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OFFICIAL RECEIVER (TRUSTEE OF BUKHAN)

v.

BHANABHAI & COMPANY

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[COURT OF APPEAL, 1967 (Gould V.P., Marsack J.A., Bodilly J.A.), 11th, 18th July]

Civil Jurisdiction

Bankruptcy—fraudulent preference—Bill of Sale—intent—evidence of debtor—adverse inference arising from circumstances duly considered by judge—question of fact—matter for court of trial—Bankruptcy Ordinance (Cap. 37) ss.3 (1) (b), 3 (1) (c), 46 (1).

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Bankruptcy—Bill of Sale securing past debt, present and future advances—whether within s.3 (1) (b) of Bankruptcy Ordinance (Cap. 37)—intent of both grantor and grantee relevant—point of law not raised in Supreme Court—susceptible to further evidence—point not open on appeal.

Appeal—question of fact—partly inference and partly credibility—nothing overlooked in court below—not matter for Court of Appeal—new point of law raised for first time on appeal—raising further question of fact—not open on appeal.

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In the Supreme Court the appellant sought unsuccessfully to have set aside as a fraudulent preference under section 46 and an act of bankruptcy under section 3 (1) (c) of the Bankruptcy Ordinance, a Bill of Sale given by the debtor to the respondent over the whole of his assets. The Bill of Sale secured an existing debt of £695-6-2, a contemporaneous advance of £312-8-2 and future advances which were in fact made to the extent of £165. The debtor's position had, to his knowledge, been growing steadily worse for some years and there were other circumstances from which inferences adverse to him could be drawn. The Chief Justice accepted the debtor's evidence that the Bill of Sale was given with the intention of salvaging and carrying on his business.

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On appeal to the Court of Appeal the appellant sought for the first time in the proceedings to rely upon section 3 (1) (b) of the Bankruptcy Ordinance.

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Held: 1. The question of the intent of the debtor was one of fact and as the Chief Justice had heard the evidence of the debtor and overlooked none of the inferences adverse to him, it was not for the Court of Appeal to say that he should have come to a different conclusion.

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2. As to section 3 (1) (b) of the Bankruptcy Ordinance —

(a) The proposition of law that an assignment of the whole of a debtors' property to a creditor in respect of a past debt is fraudulent against creditors generally does not apply as an inflexible rule to assignments made partly to secure a further advance.

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Bankruptcy Ordinance s.3 (1): A debtor commits an act of bankruptcy in each of the following cases —. . . . . (b) if in the Colony or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property or of any part thereof;.

(b) Where there is a present consideration the fraudulent intention of both debtor and grantee must be proved as matters of fact.

(c) It was not open to the court to hold as a matter of inference that the respondent's part in the transaction was a mere sham, and had section 3(1) (b) been relied on in the Supreme Court the respondent might have chosen to call evidence.

(d) A new matter of law will only be entertained on appeal if the facts upon which it is based are beyond controversy and could not have been made the subject of additional evidence in the court below. The appeal could therefore not be allowed on the basis of the new ground put forward.

Cases referred to: *In re Mohanlal; ex parte Official Receiver v. Hemraj Daya* (1959) 7 F.L.R. 10: *Mehta v. Official Receiver* (1962) 8 F.L.R. 184: *Pennell v. Reynolds* (1861) 11 C.B. (N.S.) 709; 142 E.R. 974: *Ex parte Johnson* (1884) 26 Ch.D.338; 50 L.T. 214.

Appeal from a judgment of the Supreme Court refusing an application to set aside a Bill of Sale.

R. I. Kapadia for the appellant.

J. N. Falvey for the respondent.

The facts sufficiently appear from the judgment of GOULD V.P.

The following judgments were read: GOULD V.P.: [18th July, 1967]—

This is an appeal from the judgment of the Chief Justice refusing an application by the appellant, as trustee of the property of Bukhan s/o Kanji, asking that a Bill of Sale in favour of the respondent firm be set aside as a fraudulent preference under s.46 of the Bankruptcy Ordinance (Cap. 37) and an act of bankruptcy under s.3(1) (c) of that Ordinance. It is well to note at the outset that s.3(1) (b) of the Ordinance was not mentioned in the motion, nor argued by counsel in the Supreme Court, nor mentioned in the judgment under appeal. The learned Chief Justice said —

> "It was accepted that on a question of fraudulent preference, arising under section 46 (1), certain conditions must be established, of which one is that the debtor acted with a view to giving such creditor a preference over the other cheditors. (See *In re Mohan Lal ex parte the Offcial Receiver* (1959) 7 Fiji L.R. 10). Counsel agreed that this was the only condition in dispute. No argument was raised upon any other provision of the Ordinance and I am therefore left with the issue whether the Bill of Sale was executed by the debtor with a view to giving the respondent firm a preference over his other creditors. The onus lies upon the trustee to prove that there was a real intention on the part of the debtor to prefer the respondent firm and that such was his dominant intention (see *Mehta v. Offcial Receiver* (1962) 8 F.L.R. 184."

In the Supreme Court the debtor gave evidence at length and was cross-examined; the learned Chief Justice correctly directed himself that his evidence as to his intentions did not necessarily have to be accepted but that regard must be had to the state of his affairs at the time of execution of the Bill of Sale, his conduct generally and to the surrounding circumstances.

The Bill of Sale in question dated the 12th September 1962, was given in favour of a major creditor for £1,007.14.4d. representing £695.6.2d. already owing for goods sold and delivered and an advance at the time of execution of the Bill of Sale of £312.8.2d. The Bill of Sale covered also any further advances which might be made in goods or cash. The learned Chief Justice accepted the debtor's evidence that the respondent firm agreed to continue to supply him with goods on credit up to the value of £500 and it was common ground that further goods to the value of £165 were in fact supplied up to the 4th October 1962. The Bill of Sale covered the whole of the debtors' assets and his future stock in trade.

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It is evident that there were many circumstances in the case from which inferences adverse to the debtor could be drawn. His financial position had been growing steadily worse throughout 1960, 1961 and 1962 and this he undoubtedly knew. As counsel for the appellant put it before this court, the debtor was during this period living on his creditors' money. Two of his cheques were dishonoured in the first half of 1962. One of the creditors issued a summons in June 1962 and obtained judgment against the debtor for £70.10.3d. — the month following the execution of the Bill of Sale this creditor commenced bankruptcy proceedings, which were not proceeded with. The amount actually advanced in cash on the security of the Bill of Sale was used to pay another creditor, Hari Kissun & Co. and members of both that firm and the respondent firm were related, though, as the learned Chief Justice observed, "not nearly or closely", to the debtor. The respondent firm exercised its power of sale on the 23rd December 1962.

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The inferences from these facts, as I have said above, tell against the debtor, but the learned Chief Justice overlooked none of them, and nevertheless, having heard the debtor give evidence and undergo cross-examination, accepted his evidence as to his intentions as susbstantially true and held as a fact that the Bill of Sale was entered into by him with the intention of salvaging and carrying on his business. It is well settled that what the learned Chief Justice had to decide was a pure question of fact. It is therefore in my view impossible for this court, which has not heard the evidence, to say that by reason of the surrounding circumstances the learned Chief Justice should have come to a different conclusion. If the question were one of evaluating inferences only, this court could be said to be in as good a position as the court below, but that does not apply to the assessment of the worth of evidence given directly, and, as the learned Chief Justice directed himself fully and correctly and overlooked nothing, there is no reason to disturb his finding on the case as presented to him.

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The matter does not end there. I have indicated that s.3(1)(b) of the Bankruptcy Ordinance was not put forward or relied upon in the Supreme Court. Counsel for the appellant has sought to rely upon it in this court, and counsel for the respondent firm made no objection to his doing so. That attitude may have arisen from observations made in the judgments in *Mehta v. Offcial Receiver* (1962) 8 F.L.R. 184, a case decided under s.46 (1), where Hammett J. observed that he thought it was the duty of the trial judge to bear in mind such sections as s.3(1)(b). I would point out that Mehta's case was concerned with a Bill of Sale which no money was actually advanced at the date of its execution and there was no agreement between the parties for further advances to be made: thus it was a case which fell much more clearly, and perhaps as a matter of law, within s.3(1)(b). The present case is different, and if further

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or other findings of fact are required for the due consideration of that section, their absence must be fatal to the appellant's submission having regard to the absence of any similar submission in the Supreme Court.

The initial proposition of law is that an assignment of the whole of a debtor's property to a creditor in respect of a past debt, without more, in fraudulent as against creditors generally; such creditors must thereby necessarily be delayed or defeated and that is therefore presumed to have been the intention of the debtor. I take this general and undisputed statement from *Williams on Bankruptcy* (17th Edn.) p.7 and p.15. But this does not apply as an inflexible rule to assignments partly in consideration of an existing debt and partly as security for a further advance. That is the present case, in which there was not only a sum equal approximately to one third of the whole actually advanced in cash on the execution of the document, but an agreement (as the learned Chief Justice found) to advance up to £500 more in goods on credit, implemented to the extent of £165 within a period of three weeks. These are factors which may have deterred the appellant from relying on s.3(1)(b) in the Supreme Court, where he appeared by other counsel.

Counsel for the appellant advanced arguments to the effect that the advance of £312 was paid away to another creditor and that if it had been spent on goods they would have become subject to the Bill of Sale; thus the position of the other creditors generally was prejudiced. Such a consideration cannot, however, conclude the matter as the *bona fides* of the respondent, as the lender, in the present circumstances, are also relevant. *Williams* (op. cit.) when considering the question of fraudulent intent (p. 14) expresses the view that "it seems that where there is a present consideration wholly, or in part, then the fraudulent intention of both debtor and grantee must be proved as matters of fact". Among the authorities relied upon is *Pennell v. Reynolds* (1861) 11 C.B. (N.S.) 709, 142 E.R. 974 and I take the following passage from the judgment of the court read by Willes J, at p. 979 —

> "But, before we hold that a deed conveying property in consideration of a present advance which bears a substantial proportion to the value of the property is invalid, we must be satisfied that there exists an intention to defeat and delay and consequently to defraud the creditors. And that object must be the object not only of the bankrupt, but also of the party who is dealing with him. A person dealing bona fide with the bankrupt would be safe. Unless he knows, or from the very nature of the transaction must be taken necessarily to have known, that the object was to defeat and delay the creditors, the deed cannot be impeached".

Then, regarding the matter again from the lender's viewpoint, a portion of the headnote in *Ex parte Johnson* (1884) 26 Ch. D.338 is relevant —

> "When a bill of sale of the whole of a trader's property is executed as security for an existing debt and a fresh advance, the true test whether the execution of the deed is an act of bankruptcy, is, Was the fresh advance made by the lender with the intention of enabling the borrower to continue his business, and had he reasonable grounds for believing that the advance would enable the borrower to do so? If these questions can be answered in the affirmative, the execution of the deed is not an act of bankruptcy.

The Court ought not to look at the uncommunicated intention of the borrower, nor at the actual result of the loan".

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Now whatever the position of the debtor in the present case (having regard to the learned Chief Justice's findings of fact in relation to him) it appears to me that it is not open to this court, from inference alone, to hold that the respondent's part in the transaction was a mere sham and was not intended to enable the debtor to carry on, or could not have been so intended in all the circumstances. He did advance a substantial sum when the Bill of Sale was signed and he did supply further goods. This brings me back to the fact that s.3(1)(b) of the Bankruptcy Ordinance was not relied upon in the Supreme Court. If it had been, the respondent might have chosen to call evidence; if he had not so elected that might have been a relevant factor when inferences were being drawn.

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When it is sought to raise a new matter of law on appeal it is well settled that it will only be entertained if the facts upon which it is based have been established beyond controversy and could not have been made the subject of additional evidence, if agitated in the court below. I do not find that to be the case here and would therefore reject the appellant's claim to have the appeal allowed on this ground.

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The appellant has included in his appeal an objection to the order made by the learned Chief Justice that he should pay the respondent's costs. That was merely an order that costs should follow the event and I see no reason for interfering with the discretion of the learned Chief Justice in the matter.

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For the reasons given above and as all members of the court are of the same opinion the appeal is dismissed with costs.

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MARSACK J.A.: I concur.

BODILLY J.A.: I have had the benefit of reading the judgment of the judgment of the learned Vice-President in this case with which I find myself respectfully in agreement and have nothing to add.

Appeal dismissed.