

(1959) 07 CAL CK 0010
In the Calcutta High Court
Case No : Matter No. 323 of 1949

In Re: Girish Bank Ltd. (in Liquidation)

Date of Decision : 27-07-1959

Acts Referred:

Companies Act, 1913 — Section 167, 178(1), 228, 229
Companies Act, 1956 — Section 456, 528, 529

Citation : AIR 1959 Cal 762

Hon'ble Judges : K.C. Das Gupta, C.J;S.C. Lahiri, J;H.K. Bose, J

Bench : Full Bench

Advocate : Sabyasachi Mukherji, for the Appellant;Salil Hazra, for the Respondent

Judgement

Bose, J.—In this case two questions arising out of a proceeding for settlement of the list of creditors in the winding up of a Banking Company known as Girish Bank Ltd. have been referred under Chapter V, Rule 2 of the Original Side Rules of this Court for decision by a Special Bench.

2. The two questions which have been referred are as follows:

(1) Are the Pakistan creditors that is to say, creditors of the branches at Pakistan, entitled to prove their claims and participate in the distribution of assets of the banks (in liquidation) in the Indian Union?

(2) Whether drafts issued by Pakistan branches on the head office in the Indian Union, not accepted by head office in respect of which no advice has been received, are payable out of the assets of the banks in the Indian Union?

3. It appears that this Girish Bank Ltd. was incorporated as a Banking Company under the Indian Companies Act having its registered office at No. 21/A Canning Street, Calcutta. The Bank has 23 branches of which 6 branches are in Eastern Pakistan, and there were three in the State of Tripura. On 12-1-1948 the Bank suspended payment and on that very day an application was made in the Original Side of this Court for sanction of a scheme and this Court gave the usual preliminary directions. On 8-2-1948 an application for sanction of a scheme was

made in the Dacca High Court which also gave certain directions. Ultimately however on 8-12-1949 an order for winding up of the Bank was made by this Court and one Mr. Dipak Chowdhury was appointed Official Liquidator. Sometime prior to this, the three branches in the State of Tripura which was then a foreign territory, were ordered to be wound up by the Tripura Court and the Tripura State Bank Ltd. was appointed the Official Liquidator. On 12-3-1951 Bachawat J., made an order for transfer of the records of the Tripura branches from Agartala to Calcutta, and the learned judge discharged the Tripura State Bank Ltd. and placed the affairs of the Tripura branches in charge of Mr. Dipak Chowdhury and Rai Saheb S. C. Dutt who were appointed joint liquidators. Subsequently there have been further changes in the personnel of the liquidators by orders of this Court made from time to time. The branches of the Bank in Pakistan have however been functioning at all material time and there has not been any order of winding up by the Dacca High Court in respect of these branches which are within the jurisdiction of that Court. The liquidator appointed by the Calcutta High Court is not in possession of any of the books or assets of these Pakistan branches. In the affidavit filed on behalf of the liquidator it is alleged that the present liquidator or his predecessors have not been able (suggesting thereby that although efforts were made in that direction) to obtain possession of the books or assets of the bank in Pakistan and there is total absence of reciprocity between this Court and the High Court at Dacca which has systematically refused to recognise the order of this Court and has treated the branches of the Bank in Pakistan as distinct and separate entity and have allowed the said branches to function in Pakistan in the normal and usual course in spite of the winding up order made by the Calcutta High Court. It has been further alleged in this affidavit that the High Court at Dacca has persistently refused to allow any facility to take possession of the assets of this Bank in Pakistan or to bring any assets in the Indian Union for the benefit of the creditors in general. Although no satisfactory evidence in support of all these allegations in the affidavit have been produced before us, it appears from instances of other banks referred to in the affidavit that the relation between the Dacca High Court and this Court has not been one of mutual co-operation. The learned counsel for the liquidator has also laid stress on the difficulties that exist between the Indian Union and Pakistan in the matter of free exchange of currencies and in the matter of transference of assets from one country to another, in respect of the banks and their branches functioning in the Indian Union and in Pakistan.

4. So it is against this background that the consideration of the questions raised, has to be approached.

5. The sections of the Indian Companies Act 1913 which have a bearing may be conveniently set out hereunder:

"Section 167. An order for winding up a company shall operate in favour of all the creditors and of all the contributories of the company as if made on the joint petition of a creditor and of a contributory.

Section 178(1). The official liquidator whether appointed provisionally or not shall take into his custody or under his control, all the property, effects and actionable claims to which the company is or appears to be entitled.

2. All the property and effects of the company shall be deemed to be in the custody of the court as from the date of the order for the winding up of the company.

Section 228. In every winding up (subject in the case of insolvent companies to the application in accordance with the provisions of this Act of the law of insolvency) all debts payable on a contingency and all claims against the company present or future, certain or contingent, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or for some other reason do not bear a certain value.

Section 229. In the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent; and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up and make such claims against the company as they respectively are entitled to by virtue of this section".

6. Bearing these sections in mind, some of the cases which throw certain light on the questions at issue may now be considered.

7. The first case that may be referred to is that of *In Re Oriental Inland Steam Co. Ex parte Scinde Ry. Co.* (1874) 9 Ch. A 557. In this case one Scinde Railway Company and one Oriental Inland Steam Company which were English companies and had their principal offices in England, carried on business in India. On 23-5-1867 the Scinde Company obtained in India a judgment against the Oriental Company for Rs. 40,122/-. On 8-11-1867 an order to wind up the Oriental Company was made in England and on 12-3-1868 the Scinde Company came in under the winding up and proved their debt. Thereafter on 28-1-1869 the Scinde Company, proceeding under their judgment attached certain property in India belonging to the Oriental Company. By an order made on 4-3-1869 in the winding up, the Scinde Company was ordered to withdraw the attachment, without prejudice to any question; and upon the Scinde Company undertaking to abide by any order of the Court, the official liquidator was ordered out of the proceeds of the sale of property in India belonging to the Oriental Company to pay the Scinde Company the amount of principal, interest and costs then due to them. The attachments were accordingly withdrawn and Rs. 19813/- were paid by the official liquidator to the Scinde Company in satisfaction of their claim; the remainder of their claim having been satisfied by sales under attachments before

the winding up. The official liquidator thereafter applied by Summons that the Scinde Company should repay the sum of Rs. 19813/- and Vice-Chancellor Malins, on the 18th April 1874 made the order for refund. Upon an appeal being preferred by Scinde Company, the Court of Appeal affirmed the order of the Vice-Chancellor. Dealing with the situation where the company ordered to be wound up, has assets abroad, Lord Justice James observed:

"The winding up is necessarily confined to this Country All the assets there (India) would be liable to be torn to pieces by creditors there, notwithstanding the winding up, and there would be an utter incapacity of the courts there to proceed to effect an equitable distribution of them. The English Act of Parliament has enacted that in the case of a winding up the assets of the company so wound up are to be collected and applied in discharge of its liabilities. That makes the property of the company clearly trust property. It is property affected by the Act of Parliament with an obligation to be dealt with by the proper officer in a particular way. Then it has ceased to be beneficially the property of the company; and being so it has ceased to be liable to be seized by the execution creditors of the company. There may no doubt be some difficulty in the way of dealing with assets and creditors abroad. The Court abroad may sometimes not be disposed to assist this Court or take the same view or the law as the Courts of this country have taken as to the proper mode of dealing with such companies and also with such assets. If so we must submit to these difficulties when they occur."

8. The learned Lord Justice then pointed out that in this case as Scinde Company had by means of execution abroad been able to obtain possession of part of those assets they must bring those assets in, for distribution among the creditors, on the footing that the property was trust property and the creditors were all in the position of cestui que trust.

9. Mellish L. J. also held that Scinde Company were bound to give up for the benefit of the creditors what they had obtained by means of execution out of the assets in India, and after referring to Section 87 and Section 163 of the English Act of 1862 pointed out that these Sections applied only to the Courts in England, and then further proceeded to observe as follows:--

"Of course Parliament never legislates respecting strictly foreign courts. Nor is it usually considered to be legislating respecting Colonial or Indian courts unless they are expressly mentioned. Still that appears to me not to prevent the general application to this case of the principles which have been established in cases of bankruptcy.

No doubt winding up differs from bankruptcy in this respect that in bankruptcy the whole estate both legal and beneficial is taken out of the bankrupt and is vested in his trustees or assignees, whereas in a winding up the legal estate still remains in the company. But in my opinion the beneficial interest is clearly taken out of the Company."

10. This case thus lays down the proposition that although the debt accrues in a country outside England the creditor can prove his debt in the winding up ordered by the English" Court, but if he has obtained possession of any part of the assets abroad, after the winding up order, towards satisfaction of the debt, he must bring it in for distribution among the creditors participating in the winding up.

11. The same principle has been reiterated by the House of Lords in the case of *Banco De Portugal v. Waddell* (1880) 5 AC 161. In this case a partnership firm of two persons carried on business as wine exporters in Portugal and as wine merchants in London, and had assets in both countries. The traders fell into difficulties and petitions for adjudication were presented in the two countries under the English Bankruptcy Act and under the Portuguese law, and the traders were adjudicated as bankrupts. The Portuguese court took possession of the property in Portugal and the Portuguese creditors received a dividend of 8. Shillings in the pound. These creditors then sought to prove in the English adjudication. But this was refused until they had accounted for what they had received under the Portuguese insolvency. The House of Lords held that the conditional admission of their claim was correct.

Lord Selborne observed at page 169 as follows:--

"The Portuguese assets were by the law of England, which we have to administer (and, I may add, in accordance with the general principles of private international law as to moveable property) subject to and bound by the English liquidation, except so far as the local law of Portugal might have intercepted any portion of them while within its jurisdiction. Every creditor coming in to prove under and to take the benefit of the English liquidation, must do so on the terms of the English law of Bankruptcy; he cannot be permitted to approbate and reprobate, to claim the benefit of that law and at the same time insist on retaining, as against it, any preferential right inconsistent with the equality of distribution intended by that law, which he may have obtained either by the use of legal process in a foreign country or otherwise,"

12. In the case of *In Re Kloebe, Kannreuther v. Geiselbrecht* (1884) 28 Ch. D. 175 the same principle was again applied and it was held that in the administration of the English estate of a domiciled Greek who died abroad intestate and insolvent, foreign creditors were entitled to dividends *pari passu* with English creditors. Pearson J. observed;--

"But whatever the law in France or India may be the law of England has always been that you must enforce claims in this country according to the practice and rules of our courts and according to them a creditor, whether from the furthest north or the furthest south is entitled to be paid equally with other creditors in the same class. I must refuse to alter that which has always been the law of this country and which I must say, for the sake of honesty, I hope will always be the law of this Country."

13. Following this principle that foreign creditors are as much entitled to participate in an English liquidation as the English creditors, Wynn-Parry J. in the case of *In Re Azoff-Don Commercial Bank* (1954) 1 All. E. R. 947 negated the contention raised on behalf of the Crown that the Court should not make an order for winding up at the instance of five Norwegian banks (who were creditors) who had presented the petition for winding up of a bank which was created and established in Russia by Imperial Charter, on the ground that the banking company had substantial assets in England. The learned judge observed as follows: (page 956)

"I can see no merit in the suggestion that I should refuse to make a winding up order which will benefit the petitioners as foreign creditorsThe object of a winding up order is to ensure distribution of assets among the whole body of creditors. No other basis of distribution would be fair".

14. The learned Judge then proceeded to quote the passage from the judgment of Pearson J. in (1884) 28 Ch D 175 Which I have already quoted,

15. Some English judges have however felt the unreasonableness or inequity of applying universally this principle of equal distribution of assets among the English creditors and foreign creditors and in order to provide a means of escape from the effects of Section 261 of the English Companies Act 1929 which corresponds to Section 228 of the Indian Companies Act 1913 have resorted to rules of Private International law and have applied the rule of localisation of a debt better known as "lex situs". Reference may be made to the cases of *In Re Russian Bank for Foreign Trade*, (1933) Ch. 745 at p. 766 per Maugham J.; *Re Banque des Marchands de Moscou* (1952) 1 All E R 1269 per Vaisey J. and *Re Banque des Marchands de Moscou (Koupetschesky)* (1954) 2 All E R 746. In the last mentioned case Roxburgh J. observed:

"In (1933) Ch. 745 . Maugham J. dealing with a petition to wind up a dissolved foreign company had already devised a means of escape from such an application of Section 261 of the Companies Act 1929. After all, what are being administered in this country are not all assets of the Russian Bank but assets on which the liquidator can lay his hands and which broadly speaking are English assets; and therefore it would be surprising if doubts which would be, broadly speaking, described as English debts should find themselves up against the competition of Russian debts in respect of assets which were solely English assets and, of necessity, excluded the Russian assets".

This case has been referred to by the Supreme Court in *The Delhi Cloth and General Mills Co. Ltd. Vs. Harnam Singh and Others*, .

16. But it is to be noted that in these cases of the Russian Banks the learned judges by applying the rule "lex situs" came to the conclusion that the debt the locality of which was in Russia had become extinguished or destroyed by reason of certain Russian legislation and so the proof of such debts had been rightly rejected by the Liquidator in the English liquidation.

17. In the case before us no such question of extinction of the debts arises.

18. But having regard to the peculiar conditions prevailing in India and Pakistan which have been alluded to in the affidavit already referred to and in view of the absence of reciprocity between these two countries, the unqualified application of the English rule of equal distribution of Indian assets among all creditors Pakistani and Indian will not be reasonable or equitable.

19. The reasonable thing to do is to allow proof of only such debts in the Indian liquidation which can either by "the application of the rule of "lex situs" or by the application of what is known as the "proper law of the contract" be said to be properly recoverable in the Indian Union alone. The Supreme Court in the case of *The Delhi Cloth and General Mills Co. Ltd. Vs. Harnam Singh and Others*, has summarised and explained some of these rules of Private International law for determining the locality of a simple contract debt and if applying such principles of private international law any Pakistani debt is found to be recoverable in the Indian Union, proof of it may be allowed in the Indian Liquidation subject to such terms and conditions as may be thought fit to be imposed in the particular facts of each case.

20. No hard and fast rule can be laid down in the matter. If it appears on the facts that a particular debt is locally situate in Pakistan and is liable to be discharged in that country and no- where else, or if it transpires that the elements of the contract out of which the debt arises as reflected in its formation and in its terms, can be considered to be most densely grouped in Pakistan, and the country with which the contract is in fact closely connected and in which lies its natural seat or centre of gravity, is Pakistan, then the proper forum for the liquidation and satisfaction of such debts and claims is Pakistan. If on the other hand it appears from the necessary course of business between the parties that the bank had localised its obligation to its customer or creditor, so as to confine it primarily at all events, to a particular branch of the Indian Union, such a debt or claim! must necessarily be provable in the Indian liquidation.

21. Unless some such basis is adopted an arbitrary exclusion of foreign creditors from the Indian liquidation will strike at the very root of international comity.

22. The attention of this Court was drawn to the decision of S.N. Banerjee J. in the case of *In Re: Dassi Bank Ltd.*, . In this case a customer of the Dassi Bank Ltd. which had its registered office at Calcutta, and branches in Pakistan, had a savings bank account and two fixed deposit accounts (opened in the names of his two sons) at a branch in Pakistan. The "Calcutta High Court had sanctioned a scheme and while the Bank was functioning under such scheme, the Dacca High Court made an order for winding up of the bank at the instance of some creditors of the bank ignoring the scheme sanctioned by the Calcutta High Court. The creditor whose claim was in respect of the said savings bank account and fixed deposit accounts at the Pakistan branch applied to this Court for participating in the scheme. The learned judge held that the petitioner could not be allowed to

participate in the scheme but he must go and seek relief in the winding up ordered by the Dacca High Court, as the claim of the creditor arose in Pakistan and was recoverable in Pakistan. The learned judge in arriving at his decision applied substantially the same principles which in my view as already indicated, should be adopted in determining whether a particular Pakistani creditor should be allowed to participate in the Indian liquidation or not.

23. Our attention was also drawn to a decision of the Madras High Court reported in *Rajah of Vizianagaram Vs. The Official Liquidator, Vizianagaram Mining Company Limited, Vizagapatam*, where Govinda Menon J. and Chandra Reddi J. held that in the winding up of a company registered in England but ordered to be wound up in India u/s 271 of the Indian Companies Act as an unregistered company, foreign creditors and Indian creditors are equally entitled to participate in the winding up; and dealing with the question whether the situs of a debt is at all a relevant consideration in winding up observed as follows: (page 142)

"A careful reading of all the decisions above referred to does not show that in the matter of winding up the question as to where the debt was incurred has assumed any importance. If as we have held, all the creditors of the company have to be recognised as being entitled to be paid out of the assets, the location or place where the debts were incurred cannot be considered a prima factor. The situs of the debt becomes important only with regard to administration and succession".

24. But as I have pointed out already, Maugham J., in the case reported in (1933) Ch. 745 was in view of the rule of "lex situs" reluctant to rely on a Russian debt sought to be made the foundation for an English liquidation, and later cases decided by Vaisey J. (1952) 1 All ER 1269 and by Roxburgh J. (1954) 2 All ER 746 have followed the principle adopted by Maugham J. So the statement of Govinda Menon J. that in the matter of winding up the question as to where the debt was incurred has not assumed any importance is not quite correct. Although Lord Atkin in *Russian and English Bank v. Baring Bros, and Co.* (1936) 1 All ER 505 : 1936 AC 405 had not absolutely committed himself to this line of reasoning and kept the point open, the later decisions have displayed a leaning in favour of the application of this principle in cases of winding up, and in doing so reference has been made to this passage of Lord Atkin's speech:

"But if the Corporation does trade here, acquires assets here, and incurs debts here, we shall not accept its dissolution abroad without a stipulation that it is desirable it may be wound up here so that its assets here shall be distributed amongst its creditors (I do not stay to consider whether its English creditors or creditors generally) and for the purpose of the winding up it shall be deemed not to have been dissolved".

25. Then again the statement of Govinda Menon J. that the question of situs of the debt becomes important only in the case of administration and succession is not strictly accurate. The Supreme Court (S) *The Delhi Cloth and General Mills*

Co. Ltd. Vs. Harnam Singh and Others, has observed:

"We now have to determine the legal liabilities which arise out of these facts. This raises complex questions of private international law and two distinct lines of thought emerge. One is that applied by the English courts namely the "lex situs"; the other is the one favoured by Cheshire in his book on Private International Law namely "the proper law of the contract".

The English approach is to treat the debt as property and determine its "situs" and then in general, to apply the law that obtains there at the date when payment is due. But the difficulty of the English view is that they have different sets of rules for ascertaining the situs with the result that the "situs" shifts from place to place for different purposes, also that it is determined by intention.

Thus it can be in one place for purposes of jurisdiction and in others for those of banking, insurance, death duties and probate. The situs also varies in the cases of simple contract debts and those of specialty". (See also paragraphs 43(a) to 48 of the judgment where rules as to Banking and other rules are dealt with).

26. So the rule of "lex situs." is not confined only to cases of administration and succession but its scope extends much further.

27. The case before the Supreme Court was not a case of winding up but a case where the question of jurisdiction of the Court in the Indian Union to entertain and try a suit in respect of a debt which accrued in Pakistan came up for consideration. But as the Supreme Court has laid down certain propositions affirming certain principles of Private International Law, the decision can be usefully referred to in determining the questions which are before us for consideration in this case.

28. Reference was also made to the decision of Bachawat J. reported in *Bengal Bank Ltd. Vs. Suresh Chakravartty and Others*, where the learned judge refused to sanction a scheme u/s 153 of the Indian Companies Act because notice of the meeting of creditors had not been given to the Pakistani creditors. The learned judge followed the normal rule and no question was raised before him about want of reciprocity and other difficulties existing between the two countries.

29. It appears therefore that the reasonable method of lessening the rigour of the rule which requires the giving of equal opportunities of participation to the foreign and the Indian creditors in an Indian liquidation, is to allow only such Pakistani creditors to prove their claim in the winding up whose debts are properly recoverable in the Union of India according to the principles of International law of "lex situs" or the "proper law of the contract".

30. Certain American cases have held that the public policy of the American States does not usually permit the local assets to be appropriated to the benefit of alien creditors as against the demands of the citizens of the State and "the courts in recognising such a policy does no more than has been frequently done by nations and States, in refusing to exercise the doctrine of comity in such wise

as to impair the right of local creditors to subject local property to their just claims". It has been pointed out in these cases that domestic creditors will be protected to the extent of not allowing the property or funds of a debtor to be withdrawn from the State before the domestic creditors have been paid and it is the policy of every Government to retain in its own hands the property of a debtor until all domestic claims against it have been satisfied. (See *Disconto Gesellschaft v. Umbreit* (1908) 208 US 570: 52 Law Ed 625), Reference may also be made to the case of *United States of America v. Louis H. Pink* (1942) 315 US 203: 86 Law Ed 796 in which dealing with the effect of Russian decrees and enactments of 1918 and 1919 which nationalised the business of insurance and all the property wherever situated of all Russian Insurance Companies, on an Insurance Company known as the First Russian Insurance Company which had been organised under the laws of the former Empire of Russia but which had a branch in New York and whose assets were being liquidated by the Superintendent of Insurance in New York, Mr. Justice Douglas held that although the Russian decrees effected the death of the parent company, the situs of the property of the New York branch being in New York, the confiscatory Russian decrees did not affect such property which had acquired a "character of its own", and no rule of comity constrained the State of New York to abandon any part of its control or to share it with a foreign State. Mr. Justice Douglas also reaffirmed the proposition laid down in (1908) 208 US 570 in the following words:

"A State is not precluded however by the Fourteenth Amendment from according priority to local, creditors as against creditors who are nationals of foreign countries and whose claims arose abroad." (See at page 228).

31. Mr. Justice Frankfurter at page 234 observed as follows:

"Legal ideas like other organisms cannot survive severance from their congenial environment. Concepts like "situs" and "jurisdiction" and "Comity" summarize views evolved by the judicial process, in the absence of controlling legislation, for the settlement of domestic issues."

32. These cases also thus support the view that I have taken, that in determining the question whether in view of the peculiar relations prevailing between Indian Union and Pakistan, the Pakistani creditors should be allowed to participate or not and if so to what extent, it is legitimate to have recourse to judicial concepts of "situs" and "Comity", to questions of public policy, and other legal ideas, which often in litigation, serve as instruments for solution of perplexing legal problems.

33. The other question namely whether drafts issued by Pakistan branches of the bank on the head office in Calcutta are payable out of the assets of the bank in the Indian Union can now be dealt with.

34. Now a bank and its branches are not treated as distinct or different entities but they are regarded as one composite body, and the issue of a draft by a bank is regarded in banking practice as a matter of purchase, the person at whose instance the draft is issued being regarded as a purchaser.

35. By issuing a draft the bank undertakes a direct liability towards the holder of the draft and the relationship is that of debtor and creditor, in the absence of any special circumstances constituting the banker a trustee for the holder. (*Birbhum Central Co-operative Bank Ltd. Vs. Pioneer Bank Ltd., (in liquidation),*). The ownership of the money paid for the purchase of the draft passes to the bank, as it is one of usual and recognised banking transactions, and the purchaser gets what he has bargained for, namely, a draft of the bank, the payment of which depends on the solvency of the head office at the time of the presentation of the draft. If the head office is insolvent at the time of presentation of the draft the purchaser of the draft or its holder is not entitled to an order for refund of the consideration but merely to a right to proof, (*In re Oriental Bank Corporation, Ex parte Guillemin* (1884) 28 Ch D 634 --per Chitty J.) (See also *Suganchand and Co. Vs. Brahmayya and Co.,*).

36. On the issue of a draft the bank enables third parties to acquire rights in it and the draft passes as currency from hand to hand and the bank can no longer treat the amount represented by the draft as money of the customer in its hands which it can set off against its other claims against the customer. Then again a bank cannot ordinarily stop payment of a draft unless there is some doubt as to identity of the person presenting it (*Malik Barkat Ali v. Imperial Bank of India* AIR 1945 Lah 213).

37. Such being the nature of drafts issued by one branch on another branch of the bank, the absence of advice from the drawer branch or the non-acceptance of the draft by the drawee branch does not afford justifiable grounds for refusing payment out of the Indian assets.

38. This disposes of the questions referred for decision of the Special Bench. The matter will now go back to the court dealing with company matters, for final disposal.

39. Costs to abide the result.

40. DAS GUPTA C. J.: I agree.

41. LAHIRI J.: I agree.