Judgment of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeal and Cross-Appeal of Chop Ek Chiang v. *The Official Assignee in Bankruptcy of the Estate of Khoo Syn Thuak; and of The Official Assignee in Bankruptcy of the Estate of Khoo Syn Thuak* v. *Chop Ek Chiang, from the Supreme Court of the Straits Settlements; delivered the 5th July* 1907.

Present at the Hearing:

LORD ASHBOURNE.
LORD MACNAGHTEN.
LORD ATKINSON.
SIR ARTHUR WILSON.

[*Delivered by Lord Atkinson.*]

The main question for decision in this case is whether certain payments of money and certain transfers of property made on the 11th, or 10th and 11th, of March 1905, by one Khoo Syn Thuak, who carried on the business of a rice merchant under the name of Chop Khoo Chin Hin at 22, Teluk Ayer Street, and at Kallang Rice Mills, Singapore, to a firm of rice merchants also resident at Singapore, and trading under the name of Chop Ek Chiang, amounted to a fraudulent preference within the provisions of Section 46 of the Bankruptcy Ordinance, 1888 (as amended by Ordinance No. 8 of 1896), which is practically identical with Section 48 of the English Bankruptcy Act, 1883.

Section 46 of the Ordinance (as amended) runs as follows:—

> (1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or any person in trust for any creditor, with a

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> view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within six months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the official assignee.
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> (2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt.

The firm of Chop Ek Chiang consisted of 12 partners, nine of whom, holding 53/64 of the capital, were relatives of Khoo Syn Thuak, one being his first cousin. On the 10th of March 1905 he was indebted to this firm to the amount of $26,016.

At the time when the impeached transactions took place Khoo Syn Thuak was hopelessly insolvent and unable to pay his debts as they became due. On the 11th of March a creditor demanded payment from him of a debt due for goods supplied of the amount of $504.74, but was told by Khoo Syn that he had no money to pay it. Other creditors demanded payment of their debts on the 13th of March, but without success. Of a batch of four bills of exchange for a total sum of $90,000 endorsed by him to the Netherlands, Indies and Commercial Bank to secure an overdraft of $81,000, one had been dishonoured, and though he received notice of this fact between 2 and 3 o'clock on the 11th of March, he failed to meet the bill.

On the 14th of April a writ of execution against his goods was issued and lodged with the sheriff, to which the latter three days later made a return of *nulla bona*. On the 18th of April a petition in bankruptcy was presented against the firm of Chop Khoo Chin Hin, of which Khoo Syn Tuak was the sole member, the Petitioner relying on this return as an act of bankruptcy. On the 27th April he was on this Petition adjudged bankrupt, and the Official Assignee was appointed receiver of his estate. It was then ascertained that his debts

amounted to $700,000, of which a portion amounting to $300,000 was unsecured.

It was clearly established by the evidence given on the first hearing in the Supreme Court of the Straits Settlements, sitting in Bankruptcy, before Thornton J., that the Appellant firm on the 7th March gave the bankrupt two cheques for $5,000 and $3,900 respectively, both of which were cashed by the latter.

In the Appellant firm's account, as it appears in the bankrupt's ledger, credit is given for these two sums under the following entries :—

"2nd day, 2nd moon, 7th March—
By bank cheque, $5,000."

"2nd day, 2nd moon, 7th March—
By cash received, $3,900."

It was further established that on the 10th or 11th of March 1905 (between 10 and 11 o'clock in the morning) the bankrupt gave to the Appellant firm $2,000 in cash and a cheque for $1,330.93 on the French Bank at Singapore which was subsequently cashed, and that he endorsed over and delivered to them a promissory note of one Khoo Eng Wan for $2,000. Later in the same day he delivered to them the greater portion, if not practically the whole, of his stock in trade, the means of carrying on his business.

The bankrupt admitted that this cheque absorbed all his balance at the French Bank ; that he had at the time accounts at two other banks, viz., the Dutch Bank, at which he was overdrawn to the amount of $60,000 or $70,000, and the Netherlands, Indies, and Commercial Bank, at which he had a balance to his credit of $63.19. He further admitted that after the delivery of these goods on the 11th of March he neither bought nor sold anything.

The value of the goods delivered to the Appellant firm is not fixed by the evidence of any independent witness, but in the ledger account above mentioned the Appellant firm is

debited with different sums in respect of them amounting in the whole to a sum variously stated to be $11,333.69 or $11,268.85.

That the goods so delivered comprised almost the whole of the bankrupt's property is clear from the fact that what remained at Kallang Rice Mills was sold by auction on the 27th of May and 10th of June for $4,112.80, and that his furniture was sold by auction on the 17th and 25th of May for $3,035.85.

The transaction of the 10th or 11th of March 1905 was impeached by the Official Assignee. On the 15th of September 1905 he moved the Supreme Court, sitting as a Court of First Instance in Bankruptcy, for an order declaring that the above-mentioned payments of money and transfer of property were, as against him, fraudulent and void under the above-mentioned section of the Bankruptcy Ordinance, and that the Appellant firm should be ordered to deliver up to him the money so paid and the property so delivered or its value.

This motion was resisted and the above-mentioned transactions defended by the Appellant firm on the grounds (1) as to the sum of $5,000, that the bankrupt had on the 6th of March, through his manager Kye Seng, sold to them the goods delivered on the 11th, five days later, for the sum of $11,333.69, on the terms that $5,000, portion of the purchase money, should be paid to the bankrupt, and the balance amounting to $6,333.69 applied in part discharge of a debt of $26,016 due by the bankrupt to them and absolutely unsecured; that though by this arrangement the Appellant firm secured what was equivalent to a dividend of over 25 per cent. on this debt of $26,016, while the other unsecured creditors would apparently get no dividend at all, yet that in effecting this sale it was not the dominant or paramount view or object of the bankrupt to give to the firm, composed

mainly of his relatives, the preference they undoubtedly secured, but was on the contrary to get $5,000 to relieve his necessities, the preference conferred being merely a subsidiary incident; and (2) as to the sum of $3,900, that this sum was an advance made to the bankrupt later on the same day (the 7th of March) without any security whatever to enable him to pay some draft he was obliged to meet, on his express promise to repay the loan within three or four days, and that the sums of $2,000 and the cheque for $1,330.93, and the promissory note for $2,000 were all paid and handed over to the Appellant firm on the morning of the 10th or 11th of March in fulfilment of this express promise.

Mr. Justice Thornton accepted this explanation, held that there was no fraudulent preference, and refused the motion. On appeal, his decision was reversed by a majority of the judges of the Supreme Court. They held that the preference was fraudulent, and by their Order of the 19th of March 1906 directed that the Order pronounced by Thornton J. should be discharged, and that the Appellant should pay to the Official Assignee the sum of $7,698.78 and costs.

This sum of $7,698.78 is apparently made up of two sums, namely, $6,268.85 (the difference between the purchase price of the goods alleged to have been sold and the sum of $5,000 paid to the bankrupt), and the sum of $1,430.93, the difference between the sum of $3,900 advanced to the bankrupt on the 7th of March, and the sum of $5,330.93, which, if the promissory note endorsed by the bankrupt be treated as cash (as it was treated in his books) was the amount paid by him to the Appellant firm on the morning of the 11th of March.

Against this Order two Appeals to His Majesty in Council were lodged, one by the Appellant

firm and the other, a Cross-Appeal, by the Official Assignee. These Appeals were subsequently consolidated, and on the argument the latter was withdrawn. Their Lordships have, therefore, only to deal with the Appeal of the Appellant firm.

On the hearing before Mr. Justice Thornton the bankrupt's agent, who effected the sale, was not examined. Only two documents were produced containing, or purporting to contain, any reference whatever to the alleged sale, namely, (1) the purchase book of the Appellant firm, which contained an entry under date the 6th of March, made by Tan Kah Siang, their manager, of the purchase from the bankrupt of goods not precisely identical with, but approximating to, those delivered on the 11th, no mention whatever being made of the price to be paid for them; and (2) the bankrupt's ledger in which the Appellant firm are debited in their account, under date the 11th of March, with certain sums in respect of the different descriptions of goods alleged to have been delivered to them on that day.

Various explanations were given of the non-production of the contract of sale, the delivery order, and a book of the bankrupt alleged to contain an entry of the sale. They appear to their Lordships to be far from satisfactory.

The only evidence given to show that the bankrupt was under any necessity to part with his stock in trade to the value of $11,268.85 in order to obtain an immediate payment of $5,000 in cash, was the following passage from his own evidence on cross-examination :—

> "On the 7th of March 1905 I had a bill falling due and required $5,000 to meet it. I so informed Kye Seng and instructed him to try and get the money by selling the goods. It was not easy to get cash down,

> traders usually require time to pay. On the 6th of March Kye Seng told me that he had sold the goods and had arranged for a cash payment of $5,000. I was trying to get money from other quarters, but could not, and so I asked them to lend $3,900 to me. I promised to repay the $3,900 in three or four days."

The Appellant firm had not put any pressure upon him to part with his property on such terms. On the contrary, the evidence is that the sale was first proposed to their manager by the bankrupt's manager when the former went to the bankrupt's shop to inquire about market prices, and no suggestion was made that they had before that demanded from the bankrupt payment, in whole or in part, of the debt due to them by him.

The suggestion that merchants at Singapore so strongly object to deal for cash down instead of on credit that such a sacrifice as that made by the bankrupt was necessary to enable him to obtain in cash immediately less than half the price of the goods sold, will not bear examination in face of the fact that, even after the bankrupt had denuded himself of most of his property, the Appellant firm lent him a sum of $3,900 without any security whatever, on his mere promise to repay it within three or four days.

It is much to be regretted that the evidence is so meagre, and the cross-examination so perfunctory, in a case in which the circumstances called for a searching cross-examination of the principal witnesses and a thorough investigation of all the facts. Such as the evidence is, however, it leaves no doubt upon their Lordships' mind that, whatever may be the true nature of these transactions, whether there was on the 6th of March 1905 a sale of this property of the bankrupt or not, the main object of the bankrupt in carrying out these arrangements was to secure to the firm composed of his relatives pecuniary benefits not extended to his other creditors, and

that his dominant purpose, when he saw a crisis was imminent, was to sweep almost the whole of his assets into their possession, to be applied by them in part satisfaction of the debt he owed them, to the prejudice of his other creditors. His dealing with the promissory note of Khoo Eng Wan is inexplicable on any other hypothesis. He swore he treated it in his books as cash. He debited the Appellant firm with it as cash. No evidence whatever was given as to its intrinsic value, or whether it has been since paid in whole or in part. Before he parted with it he had repaid in respect of the loan of $3,900 two sums amounting together to $3,330.93. A balance of $569.7 alone remained due, yet, in spite of his necessities, he handed over this security for $2,000, which, if equivalent to cash, as he treated it and apparently regarded it, overpaid his debt by $1,430.93. The question for decision turns upon the intention of the bankrupt in thus disposing of his assets, not upon the knowledge of the creditors at the time they received them or the intention with which they were received. His action seems to their Lordships to be inconsistent with the fair treatment of the general body of his creditors, and inexplicable except upon the supposition that he designed, in fraud of the bankruptcy laws, to prefer one set of his creditors to all the others.

On behalf of these favoured creditors it was much insisted that the transaction of the 6th of March was a sale to them, as if that circumstance was decisive, and put an end to all further controversy. But a sale to a creditor may be one of the devices by which a fraudulent preference can be effected, and where, as in this case, a merchant who is hopelessly insolvent, and is not compelled by overwhelming necessity, permits about 66 per cent. of the purchase money of his stock-in-trade to be retained by the purchasing

creditor and applied in part satisfaction of the vendor's debt, it is difficult to see what purpose was to be effected other than to secure such a preference to that creditor.

The Cross-Appeal of the Official Assignee having been withdrawn, it is only necessary for their Lordships to say that in their opinion the decision of the majority of the Judges of the Supreme Court on the hearing of the Appeal was right, and that their Order should be affirmed and these Appeals dismissed. They will humbly advise His Majesty to that effect.

The Appellant firm will pay the Official Assignee's costs of their Appeal except so far as they have been increased by the Cross-Appeal, and there will be no Order as to the costs of the Cross-Appeal.
