

## OFFICIAL RECEIVER

v.

## GOVERDHANBHAI &amp; CO.

[SUPREME COURT, 1966 (Hammett Ag. C.J.) 28th April, 12th May]

## In Bankruptcy

*Bankruptcy—evidence—records of Official Receiver form part of records of court—court will take cognizance of date of public examination and contents of statement of affairs.*

*Bankruptcy—payment to creditor pursuant to Deed of Assignment—whether with intent to prefer creditor—material date is that of Deed of Assignment—Bankruptcy Ordinance (Cap. 37) ss.39(1), 46.*

*Bankruptcy—failure to comply with bankruptcy notice—continuing act of bankruptcy—relation back of bankruptcy pursuant to debtor's petition—Bankruptcy Ordinance (Cap. 37) s.39(1).*

In a motion by the Official Receiver in Bankruptcy for a declaration that a payment, made by the bankrupt to a creditor, was void as being a transfer within section 46 of the Bankruptcy Ordinance, the court will take cognizance of the date of the public examination and the contents of the bankrupt's statement of affairs, as the Official Receiver is an officer of the court and his records and the court files in bankruptcy form part of the records of the court.

Where a payment by a debtor of the bankrupt to one of the bankrupt's creditors is made pursuant to a Deed of Assignment signed by the bankrupt at an earlier date, the material date at which the bankrupt's intention to prefer the creditor must be proved is the date of the Deed of Assignment and not the date of the payment.

*Semble* : Where a creditor's petition based on failure to comply with a bankruptcy notice is neither proceeded with nor withdrawn, and the debtor is later adjudged bankrupt on his own petition, the failure to comply with the notice is a continuing act of bankruptcy, and the bankruptcy following on the debtor's petition may, by virtue of section 39(1) of the Bankruptcy Ordinance, have relation back to a date three months prior to the presentation of that petition.

Application by Official Receiver, as trustee in bankruptcy, for a declaration that a payment to a creditor was void under section 46 of the Bankruptcy Ordinance.

D. N. Sahai for the Official Receiver.

R. D. Patel for the respondents.

HAMMETT Ag. C.J. : [12th May 1966]—

This is a motion on the part of the Official Receiver as Trustee in the Bankruptcy of one Bhim Singh, for a declaration that the payment of £166-13-4 made by the Bankrupt to the Respondents on 30th October, 1962, was a transfer within the provisions of section 46 of

the Bankruptcy Ordinance and is therefore void against the Trustee in Bankruptcy, and for an order that the Respondents do repay the said sum of £166-13-4 to the Official Receiver as such Trustee.

A The motion is supported by an affidavit by the Official Receiver to which the Respondents have filed an affidavit in reply admitting some, but denying some of the matters deposed to by the Official Receiver. At the hearing of this motion in open Court Counsel submitted a statement of the agreed facts and neither side called evidence.

B There is one point which arose during the hearing with which I would like to deal first. In the affidavit of the Official Receiver in support of the motion, he stated that the public examination of the Bankrupt was held at Sigatoka at the Magistrate's Court on 27th June, 1963, and that the Bankrupt's statement of affairs disclosed his debts to be £3,474-17-8 and his assets to be nil. These facts were not admitted by the Respondents in their affidavit in reply and it was submitted by Mr. R. D. Patel on their behalf that, since those facts were not admitted and there was no evidence concerning them, the Court must take no cognizance of those allegations. It appears to be overlooked that the Supreme Court exercises jurisdiction in bankruptcy and that the Official Receiver is an officer of this Court and that the records of the Official Receiver and the Court's files in bankruptcy matters form part of the records of the Court. It is therefore immaterial whether the Respondent admits or denies the date and place of the public examination of the Bankrupt or what is included in his statement of affairs; these are matters of Court record and the Court will take cognizance of them just in the same way as it will take cognizance of the date the Petition in Bankruptcy was filed in this Court. It is a different matter, however, where the Official Receiver, in paragraphs 7 and 8 of his affidavit, has drawn inferences from the evidence given by the Bankrupt in his public examination or has stated as fact matters which the Bankrupt then deposed to. These are matters on which the Court must adjudicate after considering all that has been said by both sides.

E On the material before me I hold the facts to be as follows:—  
On 30th June, 1958, the Respondents obtained Judgment against the debtor in the Supreme Court in Civil Action No. 171 of 1958. In January, 1962, that Judgment was unsatisfied to the extent of £667-0-4 and the Respondents issued a Bankruptcy Notice based upon the failure of the Bankrupt to satisfy that Judgment Debt. The Bankrupt failed to comply with that Bankruptcy Notice and a Bankruptcy Petition based on that Act of Bankruptcy was filed on 23rd May, 1962. The Bankrupt had a right of action against one Sue Wing which he was endeavouring to enforce in the Supreme Court in Civil Action No. 206 of 1961. On 3rd August, 1962, the Respondents agreed to withdraw their Bankruptcy Petition against the Bankrupt upon his assigning to them his one-third share of any moneys which might be recovered from Sue Wing in that action. In pursuance of that agreement, the Bankrupt executed a Deed of Assignment dated 3rd August, 1962, in favour of the Respondents. All the parties appeared to be acting under legal advice and this Deed was witnessed by two solicitors. This Deed was made between the Bankrupt, as Assignor, and S. N. Patel and G. B. Patel trading

as Goverdhanbhai Patel and Company, as Assignees. It was executed by the Bankrupt and by S. N. Patel, one of the partners in Goverdhanbhai Patel and Company, but it was not executed by G. B. Patel the other partner in that firm.

Mr. Sahai, for the Official Receiver, attacked the validity of this Deed of Assignment because it had not been executed by G. B. Patel. In my opinion it was not necessary for either S. N. Patel or G. B. Patel to execute this Assignment and the only person whose execution was essential to ensure its validity was the Assignor, namely the Bankrupt, who in fact did execute it.

I am unable to uphold the submission of Mr. Sahai that the Deed is invalid on this ground.

There is no evidence before me of the Bankrupt's liabilities and assets on 3rd August, 1962, or whether he was then able to pay his debts as they became due.

On 30th October, 1962, the debtor presented his own petition in Bankruptcy in which he stated that he was unable to pay his debts and asked for a Receiving Order to be made against him and that he be adjudicated bankrupt. On the same date, i.e. 30th October, 1962, Messrs. Pillai and Company, the Solicitors for Sue Wing, paid the Respondents the sum of £166-13-4, less bankers' exchange, amounting to a net sum of £166-9-1 as had been agreed and was required to be paid by the Deed of Assignment dated 3rd August, 1962. On 31st October, 1962, a Receiving Order was made against the debtor and he was adjudicated bankrupt.

In this application by the Trustee in Bankruptcy under section 46 of the Bankruptcy Ordinance, the onus of proof is on the Trustee in Bankruptcy to show :

- Firstly : that on the date of the transfer, i.e. the Assignment, the debtor was unable to pay his debts as they became due from his own money;
- Secondly : that the Assignment was in favour of a creditor;
- Thirdly : the Assignment was made by the debtor with the dominant intention of giving that creditor a preference over his other creditors;
- Fourthly : that the debtor was adjudged bankrupt within three months after the date of the Assignment.

During the course of his argument Mr. Sahai appeared to take the view that the material date in respect of the debtor's intention to prefer the Respondents was not the date of the Assignment, i.e. 3rd August, 1962, but the date of the payment, i.e. 30th October, 1962. This is not so. The debtor transferred, by his Deed of Assignment, his interest in the debt due to him by Sue Wing to the Respondents on 3rd August, 1962. That date is the material date on which it is essential to prove that his intention was to prefer the Respondents to his other creditors. By the time the actual payment was made to the Respondents by Sue Wing's Solicitors, i.e. 30th October, 1962, it was no longer within the power of the debtor to stop his debtor Sue Wing from paying the Respondents the debt under the terms of the Assignment. In my view the debtor's intentions on 30th October,

1962, were quite immaterial in considering the present application before me.

A It is clear that on 3rd August, 1962, the debtor entered into this Deed of Assignment under the pressure of his creditors, the Respondents, who had already issued a Bankruptcy Petition against him as far back as 23rd May, 1962. Acting under the pressure of those proceedings, I hold that this Deed of Assignment was not a voluntary transfer. There is no evidence before me of what in fact were the debts or the assets of the debtor on 3rd August, 1962, the date of this Assignment. It is not possible, therefore, for me to say that at that date he was unable to pay his debts as they became due from his own money, although it appears to be possible that this was the case.

B In these circumstances I have not been satisfied that when the debtor made this Assignment on 3rd August, 1962, he was unable to pay his debts as they became due, nor that he then gave the assignment voluntarily with the intention of preferring the Respondents to his other creditors.

C In the course of my perusal of the papers in this case, however, it appears that the original Bankruptcy Petition by the Respondents, which was filed on 23rd May, 1962, has neither been withdrawn nor proceeded with. It is still on the file. That Petition is based upon an act of bankruptcy by the Bankrupt in failing to comply with Bankruptcy Notice No. 19 of 1962, calling upon him to satisfy a D Judgment Debt due to the Respondents of some £657 within seven days of the service on him on 24th February, 1962, of the Bankruptcy Notice. Failure to comply with a Bankruptcy Notice is a continuing act of bankruptcy.

E Under the provisions of section 39, sub-section (1) of the Bankruptcy Ordinance, the bankruptcy of the debtor is deemed to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the Bankrupt within three months next preceding the date of the presentation of the bankruptcy petition. The date of the presentation of the petition in this case was 30th October, 1962. It appears to be arguable that under section 39, the Bankrupt, not having complied with the Bankruptcy Notice issued in the previous bankruptcy proceedings, at any F time, his bankruptcy must relate back to a total of three months before the 30th October, 1962, i.e. 30th July, 1962. If this is so, the title of the Trustee in Bankruptcy would relate back to a date prior to the date of this Assignment dated 3rd August, 1962. It would appear that, for this reason, that Assignment may not be effective.

G Since this matter was not considered or dealt with by either Counsel in this case, it appears to me that the interests of justice require that this case be re-listed in order to give both sides further opportunity of being heard and I do so order. I also direct that Bankruptcy Petition No. 19 of 1962, in which the Respondents are the Petitioners, be also re-listed before me for that same date in order that both matters may be dealt with at the same time.

*Order for re-listing of motion and creditor's bankruptcy petition.\**

H \* The motion and petitions were relisted on the 20th June 1966. Judgment by consent for the Official Receiver was entered in Petition 141/1962 for £83 and by leave of the Court Petition No. 19/1962 was dismissed.