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U PO SEIN
v.
E. M. BODI.

PAGE, C.J.

of the case we award the respondent half his costs of the appeal.

MYA BU, J.—I agree.

INSOLVENCY JURISDICTION.

Before Mr. Justice Braund.

1934

Dec. 14.

IN THE MATTER OF M.V.R. VELUSWAMY THEVAR AND OTHERS.*

Insolvency—"Ordinary Residence" of debtor—Confinement in jail—Transfer of "the whole solvency" of the debtor—Transfer in pursuance of an alleged antecedent agreement—Burden of proof—Petitioning creditor's duty to adduce evidence of debtor's resources—Presidency-Towns Insolvency Act (III of 1909), ss. 9 (b), *11* (b).

A person confined in the Rangoon Central Jail for upwards of twelve months immediately prior to the petition for his adjudication as an insolvent must be deemed to reside in Rangoon within the meaning of s. 11 (*b*) of the Presidency-Towns Insolvency Act.

A transfer by a debtor of the whole or substantially the whole of his property in consideration of a past debt is an act of bankruptcy as well under Indian law as under English law.

Smith v. *Cannan*, 2 E. & B. 35; *Woodhouse* v. *Murray*, L.R. 2 Q.B. 634—*followed.*

A transfer, however, made in pursuance of an antecedent *bonâ fide* agreement come to at the time of making the loan that security should be given for the loan may be valid. But the onus of proving such agreement and its *bonâ fides* in all respects lies on the person who sets it up and it is the Court's duty to scrutinize such an agreement with extreme care.

There must be no suspicion of a collusive bargain or understanding that the transfer should be delayed till insolvency has intervened and the creditor must have taken sufficient steps to obtain the security or assignment agreed to be given him before insolvency has intervened.

Ex parte Burton, 13 Ch.D. 102; *Ex parte Fisher*, 7 Ch. Ap. 636; *Ex parte Hauxwell*, 23 Ch D. 626; *Ex parte Kilner*, 13 Ch.D. 245; *Mercer* v. *Peterson*, L.R. 2 Ex. 304—*referred to.*

In alleging a transfer by a debtor of his whole solvency the adjudicating creditor should, wherever possible, be prepared to show the debtor's actual resources. Every advantage ought to be taken of the various processes of discovery before trial or evidence adduced. He cannot ask the Court to make an assumption by merely presenting the transfer unsupported by any evidence. The debtor likewise must adduce evidence of his resources if he desires the transfer to be upheld upon the ground that it left him solvent.

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* Insolvency Cases Nos. 172 and 209 of 1933.

Kalyanwala for the creditors. The debtor having been confined in the Rangoon Central Jail for over six months at the date of this application must be deemed to be residing in Rangoon within section 11 (*b*) of the Presidency-Towns Insolvency Act. Prior to his imprisonment the debtor had been living in Rangoon for over a year. No doubt he went back to Pyapôn several times, but he must be deemed during this period to have been residing in Rangoon. *In re Hecquard* (1).

The debtor has transferred all his unincumbered property in Burma to a creditor. This creditor is his own brother-in-law and the consideration is for past debts. The Court must presume under the circumstances that the transfer is made to defeat and delay creditors. *Worseley* v. *De Mattos* (2); *Re Wood* (3); *Siebert* v. *Spooner* (4); *Ex parte Foxley* (5). The debtor has not proved that he has any property other than the transferred properties. The equity of redemption of the encumbered property was valueless. The transfer was not made in pursuance of a *bonâ fide* prior agreement. The burden of proof was on the debtor, and he has failed to discharge it. *Ex parte Kilner* (6).

N. N. Sen (with him *K. C. Bose*) for the debtor. The debtor was confined in jail. This is compulsory and not voluntary residence, whereas residence under section 11 (*b*) of the Act implies free choice.

The debtor transferred property to his creditors for a genuine consideration. It was in pursuance of a prior and *bonâ fide* agreement with the creditor. He has other property besides the transferred property. It cannot be inferred from the transfer itself that it was

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(1) 24 Q.B.D. 71.
(2) 97 E.R. 407.
(3) 7 Ch. Ap. 302.
(4) 1 M. & W. 718.
(5) 3 Ch. Ap. 515.
(6) 13 Ch.D. 245.

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made with a view to defeat and delay creditors, and there is no evidence that an act of insolvency has been committed on that ground.

BRAUND, J.—I have before me, in this case, two Insolvency Petitions, Nos. 172 and 209, both of 1933, for the adjudication of the same debtors, M.V.R. Veluswamy Thevar, M.V.R. Authimoola Thevar and M.V.R Veeramuthu Thevar. The respondents are brothers. The petitioners are respectively A.S.P.S. Chettiar Firm and A.K.A.C.T.A.L. Alagappa Chettiar. The petitions allege, in substance, if not in terms, precisely the same acts of insolvency, namely, first under section 9 (*b*) of the Presidency-Towns Insolvency Act that the debtors have made a transfer of their property or part thereof with intent "to defeat and delay" their creditors and, secondly, that, under section 9 (*c*) they have made such a transfer as to raise a case of fraudulent preference in the event of their becoming insolvents. The two petitions have been dealt with by me together.

The first petitioner alleges a debt of Rs. 1,39,327-6-6 of which Rs. 1,23,073-9-6 is secured by two mortgages of some 1,250 acres of paddy lands dated the 27th November 1928 and the 9th September 1929 respectively. The balance is unsecured. The second petitioner alleges a debt of Rs. 18,679-13-9 of which Rs. 3,845-0-9 is secured by a second mortgage of the same 1,250 acres of paddy land. The balance is unsecured. There is no dispute as to these debts.

I should mention that the second and third respondents do not appear. The first respondent only appears and has been represented before me by Mr. Sen.

The first point taken by Mr. Sen is that, so far as his client is concerned, there is no jurisdiction

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inasmuch as his client has not within a year before the presentation of the insolvency petition "ordinarily resided or had a dwelling house or carried on business . . . within the limits of the ordinary original civil jurisdiction" of this Court [Presidency-Towns Insolvency Act, section 11 (*b*)]. But it is common ground that in February 1933 the first respondent was sentenced to a term of ten years' rigorous imprisonment and has since that date lodged in the Rangoon Central Jail, where he is likely to remain until his sentence is exhausted. The petitioners were prepared to establish, and the respondents were prepared to rebut, (they tell me) facts to show that the first respondent with the two other respondents had a house in Rangoon before the former went to jail; but I have not inquired into that because I am satisfied that the admitted fact of the first respondent's confinement in the Rangoon Central Jail for eighteen months prior to the date of these petitions is sufficient to attract to him the jurisdiction of this Court. That the Rangoon Central Jail had been this man's "residence," if not his "dwelling house," for upwards of twelve months there is no doubt. And I see no reason for holding that it was not his "ordinary" residence. An "ordinary" residence is not to be contrasted with an "extra-ordinary" residence in the popular sense; a jail is, happily, in one sense an unusual place of residence. A man's ordinary residence is that at which he has an intention of remaining for a sufficiently long period (whether continuous or discontinuous) to constitute it a residence at all. Thus a room in a hotel may or may not be an "ordinary residence." It depends upon the intention with, and the purpose for, which the room is taken. In the present case the first respondent can have had none other than

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an intention to remain; for any other intention must, *ex hypothesi*, have been an unlawful intention. A desire to be elsewhere is not inconsistent with an intention to remain. In my judgment, therefore, the first respondent has been ordinarily resident in Rangoon for upwards of twelve months immediately prior to the launching of these petitions. Indeed, any other conclusion would involve the absurd result that, if a prisoner did not happen to have any other residence, he would be incapable of being adjudged an insolvent after he had been in jail for twelve months. As to the other two respondents they have not appeared to deny, and do not deny, their residence in Rangoon and there is, moreover, some evidence that they in fact occupied a house in Rangoon for a considerable time prior to the presentation of the petitions. I shall hold, therefore, that this Court has jurisdiction under the Presidency-Towns Insolvency Act.

The respondents were in 1932 and 1933 all engaged in partnership in the business of money-lending at the village of Kyungya, Bogale, in the Pyapôn District and in the course of that business they came to hold and manage paddy lands there. They had a house and other property there as well. But in 1931 disaster befell them and the first respondent became the victim of the criminal proceedings I have mentioned in which he suffered a sentence of ten years' rigorous imprisonment and in which one of his brothers was also involved. Those criminal proceedings began in 1931 and ended in February 1933.

Now, these insolvency proceedings arise out of a transfer dated the 9th June 1933 made between the three respondents of the one part and some persons called A.A. Thevar Brothers of the other part. Who exactly A.A. Thevar Brothers were I am not told beyond the fact that they comprised the brother-in-law

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of the respondents. It is to be observed that the respondents' name is also Thevar. I am told that the transferees had their office on the opposite side of the road in 114th Street, Rangoon, to the house of the respondents. I must examine this deed carefully.

It recites that the respondents' father and the respondents themselves had been borrowing money over a period from the transferees and that in October 1931 an account had been taken between the respondents and the transferees showing a balance of Rs. 44,995-4-6 due on promissory notes by the respondents to the transferees as at the 16th October 1931, for which aggregate indebtedness the respondents on the following day (the 17th October 1931) gave two promissory notes for Rs. 27,446-10-6 and Rs. 17,548-10-0 respectively. Then there come these recitals :

"Whereas the vendors agreed on the 17th October 1931 to convey and transfer to the purchasers the lands and buildings specified in the Schedules A and B herein below in full settlement of the said sum of Rs. 44,995-4-6 ; Whereas an agreement was also executed in favour of the vendors on the said date, namely, 17th October 1931 to carry out the above intention of the parties hereto ; Whereas the intended transfer of sale was rendered incapable of being carried into effect on account of the criminal cases against M.V.R. Authimoola Thevar, No. 1 abovenamed and M.V.R. Veluchami Thevar, No. 3 abovenamed in which they were in custody off and on for a long time and for other reasons."

Before proceeding I will pause to make some comments upon those recitals. I have the evidence of one Somasundaram, the head book-keeping clerk of A.A. Thevar Brothers, who has produced a number of his firm's books. Having his evidence and the evidence of those books I am not prepared to disbelieve that there actually was a sum of Rs. 44,995-4-6 owing by the respondents to A.A. Thevar Brothers on the 16th October 1931 ; but this clerk's evidence is less satisfactory as to any agreement for the transfer of the

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lands to satisfy that debt. It was only after some pressure that he remembered to say that "there was some agreement come to," but even then he added that "as far as he knew it was not in writing." The recitals themselves are curious. Why, if there was a *bonâ fide* agreement to make a transfer of lands in satisfaction of the debt, were not the lands at once transferred and the transaction closed? There was, apparently, an intention on the face of the instrument for the transfer of the lands to be made as soon as possible, an intention only frustrated by the criminal proceedings. Why the elaborate process of taking two new promissory notes if there was a present intention to extinguish the debt? Why a written agreement to give the transfer, which was to be an immediate transfer? And, moreover, are the reasons for the delay very satisfactory? I do not quite follow why the criminal proceedings should have frustrated the transfer; nor is any explanation given of the "other reasons" referred to in the recital.

The deed then goes on to recite that a further sum of Rs. 6,462-2-3 had been raised since October 1931 to provide for the defence of the first respondent (it was, incidentally, a dacoity case), and it finally recites an aggregate indebtedness, with interest, as at the 9th June 1933 of Rs. 60,221-9-9, and proceeds to convey the properties set out in the schedule to the transferees "in consideration of Rs. 60,221-9-9 due (the indebtedness of which the vendors do hereby acknowledge)."

The properties set out in the schedule were (1) some 444 acres of paddy lands at Kyungya Village, Bogale, (2) a pucca dwelling house at the same place, (3) a granary and (4) a cattle shed.

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It is that transaction which is set up as the transfer with intent to defeat or delay creditors and as the transfer which, if insolvency ensues, will constitute a fraudulent preference.

It is desirable, at this point, for me to examine the law as to acts of insolvency arising out of transfers by debtors of their property. The law, as I understand it, is in England now well settled by a long line of authorities decided under the Bankruptcy Acts of 1849, 1862 and 1914. It is to be observed that the words of the Presidency-Towns Insolvency Act, section 9 (*b*), differ from the corresponding words of section 1 (*b*) of the Bankruptcy Act, 1914 and of section 6 (2) of the Bankruptcy Act, 1862. The requirements of each of those acts are that the debtor should in England or elsewhere have made a "fraudulent" conveyance, gift, delivery or transfer of his property or of any part thereof.

But in the Bankruptcy Act, 1849 (12 and 13 Vict. C. 106) section 67 the identical words of section 9 (*b*) of the Indian Act appear :—" . . . with intent to defeat or delay his creditors . . ."

It has been long settled that the transfer by a trader of the whole or substantially the whole of his property in consideration of a past debt is an act of bankruptcy under any of the English Acts. It is, as it is called, a " conveyance of the whole solvency " of the debtor. Its necessary effect is to delay his creditors ; and it is therefore, in itself a "fraud," in the sense of a fraud upon the spirit of the Bankruptcy laws. In *Woodhouse* v *Murray* (1) Chief Justice Cockburn says :

" The words of Parke B., in *Siebert* v. *Spooner* (2), are : ' I take it to be perfectly well settled that where a trader makes an assignment of all his effects, or of all except a very small

(1) (1867) L.R. 2 Q.B. 634. (2) 1 M. & W. at p. 718.

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portion, it is necessarily an act of bankruptcy, without any actual fraud.' He then refers to the several cases, which it is unnecessary for me to go over; and it was decided that an assignment by a trader of all his effects to a creditor was an act of bankruptcy. Yet the statute speaks of a fraudulent conveyance with intent to defeat and delay creditors. The meaning of the learned Judge, and the principle upon which the cases have been decided, is, that though there may be an absence of fraud in fact, that is, intentional fraud, yet when the effect of such a conveyance is to put it entirely out of a man's power to go on with his business and to meet his creditors, there he must be taken to have intended the consequence of what he has done, and though not guilty of intentional fraud, or, as we call it, moral fraud, yet he is guilty of fraud against the policy of the bankrupt law, which is, that there should be an equal distribution among all the creditors."

The leading authority is *Smith* v. *Cannan* (1). See too *Ex parte Foxley. In re Nurse* (2). It is, therefore, I think, settled under English law that a transfer by a trader of the whole or substantially the whole of his property in consideration of a past debt is an act of bankruptcy under the English Acts. I see no reason to construe section 9 (*b*) of the Presidency-Towns Insolvency Act differently. As I have pointed out the words "with the intent to defeat or delay creditors" are found in section 67 of the English Act of 1849 and are only omitted from the Acts of 1862 and 1914 because they add nothing to the word "fraudulently" [see *In re Wood* (3)]. I think that there can be no doubt that under the Indian Act it is an act of insolvency satisfying clause 9 (*b*) of the Presidency-Towns Insolvency Act for a debtor to transfer the whole of his solvency or substantially the whole of his solvency for a past consideration and in circumstances which are not satisfactorily explained.

(1) 2 E. & B. 35, 45. (2) L.R. (1868) 3 Ch. Ap. 515.
(3) L.R. (1872) 7 Ch. Ap. 302.

I need not here deal with the question of a transfer in consideration partly of a past debt and partly of a present advance. That has been the subject of numerous decisions [e.g. *Ex parte Winder. In re Winstanley* (1)]. That does not arise in this case.

The principle of *Smith* v. *Cannan* (*ubi supra*) will, however, yield where it can be shown by the debtor that the transfer claimed to be fraudulent was in fact made in pursuance of an antecedent *bonâ fide* agreement that security should be given for a loan, if such agreement was made at the time of making the loan. That principle was introduced by *Mercer* v. *Peterson* (2). Sir George Mellish said in *Ex parte Fisher. In re Ash* (3) :

> " We agree that the authorities establish, as a general rule, that where a sum of money is advanced upon the faith of a contract that a bill of sale shall be given the sum so advanced is to be treated as advanced upon the credit of the bill of sale and is not to be considered as a past debt, and also that an assignment by a debtor of all his effects partly as a security for a past debt and partly as a security for a substantial advance is not necessarily an act of bankruptcy."

And in *Ex parte Burton. In re Tunstall* (4) Lord Justice James puts it thus :

> " But a Court of Equity regards that which has been agreed to be done as done and therefore it has said that, if it was really part of the understanding when the money was advanced that a bill of sale should be given, then that agreement would be the same thing as if the bill of sale has been actually given at the time. The bill of sale would be sustained by the previous agreement."

That opened the door wide to dishonest debtors, either to set up suspicious pre-existing agreements ;

(1) 1 Ch.D. 290.
(2) L.R. 2 Ex. 304.
(3) L.R. (1872) 7 Ch. Ap. 636 at p. 643.
(4) (1879) 13 Ch.D. 102 at p. 108.

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or, in collusion with the creditors, to maintain their credit up to the last moment by delaying to give the promised security until insolvency had intervened. Where therefore a document is set up which, upon the face of it, is an act of bankruptcy, that is, an assignment of all a man's goods for a past consideration, if it is said that it is not an act of bankruptcy because it is warranted by a prior agreement the *onus probandi* is always upon the person who sets up the prior agreement to prove, not only that the agreement did exist in fact, but that it was in all respects a *bonâ fide* agreement. Such a case requires to be watched with extreme anxiety and care, because it is evident that to allow assignments or mortgages to be supported by reason of antecedent parol contracts is a matter which requires the most anxious consideration. [*Ex parte Kilner* (1), *Ex parte Hauxwell. In re Hemmingway* (2).] Very clear evidence is, I think, necessary that the previous agreement, which is set up for the purpose of rendering the suspicious transaction valid, was a *bonâ fide* agreement.

It remains to observe the salutary modifications in the doctrine of *Mercer* v. *Peterson* (3) which have been introduced by such cases as *Ex parte Fisher* (4) and *Ex parte Kilner* (1) to which I have referred. It may now, I think, be taken to be established that in cases where an antecedent agreement is produced to support the transaction in question it is the duty of the Court to satisfy itself that the agreement when made was *bonâ fide* in the sense that there was no expressed or secret bargain or understanding that the giving of the bill of sale or assignment should be delayed until the

(1) (1879) 13 Ch.D. 245.
(2) (1883) 23 Ch.D. 626 at p. 639.
(3) L.R. 2 Ex. 304.
(4) L.R. (1872) 7 Ch. Ap. 636 at p. 6[illegible]

trader had reached a state of insolvency, and there ought always to be a clear explanation of the delay in completing the transaction.

These then are, in brief, the principles which, I conclude, ought to govern my inquiry into the circumstances of this case. And the questions therefore which fall to be determined by me are these. Did the conveyance of the 9th June 1933 transfer the whole or substantially the whole of these debtors' property ? If so, do the respondents satisfy me that the transfer was made in pursuance of a *bonâ fide* antecedent agreement in that behalf, untainted by any suspicion of a collusive bargain or understanding that it should be delayed until insolvency had intervened ? And, indeed, I am inclined to think the authorities go so far as to make it incumbent upon the debtor to show that the transferee creditor has taken sufficiently energetic steps to obtain the security or assignment he had bargained for before insolvency intervened. [See *Ex parte Hauxwell. In re Hemmingway* (1).]

I have, therefore, first to consider whether the transfer was a transfer of the whole or substantially the whole of these traders' "solvency." It is not a transfer which in terms is a general transfer of all the respondents' property ; but it is a transfer of a particular substantial asset.

It is for the petitioners to discharge this onus. And I venture to take this opportunity of saying that in the cases of this kind which have come under my observation it is seldom appreciated that it is in the first place the duty of the petitioner to put the Court in possession of facts showing what the respondents' resources really are. It may be that

(1) 23 Ch.D. 626 at p. 640.

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this can be effected by the various processes of discovery before trial; or it may be necessary to search out the facts and fortify them with evidence. It is not sufficient merely to present the transfer to the Court, and to ask it to make an assumption unsupported by evidence. In the same way, if a respondent in a case like this desires to satisfy the Court of his possessions, he should take adequate steps to procure the necessary evidence to place before the Court. This case has not escaped the all too common experience that it is presented to the Court, on both sides, with insufficient material and preparation.

The petitioners themselves have offered me no actual evidence of the respondents' resources. But the first respondent himself has chosen to give evidence; and as his own witness has provided me with what he alleges to have been his possessions at the material time. He had he says (beyond the property which was the subject-matter of the transfer of the 9th June 1933) an equity of redemption in the 1,250 acres of Burma paddy lands which were the subject of the respective first and second mortgages of the petitioners which I have mentioned. He had, moreover, he says, a house at Bogale made of planks (also outside the transfer) which he values at Rs. 2,500 and "outstandings" of about Rs. 35,000. That was the extent of the respondents' Burma property, excluding the 444 acres of paddy lands and other items included in the transfer. But he claims, moreover, a number of assets in India; a large house of the value of Rs. 1,20,000; a rice mill of the value of Rs. 10,000; a quantity of land and a ginning mill. I cannot fail to observe that in his objections the first respondent contents himself with traversing the petition and makes no mention

of any of the other assets that he now alleges he had. He catalogues them for the first time in the witness box. I cannot refrain from saying that, in a case such as this, where there could have been no misunderstanding as to what the real issues were, it would have been a fairer and more convincing manner of pleading for the first respondent to have set out in his objections what he alleged his assets to be. As it is the petitioner is faced with them now for the first time, though I cannot say that by some process of discovery he might not have informed himself of them at an earlier stage.

With the exception of the equity of redemption in the 1,250 acres of mortgaged land and the Rs. 35,000 of outstandings I have no evidence whatever as to this catalogue of assets beyond the unsupported testimony of the first respondent. As to the "outstandings" he has produced books of promissory notes to substantiate this amount—rather less. But they are, I think, all themselves renewed promissory notes taken in the place of old promissory notes and in their collection no steps have been taken for a long time or are now being taken. Sitting, as I do, in the exercise of the insolvency jurisdiction of this Court I cannot close my eyes to the common experience as to the nebulous character of old book debts of this kind; and I am not prepared to assume that they have any substantial value.

As to the equity of redemption of the mortgaged property I must consider this carefully.

The evidence is unsatisfactory. The petitioners produce no evidence of the value of the lands, though they might well have anticipated this as a vital issue. The respondent produces no useful evidence either. All that he does is, by his own evidence, to refer me to a sale which he says took place in March 1932

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of other paddy lands adjoining or in the neighbourhood of the paddy lands in question for which he says the consideration was Rs. 230 an acre. He asks me to draw an inference that the different paddy lands with which I am dealing were at the 9th June 1933 of equal value. I can do no such thing. It would be the wildest speculation. The only real fact I have before me is that the 444 acres of paddy lands comprised in the deed of the 9th June 1933 were (with other property) sold for some Rs. 60,000, which, allowing for the other property is scarcely over Rs. 100 an acre. These lands were in the same neighbourhood. Moreover, these lands are mortgaged lands and may (and probably will) be sold by the mortgagees at a forced sale. I cannot, upon this evidence, conclude that there was any real value in the equity of redemption in the 1,250 acres of paddy lands. I think, therefore, that the unincumbered 444 acres and other assets comprised in the deed of the 9th June 1933 did represent, at any rate, substantially the whole of the debtors' Burma solvency. Is there then anything in the Indian properties ? No document is produced or other evidence given to substantiate their value or even their existence. As I have said, they are at the last noment catalogued by the respondent in the witness box. They are admitted, upon any footing, to be the property of an undefined joint Hindu family, of whom the respondent claims to be one. And in any case, even if they existed, they are, if not out of the reach of the Burma creditors, at least not easy of access. I am, I think, entitled to implement the plaintiffs' case with the evidence furnished to me by the respondent himself. I was by no means impressed by the respondent as a witness of truth in the witness box. And upon the materials afforded me I can come to no other conclusion

than that the 444 acres of paddy lands and other assets comprised in the transfer of the 9th June 1933 in substance represented for all practical purposes the very margin of solvency of the debtors. I do not overlook the duty of the Court to be vigilant on behalf of debtors in cases of this kind; but I think I should be allowing the Court to be misled if I came to any other conclusion.

The second question must now be determined, that is whether the respondent has satisfied the Court that the transfer of the 9th June was made in pursuance of a *bonâ fide* antecedent agreement in that behalf, untainted by any suspicion of a collusive bargain or understanding that it should be delayed until insolvency had intervened. And, as I have endeavoured to make clear, this is an onus which it falls to the respondent to discharge with clearness.

At one stage of this inquiry, I was inclined to think that inasmuch as the copy of the document of the 9th June 1933 produced by the petitioner bore on the face of it traces of an alleged antecedent agreement, it was not (if I may use the expression) in itself a "complete *primâ facie* act of insolvency;" and that for that reason the onus was thereby shifted to the petitioner to displace the *primâ facie* allegations contained in the recitals to the deed. But this cannot be so. For it is not the document which constitutes the act of insolvency; but the intention with which the transaction it records is effected. If this were so it would render it possible to defeat the principle underlying this branch of the insolvency law by a merely manufactured recital. I think the onus remains with the respondent.

The respondent has not produced the agreement of the 17th October 1931, recited in the transfer of

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the 9th June 1933. He has produced the original of the latter instrument; but not its important complement, the agreement of the 17th October 1931. He explains its absence by its having been lodged at Bogale in connection with certain revenue proceedings. But I am not satisfied that any real steps have been taken to produce it. I am not prepared to accept evidence of its contents in these circumstances. The advocate who drew the transfer of the 9th June 1933 has given evidence; he says he saw an agreement and took the recitals from it. But that is, in my judgment, no reliable substitute for the evidence of the document itself, which it was the clear duty of the respondents to produce, if by any means it could be made available.

I have already made some comments upon the recitals contained in the transfer of the 9th June 1933. They do not relieve the respondents' assertions of suspicion. The Thevar Brothers are not themselves called as witnesses. They could have thrown important light upon this matter. No satisfactory explanation is given of the delay in implementing the agreement of the 17th June 1933, for I do not accept that the transfer was hindered by the criminal proceedings. Moreover, even on the 17th October 1931, the consideration for the transfer was then a past consideration. It was then at the best an agreement to transfer this property for a past consideration and, as far as I can see, no consideration was given at the time to the debtors for that bargain. Though some Rs. 6,000 was subsequently borrowed for the purpose of the personal defence of the first respondent that apparently was no part of the agreement to transfer. At least, it is not so recited. I accept the principles of *Ex parte Kilner* that very clear evidence is necessary that the previous agreement which is set up is a *bonâ fide*

agreement and that the taking of the security has not been wantonly delayed until insolvency is in sight. In my judgment, the first respondent does not discharge the onus that is upon him. If I held that the proof in this case of a *bonâ fide* agreement was sufficient, I should, I think, be leaving a wide gap through which dishonest debtors may escape the administration of their estates for the benefit of their creditors.

I have, therefore, for the reasons which I have given come to the conclusion, upon the scanty materials that have been afforded me, that the transfer of the 9th June 1933 did include substantially the whole margin of the debtors' solvency and that the first respondent has failed wholly in discharging the onus of satisfying the Court that there was in reality a *bonâ fide* agreement for the transfer in question or (if there was) that it was not collusively delayed until the last moment.

There will, therefore, be the usual decree for the adjudication of the three respondents insolvent and I shall make that order upon the petition No. 172 of 1933, which is the first petition in order of time.

[His Lordship then passed orders as to costs.]