IN THE SUPREME COURT OF FIJI

Bankruptcy

Action No. 3 of 1957

In re Mohanlal (A Debtor)

ex parte THE OFFICIAL RECEIVER — Applicant

v.

BANK OF NEW SOUTH WALES — Respondent

Bankruptcy—fraudulent preference—onus of proof— payment into current banking account—dominant intent to prefer bank—Bankruptcy Ordinance Section 46 (1).

The debtor, a shopkeeper, operated two current accounts with the respondent bank. He had a permitted and secured overdraft of £300. By the beginning of December, 1956 his total overdraft stood at more than £600. His business had, by this time, deteriorated to such an extent that he realized that he could not pay all his creditors. The bank was pressing for the reduction of his overdraft to the agreed limit. On December 20th, 1956 he sold his business and received a part of the purchase price, which was instantly paid over to some of his creditors including the bank, which received £550. He wished to file his bankruptcy petition in the first week of January, 1957 but waited to receive the balance (£709) of the purchase price from the buyer, intending at that time " to bring the cheque (for the £709) to the Official Receiver ". When however, he received the balance of the purchase price on January 14th, 1957 he forthwith paid £569 thereof into his current accounts at the bank. He also paid in another small cheque for £1 12 0. At this point his total overdraft stood at £721 16 0, but by this payment-in he was enabled to liquidate and close one of his current accounts, and to reduce the other to a debit balance of £150 9 0. When paying in this money he informed the bank that he had drawn twenty-five post-dated cheques totalling £3,133 in favour of various creditors. Two days later he presented his bankruptcy petition, a receiving order was made, and he was adjudicated bankrupt. The Official Receiver was appointed his trustee in bankruptcy.

In this motion the Official Receiver sought a declaration that the payment of £569 15 0 and £1 12 0 to the respondent bank constituted a fraudulent preference under section 46 (1) of the Bankruptcy Ordinance (Chapter 37). The applicant prayed for an order for the repayment to him of these sums.

It was contended on behalf of the respondent that the applicant had not discharged the onus of proof cast upon him of establishing an intent to prefer because *inter alia* : (*a*) the payment into the bank was made under pressure and was not therefore a voluntary preference ; (*b*) the payment of these cheques into his current accounts was an act in the ordinary course of business such as to negative any presumption of fraudulent preference.

Held.—(1) As to the standard of proof, that the question for the court to decide was whether upon the facts in this case a dominant intent in the mind of the debtor to prefer the bank was so much the most probable of the possible explanations of his action in paying the cheque into the bank that the court could properly hold it to be the true explanation.

(2) That at the particular time when he paid in the cheques the debtor could not have been affected by pressure from the bank.

(3) That the applicant had discharged the onus of proving a dominant intent upon the part of the debtor to prefer the bank and that the payment was void under section 46 (1) Bankruptcy Ordinance.

Cases Cited:—

ex parte Hall re Cooper (1882) 19 L.R. Chancery, 580 ; 51 L.J. Ch. 556 ; 46 L.T. 549 ; *Ecclesiastical Commissioners v. Kino* 14 Ch. D. 213 ; *Colls v. Home and Colonial Stores* (1904) A.C. 179 ; *In re Cutts* (1956) 1 W.L.R. 728 ; 100 S.J. 449 (1956) 2 All E.R. 537 ; *ex parte Sharp v. Jackson* (1899) A.C. 419 ; 68 L.J. Q.B. 866 ; 80 L.T. 841 ; 6 Mans. 264 ; *In re Cohen* (1950) 2 All E.R. 36, C.A.; *Peat v. Gresham Trust Ltd.* (1934) A.C. 252 ; *ex parte Hill re Bird* (1883) 23 Ch. D. 695 ; 52 L.J. Ch. 903 ; 49 L.T. 278 ; *In re Ramsay ex parte Deacon* (1913) 2 K.B. 80 ; 82 L.J.K.B. 526 ; 108 L.T. 495 ; 20 Mans. 15 ; *In re Bell, ex parte Official Receiver* English and Empire Digest, Vol. V ; 873 ; *In ex parte Fletcher In re Vaughan* (1877) 6 Ch. D. 350 ; 37 L.T. 282 ; 25 W.R. 870 ; *ex parte Griffiths,* 23 Ch. D. 69 ; *In re M. Kushler Ltd.* (1943) Ch. 248 ; 112 L.J. Ch. 194 ; *ex parte Carlyle Banking Company, re Walton* L.T.R. 36, N.S. 522 ; *In re Lyons ex parte Barclays Bank Limited. v. The Trustee,* T.L.R. (1934-35) Vol. 51, 24 ; 152 L.T. 201.

References:—

Bankruptcy Ordinance, Chapter 37, S. 17 (8) and S. 46 (1). Bankruptcy Act, 1914 S. 44 ; Williams on Bankruptcy, 17th Edition, pages 358 and 260 ; Halsbury Laws of England, 3rd Edition, Volume II, page 558, paragraph 1106.

D. M. N. McFarlane for the applicant.

H. M. Scott and T. Rice for the respondent.

KNOX-MAWER, Ag.J. [1st May, 1959]—

In this motion, the Official Receiver as the trustee in bankruptcy of one Mohanlal seeks a declaration that a payment of £571 7s. 0d. made by the bankrupt to the respondent bank constituted a fraudulent preference within the meaning of section 46 (1) of the Bankruptcy Ordinance, Cap. 37, and as such is void against the applicant as the trustee in bankruptcy. Accordingly, the applicant seeks an order for the respondent to pay him as trustee the sum of £571 7s. 0d. In arriving at a decision in this matter I have been afforded the learned assistance of Counsel, Mr. McFarlane for the applicant and Mr. Scott and Mr. Rice for the respondent.

Section 46 of the Bankruptcy Ordinance corresponds to section 44 of the English Bankruptcy Act, 1914. As a study of the very considerable body of case law reveals, the English Courts have often experienced great difficulty in resolving cases which turn on this section. Four conditions must be established under the section. Firstly, that on the date in question (in this case 14th January, 1957) the debtor was unable to pay from his own money his debts as they were due. Secondly, that the transaction was in favour of a creditor or some person in trust for a creditor. Thirdly, that the debtor was adjudged bankrupt within three months after the date of the transaction. Fourthly, that the debtor acted with the view of giving such creditor a preference over his other creditors. Not unnaturally, it is this fourth condition which gives rise to difficulty in so far as this involves an inquiry into the state of a man's mind. It is apparent from many of the reported decisions that the Courts have often been obliged to arrive at a

decision upon this awkward issue upon the evidence of witnesses who have not been over-anxious to assist the Court in resolving the question. In the present case, neither party to the motion has called any witnesses, but both have been content to rely upon the notes of the Public Examination of the debtor and an affidavit sworn by the Manager of the respondent bank. That the notes of the Public Examination are properly receivable in evidence is made clear by section 17 (8) of the Bankruptcy Ordinance, and see also *ex parte Hall re Cooper* 1882 L.R. Chancery, 580 ; 51 L.J. Ch. 556 ; 46 L.T. 549. As for the affidavit, Counsel for the applicant has stated that he does not dispute any of the facts sworn to therein, but it is, perhaps, unfortunate that the bank official who actually dealt with the debtor at the relevant time has not been available to assist the Court. Be that as it may, there appears to be no dispute over those facts as are ascertainable from the notes of evidence and the affidavit. They are as follows:—

The debtor, Mohanlal, had for some years prior to his bankruptcy carried on a retail business in Suva under the name of D. Mohanlal & Co. He had two accounts with the respondent bank, one styled " D. Mohanlal & Co.", and the other styled " D. Mohanlal & Co., City Store ". The bank holds as security from the debtor, in the form of a mortgage, an absolute assignment dated 19th January, 1951, over a life policy for £1,000 upon the life of the debtor. An arrangement was made between the debtor and the bank, from November 1953, whereby the bank allowed him an overdraft to a limit of £300 against this security. Subsequently the bank agreed on a number of occasions to advance further monies in excess of the £300. This was done upon a short term basis. Indeed the bank found it necessary either to write to or to interview the debtor on ten occasions between November 1953 and December 1956 in an effort to ensure that his overdraft was reduced to the agreed amount. In March, 1956, according to the debtor, his " position got bad " and he considered selling his business. Business continued to be very poor during 1956. On or about 20th December, 1956, a firm known as South Sea Souvenirs agreed to buy his business for £1,000 plus a sum to be ascertained for the stock upon valuation. The debtor informed the bank that this valuation would be for £1,000. The debtor thereupon received the sum of £990 from South Sea Souvenirs. Of this he paid £550 into his bank account styled " D. Mohanlal & Co." The balance he paid out to creditors. After depositing this sum of £550 with the bank he was permitted to draw further cheques the details of which are set out in paragraph 10 of the respondent's affidavit. On the 28th December, 1956, the bank informed the debtor that he was not to draw any further cheques unless funds were banked to meet such cheques. The debtor informed the bank that his stock was about to be valued and that the sale to South Sea Souvenirs would be completed on 2nd January, 1957. As is stated in paragraph 12 of the respondent's affidavit, the bank was at this time aware that the bankrupt was worried financially. According to the affidavit, however, the bank then believed that his affairs could be put in order after the receipt of the balance of the sale price of his business from South Sea Souvenirs. Apart from a cheque for £30 paid out on the 11th January, 1957, it is to be observed that no further payments out from either of the debtor's two accounts were made by the bank after 27th December, 1956.

At this point in my recital of the facts I shall quote specifically from what the debtor himself has stated as to his actions and state of mind at this the material time. This is particularly necessary for the sake of clarity because the sequence of the debtor's evidence at the public examination is most disjointed. He has said:

" I knew last December, I could not pay all my debts fully. I paid eight creditors out of 40 all the ready money I had. The rest I could not pay. I had intended to pay everybody after the sale of the stock. Just before the sale I was forced to pay them. They all came to me within two to three days. They forced me to pay."

Accordingly he paid one Hemraj Daya £440 on 20th December, the day before a judgment debtor summons in favour of this creditor was due to be heard. The debtor has said that if he had not paid the creditor he would have issued a *fieri facias* against him. He also paid one Nama £100 by a post-dated cheque. It was cashed in December. He paid one Niranji Deoji £158 and one D. Parshottam £150. He also paid one Ram Jas £50 on 22nd December.

The remaining three out of these eight creditors were, apparently, one Jack Mohammed, one Kudai Buksh, and the respondent bank, although it is not suggested that any representative of the bank " came to " the debtor along with the other seven creditors. Quoting, then, further from the evidence of the debtor, he has said:

" When the stock of my business was valued I knew I could not pay the others. It was my intention when I received the cheque from the sale of the business to bring the cheque to the Official Receiver. I was not paid for the sale of my assets until 14th January. I paid Tazim and the rest I banked. I wanted to file my petition the first week of January but I waited to receive the proceeds of sale. The proprietor of South Sea Souvenirs did not pay me till 14/1, but in the first week of January I thought I should file a bankruptcy. My overdraft at the Bank was payable by December, they pestered me to pay. I told them I would pay from the proceeds of the sale. My intention was to pay everyone alike but here I was forced. They had called me two or three times during January. I was actually asked. Despite that I owed £6,000 to 40 creditors I preferred these eight. It was my original intention to pay everyone. It was my original intention to bring in the cheque to the Official Receiver but I did not receive the cheque from South Sea Souvenirs till 14/1. There was a cheque for £569/15/- and one cheque for £140. The Bank got one cheque and Tazim got the other."

The actual sum which, upon valuation, South Sea Souvenirs eventually paid for this stock was thus £709. While the debtor was waiting for this sum to be paid he clearly knew that he would be obliged to file his bankruptcy petition. In fact, as he says, he wanted to file his petition in the first week of January, but he apparently decided to wait to receive the balance from South Sea Souvenirs. It was, he says, his intention to " bring the cheque to the Official Receiver ". However, he must have changed his mind, for on 14th January, 1957, when he received this money, namely £709, he used it to pay the remaining three of the eight fortunate creditors. He actually received the sum in two cheques—one for £140, the other for £569—presumably at his own request. The cheque for £140 he made over to one, Tazim, who received it on behalf of the two creditors, Jack Mohammed (£100) and Kudai Buksh (£40). He paid in the other cheque of £569 15 0 (Exhibit C to the affidavit) to the respondent bank. At the same time he paid in another small cheque for £1 12 0. (Exhibit D).

It was at this time (January 14th) that the debtor apparently informed the bank that he had issued twenty-five post-dated cheques totalling £3,133 0 0, and that it was " possible " that bankruptcy proceedings would be taken against him. The Bank thereupon constrained the debtor to draw a cheque for £189 9 0 on his account styled " D. Mohanlal and Co." in order to liquidate and close the account styled " D. Mohanlal & Co., City Store ". The former account was then placed in liquidation under formal advice to the debtor. Before the two cheques, Exhibits C and D, were paid in, the debtor had, on 14th January, an overdraft in his two accounts of £535 7s. 0d. and £186 9s. 0d. respectively, a total of £721 16s. 0d. In these circumstances it must surely have been not merely " possible " but absolutely inevitable that bankruptcy proceedings would be instituted. In any case the debtor was already moved to petition himself. Two days later, on the 16th January, 1957, the debtor presented his bankruptcy petition before this Court. He was adjudicated a bankrupt and a receiving order was made appointing the applicant his trustee in bankruptcy. A public examination was held on 23rd May, 1957. His statement of affairs showed his debts to be £6,028 3 0 and his total assets to be £2,381 3 9.

It is common ground that the first three conditions required by section 46 (1) of the Ordinance are established in this case. I now have to decide upon the facts set out above, whether the fourth condition has been established. Namely, whether the cheques, Exhibits C and D, were paid into the bank with the view of giving the bank a preference over the remaining creditors. It may be remarked at this juncture, that upon facts such as arise in this case the word " fraudulent " seems to be misleading, because there is no suggestion of any fraud as such. As is indicated in Williams on Bankruptcy, 17th Edition, at page 358, the phrase " voidable preference " is, perhaps, to be preferred in this particular context.

Before I proceed to review some of the English procedents upon this, the fourth condition, I shall cite in relation thereto what the learned author of Williams (supra) has to say, at page 358:

> " In relation to such a question, once its exact import has been determined, authority as such avails only to establish on whom rests the onus of proof and what evidence is admissible, the great majority of the reported decisions being of value only as examples of the circumstances in which the court on the evidence before it has been led to one or the other conclusion. In reviewing them, the words of *Brett L.J.* in *Ecclesiastical Commissioners v. Kino* 14 Ch. D. 213 at p. 225, cited with approval by *Lord Macnaghten* in *Colls v. Home and Colonial Stores* (1904) A.C. at pp. 191-192 should be borne in mind: 'To my mind the taking of some expression of a judge used in deciding a question of fact, as to his own view of some one fact being material on a particular occasion, as laying down a rule of conduct for other judges in considering a similar state of facts in another case, is a false mode of treating authority. It appears to me that the view of a learned judge in a particular case as to the value of a particular piece of evidence is of no use to other judges who have to determine a similar question of fact in other cases where there may be many different circumstances to be taken into consideration.' "

With this in mind I shall now refer to some of the leading authorities, although I should observe here that I, like learned Counsel, have perused many other cases on the subject, although I do not think it essential to cite them in this judgment. They are all set out in the footnote to the relevant chapter in Williams (supra).

As to the onus and standard of proof required, an authoritative and recent statement on the law is to be found in the dissenting judgment of *Jenkins L.J.* in *In re Cutts* (1956) 1 W.L.R. at page 739 ; 100 S.J. 449 (1956) 2 All E.R. 537:

> " ' It is well settled ' says the learned Lord Justice of Appeal, ' that in proceedings under section 44 (1) the onus is on the trustee to prove not only that a payment was made by the bankrupt within the statutory period to a particular creditor, and that such creditor was thereby given a preference over the other creditors, but also that the bankrupt made the payment with a view of giving such creditor a preference over them. *See ex parte Sharp v. Jackson* (1899) A.C. 419 ; 68 L.J.O.B. 866 ; 80 L.T. 841 ; 6 Mans. 264 ; The view attributed to a majority of this court in the headnote to the report of *In re Cohen* (1950) 2 All E.R. 36, C.A. " that where a bankrupt in imminent expectation of bankruptcy voluntarily pays a particular creditor with the result of giving him a preference in fact, and the reason for such payment is unexplained, a prima facie case of fraudulent preference is established " is supported only by the judgment of *Sargant L.J.* and cannot be regarded as good law, having regard to the observations upon it made by *Lord Tomlin* (with whom the other Lords concurred) in his speech in the House of Lords in *Peat v. Gresham Trust Ltd.* (1934) A.C. 252 ; *sub nom M.I.C. Trust Ltd.* Re (1933) Ch. 542 102 L.J. Ch. 179 ; 149 L.T. 56 ; 49 T.L.R. 299. On the other hand the explanation of Lord Tomlin's observations in the case is that while the onus of proving not merely the fact of the payment and the resulting preference, but also the bankrupt's intent to prefer rests from first to last on the trustee, he need not, in order to discharge that onus, prove the bankrupt's intent to prefer by direct evidence or by circumstantial evidence of which such intent is the only possible explanation. It is enough if he proves facts of which the intent to prefer is so much the most probable of the possible explanations that the court can, on the ordinary principles governing the trial of an issue of fact, properly hold it to be the true explanation. As *Lord Tomlin* himself put it in *Peat v. Gresham Trust Ltd.* (1934) A.C. 252: "The onus is only discharged when the court upon a review of all the circumstances is satisfied that the dominant intent to prefer was present ". *Lord Tomlin's* reference to the " dominant " intent accords with earlier authority to the effect that it need not be shown that the payment was made with the sole view of giving a preference to the creditor, provided that the giving of such preference is shown to have been the dominant or substantial view. See *ex part Hill re Bird* (1883) 23 Ch. D. 695 ; 52 L.J. Ch. 903 ; 49 L.T. 278."

Thus this Court has to decide whether upon the facts in this case a dominant intent in the mind of the debtor to prefer the bank was so much the most probable of the possible explanations of his action on 14th January, 1957, in paying these cheques in to the bank, that this court can properly hold it to be the true explanation.

The word preference connotes an act of free will and thus it must be shown that the debtor's act was voluntary in the sense of deliberate or spontaneous. A deliberate choice must be proved. Payment made under pressure, for example in the shape of procedings, actual or threatened, by the creditor concerned or fear of such proceedings would not be a voluntary payment. I do not think upon the evidence before the Court that it can be said that the act of payment by the debtor in this case was so occasioned by the

pressure that was being put upon him by the bank that for this reason it was not a voluntary act. Certainly the bank had been pressing him on more than one occasion to reduce his overdraft to the agreed amount of £300, but at least some litttle time before the 14th January he knew very well that his position was irretrievable, and had resolved to present his bankruptcy petition. Apart from the cheque of £30 (paid out on the 11th January) the Bank had made no payments out since the 27th December. The debtor had issued 25 post-dated cheques for £3,133 against an overdraft of £721 (subsequently reduced by the payment in of the £571 7 0). I cannot think for one moment that the debtor hoped for any fresh credit from the Bank. I do not see how he could at this, the material time, have been affected by pressure (even assuming there had been very considerable pressure) from the bank (I am not concerned with the payment of the other two creditors), when he changed his mind and decided to hand over the cheques not to the Official Receiver but to the three creditors, of whom the bank was one. On this issue of " voluntariness " I consider therefore, that this case is more in the line of the following three cases rather than in the line of those cases in which the Courts have held that through fear, anticipation of benefit, or antecedent obligation, the element of deliberate choice was not proved.

In Re Ramsay ex parte Deacon (1913) 2 K.B. 80 ; 82 L.J.K.B. 526 ; 108 L.T. 495 ; 20 Mans. 15, a debtor, insolvent to his knowledge, wrote to his principal creditor, whose account exceeded £3000 and who held current bills for £1000, two of them just falling due for sums amounting together to £512, asking for one of the bills to be renewed. The creditor replied that the bills must be met and the account considerably reduced. The debtor telegraphed suggesting a return of goods. The next day at an interview the creditor demanded a substantial payment or a return of goods, otherwise he would " make it hot " for the debtor. The debtor agreed to return the goods and during the next few days returned goods to the value of £1808, being more than three times the amount of the two bills then due. Within three months the debtor became bankrupt. It was held on the evidence, that the return of the goods was not caused by any real pressure on the part of the creditor but was the voluntary act of the debtor, and therefore the transaction was a fraudulent preference.

In *ex parte Hall re Cooper* (supra) the facts were as follows: on the 17th February a trader told one of his creditors that he was about to stop payment ; the creditor then pressed for security for his debt, and threatened to commence proceedings against the debtor at once if he did not fulfil a verbal promise which he had made, on the 17th of January, when the debt was contracted, to supply the creditor with goods, or their equivalent, as security. The creditor had on the 14th of February, before he knew that the debtor was about to stop payment, pressed the debtor for the promised security, and the debtor had then again promised to give it. On the 19th of February the debtor delivered two bills of exchange, accepted by some other firms, to a third person, telling him to hand them to the creditor. On the 24th of February the debtor filed a liquidation petition, and on the 10th March he was adjudicated a bankrupt. The Court held that the delivery of the bills of exchange amounted to a fraudulent preference of the creditor, and that it was void as against the trustee in the bankruptcy: per *Jessel M.R.*:

> " Inasmuch as the threat to bring an action could have no influence on a man who was just about to become a bankrupt, there was no real pressure exerted by the creditor on the 17th February and the prior pressure on the 14th February having been ineffectual, could not be taken into account."

10

The third case which I wish to cite on the question of " pressure ", is *In re Bell ex parte Official Receiver* reported in the English and Empire Digest, Vol. V, at page 873, where it was held " that it is not sufficient to prevent a payment being a fraudulent preference, that honest pressure had something to do with bringing about such payment, if the Court comes to the conclusion that the dominant view of the bankrupt was to prefer the creditor. If it is the fact that the desire to prefer the creditor was a substantial motive operating on the mind of the bankrupt who has made the payment, in such a sense that it can be said to be the dominant motive, such payment will be a fraudulent preference, notwithstanding that but for the importunity of the creditor, the payment might never have been made."

The meaning of the word " view " has been considered in a number of cases. According to Williams (supra at page 360) " the word ' view ' though synonymous neither with ' intent ' nor with ' motive ' has a meaning nearer to the former than to the latter. The word ' object ' is of no great assistance in determining what ' view ' means, for an object may be either immediate or ulterior. If a choice between creditors as such is made, the reason for choosing a particular creditor is immaterial ; where the debtor returned goods *in specie* to their unpaid vendors because he thought it right to do so, the transaction was held none the less a voidable preference, *Vaughan Williams J.* intimating that it would be otherwise had the debtor believed he was legally bound to do what he did. In the latter case the element of free selection would have been absent."

(In *ex parte Fletcher. In re Vaughan* (1877) 6 Ch. D. 350 ; 37 L.T. 282 ; 25 W.R. 870).

Jenkins L. J. in the course of his judgment, in the case to which I have already referred (*In re Cutts* supra) has this to say upon the meaning of " view " :

> " As to the substitution of ' intent ' for ' view ' which is the word actually used in section 44 (1), ' object ' and ' motive ' have sometimes been used as other equivalents for ' view ', but I think ' intent ' or ' intention ' gives the meaning best, as the bankrupt might, for example, very well have deliberately intended to prefer one creditor over another, and made the payment with the view of producing that result, thus plainly bringing the case within the section, although his motive or ulterior object may not have been a desire to benefit the creditor preferred, but a hope or expectation that by showing favour to such creditor he might obtain by way of quid pro quo some advantage for himself. As to the distinction between ' view ' and ' motive ' see per *Vaughan Williams J. in re Fletcher* (1877) (cited supra) where the bankrupt's intention was to prefer, but his motive might have been said to be a desire to do what he considered fair."

These distinctions may be subtle, but they are relevant, for even though, upon the facts here, it might be felt that the debtor was motivated by a desire to " do his best by " the bank because the bank had helped him in the past, and because the bank might help him at some future time, if the dominant " intent " or " view " was to prefer, then this application would succeed. For preference need not be the sole view although it must be the dominant view (*vide ex parte Griffiths*, 23 Ch. D. 69, and *ex parte Hill*, supra). It is sufficient, to constitute a statutory preference, that the preferring should have been the substantial, effectual, or dominant, but not necessarily the sole, view with which the debtor acted. (See Williams supra,

page 360). Certainly, the inference of preference should not be drawn, having regard to the situation of the onus of proof, unless such inference is the true and proper inference from the facts proved. Thus, it will not be drawn, if the inference from the facts is equivocal, and in particular, it will not be drawn from the mere circumstance that the creditor paid was in fact " preferred " in the sense that he was paid when other creditors were not paid and could not be paid. (*Re Cutts* supra, per *Lord Evershed,* Master of the Rolls, page 733). I have already concluded for the reasons set out above, that the act of the debtor in paying this money into the Bank cannot be said to have been involuntary by reason of pressure. I find nothing equivocal upon the facts in that respect. However, as is stated in Halsbury Laws of England, 3rd Edition, Volume II, page 558, paragraph 1106:

> " It is not necessary to prove pressure if there are other circumstances which suffice to repel the presumption of fraudulent intention, and to show that the acts complained of were not done with the dominant view to prefer. Where, therefore, it is apparent that the debtor was acting in the ordinary course of business ; or in fulfilment of a prior agreement . . . . in none of these or the like cases will the payment or transfer be set aside."

Are the facts in this case at least " equivocal " in this respect? Counsel for the respondent has contended that the payments by the debtor of the cheques Exhibits C and D into his current account in the bank on the 14th January (upon which the bank was entitled to exercise a lien) was an act in the ordinary course of business such as to negative any presumption, that might otherwise be inferred, of fraudulent intention. However, the circumstances in which the debtor paid in these cheques were such that I cannot accept this argument. He did not pay every cheque which he received at this period into the bank. The cheque for £140 he gave to one Tazim to be paid to the two creditors, Jack Mohammed and Kudhai Buksh. When he received the deposit of £990 in December, 1956, he had actually paid into the bank only £550 of this sum. In the affidavit, paragraph 14, it is contended that insofar as the word " bearer " on the cheque Exhibit C has been crossed out, the debtor had no option but to present it to the bank for payment. It may be that the debtor, having changed his mind, and having decided to pay this amount into the bank, had asked South Sea Souvenirs to strike out " bearer ". Presumably on the other cheque for £140, which he passed on to Tazim, the word " bearer " was not struck out. What is certain, however, from the debtor's own evidence, is that he had intended to hand over the cheque he eventually received from the South Sea Souvenirs, to the Official Receiver. He could at least have done that, quite irrespective of the fact that the word " bearer " was struck out on the cheque. I do not, for one moment, think there was any confusion in the mind of the debtor in this regard. There is no suggestion of this in his evidence. To my mind, there is nothing in this point to support the respondent's contention ; moreover the same point does not arise with regard to the other cheque, Exhibit D. I do not think that the payment-in of these particular cheques on the 14th of January, in the circumstances disclosed in his evidence by the debtor himself, was an act so in the " ordinary course " of business, as to lead me to doubt his dominant intention to prefer. At that time the debtor knew that he was bankrupt, and the bank was really in a position to know this too ; he had intended to petition in bankruptcy the week before. Apart from the one cheque for £30, nothing had been paid out since December 27th. There was, at the material time, no question of a continuing

operation of the current account in its " ordinary course ": the post-dated cheques, twenty-five in all, were certainly not to be honoured. The bank there and then insisted that he made out a cheque on the one account to liquidate the amount overdrawn in the other account.

A somewhat similar argument was unsuccessfully put forward before the Court of Appeal by Counsel for the bank in the case of *In re M. Kushler Ltd.*, (1943) Ch. 248 ; 112 L.J. Ch. 194, where he argued that insofar as the directors of the company could not do anything other than pay the money received by the insolvent company into the company's bank and the bank would not allow a second account to be opened with the first account overdrawn, the liquidator had not discharged the onus of proving fraudulent preference because a doubt must remain in the mind of the Court. The Court nevertheless held that there was a fraudulent preference, over-ruling the decision of *Bennett J.* in the Court below. The Court also observed that *Lord Tomlin* in *Peat v. Gresham Trust Limited* (1934) A.C. 252, and *Romer L.J.* in *In re Lyons ex parte Barclays Bank Ltd. v. The Trustee,* (1934) 152 L.T. 201 ; T. L. R. (1934-35) Vol. 51, 24 ; were not intending to lay it down as a general principle that where there is no direct evidence of fraudulent preference the Court will not infer it if there is any other possible explanation of the facts proved.

The facts in this case are, in my opinion, quite distinguishable from those in *Ex parte Carlyle Banking Company. re Walton* L.T.R. 36, N.S., p. 522. The material portion of the evidence upon which the ratio *decidendi* of that decision is founded, is stated in the judgment of the learned Chief Judge as follows:

> " The banker's agent on the 26th April " (the material date) " knowing that the debtor was in funds, insisted upon his paying the money in. The bankrupt says ' I paid the money in, having at the time drawn cheques upon it which I expected to be paid.' I state again, as I have said before that this is one of the most ordinary transactions that can take place."

In the present case, the bankrupt told the bank on the 14th January that he had issued twenty-five post dated cheques totalling £3,133. He knew he was bankrupt. So did the bank in my opinion. He certainly did not expect these cheques to be paid. He could not therefore say, like the debtor in that case " I paid the money in, having at the time drawn cheques upon it which I expected to be paid.".

Equally, the facts of this case are distinguishable from those in *In re Lyons ex parte Barclays Bank Limited v. the Trustee,* supra. The Master of the Rolls, reversing the decision of *Clauson J.*, referred in his judgment to the vital portion of the evidence thus:

> " Mr. Justice Clauson had said that the account was operated in such a way that the only possible inference was that an effort was being made by the bankrupt to prefer. But was that so? The bankrupt continued to operate the account after September 12," (the material date) " in exactly the same way as he had done before that date, when there was admittedly no intention to prefer anyone. He paid money in and he drew money out."

In the present case the debtor did not, after the 14th January, 1957, " continue to operate the account in exactly the same way." He did not pay money in and draw money out. He did not operate it at all. He forthwith petitioned in bankruptcy, as he had intended to do the week before.

In the outcome therefore I find that the applicant has discharged the onus cast upon him.

I am satisfied that upon a review of all the circumstances in this case, that when he paid in these two cheques on 14th January, 1957, the dominant "intention" or "view" of the debtor was to prefer the respondent over the remaining creditors. I declare, therefore, that the payment of £571 7s. 0d. made to the respondent on the 14th January, 1957, is void against the applicant under section 46 (1) of the Bankruptcy Ordinance, (Cap. 37). The respondent is accordingly ordered to pay the sum of £571 7s. 0d. to the applicant. I award the applicant costs against the respondent.