
(1929) 10 BOM CK 0009
In the Bombay High Court
Case No : Appeal No. 432 of 1927

Gandabhai Gulabchand

APPELLANT

Vs

Balkrishna Vaman

RESPONDENT

Date of Decision : 16-10-1929

Acts Referred:

Provincial Insolvency Act, 1920 — Section 54

Citation : AIR 1930 Bom 217 : (1930) 32 BOMLR 294

Hon'ble Judges : Madgavkar, J;Allison, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Madgavkar, J.—The question in this appeal is whether the payment of Rs. 7,125 made on July 15, 1923, to the appellant Gandabhai by Chhotalal, adjudged insolvent on a petition of October 1923 within three months of the payment, was a payment made by Chhotalal with a view to give to Gandabhai a preference over other creditors, and therefore to be deemed fraudulent and void as against the receiver respondent u/s 54 of the Provincial Insolvency Act, as the trial Court held.

2. The facts are sufficiently stated in the judgment appealed against. Chhotalal was a timber merchant living at Bulsar with dealings also at Dahanu and Savta and a contract to supply sleepers to the Bhavnagar State Railway. He became involved about 1922. Nine or ten creditors had obtained decrees against him. Some darkhasts were also pending. He asked one Rao Saheb Narottam to obtain the consent of the creditors at least outside Bulsar to compound on a payment of eight annas in the rupee. Rao Saheb Narottam tried to obtain their consent, according to him, between January, May and June 1923. He failed to do so and informed Chhotalal accordingly. The appellant Gandabhai held a mortgage of certain property of Chhotalal and was also a creditor to the extent of Rs. 14,000. On July 15, 1923, the payment now in question was made.

3. The main facts on which the trial Court arrived at a conclusion in favour of the respondent were six:-Firstly, prior to July 15, 1923, Chhotalal knew that his position was hopeless. Secondly, he could not pay more than two annas in a rupee at the most. Thirdly, his creditors had already refused an offer of eight annas in a rupee. Fourthly, decrees and attachments existed against which no payments were made. Fifthly, Chhotalal did not produce his account books on the allegation that they had disappeared. Sixthly, the relations between Chhotalal and Gandabhai were intimate. Gandabhai was mortgagee, the shroff who cashed Chhotalal's hundis and also took over the Bhavnagar contract of supplying sleepers after Chhotalal.

4. It is argued for the appellant that the trial Court has con. founded the accidental consequence which resulted in a preference of Gandabhai with the previous view in Chhotalal's mind at the time of the payment, necessary u/s 54 of the Provincial Insolvency Act, and that, as was observed by Lord Esher M. E. in *New Prince & Garrard's Trustee v. Hunting* [1897] 2 Q. B. 19 it cannot be assumed that the debtor must be taken to have intended what might have been the natural consequence of his act. Secondly, there was pressure on the part of Gandabhai through Dullabbhai and Fakirchand so that there was no undue preference in favour of Gandabhai at the time of payment. Chhotalal's real motive was a bona fide desire and hope to pay each creditor eight annas in the rupee, the payment to Gandabhai being the beginning of such payment.

5. It is argued for the respondent that the question is as to the state of the mind of Chhotalal, not previous to but on the date of the payment, and that, except on the hypothesis of preference to Gandabhai, no other explanation for the view on the part of Chhotalal can be inferred.

6. The words "with a view of giving a creditor a preference over other creditors" have formed the subject of numerous decisions, the corresponding sections in most of the Bankruptcy Acts in different parts of the Empire being identical. It suffices to refer to the decision of the House of Lords in *Sharp v. Jackson* [1899] A. C. 419 in appeal from the case in *New Pranoë & Garrard's Trustee v. Hunting*, referred to above, and the decision of their Lordships of the Privy Council in *Sime, Darby & Co., v. Official Assignee* (1927) 30 Bom. L.R. 290 followed in *The Sholapur Spinning and Weaving Co. Ltd. Vs. Pandharinath Martand Sulakhe*, . It was observed in the j last case (p. 291):-

The question to be determined is one of fact, was the dominant motive actuating the debtor in making the transfer a desire to prefer the particular creditor or was it of a different character ? As the solution of this question involves an inquiry into the state of a man's mind, and as it must very seldom be the case that there is direct evidence on the point, the decision generally depends on the inference properly to be drawn from the circumstances attending the transfer as established by the evidence.

The second ground relied upon by the appellant may shortly be dismissed.

Gandabhai was the mortgagee and a creditor also to the extent of Rs. 14,000. It is clear from the schedule Exhibits 255 and 256 that there were other creditors of larger amounts, some of whom had obtained decrees and others were proceeding in execution. Gandabhai had not even issued a notice. The fact that he might have sent two friends such as Dullabhai and Fakirchand cannot possibly be called pressure such as to affect a voluntary decision on the part of Chhotalal or to constrain him to make the payment now in question. On the first point the argument for the appellant fails in our opinion, because it is based on the possible state of mind of Chhotalal not on the date of payment but on prior dates. It may be conceded on the evidence of Kao Saheb Narottam that about the beginning of the year and about March Chhotalal had some hopes, possibly faint and even these unjustified and made offers of payment of eight annas in a rupee. This offer is on the basis of Rs. 20,000 from a relative, not named, in Bombay, and not ceiled, and whose existence is therefore hypothetical, and on a promise of to other Rs. 20,000. This latter sum on the evidence is discrepant and equally doubtful. Chhotalal says that it was Gandabhai who promised Rs. 20,000. Gandabhai denies it and says that such a promise might have been made by Fakirchand. Fakirchand himself is not put in the box. But however that might be, it is clear that towards the end of June, the creditors including the chief creditors Madhavji and others at least outside Bulsar had decisively rejected this offer of eight annas in a rupee, and Chhotalal could have no such hope left. And it is in fact in order to get over this difficulty that his witness Dullabhai states that a settlement with Gandabhai took place about a month before the payment. Whatever the time at which this settlement took place, the evidence in our opinion clearly shows that on July 15, 1928, Chhotalal knew that his creditors would not accept eight annas in a rupee, nor had he any assets sufficient to pay any such amount even if they had accepted. It is impossible, therefore, to accept the argument for the appellant that the payment now in suit was a payment with the bona fide expectation of paying all the creditors eight annas in the rupee, Chhotalal being the first, and not, as it actually turned out, the last. It should be added that the only other person paid was a small creditor to the extent of Rs. 721.

7. It is true that because the ultimate result of a payment made was preference, it does not follow that the view in the sense of dominant motive at the time of payment was preference. As the cases referred to above show, the view on the part of the insolvent implies that the payment is firstly voluntary, and, secondly, that it is deliberate preference of one creditor over the others. In order that the payment may be voluntary on the part of the insolvent, it is necessary that there should be neither outside pressure nor even inward mental apprehension of such pressure. In the English cases referred to above, a solicitor had committed a breach of trust and made the payment in question in order to repair his criminal breach of trust and with the hope of mitigating action on the part of the aggrieved party. Incidentally the result was preference over other creditors. The dominant motive was to shield himself from the consequences of a criminal act.

Similarly in the Privy Council case referred to above the dominant motive was not directly preference of one creditor but the desire to shield himself from the alternative of prosecution for criminal breach of trust. The preference in both these cases was an incidental result ; the payment by the insolvent was in no sense voluntary, nor was it with a view to give preference. On the facts of the present case, there was no apprehension on the part of the insolvent, and as pointed out above, the pressure on the part of Gandabhai was not greater but far less than on the part of other creditors. No decree was obtained, no execution was proceeding, no attachment existed as in the case of other creditors. In such a case the only inference is that with open eyes Chhotalal preferred to pay Gandabhai rather than other creditors. If further corroboration is necessary, it suffices to refer to other facts as between Chhotalal and Gandabhai. Gandabhai had never dealt in timber or taken railway contracts. Yet he takes the present contract of supplying sleepers from the Bhavnagar State Railway straight over from Chhotalal and as the accounts disclosed to the receiver show, there are grounds to suspect the benami nature of Gandabhai's transaction in respect of these sleepers; and Gandabhai obtains for Rs. 4,500 sleepers which at least a couple of years before were worth Rs. 45,000. The property available for the other creditors was not even two annas in the rupee, a preference deliberate and actual for one creditor cannot be justified in law by an allegation of hope, not based on assets, of similar payment to others in the future or by offers in the past. The plain course for an honest debtor is a meeting of creditors and a disclosure and offer of all his assets.

8. For those reasons we agree with the lower Court that the payment in question was made by Chhotalal with a view to give the appellant preference over other creditors and the respondent receiver is therefore entitled to have it annulled by the Court. The appeal fails and is dismissed.

9. Cross-objections are filed for the respondent claiming interest from the date of payment to the appellant. It is argued for the respondent that he gave up this interest by way of settlement at the time of payment. That payment has been held to be a preference and the settlement, if any, goes with it. The appellant is entitled to prove his debt in due course and to rank with other unsecured creditors for whatever amount he proves with interest, if necessary. The respondent is in this decree entitled to obtain interest from the appellant at six per cent, on Rs. 7,125 from July 15, 1923, up to the date of payment by the appellant to the respondent.

10. The appellant will pay the costs of the appeal and of the cross-objections.