ORIGINAL INSOLVENCY.

Before Mr. Justice Mockett.

1934, November 13.

THE OFFICIAL ASSIGNEE OF MADRAS, APPLICANT,

v.

A. KANNIAH NAIDU, RESPONDENT.*

Presidency-towns Insolvency Act (III of 1909), sec. 55—"Voluntary transfer"—Meaning of—Remission of a debt without consideration—If amounts to voluntary transfer—Indian Contract Act (IX of 1872), sec. 63—Effect of.

Section 55 of the Presidency-towns Insolvency Act does not limit the expression "voluntary transfer" to any particular form of alienation. The expression is wide enough to cover all sorts of devices that may be practised or suffered by an insolvent to deprive the creditors of the benefit of his property and, as such, the remission of a debt without consideration amounts to a "voluntary transfer" within the meaning of section 55.

V. Varadaraja Mudaliar for applicant.

C. Veeraraghava Ayyar and *P. Sitaram Pantulu* for respondent.

JUDGMENT.

The Official Assignee by this notice of motion seeks for a declaration that the settlement of a debt of Rs. 2,453 due to the insolvent by the respondent alleged to have been effected on the 17th of February 1934 by the payment of Rs. 913 is a voluntary transfer under section 55 of the Presidency-towns Insolvency Act so far as the balance Rs. 1,540 is concerned. The facts are these. The insolvent and the respondent have been doing business together and on the above

* Application No. 336 of 1934 in Insolvency Petition No. 221 of 1934.

date the respondent admittedly owed to the insolvent a sum of Rs. 2,453. This debt was settled by payment in cash of Rs. 713 and a promissory note for Rs. 200, making Rs. 913, and by the balance of Rs. 1,540 being waived. The respondent's story is that this amount was remitted because the insolvent had been supplying to him (the respondent) tobacco of a low quality over a period of four years and that at the time of settlement he requested the insolvent to show him some consideration. His exact words are, "I complained and he said he would make an allowance." It should be noticed that the respondent does not suggest that he threatened the insolvent with an action in respect of the quality of the tobacco. He says that Kotayya (the insolvent) sent him a demand notice for the Rs. 2,453, but has not produced the notice, and I am inclined to think that the story is an afterthought with a view to assist his case in some way which I do not quite follow. It would have been more relevant of course if a demand had been made upon the insolvent by the respondent. This version of the facts given by the respondent is used by him in this way. He says this transfer—assuming it to be a transfer, which he denies—was in favour of a purchaser in good faith and for valuable consideration. As to this, as I have pointed out, the only evidence on the record is that the respondent requested the insolvent to make an allowance. There is no suggestion that there was any compromise of a claim. But on the respondent's story, I think, I might have held that this was a settlement of a difference between the respondent and the insolvent and it was protected

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by the saving clause in section 55; that is to say, had I considered that his story was true. But in order to test the veracity of a story such as this, the only valuable evidence is as a rule documentary, that is, records of the transaction made at the time. Now the only record of this transaction is found in the respondent's own book, Exhibit III, under the insolvent's account. This reads:

"17th February 1934. Debit owing to inability to pay the amount due, amount given up as an act of grace as per order of P.K.—Rs. 1,590-0-10."

That is an entry in the handwriting of the insolvent's clerk. There is not a word about any dispute as to the quality of the tobacco. The respondent's explanation is:

"That is the usual way to write such transactions. They must write only like that. There is no other reason."

Then, in the promissory note, Rs. 200 is stated to be "for value received in cash", and there is nothing there about the compromise. None of the attesting witnesses to the promissory note have been called, and it is admitted that none of them objected to the form of the promissory note which was clearly not accurate. The respondent kept no account of the damaged goods. Thus, finally, it comes to this, that the only record, that is Exhibit III, exactly bears out the Official Assignee's case and contradicts the respondent's. I cannot therefore accept the story about the tobacco dispute and I think that this remission of Rs. 1,590-0-10 was for some other reason. Rs. 1,590 is a very large sum to remit out of Rs. 2,453. The whole story is unconvincing read with the book entry.

[His Lordship discussed the evidence and proceeded :—]

The result of these facts, in my view, is as follows. On the 17th of February the insolvent remitted without consideration to the respondent the sum of Rs. 1,590 by receiving, in payment of a debt of Rs. 2,453, cash and a promissory note for Rs. 913 only. There was no dispute about tobacco; there was no threat of any proceedings by the respondent against the insolvent.

The learned Counsel for the respondent says that, even if that is so, remission of a debt is not a voluntary transfer, but I am against him on this. I respectfully agree with the following observations of JAI LAL J. in *Kanaya Lal* v. *Official Receiver*(1) :

> "In my opinion, section 53 [Provincial Insolvency Act (V of 1920)] does not limit the expression 'voluntary transfer' to any particular form of alienation of his property by the insolvent. The expression is wide enough to cover all sorts of devices that may be practised or suffered by the insolvent to deprive the creditors of the benefit of his property."

In *Namagiri Lakshmi Ammal* v. *Srinivasa Aiyangar*(2) SESHAGIRI AYYAR and KUMARASWAMI SASTRI JJ. state :

> "It would open a wide door to fraud if the remission of a debt is placed on a different footing from a transfer."

This is manifest for the reason that such a process would enable an insolvent to leave a greater part of his assets in the hands of complacent debtors who could thus hold them for the benefit of the insolvent.

It is however argued by the learned Counsel for the respondent that there is good consideration in this case by reason of section 63 of the Contract

(1) (1928) 110 I.C. 742.

(2) (1914) 27 I.C. 269, 270.

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Act, and that, in the absence of proof of *mala fides*, there is a contract recognized by the Indian Law and that section 55 of the Presidency-towns Insolvency Act cannot override it. I think the answer to that is that, in the first place, I do not consider this transaction was *bona fide*. It is covered up by a lot of evidence that I have found to be untrue and I think I am entitled to infer, having regard to the relations between the insolvent and Kuppuswami Naidu and the state of the insolvent's finances at the relevant time, that this remission, standing as it is totally unexplained, was for the purpose of leaving substantial sums in Kuppuswami Naidu's hands, although nominally in his son's hands. If I am wrong as to that finding of fact, I think that section 55 would override in an insolvency matter the provisions of section 63 of the Contract Act, and it has to be noted that the Presidency-towns Insolvency Act is later than the Contract Act.

The English cases, of which *In re Vansittart. Ex parte Brown*(1) is an example, establish that something must have moved from the transferee in order that he might get something from the transferor and in order to constitute a compromise there must have been some threat or at least some claim against the transferor; see *Miles* v. *New Zealand Alford Estate Co.*(2). As I have said, there is no evidence of any claim in this case. The most that is proved is that the insolvent was requested to make some concession. I do not lose sight of the fact that section 63 of the Contract Act effected a change from the Common Law, but, with the provisions of section 55 of the Presidency-towns

(1) [1893] 1 Q.B. 181. (2) (1886) 32 Ch. D. 266.

Insolvency Act before me, I have no doubt that a remission of a debt without consideration is as much a "voluntary transfer" in India as in England and as such against the Insolvency law. The cases to which I have referred seem to lead to this conclusion.

For these reasons I think that the Official Assignee succeeds and that there should be a decree in terms of this notice of motion with taxed costs.

G.R.

APPELLATE CRIMINAL.

Before Mr. Justice Pandrang Row.

THE CROWN PROSECUTOR, PETITIONER,

1934, October 29.

v.

MUTHUSAMY (ACCUSED), RESPONDENT.*

Indian Penal Code (Act XLV of 1860), sec. 75—Convictions outside British India—Court not bound to consider in determining sentence—Admissibility in evidence of.

The question of sentence is always within the discretion of the Court and ordinarily the sentence is determined only by the facts and circumstances of each case unless there is a liability to enhanced punishment by reason of any specific provision of law such as section 75, Indian Penal Code (Act XLV of 1860). Convictions outside British India cannot be made the basis of any charge under section 75, and therefore the Court is not bound to consider such convictions in determining the sentence. Evidence of such convictions is however admissible as proof of bad character. But, as there is no provision of law which compels a Magistrate to consider the antecedents of the accused before determining the sentence to be imposed upon him, the Magistrate cannot be held to have acted

* Criminal Revision Case No. 492 of 1934.