

1957
Oct. 9,
Nov. 5

[ZEKIA AND ZANNETIDES JJ.]

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EKATERINI
LYMPEROPOULOU
v.
MICHALAKIS
CHRISTODOULOU
AND OTHERS.

EKATERINI LYMPEROPOULOU,
Appellant,

AND

MICHALAKIS CHRISTODOULOU AND OTHERS,
Respondents.

(Civil Appeal No. 4228).

Fraudulent Transfer—Transfer of goods—Invalid against a creditor intended to be defrauded—“ Subsequent creditors ” not protected—Fraudulent Transfers Avoidance Law, Cap. 95, sections 2, 3 and 5.

On the 1st April, 1955, the first respondent sold and transferred his goods to his mother, the second respondent. In August, 1956, mother and son formed a company (the third respondent) and had one share of £1 allotted to the son (the first respondent) and 997 shares to the mother (the second respondent).

The first respondent became engaged to the appellant on the 27th March, 1955, and he broke his engagement in December, 1955. In July, 1956, the appellant obtained judgment against the first respondent in the Ecclesiastical Court, and in February, 1957, she obtained judgment against him in the District Court. The first respondent paid nothing against the judgment debt and left Cyprus some three weeks later.

On an application to set aside the transfer of the first respondent's goods as being fraudulent, the trial Court found that the agreement of the 1st April, 1955, was made with a fraudulent intent to delay or hinder the creditors of the first respondent, but held that on the date of the transfer the appellant was not a creditor within the meaning of section 2 of the Fraudulent Transfers Avoidance Law, Cap. 95, and dismissed her application.

On appeal,

Held (upholding the decision of the trial Court):

(1) that a fraudulent disposition was invalid against a creditor or creditors whom the transferor and transferee intended to hinder or delay; and that a fraudulent transfer could only be avoided under the provisions of section 3 (1) of the Fraudulent Transfers Avoidance Law, Cap. 95, if the creditor who applied for such avoidance was one who was intended at the time of the transfer to be delayed or hindered in recovering his debt from the transferor;

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(2) that, unlike the English statutes (13 Eliz. C. 5 and the Law of Property Act, 1925), the Cyprus statute did not provide a remedy for a "subsequent creditor," i.e. a creditor who was not in the contemplation of the debtor at the time of the fraudulent transfer ;

(3) that the appellant was not and could not be a creditor in the contemplation of the first respondent when the fraudulent transfer was effected in April, 1955 ; and that, therefore, the appellant was not a creditor within the meaning of sections 2 and 3 of the Fraudulent Transfers Avoidance Law, Cap. 95, and she was not entitled to avoid the transfer ; and

(4) that the common law and doctrines of equity were not applicable to the present case.

Appeal dismissed.

Cases referred to :

- (1) *Graham v. Furber* (1854) 14 C.B. 416.
- (2) *The Universal Advertising and Publishing Agency v. Vouros* (1952) 19 C.L.R. 87.
- (3) *Myrianthousis v. Petrou* (1956) 21 C.L.R. 32.

Appeal.

The appellant appealed against the dismissal of her application by the Full District Court of Limassol (Zenon P.D.C. and Kacathimis D.J.), dated 18th June, 1957 (Action No. 1571/56), seeking to set aside the transfer of the first respondent's goods in order to make them available for seizure in satisfaction of a writ of movables issued by the appellant against the first respondent.

Chr. Mitsides and *G. Pelagias* for the appellant.

A. Mavrommatis and *T. Papadopoulos* for the respondent.

The facts sufficiently appear in the judgment of the Court which was delivered by :

ZEKIA J. : This is an appeal from the dismissal of appellant's application seeking to set aside the transfer or disposal of goods in a chemist's shop situate at Hellas Street, Limassol, registered in the name of A. Christodoulou Ltd., Respondent No. 3, in order to make the furniture and stock-in-trade in the said shop available for seizure under a writ of movables issued on behalf of the appellant, the judgment creditor, against respondent No. 1, the judgment debtor.

The application is based on the Fraudulent Transfers Avoidance Law, Cap. 95, sections 3 and 5. The respondent No. 1, the judgment debtor, is the son of respondent 2, the mother, and respondent 3 is purported to be a company formed by respondents 1 and 2.

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Respondent No. 1 leased the shop in question early in 1955 and installed in it the furniture and stock-in-trade which he bought from a certain Demetriades. The pharmacy was registered in his name and remained so since the 1st of April, 1955. Respondent No. 1 carried on the business of a pharmacist under his name as "Lakis Pharmacy" since that date until his departure from Cyprus on the 10th March, 1957. It appears that on the eve of his departure the words "Lakis Pharmacy" were removed from the name-plate and replaced by "A. Christodoulou Ltd.". The bailiff who called at this shop for the purpose of levying execution shortly after the judgment debtor's departure, on noticing the change of the name outside the door of the shop did not proceed to the seizure but returned the writ unexecuted. The evidence adduced revealed that the mother (Respondent No. 2) by way of advancement paid the amount of £538 to her said son for the purpose of establishing him in chemist's business. The mother in order to make the advancement contracted a loan and mortgaged her immovable property to a certain Rogiros on the 2nd March, 1955. It appears that the money borrowed could not be paid by the mother and the mortgaged property was, in full satisfaction of the mortgaged debt, transferred in the name of the mortgagee

Rogiros. The mother and son on the 1st April, 1956, entered into an agreement, which has been exhibited in the Court below, its main terms being that on consideration of the sum of £538, paid in cash and a promise to pay £100 to the original seller of the shop, the furniture, stock-in-trade and indeed all the goods in the shop were sold to the mother. The management was to remain in the hands of Respondent No. 1, the son, who would receive a salary of £35 per month and that the net profits of the business would go to the mother. Although the agreement in question states that the sum of £538 had been deposited by the mother for the purpose of carrying on the business of pharmacy, it was found that such sum was not deposited for such purpose and this sum could only have reference to the amount originally advanced by the mother for establishing the son in business. In August, 1956, a certificate of the incorporation was issued, the mother and son being the only shareholders of the company, the son holding one out of the 1,000 shares of £1 each. An allotment of 997 shares in the name of the mother appears to have been made in February, 1957.

On the other hand, the judgment creditor got engaged to the judgment debtor, the son, on the 25th March, 1955. At the date of the engagement, a contract of dowry was signed and amongst other things it was stipulated that if there was a breach of the promise, the innocent party

should be entitled to compensation not less than £1,000. In December, 1955, the engagement was broken by the respondent and the appellant in February, 1956, instituted proceedings in the Ecclesiastical Court and on the 22nd July in the same year obtained a judgment for £1,400. There was an appeal against this judgment to a Superior Ecclesiastical Court, which Court reduced the amount to £381 by its decision given on the 9th September, 1956. The appellant on the 17th November, 1956, brought action No. 1571/56 in the Civil Court and a judgment by consent was obtained for the sum of £700 on the 12th February, 1957, in favour of the appellant. On the date of the consent judgment an arrangement for the payment of the judgment debt was reached between the parties. There would be a stay of execution up to the 6th March, 1957, on which date the appellant was to pay £125 and thereafter £9 monthly. Nothing was paid on the 6th March or afterwards and on the 10th March the judgment debtor left Cyprus. On the 11th or 12th March, the bailiff called at the pharmacy in order to levy execution under a writ of movables. The shop was found closed and the name of the respondent was found removed and replaced, as we said, by the name of the company.

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The Court found that the agreement of the 1st April 1955 was made with a fraudulent intent to delay or hinder the creditors of the respondent No. 1 and that the formation of the company later in 1956 and the allotment of shares and the change in the name-plate appearing outside the shop were all fraudulent acts for the furtherance of the original object.

The finding of the Court below is summarized in the following passage:

We have no doubt in our mind that Exhibit 9 was not a genuine transfer and that it was made for the purpose of hindering and delaying the creditors of Respondent 1 to the knowledge of Respondent 2, who was aware of the debts of Respondent 1 existing at the time, and namely of another debt of £300 to Bogros Theophani Papadopoulos of the debt of £100 to Mrs. Olympia Protokritou, to which, according to the evidence of Respondent 1, she was a guarantor; of the debt to Mrs. Lella Papas, and of course of the debt to the seller of the Pharmacy Mr. Lemetradis.

It is also significant that the Company, Respondent 3, was formed after the decision of the Ecclesiastical Court of the first instance and more significant still, that the allotment of shares in favour of Respondent 2 in the Company, and the declaration of the Court relating to those shares to the Registrar of Companies were sent out only after the judgment of this Court was delivered against Respondent 1.

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The whole transaction regarding the pharmacy between Respondent 1 and Respondent 2, as explained above, and their demeanour, leaves no doubt in our mind that the transaction was made for the sole purpose of defrauding or delaying the creditors of Respondent 1."

On the facts of the case, the Court, having reached the conclusion as above, proceeded to examine whether the appellant, the judgment creditor, could avail herself of the provisions and procedure of the Fraudulent Transfer Avoidance Law. The Court having gone into the matter thoroughly found that the enactment in question does not provide a remedy for a subsequent creditor as the appellant at the time of the transfer of the pharmacy in question, that is, on the 1st April, 1955, was not a creditor within the meaning of section 2 of the Fraudulent Transfers Avoidance Law and she was not therefore entitled to avoid the transfer of the shop and render it liable to seizure under a writ of *feri facias*.

The grounds of appeal are (1) that the trial Court was erroneous in their decision that the appellant was not a creditor within the relevant law; (2) the words "actually indebted" were misconstrued; (3) that the common law and equitable principles were applicable; (4) the appellant was a creditor at the time of the final conclusion of the fraudulent transactions within the accepted definition of the said word.

Section 3 (1) of the Fraudulent Transfers Avoidance Law, Cap. 95, is the material part of the law relevant to the main point in issue:

"3 (1). Every gift, sale, pledge, mortgage or other transfer or disposal of any movable or immovable property made by any person with intent to hinder or delay his creditors or any of them in recovering from him, his or their debts shall be deemed to be fraudulent, and shall be invalid as against such creditor or creditors; and, notwithstanding any such gift, sale, pledge, mortgage or other transfer or disposal, the property purported to be transferred or otherwise dealt with may be seized and sold in satisfaction of any judgment debt due from the person making such gift, sale, pledge, mortgage or other transfer or disposal".

It is clear from this section that a fraudulent disposition is invalid against a creditor or creditors whom the transferor and transferee intended to hinder or delay. A fraudulent transfer therefore can only be avoided under this section if the creditor who applies for such avoidance was one who was intended at the time of the transfer to be delayed or hindered in recovering his debts from the transferor.

The learned President was, in our view, right in holding that 13 Eliz. C. 5 and the relevant sections of the Law of Property Act, 1925, dealing with fraudulent conveyances are wider in scope from our Fraudulent Transfers Avoidance Law. Undoubtedly, under the statutory provisions of 13 Eliz. C. 5 and the Law of Property Act of 1925 subsequent creditors, that is, those creditors who were not in the contemplation of the debtors at the time of the fraudulent transfer could avail themselves of the provisions of these statutes. In 13 Eliz. C. 5, as it has been pointed out by the trial Court, the words used are "to defer, hinder or defraud creditors and others" and the word "others" has been held in a great number of cases to cover subsequent creditors.

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Another material variation between the local legislation and the English statutory provisions is to be found in the following: The Statute of Elizabeth does not say that the transfer shall be void against those who are intended to be delayed but against "any creditors who are or might be delayed" (*Graham v. Furber*, (1854), 14 C.B., 416). The words "might be" were taken to bring subsequent creditors within the beneficial effect of the statute. In our law we have not got similar provisions. Although we had the Fraudulent Transfers Law since 1886 its sphere of operation was very limited; up to the passing of Law 10 of 1927 there was a time limit, namely, one year, within which a transfer could be impeached by a creditor.

From the statement of the facts in this case it is clear, and we need not repeat dates and sequence of events, that the appellant was not and could not be a creditor in the contemplation of respondent 1 when the fraudulent transfer was effected in April, 1955. The view of the law we take on ground 1 renders unnecessary the examination of ground 2.

As to the 3rd ground, we do not think that there is room for the Common Law to be applied in this particular case. The Common Law is applicable under section 33 (1) (c) of the Courts of Justice Law, 1953, so far as no other provision has been made by any law of the Colony. In *Vouro's case*, 19 C.L.R. 87, passing off of a business was recognised as actionable in Cyprus and although there was provision for civil wrongs generally and for passing off goods in particular it was decided that there was no special provision for the passing off business and therefore Common Law could be applied. In *Myrianthousi v. Despina Petrou*, 21 C.L.R., p. 32, a contract of marriage between an infant girl and an adult was held void and not voidable at the instance of the infant as the Common Law regards such contracts.

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In our view, the local legislative authority has made provisions relating to this particular subject matter, the avoidability of the fraudulent transfers, and no room for the Common Law is left.

The last ground of appeal is the transfer of the pharmacy to a company which was also found to be fraudulent. The transferor, however, is not the judgment debtor but is his mother and whether the formation of the company and the allotment of shares are cancelled or not it makes no difference.

Since the main issue in this case was to ascertain the ownership of the stock-in-trade of the pharmacy in question and since such property had passed to Respondent 2 by a fraudulent agreement in April, 1955, subsequent fraudulent acts touching the business in question will not make the position of the appellant any better as far as the Fraudulent Transfers Avoidance Law is concerned.

We think, therefore, that the appeal should be dismissed. We give no costs.

Appeal dismissed.