APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Sen.

1931

July 27

AH FOON

v.

HOE LAI PAT AND OTHERS.*

Transfer of moveable property—Impending execution against transferor—Principles underlying 13 Eliz. c. 5 and Transfer of Property Act (IV of 1882), s. 53, application of—Bona-fide *transferee for value—Knowledge of impending execution—No share in intention of transferor to defeat creditors—Purchase at a fair value.*

The principles underlying 13 Eliz. c. 5 and s. 53 of the Transfer of Property Act are, in accordance with justice, equity and good conscience, applicable to transactions relating to the transfer of moveable property.

Abdul Hye v. *Mir Mohamed*, I.L.R. 10 Cal. 610—*followed.*

A *bona-fide* transferee for value of property is protected, although he has knowledge of an impending execution against his transferor, provided he is not aware of any intention on the part of the transferor to defeat or delay his creditors.

Ishan Chunder Das v. *Bishu Sirdar*, I.L.R. 24 Cal. 825—*followed.*

Aftabuddin v. *Basanta Kumar*, 22 C.W.N. 427; *Alton* v. *Harrison*, 4 Ch. Ap. Cases 622; *Darvill* v. *Terry*, 6 H. & N. 807; *Re. Fasey* (1923), 1 Ch. 1; *Ex-parte Games*, 12 Ch. D. 314; *Glegg* v. *Bromley*, (1912) 3 K.B. 474; *Hakim Lal* v. *Mooshahar Sahu*, I.L.R. 34 Cal. 999; *Hale* v. *Saloon Omnibus Co.*, 4 Drew 492; *Kamini* v. *Hira Lal*, 23 C.W.N. 769; *Maskelyne* v. *Smith*, (1903) 1 K.B. 671; *Palamalai* v. *South Indian Export Co*, I.L.R. 33 Mad. 334; *Twyne's Case*, 3 Coke 80; *Wood* v. *Dixie*, 7 Q.B. 892—*referred to and explained.*

Where a transferee has paid the fair value of the property transferred to him the Court will lean towards holding that he has acted *bona-fide* in the transaction.

Amarchand v. *Gokul*, 5 Bom. L.R. 142—*followed.*

Clifton with *Sein Tun Aung* for the appellant.

Hay for the second, third and fourth respondents.

PAGE, C.J.—At one time the plaintiff and the first defendant were in partnership. The partnership was dissolved in 1927. In February 1930 the plaintiff obtained a decree for over Rs. 40,000 against the

* Civil First Appeal No. 54 of 1931 from the judgment of this Court on the Original Side in Civil Regular No. 410 of 1930.

first defendant, and forthwith applied for execution of the decree. On the 21st of March 1930 execution issued by way of personal arrest of the first defendant, but it was not possible to effect his arrest, and on the 28th of March the plaintiff in execution of the decree attached certain timber which was lying in the godown of the first defendant within the Rangoon foundry.

When the attachment was made the second defendant informed the bailiff that on the 24th March 1930 he and the third and fourth defendants jointly had purchased all the timber lying in the first defendant's godown, exclusive of some timber that was newly cut, and timber of European quality. As the plaintiff refused to withdraw his attachment an objection to the attachment was filed in the execution proceedings by defendants 2 to 4, and their objection was upheld. Thereupon the plaintiff instituted the present suit for a declaration that at the time of the attachment the property in the timber remained in the first defendant, and that the sale by the first defendant to defendants 2 to 4 was voidable as being a transaction made with intent to defeat and delay the creditors of the first defendant.

Now, at common law and apart from insolvency, a person may dispose of his property as he chooses. He is at liberty to pay his creditors in any order, preferring one or more of them to the others; and although he is in embarrassed circumstances he may transfer his property or any part thereof by way of sale, gift or otherwise, provided the transaction does not infringe the provisions of section 53 of the Transfer of Property Act which relates to immoveable property, or the rules set out in 13 Eliz. ch. 5.

Now, 13 Eliz. ch. 5 was repealed by the Transfer of Property Act (1882), but it has been held

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that the principles underlying 13 Eliz. ch. 5, and I take it also section 53 of the Transfer of Property Act, ought to be applied in India to transactions relating to the transfer of moveable property upon the ground that those principles are in accordance with justice, equity and good conscience. [*Abdul Hye* v. *Mir Mohammed Mozaffar Hossein and another* (1).]

It follows, therefore, in the present case, that if the transfer by the first defendant to defendants 2 to 4 was a transfer made with intent to defeat or delay the creditors of the first defendant it was voidable at the option of any creditor so defrauded, provided that the rights of the second to fourth defendants would be preserved if they were *bonâ fide* transferees of the property for consideration.

In *Twyne's* case (2), it was held that "notwithstanding here was a true debt due to Twyne, and a good consideration of the gift, yet it was not within the proviso of the said Act of 13 Eliz., by which it was provided, that the said Act shall not extend to any estate or interest in lands, etc., goods or chattels, made on a good consideration, and *bonâ fide*; for, although it is on a true and good consideration, yet it is not *bonâ fide*, for no gift shall be deemed to be *bonâ fide* within the said proviso which is accompanied with any trust". And in *Alton* v. *Harrison* (3) Giffard, L.J., observed:

"I have no hesitation in saying that it makes no difference in regard to the statute of Elizabeth whether the deed deals with the whole or only a part of the grantor's property. If the deed is *bonâ fide* that is, if it is not a mere cloak for retaining a benefit to the grantor—it is a good deed under the statute of Elizabeth."

(1) (1884) I.L.R. 10 Cal. 616. (2) 3 Coke 80.
(3) L.R. 4 Ch. Ap. Cases 622.

See also *Ex-parte Games* (1); *Maskelyne* v. *Smith* (2); *Glegg* v. *Bromley* (3) and *Re Fasey* (4).

In my opinion, however, the rule laid down in *Twyne's* case (5) and in *Alton* v. *Harrison* (6) does not necessarily determine the matter, and I agree with the observations of Mukerjee and Holmwood, JJ., in *Hakim Lal* v. *Mooshahar Sahu* (7):

"that if the intent of the transferor is not only to sell the property, but forthwith to abscond with the proceeds so as in effect to withdraw the property from the fund available for the creditors without providing an equivalent, in such cases there would be an intention to defraud creditors which, if the purchaser had notice of it, would avoid the sale. To put the matter in another way, although a transfer, which is a mere cloak for the retention in the grantor of a benefit in the property transferred, is not a transfer in good faith, the test is by no means exhaustive; there may be cases in which the transferee is intended to take an absolute title in the property, but the object of the transfer is to convert land into money, and thus place it beyond the reach of the creditors of the grantor; a transfer of this description cannot legitimately be regarded as a transfer made in good faith."

In my opinion, the true rule was laid down in *Ishan Chunder Das Sarkar* v. *Bishu Sirdar and others* (8) in which Maclean, C.J., and Banerjee, J., observed:

"A consideration of the section, taken as a whole, leads us to the view we have taken, that the object of the last paragraph of section 53 is to protect an innocent transferee for value, notwithstanding that the transferor may be actuated by a desire to defeat or delay his creditors. But there arises a further question, whether where a transferee for value has knowledge of an impending execution against the transferor, such knowledge itself is sufficient to vitiate the transfer and make it one not in good faith, notwithstanding that the transferee may not be

(1) (1879) 12 Ch. D. 314.
(2) (1902) 2 K.B. 158 affirmed: (1903) 1 K.B. 671.
(3) (1912) 3 K.B. 474.
(4) (1923) 1 Ch. 1.
(5) 3 Coke 80.
(6) L.R. 4 Ch. Ap. Cases 622.
(7) (1907) I.L.R. 34 Cal. 999 at p. 1012.
(8) (1897) I.L.R. 24 Cal. 825.

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aware of any intention on the part of the transferor to defeat or delay his creditors, and notwithstanding that he may honestly believe that the sale is resorted to for the purpose of paying the creditors. We are of opinion that mere knowledge of an impending execution against a transferor is not sufficient to make the transferee a transferee otherwise than in good faith, when he does not share the intention of the transferor to defeat or delay his creditors.

This view is fully supported not only by reason, but also by authority ; see the case of *Ramburan Singh* v. *Jankee Saheo* (1). We are not prepared, however, to accept as correct the extreme contention urged on behalf of the appellant, that all that was necessary to constitute a transferee in good faith within the meaning of section 53 was that the transfer should be real, and that, although the transferee might share the intention of the transferor to defeat or delay creditors, he would still be a transferee in good faith. It cannot be said that a transferee for value who accepts the transfer for the purpose of helping the transferor to convert his immoveable property into money which can easily be concealed and kept out of the reach of his creditors, and thus defeat or delay the creditors, is a transferee in good faith within the meaning of section 53. Indeed, it would almost be a contradiction in terms to say that a transferee for value, who takes the transfer with the intention of helping the transferor to convert his immoveable property into money which can easily be concealed, and thus to defeat or delay his creditors, should nevertheless be treated as a transferee in good faith, and the transfer to him should be upheld, though section 53 says that a transfer made with such intention is voidable at the option of the creditors."

See also *Palamalai Mudaliar* alias *Palamalai Pillai* v. *The South Indian Export Company, Limited* (2) ; *Aftabuddin Chowdhury* v. *Basanta Kumar Mukhapadahyaya and others* (3) ; and *Kamini Kumar Roy and others* v. *Hira Lal Pal Chowdhury and another* (4).

Now, such being the law, it is necessary to consider whether the facts disclosed in the evidence

(1) 22 Weekly Reports 473.
(2) (1910) I.L.R. 33 Mad. 334.
(3) 22 Cal. W.N. 427.
(4) 23 Cal. W.N. 769.

bring the present case within the ambit of the principles that I have enunciated. As regards the first defendant I have no doubt that by selling this timber to defendants 2 to 4 the first defendant intended to convert into cash 110 tons of timber, which could not easily be removed, in order that he might be in a position to make away with the proceeds of the sale thereby defeating and delaying his creditors. The first defendant succeeded in attaining the object that he had in view, because after the sale had been completed he absconded with Rs. 13,000 which had been paid to him by the defendants 2 to 4 as the purchase price of the timber. It follows, therefore, that unless defendants 2 to 4 as transferees of the timber are able to satisfy the Court that they took the timber as *bonâ fide* transferees for valuable consideration, the plaintiff must succeed.

As regards consideration it was, and could not have been, contended upon the evidence that the finding of the learned trial Judge could be challenged that a sale was effected of this timber to the defendants 2 to 4 under which the transferees paid a fair price for the goods that they purchased. In my opinion, it is clear that the price that was paid was not less than the market value of the timber. 110 tons of timber was bought, and the purchase price that was paid by defendants 2 to 4 to the first defendant was Rs. 13,000. That sum was paid as follows :

		Rs.
On the 24th of March	...	100
On the 26th of March	...	12,500
On the 27th of March	...	400

Between the date of the sale and the 28th of March when the attachment was effected defendants 2 to 4 removed from the godown of the first defendant 70

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tons of the timber, the quantity remaining in the godown being about 40 tons. In his statement of claim the plaintiff valued the 40 tons of timber that was attached at Rs. 4,000, that is to say, at Rs. 100 a ton. It follows, therefore, that if the value put upon this timber by the plaintiff was fair and reasonable, and I think it was, the price that the defendants 2 to 4 paid for the 110 tons which they purchased was not less than the fair market value of the timber.

Now, where it is proved that the transferee paid what was the fair value of the property transferred to him, the Court will lean towards holding that the transferee acted *bonâ fide* in the transaction [*Amarchand Jethabhai* v. *Gokul Bapu* (1)]; and it is necessary to consider whether in these circumstances the Court would be justified upon the evidence in coming to the conclusion that defendants 2 to 4 were not acting *bonâ fide* in the transaction, because at the time when they purchased the timber they knew that the intention of the first defendant by transferring the timber to them was to defeat and delay his creditors. In the statement of claim no such allegation was made, for in paragraph 4 the plaintiff avers "that the alleged purchase of the said converted timber was a bogus one, without consideration, or without adequate consideration, not *bonâ fide*, and made with knowledge on the part of the defendant of the impending attachment." Nor in the memorandum of appeal filed by the plaintiff was it made a ground of appeal that the defendants 2 to 4 knew of the intention of the first defendant to defeat and delay his creditors. In paragraph 1 of the memorandum of appeal the plaintiff set out the contention "that, having found that the first respondent sold and the rest of the

(1) 5 Bom. L.R. 142.

respondents purchased the timber with knowledge of the impending attachment, the learned Judge should have avoided the transaction by applying and extending the principles underlying section 53 of the Transfer of Property Act to moveables." Further, no witness was called on behalf of the plaintiff to prove that the defendants 2 to 4 when they purchased the timber were aware of the intention of the first defendant by means of the transaction to defeat and delay his creditors. Ah Moon, a witness called on behalf of the plaintiff, stated that at the time when the sale was effected the first defendant told the defendants 2 to 4 that his object in selling the timber was to effect a quick sale, because he was afraid that the timber would be attached by the plaintiff. Ah Moon did not suggest that any information was given to the defendants 2 to 4 other than that the first defendant was anxious to sell the property before it was attached in execution of the plaintiff's decree. If that was all that the defendants 2 to 4 knew the Court ought not for that reason alone to treat them as not being *bonâ fide* transferees of the timber. [*Wood* v. *Dixie* (1); *Darvill* v. *Terry* (2); *Hale* v. *Saloon Omnibus Co.* (3); *Ishan Chunder Das Sarkar* v. *Bishu Sirdar and others* (4).]

Moreover, why should the first defendant have been anxious or willing to confide to the defendants 2 to 4 the object that he had in view in selling the timber to them?

No reason was suggested to justify the Court in assuming that the first defendant would be likely to do so, and the probabilities of the case are against it, for the plaintiff and the first defendant being Chinamen and the defendants 2 to 5 Indians, one would

(1) 7 Q.B. 892.
(2) 6 H. & N. 807.
(3) 4 Drew 492.
(4) (1897) I.L.R. 24 Cal. 825.

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not expect the first defendant to give any more information to defendants 2 to 4 than was necessary for the purpose of effecting a quick sale of the timber.

The learned advocate for the appellant, however, urged the Court to infer from the form of Ex. 1, which embodied the terms of the agreement of sale, that the transaction was a mere sham, and was carried through by the parties thereto with the intention thereby to defeat and delay the creditors of the first defendant.

In *Twyne's* case (1) reliance was placed upon the maxim *clausulæ inconsuetæ semper inducunt suspicionem*; and the learned advocate for the appellant contended that the form of Exhibit 1 was so strange that the Court ought to hold that it was not a genuine agreement for sale, but had been created to bolster up what was in truth a colourable and bogus transaction. By Exhibit 1, which was dated 24th March, it was agreed between the parties *inter alia* that the first defendant should be paid the purchase price by 12 noon on the 26th March; that the timber should be cleared within a week from the 24th March; and that if the purchasers failed to remove the material within ten days they should pay Rs. 100 a day as compensation for damage to the godown. The terms of the agreement to which the learned advocate for the appellant takes exception, however, are equally consistent with knowledge on the part of the transferees that the first defendant desired that the sale should be completed with all possible despatch in order to prevent an effective attachment of the timber by the plaintiff. It was further urged on behalf of the appellant that, inasmuch as the timber was sold

(1) 3 Coke 80.

without measurement it cannot be treated as a genuine transaction. It so happens, however, that the guess which was made by the defendants 2 to 4 as to the value of the timber was a sound one; for it is not now disputed that the amount of the timber lying in the godown was about 110 tons, and that the purchase price was rather more than what the plaintiff himself estimated to be the fair market value of the timber. This sale was an out and out sale, at a fair market price, openly carried through by the defendants, and it is not pretended that in this transaction the parties agreed that there should be any trust created in favour of the first defendant, or that the first defendant obtained any benefit under the transfer except the purchase price of the timber that was paid to him by defendants 2 to 4.

I am of opinion that the conclusion at which the learned trial Judge arrived was correct. It is not now contended that the transfer was not for good consideration, and, in my opinion, the evidence fails to establish that the defendants 2 to 4 were not *bonâ fide* transferees of the property that they bought.

For these reasons the appeal fails, and must be dismissed with costs, advocate's fees 10 gold mohurs. The cross objection was not pressed and is dismissed without costs.

SEN, J.—I agree.