Present : Ennis and Garvin JJ. 1924.

POULIER *et al v.* ALLES *et al.*

81—D. C. Colombo, 8,346.

Insolvency—Fraudulent preference—Transfer by father to daughter—Agreement to provide settlement at marriage—Ordinance No. 7 of 1853, s. 58.

Where a person, in insolvent circumstances transferred property to his daughter ten years after her marriage to fulfil a promise made to settle property on her before her marriage.

Held, that the transfer amounted to a fraudulent preference within the meaning of section 58 of the Insolvency Ordinance.

ACTION to set aside a deed on the ground either that it was executed in fraud of creditors or that it was void as a fraudulent preference under the Insolvency Ordinance. One Massillamany, being in insolvent circumstances, by his deed No. 146 of March 2, 1922, conveyed a coconut estate, his only real asset, to his daughter the first defendant. The transfer, it was alleged, was made in pursuance of an undertaking given by him at the time of her marriage some ten years previously that he would convey thirty acres of coconut land to her before her marriage. The learned District Judge found that there was no fraudulent preference as the defendants were not creditors of the insolvent, but set aside the deed on the ground that it was executed in fraud of creditors.

Samarawickreme (with him *Ferdinands*), for defendants, appellants.

Drieberg, K.C. (with him *Bartholomeusz* and *Navaratnam*), for plaintiffs, respondents.

November 4, 1924, ENNIS J.—

This was an action to set aside a deed either on the ground that it was executed in fraud of creditors, or on the ground that it was void as a fraudulent preference under the Bankruptcy Ordinance. The learned Judge found that there was no fraudulent preference as the defendants were not the creditors of the insolvent. He however, found that the conveyance by the insolvent was executed in fraud of creditors and he accordingly set aside the deed. The defendants appeal.

I am not prepared to hold, as found by the learned Judge, that the conveyance in this case was executed in fraud of creditors. It seems to me that the plaintiffs have not proved the matters, which

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they have to prove beyond any question, to succeed in the Paulian action. This point was discussed in a recent case, *Muttiah Chetty v. Mohamoodo Hadjiar*.[1] There can be no doubt that the defendants took a conveyance of the land in question in pursuance of an earlier agreement which had been entered into by the insolvent when the insolvent's daughter contracted a marriage with the second defendant. That marriage agreement must be considered in deciding whether there was fraud, and it seems to me that it negatives any question of fraud, which would have to be established to succeed in a Paulian action. On the other question, also, as to whether or not there was a fraudulent preference within the Bankruptcy Ordinance, I am not in agreement with the learned Judge. It seems to me that the defendants were the creditors of the insolvent by virtue of the earlier agreement. It was strenuously urged that this was not so, and that they had no claim which they could prove in the bankruptcy. Section 94 of the Insolvency Ordinance is, however, wide enough to cover a demand for the conveyance of land. If then the defendants were the creditors of the insolvent is there any reason why they should be put in a better position than the other creditors ? The evidence does not disclose that they took any steps to compel the insolvent to carry out his agreement. It merely shows that they were complaining that he had not carried out the agreement. In the absence of any compulsion by the creditors forcing the debtor to act, the conveyance by the debtor to one of the creditors would be a fraudulent prefence under the Bankruptcy Ordinance, and the conveyance in question is a voluntary conveyance.

Without therefore adopting the reasons of the learned Judge the conclusion he has come to is right, and I accordingly dismiss the appeal with costs.

GARVIN J.—

It has been clearly established that one A. F. Massillamany, being then in insolvent circumstances, by his deed No. 146 of March 2, 1922, conveyed a certain coconut estate being his only real asset to his daughter the first defendant.

This transaction is impeached for the following reasons :—

(*a*) That it is in fraud of creditors ;

(*b*) That it is a fraudulent preference of a creditor, *vide* section 58 of Ordinance No. 7 of 1853 ;

(*c*) That it is obnoxious to the provisions of section 51 of Ordinance No. 7 of 1853.

[1] *25 N. L. R. 185.*

I agree that there is no evidence that the first defendant took this transfer in conspiracy with Massillamany for the purpose of defrauding his creditors. But there can be no doubt that Massillamany when he found himself in insolvent circumstances decided to pass to his daughter title to his only real asset. It is contended that he did so in discharge of an obligation undertaken by him at the time of her marriage which took place some ten years previously. By the ante-nuptial agreement referred to Massillamany did undertake to convey thirty acres of coconut land to his daughter *prior to her marriage*. He did not do so then and everything indicates that his daughter and her husband had accepted the situation, and that there was no pressure brought to bear on Massillamany at the time of the execution of the transfer the validity of which is in question.

These would seem to be all the elements present to entitle the plaintiff to impeach the transaction as a fraudulent preference. It is contended however that the first defendant was not a creditor within the meaning of section 58. Counsel for the appellant would limit the word " creditor " to those persons to whom the insolvent was under liability to pay money. Persons to whom the insolvent was under a primary liability to deliver goods or chattels or transfer land are not it is contended " creditors," even where there had been a breach of such an obligation by the insolvent, because the liability to pay money was secondary and by way of damages.

If this contention is to prevail, it follows that the provisions of the law relating to fraudulent preferences will apply where the individual so favoured is a person to whom the insolvent owed Rs. 1,000 for goods purchased by him but not when he is a person to whom the insolvent has sold Rs. 1,000 worth of goods which he failed to deliver.

In the absence of specific authority in support of this contention there does not appear to be sufficient reason so to restrict the ordinary meaning of the word " creditor."

For the purpose of considering Counsel's argument, it has been assumed that at the date of the transfer the first defendant, if she so desired, was still in a position to claim her right under the agreement as alleged by the defendants.

For these reasons I agree that this appeal should be dismissed with costs.

Appeal dismissed.