different, and refer to a transaction that had already been completed.

For these reasons, in my opinion, the appeal fails, and it is dismissed with costs, advocate's fee fifteen gold mohurs.

MYA BU, J.—I agree.

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## APPELLATE CIVIL.

*Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.*

## N.P.R.M.P. ADAKAMMI ACHI v. THE OFFICIAL ASSIGNEE.*

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*July 3.*

*Insolvency—Fraudulent preference—Preferential payment—Substantial motive of debtor—Free choice of debtor—Demand by creditor—"Pressure"—Presidency Towns Insolvency Act (III of 1909), s. 56.*

The mere making of a preferential payment by a debtor to his creditor is not a fraudulent preference. The dominant intention of the debtor in making it must be considered. If the debtor's real intention is to prefer the creditor the payment is a fraudulent preference. If the transfer is made with a view to repairing a past wrong, or to avoid evil consequences to the debtor himself, the payment is not a fraudulent preference.

*Ex parte Taylor*, 18 Q.B.D. 295—*followed.*

"Preference" implies the free choice of a person to do either the one thing or the other as he prefers.

*In re Cohen*, (1924) 2 Ch. Div. 515; *In re M.I.G. Trust, Limited*, (1933) 1 Ch. Div. 542; *Sharp* v. *Jackson*, (1899) A.C. 419—*explained.*

The effect of a demand by a creditor, with or without a threat of legal proceedings, on the mind of the debtor will depend in each case on the circumstances. Where both the creditor and the debtor are aware that the latter's business is collapsing the pressure exercised by the creditor cannot be said to be real.

*Ex parte Griffith*, (1883) 23 Ch. Div. 69; *Ex parte Hall*, (1882) 19 Ch. Div. 580—*referred to.*

Where a firm was unable to pay its debts as they became due, and the agent of the firm transferred certain property and outstandings of the firm to certain creditors who knew the position of the firm, and who had done business with the firm through the agent, *held*, that the transactions amounted to a fraudulent preference.

* Civil Miscellaneous Appeals Nos. 172, 173, 174, 245, 246, 247 of 1932 against the orders of this Court in Insolvency Case No. 279 of 1931.

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*N. M. Cowasjee* and *Hay* for the appellants.

The transfers were not made with a view to prefer the appellants, but were made as a result of pressure brought to bear upon the debtor.

*Doctor* (with him *Dadachanji*) for the respondent.

In deciding whether a certain transaction amounts to a fraudulent preference under the insolvency law the Court must consider whether the transfer was made *with a view to prefer* a creditor. *Ex parte Griffith. In re Wilcoxon* (1).

[PAGE, C.J. The principles relating to fraudulent preference are set forth in *Sharp* v. *Jackson* (2).]

That is so. It is not enough to show that one creditor was in fact preferred. The intention of the debtor in making the transfer is all important, and it must be shown that the transfer was made with the intention of preferring that creditor to the others. Of course, whether there is such an intention or not will depend upon the facts of each case. See *Ex parte Taylor. In re Goldsmith* (3). The debtor in making the transfer must have been in a position to exercise his own free will without any outside pressure being brought to bear on him. Where the debtor makes a transfer in order to shield himself it cannot be contended that the transfer was made with a view to prefer the creditor.

Before deciding whether a transfer is fraudulent the Court will have regard to the surrounding circumstances. *In re Ramsay. Ex-parte Deacon* (4). *In re Cohen. Ex parte Trustee* (5).

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(1) (1883) 23 Ch. D. 69.
(2) (1899) A.C. 419.
(3) (1886) 18 Q.B.D. 295.
(4) (1913) 2 K.B. 80.
(5) (1924) 2 Ch. 515.

In the present case a number of transactions were entered into on one day, and all the transfers were in favour of the Nattalin creditors of the insolvent firm. *It is obvious that the intention of* the debtors was to prefer the Nattalin creditors to the Rangoon creditors.

PAGE, C.J.—These six appeals can be determined in one judgment. I will proceed first to dispose of appeals Nos. 172, 173 and 174 of 1932. These three appeals arise out of proceedings taken by the Official Assignee in the Insolvency of S.T.S.P.S. Chettyar Firm to set aside three transfers under s. 56 of the Presidency Towns Insolvency Act.

On the 28th of July, 1931, a petition for the adjudication of this firm had been presented by five creditors, and an order of adjudication was passed on the 18th of August, 1931. The three transfers now under consideration were executed on the 18th of July, 1931. Now, it appears that there were some 72 creditors of the insolvent firm, and I have no doubt upon the evidence that on the 18th of July, 1931, the insolvent firm was unable to pay its debts as they became due from its own money in favour of its creditors.

Soliappa, a partner in the insolvent firm, gave evidence at the hearing of the present petition in the course of which he stated that at the material date the liabilities of the firm, which carried on a money-lending business in Nattalin and also in Rangoon, were about five or six lakhs, and he further stated that at that time the firm possessed assets in land and other property at Nattalin valued at two lakhs, and that it also possessed outstanding debts due to it of Rs. 1,50,000. It appears also that the firm possessed a rice mill at Dalla, which, when it was sold, realized Rs. 33,000.

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It was contended on behalf of the appellants that the firm also possessed property in India worth two lakhs. I think that is problematical, but in any case the Indian property was not available for meeting the current liabilities of the firm. I have no doubt that on the 18th of July, 1931, the S.T.S.P.S. firm was unable to pay its debts as they became due. Indeed, it appears from the evidence of Soliappa that he "did not pay any of the creditors in Rangoon after the 3rd or 4th of July, 1931. The creditors at Rangoon and those outside Rangoon were paid up to the 3rd or 4th July, 1931, and the Nattalin creditors were also paid up to that date."

Now, the critical financial state of the firm must have been known to Karapaya, the authorized managing agent of the firm at Nattalin. In the afternoon of the 17th of July, 1931, it appears from the evidence that Karapaya expressed his willingness to transfer to the Nattalin creditors—28 in number—the landed property of the firm in Nattalin, and also, so far as might be necessary, the outstanding debts due to the firm in Nattalin. On the following morning 28 transfers were made to the Nattalin creditors by Karapaya, and inasmuch as these payments were made to the Nattalin creditors and not equally to the creditors generally, these transfers did give a preference to the Nattalin creditors.

The defence of the transferees to the Official Assignee's petition that these transfers should be declared fraudulent and void under s. 56 is that the transfers were not made with a view to preferring these creditors, but because of pressure that had been brought to bear upon Karapaya, and which induced him to execute the transfers.

The law upon this subject was precisely enunciated by Lopes L.J. in *Ex parte Taylor. In re Goldsmith* (1). The learned Lord Justice observed :

"that the animus with which the particular thing is done by the debtor is an essential element in considering whether it is a fraudulent preference. The mere making of a preferential payment is not a fraudulent preference. The substantial motive of the debtor in making it must be looked at. If the substantial motive is to prefer the creditor, the payment is a fraudulent preference. If the substantial motive is reparation for past wrong, or to avoid evil consequences to the debtor himself, the payment is not a fraudulent preference."

Now, what is the meaning of "pressure" in this connection? In *Sharp (Official Receiver)* and *Jackson and others* (2), Lord Halsbury L.C., observed :

"the word 'preference' here imports in it the voluntary act of a person who can do either the one thing or the other as he prefers."

And Lord Macnaghten added :

"I think the question of pressure is left precisely as it was under the old law, and I think the word 'preference' in itself involves and imports a free choice."

See also *In re Cohen. Ex parte Trustee* (3), and *In re M.I.G. Trust, Limited* (4)

It may be in the circumstances obtaining in a particular case that when a creditor makes a demand for payment, with or without a threat of launching legal proceedings to recover the debt, the effect of the demand upon the mind of the debtor is such that he is no longer to be regarded as making the payment voluntarily, or exercising free will in the sense of electing to do something which he need not

(1) (1886) 18 Q.B.D. 295, at p. 302.
(2) (1899) A.C. 419, at pp. 425, 427.
(3) (1924) 2 Ch. Div. 515.
(4) (1933) 1 Ch. Div. 542.

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do. If a demand has that effect upon the mind of the debtor a transfer executed in such circumstances in favour of the creditor is not made by way of a fraudulent preference within s. 56 of the Presidency Towns Insolvency Act. On the other hand, merely because a creditor makes a demand upon the debtor that his debt should be paid, and thereafter a transfer of the debtor's property is made to the creditor in my opinion it does not necessarily follow that in so doing the creditor is exerting upon the debtor such pressure as would exclude the transfer from the ambit of s. 56. It depends in each case on the circumstances. For example, suppose a debtor thinks that if he accedes to the demand and pays his creditor he will be able to continue to carry on his business, and makes the transfer with that object in view then, no doubt, the debtor's intention in making the transfer is not to prefer the creditor but to benefit himself, and prevent his business from being brought to an end. Or, *é contra*, where a demand for payment is made by a creditor to a debtor at a time when both the debtor and the creditor have reason to apprehend that the financial position of the debtor is such that in all probability the debtor's business will collapse, normally such a demand I take it would not have any real effect upon the conduct of the debtor, because in such circumstances whether or not legal proceedings are taken by the creditor to recover the debt the creditor's action will make very little difference to what the debtor expects to happen. In such circumstances it is not to be expected that the demand will in any way materially affect the conduct or action of the debtor. In *Ex parte Hall. In re Cooper* (1), a case where,

(1) (1882) 19 Ch. Div. 580, at p. 583.

when the creditor pressed for security for his debt and threatened to commence legal proceedings against the debtor, both the creditor and the debtor were apprehensive of what might happen having regard to the precarious state of the debtor's financial position, Jessel M.R. observed :

"The pressure must be a real *bonâ fide* pressure. Here it was all a sham. What pressure can be produced on a man who is going to become bankrupt in a week by your telling him you will bring an action against him ? It might be different if the creditor did not know the state of his affairs."

See also *Ex parte Griffith. In re Wilcoxon* (1).

Now, it is common ground in the present case that one Ramaswamy, a well known Chettyar of Nattalin, on the 17th of July, 1931, did make a demand upon Karapaya for repayment of the debt of the appellants. The question is whether that demand on the 17th or 18th July, 1931, was the real reason which induced Karapaya to transfer to these creditors certain of the outstanding debts due to the insolvent firm. What was the position ?

On the 17th of July, 1931, Natarajan, the representative of a Rangoon creditor, came down to Nattalin in order to demand from Karapaya payment of the debt due to him. He arrived at Nattalin in the evening, and when he came to the premises where Karapaya was carrying on the business of the firm he found Karapaya with some local Chettyars arranging for a transfer to them of certain property of the firm in payment *pro tanto* of their debts. He stated that Karapaya, when he demanded payment of his debt, said that he could not pay him because he was a Rangoon creditor who had contracted his debt with a partner of the firm and not with Karapaya, and that he must make his demand in Rangoon. He also

(1) (1883) 23 Ch. Div. 69.

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stated that he was transferring the deeds to repay creditors who were his friends. Karapaya informed the creditors on the 17th and 18th of July, 1931, that he could not pay their debts, and suggested that they should take transfers of the property and outstandings of the firm at Nattalin at their face value in payment of their debts.

It is clear from the evidence that on or about the 17th of July, 1931, it was rumoured both in Rangoon and in Nattalin that Karapaya was about to make certain transfers of the debtor firm's property. It was because he had heard of this rumour that Natarajan came down to Nattalin in the afternoon of the 17th of July, 1931. Among the Nattalin Chettyars who were assembled together in Karapaya's place of business on 17th July was Ramaswamy, the representative of the appellants. He had known Karapaya for many years, and they carried on business as members of the same community in Nattalin. On this occasion Ramaswamy was representing the appellants, and, it may be, also other creditors.

The appellants are three ladies who live in India, and their money had been invested in the insolvent firm at Nattalin through Karapaya. On the morning of the 18th of July, 1931, transfers were made by Karapaya of certain outstandings of the firm to these three ladies, and at the same time transfers were made to 27 other Nattalin creditors. Thirteen of those transfers, including the transfers to the appellants, were registered about 4 o'clock in the afternoon of the 18th of July, 1931, by Karapaya himself. Now, Natarajan was much upset when he found on the 17th of July, 1931, that the property of the insolvent firm was being transferred to the Nattalin creditors by Karapaya, and he went post-haste to Prome where Soliappa, a partner in the insolvent firm, happened to be. Soliappa

sent a message to Thegon asking Chithambaram, another partner of the debtor firm to come immediately to Nattalin. On the following morning Soliappa, Chithambaram and Natarajan saw Karapaya, and Soliappa asked Karapaya why it was that he was transferring the property at Nattalin to the Nattalin creditors. Karapaya said "that he had given documents to some of his creditors according to his wish", and that he was bound to transfer the property by way of payment to his friends who had entrusted money to the firm through him.

These are the facts of the case. What is the true inference to be drawn from them? That preferential treatment was meted out to the Nattalin creditors there is no doubt; that the Nattalin creditors were, or were represented by, members of the Chettyar community in Nattalin is not in dispute, and it is also common ground that the creditors to whom the transfers were made were all creditors who had lent money to the insolvent firm through Karapaya. Of course from a financial point of view it did not matter to Karapaya whether he executed the transfers or not, because he was only the managing agent and not a partner of the firm. But it may be that Karapaya, like the unjust Steward in the Bible story, thought that it would be a prudent course in his own interest to repay *pro tanto* by transfers of property or outstandings those creditors who had entrusted money to the firm through him at Nattalin, and who were or who were represented by, his Chettyar friends carrying on business in the same town. In my opinion in the circumstances obtaining in the present case there was no room, as the learned trial Judge, Das J., observed, for the doctrine of "pressure" to operate. When these transfers were made both the creditors and their representatives and Karapaya were apprehensive of the

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financial difficulty in which the insolvent firm was placed, and in my opinion the irresistible inference to be drawn from the evidence is that these transfers were voluntarily made by Karapaya with the intention of preferring the Nattalin creditors who had lent money to the firm through Karapaya at Nattalin.

It was further urged on behalf of the appellants that these transfers were made because of pressure brought to bear upon Soliappa and Chithambaram, two of the three partners in the insolvent firm. But such pressure if it existed, in my opinion, did not operate upon the mind of Karapaya when he made the transfers, because he did not purport to act upon instructions from his principals but was deliberately making these transfers without reference to them, and acting upon his own initiative as the managing agent of the firm at Nattalin.

I am clearly of opinion that the decision of the learned trial Judge as regards the transfers which are the subject-matter of appeals Nos. 172, 173 and 174 of 1932 was correct, and must be upheld.

As regards appeals Nos. 245, 246 and 247 of 1932, which also arose out of petitions presented by the Official Assignee under s. 56 of the Presidency Towns Insolvency Act, Sen J. at the hearing of the petition passed an order in favour of the Official Assignee. These three transfers were also executed by Karapaya at the instance of Chettyars who were carrying on business at Nattalin on the 18th of July, 1931. The only substantial difference that I can see between these three cases and appeals Nos. 172 to 174 of 1932, is that in appeals Nos. 245 to 247 of 1932, the transfers were presented for registration, not by Karapaya but by or on behalf of the transferees themselves. In other respects, in my opinion, all six cases stand very much upon the same footing.

There is no doubt that in each of these three cases demands for repayment of the debts were made both upon the principals and upon Karapaya. But, in my opinion, the transfers were not made by Karapaya by reason of any pressure that was brought to bear upon him by or on behalf of the transferees.

It appears that on the early morning of the 18th of July, the Chettyars who were representing these transferees happened to hear that Karapaya was making transfers to certain Nattalin creditors of the property of the firm at Nattalin, and in each case the representatives of these transferees stated that on receiving this information they also went to Karapaya, demanded repayment of their debts, and accepted transfers from Karapaya. The intention with which Karapaya made the transfers in these cases, in my opinion, was precisely the same as the intention with which he transferred the property of the insolvent firm to the creditors in the earlier cases. As I appraise the situation in all six of these cases what really happened was that, when it became known both to the creditors and to Karapaya that there was imminent danger of the collapse of the insolvent firm, Karapaya took counsel with his friends who were Chettyars at Nattalin with a view to the Nattalin creditors who had lent money to the firm through Karapaya obtaining some share of the assets of the firm by way of repayment of their debts before the crash occurred. As the result of these deliberations the transfers under consideration were executed. I can see no ground in such circumstances for holding that the transfers were executed by Karapaya because of pressure that had been brought to bear upon him by the transferees. I do not believe that Karapaya made these transfers because of any pressure in the legal sense from the creditors. On the contrary

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I am satisfied that he executed the transfers voluntarily and deliberately in order to prefer the Nattalin creditors to those creditors who had not lent money to the insolvent firm through him at Nattalin.

For these reasons, in my opinion, the decision of Sen J. was correct, and must be upheld. The result is that all six appeals fail, and they are dismissed.

The cases represented by appeals Nos. 245, 246 and 247 of 1932, are to be treated as one consolidated case, and the cases represented by appeals Nos. 172, 173 and 174 of 1932 are also to be treated as one consolidated case for the purpose of costs.

The Official Assignee is entitled in each consolidated case to ten gold mohurs a day as costs of the hearing in the Court below, and to ten gold mohurs in each consolidated case as the costs of the appeal.

The three respondents in each case will bear one-third of the costs awarded in the respective cases both of the hearing and of the appeal.

MYA BU, J.—I agree.