

PRIVY COUNCIL

Musahar Sahu and another

Vs.

Hakim Lal and another

P.C.A.No. 10 of 1912

(Viscount Haldane, CJ, Lords Parmoor Wrenbury, Sir John Edge and Mr. Ameer Ali.JJ)

22.11.1915

JUDGMENT

Lord Wrenbury J.

1. On the 2nd September 1901 Kishun Benode executed two kobalas or conveyances, the one to Kamta Prashad and the other to Hakim Lal. They were conveyances of certain lands, the parcels in the second deed being much more numerous than those in the first deed. Kamta Prashad was the nephew of Ram Aotar Lal, a brother of Hakim Lal. He was a minor and Ram Aotar Lal was his guardian.
2. The plaintiff Musahar Sahu, was at this date a creditor of Kishun Benode. He had on the 14th December 1900 sued for the debt and on the 5th January 1901 had presented a petition for security by way of attachment before judgment. On the 11th February 1901 Kishun Benode had made an affidavit that he did not intend to transfer any of his properties and accordingly on the 11th February 1901, the petition was dismissed.
3. In this state of facts the two kobalas were executed by the debtor on the 2nd September 1901.
4. On the 5th December 1901 the plaintiff obtained judgment in his action for Rs. 12,695-10-0 and costs. The defendant did not appear at the trial. On the 21st December 1901, Kishun Benode applied for a rehearing, but on the 2nd August 1902 that application was dismissed by default. In the interval, viz., on the 11th June 1902, the transferees had obtained an order for registration of their names in respect of the

properties transferred.

5. Under these circumstances two suits were brought to set aside the *kobalas* on the ground that within section 53 of the Transfer of Property Act, IV of 1832, the transfer were made with intent to defeat or delay the creditors of Kishun Benode.

6. The Subordinate Judge set aside the first *kobala* on the ground that no consideration was paid, that a debt of Rs. 6,335 therein alleged to be due to Kamta Prashad was fictitious, that the transfer was made gratuitously, and that the transfer was made with intent to defraud. An appeal was dismissed with costs, and this decision is not questioned before this Board.

7. As regards the second *kobala*, there are concurrent findings that the consideration for this deed was real and not fictitious. The Subordinate Judge nevertheless decided in favour of the plaintiff. Upon appeal this decision was reversed, and the second *kobala* upheld. From that decision the plaintiff has brought this appeal.

8. The appellant has not argued that the law is wrongly laid down in the judgment of the High Court. His contention is that the two deeds of the 2nd September 1901 form really one transaction, and that the second *kobala* must fall with the first.

9. As matter of law their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy applies there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts. The law is, in their Lordships' opinion, rightly stated by Palles, C.B., in *Moroney, In re*¹, where he says:-

"The right of the creditors taken as a whole is that all the property of the debtor should be applied in payment of demands of them or some of them, without any portion of it being parted with without consideration or reserved or retained by the debtor to their prejudice. It follows from this, that security given by a debtor to one creditor upon a portion of or upon all his property, although the effect of it or even the interest of the debtor in making it; may be to defeat an expected execution of another creditor, is not a fraud within the statute, because notwithstanding such an act, the entire property remains available for the creditors or some or one of them, and as the statute gives no right to ratable distribution, the right of the creditors by such act is not invaded or affected."

10. The transfer which defeats or delays creditors is not an instrument which prefers

one creditor to another but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid: *Middleton v. Pollock*², So soon as it is found that the transfer here impeached was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor it follows that no ground for impeaching it lies in the fact that the plaintiff who also was a creditor was a loser by payment being made to this preferred creditor, there being in the case no question of bankruptcy.

11. The argument presented to their Lordships has in substance been that the transaction of the 2nd September 1901 was one transaction : that (i) Kamta Prashad, the nephew, the minor and ward, and (ii) Hakim Lal, the uncle of Kamta and brother of Ram Aotar Lal, minor's guardian, are for this purpose not distinguishable as independent, transferees, that from the 11th February 1901 until after the 11th June 1902 Kishun Benode was praying for time, and that this fact and the fact that the former *kobala* was fictitious and fraudulent show that the latter *kobala* was fraudulent also. Their Lordships do not accept this contention. The *kobala* in favour of Hakim Lal must stand or fall on its own merits. The concurrent finding that the consideration for the deed was real reduces the case to one in which the debtor has preferred one creditor to the detriment of another, but this in itself is no ground for impeaching it under the section even if the debtor was intending to defeat an anticipated execution by the plaintiff.

12. Their Lordships will humbly advise His Majesty that the appeal should stand dismissed with costs.

Appeal dismissed.

Cases Referred.

1. [1887] 21 Ir. 27
2. [1876] 2 Ch.D.104 - 45 L.J.Ch.29