(ZEKIA, P. TRIANTAFYLLIDES, JOSEPHIDES, JJ.)

EVANTHIA I. KOTSAPA,
Appellant (Respondent),

v.

THE OFFICIAL RECEIVER AND REGISTRAR,
TRUSTEE IN BANKRUPTCY,
Respondent (Applicant).

(*Civil Appeal No.* 4534).

Bankruptcy - Contract of dowry - Disclaimer of rights thereunder by beneficiary bankrupt - Time of execution of disclaimer - The crucial time for ascertaining the existence or non-existence of fraud, good faith and valuable consideration - Disclaimer made in good faith without intention to defraud creditors - New trial ordered on the issue of whether valuable consideration accompanied disclaimer - Bankruptcy Law, Cap. 5, sections 2, 3 (1) (b), 41 (c), 42, 46 (1) (4) and 50 (2), Fraudulent Transfers Avoidance Law, Cap. 62, section 3, Civil Procedure Law, Cap. 6, section 23 and the Courts of Justice Law 1960 (Law 14 of 1960), section 25 (3).

Appeal - Practice - New trial - Bankruptcy - Contract of dowry - Disclaimer of rights thereunder - Issue of whether valuable consideration accompanied disclaimer - New trial ordered on such issue under section 25 (3) of the Courts of Justice Law, 1960 (Law 14 of 1960).

Practice - New trial - Bankruptcy - See under "Appeal" above.

By virtue of a contract of dowry dated the 2nd April, 1959, the appellant on the occasion of the betrothal of her daughter Elli undertook to give to her the upper part of her (appellant's) house at Iphigenia Street Limassol.

The husband of her said daughter having incurred debts and having unsettled debts totalling about £3,000 for which the daughter as his guarantor was unable to pay, a bankruptcy petition was presented against the daughter on the 15.12.60 and a receiving order obtained on the 30.12.60 and on the 3rd March, 1961 she was declared bankrupt.

The appellant on the 5th September, 1960, obtained a written declaration (exhibit 8) from her said daughter and son-in-law,

whereby, any right of theirs on a house at Iphigenia Street, which house was designated in the contract of dowry to be given to them was foregone. The said declaration is set out in full in the judgment of the Supreme Court which follows. As there were no other assets for the creditors to meet the proved debts of the Bankrupt the Trustee in bankruptcy applied to the Court for a declaration *inter alia* that the said declaration was void as being contrary to s. 3 (1) (b) and s. 46 of the Bankruptcy Law Cap. 5 and being in the nature of a voluntary settlement or conveyance or an attempt to execute either; that such a transaction was void against the applicant as being fraudulent within the meaning of section 3 of the Fraudulent Transfers Avoidance Law, Cap. 62; and even if such a transaction was viewed as a contract it had no legal effect because it lacked consideration and was not executed in good faith.

The Applicant Trustee further applied for (1) an order that the appellant transfer and deliver up vacant possession of the house in question to the applicant; (2) an order of compensation if she was unable to transfer it and (3) any other order the Court might deem proper.

The trial Court declared as per the application and ordered the appellant to transfer and deliver up vacant possession of the house in question to the trustee in bankruptcy. Against this decision the appellant appealed mainly on the ground that the trial Court was wrong in its findings of fact and in law.

It was mainly argued on behalf of the appellant on appeal that the Court was wrong in law in holding that the contract of dowry was a chose in action forming property capable of being divisible among creditors in view of section 41 (c) of Cap. 5.

On the other hand it was argued on behalf of the respondent that the finding of the Court was supported by evidence that the object of the aforesaid letter was to put Elli's property out of reach of the creditors. The main legal issue to be decided was whether the declaration made by the Bankrupt and husband renouncing their right over the house of the appellant was made in good faith and was accompanied with valuable consideration. The Supreme Court in allowing the appeal:

Held, I. (1) The crucial time for ascertaining the existence or non existence of fraud, good faith and valuable consideration was at the time the declaration, was executed that

is the 5th September, 1960. On that day Ilh was as far as the evidence goes in control of property to a value enough to cover her debts.

(2) The subject-matter under consideration, being a house, the judgment debtor is entitled to the exemption as provided by section 23 of the Civil Procedure Law, Cap. 6. Of course the exemption of the house of a judgment debtor from sale is limited to what is absolutely necessary for the accommodation of himself and his family. But this shows that a house is not readily available for the realization of debts due to creditors.

(3) We feel that the Court ought to have been slow in attributing any intention to the appellant or to Ilh, her daughter, to defeat the creditors when the latter renounced her claim to the house of the former. We are of the opinion, therefore, that the document of the 5th September, 1960, was made in good faith without the intention to defraud any creditor.

Held II. *On the issue of valuable consideration*:

(1) From a perusal of the trial Court's judgment as a whole, we have reached the conclusion that what must have really swayed, to a considerable extent, the minds of the trial Court in finding against appellant on this issue and in disbelieving her version must have been the fact that the Court had already first reached the conclusion that at the time of the signing of exhibit 8, the bankrupt daughter of appellant Ilh, was unable to meet her obligations, without the aid of the house in question, and that exhibit 8 was not signed in good faith but with intent to defraud the creditors of the said bankrupt.

(2) As already held by us in this judgment, the conclusion of the trial Court that exhibit 8 has not been signed in good faith is, in our opinion, erroneous and it is also erroneous, in our opinion, to say that at the material time the bankrupt Ilh could not meet her obligations without having to use also, for the purpose, the house in question.

(3) We have, therefore, formed the view that it is proper, in the interests of justice, to set aside the said finding of the trial Court on this issue of valuable consideration and to order, under section 25 (3) of the Courts of Justice Law 1960, a new trial on such issue, before a differently constituted Court.

Appeal allowed. New trial ordered in the above terms. Each party to bear own costs here and in Court below.

1965
Nov. 23,
1966
March 2
—
EVANTHIA
I. KOTSAPA
v.
THE OFFICIAL
RECEIVER
AND REGISTRAR

Appeal.

Appeal against the judgment of the District Court of Limassol (Loizou, P.D.C. & Malachtos, D.J.) dated the 5th May, 1965, (Bankruptcy Petition No. 6/60) whereby it was declared, *inter alia*, that a letter dated 5th September, 1960, addressed to appellant by her daughter and son-in-law was void and was not executed in good faith and for good consideration.

Chr. Demetriades, for the appellant.

M. M. Houry, for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by:

ZEKIA, P.: The relevant and material facts in this appeal are briefly as follows:

The appellant, the mother of Elli Mimi Demetriou of Limassol, the bankrupt, on the occasion of the betrothal of her said daughter to Mimi Demetriou of Limassol, undertook to give to the said daughter as dowry by virtue of a contract of dowry, dated 2nd April, 1959, the upper part of her (appellant's) house at Iphigenia Street, Limassol, and the necessary furniture.

The father of the bankrupt, by the same contract of dowry, had undertaken to give to his said daughter property of considerable value with certain subsequent variations as to the property to be transferred which variations were the subject of litigation before the trial Court—which was transferred to her. The trustee did not, after the decision of the lower Court, pursue the matter any further against the father.

On the 21st June, 1959, the marriage of Elli, the bankrupt, with Mimi Demetriou was solemnized. The husband led an extravagant life, spent lavishly his money and that of his wife and also indulged in speculative business. He contracted loans from various persons and banks amounting to several thousands of pounds to many of which his wife appears to have stood as surety and on certain occasions his mother-in-law guaranteed such loans. Elli sold before the presentation of the application in bankruptcy almost all the properties she got from her father and passed the proceeds amounting to about £19,500 to her husband with a view to settling his debts. In 15 months from the time of his engagement to the time of his departure to England, in December, 1960, he contracted loans amounting to £26,000 .The appellant, as guarantor of her son-in-law, paid £3,000 and also advanced another £600 in cash.

There remained unsettled debts totalling about £3,000, for which Elli was his guarantor, she being unable to pay these debts, on the 15th December, 1960, a bankruptcy petition was presented against her, and a receiving order was obtained on the 30th December, 1960 On the 3rd March, 1961, she was declared bankrupt

The appellant, on the 5th September, 1960, obtained a written declaration from her daughter Elli and son-in-law Mimi, foregoing any right they had on the house at Iphigenia Street, Limassol, above the Chartered Bank premises, which house was designated in the contract of dowry The said declaration was produced as Exhibit No 8 to the Court below *Exhibit* 8 reads as follows

"Limassol 5th September, 1960

"Mrs Evanthia F Kyriakides,
E V

DECLARATION

We the undersigned, Elli Mimi Demetriou and Mimis P Demetriou hereby declare as follows

According to the contract of dowry of the 2nd April, 1959, at the see of Kition, it is stated that Mrs Evanthia F Kyriakides gives her house above the Chartered Bank at Iphigenias Street, Limassol, as dowry to her daughter Elli M Demetriou

It is to-day hereby decided and declared that there is no claim on the above house whatsoever on behalf of the undersigned and consequently she remains and will remain occupier of the said premises

(Sgd) Elli Mimi Demetriou (Sgd) M P Demetriou'

As there were no other assets for the creditors to meet the proved debts of Elli (the bankrupt), the trustee in bankruptcy applied to the Court for a declaration *inter alia* (a) that the letter dated 5th September, 1960 (apparently referring to Exhibit 8), addressed to respondent 2, disclaiming any right over the house of the appellant, was void as being contrary to section 3 (1) (b) and section 46 of the Bankruptcy Law, Cap 5, and being in the nature of a voluntary settlement or conveyance or an attempt to execute either ; (b) such a transaction is void against the applicant as being fraudulent

within the meaning of section 3 of the Fraudulent Transfers Avoidance Law, Cap. 62 ; (c) even if such a transaction is viewed as a contract it has no legal effect becuase it lacks consideration and is not executed in good faith.

The applicant Trustee further applied (1) for an order that the appellant transfer and deliver up vacant possession of the house in question to the applicant ; (2) an order of compensation if she was unable to transfer it and (3) any other order the Court might deem proper.

The trial Court, after hearing the evidence, by its judgment declared that the letter, dated 5th September, 1960, purporting the discharge of the appellant from any liability under the contract of dowry to transfer her house, described above, to her daughter Elli, was void on the ground stated in the application and ordered the appellant to transfer and deliver up vacant possession of the house in question to the applicant (respondent in this appeal) in his capacity as Trustee.

The main grounds of the present appeal are :

The trial Court was wrong (A) in its findings of fact and (B) in law.

(A) It was contended that the Court was wrong in holding that the document of the 5th September, 1960, signed by Elli, the bankrupt, and her husband, acquitting the appellant of the liability to transfer the house in question, was a settlement not made in good faith and for a valuable consideration. The appellant had stood as guarantor to the husband of Elli for sums totalling £3,000 and also paid to him £600 in cash. This constituted adequate consideration inasmuch as the value of the house to be transferred did not exceed £3,600, the house being rented at £9 per month. On the other hand Elli, at the time of the execution of the document in question was quite solvent. She owned property at Platres worth £6,000 and her liabilities at that time did not exceed that sum.

It was further contended that the time which elapsed between the closing of the hearing of the application before the lower Court and the delivery of its judgment was 25 months and, as a result, the trial Court lost the advantage it had over the Court of Appeal in estimating the credibility of a witness in this case, namely, the evidence of the appellant, relating to good faith and to the allegation that the guarantee was signed on the understanding that Elli and Mimi renounced their rights under the contract of dowry.

It was argued on behalf of the appellant that—

(i) the Court was wrong in law in holding that the contract of dowry was a chose in action forming property capable of being divisible among creditors in view of section 41 (c) of Cap. 5 ;

(ii) the execution of the document of the 5th September, 1960, was not a settlement or transfer of property, but it was a release of obligation ;

(iii) this was not a proceeding under section 47 of preferring creditor ; and that

(iv) the Court had no power to grant relief (f), that is, to order appellant to transfer the house in question to the Trustee. The appellant could effectively oppose a claim for specific performance under the contract of dowry and she could claim a set off of £3,600 paid by her , any rights under the contract of dowry, if not lost, could only pass to the Trustee subject to the same equities and liabilities before the bankruptcy.

The respondent's counsel on the other hand submitted that the finding of the Court is supported by evidence that the object of the letter dated 5th September, 1960, was to put Elli's property out of reach of the creditors and at the time she signed the letter in question she was under constant pressure of the creditors Ability to pay does not arise when a settlor becomes bankrupt within two years after the settlement The appellant did not ask exemption of the house for her accommodation The Court acted under section 50 (2) of Cap. 5 The Trustee claimed the transfer of the house or compensation This was a claim for an order *in rem* for possession of land.

We propose to deal first with the legal aspect and then the factual aspect of the case The declaration renouncing any right over the house of the appellant in question, made on the 5th September, 1960, by the bankrupt and her husband, no doubt was in the nature of a settlement of property referred to in section 46 (1) of the Bankruptcy Law ; section 46 (4) reads :

" 'settlement' shall, for the purpose of this section, include any conveyance or transfer of property "

Section 2 of the same law defines "property as including—

> " money, goods, things in action, land, and every description of property whether movable or immovable, and whether situate in Cyprus or elsewhere, also, obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent arising out of or incident to property as above defined".

Release of obligation is, therefore, a settlement within the meaning of section 46 (1) of the Bankruptcy Law. Reference was made by learned counsel for the appellant to Halsbury's Laws of England, Volume 2, paragraph 1086 and to Williams on Bankruptcy, 16th edition, page 350. We went into the authorities relating to the release of claim mentioned in these books. These authorities refer to cases where the bankrupt did not possess interest for himself but for others and therefore they are not applicable to the instant case.

Section 41 of the Bankruptcy Law relates to the bankrupt's property divisible among the creditors. It reads:

> " The property of the bankrupt divisible among his creditors in this Law referred to as the property of the bankrupt shall comprise the following particulars:
>
> (b) the capacity to exercise and to take proceedings for exercising all such powers in and over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge."

The trial Court, therefore, rightly directed itself that the main legal issue to be decided was one, namely, whether the declaration made by the bankrupt and her husband renouncing their right over the house of the appellant was made in good faith and was accompanied with valuable consideration.

Appellant's counsel submitted that the Court could not grant relief in the way it did, that is, it could not declare the document of the 5th September, 1960, void as being fraudulent under the Fraudulent Transfer Avoidence Law, Cap. 62 and being executed without good faith and valuable consideration under section 46 (1) of the Bankruptcy Law.

It was further submitted that the Court could not order appellant to transfer and deliver up vacant possession of her

house to the applicant trustee. We prefer to deal with this ground of appeal after going into the facts of the case. The Court recorded its findings in its judgment as follows :

" In considering the case of Resp. No. 2 either under s. 46 (1) of the Bankruptcy Law or s. 3 of the Fraudulent Transfers Avoidance Law, the only question for the Court to decide on the evidence adduced is whether the settlement and/or transfer of the property was made in good faith and for valuable consideration.

It is clear from the evidence adduced that the bankrupt at the time the chose in action was settled and/or transferred to this respondent was unable to meet her obligations without the aid of the said property. Both Resp: No. 2 and the bankrupt stated before this Court that at that time they knew that the husband of the bankrupt was heavily indebted and that for every debt his wife (the bankrupt) was his surety. It is also clear that the declaration dated 5.9.60 (Exh. 8) makes no reference of consideration either past or present.

We don't accept the evidence of the Resp. No. 2 and her witnesses on the question of consideration that an agreement was made after this respondent signed as surety for the sum of £2,000 to the Chartered Bank to the effect that the Bankrupt and her husband would sign a declaration that they would have no claim on the house any more. Had it been it so the declaration, Exhibit 8, should be signed on the very same day this respondent signed as surety, as she knew even before the marriage that her son-in-law was among other things a spendthrift.

We must further say that from the evidence adduced as we have accepted it, it can reasonably be inferred that the settlement and/or transfer of the property in question was not made in good faith but with intent to defraud the creditors of the bankrupt. For the reasons stated above the settlement and/or transfer of property under consideration is void against the trustee in bankruptcy under s. 46 (1) of the Bankruptcy Law CAP. 5 as well as fraudulent and invalid under s. 3 of the Fraudulent Transfers Avoidance Law, CAP. 62 ".

In our view the Court below, on the evidence before them, went too far. The crucial time for ascertaining the existence or non-existence of fraud, good faith and valuable considera-

tion was at the time the declaration, Exhibit 8, was executed, that is, the 5th September, 1960. On that day Elli was, as far as her evidence goes, in control of property to a value enough to cover her debts. Mr. Andreas Hardjiotis, the Examiner in charge of the Bankruptcy Section in the Official Receiver's Office, did not contradict Elli on this point. To a question put to him as to Elli's liability on the 30th August 1960, his reply was, "It is very difficult to know." Evidence as to the indebtedness of the husband was of a general character and it is by no means clear how far his creditors' rights on the date the document in question was executed might have been affected by the non-transfer of the house in the name of his wife.

Appellant's mind, on the other hand, was dominated by the fear of having her house sold by her son-in-law and the proceeds squandered. This seems to us to be the reasonable inference to be drawn from the evidence adduced. It was natural for her to wish to keep her house in her lifetime and to exert all her power in that direction. In doing so, the intention to defeat any creditor of her daughter or son-in-law could hardly enter her mind. We cannot say that at the time she knew that her daughter was or would become an insolvent person in the near future. For future creditors of her daughter and son-in-law she could not be held responsible in any way.

The subject-matter under consideration, being a house, the judgment debtor is entitled to the exemption as provided by section 23 of the Civil Procedure Law, Cap. 6. Of course the exemption of the house of a judgment debtor from sale is limited to what is absolutely necessary for the accommodation of himself and his family. But this shows that a house is not readily available for the realization of debts due to creditors.

Section 42 of the Bankruptcy Law reads:

> "The following shall not form part of the bankrupt's property divisible among his creditors, namely,
>
> (b) all property as would be exempt from execution under any law for the time being in force in Cyprus."

We feel that the Court ought to have been slow to attribute any intention to the appellant or to Elli, her daughter, to defeat the creditors when the latter renounced her claim to the house of the former.

We are of the opinion, therefore, that the document of the 5th September, 1960, was made in good faith without the intention to defraud any creditor

There remains, however, another serious point to be considered, namely, whether valuable consideration accompanied the declaration of the 5th September, 1960

The finding of the trial Court in this respect is in the negative

From the part of the judgment of the trial Court, which has already been quoted, it appears that it did not accept in this respect the evidence of the appellant and her witnesses, the Court has given, as one of its reasons for not accepting such evidence, the fact that the declaration, exhibit 8, was not signed on the very same day when appellant signed the guarantee, with the Chartered Bank, for £2,000

From a perusal of the trial Court's judgment, as a whole, we have reached the conclusion that what must have really swayed, to a considerable extent, the minds of the trial Court in finding against appellant on this issue, and in disbelieving her version, must have been the fact that the Court had already first reached the conclusion that at the time of the signing of exhibit 8, the bankrupt daughter of appellant (Ell) was *unable to meet her obligations, without the aid of the* house in question, and that exhibit 8 was not signed in good faith but with intent to defraud the creditors of the said bankrupt

As already held by us in this judgment, the conclusion of the trial Court that exhibit 8 has not been signed in good faith is, in our opinion, erroneous and it is also erroneous, in our opinion, to say that at the material time the bankrupt (Ell) could not meet her obligations without having to use, also, *for the purpose the house in question*

It is, to our mind, quite possible, to say the least, that had the trial Court not laboured under the conclusion that the appellant had acted in bad faith and with intention to defraud the creditors of a bankrupt whose property was not otherwise sufficient to meet her liabilities, it would not necessarily have reached the same conclusion as it has regarding the absence of valuable consideration

We have, therefore, formed the view that it is proper, in the interests of justice, to set aside the said finding of the trial

Court on this issue of valuable consideration and to order, under section 25 (3) of the Courts of Justice Law 1960, a new trial on such issue, before a differently constituted Court

Should at such new trial the Court reach the conclusion, from all relevant circumstances as they may be established by the evidence to be adduced, that the settlement, exhibit 8, was made for valuable consideration, then appellant would be entitled to judgment in her favour, because, we have already held that she has acted in this matter in good faith

Should, however, the Court reach the conclusion that there is absence of valuable consideration, then it will have to proceed and consider to what extent, if any, it can grant, in the proceedings before it, as instituted, the relief sought under paragraph (f) of the application of the respondent, should it decide that it may grant the whole or part of such relief, then we might point out that the provisions of section 23 of the Civil Procedure Law, should not be lost sight of

Appeal allowed New trial ordered in above terms

Each party to bear own costs here and in Court below

TRIANTAFYLLIDES, J. I agree

JOSEPHIDES, J. I also agree

Appeal allowed. New trial ordered in the above terms. Each party to bear own costs here and in Court below.