INSOLVENCY JURISDICTION.

Before Mr. Justice Russell; and, on appeal, before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Starling.

1902.
January 17.

KARSANDAS RAMDAS AND ANOTHER, APPELLANTS, *v.* MAGANLAL KANKUCHAND AND OTHERS, RESPONDENTS.*

Insolvency—Trust deed for benefit of creditors—Act of Insolvency—Indian Insolvent Act, Stat. 11 and 12 Vic., c. 21, sec. 9.

An assignment by a debtor of all his property for the benefit of all his creditors is an act of insolvency within section 9 of the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21) and justifies an application for adjudication under that section.

ON the 8th October, 1901, the appellants, Karsandas Ramdas and Bhagwandas Ramdas, who had till then carried on business in Bombay, executed a composition deed, whereby they assigned the whole of their property to trustees for the payment of such of their creditors as should accept and sign the deed within two months. A large number of creditors accepted and signed the said deed.

The respondents, however, were creditors who did not sign or accept the deed, and on the 25th November, 1901, they applied to the Court under section 9 of the Indian Insolvent Act (Stat. 11 and 12 Vict., c. 21) for an order that the said Karsandas and Bhagwandas should be adjudged insolvents, on the ground that the execution of the composition deed was an act of insolvency.

Lowndes appeared for the petitioning creditors.
Scott (Advocate General) for Karsandas and Bhagwandas.
Davar for the trustees of the deed.

After argument, the Commissioner (Russell, J.) granted the application, holding that the execution of the deed was an act of insolvency within the section.

The following was his judgment:

RUSSELL, J.:—The point in this case is one which, I am told, has not been decided in India, and it therefore deserves careful consideration.

* Appeal No. 1193.

By an Indenture dated the 7th October, 1901, and made between Karsandas Ramdas and Bhagwandas Ramdas (till lately carrying on business in Bombay as Ramdas Bhanji and C. R. Bhanji and Co., and also in partnership with Ramdas Devji as Jamnadas Karsandas and Co.) of the first part, and certain trustees of the second part, and the several persons and firms being creditors of the said Karsandas Ramdas and Bhagwandas Ramdas of the third part, after reciting that several of the parties of the third part had made pressing demands on the said debtors for the amounts respectively due to them, and that at a meeting of their creditors under pressure brought to bear on them, the said debtors, with the object of paying their creditors equally to the utmost of their ability, it was agreed that the parties of the second part should be appointed trustees for the benefit of the said creditors and that the said Karsandas Ramdas and Bhagwandas Ramdas should convey the whole of their real and personal estate (save such necessary furniture and wearing apparel as the parties of the second part should, in their absolute discretion, determine) to the parties of the second part, the said debtors conveyed all their said property to the said trustees, who were to sell the same and get in the residue and stand possessed of the moneys to be got in, upon trust to pay costs, and to apply the residue in reduction or full satisfaction of the debts due to the third parties who accepted and signed the deed within two months, rateably and in proportion to the amount of the debts owing to them, and to pay the surplus, if any, to the debtors: and the debtors appointed the trustees their attorneys in the usual way, and covenanted to disclose all their properties, and not to leave Bombay without their written consent, and the trustees had power to compound with any creditor and as soon as the creditors had been paid their full proportionate share and the trustees certified that they had fully disclosed their assets a release was to be executed and the creditors covenanted not to sue.

The sole question argued before me was whether the execution of this deed was an act of bankruptcy within section 9 of the Indian Insolvent Debtors' Act. Upon the deed itself it is clear that at the date of its execution the debtors were in insolvent circumstances, *i.e.*, not in a position to pay their debts then in full.

1902.

KARSANDAS v. MAGANLAL.

For otherwise there was no need for the deed. Moreover, it is not all the creditors of the debtors who are to be paid, but those who have accepted and signed the deed within two months, unless the time is extended by the trustees. Those creditors who do not sign are not provided for: they must "be defeated or delayed." This, to my mind, is the plain intent of the deed. If this is so, then the deed must be fraudulent, though there be no moral fraud whatever, for it may and must be a fraud on creditors.

Again, it is substantially the whole of the debtor's property which is conveyed.

For some years after the beginning of the present century the privileges of bankruptcy were confined to traders. For non-traders the old harsh law of debtor and creditor still ruled. But in 1813 a series of Acts began (53 Geo. III, c. 110; 7 Geo. IV, c. 57; 1 & 3 Vic., c. 110; and 5 & 6 Vic., c. 116), known as the Relief of Insolvent Debtors' Acts, designed, as the preamble of the last Act says, "to protect from all process against the person such persons as have become indebted without any fraud, or gross or culpable negligence, so as nevertheless their estates may be duly distributed among their creditors." From this it was but a step to extend the law of bankruptcy (as the Act of 1861 did) to non-traders. "A conveyance or assignment by a debtor of his property to a trustee for the benefit of his creditors generally, need not, it is true, be fraudulent in a moral sense, but it tends, nevertheless, to defeat and delay creditors, and for that reason—independently of its being an admission of insolvency—has always been treated as an act of bankruptcy" (see Encyclopœdia of the Laws of England: Title "Bankruptcy").

Section 2 of Stat. 1 Jac. I., c. 15, says, "every person using the trade of merchandise, who shall make any fraudulent grant or conveyance of his lands, &c., to the intent or whereby his creditors be defeated or delayed for the recovery of their debts, shall be adjudged a bankrupt to all intents."

Section 3 of Stat. 6 Geo. IV, c. 16, says, "if any trader make any fraudulent grant or conveyance of any of his lands, goods, &c., with intent to defeat or delay his creditors, he shall be deemed to have committed an act of bankruptcy."

Section 9 of the Indian Insolvent Act provides that if any person with intent to defeat or delay his creditors "make any fraudulent gift, grant, &c., of any of his lands, &c., goods or chattels ....., he shall be deemed to have committed an act of insolvency on which creditors may petition." That section uses the words "act of insolvency," but the words in the English statutes (which are more appropriate) are "act of *bankruptcy*."

The words of the Indian Act are practically the same as those of the statutes of James I and Geo. IV, under which it has been held that a conveyance of all a trader's property to trustees for his creditors is an act of bankruptcy. "There is a great difference between the conveyance of all and of a part. A conveyance of a *part* may be public, fair and honest: as a trader may sell, so he may openly transfer many kinds of property, by way of *security*; but a conveyance of *all* must either be fraudulently kept secret, or produce an immediate absolute bankruptcy" (per Lord Mansfield in *Worsely* v. *DeMattos*[1]). See *Stewart* v. *Moody*.[2] *Re Wood*[3] shows that the words "with intent, &c.," being omitted in the later Acts makes no difference. The reason is thus stated in *In re Phillips*[4]:

> The object of section 4, sub-section 1 (*a*), of the Act of 1883 was to bring within the operation of the Act assignments which could not be attacked on the ground that they were a fraudulent preference, but which might be attacked on the ground that they had a similar effect to bankruptcy, namely, that they were intended to bring about the division of all the debtor's property among his creditors. The clause was aimed at such assignments, and such only.

The learned Advocate General's argument deserves detailed consideration, because, in the first place, I am of opinion that *In re Kahandas Narrandas*[5] is an authority for the proposition that English law must be regarded as applicable to cases arising under Indian Acts in the sense intended if the principles required by the English Equity Courts are applicable. The principles required by the English Bankruptcy Courts are in this case, to my mind, strictly applicable. *In re Dhanjibhai Kharsetji*[6]

(1) (1758) 1 Burr. 467 p. 478.
(2) (1835) 1 C. M. R. 777, 779.
(3) (1872) L. R. 7 Ch. 302.
(4) (1900) 2 Q. B. 329 (331).
(5) (1881) 5 Bom. 154.
(6) (1873) 10 Bom. H. C. 327.

1902.

KARSANDAS v. MAGANLAL.

does not apply, for the only question there was whether the deed was a voluntary assignment under section 24, and there the debtors had on the 13th January, 1873, filed their petition and schedule in the Insolvent Court. It was held not to be a voluntary deed under that section. The ingenious argument of the Advocate General on the words "with the intention of committing an act of insolvency" does not also apply, for the words at the beginning of the section are "if any insolvent who shall file, &c., or who shall be adjudged *to have committed an act of insolvency.*" Here the question is, have the debtors committed an act of insolvency? Again, in *Oriental Bank Corporation* v. *John Fleming*[1] which was cited, this point was not decided, and Mr. Macpherson in his argument admits there "that any creditor who has not signed this deed could throw the estate into insolvency." Nor did this question arise in *Bamanji* v. *Naoroji*,[2] for there Sorabji had filed his petition and schedule, but was induced to withdraw it at the desire of several of his creditors *of whom the defendant Naoroji was one*, and after the deed was executed Naoroji filed a plaint for his debt, got a decree, and wanted to execute it—a most inequitable proceeding.

I am, therefore, of opinion that the execution of this deed was 'an act of insolvency' (to use the words of the Insolvent Act), on which the creditors could petition and the usual adjudication order must be passed.

Mr. Davar appeared for the trustees of the deed as well as a creditor to support, but I hold he has no *locus standi* for the trustees. The same order will be made on the other petition against these debtors.

Karsandas and Bhagwandas appealed.

Lowndes for the respondents (petitioning creditors) took the preliminary objection, that the Official Assignee was not a party to the appeal, and that it was then too late to make him a party. He cited *Ex-parte Ward*[3]; section 73 of the Insolvent Act (Stat. 11 and 12 Vict., c. 21).

(1) (1879) 3 Bom. 242.
(2) (1864) 1 Bom. H. C. 233.
(3) (1880) 15 Ch. D. 292.

1902.

KARSANDAS v. MAGANLAL.

[Jenkins, C.J. :—We think the appeal may be heard.]

Inverarity (with *Scott*, Advocate General) for the appellants :—The question is whether the execution by the appellants of the composition deed of the 8th October, 1901, was an act of insolvency within section 9 of the Insolvent Act. To come within the section the deed must be made with intent to defeat or delay creditors. It is, therefore, material to ascertain whether it was executed under pressure.

The lower Court held this point immaterial and took no evidence upon it. It held that the mere execution of the deed, irrespective of intent, was an act of insolvency. We contend that if the deed was not voluntary, but was the result of pressure by creditors, it does not come within the section: *In re Dhanjibhai K. Ratnagar.*(1) Section 24 of the Insolvent Act shows that it is only a voluntary deed which can be an act of insolvency: Griffiths on Bankruptcy, Volume I, pages 130—132; *Thornton* v. *Hargreaves.*(2) The trustees of the deed were not selected by the insolvents: *Bamanji* v. *Naoroji*(3); *Oriental Bank Corporation* v. *Fleming*(4); *Alton* v. *Harrison.*(5) We also object to the order for costs made by the lower Court.

Lowndes for the respondents (petitioning creditors) :—Section 9 of the Indian Insolvent Act is similar to the English law: Stat. 1 Jac., c. 15, sec. 2, sub-sec. 7; Stat. 6 Geo. IV, c. 16, sec. 3; *Worsely* v. *DeMattos.*(6) We do not admit that there was any pressure here: *Wilson* v. *Day*(7); *Dutton* v. *Morrison*(8); *Robertson* v. *Liddell*(9); *Ex-parte Wensley*(10); *Stewart* v. *Moody.*(11) In the Bankruptcy Act of 1869 the words "with intent to defeat and delay" are omitted as the law was then settled: *Ex-parte Wood*(12); *Tomkins* v. *Saffery*(13); Robson on Bankruptcy, page 143; *Ex parte Bailey.*(14)

(1) (1878) 10 B. H. C. R. 327.
(2) (1806) 7 East 544, 548.
(3) (1864) 1 B. H. C. R. 233.
(4) (1879) 3 Bom. 247, p. 253.
(5) (1869) L. R. 4 Ch. 622.
(6) (1758) 1 Burr. 467.
(7) (1759) 2 Burr. 827.
(8) (1809) 17 Ves. 193.
(9) (1808) 9 East 487.
(10) (1862) 1 DeG. J. and S. 273.
(11) (1835) 1 Cr. M. and R. 777.
(12) (1872) L. R. 7 Ch. 305.
(13) (1877) 3 Ap. Ch. 213 at p. 217 per Cairns, L.C.
(14) (1853) 3 DeG. M. and G. 534.

1902.

KARSANDAS v. NAGANLAL.

JENKINS, C.J. :—The sole point in this appeal is whether the Commissioner in Insolvency erred in holding that the appellants had committed an act of insolvency by executing a deed of assignment to trustees in favour of their creditors.

It is argued that though the assignment was of the whole of the appellants' property, still it was not an act of insolvency, as it was for the benefit of all creditors who might elect to come under it, and was executed under pressure.

The question turns on section 9 of the Indian Insolvent Act, whereby it is provided that "if any person who.....would be deemed a trader liable to become bankrupt.....shall depart from within the limits of the jurisdiction of any of the said Supreme Courts with intent to defeat or delay his creditors.....or make with like intent any fraudulent gift, grant, conveyance, delivery or transfer of any of his lands, tenements, money, goods or chattels.....it shall be lawful for any person being a creditor..... to present a petition to the Court for the Relief of Insolvent Debtors.....and upon such petition being duly verified, it shall be lawful for the Court to adjudge that such person has committed an act of insolvency."

The point for decision, therefore, is this: Did the appellants make, with intent to defeat or delay their creditors, a fraudulent grant?

The Indian Insolvency Act is in this connection practically identical with the earlier English Bankruptcy Acts, and there is an abundance of English authority as to what is an intent to defeat or delay creditors, by which, in the absence of Indian authority, it is legitimate to be guided. In *Dutton* v. *Morrison*[1] there was an indenture purporting to be assignment of all the property of three partners upon trust to pay their creditors, and there was a proviso that in case all the joint creditors whose debts amounted to upwards of £20 should not execute it by the time therein mentioned, the indenture should be void. The first question was whether the indenture, not being a fraudulent conveyance nor executed by one of the parties to it, and containing the above proviso, was an act of bankruptcy. In reference to

(1) (1809) 17 Ves. 193; 1 Rose 214.

this Lord Eldon said: "Assuming for a moment this instrument was executed by all the three, and comprehends the whole, or nearly the whole, of their estate and effects, it would be very improper to intimate any doubt that it is now to be considered as perfectly settled, that such an instrument, though not a fraudulent grant at Common Law, is an act of bankruptcy."

In *Simpson* v. *Sikes*[1] Lord Ellenborough, C.J., said: "The ground upon which a deed assigning all a trader's property is an act of bankruptcy is this, that it takes away from him all further power of carrying on his trade and subjects all his property to distribution without the safeguards and assistances which the Bankruptcy laws provide; and this ground applies with equal force whatever may be the trader's motives for executing the deed."

On these grounds the Court there held an assignment by the debtors of all their estate and effects for the benefit of their creditors in the usual form to be an act of bankruptcy.

In the case of *Ex parte Alsop*[2] the debtor had assigned all his estate and effects to a trustee upon trust for sale and for the distribution of the proceeds among his creditors. The assignment purported to be made in pursuance of the provisions of the Bankruptcy Law Consolidation Act, 1849, relating to arrangements by deed. Prior to the execution of the assignment by the requisite number of creditors the petitioning creditor petitioned for an adjudication in Bankruptcy, relying on the execution of the deed as an act of bankruptcy. In opposition it was argued that the assignment was not executed in any way to defeat or delay creditors, but for the express purpose of carrying into effect the provisions of the Consolidation Act—provisions which were for the benefit of the creditors as well as the trader. Lord Justice Turner, in the course of his judgment, said: "Upon the first point I am of opinion that there has been here an act of bankruptcy. Before the passing of the Bankruptcy Law Consolidation Act, the execution by a trader of a deed purporting to be a general assignment of all his property to trustees, for the benefit of his creditors, was an act of bankruptcy."

(1) (1817) 6 M. and S. 295 at p. 312. (2) (1859) 1 D. F. and J. 289.

1902.

KARSANDAS v. MAGANLAL.

I refrain from citing further cases, as these sufficiently expound the law on this point. They show that, though a deed may not be fraudulent within the doctrines of Common Law, it still may be fraudulent within the meaning of Bankruptcy Laws, and, from the grounds on which this conclusion is based, it is clear that the absence of pressure, though relevant to the question of fraudulent preference, is not a necessary condition of an act of bankruptcy.

In my opinion Mr. Justice Russell was right in following the English rule, and I therefore would confirm his decree, with the variation that there be omitted therefrom the words "in whosesoever hands they may be, whether the trustees or anybody else." The respondent to get his costs out of the estate.

STARLING, J.:—The point to be decided in this appeal is whether a conveyance by a debtor of all his property for the benefit of all his creditors is in itself an act of insolvency, or whether the Court ought to take evidence as to the circumstances under which it was executed and decide upon each case on the particular circumstances under which the deed was executed.

The Insolvent Act, section 9, defines what are acts of insolvency, and, *inter alia*, it provides that if a debtor with intent to defeat or delay his creditors makes any fraudulent grant, conveyance, delivery, or transfer of any of his property, he has committed an act of insolvency and may thereupon be adjudicated an insolvent.

The questions, therefore, to be decided on this section are whether such a deed is fraudulent, and whether it is done with intent to defeat or delay the creditors. As to the former, Mellish, L.J., in the case of *In re Wood*,(1) while discussing the earlier Bankruptcy Acts, the decisions on which would govern this case, says: "There were various conveyances which the Court held to be fraudulent ..... conveyance of a man's whole property for the benefit of all his creditors," and that is in accord with earlier decisions on the earlier Bankruptcy Acts. The same learned Judge at the same page is reported to have said: "As respects a fraudulent conveyance ..... the mere act

(1) (1872) L. R. 7 Ch. at p. 306.

was necessarily an act of bankruptcy, and the law assumed the intent to defeat or delay the creditors as a necessary consequence of the act."

In *Stewart* v. *Moody*,(1) Parke, B., at page 780, says: "It has been already settled that if the necessary consequence of a man's act is to delay his creditors, he must be taken to intend it. When a man assigns all his property and puts it into a different course of distribution from what the Bankrupt Laws direct, he commits an act of bankruptcy." The cases of *Buck* v. *Shippam*,(2) *Cullingworth* v. *Loyd*,(3) *Pfleger* v. *Browne*,(4) show how, in the case of several creditors, their claims may be defeated or delayed under such a deed as is in question in the present appeal.

I am consequently of opinion that the assignment by a debtor of all his property for the benefit of all his creditors is in itself an act of insolvency, and this appeal must be dismissed.

Attorneys for the appellants—*Messrs. Payne, Gilbert and Sayani.*

Attorneys for the respondents—*Messrs. Malvi, Hiralal and Malvi.*

(1) (1835) 1 Cr. M. & R. 777.
(2) (1846) 1 Phillips 694.
(3) (1839) 2 Beav. 385.
(4) (1860) 28 Beav. 391.

APPELLATE CIVIL.

Before Mr. Justice Candy.

VAMAN SAKHARAM JOSHI (ORIGINAL DEFENDANT), APPLICANT, *v.* MALHARI BIN MAHADU (ORIGINAL PLAINTIFF), OPPONENT.*

1902. *January* 27.

Civil Procedure Code (Act XIV of 1882), sections 633, 639—Review—Second application for review—Exclusion of time occupied by first application—Limitation Act (XV of 1877), section 5, and schedule II, article 173.

An appeal was decided by the High Court on the 21st June, 1900. An application for review of judgment was made, which was dismissed on the 4th December, 1900. On the 7th January, 1901, a second application for review of the judgment was filed.

* Review Petition No. 133 of 1901.