to Mr. Hinde a day or two after it had been ascertained in December 1888.

Turning to the correspondence that passed between Ferguson and Mr. Hinde, it appears that the trustees of Mrs. Hinde had asked him to execute a mortgage and offered to pay the prior mortgage in favour of the Agra Bank (Limited). Exhibit XVI contains extracts from Mr. Ferguson's letters, which convey the impression that between July and December 1888 there was a demand on the part of the trustees for the execution of a mortgage, that they offered to pay off the Agra Bank, and that a draft deed was also forwarded by them. In his letter of 10th December 1888 Ferguson stated that a conveyance of the Plantation house was necessary from Mr. Hinde to complete the mortgage. The mortgage was executed by Mr. Hinde on 28th December 1888 and by Mr. Ferguson on 2nd January 1889, and on the 8th June 1889 the Agra Bank executed an assignment of their mortgage. Upon these facts it is urged by appellants' counsel that the mortgage was executed for a barred debt and by way of fraudulent preference.

We see no reason to think that the mortgage was not executed for value. The mortgage right under the deed of assignment B was admitted in the Court below, nor was it denied in the Court below that money was originally advanced upon the four promissory notes each for Rs. 8,000 dated 17th May 1879, and upon another note of 19th August 1887, which made up the mortgage debt of December 1888. Exhibits VI, VII, VIII and IX, which are the four promissory notes, are endorsed as having been paid. Again, when Tomlinson's representatives attached in execution

H. W. BROWN
T. J. FERGU-
SON.

H. W. BROWN
T. J. FERGU-
SON.

certain movable property, the trustees preferred a claim on the mortgage in their favour, which was upheld on the 6th February 1891. In the order on the claim petition the District Judge recognised their claim to a valid charge on the Plantation house property for Rs. 43,146-2-2 and Mr. Tomlinson's representatives have not sued to set aside the order, though more than one year has elapsed since it was passed.

It is then argued on appellants' behalf that the mortgage was granted as a security for a barred debt. This is so, for, the first four promissory notes which are payable on demand are dated May 1879, whereas the mortgage was executed by Mr. Ferguson in January 1889. Two letters were produced as containing acknowledgments, but the Judge rejected them as unstamped and therefore inadmissible in evidence. If, as urged by respondent's pleader, they are admissible for the purpose of repelling the fraud imputed to him, they do certainly show that the promissory notes were acknowledged in 1882 and in 1885 before Tomlinson instituted his suit and when insolvency was not in contemplation. The letter, which was accepted by the Judge as evidencing a contract on the part of the respondent to pay the barred debt, is that of the 17th August 1888, which was duly stamped, and there is nothing to show that insolvency was contemplated either at that time. It is true there was no legal obligation to arrange for paying a barred debt, but there is nothing dishonest in doing so if it was a real debt. As for Tomlinson's suit, it had then been decided against him, though an appeal was pending from the decision. Another contention on appellants' behalf is that the execution of the mortgage of January 1889 was an act of fraudulent preference. In order to constitute such preference, the disposition must be voluntary and not one made under pressure. Pressure legalizes the disposition, because it rebuts the presumption of an intention on the part of the debtor to act in fraud of the Bankruptcy law, which provides for the equal distribution of his assets among all his creditors. In the case before us the deed of dissolution (exhibit XII, dated 1st January 1886) provided for the execution of a mortgage if required, and no act of bankruptcy had then been committed nor was bankruptcy then in contemplation as probable. Further, the extracts from Ferguson's letters marked XVI show that a mortgage had been demanded and negotiations had been in progress as to the satisfaction of the prior

mortgage in favour of the Agra Bank previous to the decision of the High Court. It is sufficient to constitute pressure if there is a demand by a creditor with an immediate power of enforcing it by taking legal steps. In *Mogg v. Baker*(1) Lord Abinger says, if a demand is made by a creditor *bona fide*, and a transfer takes place in pursuance of that demand, that takes it out of the case of voluntary transfer contemplated by the Insolvent Act. Again, in *Butcher v. Stead*(2) Lord Hatherley says, "I think the Legislature intended to say that if you, the debtor, for the purpose of evading the operation of the bankruptcy laws and in order to give a fraudulent preference make this payment or this charge, it shall be wholly done away with except in cases where the person you have favoured is wholly ignorant of your intention to favour him and receives payment simply for valuable consideration and without notice of any intention on your part to favour one creditor above another." In this case an obligation to give a mortgage was created on 1st January 1886 long before there was reason to apprehend insolvency and the trustees of Mrs. Hinde took the mortgage in fulfilment of this obligation, which negatives a belief on their part that any fraud was committed upon the policy of the Law of Bankruptcy. In *Dadapa v. Vishnudas*(3), where the Bombay High Court followed the principle laid down by Lord Hatherley there was no antecedent obligation to execute a mortgage in favour of Gokuldas the creditor. Beyond the bare possibility of Tomlinson's appeal succeeding and the original judgment being reversed, there was no tangible foundation for questioning the transaction of 1886, and such possibility is not a sufficient ground for holding the transaction of 1886 and the mortgage since executed in consequence of it were fraudulent.

It was certainly irregular on the part of the Judge to have received in evidence extracts from Mr. Ferguson's letters instead of calling for the letters themselves, but it does not appear that objection was taken to their admission as evidence in the Court below. Moreover, the irregularity is not material, there having been an antecedent obligation to execute a mortgage on demand.

The appeal fails and is dismissed with costs.

(1) 4 M. & W., 350.

(2) 7 Eng., and Ir. App., 849.

(3) I.L.R., 12 Bom., 424.

