APPELLATE CIVIL.

Before R. C. Mitter J.

1936

April 30.

ARJUN DAS KUNDU

v.

MARCHIYA TELINEE*.

Insolvency—Absolute order for discharge, if releases property acquired by insolvent before order—Proof of debts, if permissible till completion of administration in insolvency—Provincial Insolvency Act (V of 1920), ss. 28, 33(3), 44, 64.

An absolute order of discharge of an insolvent does not release any property acquired by him before such order from the liability to meet his debts provable in insolvency.

There is no express period of limitation for a creditor, whose debt is provable in insolvency proceedings, to prove his debt. A debt is to be proved ordinarily before any dividend is declared.

The words of s. 33, cl. (*3*), of the Provincial Insolvency Act of 1920, which include creditors whose claim had already been notified but whose debts have not already been proved, do not lay down the proposition that creditors are bound to come with proofs of their debts before the discharge of the insolvent; the said words are merely directory. And the creditors can come on the schedule of creditors as long as any assets are available for distribution amongst them by proving their debts at any time before the administration is complete.

In re *McMurdo. Penfield* v. *McMurdo* (1) followed.

Sivasubramania Pillai v. *Theethiappa Pillai* (2); *Babu Lal Sahu* v. *Krishna Prashad* (3); and *Jhan Bahadur Singh* v. *Bailiff of the District Court of Toungoo* (4) referred to.

APPEAL FROM ORIGINAL ORDER by a creditor of the insolvent.

The material facts of the case and the arguments in the appeal appear in the judgment.

Gunendra Krishna Ghosh and *Durga Charan Chatterji* for the appellant.

A. Quasem for the respondent.

*Appeal from Original Order, No. 283 of 1934, against the order of K. C. Basak, District Judge of Hooghly, dated Feb. 8, 1934.

(1) [1902] 2 Ch. 684.
(2) (1923) I. L. R. 47 Mad. 120.
(3) (1924) I. L. R. 4 Pat. 128.
(4) (1927) I. L. R. 5 Ran. 384.

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R. C. MITTER J. The respondent before me applied under s. 10 of the Provincial Insolvency Act for being adjudicated an insolvent. She said in her application that her assets were almost nil. She mentioned the names of her creditors, the appellant being one of them. The application was dated September 1, 1930, and the adjudication order was passed on August 25, 1931, by which the insolvent was directed to apply for discharge within six months of the said order. As there were no appreciable assets, the Court did not appoint a receiver on her adjudication. In the application she gave an information that she had instituted a suit for some land against her husband and if she won that suit her assets could be used for the purpose of meeting the creditors, but she had no present means for satisfying her creditors. The present appellant, although his name was given in the application as a creditor, did not take any steps to prove his debt before the discharge of the insolvent.

The insolvent applied for her discharge, and on September 9, 1932, the Court directed that the final discharge should await the disposal of the suit then pending in the Serampore Munsif's Court, the suit which the insolvent had filed against her husband. On December 9, 1932, the insolvent informed the Court that she had won the said suit. The Court stated in its order that the creditors had not taken any interest in the case and she was not to be blamed for her debts in that they were caused by litigation forced on her. The Court accordingly granted an absolute order of discharge on December 9, 1932.

After this order the appellant appeared on the scene. He wanted to prove his debt and wanted the property of the insolvent which she got as a result of the said suit, to be brought under the administration of the Court in the insolvency proceedings. The insolvent opposed successfully, and it is against the

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order passed by the Court below on February 8, 1934, the present appellant has filed the present appeal.

For the purpose of deciding the controversy in this case, two facts are important, firstly, that it was known to the Court from the time of the filing of the application for adjudication that the appellant was a creditor of the insolvent, and secondly, that no dividend has been declared up to now much less the final dividend.

The learned District Judge, in support of the order he passed, has held that the effect of the absolute discharge under the provisions of s. 44 of the Provincial Insolvency Act was to release the insolvent from all debts provable under the Act and that such debts had to be proved in the proceedings before the order of absolute discharge was made. Under s. 33(*3*) of the Act, says he, it is imperative on the creditor to prove his debt before the discharge of the insolvent. The learned Judge has further remarked that as none of the creditors of the insolvent had proved their debts before the final discharge, the property which has been recovered by the insolvent as a result of the aforesaid suit is no longer available for distribution in the insolvency proceedings, but that property, though acquired before the discharge order, is to be enjoyed by the insolvent absolutely and without any restriction.

In my judgment none of these reasons appear to me to be sound and the learned Judge has overlooked not only certain important provisions of the Insolvency Act but has committed fundamental errors with regard to matters of principle applicable to such cases. The principle underlying all bankruptcy proceedings, in my judgment, is this: that when a debtor is adjudicated an insolvent at his instance all his assets, those which he had at the time of the presentation of the application and all assets which he may acquire before his final discharge, must come into the hands of the Court in order that the said assets may

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be administered, and his creditors whose debts can be proved in the insolvency proceedings may get their debts *pro rata* from those assets. When an insolvency proceeding takes place at the instances of the creditor there is the self-same principle. The man adjudicated an insolvent is given a chance to become a free man after his discharge after he had placed in Court for the benefit of his creditors all his assets. The next principle is that when this is done and he gets an absolute discharge, he is a free man and the legislature makes him a free man on high policy that after his properties had been taken out of him for the purpose of meeting his creditors, he ought to begin again his career without any impediment.

It follows, therefore, that an insolvent has no title in the properties in which he had beneficial rights at the date of the presentation of the application or which was acquired subsequently by him at any time before his absolute discharge. All such properties vest in the Court or in the receiver appointed by the Court. This is the express provision of s. 28 of the Act. The effect of absolute discharge is defined in s. 44 of the Act. The insolvent is not freed in respect of certain particular debts which are specified in sub-s. (*1*) of s. 44. With regard to other debts provable in insolvency he is personally freed from liability. It is on this principle that the creditors are entitled to look only to those assets which had vested in the Court or receiver by reason of the adjudication. That is to say, the claims of such creditors are transferred from one fund to another. The claims of such creditors can only be realised from the assets which had vested in the Court or the receiver and not against the assets which insolvent may acquire after absolute discharge. The effect of s. 44(*2*), in my judgment, is not to *extinguish* altogether the claims of the creditors whose claims are provable under the Act, but to limit their remedy for the purpose of realizing the same from the assets vested in the Court or receiver according to the provisions of s. 28 of the Insolvency Act.

There is no express period of limitation for a creditor, whose debt is provable in insolvency proceedings to prove his debt. A debt is to be proved ordinarily before any dividend is declared. That is necessary in order that the officer of the Court administering the insolvent's estate may have in his possession materials which will enable him to make a *pro rata* and equitable distribution of the assets. If the receiver has got materials in his hands to show that there are creditors who have not proved their debts because they reside at distant places and that they had had no time to tender proof of their debts, he can set apart a sum of money sufficient for the purpose of paying them, if and when they prove their debts, after meeting his expenses.

The learned District Judge has referred to the provisions of s. 33, cl. (*3*) of the Act, for the purpose of laying down the proposition that a creditor is bound to come with the proof of his debt before the discharge of the insolvent, and if he comes after the discharge he is too late. The whole question is whether that sub-section bears the meaning which the learned Judge has put upon it. That sub-section says that a creditor of the insolvent *may*, at any time before the discharge of the insolvent, tender proof of his debt.....The only question is whether that sub-section makes it obligatory on the creditor to come in before the discharge of the insolvent. For the reasons which I shall indicate later on, my judgment is that the provisions of that sub-section is directory and that he can come on the schedule of creditors as long as there are any assets available for distribution amongst the creditors and till the final dividends are distributed, that is, till the administration is complete. This view of mine has the support of the weighty authority of Lord Justice Vaughan Williams in the case of *In re McMurdo. Penfield* v. *McMurdo* (1).

(1) [1902] 2 Ch. 684, 699.

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The principle is laid down by that learned Judge at p. 699 of the report in these words :—

> 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 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.

Some indication is given in the Insolvency Act itself that the correct principle is the principle which is formulated by the said Lord Justice.

Section 64 of the Provincial Insolvency Act requires a receiver, before declaring a final dividend, to serve notice in the manner prescribed to persons whose claims as creditors have been *notified but not proved;* and if such persons come and prove their claims within the time limited by the notice then they will be entitled to share in the final distribution. That contemplates that creditors who have not proved already can come in and prove their debts in time before the final dividend is declared and distributed by the receiver. The time of the discharge of an insolvent has no relation to and can have no relation to in any case to the time for declaring the final dividend. When making the order of adjudication the Court limits the time within which the insolvent is to apply for his final discharge and this without reference to the time that may possibly be taken up for the administration of the estate of the insolvent. Then when the insolvent makes an application for discharge the question whether he will get absolute discharge or not or from what date depends upon circumstances which have no relation to the administration of his estate. It may be that where the causes of his insolvency are his misfortunes he ought to be made a free man quickly but the administration of his estate may be a complicated one, and it may take a large number of years to get in the assets and to distribute them amongst the creditors. Section 64, therefore, will still have to be invoked in such cases where the discharge order has

been made a long time ago but the assets have been realized by the receiver a long time thereafter, and the time for making a final dividend may have arrived a long time after the discharge of the insolvent. In such a case, on the wording of the statute, clearly a creditor, who has not already proved his debt, will not be debarred from proving his debt within the time given in the notice issued under s. 64 of the Act. This principle leads me to think that the words of s. 33, cl. (*3*) which include creditors whose claim had already been notified but whose debts have not already been proved are merely directory. It is on this principle and on this limited ground that I follow the decision of the Madras High Court in the case of *Sivasubramania Pillai* v. *Theethiappa Pillai* (1), of the Patna High Court in the case of *Babu Lal Sahu* v. *Krishna Prashad* (2) and of the Rangoon High Court in the case of *Jhan Bahadur Singh* v. *Bailiff of the District Court of Toungoo* (3).

I do not base my decision on the distinction which has been drawn in some of these cases between a conditional order of discharge and an order of absolute discharge. I go upon the principle laid down by Lord Justice Vaughan Williams and on the principle laid down in s. 64 of the Act.

I accordingly discharge the order of the learned District Judge and I direct that the Court would take immediate steps for the purpose of bringing the said property in its possession through any of its officers, that it would take steps for sale of the said property and after the assets are realized would take steps (after complying with s. 64) for their distribution amongst those creditors who would prove their debts before the final dividend is declared. The appellant before me and all other creditors who may wish may tender proof of their debts at any time before the

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assets realized by the sale of the said property are distributed, that is, before the final dividend is declared.

The appellant before me will get his costs of this appeal not from the insolvent personally but from the assets realized in the insolvency proceedings, hearing fee being assessed at one gold mohur.

Appeal allowed.

A. K. D.