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APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

DADAPA (*Original Applicant*), *Appellant v.* VISHNUDAS AND OTHERS (*Original Opponents*), *Respondents.** [11th August, 1887.]

Insolvency—Insolvent-debtor—Unfair preference—Civil Procedure Code (Act XIV of 1882), s. 351.

A creditor can put pressure on his debtor to get payment of his claim, notwithstanding that the debtor may be in embarrassed circumstances. But a debtor, who gives an unfair preference to one creditor by giving him a large proportion of his property, so as to reduce the *aliquot* share of the other creditors acts fraudulently, and no title is given to that particular creditor as against the assignees who represent the creditors generally.

A. filed a suit and obtained a decree against B. During the pendency of the suit, and only four days before the decree was passed, B. assigned by way of mortgage nearly the whole of his property to one of his creditors C. The assignment was made, not to secure a fresh advance, but in consideration of past debts [425] due to C. C. was aware of B.'s embarrassments. Two years afterwards B. was arrested in execution of A's decree. B. thereupon applied to be declared an insolvent.

Held, that the assignment by B. of nearly the whole of his property to C. amounted, under the circumstances, to an unfair preference, within the meaning of s. 351, cl. (*c*) of the Code of Civil Procedure (XIV of 1882). B. was, therefore, not entitled to be declared an insolvent.

[R., 25 B. 202 (214); 16 M. 499 (505).]

APPEAL from the order of Rav Saheb Vyankatrao R. Inamdar, Second Class Subordinate Judge of Bijapur, in miscellaneous application No. 7 of 1886.

The appellant Dadapa was arrested in execution of a decree obtained by one Vishnudas on the 30th May, 1884. Thereupon Dadapa applied to be declared an insolvent under the provisions of chap. XX of the Code of Civil Procedure (XIV of 1882).

This application was rejected by the Subordinate Judge. He found that in 1879 Dadapa had mortgaged certain property to one Gokuldas for Rs. 800; that when Vishnudas sued Dadapa in 1884, Gokuldas began to press Dadapa for payment of his money; that during the pendency of the suit, and only four days before the decree was passed in favour of Vishnudas, Dadapa transferred nearly the whole of his property to Gokuldas under a mortgage-bond for Rs. 600; and that the consideration for this bond was the balance due to Gokuldas on account of former transactions.

The Subordinate Judge was of opinion that the mortgage by Dadapa of nearly the whole of his property for Rs. 600 amounted, under the circumstances, to an unfair preference within the meaning of s. 351, cl. (*c*) of the Code of Civil Procedure (XIV of 1882), and as such disentitled him to be declared an insolvent.

Against this decision Dadapa appealed to the High Court.

Shamrav Vithal, for the appellant.—On the facts found by the Subordinate Judge the appellant is entitled to be declared an insolvent.

* Appeal from Order No. 2 of 1887.

There were debts due to Gokuldas. He was pressing hard for payment. The mortgage was effected under this pressure. There is no proof of any intention to defraud the general body of creditors. The transaction, therefore, does not amount to an [426] unfair preference—*Joakim* v. *The Secretary State for India* (1); *Ex parte Craven* (2).

There was no appearance for the respondents.

JUDGMENT.

WEST, J.—In this case the Subordinate Judge determined that the transaction on the part of the present appellant amounted to an unfair preference, and as such, disentitled him to the benefit of s. 351 of the Code of Civil Procedure (XIV of 1882). The ground for his decision was that the bond for Rs. 600 passed to Gokuldas four days before the decree against the appellant of itself constituted an unfair preference, and was one which put Gokuldas in a more advantageous position as compared with the other creditors.

It is clear that his passing that mortgage bond to Gokuldas, instead of letting the latter wait for the distribution of his assets under the insolvency rules, gave Gokuldas a preference; and, *prima facie*, it was an unfair advantage given to him over the other creditors.

It has been argued at much length that there was no unfair or fraudulent preference shown; and Mr. Shamrav Vithal on behalf of the appellant has relied upon a decision in *Joakim* v. *The Secretary of State for India*. This decision appears to be opposed to several English rulings which bear directly upon the question in this case. The general doctrine is that a creditor can put pressure on a debtor to get payment of his claim, notwithstanding that the debtor may be in embarrassed circumstances; but it is also the general doctrine that a debtor who gives an unfair preference to one particular creditor by giving him a large proportion of his property, so as to reduce the *aliquot* share of the other creditors, acts fraudulently, and no title is given to that particular creditor as against the assignees who represent the creditors generally—*Ex parte Halliday*; *In re Liebert* (3); also *Marks* v. *Feldman* (4) and *Butcher* v. *Stead* (5). In the last mentioned case Lord Hatherley says: "I think the Legislature intended to say that if you, the debtor, for the purpose of evading the operation of the bankruptcy laws, and in order to give a [427] fraudulent preference, make this payment or this charge it shall be wholly done away with except in cases where the person you have so favoured is wholly ignorant of your intention to favour him and receives payment simply for valuable consideration and *bona fide*, that is, without any notice of any intention on your part fraudulently to favour one creditor above another." If there had been a new advance given by Gokuldas to the appellant, the conduct of the latter would not, perhaps, have been an act of bankruptcy. In the present case, however, the creditor was aware that the debtor was in embarrassed circumstances, and got an assignment of nearly the whole of his property only four days before a decree was passed against him. There was, clearly, an unfair preference shown to Gokuldas by the debtor, although the latter did not apply to be declared an insolvent for nearly two years afterwards. As a matter of fact, he applied as soon as execution of the decree was sought in the very suit, during the pendency of

(1) 3 A. 530. (2) L.R. 10 Eq. 648. (3) L.R. 8 Ch. App. 283.
(4) L.R. 5 Q.B. 275. (5) 7 Eng. and Ir. App. 839 (849).

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which he passed the bond charging his property with Rs. 600. This transaction the lower Court held to be a fraudulent preference; and we would not be justified in interfering with the lower Court's decision, unless we were satisfied to the contrary. We must, therefore, confirm the order of the Subordinate Judge.

Order confirmed.

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12 B. 427.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

HARI (*Assignee of Decree-holder*), *Appellant v.* NARAYAN *alias* SAMBHOJI, A MINOR, BY HIS GUARDIAN CHIMABAI (*Judgment-debtor*), *Respondent.**

[17th August, 1887.]

Execution of decree—Limitation—Application for execution in accordance with law—Limitation Act (XV of 1877), sch. II, art. 179—Decree against a minor—Application for execution against minor's mother personally, but not as his guardian.

On the 31st July, 1879, a decree was passed against N., a minor, represented by his mother and guardian C. In December, 1880, the first application for execution was made. Through mistake execution was sought against C. herself, as 'widow of B.' and not as guardian of the minor N. That application was granted, and [428] certain property belonging to the minor was attached. On the 29th November, 1883, the second application for execution was made against the minor as represented by his guardian C. The present application for execution was made on the 3rd December, 1884. This application was rejected as time-barred by the District Court in appeal, on the ground that the first application having been made against a wrong person, could not be taken into account; that, therefore, it could not keep the decree alive, and that the present application was barred.

Held, reversing the decision of the lower Court, that the decree-holder ought not to be deprived of the fruit of his decree on account of a technical defect in his application of 1880. The minor was substantially and for all practical purposes represented by his mother.

[R., 32 A. 404=7 A.L.J. 542 (583)=6 Ind. Cas. 38; 20 B. 534 (536); 12 M. 90 (91); 13 Bom. L.R. 22=9 Ind. Cas. 349.]

THIS was an appeal from the order of C. G. W. Macpherson, Acting District Judge of Satara, in Appeal No. 279 of 1885.

On the 31st July, 1879, the plaintiff Vithoba bin Malapa obtained a decree against Narayan Babaji, a minor, represented by his mother and guardian, Chimabai.

On the 1st December, 1880, Vithoba applied for execution of the decree against Chimabai herself, describing her as "widow and heir of Babaji, deceased," and not as guardian of the minor Narayan. The Court issued a notice to Chimabai, but she did not appear to contest the application. The Court accordingly ordered execution to issue.

On the 29th November, 1883, the decree-holder presented a second *darkhast* for execution. On this occasion he did not omit to put the minor on the record. Nothing, however, was done on this application.

On the 3rd December, 1884, the present application for execution was made by Hari bin Irapa, to whom the decree had been assigned.

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* Second Appeal. No. 117 of 1887.