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17 B. 334.

previously in three cases arrived at the same conclusions—*Queen v. Mahendranarayan Bangabhushan* (1); *Aradhun Mundul v. Myan Khan Takadgeer* (2); *Queen v. Ram Rutton Mookerjee* (3).

For the reasons that I have given I am of opinion that this Court has no power to admit the insolvent to bail; and that assuming it has such power, this is not a case in which, in the exercise of its discretion, this Court ought to allow the insolvent to be bailed until the hearing and final disposal of the appeal.

The application must, therefore, in my opinion, be refused.

Attorneys for the insolvent: Messrs. *Chalk, Walker and Smethan*.

Attorneys for the opposing creditors: Messrs. *Craigie, Lynch and Owen*.

17 B. 341 (P.C.)=20 I.A. 1=6 Sar. P.C.J. 256=17 Ind. Jur. 40.

PRIVY COUNCIL.

PRESENT:

*Lord Hobhouse, Lord Macnaghten, Lord Hannen, Lord Shand
and Sir R. Couch.*

[*On appeal from the High Court at Bombay.*]

RAHIMBOY HABIBBOY (*Original Defendant*), Appellant v.
CHARLES AGNEW TURNER (*Original Plaintiff*), Respondent.
[9th and 10th November, 1892].

Limitation—Application of s. 18, Act XV of 1877—Knowledge kept from the Official Assignee (11 and 12 Vic., c. 21), of his right to sue for an account of assets fraudulently transferred by an insolvent—Burden of proving when first the plaintiff had clear and definite knowledge—Party for purpose of discovery— Ss. 13 and 43, Civ. Proc. Code (XIV of 1882)—Account.

In order to make limitation operate when a fraud has been committed by one who has obtained property thereby, it is for him to show that the injured complainant has had clear and definite knowledge of the facts, constituting the fraud, [342] at a time which is too remote for the suit to be brought. Suggestion of his having been defrauded does not amount to such knowledge as is required by s. 18 of the Indian Limitation Act XV of 1877.

In a suit brought by the Official Assignee in 1887 it was established that the defendant receiving in 1869, upon a voluntary transfer, some of the insolvent's assets, joined and assisted him in defrauding his creditors; and that no disclosure of this fraud was made to the Official Assignee, while the defendant did what he could to prevent the latter from seeing the accounts of the assets transferred.

Held, that the burden of proof was on the defendant to show that the plaintiff had clear and definite knowledge of this fraud for more than the period of limitation. This burden had not been discharged by proof of the fact that some hints and clues had reached the Official Assignee which might have led to such knowledge; and *held*, that the Official Assignee had been kept from knowledge of his right to sue, within the meaning of s. 18 of the Limitation Act.

Also, this defendant having been "made a party," but only "for the purpose of discovery," to a prior suit brought by the plaintiff, according to an order in that suit, in which, however, there was no decree against him as a party, and no order as to his costs:

Held, that this irregular proceeding had not rendered him a party to that suit so as to make applicable either s. 18 or 43 of the Civil Procedure Code (XIV of 1882).

(1) 1 B. L. R. A. C. 7.

(2) 24 W. R. C. R. 7.

(3) 24 W. R. C. R. 8.

A decree that the defendant should account to the Official Assignee for the assets received by him from the insolvent after the date of the insolvency was affirmed.

[F., 14 Bom. L.R. 771=17 Ind. Cas. 10 (11); 15 C.W.N. 102 (105)=6 Ind. Cas. 154; 27 A. 540 (543)=2 A.L.J. 350=25 A.W.N. 88. R., 31 M. 230 (233)=18 M.L.J. 19=4 M.L.T. 80; 15 C.W.N. 102 (105)=6 Ind. Cas. 154; 15 C.W.N. 965 (970)=11 Ind. Cas. 295 (298); 16 C.W.N. 894=16 Ind. Cas. 464 (465); 19 Ind. Cas. 163=9 M.L.T. 303=(1911) 1 M.W.N. 192; 2 N.L.R. 98 (99); 18 C.W.N. 1266; 24 Ind. Cas. 249.]

APPEAL by special leave (1) from a decree (17th March, 1890) (2) of the appellate High Court, generally affirming, with a modification, a decree (10th December, 1888) (3) of the Court in the original jurisdiction.

This suit was brought by the Official Assignee on the 25th February, 1887, and arose out of the insolvency, in Bombay, of Alladinbhoj Habibbhoj. The adjudication under the Indian Insolvent Act was dated 9th January, 1867, and the petition, to which the vesting order related back, 17th December, 1865.

The defendant, against whom it was alleged that he had become liable to account to the Official Assignee, was Rahimbhoj Habibbhoj, the insolvent's brother, to whom the property of the insolvent had been transferred, whilst Rahimbhoj was carrying on business with another brother, Ahmedbhoj, with whom he remained partner in Bombay, trading under the name [343] of Ahmedbhoj Habibbhoj until August, 1869. These two brothers also had a branch firm styled Rahimbhoj Habibbhoj carrying on business in Hongkong, where also the insolvent, Alladinbhoj, had a firm as well as in Bombay.

The property, of which fraudulent possession was attributed to the defendant, was in six classes as set forth in the plaint and in the judgments of the Courts below (4).

As to three of these classes of property the suit in the original jurisdiction was dismissed. As to the remaining three an account was decreed of the dealings between the defendant's firm and the insolvent. On appeal, the High Court affirmed this decree with a variation of detail, but decided against the plaintiff as to one of the three classes that had been allowed in the first instance, and as to the other two classes restricted the account decreed, so that it should only commence with the assets received by the defendant after the date of the insolvency. No appeal was preferred by the Official Assignee. This appeal was, accordingly, limited to the transfer of the two classes of property, which were referred to as the China property and the Elphinstone shares. It involved the main question whether the transfer was not only voluntary and invalid against the creditors of 1866, but was a fraud which prevented the Official Assignee from having the knowledge of his right to recover the assets during the intervening years so as to bring into operation the saving effect of s. 18 of the Limitation Act. The question whether a decree made against Ahmedbhoj in 1882 had barred the claim was also considered; as well as whether modifications in the taking of the account made by the appellate Court were correct.

In 1881 the Official Assignee sued Ahmedbhoj. In that suit an order was made for the present defendant Rahimbhoj to be made a party "for the purpose only of discovery." No relief was in that suit sought against Rahimbhoj, nor was any decree, made against him. But

(1) 15 B. 155.

(2) 14 B. 408.

(3) 14 B. 412.

(4) 14 B. 411 (422).

1892
NOV. 10.PRIVY
COUNCIL.17 B. 341
(P.C.)=

20 I.A. 1=

6 Sar. P.C.J.
256=17
Ind. Jur.

40.

1892
Nov. 10.

PRIVY
COUNCIL.

17 B. 341
(P.C.)=
20 I.A. 1=
6 Sar. P.C.J.
256=17
Ind. Jur.
40.

there was a decree, after a reference to arbitration, made against Ahmedbhoj for Rs. 3,60,000 in [344] connection with transactions with the insolvent's estate. In December, 1885, in the course of that suit, an order for the inspection of the account books then in Rahimbhoj's (the present defendant's) possession was obtained. This led to further discoveries and this suit was, in consequence, filed.

The facts are stated at length in the report in I. L. R., 15 Bom., p. 155. They are given in the judgments of the Courts below; and they also appear in their Lordships' judgment on this appeal.

The High Court concurring with the first Court found that as to the China property the evidence established a fraudulent transaction as regarded the creditors on the part of the China and Bombay firms of Rahimbhoj and Ahmedhoy in complicity with the insolvent himself. Also, as to the Elphinstone shares, the Courts found that the conduct of the three brothers in 1866 left no doubt that although the transfer was for value, it was effected in furtherance of the general scheme for delaying and defeating creditors. As regarded limitation, both Courts treated the period as three years from the time of the adjudication in January, 1867. But they held that limitation did not apply where, as here, the plaintiff had by means of fraud been kept from the knowledge of his right to sue. The foundation for this was the conclusion at which the Courts had arrived, that there was designed fraud in the transaction by which the defendants, knowing to whom the rights belonged, concealed the circumstances giving those rights, until the Official Assignee obtained inspection of the China books in December, 1885.

As to the suit brought in 1881, the present defendant was not, according to the opinion of the first Court, then made such a defendant as that a substantial decree could have been passed against him. It was not in that suit asserted that the Elphinstone shares were claimed at all. The first Court also found as a fact that the claim originally made in 1881 in respect of part of the China assets was not taken into consideration by the arbitrator in determining the amount which he awarded to the Official Assignee. Lastly, the terms in which the accounts were directed appear in the judgments of the Courts below (1).

[345] Mr. A. Cohen, Q. C., and Mr. J. H. A. Branson, for the appellant, argued that the claims of the plaintiff both in respect of the China assets and the Elphinstone shares should have been held barred by limitation, the Courts below having erred in applying the saving provisions of s. 18 of the Limitation Act to this suit. The proceedings in 1881 showed that the Official Assignee before 1885 possessed, at least, the means of obtaining knowledge of the circumstances, and the means of ascertaining the particulars. It was upon his knowledge that he took those proceedings. Further evidence was afforded, to which reference was made in the record, upon which, as it was contended, the Official Assignee might have, but had not, acted against the present defendant. The Courts below should have found upon the facts that it was not proved that the plaintiff had by means of fraud, on the part of the defendant, been kept from the knowledge of his right, such "keeping from knowledge" being an essential part of the case. It was not sufficient that an invalid, or fraudulent, preference, on the part of the insolvent, should have been shown, or even that Rahimbhoj assisted him, for nothing less than continuance in concealing of the real state of things

(1) 14 B. 411 (422).

by the defendant would satisfy the requirement of s. 18. In regard to having the means of knowledge, reference was made to *Barnes v. Addy* (1). It was also contended that the Courts below ought to have held that the judgment obtained against Ahmedbhoj in 1882, barred this suit, the prior suit having been based on allegations of a collusive and fraudulent transfer of the property of which an account was decreed. This defence was maintainable either under s. 13 of the Civil Procedure Code (XIV of 1882) in one view of the case, or in another, under s. 43, as the two classes of property now in dispute, if to be the subject of an account, might have been included in the prior suit.

Mr. *R. B. Finlay*, Q.C., and Mr. *J. D. Mayne*, for the respondent, were heard only as to the variation in the mode of taking the account.

Mr. *A. Cohen*, Q.C., replied on this last matter.

JUDGMENT.

[346] At the end of the arguments of counsel their Lordships' judgment was given by

LOLD HOBHOUSE.—This suit is brought by the Assignee of Alladinbhoj, who became insolvent in the year 1867, against the appellant, to recover assets alleged to belong to the insolvent's estate, of which the appellant had wrongfully become possessed.

The dispute is now narrowed down to two items, one being what is called the China assets, and the other, certain shares in a joint stock Company called the Elphinstone Land Company.

There is no need to make a long story about the facts, of which very few are in dispute. The only peculiarity in the case is the length of time that elapsed between the insolvency and the bringing of the action. Their Lordships entirely accept the view which both the Courts below have taken, that the insolvent, his son, and his two brothers, Ahmedbhoj and the present appellant Rahimbhoj, combined together to conceal the property of the insolvent with the view of defrauding his creditors.

The first item which is in dispute, namely the China assets, is of the following kind. The insolvent had a business at Hongkong, and his brothers Ahmedbhoj and Rahimbhoj also carried on business at the same place in partnership. By the middle of 1866 the insolvent was in very embarrassed circumstances. In September, 1866, he absconded so as to conceal himself from his creditors. His petition in insolvency was presented on the 17th of December, 1866, and he was adjudicated insolvent on the 7th of January, 1867. Pending these transactions, that is to say on the 1st of January, 1867, between the date of the petition and the date of the adjudication, the whole of the insolvent's assets at Hongkong were handed over by his manager to the firm of his brothers Ahmedbhoj and Rahimbhoj, and his books were also handed over. It is not disputed that the transfer was a voluntary one; that it cannot be maintained, and that if this action had been brought in 1867 the assets must have been recovered. But it is said that as the action was not brought till 1887, it is barred by time. The answer is that the transfer was not only a voluntary one and bad against the creditors, but that it was committed in pursuance of a fraud, and was concealed from the [347] creditors; that it was a fraud which prevented the Assignee from having knowledge of his right to recover the assets, and, therefore, falls within the 18th section of the Limitation Act XV of 1877, which directs that in such a case the

(1) L.R. 9 Ch. 244.

1892
 NOV. 10.
 —
 PRIVY
 COUNCIL.
 —
 17 B. 341
 (P.C.)=
 20 I.A. 1=
 6 Sar. P.C.J.
 256 = 17
 Ind. Jur.
 40.

1892
Nov. 10.

PRIVY
COUNCIL.

17 B. 341

(P.C.)=

20 I.A. 1=

6 Sar. P.C.J.

256=17

Ind. Jur.

40.

time for instituting an action shall be computed from the time when the fraud first became known to the person injuriously affected thereby.

The Assignee is positive that he did not know anything about this fraud until the year 1885, when he learnt it in the course of a suit brought against Ahmedbhoy to recover a number of other items, in conjunction with this one, belonging to the insolvent's estate.

Their Lordships consider that when a man has committed a fraud, and has got property thereby, it is for him to show that the person injured by his fraud and suing to recover the property has had clear and definite knowledge of those facts which constitute the fraud, at a time which is too remote to allow him to bring the suit. That is attempted in the present case. But their Lordships consider, —and in this they agree with both the Courts below—that all that the appellant Rahimbhoy has done is to show that some clues and hints reached the Assignee in the year 1881, which perhaps, if vigorously and acutely followed up, might have led to a complete knowledge of the fraud, but that there was no disclosure made which informed the mind of the Assignee that the insolvent's estate had been defrauded by Rahimbhoy of these assets in the year 1867.

Reference is made to a letter showing the transfer of the assets at that time, to an affidavit of documents which in themselves contain hints as to the conduct of the parties, and to certain memoranda called "the stitched book," which was kept by a treacherous servant of Ahmedbhoy, which again give hints and clues which might have led to knowledge. But all this while the appellant was doing what he could to keep back the books of the insolvent firm which he had got into his hands, and to prevent the Assignee from seeing accounts which he desired to see. Their Lordships cannot consider that this is such knowledge on the part of the Assignee as would deprive him of the benefit of the 18th section of the Limitation Act. They, therefore, [348] consider that the action is brought in good time, being brought within two years after the real knowledge came to the mind of the Assignee.

Then it is said that the suit against Ahmedbhoy is itself a bar to the present suit, because Rahimbhoy was made a party to it. There seems to have been a very irregular proceeding in that suit. Rahimbhoy was made a party expressly, as the order termed it, for the purpose of discovery only, but he was not treated as a party. There was no decree against him; he was dispensed from attendance unless and until the plaintiff gave him notice; and the Court has never made any order about his costs.

Their Lordships consider that the Courts below took a right view when they held that Rahimbhoy must not be considered a party to that suit, so as to be bound or protected by a decree made in it.

It is further urged that this item has in fact been recovered from Ahmedbhoy. It should have been mentioned that Ahmedbhoy and Rahimbhoy dissolved partnership in the year 1871, and they have since that time been severed in interest. No doubt there was the suit against Ahmedbhoy which has been already mentioned, and the item was claimed against him in that suit. But the suit resulted in a reference to an arbitrator, and it was agreed between the parties when they came before the arbitrator that this particular item should not be pressed. It was in effect withdrawn from the arbitrator, and as the decree only follows the arbitrator's award, that item must be considered as excluded from the suit.

Their Lordships consider that there is nothing now to prevent the Assignee making his claim against the appellant Rahimbhoy, who is the other party to the fraud.

An objection was made by counsel for Rahimbhoy to a variation of the decree made by the first Court. The first Court directed a general account of the dealings between Rahimbhoy's firm and the insolvent. The appellate Court limited that account, by directing that it should only commence with the [349] assets received after the date of the insolvency. Their Lordships consider that the appellate Court have gone upon a right principle, and they decline to vary the decree in that respect.

The remaining item is that which has reference to the Elphinstone shares. As regards the question of fraud, this item stands in precisely the same position as that which relates to the China assets, and their Lordships come to the same conclusion upon it.

The appellant, however, complains of a variation made in the decree of the first Court by the appellate Court, by which it is directed that in taking an account of these shares two sums for which credit is claimed by the appellant shall be disallowed to him. The matter stands in this way. The shares belonged to Alladinbhoy. He mortgaged them to the Imperial Bank of Bombay. On the 15th of May, 1866, the firm of Ahmedbhoy and Rahimbhoy paid off the sum then due upon the mortgage of the shares, namely, Rs. 68,838-4, and they subsequently paid a call upon the shares of Rs. 22,785-8. When the reference was before the arbitrator in the suit against Ahmedbhoy, Ahmedbhoy claimed to be allowed those two sums. The appellate Court thought that inasmuch as that matter was before the arbitrator it must be taken as certain that he allowed those two sums, or allowed value for them, and made his award against Ahmedbhoy upon that footing. It does not seem to their Lordships that this is by any means certain. It appears that there was an agreement made between Ahmedbhoy and Rahimbhoy in the year 1871, by which a sum of Rs. 1,17,520, which under a previous award belonged to Rahimbhoy, was transferred by him to Ahmedbhoy and became Ahmedbhoy's property. There were several other items surrendered by Rahimbhoy to Ahmedbhoy, and Rahimbhoy took all the residue of the property of the partnership. That was the effect of the agreement of 1871. The appellate Court have considered that the two sums of Rs. 68,838-4 and Rs. 22,785-8, claimed in the reference in Ahmedbhoy's suit, were portions of the Rs. 1,17,520 which was assigned by Rahimbhoy to Ahmedbhoy, and they have directed that, so far as those sums form a portion of the Rs. 1,17,520, they shall be disallowed in taking the account.

[350] Their Lordships are not at all prepared to say that it may not turn out as the appellate Court anticipate; but they do not consider that there is evidence enough before them to warrant them in assuming any such thing. It may be that there is no identity between the two sums. It may be that the arbitrator, finding that the two sums were a charge upon certain shares which were not embraced in the suit against Ahmedbhoy, threw out the whole matter. Their Lordships cannot tell what circumstances may be brought out in the inquiry. Upon the general account directed by the first Court the whole facts will be ascertained; and then it will be competent for the Court to make a decree to meet the exact justice of the case.

Their Lordships think it, therefore, more prudent at the present stage of the case to make no direction as to those sums. What they say now is not intended to prejudice the question in any way. They merely think

1892
Nov. 10.

PRIVY
COUNCIL.

17 B. 341
(P.C.) =
20 I.A. 1 =
6 Sar. P.C.J.
256 = 17
Ind. Jur.
40.

1892
Nov. 10.

PRIVY
COUNCIL.

17 B. 341
(P.C.)=
20 I.A. 1=
6 Sar. P.C.J.
256-17
Ind. Jur.
40.

that it is right to suspend the judgment until the facts are accurately ascertained.

It should be observed that this matter is not mentioned in the pleadings. If it were the case that the two sums were taken into account by the arbitrator, and the shares thereby liberated from the charge, it would have been more natural to have disclosed that fact in the pleadings, in order that it might be sifted and elucidated in the course of the evidence and the hearing. But that has not been done, and therefore there is a certain amount of obscurity and darkness hanging over the point, which makes their Lordships desirous that the account should be taken in the general form settled by the first Court.

The result is that the decree of the appellate Court will be varied, by omitting therefrom the direction that the defendant is not to be allowed credit for the sums of Rs. 68,838-4 and Rs. 22,785-8 so far as the said two sums are included in the sum of Rs. 1,17,520, and affirmed in all other respects.

With regard to the costs of the appeal, their Lordships think that the variation now made ought to make no difference. Though it may prove to be a point of importance, the appeal was presented, not on this ground, but on the much broader and [351] more vital grounds which have been dealt with and decided adversely to the appellant.

Their Lordships think, therefore, that substantially this appeal has failed, and that the appellant must bear the costs.

Solicitors for the appellant: Messrs. *Lathey and Hart*.

Solicitors for the respondent: Messrs. *Payne and Lattey*.

17 B. 351.

ORIGINAL CIVIL.

Before Mr. Justice Starling.

MORARJI CULLIANJI (*Plaintiff*) *v.* NENBAI AND OTHERS
(*Defendants*).* [25th November, 1892.]

Will—Construction—Charity—Bequest to charity—Sadavarat—Bequest to a definite sadavarat—Bequest to two charitable objects, one of such bequest being invalid—Bequest of interest of a fund to A. with invalid gift over of interest after A.'s death—A. takes corpus of fund.

Where a testator by his will directed certain rents to be used "for *sadavarat*," and where from the wording of the will it appeared that the testator intended his executors to establish a definite *sadavarat* in some definite place, and not merely, at their discretion, themselves to distribute the income of the property at any indefinite place, and perhaps at many places, to Brahmins and travellers.

Held, that the bequest to charity was good, and an enquiry was directed as to the place at which such *sadavarat* should, at the proper time, be established, and a scheme for its administration was ordered to be prepared.

A testator by his will directed that, if his daughters died without issue, the property of his daughters should be used by his executors for *dhurm* and for *sadavarat*.

Held, following *Hoare v. Osborne* (1), that the bequest was good to the extent of one-half in favour of the *sadavarat*. The gift to *dhurm* being invalid, the other half was undisposed of.

A testator by his will directed that his wife should enjoy for life the interest of Rs. 4,000 which were deposited with a certain firm, and that after her death

* Suit No. 96 of 1891.

(1) L.R. 1 Eq. 585.