

Manchersha Ardeshir Devierwala Vs Ismail Ibrahim Patel

Court: Bombay High Court

Date of Decision: Dec. 3, 1935

Acts Referred: Penal Code, 1860 (IPC) â€” Section 109, 421, 423

Citation: (1936) 38 BOMLR 168

Hon'ble Judges: Divatia, J; Barlee, J

Bench: Division Bench

Judgement

Divatia, J.

This revisional application is preferred by the original complainant against the order of discharge of the four accused who were

charged with offences under Sections 421, 423 and 109 of the Indian Penal Code. The discharge order having been confirmed by the Sessions

Judge, the complainant has come to this Court in revision.

2. His case in substance was that he and accused Nos. 1 and 2 were partners in the business of making charcoal out of wood. These two accused

had obtained the right of cutting trees and making charcoal from wood in some villages in the Bansda State. The charcoal was to be brought to

Bulsar in British India for sale. The complainant was the financing partner and after accounts between the parties were made up, these accused had

in 1931 pledged some ready made charcoal to the complainant for Rs. 16,000 and had agreed to deliver it to him at Bulsar. As the accused failed

to do so, the complainant had filed suits against the accused. One suit was filed in Thana Court in which one Ranchhodji, accused No. 3, who

alleged that some of the charcoal was pledged to him, was appointed a receiver by consent of the parties; this Ranchhodji, being afraid that his

pledge may not be substantiated, instigated accused Nos. 1 and 2 to pass a sale-deed for a nominal sum to his joint nephew, accused No. 4, of

their rights to cut trees under the agreement made with the Bansda State. It is alleged that this sale-deed of November 13, 1932, was passed with

the intention of defrauding the petitioner who was a creditor of accused Nos. 1 and 2 for a large amount. Thereafter, the complainant applied for

the adjudication of accused Nos. 1 and 2 as insolvents, and in the insolvency proceedings, accused No. 4 preferred his claim under the above-

mentioned sale-deed. Therefore, the complainant filed the present complaint alleging that all the four accused had committed the offences of

fraudulent removal of property to prevent its distribution among creditors u/s 421, Indian Penal Code, and fraudulent execution of a deed of

transfer containing a false statement u/s 423, Indian Penal Code, and the abetment of these offences.

3. The trying Magistrate, without going into the merits of the case, held that the acts with which the accused were charged did not come under

those two sections inasmuch as the right to cut trees which had been transferred under the said sale-deed could not be regarded as property, and,

secondly, even if it was property, it was not property which could be lawfully distributed among creditors, being situated in the foreign State of

Bansda, was not subject to the law of British India and could not be attached in Bansda State under British law, and hence the disposal of such

property in a foreign State could not defeat or delay creditors. On these grounds, the accused were discharged by him.

4. The learned Sessions Judge, who was approached in revision by the complainant, has held, and in our opinion rightly held, that the right of

accused Nos. 1 and 2 under the agreement with the Bansda State to cut trees was property as decided in *Alisaheb Baba Diwakar Vs. Mohidin*

Sadik, but he agreed with the Magistrate that that property was not governed by the law in British India, that the receiver in insolvency could not

touch the property in the foreign State which was governed by its own laws, and that it could not be said that it could be distributed in British India,

and its transfer, therefore, could not be said to be fraudulent.

5. Now, it seems to be clear on the authority of *Alisaheb v. Mohidin* that the subject-matter of the deed of transfer by accused Nos. 1 and 2 to

accused No. 4 is not only property but is also moveable property. That decision lays down that a contract for cutting of trees to be converted into

charcoal is an agreement relating to moveable property.

6. The learned counsel for the opponents contends that the right of cutting trees was only a personal license, and, therefore, not property which can

be transferred, and he relies on some observations of the Sessions Judge that this was only a personal right, but the learned Judge himself has in

another part of his judgment stated that the right is derived under a contract with the State, and there is nothing to show from the record that it was

only a personal license. The document is not on the record.

7. The only question that remains is whether it is property which was intended to be prevented from being distributed among creditors according to

law. The trees are no doubt situated in Bansda State and the agreement between accused Nos. 1 and 2 and the Bansda State relating to the right

of cutting trees took place in that State. The sale-deed transferring the right to accused No. 4 has been executed and registered in British India, the

insolvency proceedings are in British India, and all the accused are also British Indian subjects. The lower Court has proceeded on the basis as to

whether the British Court had any jurisdiction to annul a transfer of property in foreign jurisdiction and thereby to divest the transferee and to vest

the property in the receiver in insolvency, and it replies in the negative on the ground that the foreign Court would not recognise such annulment

with the result that the property could not be distributed among creditors in British India. But this view seems to us to be incorrect. According to

the law of Bankruptcy, which on this point is the same in England as in India, the law imposes on the bankrupt-

A personal obligation enforceable by the punitive process of the Court to do all acts necessary for completing the title of the trustee to all property

situate outside the British dominions.... By the rules of private international law, Immovable property can only be transferred in accordance with the

lex rei sitae; moveables, on the other hand, follow the person and, wherever situate, are bound by an adjudication in bankruptcy in the country

where the bankrupt is domiciled, unless the particular law of the country where the property is situate specially prevents this.

Vide Halsbury's Laws of England, 2nd Edn., Vol. II, para. 277, page 208; Cf. Sections 17 and 33 of the Presidency-towns Insolvency Act and

Sections 22 and 28 of the Provincial Insolvency Act. In two recent cases, the Calcutta High Court has summarised the law to the same effect,

though the points actually decided in them were different from the point arising in the present case (Yok, Sp. Bank Ltd. v. Curlender & Co. ALR

[1926] Cal. 898 and Sumermull Surena v. Bansilal [1932] AIR Cal. 310)

8. The position, therefore, is that moveable property in a foreign State belonging to the insolvent would ordinarily vest in the receiver in insolvency

and the latter can take steps to recover it through the insolvent or otherwise so as to make it available and distributable among his creditors. It may

be that in some cases he may not succeed in doing so, but the liability of the property being distributed among creditors does remain according to

the law of British India, and if a dishonest or fraudulent transfer, removal or concealment or delivery of such property, is made by the insolvent

without adequate consideration so as to prevent its distribution among his creditors according to our law, the offence u/s 421 would be established

even if that property is in a foreign State. I think, therefore, that the lower Courts were wrong in holding that no offence was committed under that

section and in discharging the accused.

9. With regard to the offence u/s 423, the learned Sessions Judge says that there was no falsa recital in the deed of transfer as contemplated by

that section, but in his judgment he has not discussed the evidence nor has he given any reasons for saying so.

10. In the result, the grounds of law on which the order of discharge is based cannot be sustained.

11. It has been urged by the learned counsel for the opponents that this Court should not, in any case, interfere with the order of discharge as the

dispute between the parties is a civil one and various legal proceedings are pending between them, one of which is a suit by the petitioner in the

Bansda State Court in which the validity of this deed of transfer is in question. However, the lower Courts have not gone into the merits of the case

but have based their decision on the ground that the facts alleged by the complainant do not amount to an offence as British Indian Courts have no

jurisdiction over the property. In this application, we have not got the evidence placed and discussed before us and we are therefore unable to say

that the dispute is only of a civil nature.

12. The rule is made absolute, the order of discharge is set aside and the case is sent back to the trial Court to be dealt with according to law.

Barlee, J.

13. I agree with the order proposed by my learned brother. This does not of course mean that the Magistrate is bound to frame a charge, for there

are several points to be considered, which he has still to consider. He will have to record his findings on all the issues which arise in the case and

then either frame a charge or discharge the accused.

14. On the merits we agree with the learned Sessions Judge that the opponents' right under the contract with the Bansda State was "property".

The principal question for us to decide is whether this right or the proceeds of its sale could have been distributed amongst the creditors in an

insolvency had it not been transferred by the accused. The learned Magistrate held in the negative because the right is property outside British

India. The learned Sessions Judge agreed with him on the ground that the Insolvency Court cannot annul a transfer of property which is not within

its territorial jurisdiction. It seems to us that he has missed the point, for it is an offence to make a transfer which cannot be annulled by an

Insolvency Court.

15. Section 28 of the Provincial Insolvency Act provides that the whole of the property of the insolvent shall vest in the Court or in a receiver and

shall become divisible among the creditors.

16. It has been contended that this must be interpreted to include only the property of the insolvent which is within jurisdiction, on the ground that it

must be presumed that the legislature does not intend to legislate in respect of property beyond jurisdiction. But this cannot be conceded; for the

corresponding section of the Presidency-towns Insolvency Act, Section 17, provides that the property of the insolvent "wherever situate" shall

vest in the Official Assignee, and it is, therefore, clear that the legislature does not consider that its jurisdiction is restricted to property within

jurisdiction. The reason is that the insolvent himself is and must be subject to the jurisdiction of the Insolvency Court, since he must be a person

who resides, or carries on business or works for gain within the local area in which the Court has jurisdiction; and he is, therefore, personally

subject to the jurisdiction of the Court. This jurisdiction is similar to that claimed by the Court of Chancery over property both moveable and

Immovable outside jurisdiction: *Penn v. Lord Baltimore* (1750) 1 Ves. Sen. 444.

17. The literature on this subject is scanty. We have been shown no case which is on all fours with the case with which we are dealing. In *Naoroji*

Sorabji Talati, In re ILR (1908) 3 Bom. 462 : 10 Bom. L.R. 965, it was held that the property of an insolvent situate at Shanghai vested in the

Official Receiver in Bombay. The question there was not whether the property had vested in the Official Receiver in Bombay, but how he might get

control or possession; and the solution was that he could seek the assistance of the British Consul, who had jurisdiction over the insolvents. Two

cases have been cited from an unauthorised report. In *Yok. Sp. Bank Ltd. v. Curlender & Co.* (1926) AIR Cal. 898 the question was entirely

different from that at present under consideration. Apparently *Mogi & Co.*, a Japanese firm, was declared insolvent in Japan; and the *Yokohama*

Bank obtained a dividend in Japan. In a contemporaneous or subsequent insolvency in Bombay, the Bank was a creditor and it was held that it

was not bound to account for the dividend received out of jurisdiction, as that was not a part of the fund available for distribution among the

creditors in Bombay. It is to be noticed that both the Bank and *Mogi & Company* had a Japanese domicile. It was not argued that moveables in

Japan would not have been a part of the fund available for the Indian creditors had they not been transferred; and it seems to have been assumed

that they would have been available had the *Yokohama Bank* had an Indian domicile.

18. The other case is *Sumermul Surena Vs. Bansilal Abirchand*, in which it was held merely that an Insolvency Court in Calcutta would not issue

an injunction to restrain a creditor domiciled in Bikanir from suing in Bikanir to recover im-moveables of an insolvent situate there. This merely

means that the Bikanir creditor was not subject to the personal jurisdiction of the Calcutta Court.

19. The general result is that the property of an insolvent which is outside jurisdiction vests and can always be distributed, so long as it remains in

the possession of the insolvent. In the two Calcutta cases the Courts were not concerned with this question, but with difficulties which had arisen

owing to the fact that the property had been taken or was likely to be taken by third parties by due process of a foreign law; and with such

questions we have no concern.

20. Mr. Thakor has contended that the word "property" in Section 421 includes only corporeal property. He relied on Section 22 for the

definition of "moveable property" and on the plan of Chapter XVII of the Code. In his view in none of the other sections of that Chapter, which

relates to offences against property, can the word "property" be interpreted as anything but corporeal property.

21. It is clear that in theft, robbery and receiving stolen property the property must be corporeal property, and very possibly the same can be said

about "mischief. I am not so sure about "criminal breach of trust". But we do not think it necessary to consider the chapter section by section or to

decide exactly whether the word "property" in other sections can only refer to corporeal property, for we are satisfied that there is no rule which

restricts the meaning of the word in the section with which we are dealing. The definition in Section 22 of "moveable property" is an inclusive

definition. It informs us that "moveable property includes corporeal property of every description," but it does not give us any information about

incorporeal property. A wider definition is contained in the General Clauses Act, where "moveable property" is defined in Section 3, Clause (34),

as property of every description except Immovable property. The word "property" in Section 421 is wide enough to include a chose in action, and

it appears to us that we should give a wide interpretation to the word here since the act of dishonestly transferring a chose in action to defraud

creditors is within the mischief of the section.