

(1907) 04 CAL CK 0011
In the Calcutta High Court

Hakim Lal

APPELLANT

Vs

Mooshahar Sahu

RESPONDENT

Date of Decision : 03-04-1907

Acts Referred:

Transfer of Property Act, 1882 — Section 53

Citation : (1907) ILR (Cal) 999

Hon'ble Judges : Mookerjee, J;Holmwood, J

Bench : Division Bench

Judgement

Mookerjee and Holmwood, JJ.—The circumstances which led to the litigations out of which these two appeals arise, so far as it is necessary to state them for the disposal of the questions raised before us, lie in a narrow compass, and although they were the subject of controversy in the Court below, were not disputed before us. On the 14th December 1900, the plaintiffs respondents commenced an action against Krishna Benode Upadhyaya, one of the defendants in these suits, for recovery of money due under a usufructuary mortgage. The plaintiffs apprehended that the defendant might alienate his properties before judgment, and made an application for attachment pendente lite. The application, however, proved infructuous, and was rejected on the 12th February 1901. On the 29th November following, the plaintiffs obtained a decree for a large sum of money against the defendant, and subsequently in execution of this decree attached the properties now in suit. Two claims u/s 278 of the Civil Procedure Code, were preferred by two different sets of persons, who are the appellants before us; their claim was founded upon two conveyances alleged to have been executed in their favour on the 2nd September 1901 by the defendant in the suit of the plaintiffs-respondents. The claims were allowed on the 13th September 1902. On the 12th September 1903 the decree-holders commenced the suits out of which these appeals arise u/s 283 of the Civil Procedure Code, and in each case they asked for a declaration that the properties in dispute still belonged to their judgment-debtor and were liable to be sold in execution of their decree against him. Suit No. 73 of 1903 impeached the conveyance executed by the judgment-

debtor in favour of Lala Hakim Lal; suit No. 7 of 1903 related to the conveyance executed in favour of Kamta Prosad. Both the suits were defended, substantially on the ground that the conveyances were bona fide and for consideration, and had consequently created a good title in the purchasers which could not be successfully impeached by the execution creditor of the vendor. As regards the conveyance executed in favour of Lala Hakim Lal, the Subordinate Judge found upon the evidence that the consideration recited in the document was genuine, but he set aside the conveyance on the ground that it had not been executed bona fide, and that the effect of it had been to delay, if not to defeat, the creditors of the transferor. As regards the conveyance executed in favour of Kamta Prosad, the Subordinate Judge found on the evidence that the consideration recited in the document was fictitious, and that it was a contrivance by the vendor to place the property out of the reach of his creditors. In this view of the matter, the Subordinate Judge made a decree in favour of the plaintiffs in both the suits, and declared that the conveyances were inoperative as against the creditors. The purchaser defendant in each case has appealed to this Court. The two appeals have been argued, one after the other, and we propose to deal with them separately. As regards the conveyance executed in favour of Lala Hakim Lal, which was the subject-matter of suit No. 73 of 1903 in the Court below, the question arises in appeal No. 433 of 1904. As regards the conveyance of Kamta Prosad which was the subject-matter of suit No. 74 of 1903, the question arises in appeal" No 440 of 1904. We shall take up the latter case first, because no serious argument was advanced on behalf of the appellant to show that the decision of the Subordinate Judge is erroneous.

2. Their Lordships agreed with the Subordinate Judge and dismissed the appeal.

3. As regards the conveyance executed in favour of Lala Hakim Lal on the 2nd September 1901, the Subordinate Judge has found that it was for consideration. This finding has not been assailed before this Court on behalf of the plaintiffs respondents, and after an examination of the evidence on the record, we are satisfied that it cannot be successfully impeached. The conveyance recites that the transferor Krishna Binode was indebted to the transferee, Lala Hakim Lal, to the extent of Rs. 30,309, and was also indebted to the extent of Rs. 12,347 to various other creditors whose debts are specifically set out in the document. The total amount of indebtedness of Krishna Binode at the time of execution of this document, so far as the creditors mentioned in the document were concerned, therefore amounted to Rs. 42,656, and the deed purports to convey to Lala Hakim Lal various properties in satisfaction of those debts. The purchaser was to set off against the consideration for the conveyance the debt due to himself, and the remainder of the consideration was to be left in deposit with him for payment to the other creditors, for the obvious reason that most of the debts were secured by mortgages: Now it has been satisfactorily established in the present litigation that the debts mentioned in the document all represented genuine transactions, and the learned Subordinate Judge has found that they were in reality due at the time of the execution of the conveyance. He has further found

that not only has the debt due to the purchaser been satisfied by a set off against the consideration for the deed, but also that the sum left in deposit with the transferee for payment to the other creditors has been duly applied in discharge of their claims. These facts have not been; and upon the evidence on the record as it stands cannot be, controverted. The Subordinate Judge, however, has declared the conveyance inoperative, because, in his opinion, the effect of it was to give an undue preference to some out of the many creditors of the transferor. This conclusion has been assailed, on behalf of the appellants, substantially on three grounds, namely: first, that inasmuch as the case of the plaintiffs was that the conveyance was nominal and without consideration, and as this case has failed, they are not entitled to succeed on the ground that the transaction was in fraud of the Creditors of the transferor; secondly, that if the action be treated as one to set aside a fraudulent conveyance u/s 53 of the Transfer of Property Act, it has not been properly framed, inasmuch as a suit of this description can be maintained only by, or on behalf of, all the creditors of the transferor; and thirdly, that in any event, the conveyance is not void or voidable u/s 53 of the Transfer of Property Act merely on the ground that, by means of it, preference was given to some among the many creditors of the transferor. In support of his first contention, it has been argued by the learned vakil for the appellants that the suit was in substance one u/s 283 of the Civil Procedure Code, that the object of it was to establish the right which the plaintiffs claimed unsuccessfully in the execution proceedings, and that the only ground upon which they impeached the validity of the conveyance was that it was without consideration, and a mere device on the part of the transferor to keep his property out of the reach of his creditors. It must be conceded that there is considerable force in this contention. An examination of the plaint as a whole convinces us that the suit was not framed with a view to obtain a declaration that the transfer in question was voidable at the option of the plaintiffs, because it had been made with intent to defeat or delay the creditors of the transferor. It is not necessary, however, to deal with this aspect of the case in detail; because in our opinion the appellants are entitled to succeed upon the merits.

4. In support of his second contention, it was argued by the learned vakil for the appellants that a suit to set aside a conveyance alleged to be fraudulent within the meaning of Section 53 of the Transfer of Property Act, must be brought by or on behalf of all the creditors, and that this suit which had not been brought on behalf of all the creditors was not maintainable in its present form. In our opinion this contention is manifestly well founded. It was pointed out by Mr. Justice Telang in the case of *Burjorji Dorabji Patel v. Dhun Bai* (1891) ILR 16 Bom., 1, 19 that a claim to set aside a deed of settlement, on the ground that it is fraudulent and void as against the creditors, can only be enforced in a suit either filed by all, or on behalf of and for the benefit of all the creditors. The same view was adopted by Sir Lawrence Jenkins, C.J., in *Ishvar Timappa Hegde v. Devar Venkappa* (1902) ILR 27 Bom. 146 in which it was ruled that when a creditor sues to set aside a deed executed by his debtor on the ground that the deed was

voidable u/s 53 of the Transfer of Property Act, the creditor can only sue on behalf of himself and all the other creditors. This view receives support from the decision of their Lordships of the Judicial Committee in the case of *Chatterput Singh v. Maharaj Bahadur* (1904) ILR 32 Calc. 198. The question there arose as to the validity of certain transfers alleged to have been made to one Chatterput. The transfers were challenged u/s 52 of the Transfer of Property Act, and it was suggested that if they were not actually void under that section, they were at least voidable u/s 53 of the Act at the instance of the plaintiffs who had been eventually defeated and defrauded thereby. Their Lordships held that an issue upon such a question could be raised, and a decree could be made only in a suit properly constituted for the purpose, and that the suit as framed, which was between the purchaser on the one hand and one only of the creditors on the other, was not so constituted either as to parties or otherwise. This view, it may be observed, is in harmony with what has been regarded as the settled rule in England, where it has been held that if the settlor is alive and not a bankrupt at the time the action is brought to set aside a conveyance on the ground that it was voidable under Statute 13 Elizabeth Chap. 5, it should be by a creditor or creditors on behalf of himself or themselves and all other creditors of the settlor: see *Reese River Silver Mining Co. v. Atwell* (1869) L.B. 7 Eq. 347; see also *White and Tudor's Leading Cases on Equity*, 7th Edition, Vol. II, p. 882. The rule appears to us to be based upon a perfectly sound and intelligible principle. To allow one creditor to impeach the validity of a conveyance would expose the transferee to separate attacks by different creditors, each of whom might litigate the same question in a different suit, and it is not inconceivable that the Court might arrive at different conclusions in different suits brought at the instance of different creditors. We must, therefore, hold that if the present suit be regarded as commenced u/s 63 of the Transfer of Property Act, with a view to obtain a declaration that the conveyance in question is voidable at the instance of the creditors of the transferor, the suit has not been properly framed and is not maintainable. It was argued, however, by the learned vakil for the plaintiff-respondents that as this objection to the frame of the suit was not taken in the Court below, it is too late for the appellants to raise it now, and that in any event, if the objection prevail the plaintiffs ought to be allowed an opportunity to amend (sic) plaint, so as to make this a suit on behalf of themselves all other creditors of the transferor. It cannot be disputed that there is considerable force in this contention. Although, therefore, we must hold that the second ground taken on behalf of the appellants ought to prevail, we are not disposed to dismiss the suit on this ground alone, and we must consequently examine the validity of the third ground upon which the judgment of the Subordinate Judge is assailed.

5. The third ground taken on behalf of the appellant was that, as the transfer was for adequate consideration, as it was not a mere cloak for the ultimate benefit of the transferor himself, and as most of the debts which were satisfied out of the consideration for the deed were secured by mortgages, the transaction is not voidable u/s 53 of the Transfer of Property Act. In support of this position,

reliance was placed on the cases of *Alton v. Hairison* (1869) L.R. 4 Ch. 622, *Ex-parte Games* (1879) 12 Ch.D. 814, *Wood v. Dixie* (1845) 7 Q.B. 892 ; 68 R.R. 590, *Sankarappa v. Kumayya* (1866) 8 Mad. H.C. 231, *Tillak Chand Hindumal v. Jita Mal Sudoram* (1873) 10 B H.C. 206, *Rajan Harji v. Ardeshir Hormusji Wadia* (1879) ILR 4 Bom. 70, *Bhagwant v. Kedari* (1900) ILR 25 Bom. 202, *Hanifa Bibi v. Punnamma* (1906) 17 M L.J.R. 11, *Mahammadunissa Begum v. Bachelor* (1905) ILR 29 Bom. 428, *Rama Samia Pillai v. Adi Narayana Pillai* (1897) ILR 20 Mad, 465. It was contended on the other hand by the learned vakeel for the plaintiffs respondents that it was not enough to examine whether the conveyance which is the foundation of their title was for consideration, but that the Court must also investigate whether or not it was bond fide, and in support of this proposition reliance was placed upon a passage from the judgment of this Court in the case of *Ishan Chunder Das Sarkar v. Bishu Sirdar* (1897) ILR 24 Calc. 825.

6. We are of opinion that, in order to establish the validity of a conveyance impeached as fraudulent on creditors, it is not enough to prove that it was for consideration: it must also be proved that it was made in good faith. The question however, remains under what circumstances may a transfer be said to have been made in good faith: to determine this, we have to consider the provisions of Section 53 of the Transfer of Property Act. That section, in so far as it applies to the present case, provides that every transfer of Immovable property made with intent to defeat or delay the creditors of the transferor is voidable at the option of any person so defrauded, defeated or delayed; but this does not impair the rights of any transferee in good faith and for consideration. The section, as is well known, is founded upon Statute 13 Eliz. Ch. 5, although there has been some divergence of judicial opinion as to how far the Indian law as comprised in Section 53 of the Transfer of Property Act was intended to vary from the English law as laid down in the Statute of Elizabeth: see *Bhagwant v. Kedari* (1900) ILR 25 Bom. 202, and *Ishan Chunder Das Sarkar v. Bishu Sirdar* (1897) ILR 24 Calc. 825, the former of which supports the view that the section under consideration did not alter the pre-existing law governing these matters, and the latter supports the view that although the Statute of Elizabeth forms a substantial part of the groundwork, of see 53, its language is different, and the Indian Code goes much further than the English Statute. One point, however, is fairly beyond the domain of controversy. The third paragraph of Section 53, which lays down that nothing contained in the section shall impair the rights of any transferee in good faith and for consideration, is based upon Stat. 13 Eliz. Ch. 5, Section 6, which protects transfers made "upon good consideration and bond fide." We may take it therefore that the Legislature when it used the words "good faith" in Section 53, did not intend to depart from the interpretation which had been put upon the term bond fide in the Statute of Elizabeth. Reference to English authorities under these circumstances is not only legitimate but essential; as was observed in *Mansell v. Reg*(1867) 8 E. & B. 54, 73 ; 27 L.J., M.C. 4, if a statute upon which a particular construction has been long put is re-enacted *ipsissimis verbis*, this construction must be considered to have the

sanction of the Legislature; likewise, if Acts are framed using the forms of words or clauses in prior Acts which have received judicial construction, unless a contrary intention appears, the Courts will presume that the Legislature has adopted the judicial interpretation, or has used the words in the sense attributed to them by the Courts; this view is amply supported by the observation of James, L.J. in *Ex-parte Campbell* (1870) L.B. 5 Ch., 703, and of Lord Coleridge, C.J. in *Barlow v. Teal* (1885) 15 Q.B.D., 403, and is in no way inconsistent with the rule laid down in *Bank of England v. Vagliano* [1891] A.C. 107 and *Norendra Nath Sircar v. Kamalbasini Dasi* (1896) ILR 23 Calc. 563 to the effect that the language of an enactment by which the law is codified must receive its natural meaning without an assumption that the probable intention of the Legislature was to leave unaltered the law as it existed before. If we turn, therefore, to the leading authorities in England, upon the matter, we find that in *Middleton v. Pollock* (1876) 2 Ch. D. 104, 108, Sir George Jessel observed that the meaning of the statute is that the debtor must not retain a benefit for himself; it has no regard whatever to the question of preference or priority among the creditors of the debtor. A settlement, therefore, which preferred certain creditors and tended to defeat others, might be good under the Statute of Elizabeth. Nor again is it material under that Statute, whether the assignment by the debtor is of the whole of his property, present or future, or of any part of it. Again, Lord Justice Thesiger in *Ex-parte Games* (1879) 12 Ch.D. 324 quotes with approval the words of Griffard, L.J. in *Alton Harrison* (1869) L.B. 4 Ch. 622, 626: "I have no hesitation in saying that it makes no difference in regard to the Statute of Elizabeth whether the deed deals with the whole or only a part of the grantor's property. If the deed is bond fide, that is, if it is not a mere cloak for retaining a benefit to the grantor, it is a good deed under the Statute of Elizabeth." It is clear therefore that a deed is bond fide within the meaning of the Statute of Elizabeth, if it is not a mere cloak for retaining a benefit to the grantor. A similar construction has been put upon Section 53 of the Transfer of Property Act. Thus in *Natha v. Magan Chand* (1903) ILR 27 Bom. 322, Mr. Justice Chandavarkar pointed out that the test of good faith is whether the transfer is a mere cloak for retaining a benefit to the grantor, or whether it was intended thereby that the grantee should have the property and keep it. The same view was adopted in the case of *Mahammadunissa v. Bachelor* (1905) I.L.R., 29 Bom. 428, in which the learned Judges observed that the test of good faith is whether it was a genuine or colourable transaction, and pointed out that, as laid down by Denman, C.J. in *Wood v. Dixie* (1845) 7 Q.B. 892 ; 68 R.R. 590, if a conveyance is made bond fide and with a full intention that the property should be parted with, it will not be fraudulent, if made with intent to defeat a pending or an intended execution, for such a motive does not defeat the assignment. Substantially the same view appears to have been adopted under the law as it existed before Section 53 of the Transfer of Property Act was added to the statute-book. As an example, reference may be made to *Sankarappa v. Kamayya* (1868) 8 M H.C. 231, where it was ruled that if there is a real transaction between the parties for valuable consideration, whether it be by way of sale or mortgage, the transaction is valid

even as against a creditor, though the object may have been to defeat an expected execution. To the same effect are the cases of *Tillak Chand v. Jita Mal* (1873) 10 B H.C. 206, *Rajan Harji v. Ardeshir* (1879) ILR 4 Bom. 70, and *Rama Sami Pillai v. Narayanan* (1897) ILR 20 Mad. 465. If the test laid down in these cases is applied to the circumstances of the present litigation, it is obvious that the plaintiffs are inevitably placed out of Court. It has not been and cannot be disputed that the transfer was for adequate consideration, and was in no sense a mere cloak for the benefit of the grantor; it must be taken, therefore, that the transaction was not only for consideration, but was also entered into in good faith, and cannot consequently be successfully assailed.

7. Our attention, however, was invited to a passage in the judgment of this Court in the case of *Ishan Chunder Das Sarkar v. Bishu Sirdar* (1897) ILR 24 Cal. 825, in which the learned Judges overruled the extreme contention that all that is necessary to impress upon a transfer the character of good faith within the meaning of see 53, is to prove that the transfer is real, and that although the transferee may share the intention of the transferor to defeat or delay the creditors, he is still a transferee in good faith. It was argued by the learned vakils for the appellants that the rule thus laid down in *Ishan Chunder Das Sarkar v. Bishu Sirdar* (1897) ILR 24 Cal. 825 is inconsistent with what has been accepted as the settled construction of the Statute of Elizabeth, and, in support of this view, reliance was placed upon *Wood v. Dixie* (1845) 7 Q.B. 892 and *Hale v. Saloon Omnibus Co.* (1859) 4 Drew. 492 ; 28 L.J. Ch. 777. After careful examination of these and other cases to which we shall presently refer, we are not prepared, however, to hold that they lay down any inflexible rule which might rightly be regarded as in conflict with the observations contained in the judgment of this Court in *Ishan Chunder Das Sarkar v. Bishu Sirdar* (1897) ILR 24 Cal. 825. The decision in *Wood v. Dixie* (1845) 7 Q.B. 892 goes no further than determining that the intent to defeat a particular creditor in the case of a bond fide sale for value does not, per se as a matter of law, render the conveyance fraudulent. We may refer to the judgments in *In re Moroney* (1888) L.B. 21 Ir. 27, in which the case of *Wood v. Dixie* (1845) 7 Q.B. 892 is analysed and the true foundation of the decision explained. We agree with the observations of Pallett, C.B. that if the intent of the transferor is not only to sell the property but forthwith to abscond with the proceeds so as in effect to withdraw the property from the fund available for the creditors without providing an equivalent, in such cases there would be an intention to defraud creditors which, if the purchaser had notice of it, would avoid the sale. To put the matter in another way, although a transfer, which is a mere cloak for the retention in the grantor of a benefit in the property transferred, is not a transfer in good faith, the test is by no means-exhaustive; there may be cases in which the transferee is intended to take an absolute title in the property, but the object of the transfer is to convert land into money and thus place it beyond the reach of the creditors of the grantor; a transfer of this description cannot legitimately be regarded as a transfer made in good faith. A similar view appears to have been adopted by the learned-Judges

of the Madras High Court in *Chidambaram Chettiar v. Sami Aiyar* (1906) ILR 30 Mad. 6, when they declined to give effect to the contention that, whenever there is any real consideration, however small, for the transfer, the question of intention is immaterial, and the transaction must be held to be one entered into in good faith and therefore not inoperative as against creditors, even though it was in fact intended to delay or defeat creditors and had the intended effect. After a careful examination of the authorities on the subject, we are disposed to hold that under the Transfer of Property Act, as under the Statute of Elizabeth, good faith as well as consideration is made in terms an essential condition of the validity of a transfer, and that there may be cases in which a transfer, although made for consideration, may be voidable on the ground that it was made *mala fide*; in other words, in the language of Lord Coke, "a good consideration doth not suffice if it be not also *bond fide*": *Twyne's case* (1602) 1 Smith L.C. 1.

8. The distinction is supported by a considerable body of authorities. Lord Mansfield said in discharging a rule for a new trial in *Cadogan v. Kennett* (1776) 2 C 482: "If the transaction be not *bond fide*, the circumstance of its being done for a valuable consideration will not alone take it out of the statute. I have known several cases where persons have given a fair and full price for goods, and where the possession was actually changed, and yet being done for the purpose of defeating creditors, the transaction has been held fraudulent and therefore void." To the same effect are his observations in *Worsely v. De Mattos* (1758) 1 Burr. 467, in which he said that if a man, knowing that a creditor has obtained a judgment against his debtor, buys the debtor's goods for a full price to enable him to defeat the creditor's execution, it is fraudulent. Since the time of Lord Mansfield, conveyances founded upon adequate consideration have been held fraudulent by reason of the bad faith of the participants, and the principle has become one of vital interest and paramount importance to the parties concerned. That a conveyance whether it be of real or personal property, founded upon adequate consideration, may be avoided and annulled at the suit of creditors for fraud, is established in an endless variety of cases: see, for instances, *Halbird v. Anderson* (1793) 5 Term R. 235, *Piclcstock v. Lyster* (1815) 3 M. & S. 371 ; 16 R.R. 300, *Corlett v. Radcliffe*, (1860) 14 Moo. P.C. 121, 136, *Bott v. Smith* (1856) 21 Beav. 511, *Golden v. Gillam* (1831) 20 Ch. D. 389, 392, *In re Sinclair* (1884) 26 Ch. D. 319, 338, *Grover v. Wakeman* (1834) 11 Wendell 192, *Stinson v. Hawkins* (1882) 4 Mc. Cray 500 ; 18 Fed. Rep. 833. The same view has been adopted in the American Courts. In *Woolsworth v. Willana* (1808) 100 Mass. 130, Mr. Justice Hoar in delivering the opinion of the Supreme Court of Massachusetts said: "A conveyance made with an actual purpose and intent to defraud creditors, present or future, is not valid against them in favour of a grantee who participates in that fraudulent intention, although made for a full consideration and by a grantor in the possession of any amount of property." The distinction is brought out nowhere more concisely and effectively than in the judgment of Black, C.J. in *Coranhovan v. Hart* (1853) 21 Pa. St. 500 ; 60 Am. Dec. 57 in which that learned Judge observes as follows; "If a debtor with the purpose of

cheating his creditors, convert his lands into money, because money is more easily shuffled out of sight than land, he, of course, commits a gross fraud. If his object in making the sale is known to the purchaser, and he nevertheless aids and assists in executing it, his title is worthless as against creditors, though he may have paid the full price. But the rule is different when property is taken for a debt. One creditor of a failing debtor is not bound to take care of another. It cannot be said that one is defrauded by the payment of another. In such cases, if the assets are not large enough to pay all, somebody must suffer. It is a race in which it is impossible for every one to be foremost." To the same effect is the decision in *Werner v. Zierfuss* (1894) 162 Pa. St. 366 ; 29 A R737. The view taken in these cases appears to be substantially identical with the view adopted by this Court in *Ishan Chunder v. Bishu Sirdar* (1897) ILR 24 Calc. 825, in which the learned Judges observed that a transferee for value, who accepts the transfer for the purpose of helping the transferor to convert his Immovable property into money which can easily be concealed and kept, out of the reach of his creditors and thus defeat or delay the creditors, is not a transferee in good faith within the meaning of Section 53. The rule, however, as we have just pointed out, does not apply to the case in which a creditor takes property in satisfaction of an existing debt, although the effect of the transfer to him is to defeat or delay the other creditors of the transferor. It is well settled that in the absence of a Bankruptcy Act, a debtor may make preference amongst his creditors even to the extent of transferring all his property to one creditor to the exclusion of the others. The object of a Bankruptcy Act, so far as creditors are concerned, is to secure, as far as practicable, equality of distribution of property of the bankrupt among them; this, however, is not the object of Section 53 of the Transfer of Property Act. It is firmly settled in England that a debtor, provided the transaction is not invalidated as a fraud-lent preference under the Bankruptcy law, may openly prefer a particular creditor to the rest, and may transfer property to him for the bona fide purpose of discharging his debt, even after the other creditors have brought actions or recovered judgment, and such transfers are not void under the Statute of Elizabeth against the preferred creditors: *Alton v. Harrison* (1869) L.R. 4 Ch. 622 *Halbird v. Anderson* (1793) 6 T. R. 235, *Estwick v. Caklaud* (1793) 5 Term. R. 420, *Exp. Elliott* (1876) 2 Ch. D. 104, *Exp. Games* (1879) 12 Ch. D. 314, *Mnskeiiput & Cooke v. Smith* [1902] 2 K.B. 168, *Morris v. Morris* [1895] A.C. 625. The learned Subordinate Judge, when he relied upon passages from Benjamin on Sales, 5th Ed., Book III, Chap. III Section IV, pp. 494-6, overlooked this distinction and the history and policy of the Bankruptcy laws in England: *Nunes v. Carter* (1866) L.R.I.P.C. 342, 848, *Parker on Frauds on Creditors*, Ch. VII, X and XIII. This is in accordance with the view taken in the oases of *Bhagwant v. Kedari* (1900) ILR 25 Bom. 202 and *Chidambaram v. Sami Aiyar* (1906) ILR 30 Mad. 6, the principle of which appears to us to be consistent with the rule of justice, equity and good conscience. The law favors and rewards the vigilant and active creditor. The right of a debtor to devote his whole estate to the satisfaction of the claims of particular creditors results, as Chief Justice Marshall, declares, from that absolute ownership which

every man claims over that which is his own: *Brashear v. West* (1833) 7 Peter 608, 618. If while a man retains his property in his own hands, the right of giving preference should be denied, he would so far lose the dominion over his own that he could not pay anybody, because whoever he paid, would receive a preference. It makes no difference that the creditor and debtor both knew that the effect of the application of the property to the satisfaction of a particular claim would be to deprive other creditors of the power to reach the debtor's property by legal process or enforce satisfaction of their claims. If there is no secret trust agreed upon or understood between the debtor and creditor in favor of the former, but the sole object of the transfer is to pay or secure the payment of a debt, the transaction is a valid one. It cannot rightly be said that a conveyance of property which pays one creditor his just debt and nothing more, is fraudulent as against other creditors of the common debtor. The mere preference in payment of one honest creditor over another is no evidence of fraudulent intent: *Abegg v. Bishop* (1894) 142 New York 289, The distinction is between a transfer of property made solely by way of preference to one creditor over others, which is legal, and a similar transfer made with a design to secure some benefit or advantage from it to the debtor, which is fraudulent: *Bonfield v. Whipple* (1867) 14 Allen 13 (Mass), *Giddings v. Sears* (1874) 115 Mass. 507. In the fair race for preference, if a creditor by diligence secures some advantage, it should be maintained; but if his purpose is not to realise his debt but to help the debtor to cover up his property, he can not shield himself by showing that his debt was bond fide: *Smith v. Schiwed* (1881) 9 Fed. Rep. 483. This view is also supported by the case of *In re Moroney* (1838) L.R. 21 Ir. 27 in which Palles, C.B., observed as follows with reference to the Statute of Elizabeth: "Its object was to protect the rights of creditors as against the property of their debtor, and not to regulate the rights of creditors inter se, or to entitle them to an equal distribution of their property. The right of the creditors taken as a whole is that all the property of the debtor should be applied in payment of demands of them, or some of them, without any portion of it being parted with without consideration or reserved or retained by the debtor to their prejudice. It follows from this, that security given by a debtor to one creditor upon a portion of, or upon all his property, although the effect of it, or even the intent of the debtor in making it, may be to defeat an expected execution of another Creditor, is not a fraud within the statute; because notwithstanding such an act, the entire property remains available for the creditors or some or one of them, and as the statute gives no right to rateable distribution, the right of the creditors by such act is not invaded or affected."

9. Upon a review then of the authorities, and upon an examination of the principles which underlie them, we are of opinion, that the following rule is delucible:--A. conveyance or transfer, whether founded on a valuable or adequate consideration or not if entered into by the parties thereto with the intent to hinder, delay or defraud creditors, is void as to them: *Bott v. Smith* (1856) 21 Beav. 511, *Harman v. Richards* (1852) 10 Hare 81, *Corlett v. Radcliff* (1860) 14 M. P.C. 121, *Chandler v. Von Reader* (1860) 24 Howard 224,

Alexander v. Todd (1853) 1 Bonl. 175 ; 1 Fed. Cas., 383, Gilmore v. North American Land Co. (1817) P C.C. 460 ; 10 Fed. Cas. 413, Parrish v. Dariford (1830) 1 Bond. 345 ; 18 Fed. Cas. 1231. It is not enough, in order to support a conveyance or transfer as against creditors, that it be made for a valuable consideration; it must also be bond fide: Blennerhansstt v. Sheffman (1881) 105 U.S. 100. When it appears that the parties to a transaction impugned for fraud were actuated by a motive which is denounced as fraudulent, namely a motive to hinder, delay or defraud creditors, it is utterly immaterial how valuable a consideration may have passed from the grantee or transferee, for the conveyance is nevertheless void in law: Macdonald v. Hoover (1898). 142 Missouri 484 ; 44 S.W. 334. A mere fraudulent intent on the part of the grantor alone will not invalidate the transfer, if it is for valuable consideration, and there is no want of good faith on the part of the grantee. Where, however, the transferee is himself a creditor, he occupies a more favored position: Bamberger v. School field (1895) 160 U.S. 149. In the absence of a law of bankurptcy, a preferential transfer of property to one creditor cannot be declared fraudulent as to other creditors, although the debtor in making it intended to defeat their claims, and the creditor had knowledge of such intention; if the only purpose of the creditor is to secure his debt, and the property is not worth materially more than the amount of the debt, the transaction is not fraudulent. If, however, the transfer is not in reality a preference of an actual debt, but is ft mere colorable device to place the debtor's property beyond the reach of his creditors, or if the transaction extends beyond the necessary purpose of a mere preference, so as to secure to the debtor some benefit or advantage, or to unnecessarily hinder and delay other creditors, the transfer is fraudulent. The preferred creditor participates in the fraudulent intent of the debtor, where his purpose is not to secure the payment of his own debt, but to aid the debtor in defeating other creditors, in covering up his property, in giving him a secret interest therein, or in looking it up in any way for the debtor's own use and benefit. Proof of a valid indebtedness does not necessarily disprove the existence of a fraudulent intent. The reasons for the distinction between one who purchases for a present consideration and one who purchases in satisfaction of a pre-existing debt have been very clearly formulated in the case of Lockrain v. Bastan (1899) 9 ND 434 ; 81 N.W. 60. "A person who purchases for a present consideration is in every sense a volunteer; he has nothing at stake, no self-interest to serve; he may with perfect safety keep out of the transaction. Having no motive of interest prompting him to enter into it, if yet he does enter, knowing the fraudulent purpose of the grantor, the law very properly says that he enters into it for the purpose of aiding that fraudulent purpose. Not so with him who takes the property in satisfaction of a pre-existing indebtedness; he has an interest to serve; he can keep out of the transaction only at the risk of losing his claim. The law throws upon him no duty of protecting other creditors. He has the same right to accept voluntary preference that he has to obtain a preference by superior diligence; he may know the fraudulent purpose of the grantor, but the law sees that he has a purpose of his own to serve, and if he goes no further than is

necessary, to serve that purpose, the law. "will not charge him with fraud by reason of such knowledge." These reasons appear to us to be sound and unassailable, and we adopt them in justification of the principle laid down by us.

10. If now we apply these principles to the facts of the case before us, it is incontestable that the claim of the plaintiffs is unfounded. It cannot be disputed that the conveyance in favour of Lala Hakim Lal is for adequate consideration. It has been conclusively proved that the debts for the satisfaction of which the transfer was made were genuine debts, and they have all been discharged out of the consideration for the conveyance. It has also been satisfactorily established that the consideration for the deed represented the value of the properties transferred.

11. Under these circumstances, it is impossible to hold that the conveyance was voidable at the instance of the plaintiffs.

12. The result, therefore, is that Appeal No. 433 of 190,4 must be allowed, the decree of the Subordinate Judge reversed;;and the suit dismissed with costs in both the Courts.

13. The effect of our decision is that the plaintiff-respondents will be at liberty to execute their decree against the properties, included in the conveyance executed by their judgment-debtors in favour of Kamta Prosad on the 2nd September 1901, but they cannot proceed against the properties which were, on the same day, conveyed to Lala Hakim Lal.