

1949

Present: **Basnayake J. and Gratiaen J.**JANSZ, Appellant, and WEERASEKERA *et al.*, RespondentsS. C. 245.—D. C. Colombo, 5777/*Insol.*IN THE MATTER OF THE INSOLVENCY OF BERTRAM CLIFFORD JANSZ
OF PAMANKADE LANE, WELLAWATTA, COLOMBO*Insolvency Ordinance—Fraudulent preference—Possible even when there is no moral blame—Refusal of certificate of conformity—Extenuating circumstances—Sections 58 and 151.*

A fraudulent preference need not involve any moral blame at all, and an insolvent will be guilty of it if, for example, he makes payment to his creditors influenced by the property of some and out of gratitude to others.

Where fraudulent preference is proved but there are extenuating circumstances an insolvent will not be refused a certificate of conformity for all time.

A PPEAL from an order of the District Court, Colombo.

S. Nadesan, with *M. A. M. Hussain*, for insolvent appellant.

S. J. Kadirgamar, with *R. S. Wanasinghe*, for opposing-creditor respondent.

Cur adv. vult.

September 28, 1949. BASNAYAKE J.—

The appellant (hereinafter referred to as the insolvent) appeals from the order of the District Judge refusing him a certificate of conformity and withdrawing the protection from arrest granted to him under section 36 of the Insolvency Ordinance.

Objection has been taken to the grant of a certificate of conformity by one Verona Florence Weerasekera, a creditor (hereinafter referred to as the opposing-creditor) to whom a sum of Rs. 1,950 is due on a promissory note dated December 4, 1945. The grounds on which her objection is based are as follows:—

“ (1) The insolvent has, in contemplation of insolvency or with the intent to defeat the object of the Insolvency Ordinance, concealed part of his property.

(2) The insolvent has contracted debts under false pretences and has by false pretences obtained the forbearance of his creditors.

(3) The insolvent has within two months next preceding the filing of the petition for sequestration of his estate, fraudulently in contemplation of insolvency and with intent to diminish the sum to be divided among his creditors, or to give undue preference to some of his creditor, has paid some creditors wholly or in part and has made away with part of his property.

(4) The insolvent has under his insolvency attempted to account for his property by fictitious losses.

(5) The insolvent has not made a full and true disclosure of all his matters and assets. ”

One Richard James Norton Weerasekera, a brother of the opposing creditor, has given evidence on behalf of the opposing creditor. He details the circumstances in which the opposing creditor came to make the loan to the insolvent. He says that the insolvent whom he had known for about 15 years came to see him in December, 1945, and told him that

he was in debt and that if his father came to know about it he would be in a bad way, but that if he managed to clear his debts his father would take him on as a partner in his father's business. The insolvent wanted Rs. 1,500 to clear all his debts. The witness knew that the insolvent's father was a prosperous business man and says he believed him. The witness therefore arranged for a loan from his sister, the interest charged being 15 per cent. per annum. The witness says: "I would not have given this money to him if I knew that the representations he made were false". The evidence of this witness does not in my opinion support the allegation that the opposing creditor was induced to lend the money on false representations made by the insolvent to her, nor is there any evidence to the effect that the witness acted as an insolvent's agent or made any false representations on his behalf and thereby induced the opposing creditor to lend the money.

On the evidence of the witness Richard James Norton Weerasekera the learned District Judge holds that the opposing creditor was induced by her brother, the witness, to make the loan on the false representations made to him. He says: "I accept this evidence and find that, apart from the insolvent having been unable to give a satisfactory explanation for the full Rs. 5,000 that came into his hands as commuted pension about three months prior to his coming to the Insolvency Court, the insolvent on his own admission, has given undue preference to some of his creditors. I also find on the evidence of Mr. R. J. N. Weerasekera that the insolvent has been contracting the debt of Miss Weerasekera by fraud and by means of false pretences, and that on this ground he is not entitled to a certificate of conformity."

I am unable to agree with the learned District Judge that in the instant case it is established that the insolvent contracted the debt with the opposing creditor "by fraud and by means of false pretences", nor is there any evidence to support objections (1), (4), and (5) mentioned above. The only question that merits examination is the question of "fraudulent preference".

I shall first discuss the meaning of the expression "fraudulent preference" and then consider whether the evidence discloses that the insolvent is guilty of fraudulent preference. In our law the expression "fraudulent preference" bears the same meaning that it bears in English law at the corresponding period of time.¹

A "fraudulent preference" is well known to the law of bankruptcy. It arises where the debtor, in contemplation of bankruptcy—that is, knowing his circumstances to be such as that bankruptcy must be, or will be, the probable result, though it may not be the inevitable result—does *ex mero motu*, make a payment of money, or a delivery of property to a creditor, not in the ordinary course of business, and without any pressure or demand on the part of the creditor². The elements which go to make up a fraudulent preference are two: first insolvency—inability on the debtor's part to pay his debts as they become due, from his own moneys—; and, secondly, a payment to a creditor with a view to giving him a preference over the other creditors. Preference given to a creditor from a mere sense of duty or honour will not prevent the transaction

¹ Section 58, *Insolvency Ordinance*.

² *Nunes v. Carter*, I. L. R. P. C. (1865-67) 342 at 348.

being a fraudulent preference.¹ It is the duty of a debtor who is unable to pay his debts as they become due not to interfere in any way amongst his creditors. If he interferes in any way in order to give an advantage to one creditor over the others, he cannot escape the consequences of his act.² An insolvent is not free to pay some only of his creditors, even though it be in part, during the two months preceding his adjudication on the ground that they had done him services or because they were friendly to him and because he liked them better than his other creditors. He cannot be allowed to anticipate the action of the Bankruptcy Court with an intention of preferring one of his creditors to another and virtually take the administration of his estate out of bankruptcy into his own hands, preferring one creditor to another, even though the creditors whom he paid might or would be entitled to priority in the bankruptcy.³

It should be observed that although the early English legislation described the preferring of creditors by a bankrupt in contemplation of bankruptcy as a fraudulent preference the act need not be accompanied by any fraud practised on the creditors. Maugham J. in the case of *Re Patrick and Lyon Ltd.* observes "A fraudulent preference . . . possibly may not involve any moral blame at all; for example, there may be a discrimination between creditors, irrespective of pressure, on grounds with which most people would sympathise". The debtor may be influenced by the affluence of his other creditors and, as in the instant case, by the poverty of the preference; or again, as in the instant case, by gratitude to some of the preferencees.

The petition to have the appellant adjudged insolvent was filed on January 20, 1948. At 1.30 p.m. on the same day the appellant filed his declaration of insolvency and asked for protection. On these representations the District Judge made order on the same day adjudging the appellant an insolvent and ordered that his estate be placed under sequestration in the hands of the Fiscal. There is proof that the appellant, through the very proctor who filed his declaration of insolvency, paid certain sums of money to some only of his creditors within two months⁴ of his adjudication. The payments made by the appellant's proctor are as follows:—

| Name | Amount due | | Amount paid | |
|--------------------|------------|-----|-------------|-----|
| | Rs. | ... | Rs. | ... |
| A. Nanayakkara | 400 | ... | 150 | ... |
| Etta de Silva | 1,250 | ... | 750 | ... |
| Q. R. de Silva | 500 | ... | 250 | ... |
| P. F. G. Fernando | 200 | ... | 50 | ... |
| Sayed Karim Bhai | 375 | ... | 150 | ... |
| P. T. P. Gunaratne | 400 | ... | 200 | ... |
| P. Don Albert | 200 | ... | 100 | ... |
| M. de Silva | 150 | ... | 100 | ... |
| S. Guluvite | 750 | ... | 250 | ... |
| | 4,225 | | 2,000 | |

Of the above payments two at least were paid on the very day the appellant was adjudged insolvent. The actual dates of the other payments.

¹ *Re Viree and Davies, ex parte Viree, (1894) 1 Mans. 416.*

² *In re Skegg, (1890) 59 L. J. 546 at 548.*

³ *In re Bryant, (1895) L. R. 1 Q. B. D. 420.*

⁴ (1933) *v. R. Ch. 790.*

⁵ *Section 151 (4) of the Insolvency Ordinance.*

are not stated in the list filed by the appellant's proctor, nor have I been able to find any receipts for them in the record.

The appellant's explanation as to why he preferred certain creditors to others is in his own words as follows:

"I released Rs. 2,000 to Mr. Stave so that he might come to some sort of settlement with my creditors. He has distributed that Rs. 2,000. I have got the names of the persons to whom this money was distributed. They were good friends of mine and they wanted full amounts."

From the foregoing it appears that the insolvent has deliberately in contemplation of insolvency with intent to give an undue preference to certain of his creditors paid them in part—a course of conduct which the law of insolvency declares to be an offence. But what is surprising in this case is the action of the insolvent's proctor, who, without advising the insolvent as to the proper course he should take, himself undertook to act for him in distributing the sum of Rs. 2,000 among his creditors at a time when he appears to have known that the appellant was about to declare himself insolvent. His conduct needs explanation. Even on the very day the appellant was adjudged insolvent, the appellant's proctor made a payment of Rs. 100 to a creditor to whom only Rs. 150 was due. The appellant's instructions were written on paper bearing his proctor's name and address and read:

"Mr. Stave.

I owe this body Rs. 150. Please pay him Rs. 100 as this is a very deserving case.

(Sgd.)'' and dated 28.1.48.

The receipt dated the same date on the same paper is as follows:

"Received Rs. 100 from Proctor Stave on behalf of Mr. B. C. Jansz.

M. de Silva
28.1.48."

The insolvent had no right to make payments to his creditors in the way he did influenced by the poverty of some and out of gratitude to others. I am therefore unable to hold that the learned District Judge is wrong in refusing him a certificate and withdrawing his protection under section 151 of the Insolvency Ordinance.

But having regard to the circumstances of the instant case I do not think that the insolvent should be refused a certificate of conformity for all time. The insolvent is 43 years of age. He started life as a Clerk in a Bank on a salary of Rs. 50 per month. Thereafter in 1922 he joined the Railway Department as an Inspector of Railway Telegraphs on a starting salary of Rs. 80 per month, and later in the year 1927 he became an Inspector of Telegraphs of the Post and Telegraph Department on a starting salary of Rs. 103 per month. He married in the year 1933 and has three children of the ages of 13, 10, and 7—two girls and a boy. They are being educated at Ladies' College, Colombo.

In the year 1939 he was in difficult financial circumstances and was compelled to borrow, for the first time to meet the expenses connected with the illness of his uncle who was staying with him. The insolvent's

domestic budget was strained by the fact that he had also to support his mother-in-law and brother-in-law. The insolvent's father is a prosperous business man with trading establishments at Wellawatta and Nugegoda, but he says he is unable to turn to him for the solution of his financial troubles because he had incurred his displeasure on his marriage without his approval.

The insolvent's creditors are Chettiars, Afghans, and others, and the rates of interest charged by them range from 120 to 200 per cent.

In 1941 the insolvent's wife took employment in the Naval Office on a salary of Rs. 200 in order to alleviate their financial difficulties. His wife's services came to an end in 1944 owing to her illness. In 1946 she again sought employment and she is now employed at Lee Hedges & Co. on a salary of Rs. 60 per month and a cost-of-living allowance of Rs. 56.

Owing to financial worry he ran down in his health and retired from Government Service in the year 1947, having been condemned by a medical board as unfit for work. He drew as commuted pension and retirement allowance a sum of about Rs. 5,000. It is Rs. 2,000 of this sum that he handed over to his proctor for settlement among some of his creditors.

The insolvent says that he never gambled on the racecourse or otherwise and that his present financial difficulties are due entirely to misfortune. His monthly pension together with the cost-of-living allowance is Rs. 124.85, and his wife's income is Rs. 105.50 with allowance. His father pays him Rs. 50 a month on account of his children's schooling and has given him a house to live in free of rent.

Having regard to the above facts I think it is sufficient if the issue of the insolvent's certificate is suspended till he brings into court a sum of Rs. 2,000, which is the amount he took upon himself to distribute among some only of his creditors, either a lump or in monthly instalments of Rs. 100. The first of such instalments is to be paid within thirty days from the day on which this judgment is communicated to him by the learned District Judge and the subsequent instalments monthly on the date corresponding to the date on which the first instalments is paid in pursuance of this order. I order that upon the completion of the payment of that sum the insolvent be granted a certificate of conformity if meanwhile he does not do anything to forfeit his claims to it on any other ground or any other circumstance which disentitles him to a certificate is not disclosed. The District Judge should determine the class of the certificate on the material before him at the time he grants it. The insolvent has undertaken to pay monthly a sum of Rs. 50 for the benefit of his creditors. The record indicates that he has in pursuance of this undertaking made certain payments, which should be credited to the amount I have ordered him to pay, i.e., he will pay Rs. 2,000 less any sum he has already paid in instalments. The insolvent shall be intitled to protection from arrest pending the grant of a certificate of conformity so long as he duly complies with the order I have made.

The respondent is entitled to the costs of this appeal.

GRATIAEN J.—I agree.

Order varied.