
(1930) 08 BOM CK 0002
In the Bombay High Court

Vrijlal Mansukhram and Others

APPELLANT

Vs

Chunilal Fatechand

RESPONDENT

Date of Decision : 14-08-1930

Acts Referred:

Presidency Towns Insolvency Act, 1909 — Section 72

Citation : AIR 1931 Bom 210 : (1931) ILR (Bom) 200

Hon'ble Judges : Patkar, J; Baker, J

Bench : Full Bench

Judgement

Patkar, J.—In this case the respondents, the firm of Messrs. Chunilal Fatechand, were the creditors of the insolvent and had notified and also proved their claim before the dividend was declared by the receiver, whereas the appellants, Vrijlal Mansukhram and others, who were the creditors of the insolvent, proved them only after the declaration of the dividend.

2. The learned Subordinate Judge held that as it was the only dividend and probably the final dividend, the appellants were entitled to individual notices u/s 64, Provl. Insol. Act 5 of 1920, and therefore, as they did not receive the notices they were entitled to reopen the distribution of the dividend already declared and distributed. The view of the learned Subordinate Judge was confirmed by the District Judge in appeal. On second appeal, Madgavkar, J., came to the contrary conclusion, and held that the mere fact that the first dividend proved to be the final dividend did not entitle the negligent creditors to compel the vigilant creditors to refund the amount which they had already obtained from the receiver on the assumption that it was not the final but only the first dividend.

3. In this appeal it is urged on behalf of the appellants that u/s 64, Provl. Insol. Act, it is incumbent on the receiver to give individual notices to the creditors before the declaration of the final dividend by registered post according to form No. 11 at p. 359 of the Civil Circulars, and Rule 24, Clause (6), at p. 351 of the Civil Circulars and, that the individual notices not having been given, the first dividend, which was, the final dividend, ought to be re opened, and reliance is

placed on the decision of the Madras High Court in Venkatanarayana Chetty v. Sevugan Chetty AIR 1924 Mad. 769.

4. It appears that on 8th March 1926, the receiver sent a report to the Court, but did not mention therein that the assets which were realized were the only assets available for distribution, nor is there the opinion of the Court that the assets realized were the only available assets and that the receiver should declare a final dividend. Under those circumstances on 12th March 1926, the dividend was declared and distributed. It appears to have been the first dividend in the opinion of the receiver and the Court. On 26th March 1926, the appellants made an application, Ex. 12, to prove their claim. The receiver opposed the application and in para. 9 of the receiver's report it is mentioned:

There appear to be some out-standings of the insolvent but these cannot be ascertained unless the khatas have been made up.

5. We are not therefore satisfied in the present case that the dividend which was declared and distributed was the final dividend in the insolvency.

6. Assuming however that it was the first and the final dividend, Section 63, Act 5 of 1920, would not enable the appellants to re open the distribution which has already been made. Section 63 runs as follows:

Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid, out of any money for the time being in the hands of the receiver, any dividend or dividends which he may have failed to receive before that money is applied to the payment of any future dividend or dividends; but he shall not be entitled to distribution of any dividend declared before his debt was proved by reason that he has not participated therein.

7. The effect of the section is that the creditor coming late is not entitled to disturb the distribution of the dividends that have been paid before he came in though he may have the first claim in respect of any money in the hands of the receiver before any future dividends are made.

8. In *Mc Murdo, In re Penfield v. Mc Murdo* 1902 2 Ch. 684, where a similar question arose, it was held by Vaughan Williams, L.J., at p. 699:

Now, according to my experience of bankruptcy practice, there never has been any doubt as to the right of a creditor, whether he is a secured creditor or whether he is an unsecured creditor, to come in and prove at any time during the administration, provided only that he does not by his proof interfere with the prior distribution of the estate amongst the creditors and subject always, in which he has to come in and ask for leave to prove, to any terms which the Court may think it just to impose.

9. To the same effect is the opinion of Bonier, L.J. at p. 706.

10. In an analogous administration suit in *Harrison v. Kirk* [1904] A.C. 1 it was held that where in an administration suit there is a fund in Court, a creditor for a

debt at law, though the appointed time for coming in has long elapsed, is by well established practice allowed to prove against the general estate, subject to terms as to costs and as to payments already made.

11. In *In re Ramchandra Ganuji* [1922] 104 I.C. 378, where a dividend was declared by the Official Assignee and the name of one creditor who had proved his claim was omitted through mistake, it was held that he was entitled to re open the distribution made, but with regard to another creditor who did not prove his claim within time, it was held that once the declared dividend was set aside, he was also entitled to participate in the dividend that would have to be declared subsequently though he was not entitled to re open the distribution in his own right. At p. 1176, Marten, J. observes:

Then other cases cited to me were *Ex parte Day*: In the matter of Fenton [1831] 1 Mon. 212 *Ex parte Dilworth* [1842] 3 D & D G 63 and *In re Graham* [1833] 2 D. & C 55. These cases would all rather tend to show that the general policy of the Insolvency Court was not to interfere with a distribution already made, supposing a creditor came in late.

12. And after a reference to Section 72, Presidency Towns Insolvency Act, which corresponds to Section 63, Provincial Insolvency Act of 1920, it is observed (p. 1176):

This section, I think, to some degree, bears out what I have referred to as being London practice, viz. That speaking generally the Court ought not to interfere with a past distribution. That I entirely follow when one has a case where the creditor comes in late but everything up to ill at date has been done quite correctly by the bankruptcy officials. If we had a case where the Court had distributed dividends only amongst the people then known but in fact there is some other person who is to blame for not having made known his claim, then it may be fair to say it is not the fault of anybody except himself that he did not share in the dividend up to that date. The Court in effect says: We won't undo the past. But we shall make up the deficit to you so far as we can in the future.

13. At the time of the declaration of the first dividend it is not possible for the receiver to be sure whether it will or it will not be the final dividend. Unless it is quite clear that it is the final dividend, it is not incumbent on him to give individual notices u/s 64 of the Act. Generally a final dividend is declared after the realization of the whole of the property of the insolvent or so much thereof as can, in the opinion of the Court be realized without needlessly protracting the receivership. That stage was not reached when the first dividend was declared. I think therefore that the receiver was not in default in omitting to issue individual notices, further it appears from the receiver's report that petitioner 1 was asked to prove his claim but replied that he had proved his claim but the statement was found to be incorrect. The unexpected event that the first dividend happened to be the final dividend would not entitle the negligent creditor to re open the distribution in contravention of the provisions of Section 63 of the Act.

14. In *Krishna Chinnoo & Sons v. Matubhai* AIR 1920 Bom. 107 the secured creditors in the leasehold property were entitled to say that they were unsecured creditors of the insolvent and lodged their proof before the declaration of the dividend, and therefore were not creditors who had not proved their debt before the declaration of the dividend so as to fall under the bar against disturbance of a distribution of dividend, and the omission of the Official Assignee to accept the proof did not prejudice their rights.

15. We think that a creditor who has been guilty of delay is not entitled to disturb the distribution of any dividend already declared though he may be entitled to be paid the dividend or dividends, which he has failed to receive out of any money which may be in the hands of the receiver before the declaration of any future dividend. We think therefore that Section 64 does not control the proviso to Section 63, Provincial Insolvency Act. In *Venkatanarayana Chetty v. Sevuyan Chetty* AIR 1924 Mad. 769 the case was remanded to the lower Court in order to ascertain whether the dividend which was declared was the first or the final dividend, but though the decision lends support to the contention that a creditor who comes in late is entitled to reopen the distribution on the ground of want of notice u/s 64 of the Act, we prefer the view taken by Madgavkar, J. which is supported by the cases to which I have referred.

16. I therefore think that the view taken by Madgavkar, J. is correct and this appeal must be dismissed with costs.

Baker, J.

17. I am of the same opinion. The question really is whether the express provision in Section 63, Provincial Insolvency Act, that the distribution of any dividend already declared should not be disturbed is controlled by the provision in Section 64 with regard to the necessity of giving notice to all the creditors before the declaration of the dividend is made. This is a point on which there is no Indian authority except the case referred to in the judgment of Madgavkar, J., viz, *Venkatanarayana Chetty v. Sevugan Chetty* AIR 1924 Mad. 769, but the subject has been discussed by this Court in *In re Ramchandra Ganuji* [1922] 104 I.C. 378, and from the remarks, at p. 1176 of that judgment and the English cases referred to therein, it will appear that the principle is that a distribution which has already taken place, should not be disturbed. This has been held in the leading cases already referred to, viz, *Harrison v. Kirk* [1904] A.C. 1 and. *Me Murdo*, *In re Pen field v. Me Murdo* 1902 2 Ch. 684. In this state of the authorities and in view of the practice obtaining in England, I think that the view taken by Madgavkar, J., is correct and that the appeal should be dismissed.