Privy Council Appeal No. 90 of 1927.

Sime, Darby and Company, Limited - - - - - *Appellants*

v.

The Official Assignee of the Estate of Lee Pang Seng (a bankrupt) - *Respondent*

FROM

THE SUPREME COURT OF THE STRAITS SETTLEMENTS (SETTLEMENT OF SINGAPORE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 28TH NOVEMBER, 1927.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD BUCKMASTER.
LORD CARSON.
LORD DARLING.
LORD WARRINGTON OF CLYFFE.

[*Delivered by* LORD WARRINGTON OF CLYFFE.]

On the 10th June, 1925, Lee Pang Seng, the assignee of whose estate is the respondent to this appeal, transferred to the appellants, to whom he was largely indebted, a quantity of rubber as security for their debt. He was then unable to pay his debts as they became due from his own money. He was adjudged bankrupt on a petition presented within three months after the date of making the transfer. The question in this appeal is whether the transfer is to be deemed fraudulent and void as against the official assignee in the bankruptcy.

In Singapore the matter is regulated by s. 51 (1) of the Bankruptcy Ordinance, which is identical with the provision on the same subject in the English Bankruptcy Act.

The result depends on the answer to be given to the question, was the transfer to the appellants made " with a view of giving them a preference over the other creditors " ?

There is no doubt about the law; this has long since been settled as regards the effect of the English statute, and it is common ground that the same principles are applicable to the Ordinance in Singapore.

The question to be determined is one of fact, was the dominant motive actuating the debtor in making the transfer a desire to prefer the particular creditor or was it of a different character ? As the solution of this question involves an enquiry into the state of a man's mind, and as it must very seldom be the case that there is direct evidence on the point, the decision generally depends on the inference properly to be drawn from the circumstances attending the transfer as established by the evidence.

A word or two must be said on the onus of proof. In their Lordships' opinion, the onus is on the assignee—he has to show that the case is within the statute. A good deal was said in argument as to the shifting of the onus at particular points in the development of the case, but when all the circumstances have been ascertained so far as the parties have thought fit to ascertain them, discussion on this point becomes immaterial and the decision must be come to on the whole of the circumstances so ascertained, and the question of onus only becomes important if the circumstances are so ambiguous that a satisfactory conclusion is impossible without resort to it. (See the judgment delivered by Lord Dunedin in *Robins* v. *National Trust Co.*, [1927] A.C. 515, p. 520.)

The action in which the present appeal arises was brought by the respondent against the appellants for the purpose of recovering the goods the subject of the transfer. It was tried by Deane, J., in the Supreme Court of Singapore, who on the 18th August, 1926, gave judgment for the appellants with costs. On the 10th January, 1927, this judgment was reversed in the Supreme Court in its appellate jurisdiction by a majority, Sir James Murison, C.J., dissenting.

At the trial the following facts were established to the satisfaction of the learned Judge.

The appellants are a company carrying on business as merchants at Singapore, Mr. John Middleton Sime being chairman of the board of directors. They have a high reputation amongst the members of the commercial community in the city.

The debtor was a Chinese merchant carrying on business under the firm name of Chin Seng & Co. The business was managed by another Chinese named Lim Soo Yan. The debtor is a son of Lu Choon Guan, now deceased, who was a shareholder in the appellant company and a director thereof. The shares form part of his estate, in which the debtor is interested. Mr. J. M. Sime was on friendly business terms with the father, but, though he knew the son, he had no business relations with him until those which resulted in the present proceedings. In January, 1925, the debtor applied to Mr. Sime for financial assistance. He told him that he was engaged in buying rubber on commission for certain firms in America, and that he wanted advances to enable him to finance these transactions. The business involved no or little risk. The debtor received instructions from the American firm to buy rubber on their behalf. The rubber thus bought in the debtor's name was then shipped to the American purchaser, the amount

payable to the debtor was then covered by bills drawn on the American purchaser and discounted by a bank in Singapore before acceptance, relying, no doubt, on a credit from America. The advances by the appellants were made against each lot of rubber, and the arrangement was that they were to be repaid within a few days after the receipt of the money from the discounting bank.

Each transaction was recorded in a letter written by Seng to the appellants. All these letters were in the same form, that of the transaction of the 29th May, 1925, may be set out as an example :—

"SINGAPORE,
"*29th May*, 1925.

"LEE PANG SENG,
"CHIN SENG & CO.,
"General Merchants.
"Messrs. SIME, DARBY & CO., LTD.,
"Singapore.

"DEAR SIRS,

"In consideration of your having advanced me $87,887 only, being advance on 93,900 lbs. para rubber purchased by me and stored at basement, Raffles Chambers, I hereby convey the ownership of the said rubber to you and engage to act as your agent and factor in dealing with and shipping said rubber, repaying you the amount advanced as soon after the said rubber has been shipped and proceeds of drafts received from negotiating bankers.

"I undertake to keep the said rubber fully insured against fire.

"Yours faithfully,
"(Signed) LEE PANG SENG."

Advances amounting to a very large sum were made on the security of letters in the above form, and for some time all went well, the advances being duly repaid out of the proceeds of the bills, but during May, 1925, considerable delay occurred in the payment of the advances and complaints were from time to time made by the appellants, but they did not then decline to advance further sums, and on the 10th June, 1925, there remained outstanding three advances amounting together to $253,620.06, made respectively on the 29th May, the 5th June and the 9th June. On the evening of the 9th June it came to the knowledge of Mr. Sime that, in addition to the business which had been financed by him, the debtor had for some time been speculating in rubber, and Mr. Sime became anxious about his security. He did not, however, then or on the 10th June know more about the actual financial position of the debtor.

On the 10th June he consulted his company's solicitors, and as the result wrote the following letter to the debtor :—

"SINGAPORE,
"*10th June*, 1925.

"Messrs. CHIN SENG & CO.,
"Malacca Street,
"Singapore.

"DEAR SIRS,

"With reference to the advances made by us to you against your letters of lien dated 29th May, 5th June and 9th June, amounting in all to $253,620.06,

as we are advised by our solicitors that our security is not adequate, we must ask you to let us have your cheque to-day in repayment of the advances or deliver to us immediately ample security in the form of rubber to cover the advances.

"Yours faithfully,

"SIME, DARBY & CO., LTD.

"(Signed) J. M. SIME."

It will be observed that the letter says that it is the solicitors who advise that the security is not adequate and requires actual delivery of rubber to cover the advances. It must in their Lordships' opinion have conveyed to the recipient that it was in the nature of the security and not in the value of the rubber purported to be covered by it that the inadequacy consisted, and that what was required was actual physical possession of rubber instead of a mere paper lien over rubber remaining in the debtor's possession.

About 4 p.m. on the 10th June the letter was delivered at the debtor's place of business and was read by his manager, Lim Soo Yan.

It is now necessary to state the financial position of the debtor on the 10th June as it was known to himself, though not to Mr. Sime.

There is no doubt he was hopelessly insolvent as the result of speculative purchases of rubber sold by him for future delivery. During the few days preceding the 10th June and on that day he had bought from Chinese merchants large quantities of rubber, which had been delivered at his godown, but had not been paid for. He had on the 10th June, after banking hours, drawn and signed six cheques for sums amounting to $92,000. His account was overdrawn and he knew that unless he obtained further credit these cheques, when presented, must be dishonoured and the general collapse of his affairs would ensue. He knew also that in breach of his duty as agent for the appellants he had applied the proceeds of rubber covered by one or other of the letters of lien to his own purposes. Some of the rubber covered by the outstanding letters of lien still remained in store, but a large part of the rubber there was that bought from Chinese merchants and not paid for.

On receiving the letter of the 10th June, Lim Soo Yan rang up the debtor on the telephone and either read the letter to him or told him its contents, asking what he was to do. The answer was there was no alternative but to deliver to Sime, Darby, as he could not pay the money. He told his manager not to allow them to take more than was necessary, and he asked him whether, if he allowed Mr. Sime to take away the rubber, he would go on advancing. The manager said he thought he would. Nothing further was said, and the manager thereupon, on behalf of and in the name of the debtor, wrote to the appellants the following letter :—

"With reference to your letter of even date, as it is not convenient to repay you the advances to-day, please note that we have given instructions to our storekeeper to deliver to your order sufficient rubber to cover the advances made by you."

Delivery of the rubber began about 5 p.m. and continued during the night until 6 a.m. on the morning of the 11th June, the debtor's manager attending to see that no more than the proper quantity was removed.

On the morning of the 11th June two of the cheques drawn on the 10th were presented and paid, the bank apparently assuming that an advance would be made by the appellants, as on previous occasions, but about noon Lim Soo Yan was informed by Mr. Sime, on his application for further advances, that further advances would not be made. He immediately informed the bank manager. The remaining four cheques were dishonoured and the final crash came.

One further fact should be mentioned. During May arrangements were made for the formation of a limited company to take over the debtor's business, with Mr. Sime as chairman Such a company was registered, but did not do any business, and nothing came of the scheme.

It was suggested that the last-mentioned fact, coupled with the possession by the father's estate of shares in the appellant company and the interest of the debtor in that estate, provided a motive for desiring to avoid a serious loss on the appellants' part, with the possible diminution of the value of the estate. But no detailed facts were elicited such as were necessary to support such a suggestion, and in these circumstances their Lordships think no importance should be attached to it.

What, then, is the proper inference to be drawn as to the dominant motive of the debtor? The learned Trial Judge expressed his view as follows :—

> " It seems to me that the expression he used that there was no alternative but to hand over did most accurately and realistically represent what must have been in the mind of the debtor. To him, believing that he was bound by the terms of the letter, it must have appeared that the alternative to handing over was a prosecution for criminal breach of trust."

Their Lordships agree that the proper inference to draw from the facts is that the debtor believed, and on the form of the letter reasonably believed, that the appellants were entitled in the events which had happened to have actual possession of the rubber, and to put an end to the possession and power of disposition which he had as their agent, and, further, that as he had wrongly disposed of the proceeds of some of the appellants' rubber for his own purposes, he would be running grave risks if he failed to deliver rubber of his own in its place. He would be fortified in this view by the information that the demand was made on the advice of solicitors. Moreover, the manager said in evidence that he believed—

> " Sime, Darby, under the letter we gave, controlled the rubber, the letter was a sort of security for the money advanced to us, and we thought it bound the firm."

In their Lordships' opinion, the dominant motive actuating the debtor was that, in making the transfer, he was only doing what he felt himself bound or compelled to do.

The possibility of obtaining further advances probably weighed with him also, but if the above view is correct it is unnecessary further to pursue this matter.

Upon the whole case their Lordships are of opinion that the official assignee failed to establish his case under the Ordinance, that the Trial Judge rightly dismissed the action, and that this appeal ought therefore to be allowed with costs, the Order of the Court of Appeal being discharged, and that of the Trial Judge restored, and they will humbly advise His Majesty accordingly.

In the Privy Council.

SIME, DARBY AND COMPANY, LIMITED,

v.

THE OFFICIAL ASSIGNEE OF THE ESTATE OF LEE PANG SENG (A BANKRUPT).

DELIVERED BY LORD WARRINGTON OF CLYFFE

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