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WALCHAND v. HARI ANANT

Mirza J.

In *Maung Mra Tun* v. *Ma Kra Zoe Pru*,[1] Mr. Justice Das followed the rulings in *Khema Rukhad, In re*[2] and in *Emperor* v. *Debi Ram*.[3] The earlier case in *King-Emperor* v. *Nga Po Chit*[4] was not cited before him. In *U Po Hla* v. *Ko Po Shein*,[5] a Full Bench of the Rangoon High Court has, after a review of the earlier conflicting decisions on this subject of the various High Courts in India, come to the conclusion that *Khema Rukhad, In re*,[2] is not good law and that the contrary view is correct. The weight of authority of the other High Courts is clearly in favour of our overruling *Khema Rukhad, In re*.[2] I respectfully agree with my Lord the Chief Justice in the interpretation he has put on section 520 of the Criminal Procedure Code and in the order he proposes on this application.

MURPHY, J. I agree and have nothing further to add.

Order set aside.

B. G. R.

[1] (1928) 6 Rang. 259.
[2] (1918) 42 Bom. 664.
[3] (1924) 46 All. 623.
[4] (1923) 1 Rang. 199.
[5] (1929) 7 Rang. 345.

PRIVY COUNCIL.

J. C.* 1932 *May* 6.

OFFICIAL ASSIGNEE OF BOMBAY (PLAINTIFF) *v.* K. B. P. SHROFF AND OTHERS (DEFENDANTS).

[On Appeal from the High Court at Bombay.]

Insolvency—Vesting of property—Rights as Member of Voluntary Association—Native Share and Stock Brokers' Association—Rules of Association—Default of Member—Forfeiture of rights—Transfer of Property Act (IV of 1882), section 12—Presidency-towns Insolvency Act (III of 1909), sections 17, 52.

The Bombay Native Share and Stock Brokers' Association is a voluntary association, the members of which are subject to rules made under the trust deed by which it was constituted. A member, who had been declared under the rules to be a defaulter, was adjudicated an insolvent under the Presidency-towns Insolvency Act, 1909, the insolvency dating from before the declaration of default. The Official Assignee claimed that the member's card of membership, and all rights thereto

**Present:* Lord Blanesburgh, Lord Tomlin, and Sir George Lowndes.

attached, vested in him, and that the proceeds of sale thereof were distributable among the general body of creditors.

Held, that the claim failed because having regard to the nature and character of the Association, as appearing from the trust deed and rules, a member who was declared a defaulter was expelled from the Association and had no interest which could pass to the Assignee, whether the expulsion was before or after the commencement of the insolvency; section 12 of the Transfer of Property Act, 1882, did not apply, as membership involved no transfer of property.

In re Plumbly : Ex parte Grant,[1] referred to.

Appeal from decree of the High Court, 55 Bom. 623, dismissed.

APPEAL (No. 56 of 1931) from a decree of the High Court in its appellate jurisdiction (September 30, 1930) affirming a decree of the Court in its original jurisdiction (March 19, 1930).

On June 23, 1925, a member of the Bombay Native Share and Stock Brokers' Association was declared a defaulter under the rules of the association, and his card or right of membership was forfeited by the directors. On July 2, 1925, the member was adjudicated an insolvent under the Presidency-towns Insolvency Act, 1909, his insolvency dating from some days before the forfeiture of his membership became effective.

On October 9, 1928, the appellant, the Official Assignee, instituted a suit in the High Court against the respondents, directors of the association, on behalf of themselves and all other members, claiming (1) a declaration that the insolvent's card of membership and all rights and benefits annexed thereto vested in the plaintiff, and that the plaintiff was entitled to the net proceeds of the sale thereof; (2) an order that the defendants should sell the said card and all rights and benefits attached thereto and hand over the proceeds to the plaintiff for distribution amongst the creditors of the insolvent.

The trial Judge (Kemp J.) dismissed the suit, subject, however, to an order on the defendants to sell the insolvent's

[1] (1880) 13 Ch. D. 667.

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card, or right of membership, and apply the proceeds in payment of those creditors who were members of the association, any surplus to belong to the association.

An appeal by the Official Assignee was heard by Beaumont C. J. and Blackwell J. and was dismissed. The appeal is reported at 55 Bom. 623.

De Gruyther K. C. and *Stable* for the appellant :—Under the rules of the association the insolvent had (1) a personal right, and (2) a proprietary interest. So far as the rules result in forfeiture of the personal right they are valid, but the proprietary interest represented by the proceeds of the card vested in the Official Assignee. If upon the true construction of the rules the proceeds of sale of the card were distributable among the association creditors, to the exclusion of the general body of creditors (which the appellant denies), the rules were to that extent contrary to the law of insolvency and to section 12 of the Transfer of Property Act, 1882. The insolvency, and therefore the vesting in the Official Assignee of the proprietary interest in the card, dated back to before the insolvent was declared a defaulter. There was a right under rule 62 to have a sale, the rule being valid to that extent. The rules differentiate this case from *In re Plumbly : Ex parte Grant.*[1] [Reference was made to *Borland's Trustee* v. *Steel Brothers & Co., Limited,*[2] *Whitmore* v. *Mason,*[3] *Wilson* v. *United Counties Bank, Ld.,*[4] *In re Farrow's Bank, Ld.,*[5] and *Ex parte Warden : Re Williams.*[6]]

Upjohn K. C. and *Jinnah* for the respondents :—Having regard to the nature of the association and the rules governing membership the insolvent upon being declared a defaulter had no proprietary interest. It is true that the title, if any, of the appellant related back to a date

(1) (1880) 13 Ch. D. 667.
(2) [1901] 1 Ch. 279.
(3) (1861) 2 J. & H. 204 ; 70 E. R. 1031.
(4) [1920] A. C. 102.
(5) [1921] 2 Ch. 164.
(6) (1872) 21 W. R. 51.

earlier than the default, but no proprietary interest vested save such as the insolvent had under the rules, and he had no such interest. The decision in *In re Plumbly*[1] is applicable. Section 12 of the Transfer of Property Act cannot be applied to the facts of this case.

De Gruyther K. C. replied.

May 6.

The judgment of their Lordships was delivered by LORD BLANESBURGH. This is an appeal from a decree of the High Court at Bombay of September 30, 1930, made in its Appellate Jurisdiction, dismissing an appeal of the appellant from a decree of the same Court of March 19, 1930, made in its Original Civil Jurisdiction. The main question for determination is whether a card or right of membership of one Virji Madhavji in the Bombay Native Share and Stock Brokers' Association or the proceeds of sale thereof, when sold, pass to the appellant as the assignee in insolvency of his estate and effects.

By both Courts in India the question has been answered in the negative.

The facts of the case are simple and are not in dispute. On or about November 26, 1910, the insolvent was, on his own application, admitted a member of the Association in the place of his deceased father. On May 11, 1917, a card was issued to him, certifying that as such member, enrolled in 1910, he was entitled to enjoy all the rights and privileges and was subject to all the liabilities of membership according to the rules and regulations of the Association. Being successor to his father he was not, on his enrolment as a member, required to pay any entrance fee, but in every year until he was declared a defaulter as presently to be mentioned he paid to the Association a subscription of Rs. 5, and in the receipt given him on the occasion of each payment he is described as "a registered broker in the Sir Dinshaw Petit Native Share Brokers' Hall". He remained a member of the Association until June 23, 1925. On that day,

(1) (1880) 13 Ch. D. 667.

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following a notification to the Association of June 13 that he was unable to meet his liabilities, he was, under the rules, declared a defaulter and his card or right of membership was forfeited by the Directors. On July 2, 1925, he was adjudicated an insolvent under the Presidency-towns Insolvency Act, 1909. Thereupon by virtue of sections 17 and 52 of the Act all his property wherever situated which might belong to or be vested in him at the commencement of the insolvency (with certain exceptions not presently material) vested in the Official Assignee and became divisible among his creditors. Virji Madhavji's insolvency in fact commenced, at the latest, on June 13, 1925, the date of his notification to the Association already referred to, that is to say, some days before the forfeiture of his membership of the Association had become effective.

More than three years later, on October 9, 1928, the appellant as assignee in his insolvency commenced the suit out of which this appeal arises claiming against the respondents sued as representing the Association a declaration that the card of the insolvent and all rights and benefits annexed thereto were vested in him, the appellant, and that he was entitled to the net proceeds of their sale. He claimed also that the respondents might be ordered to effect such sale and to hand over the proceeds to the appellant for distribution amongst the creditors of the insolvent.

At all times material to these claims of the appellant, the relations between the Association and its members were regulated by a deed of association, dated December 3, 1887, and by rules subsequently made and adopted pursuant to its provisions. In a less formal shape the Association had been in existence for some years before. Recitals in the deed of 1887 show that in 1875 some native brokers doing brokerage business in shares and stocks had formed in Bombay an association for protecting the character, status and interest of native share and stock brokers, and for providing a hall or building for the use of the members of the Association :

that ever since these brokers had been associated as a brokers' association, and that having become possessed of certain moneys they had resolved formally to establish and form themselves into a society to be called the Native Share and Stock Brokers' Association. The deed of 1887 was to accomplish that purpose. All the existing members of the Association in person or by representation were parties to it of the first part. By them at a meeting at the Brokers' Hall of the previous 5th of February the parties of the second part had been appointed the Managing Committee of the Association and those of the third part its trustees.

By the deed, made operative as one of mutual covenants between its signatories, it was amongst other things provided that the parties of the first part and such other persons as had already been and as should thereafter be appointed and admitted members should thenceforth constitute and be a society to be called the Native Share and Stock Brokers' Association.

The first stated purpose of the Association was :—

"To support and protect the character, status and interests of brokers dealing in shares, stock and other like securities in Bombay, to promote honourable practice, to suppress malpractices, to settle disputes amongst brokers, to decide all questions of usage or courtesy in conducting brokerage business."

The second purpose was to erect and maintain at Bombay a suitable building for use by the Association as a Brokers' Hall to be called "Sir Dinshaw Petit Native Brokers' Exchange Hall".

A third purpose was to purchase or otherwise acquire any real property and any rights or privileges necessary or convenient for the purposes of the Association, elaborate provision being made for vesting the property of the Association in Trustees.

None but natives of India were to be admitted as members of the Association (clause 2) : any person who was a native of India might with the assent of the Managing Committee

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become a member (clause 3) but any application for membership might be rejected by the Managing Committee without assigning any reason (clause 6). Any member of the Association might withdraw therefrom on two months' notice at the expiration of which he would cease to be a member (clause 11) but any person ceasing for any reason to be a member was nevertheless to be liable for and must pay all moneys then due from him to the Association (clause 13). Upon the Managing Committee, amongst other wide powers, was conferred the power of "framing and altering Bye-laws and Rules from time to time for the guidance of the members" (clause 21), while by clause 26 a general meeting of the members was given power "to ordain and make such and so many rules and orders although they may have the effect of altering the clauses and provisions of these presents as to them or the major part of them shall seem necessary for," *inter alia*, "carrying the objects and purposes of the said Association into full and complete effect and such rules and orders or any of them from time to time to alter, change or annul".

One clause of the deed, and certain "rules and orders" subsequently ordained by general meetings of the Association their Lordships now set forth textually as being more or less directly germane to the question at issue on this appeal.

DEED.

"Section XII.—That the rights and privileges of a member during his lifetime shall be enjoyed by his sons without any payment of entrance fee or the annual subscription but otherwise shall be personal and incapable of transfer by the act of such member or by operation of law, those of a firm shall cease upon its dissolution and those of an individual member on his death."

RULES.

"3. No person, without holding . . . a card, shall be allowed to enter the hall and the business.

"4. For admission into the hall, each person shall be charged a fee of Rs. 1,000, and a member thus admitted shall have to pay an annual subscription of Rs. 5.

"5. The Board of Directors has power to enhance or reduce the admission fee and the annual subscription from time to time according to the circumstances.

"8. A member who is admitted as above, shall act according to the rules and regulations of the hall and if it is proved that he is guilty of misconduct of any sort, the Board of Directors have power to strike off his name from the list of certified brokers of the hall. Besides this, his admission fee also shall be forfeited.

DISPOSAL OF THE DECEASED BROKER'S CARD.

"13. On the death of a certified broker his card shall pass to his son, and no fee will have to be paid on that account.

"15. If the deceased broker has no issue, the card shall be sold to the person to whom the widow or the executor of the deceased directs (it to be sold) . . .

DIRECTOR.

"16. Only after obtaining the assent of the Board, shall the card be transferred as above to a particular individual, and the director shall disallow any such application without giving any reason.

"17. If there is no such relative of the deceased broker who can carry on his business, his card shall be sold according to the practice of the Association and the sale proceeds thereof shall be paid to his widow or to any one else (who is) his lawful heir.

DISPOSAL OF AN INSOLVENT BROKER'S CARD.

"18. If any of the brokers goes away from the market without paying the moneys claimable by another certified broker or is unable to pay (the same), his card shall be sold and the sale proceeds thereof shall be distributed amongst his creditors.

"19. If any deceased broker is indebted to any of the certified brokers the directors shall settle such debt and shall pay whatever amount they want to pay from the sale proceeds of the card of the deceased, and the balance, whatever it be, shall be paid to his lawful heir.

"21. If any broker does not pay the subscription in respect of his card for two consecutive years, his name shall be struck off the roll of members, his card shall be forfeited . . .

CONDUCT OF BROKERS.

"22. If the card of any broker has been forfeited for any reason whatever, no certified broker shall deal with him in any way, and if any broker will be found so dealing with him, his card also shall be forfeited.

"56. If a member fails to pay the annual subscription

or

K. goes away from the Association's Hall

or

Kh. If the Directors deprive any member of his rights for his having failed as a member broker of the Association to pay the amount due to any other member broker of the Association in respect of share and stock business, then after such a thing is notified and after his name is published by order of the Directors as that

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of a defaulter that broker shall cease to derive any benefit as a member of the Association and the amount paid by him as entrance fee to the Association shall be forfeited.

"57. In addition to their inherent powers the Directors shall have, free from anybody's right of raising any question in that behalf, the following powers (*i.e.*) . . . to sell . . . the right appertaining to the vacancy thus created and to distribute in such manner as the Directors may deem proper the amount which may be realized from the purchase of the right of the member who may have been declared a defaulter as stated above, among such members of the Association who may be declared to be the creditors of that defaulter and the defaulting member shall have no right to challenge this power possessed by them.

"62. On account of his having become a defaulter his card shall be cancelled in accordance with the rules of the Association. If he fails to pay in full his creditors within a period of six months then his card shall be sold and the amount realized on the sale thereof shall be distributed among his creditors in proportion (to their claims) and if on such distribution being made any balance remains over then the same shall remain credited to the account of the fund in respect of the hall."

RESOLUTION OF 17TH NOVEMBER 1924.

"If a member who has continued to be a member for a period of not less than 25 years, desires to tender his resignation and intends to have his nominee enrolled as a member in his stead and applies in writing to the Board accordingly, the Board can, if it deems proper under the absolute discretion vested in it, enroll the aforesaid nominee (as a member in the place of the said member without charging any entrance fees . . .

"The Board shall not enroll any such nominee as a member unless and until in connection with the said matter, the said nominee is fit in all respects to become a member according to the rules and regulations governing the exchange at that time, and the said proposed nominee has been selected by the Board itself.

"From what has been hereinabove stated it is not to be thought that (it) confers upon any member the right to transfer his card to the name of any other person or that (it) gives any transferable interest to any member in his card."

Their Lordships have made this full survey of the salient provisions of the constitution deed and rules of the Association in order that its real nature and the status of its members might thereby be disclosed. So much is essential, if the claims of the appellant are to be dealt with according to law. And in the result certain things, they think, have become clear.

First, as to the nature of the Association in point of law. It is of course not a company. Nor is it a partnership : it is

not formed for profit of its members as associates in business. It is merely a voluntary association, resembling a members' club, perhaps, more closely than anything else. It has been formed in order that its members, share and stock brokers by profession, admitted for their character and position, might have for their use a Hall for the transaction of their business with one another according to honourable practice. The transactions of the members *inter se* are for the benefit or burden of the several participants and of them only. With bargains between members, as such, neither the Association at large nor the other members are concerned.

Now if such an organisation is to attain its ends membership must plainly be a personal thing, incapable of uncontrolled transfer: expulsion from membership must normally follow default or misconduct: upon expulsion all interest of the defaulting member in the property of the organization must cease. For all these things—characteristic necessities *mutatis mutandis* for provision by the rules of any members' club—most careful provision, as will have been seen, is made in the case of this Association.

It may not, of course, be said that the members of the Association, so long as they remain members, are not interested in its Hall and other property. On the contrary that Hall and property is theirs collectively although held, on their account, for the purposes of the Association and with no right in any member or any majority of members to have any realisation for individual benefit. Only if and when all the members have agreed to put an end to the Association will they, after its debts have been satisfied, be entitled to have a division amongst themselves of what remains: See *Baird* v. *Wells*.[1] It may well be that the remoteness of the individual interest possessed by any member in the property of such an association is the effective reason why forfeiture or abandonment of all interest therein naturally follows expulsion, resignation or death and why no

[1] (1890) 44 Ch. D. 661 at p. 675.

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trustee in bankruptcy seems so far to have been courageous enough in any case like the present to put forward a claim analogous to that made by the appellant in these proceedings.

That claim, now that it is put forward, is rested on two quite separate grounds. First of all the appellant bases it, as their Lordships understand, on the rules of the Association, according to what he submits is their true construction. That ground failing, he relies, secondly, despite all rules, upon his paramount rights as assignee in insolvency.

Upon the first of these grounds their Lordships are unable to see how under the rules the appellant's claim can be maintained. He does not challenge the regularity of the forfeiture of the insolvent's right of membership nor does he dispute that under the rules the declaration of default was fully justified. That being so, it cannot in their Lordships' judgment be questioned that thereupon the insolvent's interest in the Association, whether in respect of his card or otherwise, became, under the rules, extinguished. So soon as membership ceases whether on resignation, death, as a result of misconduct or for non-payment of his subscription all the interest of the member in the property of the Association is under the rules at an end. This is made clear, in case of resignation or death by clauses 11, 12 and 13 of the deed: in case of misconduct by rule 8: and in case of exclusion for non-payment of his subscription by rule 21: and again in the last two cases by rule 56. In relation to his card, which is a thing separate altogether from the property of the Association, certain rights are reserved to a member or his representatives on death or retirement. On death it may pass to his son, under rule 13: and if he has no son, then the Association, waiving the privilege of admitting a new member on payment of an entrance fee to itself under rule 4, finds a successor to the deceased in a purchaser of his card for a price to be handed to his widow or executor under rule 15 or, in the circumstances of rule 17, to his lawful

heir. And their Lordships do not doubt that these rights in the representatives of the deceased are enforceable rights, as after 25 years' membership are the rights of the member himself under the resolution of November 17, 1924: See *Baird* v. *Wells*.[1]

But, although the rules are badly drawn and not in uniform phraseology their result in the case of a member who has lost his membership for being a defaulter clearly enough is that he loses all interest both in the property of the Association and in his card. In such a case no interest is reserved in the defaulter's card except to members of the Association who have suffered by his lapse—in the rules sometimes called his creditors—or to the Association itself. This seems to their Lordships to be the result of rules 18, 56, 57 and 62. The defaulting member himself has no interest in the result of the sale provided for under these rules nor can he require a sale to be made. The rules are there for the benefit of his "exchange creditors" and are doubtless enforceable at their instance. In this case the learned trial judge was of opinion that rule 62 was enforceable by the appellant and he directed the sale of the insolvent's card and the application of the proceeds as by that rule prescribed. There has been no appeal by the respondents against that part of the order and therefore as against them it must stand. But it must not be supposed that their Lordships think it justified. In their view, so far as the appellant's case was one under the rules, his suit ought to have been dismissed.

Nor does it appear to their Lordships that his second or alternative ground of claim has any higher warrant. That claim amounts to this that, if the effect of the rules be that the proceeds of sale of the insolvent's card do not enure for the benefit of the general body of his creditors the rules are contrary to the law of insolvency and, separately,

[1] (1890) 44 Ch. D. 661.

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to the provisions of section 12 of the Transfer of Property Act, 1882, which, it will be recalled, is as follows :—

"Where property is transferred subject to a condition or limitation making any interest therein, reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void."

The appellant sought to justify his position here by quoting *Borland's Trustee* v. *Steel Brothers & Co., Limited*[1] in reference to a company, and *Whitmore* v. *Mason*[2] in reference to a partnership, and by insisting upon the restricted permissible operation of forfeiture provisions in such cases. It being agreed however on all hands that the rules of this Association are entirely innocent of any design to evade the law of insolvency it may be that even these cases, although cases of a company and a partnership, are more favourable to the respondents than to the appellant. The case of *In re Plumbly: Ex parte Grant*[3] a Stock Exchange case, is more germane to the present and is the case relied upon in the Indian Courts. There a rule of the London Stock Exchange was upheld against a trustee in bankruptcy although the result was to withdraw from the bankruptcy in favour of exchange creditors sums actually due to the bankrupt on exchange transactions. And no such extreme claim against the assignee is here involved.

But their Lordships find the real answer to this contention of the appellant in the nature and character of the Association as they have described it whereby in the case of a defaulting member who is expelled from the Association no interest in his card remains in himself and none that can pass to his assignee whether his expulsion does or does not take place prior to the commencement of his insolvency.

As to section 12 of the Transfer of Property Act their Lordships have been unable to see that it has any application to the card of a member of this Association. When the

(1) [1901] 1 Ch. 279. (2) (1861) 2 J. & H. 204.
(3) (1880) 13 Ch. D. 667.

nature of the interest acquired by him upon admission to the Association is considered—and this has already been expounded in an earlier portion of this judgment—it is difficult to see how the assumption of membership involves at any stage the transfer of any property on any condition whatever. It is impossible, in their Lordships' judgment, to describe the insolvent's status of membership of the Association in language which, however tortured, could bring it within the terms of the section.

On the whole, their Lordships' conclusion, so far as the case remains open for them to deal with, is that reached by both Courts in India, and in their judgment the appeal fails.

Their Lordships will accordingly humbly advise His Majesty that it be dismissed; and with costs.

Solicitors for appellant: Messrs. *Lattey & Dawe.*

Solicitors for respondents: Messrs. *T. L. Wilson & Co.*

A. M. T.

APPELLATE CIVIL.

Before Mr. Justice Baker and Mr. Justice Nanavati.

PARSHOTTAMDAS CHUNILAL SHAH AND ANOTHER, APPLICANTS *v.* THE FIRM OF BHAGUBAI NATHUBHAI, OPPONENT.*

1931
November 25.

Civil Procedure Code (Act V of 1908), section 24, sub-sections (1) and (4)—Suit filed in a Court of Small Causes—Application to transfer suit to Subordinate Judge's Court—Extent of Small Cause Court powers of the latter Court immaterial—Transfer can be legally effected.

Section 24, sub-section (*1*) of the Civil Procedure Code, 1908, gives power to the High Court or the District Court to transfer *inter alia* a suit from a Court of Small Causes to a regular Court. Sub-section (*4*) of section 24 lays down that any case transferred from a Court of Small Causes shall be tried as a Small Cause suit by the Court to which it is transferred, but makes no reference to the Court to which the case is so transferred being invested with Small Cause Court powers up to any particular extent.

*Civil Application No. 401 of 1931.