

(1914) 06 CAL CK 0032
In the Calcutta High Court

Nripendro Nath Shahoo and Gopinath Mandal	APPELLANT
Vs	
Ashutosh Ghosh and Others	RESPONDENT

Date of Decision : 04-06-1914

Acts Referred:

Provincial Insolvency Act, 1920 — Section 37(1), 5

Citation : AIR 1915 Cal 460 : 29 Ind. Cas. 128

Hon'ble Judges : Beachcroft, J; Asutosh Mookerjee, J

Bench : Division Bench

Judgement

Asutosh Mookerjee, J.—These appeals are directed against an order u/s 37 of the Provincial Insolvency Act. On the 4th December 1911, Nilratan Mandal and his four brothers executed a mortgage for Rs. 9,000 in favour of one of their unsecured creditors, Nripendra Nath Sahu. On the 27th December 1911 and 14th February 1912, they executed two other mortgages, one for Rs. 6,000 and another for Rs. 10,000, in favour of their unsecured creditor Gopinath Mandal. On the 19th February 1912, a third creditor, Kissen Chand Kessari Chand, applied to the District Judge u/s 5 of the Provincial Insolvency Act so that the mortgagors might be adjudicated insolvents. The application was granted and a local Pleader, Babu Ashutosh Ghose, was appointed Receiver. In due course on the 26th September 1912, the Receiver applied to the Court to take action u/s 37 and to annul the three mortgages mentioned. This application was granted on the 30th January 1913, and the present appeals, which have been preferred by the two mortgagees separately, are directed against that order. The District Judge has found that when Nilratan Mandal executed and registered the deeds, he knew that he was not in a position to pay his debts, and that, consequently, the mortgages must be declared fraudulent and void as against the Receiver. This decision of the District Judge has been assailed before us, on the ground that all the elements necessary to justify an order for avoidance of the mortgages u/s 37 have not been established, and that the requirements of that section have not been fully appreciated. In our opinion, this contention is well-founded and the case must be re-tried.

2. Sub-section (1) of Section 37 of the Provincial Insolvency Act--we quote so much only of the sub-section as applies to the present case--provides as follows: "Every transfer of property or of any interest therein.... by any person unable to pay his debts, as they become due, from his own money, in favour of any creditor with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the Receiver and shall be annulled by the Court." It is plain that before a transfer by a debtor of any interest in his property is avoided under this section, four conditions must be fulfilled, namely, first, the debtor must, at the date of the transaction, be unable to pay from his own money his debts as they fall due; secondly, the transaction must be in favour of a creditor or of some person in trust for a creditor; thirdly, the debtor must have acted with the view of giving such creditor a preference over his other creditors; and fourthly, the debtor must be adjudged an insolvent on an insolvency petition presented within three months after the date of the transaction sought to be impeached. There is no dispute that the second and fourth elements are present in the case before us. The mortgagees were creditors of the mortgagors on the dates when the mortgage instruments were executed; the promissory notes on which they had previously advanced moneys to the Mandals were unpaid on those dates : these have been produced and proved to represent genuine transactions. There is also no question that the insolvency petition was presented by the creditor on the 19th February 1912, that is, within three months after the earliest of the three mortgages impeached. The controversy has thus centered round the first and third conditions. Before we discuss the requirements of these two conditions, we may point out, however, that where an act is impeached as a fraudulent preference the onus of proof lies on the Receiver Expte Lancaster, *In re Manden* (1883) 25 Ch. D. 311: 53 L.J. Ch. 1123 : 50 L.T. 223 : 35 W.R. 4488] and it has been said Laurie, Ex parte Green (1898) 5 Man 48 : 67 L.J.Q.B. 431 : 46 W.R. 491] that the burden of proof lies on the Receiver, even if the debtor was insolvent at the time of the payment and knew himself to be so, though the view has been indicated that in such a case the onus might shift: *In re Eaton and Company, Ex parte Viney* (1897) 2 Q.B. 16 : 66 L.J.Q.B. 491 : 4 Man 111 *In re Lake, Ex parte, Dyer* (1901) 1 K.B. 710 : 70 L.J.K.B. 390 : 84 L.T. 4439 : 49 W.R. 291 : 8 Man 145 : 17 T.L.R. 296.

3. The first point for consideration is, whether the mortgagors were, on the dates of the mortgage transactions, able to pay from their own money their debts as they fell due. The evidence on the record does not enable us to pronounce an opinion upon this matter. There were, it must be remembered, three mortgages of the 4th December 1911, 27th November 1911 and 14th February 1912. Each of these transactions has to be tested from the point of view of the condition mentioned, and it is quite conceivable that the mortgagors, though not able to pay from their own money their debts as they fell due on the 14th February 1912, might have been in a very different position more than two months earlier,

on the date of the first of the three mortgages. Two factors must plainly be taken into account on the date of each transaction, namely, what were the debts payable by the mortgagors on that date, and, what was the money then available to them to pay such debts? In this connection, it may be pointed out that in the determination of the question whether a person is able or unable to pay his debts as they become due from his own money, the fact that he has money locked up which, at a later period, may be available for the payment of his debts is immaterial : *Washington Diamond Co. In re* (1898) 3 Ch. 95 : 62 L.J. Ch. 895 : 69 L.T. 27 : 41 W.R. 681. The question, therefore, whether the debtors were, at the date of each of the three mortgages impeached, unable to pay, from their own money, their debts as they fell due, must be investigated.

4. The second point for consideration is whether the debtors acted with the view of giving the mortgagees a preference over their other creditors. Here again, the case of each mortgagee and of each transaction with him has to be separately considered in the light of the surrounding circumstances on the several dates. A particular transaction may be set aside as a fraudulent preference, only if it is proved that it was carried out with the substantial or dominant view of giving the creditor a preference over the other creditors: *Ex parte Griffith, Wilcoxon, In re* (1883) 23 Ch. D. 69 : 52 L.J. Ch. 717 : 48 L.T. 450 : 31 W.R. 878 *Ex parte Hill, Bird, In re* (1883) 23 Ch. D. 695 : 52 L.J. Ch. 903 : 49 L.T. 278 : 32 W.R. 177. This need not be the primary result aimed at it is sufficient that it should be the object aimed at infringing about the primary result: *Ex parte Taylor, Goldsmid, In re* (1886) 18 Q.B.D. 295 : 56 L.J.Q.B. 195 : 335 W.R. 148 *New's Trustee v. Hunting* (1897) 2 Q.B. 19 66 L.J.Q.B. 554 : 45 W.R. 577 : 76 O.T. 742 : 4 Man 03. If the transaction can properly be referred to some other motive than that of giving the particular creditor a preference over the other creditors, the payment is not fraudulent, because the invalidity of the transaction arises from the intention on the part of the debtor to act in fraud of the Bankruptcy Law, that is, to prevent the distribution of his property rateably among all his creditors *Bills v. Smith* (1865) 6 B. and S. 314 : 34 L.J.Q.B. 68 : 11 Jur. (N.S.) 154 : 12 L.T. 22 : 13 W.R. 407 : 122 E.R. 1211 : 141 R.R. 421. To ascertain whether the giving of a preference to the particular creditor, that is, putting that creditor in a better position relatively to the other creditors than that in which he would be placed by the Bankruptcy Law *Bowrne v. Graham* (1856) 2 Jur. (N.S.) 1225 was the dominant view in the debtor's minds, the proper test to be applied is, was the act done voluntarily, a question the solution of which depends primarily on the inquiry, from which party did the proposition originate: *In re Eaton and Co., Ex parte Viney* (1897) 2 Q.B. 710 : 70 L.J.K.B. 390 : 84 L.T. 430 : 49 W.R. 29 : 8 Man 145 : 17 T.L.R. 296, *In re Vautin; Saffery, Ex parte* (1900) 2 Q.B. 325 : 69 L.J.Q.B. 703 : 82 L.T. 722 : 48 W.R. 652 : 7 Man 291. A voluntary disposition is an act moving from the debtor; the question, consequently, in most cases, if not always, is--did the thing move from the debtor or from the creditor? *Ex parte Deetastet* (1810) 17 Ves. 247 : 34 E.R. 95 : 11 R.R. 70 *Strachan v. Barton* (1856) 11 Exch. 647 : 25 L.J. Ex. 182 : 4 W.R. 292. If it moves entirely from the

debtor, in the sense that it was his spontaneous act uninfluenced by any circumstances which tend to rebut the presumption that the bankrupt made a distinction among his creditors, then the transaction will be condemned as a fraudulent preference: *Ex parte Tempest*, *Graven*, *In re* (1870) 6 Ch. App. 70 : 40 L.J. Bk. 22 : 23 L.T. 650 : 19 W.R. 137 *Bills v. Smith* (1865) 6 B. & S. 314 : 34 L.J.Q.B. 68 : 11 Jur (N.S.) 154 : 12 L.T. 22 : 13 W.R. 407 : 122 E.R. 1211 : 141 R.R. 421. If on the other hand, the proposal for the payment or the disposition of the property comes entirely from the creditor and is not collusive, the transaction will stand: *Grosbn v. Crouch* (1809) 11 East 256 : 2 Camp 166 : 103 E.R. 1003 *Ex parte Hall*, *Cooper*, *In re* (1882) 19 Ch. D. 580 : 51 L.J. Ch. 556 : 46 L.T. 549. To take one illustration if it is established that the transaction was the result of real pressure brought to bear on the debtor by a creditor, it cannot be deemed his spontaneous act: *Tomkins v. Saffery* (1870) 3 A.C. 213 : 47 L.J. Bk. 11 : 37 L.T. 758 : 26 W.R. 62 *Butcher v. Stead* (1875) 7 H.L. 839 : 44 L.J. Bk. 129 : 33 L.T. 541 : 24 W.R. 463 *Sharp v. Jackson* (1899) App. Cas. 419 : 68 L.J.Q.B. 866 : 80 L.T. 841 : 6 Man 264 : 15 T.L.R. 418 *Joakim v. Secretary of State* 3 A. 530 for as *Loru Cairns* said in *Butctur v. Stead* (1870) 3 A.C. 213 : 47 L.J. Bk. 11 : 37 L.T. 758 : 26 W.R. 62 the use of the word "preference" implies an act of free will, so that there can be no preference where the act is the result of pressure. The pressure, as we have said, must have been real, that is, it must have operated on the mind of the debtor as the dominant influence affecting him: *Boyd*, *Ex parte*, *Boyd*, *In re* 6 *Morrell*, *Official Receiver*, *Ex parte*, *Bell*, *In re* (1892) 10 *Mor* 15 and it must not have been fraudulent, *Ex parte* *Reader*, *Wrightley* *In re*: I (1875) 20 *Eq.* 763 : 44 L.J. Bk. : 139 : 33 L.T. 36; *Miller v. Sheo Prasad* 10 *L.A.* 98 : 6 *A.* 84 : 13 *C.L.R.* 305 : 4 *Sar P.C.* 7. 430; *Phulchand v. Miller* 7 *A.* 340 : *A.W.N.* (1885) 33. In the case of *Official Receiver*, *Ex parte*, *Bell*, *In re* (1892) 10 *Mor* 15 it was observed that the preference is fraudulent, if it is established that, notwithstanding that the payment or disposition might never have been made but for the importunity of the creditor, it is also a fact that the payment never would have been made but for the desire to prefer *Brown v. Kernpson* (1850) 19 *L.J.C.P.* 169 *Graham v. Candy* (1862) 3 *F. and F.* 206; *Ex parte Hall*; *In re*: *Cooper* (1882) 19 *Ch. D.* 580 : 51 *L.J. Ch.* 556 : 46 *L.T.* 549. To take another illustration, the presumption of fraudulent intention may be repelled, if it be apparent that the debtor acted in fulfilment of a prior agreement: *Halliday v. Holgate* (1867) 17 *L.T.* 18 *Ex parte Kevan*; *In re*: *Crawford* (1874) 9 *Ch. Ap.* 752 *Ex parte Mackenzie Bent*, *In re*: (1873) 28 *L.T.* 486 42 *L.J. Bk.* 25 *Ex parte Hodgkin* *In re*: *Softley* (1875) 20 *Eq.* 746 : 44 *L.J. Bk.* 107 : 33 *L.T.* 62 : 24 *W.R.* 68. But it will not suffice to prove that the debtor jwas moved by a mere sense of honour or a sense of duty-or of morn 1 obligation, or that the acted from motives of kindness or of gratitude. *Suffolk*, *Ex parte*, *Fletcher*, *In ie* (1891) 9 *Morrell* 8, *Vingoe*, *In re*, *Viney*, *Ex parte* 1 *Manson*, 416, *Bhluckburn of Co.*, *In re* (1899) 2 *Ch.* 725 : 68 *L.J. Ch.* 764 : 81 *L.T.* 520 : 48 *W.R.* 186 : 7 *Nan* 47 *In re Juices*, *Ex parte Official Eeceiver* (1902) 2 *K.B.* 58 : 71 *L.J.K.B.* 710 : 86 *I.T.* 456 : 50 *W.R.* 560 : 9 *Man* 249. In every case, as was said in *Sharp v. Jackson* (1839) App. Cas. 419 : 68 *L.J.Q.B.* 866 : 80 *L.T.* 841 : 6

Man 264 : 15 T.L.R. 418 the state of mind of the debtor is the paramount consideration; the intention or view to prefer the creditor as the causa causans of the debtor's conduct is the cardinal point round which the whole question turns: In re Ramsay, Ex parte Deacon (1913) 2 K.B. 80 : 82 L.J.K.B. 526 108 L.T. 495 : 20 Man 15 : 29 T.L.R. 225. The case before us has not been considered from this point of view, and the facts must be fully investigated before an order of annulment can be made.

5. We may add that, on behalf of the appellants, a strenuous effort was made to sustain the view that if the creditor has acted in good faith and in ignorance of the intention of the debtor, he is protected from the operation of Section 37. In our opinion this contention is not well founded, as u/s 37 of the Provincial Insolvency Act, which is substantially identical with Section 18 of 46 and 47 Vict. c. 52, good faith on the part of the creditor affords him no protection, where the intention of the debtor to give (him) a preference is established, although Sub-section 2 of Section 37 protects a person who, in good faith and for valuable consideration, has acquired a title through or under a creditor of the insolvent: see Davison v. Robinson (1857) 3 Jur. (N.S.) 79 1; (1875) 7 H.L. 839 : 44 L.J. Bk. 120 : 33 L.T. 541 : 24 W.R. 463 and Sharp v. Jackson (1839) App. Cas. 419 : 68 L.J.Q.B. 866 : 80 L.T. 841 : 6 Man 264 : 15 T.L.R. 418 which show how the law on this point in England has undergone a material change in recent years. (Williams on Bankruptcy Practice, eighth Edition, page 258.)

6. The result is that these appeals are allowed, the order of the District Judge set aside and the case remanded to him for re-trial on additional evidence. The costs of these appeals will abide the result. We assess the hearing fee in each case at two gold mohurs.

7. Let the record be sent down as soon as possible.

Beachcroft, J.

8. I agree.