
(1954) 07 BOM CK 0002
In the Bombay High Court
Case No : First Appeal No. 363 of 1950

Jayantilal Keshavlal Gajjar

APPELLANT

Vs

Kantilal Jesingbhai Dalal

RESPONDENT

Date of Decision : 20-07-1954

Acts Referred:

Provincial Insolvency Act, 1920 — Section 20, 28, 28(1), 28(2), 28(7)

Citation : AIR 1955 Bom 170 : (1954) 56 BOMLR 1028 : (1955) ILR (Bom) 236

Hon'ble Judges : Shah, J

Bench : Single Bench

Advocate : R.S. Dixit and C.S. Trivedi, for the Appellant; B.K. Amin, V.H. Kamat and N.A. Desai, for the Respondent

Judgement

1. On 27-2-1946, one Mohanlal Lallubhai filed Application No. 5 of 1946 in the Court of the Civil Judge (Senior Division) at Ahmedabad, in the exercise of insolvency jurisdiction, for adjudicating one Gordhandas Suthar an insolvent. On 28-2-1946, the Insolvency Court appointed an Interim receiver, of the estate of Gordhandas Suthar. An order adjudicating Gordhandas Suthar was passed on 29-10-1946, and one Dalai, a pleader, was appointed Receiver in Insolvency of his property by the same order. It appears that the insolvent had certain property in British India as it then was. He was also owner of S. N. 291 of the village of Adivad in the Baroda State, and of a factory for manufacture of bobbins standing thereon.

One Gajjar who was a cousin of the insolvent filed on 20-2-1946, Suit No. 118 of 1945-46 in the Court of the Subordinate Judge at Kalol for a money decree and obtained on 3-3-1946, an order for attachment before judgment of S. No. 291 and the bobbin factory standing thereon. It may be mentioned that the property attached was outside British India, Similarly the Court at Kalol was a Court in the Baroda State which was not a part of British India as it then was. On 29-3-1946, a decree "ex parte" was passed in Gajjar's suit and the order of attachment before judgment was confirmed by the Court at Kalol. Gajjar thereafter filed a

darkhast for executing the decree and on 21-9-1946, the property attached was brought to sale and was ultimately purchased by a stranger to these proceedings.

The auction-purchaser deposited in the Court at Kalol Rs. 5,200 being the amount for which he purchased the property and the amount was paid under order of the Court to Gajjar on 6-11-1946. The insolvent having failed to apply for discharge, the Insolvency Court at Ahmedabad annulled the adjudication by order dated 24-4-1948, but it was directed by the order of annulment that

"All the properties of the insolvent-debtor and in particular his half share in Pethapur property and the sale amount of Rs. 5,200 recovered by one of his creditors and cash held by him (receiver) at present are vested in the receiver. The receiver to continue his work and after deducting his costs and remuneration and the costs of the appellant-creditor should distribute the surplus when realised among the proved creditors in the Schedule."

It may be observed that Gajjar had attempted to make a claim for the balance remaining due to him in insolvency proceedings in the Ahmedabad Court but had not prosecuted the claim. On 17-2-1949, the Receiver in Insolvency filed Suit No. 54 of 1949 in the Court of the Civil Judge (Senior Division) at Ahmedabad against Gajjar for a decree for Rs. 5,200 which Gajjar had received from the Kalol Court. Gajjar resisted the claim. During the pendency of the suit Baroda State merged with the Indian Union on 1-5-1949.

2. The learned trial Judge held that Gajjar having failed to challenge the order vesting Rs. 5,200 in the Receiver in Insolvency the suit was maintainable against him; _ that the civil Courts in India were bound to recognise the validity of the order passed by the Insolvency Court in India and to enforce the order passed by that Court; that even though the property at Adivad was situate outside British India at the date of adjudication it still vested in the Receiver and continued to vest in the Receiver under the order of annulment passed on 24-4-1948. The learned Judge also held that even though the order of adjudication was passed on 29-10-1946, and the property was sold prior to that date, the insolvency related back to 28-2-1946, and the defendant having received the amount after that date the Receiver in Insolvency was entitled to recover that amount by a suit filed in the Civil Court at Ahmedabad.

The learned Judge in the course of his judgment observed:

"The amount was recovered by the defendant (Gajjar) by the sale of the insolvent's property after the filing of the insolvency petition. Under the Insolvency Act the property of the insolvent even in foreign territory vests in the receiver. This property in Adivad belonging to the insolvent had thus vested in the interim receiver. Attachment before judgment can have no effect to prevent the vesting of the property in the receiver or to create any charge or right in favour of the attaching creditor against the receiver, so far as the administration of law is concerned this Court will have to respect our own law.

It would have been different if the receiver had gone to the Kalol Court (Baroda State). That Court would not have respected the adjudication order passed, by this court being a foreign Court so far as the Kalol Court was concerned. But this does not mean that we cannot recognise our own adjudication order so as to hold that the property of the insolvent within Kalol jurisdiction had not vested in the receiver and that the attachment before judgment of that Court would create a right in the attaching creditor against the receiver."

It must be pointed out that the learned Judge in the Court below was in error in assuming that by the appointment of an interim receiver the property of Gordhandas Suthar vested in the receiver. u/s 20, Provincial Insolvency Act, an interim receiver has powers conferrable on a receiver appointed under the Code of Civil Procedure. The property of the debtor against whom an application for adjudication is made is not vested in the interim receiver. Till the debtor is adjudicated an insolvent, the property continues to remain vested in the debtor. It is only when an order of adjudication is passed that the title of the Receiver in Insolvency relates back to the date of the application for adjudication.

3. The assumption made by the learned trial Judge that a Receiver in Insolvency in whom the estate vested by order of the Court in British India was entitled to ignore proceedings competently entertained by a foreign Court in respect of Immovable property of the insolvent and the order passed therein and to claim the amount received by a creditor of the insolvent by those proceedings as if the amount was property of the insolvent to which the receiver was entitled by reason of the order of adjudication, is in my judgment fallacious. Indisputably, the Kalol Court had jurisdiction to entertain the suit against the insolvent when filed. That Court was competent to attach the property and to sell it in enforcement of the decree passed by it.

The Kalol Court was not bound to recognise the title of the Receiver even if by the law of British India, which had no operation in the Baroda State, the property had vested in the Receiver. Gajjar received the amount paid by the auction-purchaser under orders of the Court at Kalol and the operation of that order was not liable to be questioned under the extra-territorial operation of a statute which might have been under the rules of private International law respected, if steps had been taken for obtaining recognition of the title of the Receiver, but which it was not obligatory upon the Court at Kalol to respect. Section 28(2), Provincial Insolvency Act, provides:

"On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose."

Sub-section (7) of Section 28 provides that

"An order of adjudication shall relate back to, and take effect from, the date of the presentation of the petition on which it is made."

Under Section 51(1) of the Act

"Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of the admission of the petition,"

It cannot be disputed that the expression "the whole of the property of the insolvent" as used in Sub-section (2) of Section 28 would include all properties of the insolvent wherever situate. That provision has apparently extra-territorial operation; but that extra-territorial operation can become effective only if its validity is recognised in the foreign State.

4. In Westlake's Private International Law, 7th Edn., at p. 179, it is observed, in stating the effect of the English Bankruptcy Act, 1914, in which the word "property" is defined to include every description of property whether real or personal and whether situate in England or elsewhere, as follows:

"....These words would appear to embrace in an English bankruptcy real property abroad. But the idea that land is subject to the local law in a peculiar measure is so deeply seated in the English system of private international law that it is difficult to suppose that the mother country while establishing what have been called sister States, intended any longer to affect land in them by her own legislation. No theory of the unity of bankruptcy could be cited in support of such a supposition, be cause the unity of bankruptcy is not adopted by the English system.

It would not be enough to say that where an English bankruptcy or winding up is later in date than a similar proceeding under the law of a self-governing colony, Parliament cannot have intended to displace a disposition of the local immovables already made in or by the latter. It would seem scarcely enough to say that even where the English proceeding is the earlier or the only one. Parliament cannot intend to withdraw land in such a colony from the future operation of laws which have been made in it in reference to bankruptcy .. the real or immovable property of the bankrupt or company in the colony in question cannot be deemed to pass by an English bankruptcy or winding up, through the mere force of British legislation, though it may be brought under the proceeding through the view which the courts of the colony take of its international effect."

The observations of Westlake relate primarily to the authority of the British Parliament to legislate in respect of property situate in the Dominions and self-governing colonies of the British Empire. But they would be valid in the context of the legislative competence of the Indian Legislature in the year 1920 when the Provincial Insolvency Act was enacted by the Indian Legislature. The Indian

Legislature had no competence to legislate in respect of insolvency so as to make that legislation operative on land within the territory of any of the Indian States.

5. Again as observed in Dicey's Conflict of Laws, 6th Eds., at p. 438, R. 98 :

"An assignment of a bankrupt's property to the representative of his creditors, under the bankruptcy law of any foreign country, .. is not, and does not operate as, an assignment of any immovables of the bankrupt situate in England."

In the commentary under that rule at p. 439 it is observed:

"It may, indeed, be laid down in broad terms that, according to the doctrine maintained by English courts, a bankruptcy in one country has no effect as an assignment or otherwise . (except, of course, where the bankruptcy takes place under an Act of Parliament) on land in another country."

It need hardly be said that Legislature in one State cannot legislate in respect of land situate in a foreign State. Even if the land in a foreign State be regarded as vested on adjudication in the Receiver in Insolvency in an ideal sense, unless the law of the foreign State recognises the vesting as a transfer of the property to the Receiver, the vesting cannot operate to confer title upon the Receiver in Insolvency and the property situate in the foreign State would continue to be liable for satisfaction of the claims against the debtor according to the law of that State and unaffected by the insolvency.

By Section 28(1), Provincial Insolvency Act duty is imposed upon an insolvent to aid to the utmost of his power in the realisation of his property and the distribution of the proceeds among his creditors. But the provision imposes a purely personal obligation upon the insolvent which may be enforced by process of the Insolvency Court to compel compliance of all acts necessary for completing the title of the receiver to property situate in a foreign territory. But the personal obligation cannot affect the jurisdiction of the Courts in the foreign State to deal with property situate in that State; nor can it compel the creditors, who are not amenable to the jurisdiction of the Insolvency Court which has adjudicated the debtor an insolvent, to allow other creditors to participate in the satisfaction obtained by them by taking proceedings in a foreign State. By the rules of private international law Immovable property can only be transferred in accordance with what is called "lex rei sitae".

6. In a case which came before their Lordships of the Privy Council, reported in -- "Cockerell v. Dickens", 2 Moo Ind App 353 (A) the effect of insolvency of a debtor by a Court in India upon orders passed by a foreign Court dealing with property of the debtor in another independent State and upon the rights of a creditor of that debtor who has satisfied his claim in a foreign State out of that property was considered. In that case Palmer & Co. were declared insolvents under the Indian Insolvency Act, 9 Geo. IV, c. 73, by the Supreme Court at Calcutta. Palmer & Co. were debtors to a creditor in the island of Java.

The Orphan Chamber of Batavia -- executors of the creditor -- by their agent in

Calcutta proved the amount of the debt in insolvency and after making such proof and after receiving dividends upon the whole debt instituted a suit in a Court in the island of Java to recover a plantation or estate in Java held by one of the insolvents as trustees for the firm of Palmer & Co. and certain other person in equal shares. In that suit the assignees of the insolvent appointed by the Calcutta Supreme Court appeared as defendants; but the Court in Java gave Judgment in favour of the creditor and ordered sale of the estate in Java for his benefit.

The assignees of Palmer & Co. thereafter filed a bill on the equity side of the Supreme Court at Calcutta against the agent of the foreign creditor, resident within the jurisdiction of the Supreme Court, praying that the dividends received by the foreign creditor be refunded and that the defendants be restrained by an injunction from receiving any further dividends "until all the other creditors were put on an equal footing with the creditors in Java. The defendant resisted the claim and the bill was dismissed by the Supreme Court. In appeal to the Judicial Committee of the Privy Council it was held that the estate in Java not passing to the assignees under the assignment did not form any part of the fund available for the benefit of the general creditors and that the creditor therefore was not bound to refund the dividends received by him: nor could he be prevented from receiving any further dividends provided he did not receive more than 20 shillings in the pound upon his whole debt.

Baron Parke in delivering the Judgment of the Judicial Committee at page 384 referred to the Judgment of Sir Edward Ryan, Chief Justice of the Supreme Court, and observed that the Chief Justice had upon a review of the authorities and acting on the distinction between personal and real estate, the former of which is generally speaking governed by the law of the domicile of the owner and transferred by an assignment according to that law. and the latter by the "*lex loci rei sitae*", and not so transferred -- allowed the demurrer and dismissed the bill. He then observed (p. 387) :

"....if the real estate in "Java" did not pass by the assignment under 9 Geo. IV, c. 73, Section 8, nor could in any way be got hold of, and made available by the assignees, for the payment of the general creditors, any individual creditor who could obtain it by due course of law, would have a right to hold it, and if he duly - proved the debt due to him, before he had been paid any part of the debt so proved, by means of that estate, he would be entitled to receive the dividends under the insolvent estate, until he had been paid altogether twenty shillings in the pound, exactly in the same way as if the creditor had had a security on the real estate or personal credit of a third person."

Baron Parke then observed (p. 387):

"Was the real estate in Java therefore a part, or capable of being made part, of the general fund distributable under the Bengal Insolvent Act? Upon the statements contained in the bill, it does not appear that it was. Under the

general assignment made by Palmer & Co., of all their property which would operate wherever, but not elsewhere, the Imperial Parliament could give the law, it certainly would not pass, unless the law of Java made such conveyance, being in the English form operative. There is no statement that it did; and on the contrary, as the intervention of the assignees was held to be ineffectual by the Court at Batavia and by the Court of Appeal in the Netherlands, it must be assumed that by the "*lex loci rei sitae*" the assignees were not at the time of the suit by the creditors entitled to the property.

.....They were then, by law, fully entitled to have satisfaction out of the real property, and that property was at that time no part of the fund available for the benefit of the general creditors. And we are of opinion, on these grounds, that the personal representatives of the deceased were entitled to all the benefit they had then obtained by their diligence, as much as if it had been the estate of a stranger."

7. In-- In Re: Mogi and Co: The Yokohama Specie Bank, Ltd., a Division Bench of the Calcutta High Court had to consider the question whether a banking company which had received dividend out of the estate of an insolvent in Japan was entitled to submit proof and claim dividend in the insolvency of the same debtor in India. The insolvents in that case were Mogi & Co. who carried on business in Japan and in several other countries. The Yokohama Specie Bank Ltd., were the bankers and were creditors of Mogi & Co. for a very large amount. Messrs. Curlender & Co. obtained a decree against Mogi & Co., on the Original Side of the Calcutta High Court and obtained an order for attachment before judgment of their assets in India. Thereafter Mogi & Co. were adjudicated insolvents at the instance of Curlender & Co.

It appears that before adjudication in India the creditors of Mogi & Co. in Japan had appointed a Re-adjustment Committee consisting of several creditors and Messrs. Curlender & Co. were also invited to join the scheme of distribution of the assets of Mogi & Co. Curlender & Co. did not join the proceedings and did not receive any dividends from the Re-Adjustment Committee in Japan. They only proceeded with the insolvency proceedings in India. Yokohama Specie Bank Having received dividend from the Re-Adjustment Committee in Japan lodged proof of their debts in the insolvency proceedings in India. Curlender and Co. objected to the bank lodging such proof and claiming dividends.

It was held by the Calcutta High Court that Curlender & Co. was not entitled to object to proof of debts by the bank. It was held in that case:

"As regards immovables in a foreign country, such as Japan, the view of international law taken by English and British Indian Courts is that Indian Statutes do not operate unless indeed it is shown that the foreign law will give them effect."

Mr. Justice Rankin, as he then was, analysed the authorities and stated five propositions two of which are material in this case: (1) The property of the

insolvent wherever situate vests in the Official Assignee and no creditor shall have any remedy against that property. But. the statute being a statute of the Indian Legislature, it operates wherever, but not elsewhere, that Legislature could give the law. (2) As regards immovables in a foreign country, such as Japan, by the international law the Indian statutes do not operate unless it is shown that the foreign law Will give them effect. The 3rd, 4th and 5th propositions refer to moveables which need not be discussed. It is clear from the observations made by the Court in the case of--"Yokohama Specie Bank Ltd. v. Curlender & Co. (B)" that Immovable property in a foreign country is not transferred to a Receiver in insolvency by operation of an Indian statute relating to insolvency.

8. The learned Judge in the Court below relied upon a decision of this Court reported in-- B.N. Lang Vs. Jasvantlal Hathichand, . In that case a decree passed by the Bombay High Court was transferred for execution to the Political Agent at Sadra, Mahikantha Agency, and certain property belonging to the defendant was attached in the territory of the Thakore Saheb of Pethapur. In the meanwhile the defendant was adjudicated insolvent by the Bombay High Court. The Official Assignee in whom the estate of the defendant had vested applied for an order for stay and withdrawal, without execution, of the decree passed by the High Court from the Political Agent at Sadra; and an order ex parte granting the application was passed. Thereafter the decree-holder filed an application for vacating the order.

Mr. Justice Mirza passed an order vacating the order for withdrawal of execution proceedings from the Court of the Political Agent at Sadra. An appeal was preferred against that order by the Official Assignee and it was held by a Division Bench of this Court that Mr. Justice Mirza was in error in vacating the order previously passed. That case has no application to the facts of the present case. The only point decided by the Court was that the Bombay High Court being the Court which passed the decree and also being the Court which was invested with insolvency jurisdiction over the estate of the defendant was entitled to withdraw the execution proceedings taken at the instance of the plaintiff even after they were transferred to a foreign Court.

It has to be noted that the execution proceedings were launched in the Bombay High Court and even though they were transferred to the Court of the Political Agent at Sadra this Court retained jurisdiction to withdraw those proceedings, and it was held that when insolvency had supervened the decree-holder should not be permitted to obtain an undue advantage over other creditors by availing himself of property outside British India. The distinction between that case and the present case is obvious. In the case before me the decree was passed by a foreign Court and was duly executed by process of the foreign Court. In the case in --"Lang v. Jaswantlal (C)" the decree was passed by a British Indian Court and the Court retained control over the execution proceedings even though they were for the time being, pending in a foreign Court.

9. The title of the insolvent to the property in the foreign territory was not transferred to the receiver by the mere vesting of the property in him. It is true that though the property was sold before the order of adjudication was passed, the insolvency proceeding by the operation of Section 28(7), Provincial Insolvency Act, related back to the date of the presentation of the petition. But the Kalol Court which was a foreign Court was competent to entertain a suit at the instance of Gajjar to recover the amount due to him and was competent to attach the property of the insolvent within its jurisdiction. The institution of insolvency proceedings in the Ahmedabad Court did not affect the jurisdiction of the Kalol Court to attach and sell the property within its jurisdiction.

If jurisdiction to attach and sell the property of the debtor be granted, it is difficult to appreciate what authority the Ahmedabad Court had to supersede proceedings of the Kalol Court and to nullify the same after the property had been sold and title had vested according to the law prevailing in the Baroda State in a third person. Undoubtedly Baroda State has merged with the Indian Union after auction sale of the property of the debtor took place. But the merger of the State does not authorise the Courts in the Indian Union to reopen orders competently passed by Courts in the Baroda State and which have become final, before that State was merged.

The Ahmedabad Court, it is true, is bound to administer the law of the Indian Union in a suit filed in a Court in the Indian Union. But in the administration of that law the Court has no authority to reopen transactions completed under the authority of adjudications competently made by foreign Courts before the territory in which they were functioning became merged with the Indian Union.

10. On the view taken by me the appeal must be allowed and the decree passed by the trial Court set aside and the suit dismissed with costs throughout.

11. Appeal allowed.