

not prepared to interfere with the discretion of the trial Court in the matter, and we therefore dismiss the cross-appeal with costs also.

A. N. C.

Appeals dismissed.

APPELLATE CIVIL.

Before Mr. Justice Campbell and Mr. Justice Tek Chand.

MOHAMMAD ISHAQ AND OTHERS (DEFENDANTS)

Appellants

versus

MOHAMMAD YUSAF AND ANOTHER

(PLAINTIFFS)

MOHAMMAD IBRAHIM (DEFENDANT)

} Respon-
dents.

1927
Feb. 22.

Civil Appeal No. 2142 of 1922

Transfer of Property Act, IV of 1882, section 53—principles of—applicable in Punjab—Voluntary alienation—intent to defeat or delay creditors—Presumption—elements necessary to raise—Burden of proof—debts due at the time of gift—debts subsequently incurred—distinction.

The plaintiff claimed to have been granted a decree upon a pro-note which was alleged by her to have been made in her favour prior to a gift by the judgment-debtor of his land in favour of his minor sons and sued for a declaration that the gift was a nullity, fraudulently defeating her as a creditor; but neither the decree nor the judgment nor the pro-note in suit was produced.

Held, that by virtue of section 53 of the Transfer of Property Act (the *principles* of which are applicable to the Punjab) it was upon the plaintiff to prove, not only that the alienation was gratuitous and that her claim against the donor had been defeated or delayed by that gift, but also, that she was a creditor of the donor at the time the gift was made; failing which, the presumption that the gift had been made with the intention of defeating or delaying her as a creditor did not arise.

Held (per Tek Chand, J.) that, although creditors whose debts were actually due at the time of the voluntary transfer

are not the only persons who may be entitled to impeach it, nevertheless in the case of a subsequent creditor the allocation of the *onus* of proof is regulated on entirely different considerations.

Thus on proof that the debts were actually due at the time of such transfer, the intent to defeat or delay creditors will be presumed ; whereas, if there are no debts due at the time and the transferor runs into indebtedness subsequently, the presumption will be regulated by the circumstances of each particular case.

And, that a voluntary settlement by a person, who owes no debts at the time, in favour of his children, for natural love and affection, cannot be set aside merely because some years afterwards it is proved to have the effect of defeating or delaying subsequent creditors.

Story's 'Equity Jurisprudence', Volume I, section 361, and May's 'Fraudulent Conveyances and Dispositions of Property,' referred to.

First appeal from the decree of Khwaja Abdus Samad, Subordinate Judge, 1st class, Delhi, dated the 20th May 1922, declaring that the gift was with intent to defraud the plaintiffs, etc.

JAGAN NATH AGGARWAL and ANANT RAM KHOSLA,
for Appellants.

KISHEN DAYAL and BISHEN NARAIN, for Respondents.

JUDGMENT.

CAMPBELL J.—On 22nd November 1920 *Mussammat* Muhammad Zamani Begum obtained a decree for Rs. 5,500 against her husband Muhammad Ibrahim. On 19th August 1919 Muhammad Ibrahim gifted certain house property to his minor sons by another wife *Mussammat* Bunyadi Begam. This property was attached by *Mussammat* Muhammad Zamani Begam in execution of her decree. The donees lodged objections which were successful. *Mussammat* Muhammad

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Zamani Begam then lodged the present suit on 5th August 1921 for a declaration that the gift was a nullity, and that the gifted property was liable to be taken in satisfaction of her decree. The trial Court has given her the declaration sought and the donee-defendants have appealed.

The lower Court struck the issue "is the gift invalid", and held that it had been made in order to defraud the plaintiff, a creditor. The rule governing the disposal of the suit is that contained in section 53 of the Transfer of Property Act, the principles of which section have been repeatedly applied by the Punjab Courts in dealing with similar questions. The burden of proof was on the plaintiff, but if she succeeded in proving (a) that at the time of the gift she was a creditor of the donor, (b) that the alienation was gratuitous and (c) that her claim against the donor had been defeated or delayed by it, the Court was entitled to presume that the alienation had been made with intent to defeat or delay her as a creditor.

In my opinion if this presumption can be created the plaintiff must succeed, but otherwise she must fail. The case strikes me as having been conducted with great laxity on both sides and the evidence as recorded appears to me to be quite worthless.

The gift was a gratuitous alienation without doubt and it has defeated the claim of the plaintiff based on her decree, but the plaintiff has failed to prove that she was a creditor at the time of the gift. It is alleged and was alleged in the plaint that the decree was an *ex parte* decree based upon a promissory note dated 1st October 1918, a date prior to that on which the gift was made, but this has not been proved. The defendant-appellants pleaded, as they were entitled to plead (being minors) that they knew nothing

of either suit or promissory note. The plaintiff has failed to bring on to the record either the promissory note or a copy of the decree or a copy of the judgment on which it was based. At the most the plaintiff has established that a decree was passed against Muhammad Ibrahim in her favour after the gift was made. The question whether the execution of a promissory note by Muhammad Ibrahim in favour of *Mussammât* Muhammad Zamani Begam constituted the latter his creditor within the meaning of section 53 of the Transfer of Property Act would not arise until that execution is proved to have taken place before the alienation attacked in the suit. The learned Subordinate Judge has assumed without any support from the contents of the record that it did so take place, and all that the respondents' learned counsel can do to meet this defect in his case is to ask for an opportunity to lead fresh evidence, a request which I can see no reason for granting.

I would accept the appeal and dismiss the suit with costs throughout.

TEK CHAND J.—I agree and wish to add a few words with reference to an additional argument put forward on behalf of the respondents, that under section 53 of the Transfer of Property Act, it is not only the creditors, who have actually a debt due to them at the time of the voluntary transfer, who are entitled to impeach it, but that the transaction can be annulled at the instance of subsequent creditors also. This proposition is no doubt true, but it has to be borne in mind, that in such cases the allocation of *onus* will be regulated on entirely different considerations. In cases where there are debts due at the time of a gratuitous transfer, it will be presumed, as has been

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pointed out by my learned brother, that the transfer was made with intent to defeat or delay the creditors. But where there are no debts due at the time and the transferor runs into indebtedness subsequently, the presumption will be regulated by the peculiar circumstances of each particular case. If, for instance, the transfer was made to ward off the effects of a threatened litigation or in anticipation of the transferor embarking upon a commercial venture or on the eve of his going into trade, the intent to defeat or delay future creditors will be presumed. But in other circumstances, the transaction will be presumed to be *bona fide*, and it will lie on the future creditors to prove that the transfer was made with an intent to defeat or delay them.

In my opinion a voluntary settlement by a person, who owes no debt at the time, in favour of his children for natural love and affection cannot be set aside merely because some years afterwards it is proved to have the effect of defeating or delaying the subsequent creditors. Story in his "*Equity Jurisprudence*" (Volume I, Section 361) has thus summed up the law on the subject, in the words of Chancellor Kent :—

"Fraud in a voluntary conveyance is an inference of law in so far as it concerns *existing* debts, but there is no such legal presumption as regards subsequent debts. There must be proof of positive fraud in fact, to vitiate a voluntary conveyance".

Similarly May, in his standard work on *Fraudulent Conveyances and Dispositions of Property*, says :—

"Where the settler was not indebted at the time, the *onus* of proving the fraud is thrown on those, who impeach the settlement, for fraud is not to be pre-

sumed. * * * * * The mere fact of subsequent indebtedness is not evidence of a fraudulent intent against subsequent creditors ”.

The *onus* thus being on the plaintiff, and he having failed to place on the record any materials to discharge it, it cannot be said that the gift was made with intent to defeat or delay the plaintiff.

I, therefore, concur in the conclusions arrived at by my learned brother.

N. F. E.

Appeal accepted.

APPELLATE CIVIL.

Before Mr. Justice Harrison.

BILLIMORIA, OFFICIAL LIQUIDATOR, DEVELOPMENT
CORPORATION OF INDIA, APPELLANT

versus

MRS. CECILIA MARY DESOUZA AND OTHERS,
Respondents.

Civil Appeal No. 2526 of 1926.

Indian Companies Act, VII of 1913, section 235—Winding up—Proceedings against deceased Director—Legal representatives—appeal against—whether proceeding survives—Indian Succession Act, XXXIX of 1925, section 306—whether applies to executive action under Companies Act—Appeal by liquidator—costs—Indian Acts taken from English Statutes—Construction of.

In the course of the winding up of a Company, an application by the Liquidator against a Director under section 235 of the Companies Act was dismissed, whereupon the Liquidator appealed. The respondent-Director had meanwhile died. The Liquidator contended that though the wording of section 235 of the Indian Act had been borrowed from

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