1930

JANARDAN TRIMBAK v. DINKAR HARI

Madgavkar J.

defendants Nos. 1 and 2 and will pay them 9/10th of their costs.

The cross-objections of the plaintiff are dismissed with costs.

Appeal allowed.

B. G. R.

APPELLATE CIVIL.

Before Mr. Justice Patkar and Mr. Justice Baker.

1930

August 14.

VRIJLAL MANSUKHRAM AND OTHERS (ORIGINAL APPLICANTS), APPELLANTS *v.* FIRM OF MESSRS. CHUNILAL FATECHAND (ORIGINAL OPPOSING CREDITORS), RESPONDENTS.*

Provincial Insolvency Act (V of 1920), sections 63, 64—Declaration and distribution of dividend among creditors—Individual notices not given to creditors—Reopening of such distribution by creditor who has not proved his claim before declaration of dividend.

The provision in section 64 of the Act, as to the necessity of giving notice to all the creditors before the declaration of the dividend is made, does not control the provisions of section 63 of the Act.

In re McMurdo; Penfield v. *McMurdo*,[1] *Harrison* v. *Kirk*[2]; *In re Ramchandra Ganuji*[3]; and *Krishna Chinnoo & Sons* v *Matubhai*,[4] referred to.

Venkatanarayana Chetty v. *Sevugan Chetty*,[5] dissented from.

APPEAL under the Letters Patent against the decision of Mr. Justice Madgavkar in Second Appeal No. 886 of 1927 preferred against the decision of R. S. Broomfield, District Judge of Ahmedabad, in Appeal No. 5 of 1927.

Proceedings in Insolvency.

The material facts are set out in the judgment.

K. N. Koyajee, for the appellants.

H. V. Divatia, for the respondents.

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

*Appeal No. 79 of 1929 under the Letters Patent.

(1) [1902] 2 Ch. 684.
(2) [1904] A. C. 1.
(3) (1922) 29 Bom. L. R. 1167.
(4) (1923) 31 Bom. L. R. 35 at p. 48.
(5) (1924) 47 Mad. 916.

the appellants, Vrijlal Mansukhram and others, who were the creditors of the insolvent, proved them only after the declaration of the dividend.

The learned Subordinate Judge held that as it was the only dividend and probably the final dividend, the appellants were entitled to individual notices under section 64 of the Provincial Insolvency Act V of 1920, and therefore, as they did not receive the notices they were entitled to re-open 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, Mr. Justice Madgavkar 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.

In this appeal it is urged on behalf of the appellants that under section 64 of the Provincial Insolvency 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 page 359 of the Civil Circulars, and rule No. 24, clause (6) at page 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*.[1]

It appears that on March 8, 1926, the receiver sent a report to the Court, but did not mention therein that the assets which were realised were the only assets available for distribution, nor is there the opinion of

[1] (1924) 47 Mad. 916.

1930

VRIJLAL MANSUKHRAM v. CHUNILAL FATECHAND

Patkar J.

the Court that the assets realised were the only available assets and that the receiver should declare a final dividend. Under those circumstances on March 12, 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 March 26, 1926, the appellants made an application, Exhibit 12, to prove their claim. The receiver opposed the application and in paragraph 9 of the receiver's report it is mentioned: "There appear to be some outstandings of the insolvent but these cannot be ascertained unless the khatas have been made up." We are not, therefore, satisfied in the present case that the dividend which was declared and distributed was the final dividend in the insolvency.

Assuming, however, that it was the first and the final dividend, section 63 of Act V 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 disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein."

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.

In *In re McMurdo; Penfield* v. *McMurdo*,[1] where a similar question arose, it was held by Vaughan Williams L. J. at page 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

[1] [1902] 2 Ch. 684.

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 cases 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."

To the same effect is the opinion of Romer L. J. at page 706.

In an analogous administration suit in *Harrison* v. *Kirk*[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.

In *In re Ramchandra Ganuji*,[2] 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 page 1176, Marten J. observes :—

" Then other cases cited to me were *Ex parte Day: In the matter of Fenton*[3]; *Ex parte Dilworth*[4]; and *In re Graham.*[5] 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."

And after a reference to section 72 of the Presidency-towns Insolvency Act, which corresponds to section 63 of the 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

(1) [1904] A. C. 1.
(2) (1922) 29 Bom. L. R. 1167.
(3) (1831) 1 Mon. 212.
(4) (1842) 3 Mon. Deac. & De. Gex 63.
(5) (1833) 2 Deac. & Chitty 554.

1930

VRIJLAL MANSUKHRAM v. CHUNILAL FATECHAND

Patkar J.

to interfere with a past distribution. That I entirely follow when one has a case where the creditor comes in *late* but every thing up to that date had 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 as far as we can in the future."

At the time of the declaration of the first dividend it is not possible for the receiver to be sure whether it will or 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 under section 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 fault in omitting to issue individual notices. Further, it appears from the receiver's report that petitioner No. 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.

In *Krishna Chinnoo & Sons* v. *Matubhai*,[1] 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

[1] (1928) 31 Bom. L. R. 35 at p. 48.

Official Assignee to accept the proof did not prejudice their rights.

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 of the Provincial Insolvency Act. In *Venkatanarayana Chetty* v. *Sevugan Chetty*[1] 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 re-open the distribution on the ground of want of notice under section 64 of the Act, we prefer the view taken by Madgavkar J. which is supported by the cases to which I have referred.

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

BAKER, J. :—I am of the same opinion. The question really is whether the express provision in section 63 of the 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 Mr. Justice Madgavkar, viz., *Venkatanarayana Chetty* v. *Sevugan Chetty*,[1] but the subject has been discussed by this Court in *In re Ramchandra Ganuji*,[2] and from the

[1] (1924) 47 Mad. 916. [2] (1922) 29 Bom. L. R. 1167.

1930

VRIJLAL MANSUKHRAM v. CHUNILAL FATECHAND

Baker J.

remarks at page 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*[1] and *In re McMurdo; Penfield* v. *McMurdo*.[2] In this state of the authorities and in view of the practice obtaining in England, I think that the view taken by Mr. Justice Madgavkar is correct and that the appeal should be dismissed.

Appeal dismissed.

B. G. R.

[1] [1904] A. C. I. [2] [1902] 2 Ch. 684.

APPELLATE CIVIL.

Before Mr. Justice Patkar and Mr. Justice Baker.

1930

September 9.

SHIDRAMAPPA MUTAPPA BIRADAR, MINOR, BY HIS GUARDIAN NAGAWA KOM MUTTAPPA (ORIGINAL DEFENDANT No. 5), APPELLANT *v.* MALLAPPA RAMCHANDRAPPA BIRADAR, MINOR, BY GUARDIAN SHIDRAMAPPA GOUDAPPA BIRADAR AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT No. 1), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), Order XXIII, rule 1—Withdrawal of suit—Leave granted to withdraw suit and bring fresh suit on condition of payment of defendant's costs—Second suit instituted without paying defendant's costs—Second suit allowed to be withdrawn with liberty to file fresh suit—Second suit bad ab initio*—Third suit after payment of costs of first suit not maintainable.*

Under Order XXIII, rule 1 of the Civil Procedure Code, 1908, where a plaintiff is allowed to withdraw a suit and leave is granted to bring a fresh suit on condition that the plaintiff paid the defendant's costs, the plaintiff is precluded from bringing a second suit unless the costs are paid before the institution of the second suit. If a second suit is instituted without paying the costs of the first suit and leave is granted to withdraw that suit with liberty to bring a fresh suit such leave will not be valid in law and the fresh suit will not be maintainable even if the costs of the first suit are paid before the institution of the fresh suit.

Ambubai v. *Shankarsa*,[1] applied.

Seshayya v. *Subbayya*[2]; *Fischer* v. *Nagappa Mudaly*[3] and *Raokhpal Singh* v. *Sheo Ratan Singh*,[4] approved.

*Appeal from Order No. 2 of 1929.

[1] (1924) 27 Bom. L. R. 243. [3] (1909) 33 Mad. 258.
[2] (1924) 47 Mad. L. J. 646. [4] [1929] A. I. R. (All.) 692.