
(1963) 04 GUJ CK 0015
In the Gujarat High Court

Bhulabhai Dahyabhai and Another

APPELLANT

Vs

P.L. Gandhi and Others

RESPONDENT

Date of Decision : 09-04-1963

Acts Referred:

Provincial Insolvency Act, 1920 — Section 53, 53, 54, 54

Citation : (1964) 5 GLR 130

Hon'ble Judges : M.M. Miabhoy, J

Bench : Single Bench

Judgement

M.M. Miabhoy, J.—This revision petition is directed against an appellate order dated 31st March 1959 passed by the learned Extra Assistant Judge at Surat in Civil Miscellaneous Appeal No. 53 of 1958 which appeal was directed against an order dated 7th October 1958 passed below Ex. 194 which was an application made by second opponent herein raising a dispute regarding the debts claimed by the two petitioners. The question which is raised in the present petition is whether the Insolvency Court was prevented from considering the question about the acceptance of the debts of the petitioners by virtue of certain proceedings which had already taken place during the course of the insolvency proceedings and whether therefore the debts of the two petitioners had already been accepted by that Court which would entitle them to share in the distribution of the assets of the insolvent. The two lower Courts have taken different views. The Insolvency Court took the view that the debts of the petitioners had already been accepted and that therefore the application of the opponent No. 2 calling Upon the Court to determine the debts claimed by the two petitioners was not tenable. The appellate Court took the view that the Insolvency Court had not applied its mind on the subject of the determination of the aforesaid debts and that that step still was required to be taken and that therefore it was open to the Insolvency Court to enter into the question about the correctness of the claims made by the two petitioners.

2. In Insolvency Petition No. 20/32-33 one Parbhubhai Laxmidas was adjudged

insolvent by the Civil Court at Kathor which was in the Baroda State territory then. On 23rd of February 1932 the insolvent had transferred some of his assets to Gopal Parbhu for Rs. 8 0 and with the sale proceeds he had satisfied the debts of his three creditors (1) Dahya Vira (2) Amaidas Dhanji and (3) Gopal Parbhu himself. This transaction was impeached by the receiver under Sections 53 and 54 of the Provincial Insolvency Act. Ultimately the transaction was held not to be bad by the Baroda High Court by its order dated 6th December 1946. But the Baroda High Court held that though the transfer was not bad the aforesaid three creditors had been given fraudulent preference. Therefore the Baroda High Court ordered those three creditors to refund the amount of Rs. 8 0 together with interest and called upon those three creditors if they chose to prove their claims in the insolvency proceedings. Accordingly the creditors aforesaid refunded the amount of Rs. 8 0 and the creditors Dahya Vira and Gopal Parbhu further paid a sum of Rs. 1 0 towards interest. Creditor Amaidas Dhanji did not care to prove his claim in the insolvency proceedings. Therefore he went out of the picture. Dahyabhai Vira died and his place was taken by his heir Bhulabhai Dahyabhai petitioner No. 1 herein Similarly Gopal Parbhu also died and he is now represented by his son Rambhai who is petitioner No. 2 herein. Bhulabhai filed an affidavit Ex. 17 to prove his claim of Rs. 5 383 and Rambhai filed his affidavit Ex. 16 in proof of his claim of Rs. 2 275 It appears that whilst the dispute between the three creditors aforesaid and the receiver was pending regarding the transfer dated 23rd February 1932 the Insolvency Court at Kathor had prepared a schedule of creditors at Ex. 123. After Exs. 16 and 17 were filed receiver made a report Ex. 167 seeking directions from the Insolvency Court how payment was to be made to the creditors and whether the present two petitioners were the only legal representatives of Dahya Vira and Gopal Parbhu. On this the Court passed the order Ex. 171 dated 23rd of August 1957 calling upon the receiver to prepare a fresh schedule of creditors. The receiver made his report ex. 179 seeking orders of the Court as to how the assets were to be distributed and attached to the report a schedule of creditors in which he included the names of the present two petitioners as creditors. This report was made on 1st November 1957. This report was posted for hearing to a date after about a fortnight. This report appears to have been shown to several pleaders appearing for different parties in the insolvency proceedings and there are endorsements of some of these pleaders dated 17th of January 1958 in which they have said that they had no objection One of the endorsees was Mr. N.H. Shah who made the endorsement as the transferee of Mr. U.T. Shah who was appearing for the second opponent herein. On 14th of February 1958 the Court passed an order that the schedule should be prepared and asked the receiver to propose a dividend On this the receiver prepared a schedule Ex. 190 dated 22nd of March 1958 which included the names of the two petitioners and showed the sum of Rs. 2,275-4-9 against Rambhai Gopal and the sum of Rs. 5 383-1-0 against Bhulabhai Dahyabhai. This schedule was signed by the learned Civil Judge (Senior Division) Surat. This was so because after the merger the insolvency proceedings had come to be transferred to that Court and numbered

as Insolvency Petition No. 3 of 1958. On 28th of March 1958 the receiver by his report Ex. 1919 proposed a dividend and asked for the fixation of payment of his remuneration. On this the Court passed an order on 22 of March 1958 calling upon the creditors to have their say and on the 1st of April 1958 Shri U.T. Shah the learned Advocate for the opponent No. 2 made an endorsement to the effect that he had no objection if reasonable remuneration was paid to the receiver. There was a similar endorsement dated 10th of April 1958 by another Advocate named K.G. Desai. On 23rd of April 1958 the Court passed an order on the basis that the parties had no objection to the proposal of the receiver and approved the proposal and called upon the receiver to distribute a dividend as proposed by him and to receive the amount of remuneration as suggested by him. It is after this order was passed on 23rd of April 1958 that the second opponent herein made the application Ex. 194 on 6th of August 1958. By this application the second opponent contended that the two petitioners debts in substance had not been accepted by the Insolvency Court and that they were not entitled to a share in the distribution of the assets unless an order was passed accepting their debts. Therefore in substance the second opponent requested the Court to enquire into the correctness or otherwise of the claims made by two petitioners by Exs. 16 and 17. The two petitioners gave their reply by Ex. 199 in which they contended that in effect their debts had already been accepted by the Insolvency Court and that nothing further required to be done. In stating the facts I have not used the same nomenclature as the parties have done in the course of their pleadings or the nomenclature which has been used by the Insolvency Court and the Appellate Court. The contention which was in fact urged by opponent No. 2 was that the petitioners had not proved their debts and the reply of the petitioners was that in fact they had so proved their debts. What really the opponent No. 2 contended was as already stated that the claims made by the two petitioners had not been accepted by the Court till then and what the two petitioners contended was that those debts had been in fact so accepted. The Insolvency Court as already stated took the view that that Court had done whatever was necessary for the two petitioners to be entitled to a share in the distribution of the assets and that having regard to the proceedings already undertaken nothing further required to be done by the Court to enable the two petitioners to a share in the proposed dividend. The Appellate Court took a different view. It held that the Insolvency Court had not applied its mind and determined the correctness of the claims made by the two petitioners and that unless that step was taken which the Court should have done the petitioners could not be said to have acquired a right to a share in the distribution of the assets. It is this question which requires to be resolved in the present petition.

3. Now as to whether a debtor has or has not acquired a right to a share in the distribution of the assets depends upon a consideration of the provision contained in Section 33 of the Insolvency Act. Sub-section (1) of Section 33 states that when an order of adjudication has been made all persons alleging themselves to be creditors of the insolvent in respect of debts provable under the

Insolvency Act shall tender proof of their respective debts by producing evidence of the amount and particulars thereof and the Court shall by order determine the persons who have proved themselves to be creditors of the insolvent in respect of such debts and the amounts of debts respectively and shall frame a schedule of such persons and debts. The same subject is also dealt with by Rule 8 of the Insolvency Rules framed by the High Court of Bombay. Sub-rule (1) states that unless otherwise ordered all claims shall be proved by affidavit in form No. VII in the manner provided in Section 49 of the Act provided that before admitting any claim the Court may call for further evidence. Sub-rule (3) states that as soon as may be after proof of any debt is tendered the Court shall by order in writing admit the creditors claim in whole or in part or reject it provided that when a claim is rejected in whole or in part the order shall state briefly the reasons for the rejection. The effect of the aforesaid provisions is as follows. There are three steps to be taken one by the alleged creditor and the other two by the Court for determining as to who are the creditors of the insolvent and what are the debts due to them. The first step is to be taken by the alleged creditor and that step is described as the proof of his debt in Section 49 and some other sections of the Insolvency Act. Section 49 says that a debt may be proved either by delivering or by sending by registered post to the Court an affidavit verifying the debt. According to Rule 8 aforesaid the normal way of proving the claim is by making an affidavit in Form No. VII. The second and the third steps are to be taken by the Court. The second step is the determination of the persons who have proved themselves to be creditors and the amounts of the debts proved by them. This is to be done by passing a written order. Not only the rules enjoin that the Court is to do this by passing an order but Section 33 in specific terms says that the two questions are to be determined in that manner. After the Court has discharged this duty the third step is that of the framing of a schedule of creditors and the debts due to them and it is to be taken by the Court.

4. Now if we confine our attention to the language of Section 33 then it will be quite clear that the section speaks of (i) tender of proof of debts (ii) determination by an order of the creditors and their claims and (iii) preparation of a schedule of creditors and their claims. If we turn to Section 49 we find that that section speaks of proof of debts. But actually as the marginal note suggests that section deals with the mode of proof. It enacts as to how a creditor has to prove his debt. But proof of his debt by a creditor is not tantamount to proof of his claim in the general sense. When in the ordinary law it is stated that a person has proved his debt what is meant to be conveyed is that the person has adduced sufficient evidence before the Court which the Court has accepted and therefore has held the debt to be proved. From a consideration of the language used in Sections 33 and 49 of the Insolvency Act it is quite clear that the term proof of debt used in Section 49 is not used in this ordinary sense. When Section 49 states that a creditor may prove his debt in the manner laid down therein that section only speaks of the mode in which the debt is to be proved. That the phrase has been used in that sense in Section 49 is made quite clear by the fact

that in Section 33 the Legislature has described the same process as tender proof of debts.

5. From the aforesaid recital of facts it is quite clear that the two petitioners tendered proofs of their debts by making the affidavits Exs. 17 and 16 respectively. It is also quite clear that the Court also framed a schedule of creditors. This is so by reason of the fact that the schedule of creditors Ex. 190 which was prepared on the basis of the schedule attached by the receiver to his report Ex. 179 bears the signature of the learned Civil Judge (Senior Division) Surat. Therefore both the parties are in agreement that the first step contemplated by Section 33 was taken in the present proceeding. Mr. Thakor the learned Advocate for opponent No. 2 though he does not admit that a schedule was prepared by the Court argues that even if it be so held in any case the second step viz. the determination of the creditors and their claims had not been undertaken in the present proceedings by the Court. Therefore Mr. Thakor contends that opponent No. 2 was justified in calling attention of the Insolvency Court to the aforesaid lacuna and calling upon it to discharge the duty of determining that question in respect of the present two petitioners by an order of the Court as required by Section 33 of the Act and Rule 8 Sub-rule (3) of the Insolvency Rules. On the other hand Mr. Kapadia very strenuously urges that though there is no specific order passed by the Court determining the two petitioners as the creditors and the amounts of their debts it must be presumed that the Court did pass such an order by reason of the fact that the Court had framed the schedule Ex. 190. It is this controversy which requires to be resolved in the present proceedings.

6. Now the contention of Mr. Kapadia is that the moment the two affidavits were filed Exs. 16 and 17 the two petitioners had done all that they were required to do under the Act and they were not required to do anything further for the purpose of claiming a share in the distribution of assets. Mr. Kapadia is right in making this contention. But the mere fact that a creditor has made an affidavit does not ipso facto entitle him to a share in the distribution of the assets. In order to enable him to do so the second and the third steps mentioned in Section 33 must be undertaken. But Mr. Kapadia contends that the term proof of debt as used in Section 49 can only mean the filing of the affidavit by the creditor and nothing more and that as soon as this is done it does not matter whether the Court has passed an order or not in terms of Section 33 specially when the Court has framed a schedule of creditors in which the name of the creditor concerned has been included. In support of this contention Mr. Kapadia relies upon a number of authorities beginning with the case of AIR 1943 98 (Privy Council) . In this case Their Lordships of the Privy Council held that it was not correct to say that a debt can be said to be proved under the Act only if it is accepted or admitted by the Court. Provable and proof are words of technical import in the language of the law of insolvency. A creditor proves his debt when he lodges a proof in the mode prescribed by the statute i.e. by fulfilling the requirements laid down in Section 49 of the Act and when he has done that he has proved his debt

within the meaning of the proviso to Section 78(2). Now these observations were made by Their Lordships not with reference to Section 33 of the Act but were made by them with reference to the proviso to Section 78 Sub-section (2). That sub-section deals with the subject of exclusion of a certain period for the purpose of computing the period of limitation prescribed for any suit or application for the execution of a decree. The sub-section states that when such a question arises in a case where an order of adjudication has been annulled then the period from the date of the order of adjudication to the date of the order of annulment has got to be excluded. But there is a proviso to that sub-section and the proviso states that nothing in that sub-section shall apply to a suit or application in respect of a debt provable but not proved under the Act. The aforesaid observations were made by Their Lordships of the Privy Council whilst considering the language of the aforesaid proviso. Having regard to the context in which the words provable and not proved are used in the proviso and also having regard to the way in which these words have been used in Section 49 it is quite clear that the proviso is applicable to a case where a persons debt is provable but has not been proved as required by Section 49 of the Act. There could not have been any reference in this proviso to any act of the Court accepting or admitting proof of a debt. That the insolvency law requires a debt to be accepted by the Insolvency Court is implicit in that observation of Their Lordships wherein they have stated that the proviso does not become inapplicable merely because the Court does not accept or admit a debt. Therefore the other authorities such as Kathara Lakshmi Bai Vs. Bandubodo Rukmaji Rao and Others, and Satyabadi Sahu and Others Vs. Sri Jagannath Mahaprabhu, relied on by Mr. Kapadia which also construe the same proviso are not of any assistance in resolving the aforesaid controversy. However there is one authority reported in Narahari Ramanamma v. Official Receiver Kistna and Ors. AIR 1946 Mad 500 on which Mr. Kapadia strongly relies and which does support the proposition for which Mr. Kapadia contends. In that case Rajamannar J. holds that when a creditor delivers or sends by registered post an affidavit verifying his debt he must be deemed to have proved his debt. In support of this contention the learned Judge has relied upon an authority reported in Kathari Lakshmi Bai v. Bandubodo Rukmaji Rao and Ors. 57 Mad 767 which is also a case under the proviso to Section 78 Sub-section (2) of the Provincial Insolvency Act. With respect I am unable to agree with the conclusion arrived at by the learned Judge. With respect in my judgment the learned Judge has confused the question about the proof of debt by a creditor with the question about the acceptance or admission of his debt by the Insolvency Court. These two are distinct steps. The first step is to be taken by the creditor and the second by the Court. It is only when the Court either accepts or rejects the creditors claim and in case of acceptance enters his name and claim in a schedule that it can be said that the question has been finally determined by the Court. For the above reasons the real point which requires to be decided in the context of the present facts is as to the effect of the preparation of the schedule by the Insolvency Court and the affixation of the signature by the learned Civil Judge thereon. Now that is a

question which was primarily within the jurisdiction of the learned appellate Judge to determine. It may be that another Judge may have inferred from the fact that a schedule was prepared that the Court had also determined the question about the creditor and his claim. But the fact that the appellate Court has drawn a different inference on the facts of the present case does not mean that the interference of this Court is necessary in the interests of justice. One thing is quite clear that having regard to the record of the case at no stage was the question about the correctness of the claims made by the above two creditors brought prominently before the Court for its determination. The report Ex. 167 which was made by the receiver on 18th of February 1957 only asked the direction of the Court as to whether the two petitioners were the rightful heirs of the original creditors. That was a question which was entirely different from the question as to whether in fact the two original alleged creditors were in fact the creditors of the estate and whether the amounts claimed by them were due from the estate. It may be that in a majority of cases the Court may not insist upon strict proof of the claims by the creditors with a view to determine whether the claims should be accepted or not. In a majority of cases the Court may act on the affidavits filed by the creditors and straight off put the names of the creditors and their claims in the schedule. But before doing so an order of the Court is necessary. Even assuming that the failure to pass a specific order is only an irregularity and that the mention of the names of the creditors in the schedule suggests that the Court accepted or admitted their claims even then if in the absence of a specific order a competent Court takes the view that the second step has not been taken then in my judgment it does not necessarily establish except in some extreme cases a case for the interference of the Court of revision. Now in the present case it is quite clear that the Baroda High Court held that the aforesaid three creditors had been fraudulently preferred. That Court also gave a direction that the three creditors might if they so chose lodge their claims for claiming a share in the distribution of the assets. Having regard to the finding of the Baroda High Court that the circumstances in which the amounts were paid to the three creditors revealed that they were fraudulently preferred in my judgment the Insolvency Court must be on its guard and should carefully investigate into the correctness of the claims of the creditors. I am not convinced that the endorsements made by Mr. N.H Shah and Mr. U.T. Shah on 17th of January 1958 and 1st of April 1958 respectively necessarily shows that they did not raise any objection to the correctness of the claims made by the two petitioners As regards the second endorsement there is no doubt that the endorsee did not say anything about the correctness of the claims. This is so because the endorsee only made a specific reference to the question of the remuneration of the receiver and did not say anything specifically about the correctness of the claims. As regards the first endorsement at the most it is an equivocal endorsement. It is not quite clear as to whether the endorsee intended to convey that he had no objection to the distribution of the assets or to the inclusion of the names of the aforesaid two petitioners in the schedule of creditors attached to the report In my judgment no injustice will be done to the

petitioners by reason of the order of the appellate Court. In this connection it is important to notice that even if the Insolvency Court had included the names of the two petitioners in the ordinary course the other creditors could have got the question about the correctness of the petitioners claims determined by starting proceedings u/s 50 of the Act. It is true that the approach of the Insolvency Court is different when an application comes to be made u/s 50. But the section undoubtedly shows that in spite of the admission of a claim by the Insolvency Court the creditors have a right to raise the question about the correctness of the claim. Now in the present case opponent No. 2 apparently did not start any proceeding u/s 50 because he thought that the second step as required by Section 33 was never taken and that therefore it was not necessary for him to start proceedings under that section. Mr. Kapadia however contends that if the view of the appellate Court is up held that the claims of the two petitioners were not admitted then they would be precluded altogether from getting their shares in the distribution of the assets. I cannot agree with this view. The facts reveal that although the other creditors have received their shares the amounts which would become payable to the petitioners in case they establish their claims are held by the Court. If the petitioners happen to get their claims accepted by the Court they would be entitled to receive their claims from the amounts held by the Court. But even assuming that the assets had come to be already distributed that would not in any way prejudice the claims of the two creditors because in a similar case *Krishna Chinoo and Sons v. Matubhai Kasanbhai and Ors.* reported in AIR 1929 Bom 107 their Lordships of the Bombay High Court held that the failure of the Official Assignee to accept the proof in accordance with the provisions of Rule 119 made by the High Court of Bombay under the Presidency Town Insolvency Act cannot be allowed to prejudice the rights of the creditor and that such a failure was an adequate ground for disturbing the distribution of the dividend on the ground that it was not validly made.

7. For the above reasons I have come to the conclusion that no valid cause has been shown for interference in revision and the petition should be dismissed with costs.

Rule discharged with costs.