

THE OFFICIAL RECEIVER

v

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SIBLUK TRANSPORT COMPANY LIMITED

[HIGH COURT, 1993 (Scott J), 8 June]

Civil Jurisdiction

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Company law-fraudulent preference-relevance of debtors motive-Companies Act (Cap. 247) Section 131.

In an action for declaratory Judgment the High Court HELD: that in the absence of evidence of motive a preference could not be deemed fraudulent.

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No cases were cited.

S.M. Koya for the Plaintiff
J Semisi for the Defendant

Scott J:

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In this matter, begun by Originating Summons, the Plaintiff seeks a number of reliefs set out in the Summons dated 21 December 1992, the central relief sought being a declaration that the transfers to the Defendant of 5 motor coaches in February, March and May 1992 were void as being fraudulent preferences within the meaning of section 131 of the Companies Act (Cap.247)

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The evidence consists of two affidavits:- the first by J. Prasad, Messrs Koya and Company's Managing Clerk dated 15 December 1992 filed in support of the Summons and the second by the Managing Director of the Defendant Company filed on 25 February 1993 in answer.

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There really is no dispute as to the facts which are simply that the vehicles were transferred to the Defendant Company within 6 months of a Winding Up Petition being presented against it in June 1991. The issue between the parties is whether on those facts the transfers amount to a fraudulent preference.

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Both Counsel filed written submissions for which I am most grateful. Further argument was heard on 7 April 1992. Mr. Koya's argument can be simply put:- the question of good faith on the part of the debtor company later wound up is of no relevance - the sole question to be determined is whether the transfers in question took place less than six months before the winding up. The word "deemed" appearing in the section prevents, it was argued, the Court exercising any discretion in the matter.

In answer Mr. Semisi submitted that on the contrary the whole question was one of fact and the issue before the Court was whether there was satisfactory evidence, the burden of discharge of which fell on the Plaintiff, to establish

fraud on the part of the debtor company.

In my view Mr. Koya's deterministic approach is, with respect, quite unsustainable both in law and common sense. As is clear from the commentary and cases cited in Halsbury's Laws of England 2nd Edition, Volume 7 paragraphs 1332 - 1334 a preference is only deemed fraudulent when "the substantial and dominant motive in the mind of the debtor was to prefer one creditor or particular creditors". Of course, companies do not have minds of their own and that is why section 313 compares the actions of debtor companies to the actions of individual debtors

In the present case there is no evidence whatever that A. Khalil Khan Limited was indebted either to the Defendant or indeed anyone else at the time that the transfers took place. It follows that there is no evidence either of motive in the mind of the debtor company. Accordingly the Plaintiff has failed to establish the necessary premises for its action to succeed and therefore the action must fail.

There will be judgment for the Defendant.

(Judgment for the Defendant)

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