CHAMPAKLAL PREMBHAI MEHTA & ANOTHER

v.

OFFICIAL RECEIVER

[COURT OF APPEAL, 1962 (MacDuff P., Hammett J.A., Marsack J.A.), 3rd, 17th August]

Civil Jurisdiction

Bankruptcy—fraudulent preference—Bill of Sale—onus of proof on trustee—assessment of weight of evidence—conflict between direct and circumstantial evidence—Bankruptcy Ordinance (Cap. 37) ss.3(1)(b), 46(1), 71, 133(1)(a)—Bankruptcy Act 1914 (4 & 5 Geo. 5, c.59) (Imperial) s.1(1)(b).

Bankruptcy—act of bankruptcy—fraudulent transfer within s.3(1)(b) of Bankruptcy Ordinance (Cap. 37).

Evidence and proof—bankruptcy—fraudulent preference—onus of proof—weight of evidence—Bankruptcy Ordinance (Cap. 37) s.46(1).

In proceedings by the Official Receiver for a declaration that the execution of a bill of sale constituted a fraudulent preference under section 46(1) of the Bankruptcy Ordinance the onus is on the Official Receiver to prove that the bill of sale was given by the debtors with the dominant intention of giving the grantees a preference over the other creditors. The onus may be discharged by direct or circumstantial evidence.

Held: In deciding whether the onus had been discharged it was open to the trial judge to prefer the circumstantial evidence to the direct evidence of the debtors and in the circumstances proved he was correct in so doing.

Semble: On the facts, the bill of sale was an act of bankruptcy under section 3(1)(b) of the Bankruptcy Ordinance, as well as a fraudulent preference within the meaning of section 46(1) thereof.

Cases referred to: *Peat v. Gresham Trust* [1934] A.C. 252; 151 L.T. 63: *Ex parte Griffith* (1883) 23 Ch. D. 69; 48 L.T. 450: *Ex parte Hill* (1883) 23 Ch. D. 695; 49 L.T. 278: *Ex parte Dann* (1881) 17 Ch. D 26; 44 L.T. 760: *Re M. Kushler Ltd.* [1943] Ch. 248; [1943] 2 All E.R. 22: *Re Cutts, Ex parte Bognor Mutual Building Society v. Cutts* [1956] 1 W.L.R. 728; [1956] 2 All E.R. 537.

Appeal from a judgment of the Supreme Court declaring a bill of sale void as a fraudulent preference.

R. I. Kapadia for the appellants.

R. D. Patel for the respondent.

The facts sufficiently appear from the judgments of Hammett and Marsack JJ.A.

The following judgments were read: [17th August, 1962]—

HAMMETT J.A.: The Official Receiver's claim in the Court below was for a declaration that a Bill of Sale dated 12th March, 1956, No. 56/475 executed by Premabhai Patel and Parbhubhai Patel, sons of Panchabhai, in favour of the Defendants-Appellants is fraudulent and void and in the alternative void under Section 133(1) (o) of the Bankruptcy Ordinance, coupled with a claim for £1,500 being the declared minimum value of the goods and chattels over which the Bill of Sale was given, in the Bill of Sale.

The learned trial Judge held that the Plaintiff-Respondent had discharged the onus of proof that rested on him of proving that the execution of this Bill of Sale constituted a fraudulent preference and that it was void under Section 46(1) of the Bankruptcy Ordinance. He also entered judgment for the Plaintiff-Respondent for £213.6.8d. which is the nett sum actually realised when the goods, over which the Bill of Sale was given, were sold by the Bailiff after they had been seized, and for costs.

The learned trial Judge did not record any finding of whether the Bill of Sale was void under Section 133(1) (o) of the Bankruptcy Ordinance, nor whether it amounted to a fraudulent transfer of property under Section 3(1) (b) of that Ordinance.

Against this judgment the Defendants-Appellants have appealed.

Most of the facts leading up to the grant of this Bill of Sale do not appear to have been in dispute and were as follows.

Premabhai Patel and Parbhubhai Patel had carried on business in partnership in Ba since 1942. In 1955 and 1956 their business was heavily in debt and they were being pressed for payment by a number of creditors. They realised they were unable to pay all their creditors whose debts totalled over £8,000. Their capital at the end of 1954 had been only £1,128 and in that year, according to their own accounts, they had only made a nett profit of £446.

One of their creditors was "N. Goverdhandbhai & Co.", the firm in which name the Defendants-Appellants traded. Their debt amounted to some £471.9.1d. on 12th March, 1956.

On 12th March, the debtors, P.P. Patel and P.B. Patel, in consideration of the Defendants-Appellants giving them a further 14 days to pay their debt, gave them a Bill of Sale over all their remaining property which included their stock, which had been obtained on credit, to secure payment of this past debt. There was no agreement between the parties whereby the Appellants agreed to make further advances or give the debtors further credit.

The property given as security was comprehensively listed in the Schedule to the Bill of Sale and comprised the whole of the debtors personal property as follows:

> "*SCHEDULE*
>
> *ALL THAT* the stock in trade of the businesses of storekeepers and tailors carried on in the said business premises at Tavua aforesaid which said stock in trade consists of sundry groceries, drapery, hardware, crockery and confectionery.

AND ALSO all and Singular the Book debts of the said business.
AND ALSO one treadle "Singer" Sewing Machine.
AND ALSO one treadle "Phaff" Sewing Machine.
AND ALSO one set of "Standard" counter Scales.
AND ALSO one set of Scales suitable for weights up to 14 pounds.
AND ALSO one wall clock.
AND ALSO the furniture furnishings fixtures fittings and show cases appertaining to the said business so much of the foregoing property as in corporeal is situated in upon or about the said business premises at Tavua aforesaid.
AND ALSO all personal property of whatsoever nature hereafter acquired by the Grantor or either of them in addition to or in substitution for the foregoing property or any of it and situated as aforesaid."

The debtors did not own any other property than that given as security under this Bill of Sale.

On 27th March, 1956, a meeting of the debtors' creditors was held at the office of Mr. R.D. Patel, Solicitor, in Ba, but no compromise was reached. The Defendants-Appellants, although they have since kept the benefit of this Bill of Sale entirely for themselves, there stated that they had only taken this comprehensive Bill of Sale for the benefit of the creditors generally in view of the pressing demands of one creditor, Ranchod, who, at about that time, took legal proceedings to enforce payment of his own debt.

On 9th April, 1956, the debtors filed their own petition in bankruptcy. Their debts exceeded £8,000 and since they had given the Appellants this Bill of Sale over all their property, only four weeks previously, there were no assets at all available for distribution amongst their other creditors.

In the Court below the Official Receiver brought this action to set aside the Bill of Sale as being fraudulent and void. Counsel's argument in the Court below and in this Court was almost entirely confined to the issue of whether this was a fraudulent preference and thereby void as against the Trustee in Bankruptcy (in which capacity the Official Receiver brought the action) by virtue of Section 46 (1) of the Bankruptcy Ordinance.

The material part of this Section reads as follows:

> "46 (1). Every . . . transfer of property, or charge thereon 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 such creditor . . . a preference over the other creditors, shall, if the person making, . . . the same is adjusted bankrupt on a bankruptcy petition presented within three months after the date of making . . . the same, be deemed fraudulent and void as against the trustee in the bankruptcy."

It will be seen that there are three conditions that must be established before a charge, such as the Bill of Sale in this case, can be held to be a fraudulent preference under Section 46(1). These are:

1. That at the date the Bill of Sale was given to the Appellants the debtors were unable to pay their debts as they became due from their own money;

2. That the debtors were adjudged bankrupt on a bankruptcy petition presented within 3 months of the date the Bill of Sale was given;

and

3. That the Bill of Sale was given by the debtors with a view to giving the creditors, to whom it was given, a preference over their other creditors.

The learned trial Judge held as fact that the Respondent had discharged the onus of proof that rested on him in respect of these three conditions. The Appellants do not complain of these findings in respect of conditions 1 and 2 above. This appeal is brought only against his finding that the Bill of Sale was made by the debtors with a view to giving the Appellants a preference over the debtors' other creditors, and on his order for costs, on the following grounds:

"1. *THAT* the learned trial Judge erred in law and in fact in holding that the execution of the bill of sale concerned was a fraudulent preference and was void against the Respondent under setcion 46(1) of the Bankruptcy Ordinance, Cap. 37.

2. *THAT* the learned trial Judge erred in finding on the evidence before the Court that the Respondent has discharged the onus of proving fraudulent preference.

3. *THAT* the learned Judge in any case ought to have awarded costs on the Magistrate's Court scale or lower scale."

It is not disputed that in this case the Bill of Sale given by the debtors did in fact give the Appellants a preference over the other creditors. The point that was challenged by the Appellants was whether the Bill of Sale was given "with a view to giving the Appellants a preference over the other creditors".

The onus of proof in this regard rested on the Plaintiff-Respondent, the Official Receiver. As was said by Lord Tomlin in *Peat v. Gresham Trust* [1934] A.C. 252 at page 262:

"The onus is on those who claim to avoid the transaction to establish what the debtor really intended, and that the real intention was to prefer. The onus is only discharged when the court, upon a review of all the circumstances, is satisfied that the dominant intent to prefer was present. That may be a matter of direct evidence or of inference, but where there is no direct evidence and there is room for more than one explanation it is not enough to say that there being no direct evidence the intent to prefer must be inferred."

It is well established that the giving of the preference must be a voluntary act. In this case it is clear that both the Appellants and at least one of the other creditors were pressing the debtors for payment. It was contended on behalf of the Appellants that the debtors gave this Bill of Sale in an attempt and with the object of preserving their business, and in order to avoid the Appellants

issuing legal proceedings against them to enforce payment of their debt, and not with a view to giving them preference.

On the other hand this Bill of Sale gave the Appellants at least as great powers over the entire assets of the debtors, and gave them earlier, than would have been the case had the Appellants actually taken legal proceedings against the debtors.

In this regard it must be borne in mind thtat the intention of the debtors need not have been solely to give a preference to the creditors concerned, but that this must have been the dominant view —see *Ex parte Griffith* 23 Ch.D. 69 and *Ex parte Hill* 23 Ch.D. 695.

In the Court below the debtors themselves gave evidence. It is contended by the Appellants that the direct evidence of the debtors of what their intention was at the time they gave this Bill of Sale is the best evidence thereof and should have been accepted and acted upon by the Court below. Although in his judgment he did not expressly say so, it is clear that the learned trial Judge did not believe or accept the evidence of the debtors on this issue. One of the questions that has to be considered is whether the learned trial Judge was entitled to decline to accept or act upon this direct evidence. In this case the debtors are brothers, one of whom has been employed by the Appellants since he became bankrupt and was so employed when he gave evidence in the Court below. He could hardly be considered to be an independent witness in these circumstances, since had he given different evidence he would have been testifying against the interest of his present employer. In these circumstances I consider the learned trial Judge was quite entitled after considering the testimony of the debtors, in the light of all the surrounding circumstances, not to accept their evidence, *ex post facto*, that their intention in giving the Appellants a charge over the whole of their assets was not so as to give them preference over their other creditors, which in fact it did, but was given merely to preserve their business.

The Official Receiver is an officer of the Court (Bankruptcy Ordinance, Section 71) and is in a rather anomalous position as a Plaintiff in litigation such as this. In my view he was not only entitled to, but under a duty to bring before the Court all the evidence available, including that of the debtors themselves in order that the Court could evaluate the evidence as a whole in arriving at a decision on this issue. I do not, however, consider the Official Receiver was necessarily bound solely by the evidence given by such witnesses as these two particular debtors, in these circumstances, of what they now say was their intention at the time they gave this Bill of Sale.

It is of interest, and some bearing on the facts in this case, to note the provisions of Section 3(1) (b) of the Bankruptcy Ordinance of which the material parts read:

> "A debtor commits an act of bankruptcy . . . if . . . he makes a fraudulent transfer of his property or any part thereof."

This repeats verbatim Section 1(1) (b) of the English Bankruptcy Act, 1914. Under this section it has been held in a number of cases to which reference is made in *Williams on Bankruptcy* 17th Edition at pages 7 and 8 that the assignment of the whole of a debtor's property for the benefit of one creditor to the exclusion of others is fraudulent and is an act of bankruptcy. The same considerations

apparently apply to a Bill of Sale given by a debtor over the whole of his assets to secure a past debt. In order that the execution of a Bill of Sale over substantially the whole of a debtor's property as security for a pre-existing debt may not be an act of bankruptcy there must be a *bona fide* agreement by the creditor to make further advances.

This matter was considered by the Court of Appeal in *Ex parte Dann* 17 Ch.D. 26 where, at page 33, James, L.J. said:

> "The bill of sale was substantially an assignment of the whole of the grantor's property as security for a past debt and it falls within the established rule that such a deed is void as an act of bankruptcy."

In my view, it was the duty of the learned trial Judge to bear such matters in mind in considering the whole of the evidence in this case and deciding whether the Bill of Sale in this case was void, and in deciding, as a matter of fact, whether the dominant intent or view of the debtors in granting the Bill of Sale to the Appellants over, not merely a part of their property, but over, the whole of it, was to give them a preference over their other creditors. This was done only four weeks before the debtors filed their own petition in bankruptcy and at a time when their entire assets were of less than £500 in value and their debts exceeded £8,000.

I am of the opinion that on a consideration of the whole of the evidence before him, and notwithstanding the denials of the debtors themselves that their intention was not to prefer the Appellants, although this was the only logical and actual result of their actions, there was sufficient material upon which the learned trial Judge could and was entitled properly to find, as a fact, that the dominant view of the debtors in granting this Bill of Sale to the Appellants was to give them preference over the rest of their creditors. I do not consider there is sufficient material before us for an Appellate Court to interfere with such a finding of fact in the particular circumstances of this case, or to hold that such a finding was unreasonable or one that is against the weight of the evidence or not adequately supported thereby.

For these reasons I do not consider there are sufficient merits in the first and second grounds of appeal to justify this Court interfering with the decision of the trial Judge on this issue. Even if there were, it would appeal, although no argument was led on this point, that the Bill of Sale was void as an act of bankruptcy, as was held by the Court of Appeal in Dann's case.

On the question of costs, it appears to me that this was a case of some importance to the parties and of sufficient complexity and substance to entitle the Respondent to bring his action in the Supreme Court. In my view the Respondent was entitled to costs on the Supreme Court lower scale.

I would, therefore, dismiss this appeal.

MARSACK J.: I have had the advantage of reading the judgment of Hammett, J. and agree that the appeal should be dismissed. I also agree substantially with the reasons given for his judgment, but desire

to make a few observations of my own as to the grounds upon which I think the appeal should be dismissed.

In Clause 11 of the Statement of Claim the Official Receiver, the present Respondent, pleads that the Bill of Sale given in favour of the Appellants on the 12th March, 1956, "amounted to fraudulent transfer and/or preference" and as such was void against the Official Receiver under the Bankruptcy Ordinance, Cap. 37.

There are at least three sections of the Bankruptcy Ordinance which call for consideration in determining the question as to whether the granting of this Bill of Sale amounted to a fraudulent transfer and/or preference and as such void. These are: Section 3(1) (b), Section 46(1) and Section 133(1) (o). The judgment of the Court below refers only to Section 46(1) and, in fact, no argument appears to have been directed to either of the other sections.

It is, I think, necessary to examine the evidence which was before the learned trial Judge for the purpose of determining whether he was justified in holding that the Official Receiver had discharged the onus lying upon him under Setcion 46(1) of proving that the dominant intent of the debtors was to prefer the creditor in whose favour the Bill of Sale was given. In this connection it would appear that the learned trial Judge placed some reliance on the fact that about two months after the bankruptcy one of the debtors was engaged as a salesman by the Appellants and has remained in that employment ever since, with the exception of the term spent in gaol upon his conviction, together with that of his brother, for an offence under Section 133(1) (o) arising from the execution of the Bill of Sale in question. I do not think that any presumption can be drawn from this fact as disclosing an intention to prefer the creditors. At best it can be only a reason for scrutinising carefully the evidence of that debtor on the ground, as Hammett J. points out, that he would be unlikely to give evidence detrimental to the interests of his employer. In addition, the Court might perhaps have given attention to the fact that the admitted conviction of both debtors under Section 133(1)(o) established that they had been unable to satisfy the Criminal Court that in giving the Bill of Sale they had had no intent to defraud.

At the hearing of the appeal Mr. Kapadia referred the Court to several decisions of high authority, pointing out that the onus of proof of intent to prefer lay upon the Official Receiver, and that in deciding whether that onus had been discharged the Court must confine itself to the evidence and not indulge in speculation. At the same time there is no authority for the proposition that the Court may not draw inferences which the Court may regard as conclusive from the evidence and the proved and admitted facts. In the course of the admirable summary of the law regarding onus of proof in such cases, which met with the express approval of the Court of Appeal in *Re M. Kushler Limited* [1943] 2 All E.R. 22 at p. 28, the learned author of *Williams on Bankrutcy* said (17th Ed. p. 361):

> "The law as to onus of proof may be summarised as follows:
> (1) the onus rests on the trustee; he may seek to discharge it by direct or by circumstantial evidence.
> (2) If the former, there is but one question viz: Is the bankrupt (the only possible witness who can give direct evidence) to be believed?"

As Lord Evershed, M.R. said in *Re Cutts*, cited ibid 363:

> "It is competent for the court to draw the inference of intention to prefer from all the facts of the case particularly when there is no direct evidence of intention before it."

Turning now to the evidence given in the Court below. Premabhai Patel, one of the debtors, said in the course of his evidence:

> "Our finance was weak in 1955. At the beginning of 1956 we had also 38 creditors apart from these defendants. The debts we owed amounted to £8,400 odd . . . On 12th March we executed the Bill of Sale in favour of defendants . . . When defendants threatened court proceedings they asked me for security . . . Within a day or two we agreed to give a Bill of Sale . . . We thought if we executed this Bill of Sale we would be able to slowly pay off . . . Ranchod Bhikabhai asked for his money before we made the Bill of Sale. The other creditors did not threaten but they were all asking for money . . . I was afraid then if I did not execute the Bill of Sale they would seize the goods."

The question was then asked:

> "Q: They could not seize the goods without a judgment against you?
>
> A: True. They had threatened court proceedings. We did not realise the consequence of making the Bill of Sale."

The evidence given at the public examination before the Senior Magistrate at Lautoka was put in as part of the proceedings. In the course of that the debtor Premabhai said:

> "During 1956 he (one of the Appellants) knew that I could not meet all the creditors properly. In 1955 no creditors filed an action in court against me. In 1956 one man filed action, Ranchod Bhikabhai. Filed in March 1956. Always asking for his money. Champaklal knew I had more debts than I could pay. Goods in shop at time of bankruptcy petition were goods bought on credit from wholesalers . . . I thought if I did this (i.e. sign Bill of Sale) to the man I could carry on properly afterwards. I gave away my property to the firm leaving nothing for other creditors."

In his evidence in the Court below, the other debtor, Parbhubhai Patel, said in answer to the qeustion:

> "Q: Why did you make this Bill of Sale in defendants favour?
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> A: We were under debt.
>
> "Q: Why prefer them to other creditors?
>
> A: They had a discussion with my brother. They asked him to pay. He said he could not. Later they said you will have to make something otherwise they were not happy about it. When we filed our petition we had about 40 creditors. Apart from these defendants we owed the other creditors about £8,000. Out of these 40 creditors some of them threatened legal proceedings."

This debtor further stated in his evidence that the stock-in-trade over which security was given in favour of the Appellants consisted mainly of goods obtained on credit and not paid off. This, of course,

constituted a breach of Section 133 (1) (o) of the Bankruptcy Ordinance. He further stated that Ranchod Bhikabhai issued a summons about that time but no summons was issued against them by the Appellants. He also deposed that at the time when the Bill of Sale was executed he could not recall if the Apellants threatened him.

This debtor, in the course of his public examination before the Senior Magistrate in Lautoka, said:

> "On 12.3.56 we made a Bill of Sale in favour of (Appellants). I knew then we had more creditors than we coud pay . . . When Bill of Sale was made they (Appellants) knew we were in bad financial position and knew that bulk of goods in our shop were goods on credit."

One of the other creditors, Ram Sarup, gave evidence that at the meeting of creditors one of the Appellants, Champaklal, said:

> "What we have done is to safeguard the money owed to everyone. The Bill of Sale we have executed is for the benefit of all the creditors. If Ranchod withdraws we will tear up the Bill of Sale."

Champaklal, in his own evidence, denied saying that the Bill of Sale was for the benefit of all the creditors, and he advised the rest of the creditors to be patient. He said he did this "for their own good. I did not worry because I will get the Bill of Sale. I wanted to get my money out of them and did the best I could". He denied that he took the Bill of Sale to defraud the other creditors.

At his public examination the debtor Premabhai made the rather extraordinary statement: "I did say that the Bill of Sale was not for himself, but for all the creditors". It might be possible to infer from this that Premabhai realised that the giving of this Bill of Sale was unjustifiable if it did in fact, as it did on the face of it, prefer the one creditor. But this might not be the only possible inference.

There is little, if anything, in the rest of the sworn evidence given at the hearing of the Court below relevant to the question of the proof of intent to prefer. In my view, the direct evidence given, from which I have quoted the extracts which appear to me to bear on the question, is of very little assistance to the Court on the vital point as to what was in the mind of the debtors at the time the document was signed.

When the surrounding circumstances are examined, however, I feel that there is only one possible inference to be drawn. The total debts owing by the firm to about 40 creditors in all, amounted to over £8,000. The total assets, particularly after the lorry which was under security to Millers Limited had been seized by the mortgagee, amounted at most to a few hundred pounds. The obviously optimistic, and unsupported, balance sheet given for 1954—the last one put in—at the public examination disclosed a total capital of the business of £1,128, some £434 less than it had been the previous year. The debtors had admittedly realised since 1955 that their financial position was weak and it is impossible to believe they had any real hope of paying their debts and attaining a position of financial stability. All the creditors were pressing for payment of

their accounts, and one creditor, Ranchod, went so far as to institute court proceedings, though not until shortly after the Bill of Sale had been signed. The Bill of Sale which, if not held invalid, placed the whole of the assets of the debtors beyond the reach of all creditors except the Appellants, was expressed to be in consideration of allowing the debtors 14 days before any action was taken. The debtors knew that the Appellants had not commenced legal proceedings against them and must have known that they could take no effective steps against the debtors within the space of 14 days. It must have been perfectly clear to the debtors that they had no chance of so improving their position within the space of 14 days as to pacify the creditors who on their own admission, had been pressing them for years. That being so, the only result of the signing of the Bill of Sale was to transfer the whole of the assets of the business—including those the transfer of which constituted a breach of Section 133(1)(o)—to one creditor, and to deprive all other creditors of any possibiltiy of receiving payment. The debtors must have realised that fully when they executed the document. That Premabhai Patel did so is shown by his sworn statement, already quoted, "I gave away my property to the firm, leaving nothing for other creditors".

In my view only one inference can be drawn from these facts, and that inference is inescapable. It is that at the time of signing the Bill of Sale the intent of the debtors was to prefer the Appellants. I am, therefore, of opinion that the trial Judge was right in holding that the Respondent had discharged the onus placed upon him of proving the intent to prefer which is necessary to avoid the dealing with the assets of the debtors under the provisions of Section 46(1).

On the face of it there seems little doubt that, for the reasons set out in the judgment of Hammett J., the transaction was an act of bankruptcy under Section 3(1)(b) and therefore void. I am unable to understand why no submissions on this ground were made by Counsel for the Respondent either in the Court below or before this Court. If that had been the only ground upon which, in my view, the transaction could be set aside, I should have preferred that an opportunity be given to Counsel for the Appellants to argue the matter before a formal decision of this Court was given. As, however, I think the appeal must fail under Section 46(1), I can see no good reason for inviting further argument.

With regard to the case presented for the Respondent, I feel that the Court has had not assistance whatever from Counsel appearing before us. All that Counsel for the Respondent did was to say in effect: The learned trial Judge decided this case on the facts and no grounds have been shown for reversing his decision on the facts. He made no attempt to reply to the careful and industrious argument, well supported by leading authorities, put forward by Counsel for the Appellants. For these reasons, though I would dismiss the appeal, I would make no order for costs in favour of the Respondent. As to the costs in the Court below, I agree with the view expressed by the President and Hammett J.

MACDUFF P.: I have had the benefit of reading both the judgment of Marsack J. and that of Hammett J. I agree with them that the appeal should be dismissed.

In my view the Bill of Sale dated 12th March, 1956, was an act of bankruptcy under Setcion 3(1) (b) of the Bankruptcy Ordinance (Cap. 37 Laws of Fiji) and, for the reasons set out in the judgment of Hammett J., was void. As both Counsel, in this Court and in the Court below, restricted their argument to the question as to whether or not the transaction was void as being a fraudulent preference within the meaning of Section 46(1) of the Ordinance and the learned trial Judge found it to be so and did not apply his mind to the issue as to whether or not it was a fraudulent transfer by virtue of Section 3(1) (b) of the Ordinance, I would usually have asked Counsel on this appeal to argue that point. However, taking the view I do of the appeal against the finding of the learned trial Judge, I am of opinion it is unnecessary to do so.

The learned trial Judge found, as a fact, that the dominant intent of the bankrupts in executing the Bill of Sale was to prefer the Appellants as one creditor against their remaining creditors. In doing so he appears to have drawn and relied on an inference from the subsequent employment by the Appellants of one of the bankrupts which, in my opinion, was not justified as evidence of the bankrupts' intent at the time of execution of the Bill of Sale. It was no more than a factor to be taken into account in evaluating the worth of the evidence of one of the bankrupts given subsequently, and while he was in the employ of the Appellants, as to the intent which influenced his mind in executing the Bill of Sale.

In addition, the learned trial Judge failed to express his belief or disbelief in the explanations given by the two bankrupts as to the dominant intent with which they executed the Bill of Sale. It is apparent, however, from the whole of his reasoning and his finding that he has not accepted their evidence as being of truth. In that event the facts to which the learned trial Judge has referred, with the added matters to which Marsack J. has referred, can, I agree, lead to only one inference, that is to say that the dominant intent of the bankrupts was to prefer the Appellants. For that reason alone the finding of fact by the learned trial Judge cannot be disturbed and, in my opinion, the appeal should be dismissed in so far as that finding is concerned.

I would add that, in my view, there was justification in the amount secured by the Bill of Sale in bringing this action in the Supreme Court, and I would also dismiss that ground of appeal concerning the order as to costs.

As to the costs of this appeal, I am of the same opinion as Marsack J. and would allow no costs to the Respondent on this appeal.

I therefore order that this appeal be dismissed with no order as to costs.

Appeal dismissed.