APPELLATE CIVIL.

Before Tek Chand and Currie JJ.

1930

June 25.

MADAN GOPAL (PLAINTIFF) Appellant.

versus

LEHRI MAL-JANKI DAS AND OTHERS (DEFENDANTS) Respondents.

Civil Appeal No. 9 of 1926.

Transfer of Property Act, IV of 1882, section 53—Transfer of property in favour of one creditor (who is related to the debtor) in preference to others—Validity of—essentials of—Transfer—where partly for valuable consideration and partly to defeat creditors—whether wholly void.

In execution proceedings certain immoveable property belonging to the judgment-debtor was attached and sold. His father-in-law, having unsuccessfully objected to such attachment and sale, brought the present suit for a declaration that the property in question was owned by him under a sale in his favour by the judgment-debtor and was not liable to attachment and sale under the defendants' decrees. The sale was for Rs. 7,000, out of which Rs. 5,800 was said to be due to vendee on *bahi* account, while Rs. 1,100 was kept with the vendee to pay off a debt due to a third party, but this sum had not been paid by the vendee to the latter. The main defence raised was that the alleged sale was fictitious and fraudulent and had not been effected in good faith and was intended to defeat and delay the creditors of the judgment-debtor.

Held, that if the transferor was, really and in fact, indebted to the plaintiff, the mere fact of his relationship with the former, or the circumstance that the transfer had the effect of giving one creditor preference over the others, will not render the transaction fraudulent.

Mina Kumari Bibi v. *Bijoy Singh* (1), followed.

A transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the

(1) (1917) I. L. R. 44 Cal. 662, 671 (P. C.).

benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid.

Musahar Sahu v. *Lala Hakim Rai*, per Lord Wrenbury (1), *Muthiah Chetti* v. *Palaniappa Chetti* (2), and *Ma Pwa May* v. *S.R.M.M.A. Chettyar Firm* (3), relied upon.

In order to establish the validity of a conveyance of this kind, consideration and good faith must both co-exist.

Twyne's Case (4), and May on *Fraudulent and Voluntary Dispositions of Property* (3rd Edition), page 191, referred to.

Held however, that as a large part, if not the whole, of the consideration for the alleged sale was bogus, the suit must fail, the proposition of law being firmly established that where a transfer, though in part for valuable consideration is, as regards the other part, only an arrangement to defeat creditors, it is wholly void against the creditors and cannot be upheld to the extent to which it is supported by consideration.

Chidambaran Chettiar v. *Sami Aiyar* (5), *Mula Ram* v. *Jiwanda Ram* (6), *Palaniappa Mudali* v. *Official Receiver of Trichinopoly* (7), *Subroya Goundan* v. *Perumal Chettiar* (8), and *Bhikhabhai Muljibhai* v. *Panachand Odhavji* (9), relied upon.

First appeal from the decree of Lala *Gulwant Rai, Senior Subordinate Judge, Hissar, dated the 23rd October, 1925, dismissing the plaintiff's suit.*

KISHEN DAYAL, for Appellant.

SHAMAIR CHAND and QABUL CHAND, for Respondents.

TEK CHAND J.—In execution of a money decree obtained by firm Jiwan Ram-Binj Raj (defendant No. 2), against Ram Kanwar proprietor of firm Dallu Ram- TEK CHAND J.

(1) (1916) I. L. R. 43 Cal. 521, 525 (P. C.).
(2) (1928) I. L. R. 51 Mad. 349, 359 360 (P. C.).
(3) (1929) I. L. R. 7 Rang. 624 (P. C.).
(4) (1602) Smith's Leading Cases, Vol. 1, p. 1.
(5) (1906) I. L. R. 30 Mad. 6. (6) (1923) I. L. R. 4 Lah. 211.
(7) (1914) 25 I. C. 948. (8) (1918) 43 I. C. 95.
(9) (1919) 52 I. C. 682.

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Ram Kanwar (defendant No. 7), certain immoveable property belonging to the latter was attached and sold, the auction-purchasers being defendants Nos. 1 and 6. Before the executing Court Tulsi Ram, plaintiff, who is the father-in-law of the judgment-debtor, objected to the attachment and sale of the property on the ground that it had been sold to him by Ram Kanwar for Rs. 7,000 by means of a registered sale-deed, dated the 25th of January 1923. This objection having been disallowed, Tulsi Ram brought a suit on the 26th of March 1924, for a declaration that the property in question was owned and possessed by him and was not liable to be attached and sold in execution of any of the decrees which had been obtained by defendants Nos. 1-5, against defendant No. 7.

The main plea raised by the contesting defendants was that the alleged sale in favour of the plaintiff was fictitious and fraudulent and had not been effected in good faith but was intended to defeat and delay the creditors of the judgment-debtor. On these pleadings the following issue was framed :—

" Was the property in suit validly sold and for consideration (Rs. 7,000) in good faith in favour of the plaintiff by defendant No. 7 on the 25th of January 1923?"

The learned Subordinate Judge found the issue against the plaintiff and dismissed the suit. From this decree, the plaintiff Tulsi Ram has preferred a first appeal to this Court.

As stated already the vendee, Tulsi Ram, is the father-in-law of the vendor, Ram Kanwar. It is admitted that Ram Kanwar's business had failed, and being unable to meet the demands of his creditors he

had run away to Hardwar and was brought back to Bhiwani by the plaintiff and his daughter in August 1922. It is also in evidence that in December 1922, temporary injunctions had been issued at the instance of certain creditors who had instituted suits against Ram Kanwar, directing him not to alienate the properties in suit. It was in these circumstances and while these suits were pending that the sale in question was effected in favour of the plaintiff on the 25th of January 1923. It is admitted that not a single pie out of the ostensible purchase-price was paid before the Sub-Registrar. According to the recitals in the deed, the consideration of Rs. 7,000 was made up as follows :—

	Rs.
Received credit for, under *bahi* account on account of debt due by the vendor to the vendee	5,800
Kept in deposit with the vendee for payment to *Lala* Rugh Nath Sahai etc., proprietors of the firm Lehri Mal-Janki Das (defendant No. 1), who have got an attachment order against the property sold ...	1,100
Received at home for the expenses of the sale deed	100
Total ...	7,000

The second item of Rs. 1,100 has not been paid to defendant No. 1 as yet. It is, therefore, clear that the sale was really effected with the object of paying off the sum of Rs. 5,800, alleged to be due to the plaintiff by the vendor on book account. Having regard to

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the fact that the parties to the transaction were closely related to each other and in view of the other circumstances mentioned above, it is obvious that the existence of this debt must be carefully scrutinized. It is, of course, settled law that if the transferer really and in fact was indebted to the plaintiff, the mere fact of his relationship with the former or the circumstance that the transfer had the effect of giving one creditor preference over the others will not render the transaction fradulent. As observed by Sir Lawrence Jenkins, in *Mina Kumari Bibi* v. *Bijoy Singh* (1). "It may be that the judgment-debtor preferred the plaintiff, with whom he was connected by family ties, and that he did this of set purpose, yet this would not stamp the transaction as a fraudulent transfer. A debtor, for all that is contained in section 53 of the Transfer of Property Act, may pay his debts in any order he pleases, and prefer any creditor he chooses."

The test to be applied in such cases has been laid down by the Judicial Committee in *Musahar Sahu* v. Lala *Hakim Rai* (2), *Muthiah Chetti* v. *Palaniappa Chetti* (3), and *Ma Pwa May* v. *S. R. M. M. A. Chettyar Firm* (4), in the first of which Lord Wrenbury remarked :—

"The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid : *Middleton* vs. *Pollock* (5). So soon as it is found that the transfer

(1) (1917) I. L. R. 44 Cal. 662, 671 (P. C.).
(2) (1916) I. L. R. 43 Cal. 521, 525 (P. C.).
(3) (1928) I. L. R. 51 Mad. 349, 359, 360
(4) (1929) I. L. R. 7 Rang. 624 (P C.).
(5) (1876) L. R. 2 Ch. D. 104. 108.

here impeached was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor it follows that no ground for impeaching it lies in the fact that the plaintiff, who also was a creditor, was a loser by payment being made to this preferred creditor—there being in the case no question of bankruptcy."

In other words what has to be seen is whether on the evidence produced in the particular case before the Court, the transferee can be said to be a *bonâ fide* purchaser for valuable consideration. If he acquires property for value and in good faith, without being a party to any device whereby the transferred property, or a part of it, is really retained for the transferrer, or any other ulterior gain is secured to him, the transaction will be upheld. But if the transfer is made with the intention of defeating and defrauding the general body of creditors and the intention is shared by the transferee, it cannot be said to have been made in good faith and will not stand, even though the consideration be shown to have passed in full. In the classic words of Lord Coke " a good consideration doth not suffice, if it be not also *bonâ fide* " Twyne's Case (1). " *Mala fides* supersedes all enquiry into the consideration; but *bonâ fides* alone is not always sufficient to support a transaction not founded on any Valuable consideration." [May on *Fraudulent and Voluntary Dispositions of Property* (3rd edition), page 191]. In order to establish the validity of a conveyance of this kind, therefore, consideration and good faith must both co-exist.

Let us now examine the evidence on the record and see if in the light of the principles laid down above the

(1) (1602) Smith's Leading Cases, Vol. 1, p. 1.

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appellant has succeeded in proving the genuineness of the transaction. In order to establish that the sum of Rs. 5,800 was due by Ram Kanwar to him, the plaintiff has relied principally upon entries in his own account books as well as in those of Ram Kanwar. With regard to the latter, it may be stated at once that with the exception of the *khata* the other account books produced have not been formally proved. Ram Kanwar himself died before evidence was recorded. None of his *munibs* has been produced, and as regards the *khata* the only proof on the record consists of the statement of the plainitff himself as P. W. 3, that it " was in the hand of Ram Kanwar." In the account books of the plaintiff, the second last entry relates to the amount of Rs. 2,634, which is alleged to have been brought by the plaintiff from Allenabad to Bhawani and paid there at the shop of Dallu Ram-Ram Kanwar. This transaction is stated to have taken place on *Bhadon Sudi* 5 *Sambat*, 1979, but the entry in the account book was made 24 days later, on *Asuj Sudi* 3. No satisfactory explanation has been offered for this long delay in making the entry, and this circumstance alone shows that the books are not above suspicion. The plaintiff's principal place of business is at Sirsa but this amount was not taken from that shop. It is stated to have been brought from Allenabad and an entry in the *rokar bahi* kept by the plaintiff at that place has been produced. Admittedly this *Bahi* is not regularly kept, and is described by the plaintiff himself as a *zamindara bahi*. Daily balances are not struck in this *rokar*, and it is admitted that the plaintiff had not sufficient cash with him at that time, from which this large sum could have been paid. In order to meet this difficulty, it was alleged that the amount was borrowed by the plaintiff from his wife who had a

separate *khata*. It is, however, admitted that the plaintiff's wife used to live with him, and that she does not possess any separate property of her own. The plaintiff, when pressed in the witness-box, at first stated that his wife had got this money from her father, but he immediately retracted this statement and frankly admitted that he was unable to state wherefrom she had got the money. The amount is said to have been paid by the plaintiff to Ram Kanwar in the presence of his *munibs*, Angan Lal and Shiv Chand Rai, neither of whom appeared as a witness at the trial. After examining the relevant evidence and giving due weight to the arguments addressed to us by Mr. Kishen Dayal I have no hesitation in holding that this item of Rs. 2,634 is fictitious, and was evidently entered in the account with a view to swell the debits against Ram Kanwar.

The account also contains another item of Rs. 200 which is alleged to have been paid to Ram Kanwar on *Bhadon Sudi* 3 *Sambat* 1979 (25th August, 1922) at the Railway Station of *Kulanwali*. This sum is stated to have been borrowed by Tulsi Ram from Bhura Mal (P. W. 1). Bhura Mal has produced an extract from his account book which shows that on the date above-mentioned, a sum of Rs. 150 was advanced by him to Tulsi Ram. In order to explain away the discrepancy between the amount entered in the *bahi* and the sum orally stated by this witness to have been advanced he deposed that he had borrowed the additional sum of Rs. 50 from Chhote Lal-Piare Lal and paid it to the plaintiff. This explanation does not strike me as satisfactory and has been rightly rejected by the lower Court. Moreover we have got the important fact that the entry in the *bahi* regarding the

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payment of Rs. 150 is dated *Bhadon Sudi* 2 but the money is stated to have been paid the next day, *i.e.*, *Bhadon Sudi* 3. It is not shown why the entry was made a day earlier.

Another big item in the account is the sum of Rs. 1,196 stated to have been advanced by the plaintiff Ram Kanwar on *Phagan Sudi* 2, which the plaintiff states he raised by borrowing from *Seth* Tansukh Rai-Ram Nath on a *hundi*. This amount is stated to have been taken by the plaintiff from Sirsa to Bhawani and paid to Ram Kanwar in the presence of his *Munibs*, none of whom has been produced.

There are several other items in the account which are entered as having been paid by the plaintiff to Pali Ram, Brahmin, on behalf of Ram Kanwar. Pali Ram is admittedly alive but has not been produced. This important evidence, which was available, has been withheld without any adequate explanation.

After a careful examination of the materials on the record. I have no hesitation in holding that several items in the accounts produced by the plaintiff are fictitious and that a large part, if not the whole, of the consideration for the alleged sale by Ram Kanwar in favour of the plaintiff is bogus. There seems to be no doubt that when Ram Kanwar's business began to fail and he was pressed by his creditors, both the plaintiff and he devised the plan of trying to save a part of his property by making fictitious entries in their account books and subsequently entering into the transaction in question, the real intention being to save it for the benefit of Ram Kanwar.

In this view of the case, it is not necessary to examine the remaining items in the account, for even

if it be assumed that some of them are genuine, and to that extent the consideration for the sale was good, the transaction will none-the-less be void. The proposition of law is firmly established that where a transfer, though in part for valuable consideration, is, as regards the other part, only an arrangement to defeat creditors, it is wholly void against the creditors and cannot be upheld to the extent to which it is supported by consideration *Chidambaram Chettiar* v. *Sami Aiyar* (1), *Mula Ram* v. *Jiwanda Ram* (2), *Palaniappa Mudali* v. *Official Receiver of Trichinopoly* (3), *Subroya Goundan* v. *Perumal Chettiar* (4), and *Bhikhabhai Muljibhai* v. *Panachand Odhavji* (5).

On the above findings there can be no doubt that the decision of the lower Court is correct. The appeal is without force, and I would dismiss it with costs.

CURRIE J.—I agree.

A. N. C.

Appeal dismissed.

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(1) (1906) I. L. R. 30 Mad. 6.
(2) (1923) I. L. R. 4 Lah. 211.
(3) (1914) 25 I. C. 948.
(4) (1918) 43 I. C. 956
(5) (1919) 52 I. C. 682.