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suit (and the proceeding is a suit) is embodied; the order for filing an award is but an interlocutory order, a step in the decision of the suit, the result of which is embodied in the final decree which the law (s. 522) directs shall follow judgment. The Court below should be moved to give judgment in accordance with the award and a decree to follow it. There may or may not be an appeal from that decree according to circumstances, but this appeal must I think be dismissed with costs.

Appeal dismissed.

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Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

SHEO PRASAD (DEFENDANT) *v.* A. B. MILLER, OFFICIAL ASSIGNEE TO THE HIGH COURT, CALCUTTA, (PLAINTIFF).*

Stat. 11 *and* 12 *Vict.*, *c.* 21 (*Insolvent Act*), *ss.* 21, 24, 26, 32—"*Voluntary*" *conveyance by Insolvent.*

Where two days before a person was adjudicated an insolvent and his property had by order vested in the Official Assignee, under the provisions of Stat. 11 and 12 Vict., c. 21, such person had, not spontaneously, but in consequence of being pressed, assigned to a particular creditor certain property, *held* by STUART, C. J., that such assignment was not "voluntary" within the meaning of s. 24 of that Statute, and was therefore not fraudulent and void under that section as against the Official Assignee.

Held by PEARSON, J., that such assignment was not a voluntary one in the sense that it was made spontaneously without pressure, but as the vesting order was not passed on a petition by the insolvent for his discharge that section was not relevant to the case.

ONE Baij Nath and his two brothers Bansi Dhar and Ghasi Ram carried on business at Calcutta under the style of Nanu Mal. These persons also carried on business at Cawnpore under the style of Bansi Dhar and Ghasi Ram, and at Lucknow under the style of Chotey Lal and Sita Ram. On the 20th December, 1875, the firm of Bansi Dhar and Ghasi Ram were indebted to Sheo Prasad the defendant, who carried on business at Cawnpore, in certain moneys. On the same date one Ram Prasad residing at Lucknow was indebted to the firm of Chotey Lal and Sita Ram in certain moneys. On the 21st December, 1875, two of the creditors of the firm of Nanu Mal applied to the Calcutta High Court that Baij Nath and his partners might

* First Appeal, No. 151 of 1878, from a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 25th September, 1878.

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be adjudicated insolvents. On the 22nd December, 1875, such persons were adjudicated insolvents by that Court, and that Court made an order vesting their property in the Official Assignee of the Court. In December, 1877, Mr. A. B. Miller, the Official Assignee, instituted the present suit against the defendant to recover from him the amount of Ram Prasad's debt to the firm of Chotey Lal and Sita Ram, which he alleged had been fraudulently transferred to him by Baij Nath. This debt was transferred under a "*rukka*" drawn on one Kanahiya Lal by Ram Prasad in favour of one Paras Ram, the agent of the defendant. That *rukka* was drawn in the following terms:—"My friend Lala Kanahiya Lal, Rs. 10,352 are due by me to Baij Nath: I now draw this *rukka* in your favour to the effect that under his assignment I am causing Rs. 9,452 to be paid to Paras Ram on account of his debt: take a receipt from Paras Ram according to this *rukka* and enter the amount in my account: I will give credit for this item against my item of deposit, at the time of adjustment of accounts: it is necessary that you should attend to this matter." The *rukka* purported to have been drawn on the 20th December, 1875. The plaintiff alleged that the debt had been transferred, not as appeared from the *rukka* and the books of the firm, before the 22nd December, 1875, when Baij Nath, Bansi Dhar, and Ghasi Ram were adjudicated insolvents, but after that date, and that the transfer was fraudulent and void. From the evidence of Paras Ram it appeared that the *rukka* was drawn under these circumstances: Two or three days previously to the 20th December, 1875, Paras Ram had learnt that the Bank of Bengal at Lucknow had refused to negotiate a *hundi* drawn by Baij Nath, and he had therefore on behalf of the defendant asked Baij Nath for the money due to the defendant. On the 20th December, 1875, he again asked Baij Nath for the payment of the debt, requiring payment in cash. Baij Nath replied that he had no money, but that if Paras Ram would accompany him to Ram Prasad's house, he would cause Ram Prasad, who owed him money, to pay the debt. Paras Ram accordingly accompanied Baij Nath to Ram Prasad's house, where a settlement of accounts took place between Baij Nath and Ram Prasad, and a balance of Rs. 9,452 being found due to the former by the latter, Ram Prasad drew the *rukka* in question and gave it

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to Paras Ram. The Court of first instance held that the debt was transferred after the 22nd December, 1875, and that the transfer was fraudulent and void, and gave the plaintiff a decree. The defendant appealed to the High Court.

Mr. *Colvin*, Pandit *Bishambhar Nath*, and Babu *Beni Prasad*, for the appellant.

Mr. *Howard* and Mr. *Greenway*, for the respondent.

The following judgments were delivered by the Court:

STUART, C. J.—This appeal must be allowed. The simple question is whether the *rukka* drawn by Ram Prasad on Kanahiya Lal was transferred by the former to the defendant, Lala Sheo Prasad, honestly and for good consideration, or "voluntarily" within the meaning of that word in s. 24 of the Insolvent Act 11 and 12 Vict., c. 21. That is the sole question before us, and it must be answered favourably for the *rukka* and against the plaintiff. The facts material to the question may be stated as follows:—The *rukka* was drawn and transferred to the defendant on the 20th December, 1875, and on the 22nd December, 1875, the parties represented by the plaintiff were adjudicated insolvents by the Calcutta Insolvency Court. By s. 20 of the Insolvent Act the whole estate of the insolvent, without necessity of express conveyance or assignment, vests in the Assignee in trust for the benefit of the insolvent's creditors. By s. 21 it is provided that the Assignee shall take possession of such estate, and by s. 26 it is, among other things, enacted that persons holding property of, or being indebted to, the insolvent shall hold such property for, and pay according to such indebtedness to, the Assignee for the general benefit of the creditors of such insolvent. These sections of the Insolvent Act give to the Assignee an absolute title to and complete control over the entire estate of the insolvent as at the date of the vesting order. But by s. 24 of the Act it is enacted that "if any insolvent * * * * * shall voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, * * to any creditor, or to any other person in trust for or to, or for the use, benefit, or advantage of any creditor, every such conveyance, assignment, transfer, charge, delivery, and making over, if made when in insolvent circumstances and *within*

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two months of the date of the adjudication of insolvency * * * shall be deemed, and is hereby declared to be fraudulent and void as against the assignee of such insolvent". Relying on this section the plaintiff claims the value represented by the *rukka* on the ground, first, that the 20th December, 1875, was not its true date, and secondly, even if it was, that the *rukka* was given voluntarily and fraudulently, that is, in fraudulent preference of the defendant. But I can see nothing in the evidence to support such a contention. It is very clear in the first place that the 20th December, 1875, was the true date of the *rukka*; this is the plain inference from all the evidence on the subject. The plaintiff's recorded statements to the contrary are not distinct and absolute according to certain knowledge on his part, but as rather suggestedly asserted with the view apparently of giving him a *locus standi* for contending that the date of the *rukka* was subsequent to the vesting order, and the transaction was voluntary and fraudulent within the meaning of s. 24 of the Insolvent Act. It is also in evidence that the debt represented by the *rukka* was due by Baij Nath to the defendant, and there was therefore good consideration for the transfer to the defendant. There is also evidence to show that the defendant Sheo Prasad, by himself or by Paras Ram his manager, had been pressing for payment of the debt due to the defendant by Baij Nath, and it is further in evidence that Ram Prasad discharged his debt to Baij Nath by honestly and in good faith transferring to the defendant the *rukka*, which appears to have been duly cashed by Kanahiya Lal. Under these circumstances it is idle to argue that the *rukka* was obtained by the defendant by any voluntary or fraudulent act on the part of Ram Prasad.

Some English cases were referred to at the hearing on the part of the appellant and they appear fully to support his contention. Thus in *Strachan* v. *Barton* (1) it was laid down that, in order to make a payment to a creditor by a bankrupt a fraudulent preference, the bankrupt must be a volunteer, and not pay in consequence of any request or pressure for payment on the part of the particular creditor. During the argument Pollock, C.B., remarked that the simplest request may be sufficient if payment was the result of that request. In answer to a suggestion by counsel that there

(1) 25 L. J. N. S. Ex., 182.

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was no request, and that the offer of payment on the part of the bankrupt was voluntary, the Chief Baron observed that it was only voluntary in the sense that the bankrupt offered it to satisfy the demand of the creditor, and he gave his judgment in accordance with these views. Alderson, B., was of the same opinion. He said: "The question is what is the meaning of a voluntary payment? I understand it to be a payment made by the debtor alone," that is, by the debtor without pressure or solicitation on the part of his creditor. He goes on to say, "The test in cases such as the present is, would the bankrupt have made the payment without the creditor's coming?" In the present case the creditor undoubtedly did come, for it is clear from the evidence to which I have referred that Baij Nath was hard pressed for payment by the defendant and his manager. In the same case Martin, B., concurring, observed that "every creditor has a right to go to his debtor and get his debt, if he does so *bonâ fide*. But in *Mogg* v. *Baker* (1) it was distinctly laid down, that a payment is not necessarily voluntary because pressure, in the ordinary sense of the word, has not been used. There the question was, whether a possession of goods was voluntary under the then Insolvent Act. Lord Abinger, than whom no man better understood the law on this subject, said, 'that if a demand is made by a creditor *bonâ 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', and he observes that the constant practice at Nisi Prius has been that a demand by a creditor is sufficient."

Another case referred to at the hearing was that of *Ex parte Hitchcock* (2) before Bacon, Chief Judge in Bankruptcy, where traders in a hopeless state of insolvency, three days before they suspended payment, paid in the ordinary course of business, and without any motive for favouring the payee, a considerable sum to a creditor, who received it *bonâ fide*, and the payment was upheld. In giving judgment Bacon, C. J., said, "The act of the debtor was the only thing that could be inquired into, and if the act done by him could be referred to any other motive than that of giving one creditor preference above another, the payment

(1) 4 Mee. and W. 348; S. C., 8 L. J. N. S. Ex. 55.

(2) 40 L. J. N. S., Chanc. and Bankr. 79.

would not be fraudulent or void". In the same judgment (p. 82) it was further observed: "Here was a debt paid to a person entitled to receive it, and received in good faith by the payee. Clearly, it came within the proviso at the end of the section. The statute had put the law upon a plain, reasonable, straightforward footing, by having saved the rights of payees acting in good faith. No motive could here be assigned for the bankrupts preferring this creditor to any other. In order to make out that the payment was fraudulent, it should have been proved that there was such a preference, or some motive for presuming such a preference must be shown from the other facts proved. Here a fraudulent preference was neither proved, nor could it be justly or reasonably inferred that there was any motive for such preference."

Many other authorities might be cited to the same effect, and they all go to show that, until the bankruptcy or insolvency of a debtor takes legal effect, he does not act voluntarily in the sense of giving a fraudulent preference, where he simply pays a debt that is really due at the request, in good faith, of a particular creditor. That such was the state of things in the present case cannot reasonably be doubted. And this view of the facts before us derives considerable force when the present state of the law of debtor and creditor in these Provinces is considered. I have already in another case, *Kheta Mal* v. *Chuni Lal* (1), shown what that law is, and I may be here allowed to repeat what I there laid down, I there said:—"There is no bankruptcy law in these Provinces, nor any coercive legal process which can be enforced against the property of an unwilling insolvent for the benefit of all his creditors. A person in the position of the present defendant, appellant, may avail himself of the provisions of the Code of Civil Procedure for the purpose of being relieved of his debts, but he can only do so under the conditions of that Code, he himself being the applicant, and under executed process by arrest or imprisonment. No such result can be attained by the legal action of any or even all of an insolvent's creditors. Doubtless creditors and their debtors can agree as to the disposal of property for the benefit of the former, and that is an agreement of course that can be given effect to. But irrespective of such an agreement among a debtor and

(1) I. L. R. 2 All. 173.

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his creditors, the law, at least in these Provinces, places no compulsory machinery in the hands of the creditors as a body. On the other hand, there is no law in this country to prevent a debtor from making an assignment of his estate for the benefit of all or a limited class of his creditors; nor, for that matter, from his assigning, conveying, or settling his estate in favour of any person or persons whom he may wish to favour, provided of course that he makes those assignments, settlements, or conveyances without fraud, that is, honestly and in good faith. The fundamental principle that underlies this state of things is that, so long as the law does not step in to deprive a man of his control over his estate, he remains *sui juris*, and can up to the last moment of its possession deal with his property as he thinks fit. The legal right remains in him, and if he acts honestly and in good faith, and not fraudulently, he may transfer his estate, or any portion of it, to any one or more of his creditors, but whose acceptance of such transfer or assignment, or whatever the form of the conveyance may be, of course deprives them of all further relief against their debtor, and the only remedy of other persons to whom he is indebted, and who have by that means been excluded from any such transfer, assignment, or other conveyance, can only be against such property of the debtor as may not have been so dealt with, or against the debtor's person (1)." Such undoubtedly is the law binding on this Court, and according to it, Baij Nath and the defendant, acting without any fraudulent intent, but in good faith, with respect to a debt honestly due by the one to the other, were justified in their dealing, and the plaintiff cannot interfere between them.

The Subordinate Judge does not appear to have understood the law on the subject, but has occupied himself with irrelevant and trivial considerations and details quite immaterial to the case. And not apparently knowing the law he was probably misled by the somewhat confused and evasive contention on the part of the Official Assignee persistently and elaborately maintained before him. Our judgment must therefore be for the appellant, and the suit must be dismissed, with costs in the Court below and in this Court.

PEARSON, J.—Ram Prasad's debt to the firm of Chotey Lal and Sita Ram, and that firm's debt to the defendant, appellant,

(1) at page 179.

on the date of the alleged transfer of the former debt are not points in issue. The single point for determination is, whether the assignment was made before or after the date of the order by which the property of the insolvents, Baij Nath, Bansi Dhar, and Ghasi Ram was vested in the plaintiff. (After determining that the assignment was made before the date of the vesting order, the learned Judge continued): The assignment made by him was not a voluntary one in the sense of having been made spontaneously without pressure, but as it has been stated by the respondent's attorney that the vesting order of the 22nd December, 1875, was not passed in consequence of any petition filed by the insolvents for their discharge, s. 24 of the Insolvency Act is not apparently relevant to the case. I would decree the appeal and dismiss the suit with all costs.

Appeal allowed.

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Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

SURJU PRASAD (PLAINTIFF) *v.* BHAWANI SAHAI (DEFENDANT) *

1879 November

Sulch-nama—Mortgage—Agreement creating a charge on immoveable property—Registration—Stamp—Suit for money charged on immoveable property.

Certain immoveable property having been attached in the execution of a decree held by *S*, *B* and *L* objected to the attachment. An arrangement was subsequently effected between the objectors and the parties to the decree which resulted in all parties jointly filing a "*sulch-nama*" in court, in which *B* and *L*, who had purchased the rights of the judgment-debtor in the attached property, agreed to pay the amount of the decree, which exceeded one hundred rupees, within one year, and hypothecated such property as security for the payment of such amount. *S* having sued upon this document claiming to recover the amount of the decree by the sale of such property, *held* that the document required to be registered, and not being registered the suit thereon was not maintainable.

Cases decided by the High Court in which the "*sulch-nama*," having been relied on, not as containing the hypothecation itself, but as evidence only of a separate parol agreement, or in which a decree having been made in accordance with the terms of the document, was held not to require registration, remarked upon and distinguished by SPANKIE, J.

THIS was a suit for Rs. 159-7-3, being the amount of a decree dated the 4th August, 1865, charged on certain immoveable property by a "*sulch-nama*" dated the 30th July, 1866.

* Second Appeal, No. 116 of 1879, from a decree of H. D. Willock, Esq., Judge of Azamgarh, dated the 20th November, 1878, affirming a decree of Maulvi Muhammad Zahur Husain, Munsif of Azamgarh, dated the 26th June, 1878.