

(1880) 06 CAL CK 0023

Calcutta High Court

Case No: None

In Re: D. Cowie and
Another

APPELLANT

Vs

RESPONDENT

Date of Decision: June 14, 1880

Citation: (1881) ILR (Cal) 70

Hon'ble Judges: Wilson, J

Bench: Single Bench

Judgement

Wilson, J.

The insolvents in this case, Messrs. David Cowie and John Cowie, with Bazette Colvin, were the partners in the firm of Colvin, Cowie, and Co. This case was heard on the 8th, 9th, and 10th instants; and the question for decision is, whether the insolvents are entitled to their personal discharge.

2. The firm is one of old standing. From the year 1869, the partners have been the three gentlemen I have named.

3. Down to the year 1874, the firm carried on business as merchants, business in goods on commission, and business as bankers and agents.

4. Between 1871 and 1874 they sustained heavy losses, in consequence of unsuccessful consignments of goods to Europe. At this time, Mr. David Cowie, the senior partner, was in Europe. In August 1874, he returned to Calcutta. The losses sustained during the period I have mentioned are stated by Mr. David Cowie to have amounted to Rs. 5,00,000. This amount afterwards resolved itself into three heads:-(i) a sum of about Rs. 2,00,000, which sum, in the annual balance sheets prepared by the partners for their own use, is entered to the debit of their shipping account simply "lost;" (ii) a debt, fluctuating somewhat, but always over Rs. 1,00,000, to Messrs. Crawford, Colvin & Co., a London firm, with whom the insolvents had business connections; (iii) a large sum, the exact amount of which was not stated,

which Mr. D. Cowie said was properly a debt to the same firm, but which the latter remitted.

5. It was the practice of the firm to make up their accounts to the 30th April of each year, but naturally the actual adjustment took place later. The books for the year ending 30th April 1875 were made up on the 19th October 1875. The result of the balance sheet then struck (being the balance of assets and liabilities up to the 30th April 1875) was as follows: --Liabilities, Rs. 13,58,940, as against the assets, showed a deficit of rather over Rs. 2,00,000. The balance sheet to April 1876 showed a deficit of Rs. 2,71,240 ; that to April 1877, Rs. 2,76,267 ; that to April 1878, Rs. 3,21,236 ; that to April 1879, Rs. 4,37,185. It is right to add that the large increase in this year is due, not to any real change in the state of affairs, but to the fact that debts hitherto treated as hopeful were now written off" as bad. Stating the matter in another way, the firm could, in April 1875, have paid twelve or thirteen annas in the rupee. After a steady decline, the assets now have about half that proportion to the liabilities.

6. The profits of the year ending April 1875 were Rs. 16,950; those to April 1876 Rs. 52,400; those to April 1877, Rs. 23,025, after writing off in this last year Rs. 722 of bad debts of earlier years.

7. From the year 1874, the firm almost entirely abandoned their business as merchants, and from about the middle of 1877, a further change took place. Their business as merchants came entirely to an end, and their dealings in goods on commission also ceased, and has never been resumed. There remained nothing but the banking and agency business. That business consisted almost entirely in dealing with the money of their constituents. The only other element shown to have existed in the business, was that of shipping agents--the consignment of ships to the insolvents--for which they were remunerated by a small percentage on the freight receivable here. The extent of this latter business Mr. David Cowie was not able to state, because the accounts of it were not kept separate from the general agency business. But having regard to the total profits from year to year, its results can hardly have been very important financially. About the same time occurred the circumstances which I notice, because they are favourable to the insolvents. Mr. John Cowie had, in the course of fifteen or sixteen years, overdrawn somewhat largely as between himself and the firm. In the year 1876, he borrowed from a relative Rs. 30,000, which he paid into the firm in reduction of his overdraft. Mr. David Cowie, in the same year, paid Rs. 29,235, the proceeds of a legacy which he received; and Mr. Colvin, in May 1877, Rs. 20,000, which he borrowed from a relative.

8. It is well at this point to consider the exact nature of the business henceforth carried on by the insolvents, and the financial condition of the firm at that time,--that is, to the middle of 1877. The business was that of bankers and agents. They received the money of their constituents on deposit, for investment, or for remittance, charging a commission on each transaction, and allowing 4 per cent,

interest on deposits.

9. The condition of the business was this. The firm were worth 2 3/4 lacs less than nothing. There was a steady drain upon the business in the form of interest at 5 per cent, upon the old debt to Crawford, Colvin, & Co., which never stood lower than Rs. 1,00,000. This deficit had gone on increasing since 1874. The partners had brought into the business everything that they could raise for the purpose, and every kind of business other than the banking and agency business had come to an end. The business was continued with the results shown in the yearly balance sheets, to which I have already referred. On the 20th October 1879, the firm closed their place of business for the Pujah holidays, which lasted to the 31st October, inclusive. During the Pujahs, orders for remittance and investments had accumulated to the amount of Rs. 1,20,000, which they were unable to fulfil. They re--opened their premises on the 1st November. In the course of the same day, they stopped payment, and forthwith presented their petition to this Court.

10. It is necessary now to refer to the sections of the Act applicable to the case. Section 47 empowers the Court, amongst other things, to grant an insolvent his personal discharge, or to dismiss his petition, or to adjourn the hearing until a future day, the effect of such adjournment being, of course, to postpone the discharge. Section 51 gives power to except particular debts from the order of discharge, for a limited period, upon certain specified grounds. This section is important, first, because it was contended on behalf of the opposing creditor, that certain debts in this case ought to be, under this section, excepted from the discharge, if granted. It is important, secondly, because the Legislature, having stated the considerations which are to lead the Court to suspend the discharge as to particular debts, it follows, I think, that similar considerations, when applicable to debts generally, are good grounds for deferring a discharge u/s 47.

(His Lordship read Section 51, and continued.)

11. Now, there was some suggestion on the part of the opposing creditor of debts contracted fraudulently. For this charge I see no ground whatever. It was contended that debts had been contracted by means of breaches of trust, and this on several different grounds. The opposing creditor alleges first, that his own debt was of this class. The facts, so far as it is necessary to state them, are as follows: The insolvents acted as agents in this country for the opposing creditor, Mr. Sears, in various matters; and from time to time realised money and made payments on his behalf. On the 19th April Mr. Sears wrote a letter to the insolvents, which they received early in May, instructing them to invest Rs. 40,000 in Municipal Debentures of a specified series, and to place them in the Oriental Bank. By a letter of the 12th June, received early in July, he varied his order so as to include certain other series of the like debentures. By a letter of the 28th July, he further enlarged his order so as to apply to Municipal Debentures of any series. On the 9th October he again wrote, authorising investment in Government Paper. But this letter was only received on

the 1st November, the day the insolvents stopped payment. The insolvents bought debentures to the extent of Rs. 18,000. Mr. Sears is a creditor for the balance of his money.

12. It was argued that there was here breach of trust on several grounds. First, it was said Mr. Sears's money was, from the first, in the hands of the insolvents not as bankers, but as mere agents; and that they were wrong in mixing that money with their general funds. I do not agree with this view. In the ordinary course of their business, the insolvents stood in the relation of bankers to their constituents, and were not bound to keep their money separate. The fact that they obtained 4 per cent, interest on deposit is conclusive as to this, and I see nothing to take Mr. Sears's case out of the ordinary rule. Secondly, it was argued that, on receipt of the letter of the 19th April, ordering the investment, the insolvents were bound to separate the Rs. 40,000 from their general funds, and keep the sum apart until they could find the desired securities. I do not think a banker, in such circumstances, is under any such obligation. Thirdly, a much more serious charge was made. The reason throughout given by the insolvents for not having carried out Mr. Sears's order was, that, though they did their best, they could not procure Municipal Debentures to so large an extent in the market. On behalf of Mr. Sears I was asked to find that this was a false excuse, and that the real reason was, that the insolvents could not, or would not, pay the money. Mr. David Cowie was examined upon this matter, and I am quite satisfied that the explanation given by him at the time, and now, was the true one. He is, I think, strongly confirmed by the two witnesses called for the opposing creditor, who both said that the debentures could not have been procured in the desired quantity, at any rate without paying more than the market price for them; and in the absence of special rules, I do not think the insolvents would have been justified in paying more than the market price. The charge of breach of trust in respect of Mr. Sears, therefore, in my judgment fails.

13. The next case in which breach of trust was alleged, was that of a Mrs. Mackertich. The insolvents were trustees of the settlement. As such, they received interest for her shortly before their stoppage, and remitted the amount to her in England by a draft upon Crawford, Colvin & Co. They at the same time remitted to that firm securities sufficient to cover the draft, but they omitted duly to appropriate the securities to meet the draft. Crawford, Colvin & Co. dishonoured the draft, and applied the securities in reduction of their own claim. Now, the insolvents ought, no doubt, as trustees, to have taken care to appropriate their remittances; but their omission to do so was not, I think, at all the kind of breach of trust pointed to in Section 51, and Mrs. Mackertich does not oppose.

14. The next charge of breach of trust is somewhat more general. In the list of creditors in the insolvents, schedule, several debts appear as trusts. It was explained that, in some of the cases called trusts, there was really no trust at all. In other cases, the insolvents were not trustees, but only agents for the trustees. There

remain some cases of trust proper. In these cases, it is evident from the sums appearing in the schedule, that trust business has been mixed with the general funds of the, firm. I heard with great surprise and regret from Mr. David Cowie, that, from the beginning of the century, it has been the practice of his firm, and of the firms which preceded it in business, to mix the incomes raised by them from trust properties in one common fund with their own moneys. This is a grave breach of duty in trustees, and might, in some circumstances, expose them to very serious consequences, criminal as well as civil. In the present case the aggregate amount of trust-money in the schedule is very small; in some cases, at least, the course taken seems to have had the sanction of the cestui qui trust. There is no ground for suspecting any intention to defraud, and none of these creditors oppose. I do not think, therefore, the matter is one on which I am bound to act u/s 51.

15. It further appears that the insolvents have been in the habit of taking out letters of administration to estates in this country under powers-of-attorney from executors and next-of-kin in Europe. Again, I must say I heard with surprise and regret, that (when and so long as the moneys of such estates have been in their hands) it has been their practice to mix them with their own funds. This is a serious breach of the plainest duty of an administrator. An executor or an administrator, who risks the funds of an estate by mixing them with his own, and employs these for his own purposes, even temporarily, is in great danger of criminal as well as civil liability. It has not, however, been shown, that any of the present debts of the insolvents are affected by this consideration.

16. Another irregularity also appeared in the course of the same examination. The insolvents have been in the habit of charging commission upon estates so administered by them. This is expressly prohibited by Section 56 [Section 56:--No person other than the Administrator General acting officially shall receive or retain any commission or agency charges for anything done Commission not to be as executor or administrator under any probate or letters of charged by executor or administration, or letters ad colligenda bond, which have been administrator other than granted by the Supreme Court or High Court at Fort William the Administrator General. in Bengal since the passing of Act No. VII of 1849 (for the appointment of an Administrator General in Bengal), or by either of the Supreme or High Courts at Madras and Bombay since the passing of Act No. II of 1850 (to amend and extend to Madras and Bombay Act No. VII of 1849), or which have been or shall be granted by any Court of competent jurisdiction within the meaning of sections one hundred and eighty-seven and one hundred and ninety of the Indian Succession Act 1865; but this enactment shall not prevent any executor or other Bequest in favour of person from having the benefit of any legacy bequeathed to him executors not affected. in his character of executor, or by way of Commission or otherwise.] of Act II of 1874; and I can hardly hope that the insolvents were unaware that they were acting illegally. But this does not affect the question of discharge.

17. I have now considered all the charges of breach of trust. I have come to the conclusion that none calling for any action on the part of the Court u/s 51 has been established.

18. It was next contended for the opposing creditor, that recent debts at any rate had been contracted " without having any reasonable or probable expectation at the time when contracted of paying the same." I do not think those words apply. They are pointed, not at the case of a man who incurs a debt knowing that he cannot pay his debts generally, but at that of a man who incurs a debt knowing that he cannot repay, that debt. Now, the expectation of the insolvents, no doubt, was, that, as long as they could keep the business going, they would be able each day to meet the, claims of the day. It cannot, therefore, I think, be said of any individual debt that it was incurred without expectation of repaying it.

19. There remain to be considered the words extra of the section--" If it shall appear that the insolvent's whole debts so greatly exceeded his means of providing for the payment thereof during the time when the same were in course of being contracted, reference being had to his actual and expected property, as to show gross misconduct in contracting the same." As to these words, if they apply to the case at all, they apply not to this or that debt or class of debts, but to all the debts contracted for some years past; and, under the circumstances of the case, afford ground, not for excepting any specified debt u/s 51, but for deferring the discharge u/s 47.

20. I have, therefore, to consider whether the conduct of the insolvents, in carrying on business as they have done, falls within the censure of the words I have just read. With great regret, I am forced to the conclusion that at least from the middle of 1877 it does. If I were compelled to say whether from an earlier period, I am afraid I should have had to answer in the affirmative. But, at any rate, in the middle of 1877, these gentlemen knew that they were deeply insolvent; that they had been so for some three years; and that in that time the deficits had increased, not diminished. The business was subject to a steady drain in the form of interest upon the old debts to Crawford, Colvin & Co. There was then no outside business of any kind carried on by them from which any assistance could be derived. They are not shown to have had any property apart from the business, or any expectation of any in the future. The business was carried on entirely with other people's money, entrusted to them in full confidence of their solvency. It involved, as long as it was carried on, their constantly opening new accounts with fresh constituents, as well as their constantly receiving fresh deposits from old constituents. They made genuine efforts to keep the business alive; for in the years 1876 and 1877, they brought some fresh capital into the business, not enough, however; seriously to affect its condition. But in what hope did they do so? The question was put to Mr. David Cowie and he answered it with the candour and straightforwardness that marked the whole of his examination. There was no plan for recovering the lost ground, no expectation of

relief from any assignable source, but a vague hope that times might improve, business might become more active, and something might occur to save them. They continued to carry on business for more than two years and longer, until they found themselves unable to meet the orders for investment and remittance actually in hand. I am constrained to say that I can see no excuse for their doing so; and I think justice and the interests of commercial morality require that the Court should plainly condemn trading of this character. I cannot, therefore, now grant these gentlemen their discharge, and I adjourn the hearing of this petition for a year till the Court-day in next June.

21. But though I think these gentlemen ought not at present to obtain their personal discharge, I do not think their creditors could gain anything by their being in the meantime liable to be personally harassed. And upon this point I think I am at liberty to note the fact that there is only one opposing creditor. The interim protection already granted will, in the meantime, be continued.