

(1928) 01 CAL CK 0036
In the Calcutta High Court

Kanto Mohan Mullick

APPELLANT

Vs

John Carapiet Galstaun and Another

RESPONDENT

Date of Decision : 13-01-1928

Acts Referred:

Bankruptcy Act, 1914 — Section 33(2)
Contract Act, 1872 — Section 16
Provincial Insolvency Act, 1920 — Section 40

Citation : AIR 1930 Cal 547

Hon'ble Judges : Rankin, C.J.;C.C. Ghose, J

Bench : Full Bench

Judgement

Rankin, C.J.—In this case we are concerned with the ascertainment of the amounts for which Mr. Galstaun is entitled to proof in the insolvency of one Kanto Mohan Mullick. I propose that we should give our decision upon the questions of law which are involved and what is said with reference to the particular figures and amounts will be subjected to correction hereafter on the representation of the parties. The intention is that at the conclusion of this judgment the parties should have an opportunity of checking whether the figures mentioned in it are correct in accordance with the true working out of the principle which is to be applied. Now it appears that the insolvent Kanto Mohan Mullick and four of his brothers-entered into a transaction represented by a mortgage deed dated 28th June 1903. It appears that at this time a certain will was being propounded by the persons named as executors therein as the true will of their uncle, one Gopal Lal Seal, and although the contents and effect of that will have not; been properly brought before us it is common ground that if that will were established the five brothers would be entitled to the enjoyment of the assets left by their uncle at a period of time long before they would be likely to succeed as mere reversioners expectant upon the determination of the rights of their uncle's two widows. In point of: fact at the date of the mortgage transaction the probate suit was being tried. The ultimate result of that suit was that the will was held to be a forgery. The true nature of the transaction

represented by the instrument of 28th June 1903 is not in doubt.

2. It appears that the will case was being conducted, if not nominally, at all events really, on behalf of the five brothers by an Attorney one N.C. Bose and it appears that after certain amounts of money had been spent upon-it, it was necessary to obtain more money for the same purpose. Accordingly the attorney, with the assistance to use a neutral phrase, of a gentleman called Mumford, approached Galstaun and ultimately it was arranged that a, loan of one lac should be obtained from him upon the terms that he was to get in six months two lacs for the loan and that the sum of two lacs was to carry interest at the rate of 12 per cent per, annum. A loan of half a lac was at the same time being made by one Harirdhone Dutt and upon similar terms, namely that at the end of six months double the amount was to be payable These two transactions are put into the same deed and that deed proceeds upon the basis that the brothers are borrowing from Galstaun sums of money aggregating the sum of three lacs which have been advanced to them by Galstaun out of his own moneys and of moneys contributed by Haridhone Dutt. These advances are said to have been made upon the security of certain hundis mentioned in the schedule. The actual covenant for repayment is in these words:

Now this indenture witnesseth that in pursuance of the said agreement and in consideration of the said sum of Rupees three lacs already advanced by the mortgagee to the mortgagors as aforesaid (the receipt whereof the mortgagors do hereby admit and acknowledge) the mortgagors do hereby covenant with the mortgagee that they the mortgagors shall and will on 20th December 1903 pay to the mortgagee at Calcutta the said principal sum of Rupees three lacs without any deduction or abatement whatsoever and will in the meantime and until full payment and satisfaction of the said sum of Rupees three lacs pay interest thereon or on such part thereof as shall for the time being remain owing and unpaid at the rate of 12 par cent, per annum computed from the date of these presents by equal monthly payments.

3. We are concerned with this transaction in the following circumstances: It appears that the money which was borrowed was expended and that when the time came to repay in December 1903 no part was repaid. Until events long afterwards, which I shall come to in due course, neither principal nor interest nor any part of either was repaid to Galstaun. In 1905 Haridhone Dutt died and on 11th November 1907, "Kanto Mohan Mulliok was adjudicated an insolvent under the old Act which then obtained in India, namely, the Indian Insolvency Act, 1848, 11 and 12 Vic. Cap. 21. In 1909 a suit was brought by Galstaun against all the five brothers upon the covenant in the mortgage, In March 1915 the Official Assignee was substituted in the place of the insolvent. In 1917 the plaint in this suit was amended, converting it from a mere suit upon a covenant in the mortgage to a suit to enforce a security. In 1920 Galstaun withdrew his suit so far as the Official Assignee was concerned without prejudice to his rights to prove in the insolvency if any. In February 1920 this mortgage suit came on for hearing

and the plaintiff proceeded with it on the basis of a suit upon the covenant only. He got a decree against the then defendants, that is to say, the insolvent's four brothers for a sum apparently of Rs. 5,23,500.

4. Later on, an appeal having been taken from this decree the matter was settled to certain terms of settlement agreed to before the Court of appeal in December 1920. It will be observed that shortly before this date, that is to say, in April 1920, the application with which we are now really concerned had been brought by Galstaun claiming to be entitled to prove in the insolvency of Kanto Mohan Mullick. The terms of settlement arrived at with Kanto's brothers are ten in number. There was to be a decree in favour of Mr. Galstaun for Rs. 2,75,000 with interest on the decree at 6 per cent together with certain costs. The question of the money said to be advanced by Haridhone Dutt was put upon one side altogether and he was left to proceed with his appeal if he desired to do so. The sixth term is this:

That Mr. Galstaun will be at liberty to proceed for the balance of his claim in this suit against Kanto Mohan Mullick without recourse to the Mullick parties herein.

5. I do not think that there is any further term which it is necessary to recite at the moment. In point of fact under that decree certain sums were received by Galstaun in 1925 and 1926. We are told that in May 1925 he received Rs. 1,25,000 and that in July 1926 he received Rs. 1,26,910. It seems that in 1927 there was a mortgage decree for a sum of Rs. 1,11,756, but it is not shown to us nor is it contended by Mr. Langford James that that money has been received so far.

6. Turning now in the light of these circumstances to the case which is actually before us, I find that on 7th April 1920 Galstaun made an application that the schedule filed by the insolvent should be amended by entering him as a creditor for a sum of money put by him as three lacs with interest at the rate of 12 per cent, per annum with monthly rests. It appears that in the insolvent's schedule he had entered Galstaun as a creditor in the year 1907. He had put the debt down as disputed and I will assume that he put it down not merely as disputed in point of amount but as disputed altogether. It would appear that under the Insolvency Act a debtor was required to put in his Schedule debts claimed which he disputed altogether, and it would appear probable also that there was a chance of certain advantages to a debtor if he did include his creditor's claim in the schedule because in that case he might get protection against process if the creditor should commence a suit.

7. Now that application to correct the schedule and admit Galstaun as a creditor was ultimately brought on for hearing before Greaves, J., who delivered judgment in the matter in March 1921. I will not now describe the evidence that was then before the learned Judge, but will notice only that at the hearing before him the insolvent claimed to be represented as well as and independently of the Official Assignee. That claim the learned Judge disallowed. (So far as I can see

the section of the Act under which the learned Judge was proceeding, namely Section 38, contemplates that an insolvent shall have a right to be heard upon any question of a creditor advancing a proof which is disputed. The learned Judge, however, came to a contrary conclusion and it may be that there were good reasons for that conclusion. I do not find it necessary to pronounce upon that question. I am, however, proposing to deal with this case upon the basis that the insolvent had a right u/s 38 to be heard upon this matter). The matter was fought out between Galstaun on the one hand and the Official Assignee on the other and the questions that were discussed cover the whole ground. It was disputed whether or not the contract for Galstaun's loan was a good contract or was one made by means of undue influence so as not to leave a free and full consent on the part of the insolvent. The learned Judge rejected that objection to the proof of debt. Another contention seems to have been raised to the effect that because Galstaun had at first proceeded against the insolvent and the Official Assignee by a suit he could not lodge a proof in the insolvency. That contention was very properly rejected. A contention was further based upon Clause 6 of the terms of settlement and it was also considered whether any question of limitation stood in the creditor's way. On this question of limitation it was held on the authority of *Ex parte Boss* [1827] 2 G. J. 380 that a proof for a debt which was not barred at the commencement of the bankruptcy did not become barred by lapse of time. From that judgment an appeal was taken and a good deal turned in the Court of appeal upon what the learned Judge had said with reference to the question of Clause 6 of the terms of settlement. The learned Judge pointed out that nothing had been received, at the time he was dealing with this matter, from the brothers of the insolvent on account of this debt. It was pointed out that if something was received a question of a complicated character might arise as to Galstaun's right to allocate some of that to interest rather than to principal. He was not minded to anticipate and give directions in advance about what would happen if sums of money should be received from the debtor's brothers in future and he said:

But in any case I am not finally disposing, of any rights and if and when the Rs. 2,75,000 is recovered it may be permissible for the Official Assignee to raise any contention he may be advised to raise. At the moment I am only deciding whether the claim is provable or not. I see nothing in the third contention to prevent the admission of the proof.

8. On that an order was drawn up whereby the proof was thereby admitted and allowed for the sum of Rs. 2,00,000 with interest thereon at the rate of 12 per cent per annum with monthly rests from 28th June 1903 to 11th November 1907. From this order the insolvent himself as distinct from the Official Assignee preferred an appeal which came on for hearing in January 1922. One would suppose that the insolvent's first point would be that he had not been permitted to take part in the proceedings before Greaves, J., and that, therefore,, the whole matter must be sent back so> far as he is concerned or indeed altogether. I do not find that any such Suggestion was made to the Court or that the Court

in any way proposed to act on those lines. The appeal was heard as an appeal preferred by the insolvent himself and certain points were argued for the appellant as appears from the judgment. One point which came to nothing was whether the debt was a joint debt or a joint and several debt on the part of these five brothers. Undoubtedly it was a joint and several debt.

9. The next question was, it was contended, that because Galstaun had brought a suit and had withdrawn the; suit against the insolvent, but did not obtain leave of the Court under Order 23, he could not bring another suit and could not consequently lodge a proof. That contention was negatived.

10. The third point upon which the relied was in respect of the amount for which Galstaun's claim had been admitted in the order which had been drawn up on the learned Judge's judgment. The Court of appeal apparently did not understand what the learned Judge intended to do because he did not intend, according to his judgment, to "dispose finally of any rights." It goes on to say that it was not necessary to pursue the consideration of this part of the case any further, for Mr. Sirkar, the for Galstaun has not opposed the course which was suggested by the learned Counsel for the appellant, namely that this "matter should be remanded to the learned Judge taking insolvency matters on the original side in order that he may determine what is the real indebtedness of the insolvent to Galstaun in respect of the claim which he had made. That is the order of remand under which my learned brother Buckland, J., was sitting when he gave the decision which is now under appeal.

11. The learned Judge in his judgment has again reviewed the case. He has considered in the presence of the insolvent whether or not the contract is one which must be treated as no good contract by reason of undue influence in accordance with Section 16, Contract Act, as expounded in particular by the Privy Council in the case of *Dhanipal Das v. Maneshar Bakhsh Singh* [1906] 28 All. 570. He has come to the conclusion that the contract was not brought about by undue influence and that it is a good contract in law. As regards the questions of limitation he has held that those questions were not open upon this reference. He has dealt at length with the fact and figures and has admitted proof for the sum claimed in the end by the creditor as due. That figure is the figure of rupees 2,60,760. As regards the contention that in view of Clause 6 of the term of settlement made by Galstaun with the insolvent's brothers, Galstaun's rights of proof in this insolvency are narrowed down by the phrase "without recourse to the Mullick parties herein" the learned Judge has held that this phrase has no reference to any right of contribution which might arise if and when the insolvent has paid more than a proportionate share of the total debt. Accordingly, the question of Galstaun's proof is not in his opinion affected by any such consideration.

12. Now on this appeal a good many questions have been raised and the argument of Mr. Langford James on the part of the appellant is as follows He says first of all that by a decision of the Privy Council in an ex parte appeal *Ganesh Lal*

v. Khetramohan Mahapatra AIR 1926 P.C. 56 it has now been decided that the period of limitation in a suit upon a covenant to repay contained in a mortgage is three years from the date on which the money became payable. He says, secondly, that it is not the law in India as regards proofs of debt that the terminus ad quern of the period of limitation is the date of adjudication. He says that one must go on until one finds an actual claim made in insolvency and that "if by that time the statutory period is run out the claim to prove is barred. Now on this point the learned Judge has in my judgment, correctly held that no such point is open to the appellant after the previous decision of the Court of appeal. In the memorandum of appeal on that occasion the question of limitation was raised though it was not raised in the argument. The appeal was not dealt with on the basis that it was a complaint by a person who had not been allowed to be present and who was entitled to have the case reheard in his presence. Such objections as were raised to there being any debt provable in law were heard and determined and the only question upon which the case was remanded was the question of amount arising in the manner which I have already explained.

13. It is quite true that notwithstanding that the point of limitation was not taken it was in theory the duty of the Court of appeal at that time to take the point; but if it did not take the point (and it was not altogether an obvious or easy point) it is quite wrong to suppose that without getting the decision reviewed or without exercising any rights of appeal that there might be, it can be questioned when the learned Judge comes to carry out the limited reference which was put upon him by that judgment. It is not necessary for me to do more than to state what the contentions as to limitations are and they are these. It is said that in the ex parte case Ganesh Lal v. Khetramohan Mahapatra AIR 1926 P.C. 56 to which I have referred the Privy Council has laid down not merely that there is no 12 years limitation for a suit upon a covenant, but that the limitation is a three year limitation being under Article 66, Lim. Act, 1908 and not under Article 116. This contention, it is said, is derived from an observation of what is said by Lord Pitz-Gerald in delivering the judgment of "the Judicial Committee in the case of Bamdin v. Kalha Pershad [1884] 7 All. 502 That case was decided in 1884 under the Act of 1871. As against that it is said that many years have elapsed, since 1884, and since that time questions as to the period of limitation for a suit on a covenant have many times had to be considered by all the Courts in India and that they have all along been unanimous in thinking that the period of such limitation is not three years but six. In these circumstances, it is contended, that a mere dictum in an ex parte case upon questions which it was not necessary to decide would be insufficient to justify the Court in throwing over the considered view upon which all the Courts in India are unanimous.

14. On the other question as to whether limitation comes to end with an adjudication order, many cases have been cited to us. It is said that the reasons why in England limitation after the date of the bankruptcy does not run are these : first, that it is held that creditors are in effect the beneficiaries of the trust created by law of the debtors' estate ; and, secondly, that during the

insolvency creditors are not allowed in the ordinary way to bring suits against the insolvents to enforce their debts. In my judgment it is not necessary to canvass these cases or the arguments that have been advanced. I will content myself by saying that I see no reason whatever under this Indian Insolvency Act of 1848 for thinking that the Official Assignee in administering the estate of an insolvent is not administering a trust intended for the benefit of any creditor who is willing to come in. In my judgment there is nothing in this contention that there is any difference under this Act from the ordinary law as it prevails in England. That question of limitation, therefore, must be put on one side.

15. The next question of importance is the question whether or not this contract is to be held to be void u/s 16, Contract Act. On this question two Judges have already pronounced, Greaves and Buckland, JJ. but I am only concerned with the judgment of Buckland, J. and, so far as that is concerned, it may be sufficient to say that I entirely agree in his finding of fact that this contract was not brought about or induced by undue influence. u/s 16 which is a section which deals really with what is consent?" contracts are not avoided merely because they are hard or harsh. They are avoided because there is no such consent on the part of the defendant as in principle can be regarded as a contract by him. Where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other, the contract is said to be induced by "undue influence." There are, therefore, two things to be shown : the person in a position to dominate the other's will and using that position to obtain an unfair advantage. Clause 3 of the section is to this effect; that where a person is in a position to dominate the will of another and makes a contract which is unconscionable the burden of proving that such contract was not induced by undue influence lies upon the person in a position to dominate the will of the other. In the present case these brothers were minded to finance a highly speculative litigation. They were not people who were borrowing money to enable themselves to live. They were not people without advice. They were borrowing it on the instructions not merely of their attorney but of several other people assisting him to find finance. It seems reasonably clear from the circumstances that they had little tangible security to offer. They purported to mortgage their claims to their uncle's estate. They purported to mortgage some claim also of their grandmother, but it is tolerably reasonable that they were not people who were borrowing upon any good security. The evidence of the insolvent himself contains a great many statements which are difficult to believe, some of which tell against him as well as in his favour. According to him he did not want the money to be borrowed. According to him he told Galstaun that if he lent it the money would be thrown into the sea. According to other passages in his evidence it may be supposed that he had no mind of his own and that the whole of the transaction was entered into because Galstaun wanted it. I take the same view of this matter as the learned Judge of the Court below. In a case of this character it is difficult to say that it was even prudent for the lender to lend

money to the amount of one lac on a promise of two. In my judgment the fact that the attorney and certain other agents-were employee to negotiate this loan makes it difficult to say that there is any case to the effect that Galstaun dominated the will of the Mullick brothers. This matter has been dealt with fully by the learned Judge and I do not propose to enter into the matter any further than in saying that I agree with his judgment.

16. In these circumstances the question arises next as to whether or not Clause 6 of the terms of settlement between Galstaun and the insolvent's brothers meant what it is alleged it means. There, again, I venture to say that I agree with the view taken by the learned Judge. If the intention was to stipulate that Galstaun should be at liberty to go on against the insolvent but that he should take nothing in the insolvency or otherwise which could produce a claim on the part of the insolvent for contribution against his brothers, in my judgment very different words would have been chosen to incorporate that agreement. What is said is that he

would be at liberty to proceed for the balance of his claim in this suit against Kanto Mohan Mullick without recourse to the Mullick properties herein.

17. It has been strenuously contended by Mr. Langford James that these terms of settlement were entered into for the benefit of the insolvent, and that there was to be a restriction for his benefit that Galstaun could only proceed against him for the balance of Galstaun's claim in that suit, meaning thereby the figure which he had claimed when he brought the suit. It has been contended that in other ways these terms were made by the Mullick brothers for the benefit or protection of the insolvent. In my judgment that is a complete misconstruction of it. Anything that is contained in these terms is amply accounted for by the interest of the four brothers or of Galstaun.

18. I come now to the ascertainment of the correct method in which the present proof should be dealt with as a proof in insolvency. The first principle that is appealed to by the insolvent is that the Court has a right and duty to go behind any accounts stated, or covenant or judgment and in the interest of other creditors get to the real character of the transaction. There have been many cases laying down that principle. The main one is the case of *In re Van Laun* [1907] 2 K.B. 23 which has been cited and commented upon. That principle does not mean that if a person has lent one lac upon a promise to repay two he is a person who can only prove for one lac in insolvency. It is a principle, however, which it is necessary to apply in the present case because the form of the covenant would lead one to suppose that the creditor had lent two lacs at 12 per cent per annum when, in point of fact, he has lent one lac only and he is to get by way of interest a further lac together with what he is to get as interest *eo nomine*. If therefore the ordinary principles of modern English bankruptcy law are to be applied the principle will be found expressed in Rule 66, Bankruptcy Act of 1914. This is a case where a debt has been proved and the debt includes interest or any pecuniary consideration in lieu of interest and this is a case where

the interest or consideration should for the purposes of dividend be calculated at a rate not exceeding (in England) five per cent per annum without prejudice to the right of the creditor to receive out of the estate any higher rate of interest to without he may be entitled after all the debts proved in the estate have been paid in full. If I am asked, therefore, what is the correct figure at which the proof should be admitted as distinct from the correct figure upon which the dividend should be paid, it appears to me that the correct figure at which the proof should be admitted is the figure which would be due according to the term of the real bargain between the parties, that is to say, the term that although one lac only was advanced the insolvent was to be liable to repay a sum of two lacs with interest. It appears to be common ground that on that footing the total claim up to the time of insolvency including interest at the contractual rate would be Rs. 3,04,861. For purposes of dividend, however, a different figure has to be computed, namely, the figure of one lac with interest at six per cent per annum to the date of the adjudication. That figure has yet to be ascertained but it is a figure which would be under one lac and a half.

19. The next thing to be considered is this : certain sums of money have been received in 1925 and 1926. They amount in all to some two and a half lacs, a figure which is greater than the figure which is last mentioned. It is quite obvious, therefore, that if this is an ordinary insolvency in which there is no surplus but a deficient fund the creditor would get no advantage in these circumstances by trying to prove. It has been suggested on behalf of the insolvent that before arriving at the amount which is the total amount to be proved, namely, Rs. 3,04,861, credit for the sums received ought to be given so as to reduce the actual amount at which proof is to be admitted for any purpose to a much smaller sum. In my judgment that argument is wrong. To apply the English rule : cf. *Re. London etc., Bank* [1874] 9 Ch. 687 the time at which the creditor claimed to prove is the time at which he brought this application in 1920 to have his name inserted in the schedule. That being so, while the sum since received must be taken into account when it comes to paying dividend in order that the creditor may not receive more than 20 shillings in the pound it is not a matter which reduces the nominal amount of his proof of debt. In this connexion it may be mentioned that on the strength of an old case it has been contended that since a judgment was taken against the insolvent's brothers, that judgment from the time it was pronounced must be taken to be a receipt and the equivalent of a payment. In my opinion, there is no foundation for that contention for the present purpose. If it should turn, out that after all the other creditors are paid in full the amount of their respective proofs there is a surplus sufficient left from which the full amount of Galstaun's proof of debt, namely, Rs. 3,04,861 can be paid, credit being, given for the sums already received from the brothers, then in my judgment that sum will be payable to him in due course of administration. Not only so, but if after that there should be still a further surplus, this Court should, in my opinion, now direct that a payment should be made to him so as to give him the benefit of the principle which will be found in

Section 33, Schedule 2, Bankruptcy Act, 1914 which is in these terms:

If there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date of the receiving order at the rate of four pounds per centum per annum on all debts proved in the bankruptcy.

20. It is to be carefully borne in mind that no interest will be payable upon the sums received from the Mullick brothers after the date of their receipt, that is to say, in the event of there being sufficient funds we direct that interest in this country at six per cent per annum be paid upon the total amount of the proof until such time as the first payment was received in discharge of the total liability. Thereafter the sum upon which six per cent will be payable will be reduced by the amount of the capital repaid; in like manner the sum received in 1926, and any other sums as and when received. It may be as well here to point out that by the terms of Section 40, Insolvent Act, and the decisions thereunder questions such as we have had to deal with have to be decided by the English bankruptcy law as it may be from time to time. The terms of the Presidency Towns Insolvency Act, 1909 are such that they can take no effect upon adjudication under the previous Act, but the modern bankruptcy statutes in England can according to the decisions take effect under that Act by virtue of such sections as Section 40 and Section 60. This was long ago held by Sir L. Peel in the case of *Grey v. Chick* in *Coryton's Reports*, p., 136 and also by Innes, J., in *In the matter of Vardalac Gharri* [1877] 2 Mad. 15. As I understand, until 1909 the practice of this Court in administering the old Act was to do so upon the modern English principles laid down by the old Act itself and there is nothing in existence of any rule applicable to this case. This explains what otherwise might seem erroneous with reference to the English statutes.

21. On the question of interest it is only right to say that there is a specific authority in this Court for giving six per cent interest in the case of an insolvent's estate where there is a surplus in the estate after paying all the debts in full; and on this ground the particular figure of six per cent is justified by authorities. The case to which I will refer is the case of *In re, Mahomed Mahmud Shah* [1886] 13 Cal. 66 which appears to have been followed in certain unreported cases.

22. The order of the learned Judge will be varied in accordance with our judgment and the creditor will be entitled to take his costs of this appeal out of the estate.

C.C. Ghose, J.

23. I agree.