**(1935) 01 CAL CK 0030**

**Calcutta High Court**

**Case No:** Case No. 82 of 1933

In Re: Binraj Sagormull — APPELLANT

Vs

RESPONDENT

**Date of Decision:** Jan. 10, 1935

**Final Decision:** Dismissed

**Judgement**

McNair, J.

This is an application for an injunction to restrain certain creditors of an insolvent firm known as Binraj Sagormull from proceeding with execution proceedings in the Court of the District Judge, Ratangarh, Bikanir : and from taking any proceedings other than those contemplated by a scheme of composition entered into by the insolvent firm with their creditors. The applicants are the trustees under the composition.

2. On the 16th May, 1933, an application was made in this Court by a creditor for an adjudication order against the firm of Binraj Sagormull.

3. The usual notices were issued and the firm was adjudicated insolvent on the 30th May, 1933. The proprietors of the insolvent firm were stated to be Chunilal, Sagormull and Dhanraj and they were said to carry on business at Calcutta, Patna, and Tezpur in Assam.

4. The insolvent firm filed their schedule on the 15th August, 1933 and included in their list of creditors the firm of Chunilal Hazarimull who carried on business in Calcutta, and amongst their assets, immovable property in Bikanir.

5. On the 23rd August, 1933, the same three persons Sagormull, Chunilal, and Dhanraj, purporting to be the proprietors of the Plaintiff (Insolvent), firm put forward the proposal for composition.

6. Messrs. Chunilal Hazarimull on the 7th September, 1933, submitted a proof of their debts. They claimed to be unsecured creditors for Rs. 10,000 for money lent on

two purjas now filed in the suit instituted at Ratangarh. There is an endorsement on the proof; that they were admitted to vote, and that the debt was admitted to rank for dividend.

7. A meeting of creditors was held on the 16th November, 1933, and the proposal was accepted by a majority of creditors exceeding three-fourths of the value of the aggregate claims against the insolvent''s estate.

8. The public examination of the insolvents was duly held and on the 12th December, 1933, this Court approved the proposal for composition and the appointment of the present applicants as the trustees, and empowered the Official Assignee to make over the assets of the insolvent firm to the trustees. There is some dispute whether Chunilal Hazarimull did or did not vote for the composition, but it is clear that they received a voting paper, and that they took part in the insolvency proceedings. They must therefore be governed by the decision of the meeting which approved the composition. In the meantime Messrs. Chunilal Hazarimull instituted proceedings in the Bikanir Courts to recover their debt.

9. On the 16th of May 1933, the very day on which the application was made in this Court for adjudication of the insolvent firm, they filed a suit in Bikanir and obtained an order for attachment before judgment. That suit was to recover the same debt which was mentioned in the insolvency proceedings and the plaint states that the cause of action arose in Calcutta. They impleaded not only the three members of the firm who were adjudicated insolvent but also the four sons of Chunilal Binraj, three of whom are minors and all of whom were said to carry on business as a joint family concern.

10. There is no doubt however that the debt which they sought to recover was the debt due from the firm of Binraj Sagormull for which they had proved in the insolvency, and there is no suggestion that the business was the business of a joint Hindu family other, than the statement in para. 1 of the plaint.

11. The District Judge of Ratangarh in Bikanir decreed the suit on the 29th November, 1933. During the trial he raised the issue "Is the Plaintiff not entitled to institute this suit on account of the pendency of insolvency proceedings at Calcutta against the Defendants"? This issue he decided in favour of the Plaintiff firm as "the burden of proof was on the Defendants (i.e., the insolvents) and they have produced no proof at all." An application for setting aside the order for attachment before judgment was dismissed for the same reason.

12. Following up their decree Chunilal Hazarimull on the 23rd December, 1933, obtained an order for sale of the insolvent firm''s Bikanir properties.

13. The present Petitioners applied in Bikanir for stay of execution of the decree and for an interim stay of sale but as they produced no evidence) of their status as trustees under the composition, nor any list of creditors, or of debts, or assets, it is

not surprising that their application was unsuccessful.

14. The Bikanir properties were sold by auction on the 31st March, 1934, but confirmation of the sale has been stayed pending the result of these proceedings.

15. The first question that arises is one if jurisdiction. In delivering judgment in a somewhat similar application in Re: Sumermull Surana 35 C.W. N. 506 at p. 509 (1931), Panckridge, J., said :--

there in nothing in principle which prevents the Court from restraining proceedings in a foreign Court where as here the parties sought to be restrained carry on business within the jurisdiction-- even if they do not reside here,--and have assets within the jurisdiction which can be attached in the case of any breach of injunction. Moreover I am disposed to think that the language of sec. 90 (i) of the Presidency Towns Insolvency Act is wide enough to confer on the Court the power of granting an injunction of the character here asked for.

16. With that statement of the law I respectfully agree and I have no doubt that in the present case the Court has power to grant the desired relief. The question that remains is whether in the circumstances that relief should be granted. In the case to which I have referred the learned Judge held in his discretion that no injunction should issue and his decision was upheld by the Court of Appeal [Sumermull Surana v. Bansidhar 35 C. W. N. 997 (1931)]. There are certain outstanding points of difference in the facts of this case from those outlined in the reported case.

17. Here it is the trustees who seek to enforce the composition; and the creditor in the present case has submitted a proof of his debt and taken part in the insolvency proceedings. Moreover the insolvent firm disclosed the properties now under attachment in Bikanir in their schedule of assets and they are willing to convey them to the trustees for the benefit of the general body of creditors if the attachment in Bikanin is removed. In this connection the opposing creditors contend that the Bikanir properties were excluded from the composition which provide ed in para. 6 that on the adjudication being annulled the "assets appertaining to the insolvent''s business at Calcutta, Patna and Tezpur" should vest in the trustees absolutely. These are assets in British India. The same paragraph, however, empowers the trustees "to realise all the secured and unsecured assets by suit or otherwise." These words are wide enough to include the Bikanir properties.

18. In Sumermull''s case 35 C. W. N. 997 (1931), it is suggested that as between the insolvent and his creditors an adjudication order made in British India would prima facie operate so as to make property in a foreign State available to the creditors unless the law of the foreign State interferes with the operation of our own law, but that, before granting an injunction such as that which was sought, a Judge might reasonably insist on definite evidence as to the law of the foreign State.

19. The Petitioners here produce evidence that the law of insolvency and of transfer in Bikanir so far as is relevant to the present matter, is identical with the law of British India and they urge that the property in Bikanir would vest in the Official Assignee and then in the trustees under the composition.

20. In ordinary circumstances this would be correct; but the difficulty which the Petitioners have to overcome is the fact that the Bikanir properties were already attached when the adjudication, order was made. To meet this difficulty reliance is placed on sec. 51 of the Presidency Towns Insolvency Act and it is contended that the insolvency must be deemed to relate back and commence at the time of the commission of the act of insolvency, that is, prior to the 16th May, 1933. This argument was put forward and was rejected by the House of Lords in Galbraith v. Grimshaw [1910] A. C. 508 at p. 510. Lord Loreburn there said at page 510 :

The attachment in England will not prevail against a claim of a foreign trustee in bankruptcy which is prior in date, provided that the effect of the bankruptcy is to vest in the trustee the assets in question. If the attachment is prior in date, then I do not think it will be affected by the title of the trustee in a foreign bankruptcy ; and the reason is that a foreign law making the title of the trustees relate back to transactions which the debtor himself could not have disturbed has no operation in England, while the English law as to relation back applies only to cases of English bankruptcy.

21. Lord Dunedin dealing with the same matter says at page 513

Now so far as the general principle is concerned it is quite consistent with the comity of nations that it should be a rule of international law that if the Court finds that there is already pending a process of universal distribution of a bankrupt''s effects it should not allow steps to be taken in its territory which would interfere with that process of universal distribution and that I take to be the doctrine at the bottom of the cases of which 3 Geotze v. Aders [1874] 2 R. 150 is only one example. But if you wish to extend that not only to the question of recognising a process of universal distribution but also of introducing the law of relation back, then it seems to me you at once get into rather great difficulties, because the question at once arises, according to which law will you apply the doctrine of relation back ? If you take the law of the country of the bankruptcy then the execution or security in question may be and often is of a kind which is quite foreign to the system of law which you are administering in the bankruptcy Court. If on the other hand you take the law of the country of the attachment, then you have to administer a law which is quite ignorant of the precise execution or security with which it has to deal. Accordingly, to say the least of it, there has been quoted to us no instance where as a question of international law a Court has applied the rule of relation back, and certainly there are dicta of Lord President Inglis which seem to point completely the other way.

22. The case of Galbraith v. Grimshaw [1910] A. C. 508 at p. 510 was recently applied by the Judicial Committee to an appeal from India in Gummidelli Anandapadmanabhaswami v. Official Receiver of Secunderabaet, L. R 60 I. A. 167 : s. c. I. L. R. 56 Mad. 405 : 37 C. W. N. 553 (1933). There the District Court of Secunderabad which was held to be a foreign Court, on a creditor''s petition adjudicated in 1928 certain persons insolvent, and the question arose whether under such adjudication there vested in the Official Receiver of Secunderabad who was trustee in the Bankruptcy, the benefit of a decree obtained by the insolvents in the Madras High Court freed from an attachment made by that Court in 1926. The Madras High Court on appeal held that the attachment was purely prohibitory and did not create any title, lien or security in favour of the attaching creditor which could prevail over the receiver in insolvency.

23. That view was overruled by the Privy, Council who held on the principles laid down in Galbraith v. Grimshaw [1910] A. C. 508 that the foreign adjudication order, would not be allowed to interfere with any process already pending which fettered the insolvent''s power of transferring the subject-matter of the process to the Receiver in Bankruptcy; and they quoted with approval the test supplied by Lord Loreburn which is as follows :--

In each case the question will be whether the bankrupt could have assigned to the trustee at the date when the trustee''s title accrued, the debt or assests in question situated in England. If any part of that which the bankrupt could have then assigned is situated in England, then the trustee may have it : but he could not have it unless the bankrupt could himself have assigned it.

24. In the present case at the date of the adjudication the insolvents could not themselves have assigned the Bikanir properties because of the attachment which had already been granted by a foreign Court and it is immaterial to consider, whether the property would in fact have vested in the Official Assignee if it had been merely attached in British India.

25. The result is that the creditor having duly obtained an attachment in Bikanir before the date of the adjudication cannot now be "deprived of the fruits of his diligence." The application must be dismissed with costs. The costs will be taxed as of a hearing--the Taxing Officer to decide the number of days such hearing lasted.