
(1928) 03 BOM CK 0033
In the Bombay High Court
Case No : O.C.J. Suit No. 2228 of 1926

Kaikhushru M. Talyarkhan

APPELLANT

Vs

Bai Gulab

RESPONDENT

Date of Decision : 07-03-1928

Acts Referred:

Presidency Towns Insolvency Act, 1909 — Section 52

Citation : (1929) 31 BOMLR 406 : (1929) ILR (Bom) 508

Hon'ble Judges : Crump, J

Bench : Single Bench

Judgement

Crump, J.—The plaintiff in this suit is the Official Assignee, and he sues as the assignee of the estate and effects of one Virji Madhavji who was adjudicated an insolvent on July 2, 1925. The first defendant is the widow and executrix of one Tulsidas Mohanji, and defendants Nos. 2 to 17 are the President and members of the Board of Directors of the Native Share and Stock Brokers Association. Defendants Nos. 18 to 22 are members of the Defaulter Committee of the said Association. The suit arises out of certain transactions between Virji and Tulsidas, who were both certified brokers of the said Association. The nature of those dealings is as follows :—Virji sold to Tulsidas seventy-five shares of the Century Mill for June delivery. He then bought from Tulsidas twelve shares of the same Mill for the same delivery and he also bought five shares of the Fazul Mill for July delivery. Upon these transactions three sums are alleged to have become due from Tulsidas to Virji. As regards the purchase and sale of twelve Century shares the amount is Rs. 1976-4-0. As to the balance, sixty-three Century shares, the profit alleged to be due is Rs. 12,281-4-0, and on the Fazul" shares the amount is Rs. 1458-12-0. The plaintiff, the Official Assignee, claims to be entitled to recover these three sums from Tulsidas. And as Tulsidas has paid these three sums to defendants Nos. 2 to 17, the plaintiff claims that he is entitled to recover them from those defendants. The manner in which these liabilities arise, and in what way defendants Nos. 2 to 17 are concerned, will appear more particularly hereafter. For the moment it is enough to say that they recovered these sums by

virtue of the rules of the Association. The amounts were actually paid by Tulsidas to the Defaulter Committee after the date on which Virji was adjudicated insolvent. Upon this statement of facts the question immediately suggested itself to me whether the plaintiff had any cause of action at all against the defendants other than defendant No. 1, but it was explained to me that defendants Nos. 2 to 18 did not wish to take any objection on that score. The suit is one of a number of test suits, and the Association are desirous that their liability in this matter should be settled. Having recovered these sums from Tulsidas, they do not wish that his representatives should be held liable for amounts which he has already paid, and in the event of it being found that Tulsidas would have been liable to pay these amounts, they are prepared to submit to a decree. It is unnecessary, therefore, to consider this point further. In order that there may be no misunderstanding about the matter. I think it is well to record the statement made by defendants' counsel, Mr. B.J. Desai, upon this point. It was in the following words: "Should the Court hold that as to any of the three sums in issue one or more of them did not represent a fund exclusively distributable amongst Stock Exchange creditors, defendants Nos. 2 to 18 will, submit to a decree as to such sum or sums with interest at the rate agreed upon". The general nature of the suit is thus apparent, but it is necessary to set out the precise sequence of events in order to be able to decide the points that arise, Virji was acting as broker for one Manilal, an outsider, and Manilal speculated very heavily with the result that the market for the particular shares in which he was speculating became completely disorganised. Virji had undertaken business for Manilal to the extent of about Rs. 2,70,000. That was in the month of May. At the end of May, Manilal absconded, and on June 8 on the petition of Virji, Manilal was adjudicated insolvent. A composition was effected at annas eight in the rupee, which Virji, among other creditors, accepted on June 10, and on June 15, Manilal's adjudication was annulled. We are not directly concerned with Manilal's dealings except that they constitute the reason why the Board of the Association took certain action as regards fixing rates, and also that they were the cause of Virji's insolvency. Inside the Association, Virji and Tulsidas dealt as principal and principal, and I will now turn to the sequence of events so far as the Association is concerned. On June 1, six brokers, of whom Virji was one, wrote to the Directors of the Association pointing out that a very serious position had arisen in respect of Dying and Century shares, and that certain merchants who had purchased these shares had disappeared from Bombay. The brokers were, therefore, liable for very heavy amounts, and they requested the Association to take such steps as they might think fit to deal with the position. On June 2, the President of the Association closed the market, and the Board at a meeting passed two resolutions with respect to the shares of Bombay Dying, Century, and Madhowji Mills. The first resolution put a stop to any further transaction in these shares, and directed that those members who wished to take delivery of these shares for the June settlement should, in the usual course, pass slips. With this resolution we are not specially concerned. There was, however, a second resolution, which runs as follows :?

After the slips are circulated the Badla transactions of the said shares, that is to say, of the remaining outstanding transactions, the June-July vaida shall be noted " party to party " by each party at the following rates...

Then follow certain rates for inter alia Century shares:?

On Thursday June 4, the bazar shall remain open up to 2 o'clock (in the afternoon) during which time all the outstanding saudas in respect of all the remaining Company shares can be settled; and the members can effect badla (transactions) in respect of the same.

What the Board did in effect was to direct that these transactions for the June settlement which were not carried through in the ordinary way should be compulsorily carried over to the July settlement at certain fixed rates. It will be seen that nothing is said here about shares in Fazul Mill, but on June 13, 1925, a further resolution was passed, which fixed a certain rate for Fazul shares also. It is unnecessary, I may say here, to go into any arithmetical calculations, for the effect of what was done by the Board is not disputed. The sums which I have already set out are the result of their action. The resolution of June 13 mentioned certain brokers as being affected by that resolution, but did not refer to Virji. On the same date Virji addressed a letter to the Secretary of the Board in the following terms :?

I am unable to settle my differences for the vaida of June-July of the year 1925, and there are moneys due to me from Sheit Manilal Jugaldas, and the said Bhai is to give a sum of money to each of his creditors, As for the sum which may come to my share, I make over the whole thereof to our Association, and the said sum shall be distributed amongst my creditors. Moreover my own condition is not such that I can meet this liability which has cropped up. I, therefore, request my creditors that they will receive the said sum and make me free, and the board will allow my card to remain, and along with this I have sent under cover a letter to recover the moneys of the trustees, that; is, the moneys of Manilal Jugaldas.

This is intimation by Virji that he was unable to meet his obligations to his creditors within the Association. It appears that the matter was put before the Defaulter Committee, and an attempt at settlement was made. It may be gathered from what took place subsequently that no satisfactory arrangement was arrived at. What the exact proposal made by Virji was, and what was the exact position taken by the Defaulter Committee are not really matters of any particular moment. Virji made a certain proposition, and the Defaulter Committee found themselves unable to recommend it to the Board. On June 17, 1925, there was another resolution of the Board in which they say that fifteen brokers including Virji had been unable to pay their dues, but that they had framed a scheme for settling with their creditors which the Committee accepted, and they directed the settlement should be completed before June 25, and in the meantime brokers should be prohibited from taking up any new business Virji

was one of these fifteen brokers, and that resolution must have been passed while the proposed settlement was under discussion. On June 19 Virji wrote again to the Directors, and in that letter he says :?

My case was put before the Committee in reply to which I was told as follows : My share is not sufficient at one-half and nearly Rs. 20,000 are found short. The sum should be paid up in full in cash within two days, i. e., before the 19th.

This is somewhat obscure, but it apparently means that what was due to Virji from his debtors was insufficient to pay his creditors at eight annas in the rupee, and therefore, he was called upon to find a sum of Rs. 20,000 by the 19th. The letter then goes on to say that Virji found it impossible to pay this amount for causes over which he had no control. On June 20 the Defaulter Committee made a report to the Board as regards the suggested settlement, and as regards Virji they say :?

And as regards the condition on which the last member, Bhai Virji Madhavji, applies to make a settlement, the committee is not able to recommend unanimously to effect a settlement on that condition. Therefore, the Board may act in such manner as might appear proper to them.

The matter of Virji's settlement was, therefore, still under consideration, and was referred to the Board. The matter came before the Board on June 23, and by a resolution of that date he was declared a defaulter. There is one further letter from Virji on June 30, 1925, in which he says :?

This is to write that you declared me a defaulter on the 23rd instant. Please, therefore, let me know how did brokers having dealings with me arrive at the settlement of my outstanding shares for July vaida, and at what rates, so that I may know the extent of my liability in respect of July vaida. I am of opinion that the shares should be purchased or sold on my own account at the opening rates on the day following the day on which I was declared defaulter. Please write to me immediately what the principal brokers have done.

I do not think that this last letter adds anything material to the case. The position is clear, and it is that Virji became a defaulter on June 23. After that date he was adjudicated an insolvent on the petition of an outside creditor.

2. The exact controversy arising upon these facts may be stated as follows: The Association claim that under their rules the amounts which were paid by Virji's debtors inside the Exchange to the Defaulter Committee are available for distribution pro rata among the inside creditors. The Official Assignee, on the other hand, claims that these amounts form part of the estate of Virji, and that they should be paid to him for distribution among the general body of creditors.

3. A word may be said as to the rules of the Association. The relevant rules are Rule 18 and Rules 56 to 62. They are unfortunately somewhat obscurely drafted, but under Rule 56 the Directors apparently have power to publish the name of a broker as a defaulter, and it was apparently under this rule that they took action

in Virji's case. Upon such action the matter comes before the Defaulter Committee who corresponds to the Official Assignee or Assignees of the London Stock Exchange. And the action which may be taken is defined in Rules 60 and 61, which run as follows :?

60, On the very day a broker is found to be unable to meet his liabilities, those brokers who may have their transactions outstanding with him shall give in writing intimation in that behalf to a member of the above committee or to the Mehta of the Hall, and they shall close such outstanding transactions that very date at such rate as they may be, and then shall hand over to the member of the Committee or to the Mehta of the Hall a detailed statement in writing showing the amounts claimable and payable by him.

61. The Committee shall recover the amounts claimable by him, and shall distribute the same among his creditors in proportion to their claims.

Of the three sums which are in suit in the present case the defendants abandoned all claim to the sum of Rs. 1,976-4-0 which was due from Tulsidas to Virji on the purchase and sale of twelve of the seventy- five Century shares, And that is because that sum became due quite apart from any action taken by the Board with respect to Virji's case, and was a case of ordinary differences. As regards the two other sums the defence raised is that these are not amounts due by Tulsidas to Virji, but they form an artificial fund created by the rules of the Association, and therefore, are not available for distribution among the general creditors. The respective contentions of the parties will be clearly understood from a notice under Order XII, Rule 4, to admit facts, and the answers given thereto by the defendants. We are concerned with answers Nos. 8 and 10. Answer No. 8, after setting out the difference due on the sixty-three Century shares and the difference due on the twelve Century shares, states as follows :?

The difference is not arrived at by reason of the insolvent being declared a defaulter and the insolvent would have been entitled to receive the said difference if he had not been declared a defaulter.

Mr. Desai for the defendants desired to qualify that answer and as no doubt it is a question of law or at least a mixed question of law and fact, it is open to him to do so. According; to him the answer should have run as follows :?

The difference is not arrived at by reason of the insolvent being declared a defaulter, but by reason of the resolution of the Association of June 2, 1925, being carried out. And the insolvent would have been entitled to receive the said difference if he had not been declared a defaulter and no stock exchange creditor had claimed the same for the satisfaction of his debt.

Similarly the defendants through their counsel qualified answer No. 10, and. with the qualification suggested, that answer runs as follows:?

It was in pursuance of the said resolutions of the 13th, 17th and 23rd June 1925 that the transactions for the sale of the said 63 shares of the Century Milk which

were carried over to July 1925 settlement in pursuance of the resolution of June 2, 1925, were closed at Rs. 325 per share, and the transactions for the purchase of Fazul shares were closed at Rs. 740 par share.

And the 11th answer, similarly qualified, runs as follows :?

As regards the July 1925 settlement the sum of Rs 1458-12-0 found due by the said Tulsidas Mohanji Vora to the insolvent Virji Madhavji was ascertained by such closing as aforesaid, and if the insolvent had not been declared a defaulter and no Stock Exchange creditor had claimed the sum for the satisfaction of his debt, he would have been entitled to receive the said difference.

4. Virji was adjudicated insolvent on July 2, 1925, on the petition of an outside creditor. The act of insolvency was on June 13. u/s 17 of the Presidency-towns Insolvency Act Virji's estate vested in the Official Assignee. u/s 52 the Official Assignee is empowered to recover for the general body of creditors the debts due to Virji. If Virji could have recovered these sums then the Official Assignee can do so.

5. The position between Virji and Tulsidas has to be considered. The two sums which have to be considered, viz., Rs. 12,231-4-0, due on the transaction of sixty-three Century shares, and Rs. 1458-12-0, due on the transaction for five Fazul shares, were arrived at owing to the resolutions passed by the Board. That was on June 18 and before Virji was declared a defaulter. Both Virji and Tulsidas were bound by these resolutions. The result is not in doubt. Had Virji not been declared a defaulter he could have recovered these sums from Tulsidas. These facts appear from Virji's evidence and from Exhibit 9 an extract from his contract book. In my judgment these sums became due in the course of business. It was not the ordinary course of business which was interrupted by the action taken by the Board in this emergency, but that action is merely an exceptional incident. These sums are differences agreed to be due as between Tulsidas. and Virji, and as such recoverable by Virji, and, therefore, by the Official Assignee.

6. Several decisions of the English Courts have been cited. The first of these is *Tomkins v. Saffery* (1877) 3 App. Cas. 213. The debtor Cooke had a sum of ? 5000 in the Bank of England, which was paid over by him to the Stock Exchange Officials after he was declared a defaulter. The House of Lords held that in the circumstances there was a "cessio bonorum" and thus an act of bankruptcy, and the Stock Exchange were in reality claiming an undue preference for the inside creditors. The next case, on which the defendants more especially rely, is *Ex parte Grant: In re Plumbly* (1880) 13 Ch. D. 667. The facts were shortly as follows: Prior to his failure one Plumbly had various contracts for purchase and sale to be completed on June 27. On June 25 Plumbly made a declaration to the Secretary of his inability to meet his engagements and was declared a defaulter. He filed a liquidation petition the same day. Under the rules of the Stock Exchange all his contracts were closed at the market prices at the date of default. Plumbly's debtors paid to the Official Assignee of the Stock Exchange ?

3956-17-10. The Trustee in Bankruptcy sought to recover this sum from the Official Assignee of the Stock Exchange, and the Court decided that he could not do so. Lord Justice James based his decision on the proposition which is set out in his judgment (p. 679):?

B and O. each say to A,, you owe me that ? 100. A, pays it to one of the two, the other has no right to sue the one who received it.

7. I have already explained why that proposition cannot be applied to this case. Baggallay L.J. apparently rested his decision on other grounds. He says (p. 680):?

The official assignee holds no private assets of Plumbly; the fund which he has collected is a fund collected by virtue of certain rules of the Stock Exchange, certain sums ascertained in a particular way being raised from particular members of the Stock Exchange to be applied in a particular manner. In the view which I take of the case, these funds can in no respect be regarded as funds belonging to Plumbly. If then they are voluntary contributions of the members of the Stock Exchange to be applied in satisfaction of the Stock Exchange creditors, or if they are to be regarded as moneys handed over by persons who had become sureties to meet the claims of the Stock Exchange creditors, I am unable to understand how in either view of the case they can be claimed by the trustee.

8. Cotton L.J. puts the matter shortly thus (p. 681):

The fund is an artificial one, which never belonged to the bankrupt, but has been created by the rules of the Stock Exchange for a particular purpose, and only has an existence for the purpose of being dealt with in a particular way.

9. Some further light will be found from the statement set out at page 674 of the report:

Had Mr. Plumbly not become a defaulter, and not become a liquidating debtor, and had all the contracts matured and been duly performed by him, none of the differences created and received by the official assignee of the Stock Exchange in consequence of his default could have found their way into Mr. Plumbly's hands or possession.

Could this statement be made in this case as regards the sums due by Tulsidas to Virji ? In the light of the facts it is not possible. The doctrine of "an artificial fund" rests on the existence of something which would not have arisen had the course of business been uninterrupted. I see nothing "artificial" here, nor can I in principle distinguish between the sum of ? 5000 which in *Tomkins v. Saffery* was due to the insolvent Cooke from the Bank of England, and the two sums which in this case were due from Tulsidas to Virji.

10. I do not propose to discuss the other cases cited. They have no direct application to the facts before me.

11. Decree for plaintiff against defendants Nos. 2 to 22 for Rs. 15,666-4-0 with interest at four per cent, per annum on the sums which aggregate this amount

from the dates on which they were respectively received by defendants Nos. 2 to 22 or any of them.

12. Costs and interest on judgment at sis per cent, per annum.