
(1912) 10 BOM CK 0015
In the Bombay High Court
Case No : O.C.J. Suit No. 925 of 1910

R.D. Sethna

APPELLANT

Vs

Kallianji Sangjibhai

RESPONDENT

Date of Decision : 11-10-1912

Acts Referred:

Presidency Towns Insolvency Act, 1909 — Section 47

Citation : (1913) 15 BOMLR 113 : 12 Ind. Cas. 581

Hon'ble Judges : Beaman, J

Bench : Single Bench

Judgement

Beaman, J.—This is a suit by the Official Assignee to recover from the defendant No. i the sum of Rs. 8300 paid to him on the 27th of March 1908 by Ramji Monsey on behalf of the insolvent firm of Laxman Rekhuji on the ground of fraudulent preference.

2. The material facts, none of which I think are disputed, are that on the 27th of March 1908 Rainji Monsey, the manager of the firm of Laxman Rekhuji, drew certain Hindies on the Mandvi branch of the defendant No. 1's firm, sold them in the Bazaar and realised Rs. 7200. Adding to this sum of Rs. 1100 from the small cash balance he then had, Ramji Monsey paid Rs. 8300 to the defendant No. i sometime in the afternoon of the 27th of March. By the evening of the 28th of March the firm was known generally in the Bazaar to be, if not actually insolvent, on the very brink of insolvency. On the 2pth all the creditors appear to have come down upon the firm and as they could not be satisfied it may be said that the firm stopped payment on that day. It was adjudicated at the instance of Virji on the 31st of March 1908. To understand the reason for the alleged fraudulent preference it is necessary to say that there were three Hundies, drawn by the insolvent firm upon itself, endorsed by the defendant No. 1, discounted at the Bank and paid over to the insolvent firm, which were shortly to mature. The first of these Hundies actually matured on the 30th of March 1908, the due dates of the other two being the 16th and 26th of May. It is evident that if the insolvent

firm were unable to pay these Hundies, the aggregate amount of which was Rs. 7500, the defendant No. 1 would have been called upon to do so. The defendant No. 1 is the nephew of Ramji Monsey, the manager of the insolvent firm. It is the allegation of the plaintiff that the insolvent firm being fully aware that it was then in insolvent circumstances deliberately paid over the sum of , Rs. 8,300 to the defendant in order to fully indemnify the defendant in respect of these three Hundies, principal, interest and brokerage. And it is suggested (though this is not in law necessary for the plaintiff's success) that the proceedings of the 27th of March were collusive between the insolvent and defendant No. 1, their common object being to obtain the money from innocent third parties to indemnify the defendant when called upon by the Bank to take up these Hundies. In support of that view it may be mentioned here that the defendant No. 1 telegraphed in the evening of the 28th of March at about 10-30 to his Mandvi firm not to accept any Hundies drawn upon it by the insolvent firm. Thus if this suggestion be true, the defendant No. 1 and his uncle Ramji Monsey colluded together to defraud the purchasers of the three Hundies drawn on the Mandvi branch of the defendant No. 1's firm, and no sooner had they by means of that fraud obtained the moneys then the defendant No. 1 promptly secured himself against any loss by telegraphing to Mandvi to stop acceptance. The defendant No. 1's case is that he was totally unaware of the precarious condition of Laxman Rekhuji when he received the Rs. 8300 in the afternoon of the 27th of March. He says that there had been current dealings for about two years between himself and the insolvent firm and that this payment was made in the ordinary course of those dealings by the insolvent firm and placed to the credit of that firm's account. When I come to deal with and dispose of the principal questions of fact, I shall have something to say upon the rival accounts, I have just barely outlined, given by the plaintiff and defendant No. 1, of the payment of this sum of money.

3. These being the material facts, although others will be required to be introduced when I come to discuss the evidence, the defendant first raises one or two technical legal objections which may, I think, be conveniently disposed of here.

4. The plaintiff's claim is brought u/s 24 of the Act for the relief of insolvent debtors, 11 & 12 Vic. c. 21. The defendant contends that at the time the payment was made he was in no sense a creditor of the insolvent firm to the extent of that payment. The most that the insolvent firm actually owed him on the 27th of March was roughly Rs. 600. He, therefore, urges that the provisions of Section 24 cannot be here applied. I cannot for a moment accede to any such argument. Any surety or guarantor who might, should a bankruptcy supervene before the debt of the principal were discharged, be entitled to claim among the other creditors in bankruptcy, is himself always regarded constructively as a creditor when the question is one of fraudulent preference. Nor is that legal position, with its attendant rights and disabilities, in the least affected by the fact that the principal has not been, even could not have been, called upon to

discharge the debt at the time the payment to the surety was made. I have no doubt whatever that the acceptor or endorser of negotiable instrument, which has not yet reached maturity, is for the purpose of Section 24 a creditor in regard to the maker or drawer, and that any payment made by the latter to the former, if otherwise fulfilling all the requirements of Section 24, would be as much a case of fraudulent preference as though it were made to a creditor whose legal rights against the debtor were at the time of the payment actually complete and enforceable at law. Were any authority needed in support of a proposition so self-evident, I may point to *In re Paine* [1897] 1 Q.B. 122.

5. It is next contended 3d on behalf of the defendant No. 1 that this case falls to be governed by Section 47 of the new Insolvency Act and not Section 39 of the old Act. There are two answers to that. First, that this insolvency occurred before the new Act had come into force and the firm of Laxman Rekhuji was adjudicated under the old Act. All questions, therefore, arising in the course of that insolvency, except questions of pure procedure, would have to be determined by reference to the terms and provisions of the Act of 11 & 12 Vic. c. 21. Next, even assuming that this insolvency had occurred since the passing of the new Act, Section 47 of that Act has, in my opinion, no applicability to a case of this kind. The section occurs in a chapter which deals with ways of proving insolvency, and describes the methods, in which, in certain circumstances, mutual debtor and creditor accounts, as between the insolvent and a creditor claiming in insolvency or being pursued by the Official Assignee for a debt to the insolvent's estate, are to be handled and adjusted. Here the case is altogether different, the defendant No. 1 not acknowledging the Official Assignee's rights to inquire into the manner in which he has been possessed of the sum of money which the Official Assignee now sues to recover from him. Nor indeed do I think, where a suit is brought u/s 24, the allegation being that it is a case of fraudulent preference, Section 47 could ever in any circumstances be logically invoked.

6. The defendant No. 1 next relies, but rather vaguely, on Section 57 of the Act. That general section, however, particularly excepts all cases falling u/s 24, and that appears to me to be a sufficient answer to that objection.

7. Although the defendant No. 1 throughout the hearing of this case has never alleged that the payment of the 27th of March was not voluntary, in the course of his evidence he has stated that he sent one of his servants to demand the money, and it is possible, though I do not think it probable, were this case to be carried further, some capital might be made out of that circumstance and arguments founded upon it to show that the insolvent firm did not really pay voluntarily but under pressure, so that the payment would be made out to be not within the meaning and intention of Section 24. At the close of the case the defendant No. 1's learned counsel did not allege that the payment had been procured by pressure, and indeed such an allegation would be entirely inconsistent with the whole groundwork of the defence, for, in the first place, the defendant has, as I have just mentioned, contended that he was not even a

creditor at the time the payment was made. Therefore he would not have been in a position to put any pressure whatever upon the insolvent firm. That is one point. A second and more important point is that having an eye to some supposed advantage he could obtain from the provisions of Section 47, he has from first to last contended that this was not a payment, in satisfaction of any debt, but merely as any person might voluntarily pay a sum lying idle in his hands into his banker's account in order that he might obtain interest thereon, and it was only after the defendant had incurred liability as surety to the plaintiff when he paid the three Hundies on the 30th of March that" he contends he became entitled on the footing of a mutual current and open account to appropriate against the money so paid the sum of Rs. 8,300 standing to the insolvent firm's credit in his books. I think, therefore, it is unnecessary to consider in any detail the authorities bearing upon the question : What is and what is not a voluntary payment within the meaning and intention of Section 24 ? I would merely observe upon that that there is a common and current confusion between the use of the terms " voluntary" and: " spontaneous," A payment made upon demand, although it is not a spontaneous payment, may be a perfectly voluntary payment. The mere fact of making a demand, or making an offer standing alone, leaves the will of a person upon or to whom the demand or offer is made free to accede, to accept or reject it. In cases of this kind certain payments impeached u/s 24 are really spontaneous. Such acts, of course, leave no room whatever for argument, but in a large majority of cases the impeached payments are said to be voluntary or not voluntary according to the amount of pressure . which is shown to have been brought upon the insolvent before he paid. It must always be an extremely difficult question in such cases to decide what was the dominant determinant in the insolvent's mind. Certainly the mere fact of a demand made would not, in my opinion, even raise a presumption that the ordinary play of free will had been in any degree fettered or restricted. The English Courts have indeed gone very far in recent times against the too ready inclination to accept any pressure, even the most honest pressure, as sufficient to warrant the conclusion that the payment was not voluntary. In earlier times the Courts were very ready to accept any kind of pressure or importunity as a good ground for the presumption that the resultant payment was not voluntary. But there underlies the reasoning in some at least of those cases the confusion of thought between "spontaneous" and " voluntary " to which I have drawn attention. The observations of Vaughan Williams and Wright JJ. in the case of *In re Bell* (1892) 10 Morrell 15 show that the earlier doctrine is no longer good law as it certainly never was good psychology. And were it necessary to pursue this interesting topic further, I might have thought it desirable to refer to and quote portions of the judgments of Lords Halsbury and Macnaghten in the case of *Sharp v. Jackson* [1899] A. C. 419. In view, however, of the form taken by the defence here, I do not think that this question is likely to be seriously agitated, and perhaps I have already said enough upon it. I conclude with this remark that even supposing that the defendant's story were true that he was called upon by Hargowan Jaggiwandas to pay a sum which he had not by him and that,

therefore, he sent to the insolvent firm to ask them to pay him Rs. 10,000, such a demand unaccompanied by any A threat or menace whatever would not, as far as I can see even when the state of the law was most favourable to that kind of contention, have taken the case out of the operation of Section 24.

8. I now come to consider the substantial question of fact involved, namely, whether the payment of Rs. 8,300 was made by the insolvent firm when in insolvent circumstances and with the intention of preferring the defendant No. i. It is to be observed that under the section itself, all that is necessary to be shown to bring it into operation are two facts: (1) that the payment was voluntary, (2) that it was made when the insolvent firm was in insolvent circumstances and within two months of its adjudication. It is admitted, so far as the hearing before me has gone, that the payment was voluntary. It is likewise admitted that it was made within two months of the adjudication of the firm of Laxman Rekhuji, but the defendant denies, and in this he is supported by his uncle Ramji Monsey, that it was made when the firm was in insolvent circumstances. If the defendant No. i were able to convince the Court that the firm of Laxman Rekhuji was not in insolvent circumstances on the 27th of March 1908, it would be necessary to turn to the other provisions of Section 24 and see whether the payment fell within the meaning and intention of any of them. But the two questions of fact to be answered are so simple that if they are sufficient it is better, I think, to place the decision on that ground.

9. The firm of Laxman Rekhuji consisted of four persons in all; Ramji Monsey, the manager, Shivram Vithoba, the descendant of the founder and the only man who ever had, as far as I can see, a rupee of capital in the concern, and two others who were working-agents in Cochin at the time of the insolvency. I omitted to mention in dealing with the technical points of law upon which the defendant relied that one of those points is that inasmuch as only Ramji Monsey and Shivram Vithoba were adjudicated insolvents in 1908, the furthest the present claim could go would be to recover their share of the sum of Rs. 8,300 paid on the 27th of March 1908. The other two members of the firm, who apparently were quite unknown to most of the creditors, certainly to the creditor who obtained the adjudication, were not adjudicated until March 1911, and the defendant, I cannot help thinking, rather fancifully contends that if this be a case of fraudulent preference as between him and the first two partners of the firm who were adjudicated on the 31st of March 1908, it cannot be so held as between him and the other two who were not adjudicated until March 1911, because in their case the payment was not made within two months of their insolvency.

10. Now, I suppose that is thought to be rather an ingenious point of law. I confess that it appears to me essentially trivial and" foolish, no better in fact than a mere quibble. There are certainly no merits whatever in it. What actually happened was that as the firm put up its shutters on the 29th of March and was adjudicated on the 31st, all the available assets of the firm, its books and its outstandings were immediately seized by the Official Assignee. The two partners,

who were not adjudicated, were obscure persons who do not appear to have contributed any capital whatever and whose interests in such profits as the firm made were proportionate to the work they did for it as its representatives in Cochin. It is not pretended that either of them could have assisted the firm with a ten-rupee-note in its extremities. Had it been known, they would certainly have been adjudicated along with the other two partlers, and as far as I can see the only practical effect of their non-adjudication would have been to leave them exposed to arrest at the hands of the creditors of the firm until they, like their two other partners, had obtained the protection of the Act. As a matter of fact they have been since adjudicated as members of the firm, and were it necessary to find a technical reason to refute this technical objection, I think it can be found easily enough in the words of Section 24, for the act of the manager in a partnership of this kind must be taken to be the act of the firm, and there can, I think, as will appear when my discussion of the question of fact is complete, be no doubt whatever but that this payment to the defendant No. 1 was in direct contemplation of an act of insolvency. So that then it will make no difference whether it had occurred within two months or two years of the adjudication of these two partners

11. I now take up the discussion, where I left it for the purpose of this digression, of the question of fact. The firm of Laxman Rekhuji was a very small concern dealing in ropes, ginger, and cocoanuts. It appears to have had no substantial capital of any kind but to have gone on, as firms of this kind do, living from hand to mouth upon such credit as it had by means of a constant series-of Hundy-transactions. The firm of the defendant No. 1 on the other hand is a fairly strong going concern with a solid capital of five lakhs of rupees under its Bombay establishment alone. The dealings between these two firms commenced about two years before the insolvency by the insolvent firm borrowing a sum of money from the defendant No. 1, and although the account here and there shows nominal indebtedness of the defendant No. 1 to the insolvent firm, it is perfectly absurd to suggest, as the defendant No. 1 has suggested here, that he actually used to borrow from the insolvent firm when in need of money. The real truth of the matter is only too apparent. The small firm of Laxman Rekhuji used to draw Hundies on itself in favour of the defendant No. 1, who endorsed and discounted them at the Bank holding the money to the credit of Laxman Rekhuji, and Laxman Rekhuji would draw against moneys so appearing to their credit in the defendant No. 1's books. Of course, immediately after the negotiation of any Hundy or set of Hundies in this manner, there might appear a nominal credit in favour of Laxman Rekhuji. I wonder much that the defendant did not elect to fight this case on the ground that he was a banker and had a banker's lien on the sums in his hands at the date of the insolvency which he might retain and apply against his depositor's indebtedness to him. However, from first to last whenever the Court suggested to him that the relations between himself and Laxman Rekhuji were very like those of banker and client, he stoutly and emphatically repudiated anything of the kind. He has denied right up to the -end

of the case that he was in any sense whatever Laxman Rekhuji's banker. So whatever use (I am not now expressing any opinion upon the serviceableness of . that use) he might have made of the doctrine, banker's lien, he has deliberately renounced it for the purposes of this case. Now, the evidence is that as early as the 23rd of March Virji, the first witness for the plaintiff, who got the firm adjudicated on the 31st of March, began to press for his money. He was put off with a small-payment of Rs. 600. But according to his own evidence he continued to dun Laxman Rekhuji to no purpose. Haridas Cooverji was a creditor of the firm to the extent of Rs. 12,000, of which Rs. 1,500 belonged to his sister. Ramji Monsey, the manager of the firm, who gave evidence at great length here with the obstinate determination of doing everything he could to favour the defence of his nephew, went every length he dared to convince the Court that Haridas Cooverji only became pressing and importunate on the 28th of March. The reason for this is perfectly obvious, for if he admitted that a creditor to so large an extent was pressing hard for payment on the 27th of March, he could have hardly had the effrontery to say that he voluntarily paid away Rs. 8,300, of which he stood himself in so urgent need on that day, to his kinsman the defendant No. 1, on current account. But the truth is that this .creditor Haridas Cooverji was Dressing the firm not only on the 27th but certainly before that date. This is clear from the evidence of the other partner Shivram Vithoba. Shivram Vithoba was out of Bombay and was sent for by the manager Ramji Monsey in order to meet the heavy claim of this creditor. Now observe how the claim was met. The firm was quite incapable of paying in the ordinary course of business. But for this act of fraudulent preference they could have at least stayed off this creditor with a very large payment on account. But Ramji Monsey must have known that that would be only an extremely temporary alleviation and postponement of the inevitable end. So that he preferred to pay Rs. 8,300 (as he himself has said before the Official Assignee) to indemnify his kinsman against the Hundies which he knew would be presented by the Bank for payment, the moment the firm was known to be insolvent, and so deprive himself of the means of carrying on even for two or three days longer. For without this money he was obliged to satisfy Haridas Cooverji by giving him the goods of the firm not yet transhipped and inducing his partner Shivram Vithoba to give him a mortgage of his house. In this way Haridas Cooverji obtained the whole of his demand for Rs. 12,000. Now, the mortgage was actually registered early in the morning of 28th. Stamp-paper was admittedly bought in the evening of the 27th. The goods were assigned in the evening of the 27th. And as Shivram Vithoba had been summoned from up-country to execute that mortgage, it is beyond all reasonable doubt that Haridas Cooverji was pressing the firm even before the 27th March, 1908. It is equally certain, and Ramji Monsey must have known this perfectly well, that as soon as the manner in which the firm had been obliged to make shift to silence this importunate creditor became known, all the creditors would be down upon it and it would have no other recourse but instantly to stop payment. If the defendant No. 1 had not already known the desperate state of the firm on the 27th (I have myself not the least doubt but that he did), he was

given a timely warning of the manner in which the moneys had been raised to put him in funds against the Hundies. So by the evening of the 28th, long before those Hundies could have been presented for endorsement at Mandvi, he was able to telegraph and warn his branch there.

12. The evidence of Ramji Monsey from first to last seems to me to have been a tissue of impudent lies and characteristic attempts at what witnesses of that class consider to be clever ways of throwing dust in the eyes of the Court. Nothing would induce him to admit that his financial position was not perfectly sound on the 27th of March 1908. Yet, although as a result of the manner in which he was compelled to satisfy Haridas Cooverji, the firm was hopelessly bankrupt within forty-eight hours, he stubbornly stated that it never occurred to him to draw upon the Rs. 8,300, which, according to his story, stood to his credit with the defendant No. 1, in order to put off the evil hour. Had the transaction been of the kind so vehemently sworn to both by Ramji Monsey and defendant No. 1, there is no conceivable reason why the insolvents should not have called in that money to pay off the greater part of Haridas Cooverji's claim on Saturday the 28th. The defendant No. 1, who upon this part of his case is as hardy a liar as his kinsman, has invented what no doubt he believed to be an ingenious and plausible story which no Court would dream of doubting. He has even fortified it by a little scrap of paper said to have been sent to him by the firm of Hargowan Jiwandas on the 27th of March 1908. His learned counsel, making the most of a wretched case, was very vehement on the absurdity of supposing that such great men as Hargowan Jivandas and defendant No. 1 would condescend to forge a chit of that sort merely to support a false story, This chit is Ex. 8. The defendant's story about it is that he owed the firm of Hargowan Jiwandas between Rs. 3000 and Rs, 4000 on that day. A client of Hargowan Jiwandas named Imamuddin came in from up-country requiring payment and apparently these two wealthy houses, the joint capital of which is probably no less than ten or twenty lakhs of rupees, were put to great strain to pay off this humble client. Hargowan Jiwandas had no money, so he wrote to defendant No. 1, whose cash balance on that day showed that he had at least Rs. 12,000 in hand, to send him Rs. 4,000 or as much more as he could spare. That is the purport of the note Ex. 8. The defendant No. 1, to oblige his wealthy correspondent, immediately sends off his man to get Rs. 10,000 from the tottering firm of Laxman Rekhuji and Deceives back Rs. 8,300. Rs. 6,000 " of these, he says, he sent to Hargowan Jiwandas, but most unfortunately the up-country client Imamuddin had got tired of waiting; so that the money was refused. All this urgency then setting in motion the resources of these two large firms, seems to have been quite supererogatory and illusory. Nor is it very apparent why, even if the story were true, the defendant No. 1 should not have sent Rs. 6,000 out of his cash balance of Rs. 12,000, nor is it very apparent why, when the money was returned after five o'clock in the evening, he on his part did not at once return it to his very obliging uncle Ramji Monsey. Least of all, in my opinion, is it apparent why he should have so carefully treasured up this perfectly useless "letter from the year

1908 to the present day. Nothing was effected upon it. It could not have been evidence in any subsequent transaction between the firm of Hargowan Jiwandas and defendant No. 1, and I confess that I entirely fail to-under-stand under what particular guidance of providence defendant No. i was induced to preserve it so carefully. I have my own suspicions as to how and why that paper was opportunely produced in the course of these proceedings. The whole story, however, is so transparently false from first to last that it is a mere waste of time to pick it to pieces in greater detail. There can be not the least doubt that the story told by Ramji Monsey before the Official Assignaa is the plain and simple truth, namely, that he wanted to protect his kinsman, the defendant No. 1, in respect of the Hundies, which the Bank held and which Ramji Monsey knew very well his firm was not going to, because it could not, meet. If we add the interest and brokerage, we shall find that the sum thus thoughtfully remitted on the 21st of March by the crumbling firm of Laxman Rekhuji just covers that firm's indebtedness to the defendant No. 1. There is a small surplus in favour of the firm of Laxman Rekhuji which the defendant No. 1 admits. If in these circumstances a payment of this kind is not a case of fraudulent preference, I confess I do not know what is. The firm was not only in insolvent circumstances but actually insolvent to all intents and purposes when by a fraud upon innocent people in the Bazaar it made this last desperate effort to put the defendant No. 1 in funds before it finally went crash. Twenty-four hours later the firm of Laxman Rekhuji could not possibly raise the money to pay the defendant No. i. That money had come out of the pockets of innocent people. I have not in my own mind the very slightest doubt but that the defendant No. i was himself a party to that fraud. It is not necessary to find so in order to make good the plaintiff's present claim. But the facts are such, and the evidence given both by Ramji Monsey and defendant No. i is such, that I think it right to state that that very emphatically is my conclusion.

13. Entertaining this opinion, I must decree the plaintiff's claim with interest at 6 per cent, per annum from the date of the adjudication up to judgment.

14. Costs and interest on judgment at 6 per cent, per annum.