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**(1918) 12 MAD CK 0008**  
**In the Madras High Court**

The Official Assignee of Madras

APPELLANT

Vs

T.B. Mehta and Sons

RESPONDENT

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**Date of Decision :** 04-12-1918

**Acts Referred:**

Presidency Towns Insolvency Act, 1909 — Section 56

**Citation :** (1919) ILR (Mad) 510 : (1919) 36 MLJ 190

**Hon'ble Judges :** John Wallis, C.J.; Napier, J

**Bench :** Full Bench

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**Judgement**

John Wallis, C.J.—This is an appeal from an order of Coutts Trotter, J., dismissing the Official Assignee's application by notice of motion

for a declaration that the sale of diamonds by the insolvent on and after the 19th May 1917 to the garnishees T.B. Mehta and Sons, was void as a

fraudulent preference u/s 56 of the Presidency Towns Insolvency Act or in the alternative u/s 55 as the sale was not bona fide and for valuable

consideration. In my opinion the decision of the learned Judge was right on both points. We are not now concerned with the propriety or morality

of the insolvent's conduct in obtaining large quantities of diamonds on credit from various firms and pledging them for advances to Nattukottai

Chetties and in persisting in this course when he was clearly in insolvent circumstances and had no prospect of paying for them. These are matters

to be taken into consideration at another stage. In the middle of May 1917 the insolvent was in very embarrassed circumstances and was unable to

meet his obligations as they fell due. He was indebted to the garnishees Messrs. Mehta and Sons, a Madras firm with whom he had had large

transactions, in Rs. 36,062 against which eight hundies were outstanding and also in Rs. 3000 on general account. Two hundies which fell due on

the 19th were not presented at his request. (Ex. 10 dated, 14-5-1917) but a third hundi which fell due on the same day was not met and they began to press him. The insolvent then proposed that the garnishees who were diamond merchants should purchase from him diamonds which were under pledge to various Nattukottai Chetties and apply the surplus after discharging the pledges in satisfaction of the hundies. The diamond-market was then rising and Mehta accepted the offer and in the course of five transactions between the 25th May and 12th June, purchased diamonds to the extent of Rs. 2,87,000, and in this way obtained payment of the hundies. It is not now disputed that he paid a fair price for the diamonds. An examination of the pledgees' account in the course of the case revealed the fact that the purchases by the garnishees from pledgees were larger than was necessary to pay them off out of the surpluses and that the insolvent was paid over Rs. 41,000 by the pledgees as a result of the transactions, The evidence is that this result was obtained by including in the sales, apparently without the garnishees' knowledge, other diamonds which were not under pledge. Any adverse inference that might arise from this fact is negatived by the evidence that between the 25th May the date of the first of these sales and his arrest at the end of June, he made payments to the other creditors amounting to more than Rs. 71,000 to meet his more pressing obligations and at the same time put off other creditors. All this shows that he went on trading when in hopelessly insolvent circumstances, not that he entered into the transactions now impugned with a view to prefer these particular creditors, The learned Judge has rightly held that to bring a transaction within the scope of Section 56 it must have been entered into with the dominant view of preferring the particular creditor. That construction has recently been criticised in an unreported case in this Court as proceeding upon a consideration of cases decided before the section was enacted. Lord Justice Bowen deprecated this mode of construction in *Ex parte Griffith* (1883) 23 Ch. D. 69 : and *Ex parte Hill* (1883) 23 Ch. D. 695 and in the latter case expressed the opinion on a careful consideration of the various ways in which the language of the section could be construed, that the words "with a view of giving a creditor preference over other creditors" must be read as equivalent to "with the view" the real, effectual, substantial view of giving a preference to the creditor, the word a being equivalent to the. That

construction was accepted and was approved by the House of Lords in *Sharp v. Jackson* (1899) A.C. 419 several years before that section was

re-enacted in India in 1907 and again in 1909, and the Indian Legislature must in my opinion have contemplated that that construction would be

followed here. In the present case the evidence in my opinion does not show that the insolvent entered into these transactions with the dominant

view of "preferring the garnishees because, as is suggested, they were Madras creditors whereas most of the other creditors were in Bombay. The

evidence rather shows in my opinion that he was acting throughout exclusively in his own interests and with a view to keep his business going which

he could not do without satisfying the garnishees, creditors on the spot who were pressing him to meet his obligations and were not to be put off

with excuses. As regards Section 55, the sales now in question were for full consideration and did not amount to an act of insolvency by reason of

an intent to defeat or delay creditors or otherwise, and the purchaser, had no notice of an act of insolvency. In these circumstances they must be

held to have been made in good faith and for valuable consideration and not to be avoided u/s 55. The appeal fails and is dismissed with costs.

Costs on the Original Side scale.

Napier, J.

2. This is an appeal from the judgment of *Coutts Trotter, J.*, on a motion on behalf of the Official Assignee for a declaration that certain sales of

jewels by the insolvent *Muthiah Chetty* to the firm of *T. B. Mehta and Sons* are void as not being bona fide transactions and further as constituting

a fraudulent preference of that firm in that the proceeds were largely utilised for discharging certain promissory notes given by the insolvent to the

firm, The insolvent was a diamond merchant in a large way of business in Madras, purchasing diamonds here to a certain extent and to a much

larger extent in Bombay. At the time of the sales he was in fact hopelessly insolvent. The sales covered a period between 25th May and 12th June

1917 and were completed in five transactions, on 25th May, 2nd June, 7th June, 8th June and 12th June. Nearly all the diamonds sold were under

pledge to various lenders and the sales purported to be, according to the evidence of the garnishee, of those diamonds only, the garnishee buying

the diamonds at an agreed price, paying the amount due on the pledge and

crediting the balance as against promissory notes, with the result that the whole of the promissory notes and an amount due on general account to the garnishee was discharged, while much heavier debt on promissory notes to other creditors were left undischarged. The learned Judge has found that the sales are not void nor fraudulent preference.

3. Mr. Devadoss has attacked these findings as being based on an erroneous view of the law and also contends that on the true view of the facts

they cannot be upheld. His contention on the law was as follows, that every transaction by which a creditor is given a preference is presumably

fraudulent and that there are only three conditions under which such transactions will be sustained, namely, where the transaction is to recoup a

breach of a trust, where the transaction is compelled by threats of legal proceedings and where the insolvent bona-fide believed he could avoid

bankruptcy and entered into the transaction for that purpose. In my opinion, there is no warrant for this contention. All that Mr. Devadoss has been

able to do is to invite our attention to cases in which these conditions have been held sufficient to establish that there was no fraudulent preference

in the particular case. I entirely agree with what fell from the learned Chief Justice at the beginning of the argument that what we have to do is to

construe the act with the assistance of decisions of eminent Judges in England on similar words in the English Statute. The learned trial Judge,

although he does not refer to the language of the section, starts with this proposition that he has to consider what was the dominant motive of the

insolvent in carrying through this transaction. I agree that this is the real consideration in the case, but I think it advisable to state how this

proposition is arrived at.

4. The Act to be construed is the Presidency Towns Insolvency Act, Act III of 1909, and the important sections are Section 9. which defines an

act of insolvency, Section 55, which avoids certain transactions made within two years of insolvency, Section 56, which declares certain

transactions within three months of the insolvency fraudulent and void, and Section 57 which protects certain transactions. The corresponding

English Act is the Bankruptcy Act of 1883, and the corresponding sections are Sections 4, 47, 48 and 49. Dealing first with fraudulent preference,

the words of Section 56 with which we are concerned, are : "" Every transfer of

property, every payment made, 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 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 Official Assignee." The language of Section 48 of the English Act is mutatis mutandis identical. The first thing to be noted about this section is that it does not say that every transfer of property or payment by such a person with the effect of giving the creditor preference is fraudulent, and there can be no doubt that if the Legislature had intended to avoid all transfers and payments in favour of a particular creditor without considering the motive or the object of the insolvent, it would have used some such words as the above or omitted the words "with a view, etc." We have therefore to construe the words "with a view of giving that creditor a preference" as an essential requirement for a fraudulent preference. The learned Judge in the course of his judgment has referred with disapproval to an obiter dictum of a Judge of this Court in a case not reported in the authorised reports but to be found in *Nalam Visvanatham v. Official Assignee of Madras* (1915) 32 I.C. 796 I do not think that Coutts Trotter, J.'s criticisms are quite justified on the language of my learned brother though I am not prepared to agree with some of the observations to be found in that language. I must say also that I think that the learned Judge's language is useful as drawing the attention to the fact that we have to construe a particular statute and not to apply principles founded on words which are not in the particular statute. The true rule of construction was laid in 1891 by the House of Lords in the well-known case of *the Bank of England v. Vagliano Brothers* (1891) A.C. 107 and approved of by the Privy Council in *Norendra Nath Sircar v. Kamalbasini Dasi* ILR (1896). C. 563 : 6 M.L.J. 71. I am not certain that this rule has always been borne in mind in decisions on questions of fraudulent preference in cases in England, and specially I refer to a decision which was pressed on us by Mr. Grarnt, in *re Cheese Brough* (1871) 12 Eq. Cases 353 from which, so far as the process of reasoning is concerned, I must respectfully dissent. We have however the guidance of very eminent Judges in England in cases where the language of the English statute was

critically analysed, and I propose to refer to a few of them. 4. The first case which is very much in point is in *Ex-parte Griffith* (1883) 28 Ch. D. 69

and especially the language of Bowen, L.J., at page 74. He there refers to the fact that in judicial decisions since the Bankruptcy Act there has

been a tendency among courts to discuss the question whether the Act had altered the old law and introduced an entirely new law with the result

that the court has been drawn into questions of pressure and volition and into motive of a motive, whatever that may mean, and he lays down that

the true method is to go back to the words of the Statute and be guided by them. Here we have a very eminent Judge applying the principle which

was subsequently laid down in the *Vagliano* case (1891) A.C. 107. The next is *Ex-parte Hill : In re Bird* (1683) 28 Ch. D. 695. In that case the

same learned Judge speaking of Section 92, the corresponding section of the Bankruptcy Act of 1869, says as follows : "" Whether that section has

or has not altered the old law is not a matter that need be decided though there was considerable authority for saying that it has not. But, however

that (may be, we have to look to the words of Section 92 and they are "" with a view of giving such creditor a preference over other creditors"". He

then considers the meaning of the words " a view " and says "" I should prefer keeping to the word " view " instead of " motive " though in nine

cases out of ten the two words may come to the same thing."" He declines to accept the suggestion that, the words " a view " mean " sole view " on

the ground that if the legislature had so intended it would have used the word "sole". He is of opinion that the word " a " is equivalent to " the "and

considers that" the view " means the dominant and substantial view.

5. These two cases were followed and applied by a divisional Court in *In re Bell: Ex parte the Official Receiver* (1892) 10 Morr Bank Rep 15.

That was a case where, pressure was relied on as taking the case out of the Statute and Wright, J., laid down that in such a case it must be found

that pressure was the substantial ground of the payment being made, which is of course equivalent to saying that the intention to prefer would not

be the substantial ground. Vaughan Williams, J. says : The law is well-established now that one has to ascertain in each case what was the

dominant motive which operated on the bankrupt's mind," and in another part of the judgment, " Was the substantial, effectual, or dominant view

with which the debtor made the payment a preference of that creditor? "" The next case is the decision relied on by the learned Judge in Sharp v.

Jackson (1899) A.C. 419. There the learned Lord Chancellor endorses the view of Lord Esher in the Court of Appeal in the same case that the

question depends not on the mere fact that there has been a preference but also on the state of mind of the person who made it, and that it is not

sufficient to say that the natural consequence of the act being to prefer, the intention to prefer follows. This decision is specially important as it has

been treated in subsequent cases as endorsing the correctness of the decision in the Court of Appeal in the same case. That is sub-nominee : The

trustee of the Property of New, Prance and Garrard v. Hunting and others (1897) 2 Q.B. 19. I have already referred to one extract from Lord

Esher's judgment. Other passages are as follow : "" what had he obviously in view when he executed this deed? It seems to me clear, that he made

this conveyance, not with the "" intention"", or "" object "" or whatever it may be called, of preferring those persons, but for the sole purpose of

shielding himself. Under these circumstances what he did is not a fraudulent preference within the act." A.L. Smith, L.J., says : I have always

understood that, to ascertain whether there has been a fraudulent preference it is necessary to consider what the dominant or real motive of the

person making the preference was; whether it was to defraud some creditor by preferring others, for some other motive. Chitty, L.J., says : "" I ask

myself what was really the view which Prance had in making this conveyance. Was it to prefer these particular trust estates to other creditors? No.

It was to protect himself against the charges hanging over him."" There can be no doubt that the Court of Appeal in this case were applying the

tests laid down in Exparte Griffiths and Exparte Hill and in consequence of this unanimity of the Court of Appeal and its endorsement by the House

of Lords. Wright, J., in Buckley's Case (1899) 2 Ch. 725 said as follows : " Ever since the decision in New, Prance and Garrard's Trustees v.

Hunting (1897) 2 Q.B. 19 which has since been affirmed by the House of Lords sub notn. Sharp v. Jackson (1899) A.C. 419 so little difficulty has

been felt by gentlemen who practice in Bankruptcy matters that questions of fraudulent preference comparatively seldom now arise."

6. It is clear on the authority of these cases that no hard and fast rule can be laid down as to what facts will take a particular case out of the statute

and it is not open to us to hold, as Mr. Devadoss would wish us to do, that certain circumstances only have been accepted by the courts for this

purpose and no other circumstances will suffice. Mr. Devadoss relied on a decision in *In re Lake* (1901) 1 Q.B. 710 a breach of trust case. But

this case is really against him, for there Wright, J., finding that there had been several breaches of trust of which only one was made good, held that

there was a fraudulent preference. The Court of Appeal, it is true, found on the facts that it was not. But the learned Judges did not lay down, and

I venture to think, could not lay down, a definite rule that where there are breaches of trust and one is made good, there cannot be a fraudulent

preference. Indeed on those facts, I would myself prefer the finding of Wright. J.

[His Lordship next discusses the evidence in the case.]

7. I therefore agree with Coutts Trotter, J., that these transactions did not amount to a fraudulent preference.

8. The remaining question can be shortly disposed of. It follows from the above finding that the transfer was not an act of bankruptcy u/s 9, Clause

(b). With regard to Section 55 which invalidates transfers not made in good faith and for valuable consideration within two years of insolvency, it

has been established by the evidence of an expert witness that the price paid by the garnishee for the jewels was only 4 per cent, less than the

valuation he would put on them. It is hardly necessary to say that such a variation cannot indicate anything more than a difference of opinion. There

is no evidence that the garnishee knew that the insolvent was carrying through this transaction for any other purpose than that which he (the

garnishee) thought, namely, discharging the liability to him, or that he was getting more money than was required for discharge of the pledge.

Indeed Mr. Devadoss conceded this. There was therefore no want of good faith within the ordinary meaning of the term. It is true that the words "

in good faith " have been held both in England and in this Court to require that the transaction should not be in fraud of the bankruptcy laws But as

there has been no fraudulent preference it follows that there has been no fraud of the bankruptcy laws. In these circumstances I do not think it

necessary to consider the case of *Shears v. Goddard*: *In re Sills* (1896) 3 Narsen 24 and other English cases on the point. I therefore agree with

the learned Chief Justice in dismissing the appeal with costs.