

(1965) 12 KL CK 0003

In the High Court Of Kerala

Case No : A.S. No"s. 544, 594, 595 and 620 of 1961

Smt. Jayanthi Bai and Others

APPELLANT

Vs

Popular Bank Ltd.

RESPONDENT

Date of Decision : 06-12-1965

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Companies Act, 1956 — Section 529, 531, 542

Citation : AIR 1966 Ker 296 : (1966) 36 CompCas 854

Hon'ble Judges : S. Velu Pillai, J;Anna Chandy, J

Bench : Division Bench

Advocate : T.S. Venkiteswara Iyer and R.C. Plappilly, in A.S. No. 544, S. Subramania Iyer and N. Ananthakrishna Iyer, in A.S. No. 594, S. Narayana Potti, N.K. Varkey and P.V. Rajamma, in A.S. No. 595, P.H. Sankaranarayana Iyer and N. Ananthakrishna Iyer, in A.S. No. 620, for the Appellant; Mani J. Meenattor, for the Respondent

Judgement

Velu Pillai, J.—These are four appeals against the order of the learned single Judge allowing C. M. P. 144 of 1958, a petition by the liquidator of the Popular Bank Ltd., u/s 531 of the Companies Act, 1956. That petition was made in B. C. P. 8 of 1956 (E), upon which the Popular Bank Ltd., which may be referred to hereafter as the bank, was ordered to be wound up and in pursuance of which, the liquidation proceedings are now in progress. C. M. P. 144 of 1958 was filed for a declaration, that certain entries as to payments or adjustments in the books of the bank were made by way of fraudulent preferences in favour of some of the creditors of the bank and for ancillary reliefs. The appellants are some of the respondents in C. M. P. 144 of 1958, who as creditors, were found by the learned Judge to have been preferred by the bank. Others like the appellants, who were also found by the same judgment to have been similarly preferred, have submitted to the judgment and have not appealed. The references in this judgment to respondents are as in C. M. p. 144 of 1958.

2. A. S. 544 of 1961 is by respondents 9 and 10, A. S. 594 of 1961 is by the 2nd

respondent, A. S. 595 of 1961 is by the 21st respondent and A. S. 620 of 1961 is by respondents 1 and 13. The bank suspended its business on August 16, 1956. Its winding up was ordered on December 19, 1956, on a petition presented on August 27, 1956. The impugned entries all purport to have been made shortly before the bank suspended its business and at a time when it had not enough money to make payments. They are of a general pattern, which may best be described in the words of the learned Judge. He says in paragraph 2;

"..... the device adopted was to transfer amounts from the accounts of creditors to the accounts of debtors, obviously by some arrangement between the creditor and his chosen debtor so that the debtor instead of the bank became accountable to the creditor in respect of the amount so transferred. No doubt a trusted debtor would be chosen so that the result was that the creditor got his money in full instead of the mere dividend he would get in liquidation. There was a discharge by the debtor to the extent of the amount transferred; and, but for the transfer, the bank could have recovered the amount from the debtor in full and need have paid the creditor only a dividend. Whatever the form, there was, in effect, a payment by the bank to the creditor of the money due to him, a loan by the creditor to his chosen debtor (or some other adjustment), and a payment by the debtor to the bank of the money due from him. In fact in some cases the payment by the bank to the creditor, and by the debtor to the bank, were shown in the books as cash transactions, but they were in truth mere book adjustments, the bank not having enough money to make the payment to the creditor except by such adjustment."

The learned Judge regarded the entries as evidence of payments, declared such payments to be fraudulent preferences, and ordered each of the creditors preferred to pay to the liquidator the amount held to have been paid to him, together with interest and costs.

3. Section 531(1) aforesaid, without its proviso which is not material, reads as follows:

"Any transfer of property, movable or immovable, delivery of goods, payment, execution, or other act relating to property made, taken or done; by or against a company within six months before the commencement of its winding up which, had it been made, taken or done by or against an individual within three months before the presentation of an insolvency petition on which he is adjudged insolvent, would be deemed in his insolvency a fraudulent preference, shall in the event of the company being wound up, be deemed a fraudulent preference of its creditors and be invalid accordingly."

The provision in insolvency to which Section 531(1) makes reference is, in the present case, Section 55 (1) of the Travancore-Cochin insolvency Act, 1955, Act 2 of 1956, which corresponds to Section 54(1) of the Provincial insolvency Act, 1920, and is in these terms:

"Every transfer of property, every payment made, every obligation incurred, and

every judicial proceeding taken or suffered 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 against the receiver and shall be annulled by the Court."

The onus is on the liquidator first to prove, that when the impugned entries were made, the bank was unable to pay its debts as they became due from its own money, that is, was in a state of commercial insolvency. The learned Judge considered this topic in several aspects in paragraphs 10 to 15 of his judgment and held in paragraph 16, that "at least from April 1956 the position of the bank was such that it was unable to pay its debts as they became due from its own money." Nothing that was urged at the bar is sufficient, in our opinion, to shake the reasoning of the learned Judge or affect his conclusion. We therefore, do not propose to dwell at length on the point and shall content ourselves with touching the main aspects and considering the specific arguments addressed to us by learned counsel for the appellants in A. S. 620 of 1961 on the basis of certain documents.

4. A clear insight into the financial condition of the bank and its working from the year 1954 has been furnished by P. W. 2, who had been the Manager of the bank from its inception in the year 1944 till the year 1955. It is seen that from the year 1954, the financial condition of the bank had been gradually deteriorating, that a borrowing had to be made on a repledge of gold security and resolutions had to be passed for further borrowings, that in March, 1956, the second respondent, who had become the General Manager of the bank gave a personal guarantee for 1 3/4 lakhs of rupees and the chairman of the board of directors for Rs. 50000, and obtained credit facilities, that minimum cash balances were not being maintained as per rules and that various devices such as "kite-flying" were resorted to. The evidence of P. W. 2 is corroborated to a large extent by that of R. W. 4.

If as was suggested, P. W. 2 is not a reliable witness, nothing was easier, than for the first appellant in A. S. 620 who was a director of the bank, for the husband of the appellant in A. S. 595 who was also a director of the bank and its legal adviser, and above all for, the 2nd respondent, the appellant in A. S. 594 who was the General Manager of the bank, to get into the box to give rebutting evidence supported by the books of the bank which were all available. On the day before the bank suspended its business, it passed a resolution Ext. D-1 (b) which is nothing less than a confession of its inability to pay and even to raise funds. The financial position of the bank on the 31st July, 1956, as may be seen from pages 133 145, 152, 270 and 277 and from pages 29, 74, 115, 185, 229, 246 and 259 of the current account ledger Ext. P-44 and from the cash extracts of the Alleppey office and the branches Exts. P-47 page 319, P-48 page 405, P-49 page 170 and P-50 page 328 was correctly stated by the learned Judge in

paragraph 15 thus:

"..... its credit balance with other banks stood at the negligible figure of Rs. 1883 and odd whereas it had borrowed as much as Rs. 1,67,000 and odd. The cash balance held by it in all its branches.the 4th August".

The position as on the date of the winding up as regards the realisable assets and the liabilities, also examined by the learned Judge in paragraph 10, showed beyond doubt, that the bank was not solvent. This was not caused by a run on the bank or by a sudden turn of events; we fully endorse the view of the learned Judge that "the inability to pay must have been chronic".

5. Ext. P-5 was the first of the items of evidence relied on specifically in argument by learned counsel for the appellants in A. S. 620. It is the current account ledger of the second respondent and was relied on as showing that he helped the bank with funds, which he would not have done, if the financial position was so precarious. But Ext. P-5 also shows, that his credit balance of Rs. 39,487 and odd at the close of the 14th July, 1956, came down to Rs. 3416 and odd by the 14th August, 1956; he had thus pulled out a large part of his funds by then. Ext. P-32 is also his current account ledger till the 7th April, 1956. Ext. P-5 and P-32 are useful to show, that while making deposits in the bank on Thursday and Fridays, presumably to conform to the requirements of Section 18 of the Banking Companies Act, 1949, as to the minimum cash balance, P. W. 2 withdrew them on Saturdays or Mondays. To mention one or two instances only, while there was a deposit of Rs. 10,000 on the 22nd March, a Thursday, there was a withdrawal of Rs. 10,000 on the following Saturday, and similarly while there was a deposit of Rs. 48,000 and odd on the 29th March, also a Thursday, there was a withdrawal of Rs. 60,000 on the following Monday.

Ext. P-45 the abstract of the agent's scroll from the 2nd July, 1956, relied on to show that the bank had substantial receipts daily, also shows that there had been substantial receipts by way of withdrawals from, other banks except on very rare occasions. The cash balance of the bank came down from Rs. 20,406 and odd on the 2nd July to Rs. 454 and odd on the 14th August, 1956. Ext. P-42, the Vaikom scroll docs show that the Vaikom branch had been functioning for a time even after the bank formally suspended its business earlier in the day, but this in itself is no indication as to the commercial solvency of the bank. Ext. P-42 has also disclosed, that as against a receipt of Rs. 4500 on the 16th August, there was a corresponding payment on the same day; these entries concerned respondents 19 and 20, and have been found by the learned Judge to evidence fraudulent preferences. They have not appealed against the finding. This was the situation in the Vaikom branch. Exts. D-2 (a) and (b) the renewals of fixed deposits in the name of the wife of the brother of the accountant of the bank on the 7th August and Ext. D-2 (d) the renewal of a fixed deposit in the name of the chairman of the board of directors on the 11th July, 1956, serve no more than to show that those who had the interest of the bank at heart did not want to aggravate the situation, by pulling out their own funds, These were the specific

items of evidence relied on and they do not, in our opinion, advance the case of the appellants.

6. We now come to the several appeals. The facts necessary for the disposal of A. S. 544 of 1961 preferred by respondents 9 and 10 have been set out by the learned Judge in paragraph 21 of the judgment, which may be usefully extracted below:

"The 9th respondent and her mother-in-law, the 10th respondent, had savings banks deposits with the Alleppey office of the bank which they had given as security for the overdraft allowed by the bank to a firm known as D. Lakshmana Naik and Sons, run by the 11th respondent (who is the husband of the 9th respondent and the son of the 10th respondent) and his brother. On the 14th July 1956 these savings bank deposits were converted into short notice deposits repayable on seven days' notice, the deposit in the name of the 9th respondent amounting to Rs. 12,089-5-11 and that in the name of the 10th respondent to Rs. 11,647-9-8, The deposits continued to be security for the overdraft of D. Lakshmana Naik and Sons. On the 11th August, 1956, at a time when there was not enough money in the bank to repay the deposits in cash, entries were made in the books showing both deposits as having been repaid, two payments of Rs. 10,000 each as having been made into the overdraft account of D. Lakshmana Naik and Sons, and a sum of Rs. 2,116-3-1 as having been deposited by the 9th respondent and a sum of Rs. 1,673-7-2 by the 10th respondent this sum in each case representing the original deposit plus interest minus Rs. 10,000".

The result was, as stated by the learned Judge, that

"On the 11th August, 1956, the 9th and 10th respondents were each paid Rs. 10,000 from out of their short notice deposits, the payments being actually effected by the transfer of these sums to the account of D. Lakshmana Naik and Sons, which as a result of these payments aggregating Rs. 20,000 ceased to be overdrawn and, in fact, showed a credit balance of Rs. 254-11-3."

To attract Section 531 of the Companies Act, not necessarily payment in cash but payment by transfer or adjustment in accounts, or any other act relating to property, may be impugned as a fraudulent preference, if the other conditions are fulfilled. In *Natlukottai Bank Ltd., In re*, (1957) 27 Comp Cas 404 (Mad) Balakrishna Ayyar, J. treated similar entries in the books, as "any other act relating to property", but the learned Judge in this case was inclined to regard them as evidencing cash payments though payments were to the account of some other person.

7. We are at one with the learned Judge in repelling the contention of the appellants, that the debtor, viz., the firm D. Lakshmana Naik and Sons and the creditors, viz., the appellants were one and the same and represented their joint family, the business of the former and the deposits of the latter being of the joint family, not so much for defect of pleading, as for the reason that the factual basis cannot be held to be established on the interested testimony of R. W. 10,

the 9th respondent's husband. The appellants cannot succeed in the contention without positively establishing that the deposits were made with joint family funds, not even if they had no private funds or properties. There is no presumption that a deposit in the name of a female member of a joint family represents joint family funds. There was no specific plea either that the business of the firm was joint family business. Far from raising a specific contention in the objections, that the debtor and creditor are one and the same, the plea was that the appellants are entitled to the money in deposit in their names.

8. The next argument of counsel was that if the bank can claim a set-off in liquidation u/s 529 of the Companies Act read with Section 47 of the Insolvency Act, such a set-off made prior to the winding up is legal and could not amount to a fraudulent preference. The question is whether the liability of the appellants under Exts. D-11 and D-12 by which they hypothecated and pledged the credit under their fixed deposits as security for the amount of the overdraft and the liability of the bank to them under the fixed deposit, could be set off mutually in liquidation proceedings, for if they could be, a voluntary set-off before winding up is legal, as none would be prejudiced thereby in the event of winding up. In *In re Washington Diamond Mining Co.*, (1893) 3 Ch 95 at p. 111 Lindley L. J. observed:

"The two debts could have been set one against the other after the bankruptcy just as effectually as before, and whether the debts were both paid or were set off against each other before the bankruptcy or after would be perfectly immaterial."

In *In re, In Re: Travancore National and Quilon Bank Ltd., S. Barkatally and Others*, Gentle, J. overruled an argument to the contrary as unsound. The question in final analysis is whether the two are mutual dealings as could be set off u/s 47. That section is as follows:

"Where there have been mutual dealings between an insolvent and a creditor proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively."

9. The appellants may be deemed to be sureties of the firm, but without a personal obligation of their own. The bank could not call upon them to pay the amount of the debt personally and its only right is to realise the security they have provided. The rule is stated thus by Rowlatt on *The Law of Principal and Surety*, 3rd edition at page 140:

"If a surety, being severally liable, has money in the hands of the creditor, who he comes bankrupt, he is entitled before the trustee sues the principal to apply it in satisfaction of the debt."

In *In re, D. Sundaravaradan Vs. R. Narasimhachari, Official Liquidator*, the surety was severally and jointly liable for the principal debt and so *Gentle, J.* allowed set off, but in *In re, Travancore N. and O. Bank. AIR 1941 Mad 622* in which the surety undertook no personal liability, *Vcnkata-ramana Rao, J.* distinguished, *D. Sundaravaradan Vs. R. Narasimhachari, Official Liquidator*, and held that there was no question of mutual dealings and therefore, of set off. *Leach, J.*, as he then was, rejected the claim for set off in *Official Assignee v. M. C. Harikrishna and Sons, AIR 1935 Rang 201* as inadmissible for the same reason, under the corresponding provision in Section 47 of the Presidency-Towns Insolvency Act applicable to Burma at the time. In *Mani Bhusan Malik Vs. Pioneer Bank Ltd. (In Liquidation)*, decided by a division bench of the Calcutta High Court, in which the facts were similar and the surety undertook no personal liability, no set off was allowed. *Stephens, Ex parte (1805) 32 ER 996* relied on for the appellants was distinguished by *Gentle, J.* in *AIR 1940 Mad 260* as a case of fraud on the part of the bank. The contention that in order to attract the rule of set off the surety need not be personally liable, is thus opposed not only to the terms of Section 47 of the Insolvency Act referred to earlier, which contemplates mutual dealings or demands, but also to the trend of decided cases, and we have no hesitation in rejecting it.

10. It was also contended, relying on Sections 130 and 134 of the Transfer of Property Act that the transferee, including a pledgee or mortgagee of a chose in action, is the only person who can enforce payment, and so the bank could enforce Ext. D-11 and Ext. D-12, and in the present case the securities being a debt due from the bank itself, it had every right to adjust it towards the debt due to it. The further argument was that the bank had in the exercise of its right made the impugned adjustment of Rs. 20000. So stated, the argument is plausible and requires examination. Conceding that the bank had such a right, the question is what exactly the bank did in the particular circumstances. The bank cannot with a dominant intent, prefer one creditor over the others in the guise of making an adjustment or payment. The existence of a legal right is not conclusive that what was done was in the exercise of such right, though in normal circumstances the action would be referable to it. In many instances, except perhaps in the case of naked or patent fraud, there might be some antecedent right to serve as the ostensible basis of a fraudulent preference. But once it is seen that what was achieved was the preferring of one creditor over the others with a dominant intent so to do, the vice of Section 531 of the Companies Act is attracted, and the transaction is in fact a fraudulent preference.

Direct evidence of such preference is not often forthcoming and is not necessary either. In *Cohen, In re, Trustee, Ex parte, 1924-2 Ch 515* a voluntary payment, made on the eve of the bankruptcy, with knowledge of insolvency, was held, in the absence of proof of some other dominant motive, to be sufficient to establish a fraudulent preference. As held in *In re, M. Kushler Ltd., 1943 1 Ch 248* the dominant intent to prefer may be proved by circumstantial evidence leading to a necessary inference, like any other fact. The rule is stated thus in *Halshury's*

Laws of England, 3rd edition, Volume 2, page 550, paragraph 1103:

"In order that a transaction may be set aside as a fraudulent preference, it is necessary to prove that it was carried out with the substantial or dominant view of giving the creditor, or surety or guarantor for the debt a preference over the other creditors, This need not be the primary result aimed at it is sufficient that it should be the object aimed at in bringing about the primary result. If the transaction can properly be referred to some other motive than that of giving a particular creditor or surety a preference over the other creditors, the payment is not fraudulent and void, for it is from the intention of the debtor to act in fraud of the law (i.e. to prevent the distribution of the bankrupt's property fairly among all his creditors) that the invalidity of the transaction arises."

and at page 557, paragraph 1104:

"On the other hand, in the absence of direct evidence, the existence of some other possible explanation for the transaction will not of itself exclude the drawing of an "inference that there was an intention to prefer."

It is not necessary to discuss decided cases cited at the bar, in which the debtor was found to have acted not with such a dominant intent, but say, with a belief that he was under a legal obligation to do the act whether such belief was well founded or not, or with an intent to keep his business going or to set right his financial position, or even to take an advantage for himself if the law would permit such a course. If on the facts and circumstances there is room for more than one explanation, an intent to prefer is not of necessity to be drawn. The onus of proof is of course on the liquidator. We may examine the circumstances, having regard to these considerations.

11. From the 22nd February, 1956, when Exts. D-11 and D-12 were passed by the appellants in favour of the bank till the 11th August, 1956, when the adjustments were made, no demand by the bank for payment was proved to have been made on them. On the 14th July, 1956, the fixed deposits were converted into short-term deposits, liable to withdrawal on seven days' notice. The payments or adjustments were made just within five days of the closure of business. An attempt was made by R. W. 10 to prove, that the bank called upon the appellants to pay, about six weeks before closure and that even a demand in writing signed by the Parties was not ready by the General Manager. The appellants did not even call upon the liquidator to produce evidence of the same, which if it exists, must be in his possession. Though the bank was in dire need for cash to carry on, it gained no immediate financial advantage by this adjustment. The only reasonable inference in these circumstances is, that what the bank did on the 11th August was not to adjust the amount of the deposit in the exercise of its right under Exts. D-11 and D-12, but was to prefer the appellants over the other creditors. This suffices to answer the points urged on behalf of the appellants in A. S. 594 of 1961.

12. In A. S. 595 of 1961 preferred by the 21st respondent the fact may be briefly

stated. She had a savings-banks account with the bank. On the 11th August, 1956, she drew a cheque on the bank in favour of one Sreenivasa Mallan, the 22nd respondent R. W. 3, for Rs. 2000. He had an overdraft account with the bank, which at the time, was overdrawn to the extent of Rs. 3256-9-10. The amount of the cheque was credited in the overdraft account and the balance was thereby reduced. The contention was that R. W. 3 was a longstanding client and family friend of the husband of the appellant, an advocate, that he use to borrow money from him and his father from time to lime, that on that particular occasion he was in need of funds for repairing his coir factory, that when he took the cheque to the bank for encashment the Manager told him that they were short of cash and could not pay, that in spite of his protests the bank credited the amount of the cheque in his account, and did not return the cheque and that finally he was content to effect some small repairs to the factory with other funds.

Apart from the inherent improbability of this case, the circumstances are so telling, that we cannot but come to the conclusion, that the payment of Rs. 2000 was a fraudulent preference in favour of the appellant. The position of the bank as on the 11th August which has been sketched above, must have been well-known to the appellant's husband, who was, as noticed, not only a director but was also the legal adviser of the bank. The appellant would never have drawn the cheque intending that it should be cashed. It was through the appellant's husband that the transaction was arranged. R. W. 3 admitted, that there had been no demand on him by the bank to pay his dues and that there was no pressure by the appellant on the bank to pay her dues. R. W. 3 was worth two lakhs of rupees and the appellant's husband had confidence in him. He had executed a promissory note Ext. D-8 in favour of the appellant on the 11th August for the sum of Rs. 2,000 and it now stands discharged. We agree with the learned Judge in holding, that by this device the appellant had managed to pull out Rs. 2,000 from her savings-bank account. That, as argued, she might have pulled out the whole amount, would have rendered the transaction quite transparent. We have no doubt that was a fraudulent preference.

13. In A. S. 620 of 1961 preferred by respondents 1 and 13, their cases have to be treated separately. The first, respondent was a director of the bank and had a current account in which the credit balance was Rs. 20,000 at the time. On the 8th August, 1956, he withdrew Rs. 8,500 and on the same day paid the same amount by cheque on the bank into the account of his nephew, the 15th respondent, which was credited in his overdraft account, thereby reducing its debit balance to Rs. 3176-10-0. The case of the first respondent as set out in the objection was that the payment was made in the course of a settlement of the claims of the creditors of the 15th respondent, It was stated that the bank had made demands on the 15th respondent on the 17th January, 1955, by Ext. D-10 and on the 16th March, 1956, by Ext. D-10 (a) to make payment. The first respondent did not get into the box, and only the 15th respondent did. As R. W, 7, he came out with the version, which did not find a place in the objections, that his entire stock-in-trade had been sold to the first respondent for Rs. 15,000,

suggesting that the responsibility for the discharge of all his debts including that due to the bank, had been undertaken by the latter, and that the payment of Rs. 8,500 was in pursuance of this arrangement.

This was a later development, The broad circumstances surrounding this payment are similar to those discussed above; in addition, there is the fact that the 15th respondent is the nephew of the first respondent. This is not a case, as was urged, of the bank benefiting itself. Even if the bank had demanded payment a few months before, it did not pursue the matter till it came out with this adjustment just seven days before closure. If the first respondent had undertaken to discharge the debts of his nephew, the payment would have been made long ago. It is unnecessary to deal with the cases cited before us, where without a dominant intent to prefer, the debtor acted with a motive to secure some benefit for himself or made a transfer under pressure of attachment or other legal proceedings or took an assignment of a debt due to the bank. The impugned transaction was not a payment made under a legal obligation to pay the amount of the cheque u/s 31 of the Negotiable Instruments Act as contended, because the payment was made into another account with a dominant intent to prefer as we have found. We agree with the learned Judge in holding that the transaction impugned was a fraudulent preference .

14. The 13th respondent had an overdraft account with the bank, which on the 10th August, 1956, showed a debit balance of Rs. 9,574 and odd, and also a savings-bank account which at the time showed a credit balance of Rs. 16,075 and which was secured for the liability under the former. On that day, Rs. 6,000 was transferred from the savings-bank account to an account newly opened, entitled "Sundry liabilities account", as "the amount remitted by V. A. Peethambaran (the 13th respondent) to be accounted when the sale deed of the bank's property is executed in his favour". It would appear that the bank owned and possessed a property which it could not retain, by reason of the provision in Section 9 of the Banking Companies Act and which had necessarily to be disposed of. The bank resolved to do so by Ext. D-4 on the 22nd June, 1956, but the negotiations it put through did not succeed. Eventually, by Ext. D-6 dated the 10th August, 1956, it agreed in writing to sell the property to the 13th respondent for Rs. 16,000. This accounted for the transfer of the fund to the new account. The amount of the savings-bank being a charge for the liability under the overdraft, if this was all the transfer of Rs. 16,000 ignoring the charge, might generate a suspicion in the mind of the Court as to the true character of the transfer.

But payments had been made subsequent to the 10th August to the credit of the overdraft account, no doubt chiefly with funds said to have been furnished by the second respondent, with the result, that on the 14th August the account showed a credit balance nearly Rs. 18. We are constrained to hold in A. S. 594 of 1961, the appeal preferred by the second respondent, as will be seen later, that the payments or adjustments in his favour, as part of which these credits were made

in the overdraft account of the 13th respondent, were not fraudulent preferences. So there was no more a liability or charge on the amount of the savings-bank account. Nothing precluded the 13th respondent from making a purchase of the property; neither the resolution for the disposal of the property nor the agreement of sale in his favour was impugned by the liquidator, and the learned Judge has not held the transaction to be a fraudulent contrivance. It is also seen, that on the 14th August the property was put in the possession of the 13th respondent, apparently in part performance.

The right of the 13th respondent to obtain specific performance of the agreement was thus assured. The overdraft liability apart, nothing precluded the 13th respondent from withdrawing from the savings-bank account for payment of the sale consideration. The fact, that the fund was transferred to an account, headed "Sundry liabilities account" in order that it may be available for effectuating the sale, is not per se evidence of a dominant intent to prefer the 13th respondent, so long as the agreement for sale has not been questioned. The 13th respondent and the bank were justified in all the circumstances of the case, in having the amount transferred to the account. That amount is still with the bank and can be availed of when the sale deed is executed. We hold that this has not been proved to be a fraudulent preference. A direction to the liquidator to execute the sale deed does not fall within the purview of these proceedings; the Court in charge of liquidation may perhaps have to be moved.

15. In A. S. 594 of 1961 preferred by the second respondent, four transfers have been alleged, of Rs. 5,000 from his current account to the overdraft account of Veeraiah Reddiar R. W. 4 on the 31st July, of Rs. C,000 from his current account to the overdraft account of the 13th respondent on the 11th August, of Rs. 2,900 from his current account to the overdraft account of the 13th respondent on the 14th August and of Rs. 3,500 from his current account to the overdraft account of Kamath Brothers, also on the 14th August, 1956. These have been found to be fraudulent preferences by the learned Judge. Subsequently, in application 1 of 1959 instituted by the liquidator u/s 542 of the Companies Act, these and others were alleged to be fraudulent preferences in favour of the second respondent and to form part of the fraudulent conduct of the officers of the bank. This was enquired into and disposed of by another learned Judge of this Court. The charges were grouped under various "heads" and these fraudulent preferences were dealt with under "head B". The second respondent was the 9th respondent and the transfers alleged were items 4 to 7 of Schedule VI in application 1 of 1959. The finding of the learned Judge with respect to these and two others, also alleged to be fraudulent preferences was as follows:

"I am not in a position to hold definitely that these payments even by way of transfer were with the knowledge of the insolvent position of the Bank and to prefer some creditors over the others".

The liquidator has not appealed against that judgment so far as these transactions are concerned. Learned counsel for the appellant has furnished a

copy of that judgment, which was delivered on the 19th November, 1962. We have admitted it in evidence and marked it Ext. D-18. Upon this, learned counsel for the appellant contended, that the trial of the issue as to fraudulent preferences in respect of these transactions is barred by *res judicata*. The only ground on which learned counsel for the liquidator tried to meet the argument, was that what has been extracted above as the finding of the Judge, does not amount to a finding. We do not think we can accept this argument. The Judge has held that he was not satisfied that these impugned transactions are fraudulent preferences. That the matter was directly and substantially in issue in proceedings u/s 542 was not disputed and in our opinion rightly. We therefore hold that this appeal has to succeed on the application of the rule of *res judicata*. Ext. D-18 must be taken to be the decision in a "former suit" within the meaning of Explanation I to Section 11 of the Civil Procedure Code, and as interpreted by the Supreme Court in *R. Viswanathan Vs. Rukn-ul-Mulk Syed Abdul Wajid*, . We refrain from considering the merits of this appeal.

16. One common question which has been raised in these appeals, relates to the propriety of the order made by the learned Judge calling upon the respective creditors to make repayments to the liquidator of the amounts paid to them by adjustment, with interest. It was contended, that u/s 531 of the Companies Act, the Court has no jurisdiction to order repayment, upon a declaration that the transaction is a fraudulent preference. Our attention was invited to the provision in Section 532(2)(a) of the Companies Act under which consequential orders may be passed. It was also contended, that whatever payment there had been in these cases, had been by adjustment and not in cash, and that to call upon the creditors to repay what they had not in fact received, would be to penalise or punish them for fraudulent preferences committed by the bank. There appears to be much force in the latter contention, and perhaps all that can or ought to be done is to direct a "reversal of the entries" in the books of the bank.

But we do not think it necessary to decide even the question of jurisdiction, because we feel, that a direction to the creditors to make repayment would, in cases like these of payments by adjustments, in the absence of the relative debtors as parties to the record, cause grave prejudice to them, because the decision we give in these proceedings may not bind the relative debtors. We venture to think, that the debtors are at least proper parties to these proceedings, for making an order of repayment whether in cash or by reversal of entries. In these circumstances, we set aside the direction of the learned Judge directing repayment to the liquidator. The liquidator is at liberty to institute appropriate proceedings against the parties concerned for obtaining payments and to collect the amount.

17. The result is that A. S. 544 and 595 of 1961 are dismissed with costs to the liquidator. A. S. 594 of 1961 is allowed but in the circumstances we direct the parties to bear their costs. A. S. 620 of 1961 is partly allowed so far as the 13th respondent is concerned with costs payable to him by the liquidator and is

dismissed with costs so far as the first respondent is concerned.