

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Rahimbhoy Hubibbhoy v. Turner, Assignee of
the Estate of Alladinbhoy Hubibbhoy, insolvent,
from the High Court of Judicature at Bombay ;
delivered November 10th, 1892.*

Present :

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD HANNEN.

LORD SHAND.

SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

THIS suit is brought by the Assignee of Alladinbhoy, 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, Ahmedbhoy and the present Appellant Rahimbhoy, 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 Hong Kong, and his brothers Ahmedbhoy and Rahimbhoy, 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 Hong Kong were handed over by his manager to the firm of his brothers Ahmedbhoy and Rahimbhoy, 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 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 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 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 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 Alladinbhoj. He mortgaged them to the Imperial Bank of Bombay. On the 15th of May 1866 the firm of Ahmedbhoj and Rahimbhoj 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 Ahmedbhoj, Ahmedbhoj 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 Ahmedbhoj 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 Ahmedbhoj and Rahimbhoj in the year 1871, by which a sum of Rs. 1,17520 which under a previous award belonged to Rahimbhoj was transferred by him to Ahmedbhoj 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 portion of the Rs. 1,17520 which was assigned by Rahimbhoy to Ahmedbhoy, and they have directed that so far as those sums form a portion of the Rs. 1,17520 they shall be disallowed in taking the account.

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 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. 1,17520, 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 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.

