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and it has been argued that the question raised here is not between the parties to the suit but between one of the parties and his transferee. This may be so as between the transferor and the transferee; but the transferee is clearly a representative of the decree-holder and as such the question can be raised as between him and the judgment-debtor.

I am therefore of opinion that the appellant cannot be allowed to execute the decree so long as he does not pay the balance of the consideration money to the original decree-holder. Subject to the variations in the order of the Subordinate Judge as regards the right of the judgment-debtor to enforce any equities which he may have as observed above, the order of the learned Subordinate Judge must stand. The appeal must be dismissed with costs.

Ross, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Jwala Prasad, A.C.J. and Kulwant Sahay, J.

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July, 10, 11; and August, 4.

BABU LAL SAHU*

v.

KRISHNA PRASHAD.

Provincial Insolvency Act, 1907 (*Act III of* 1907), *sections* 24(3), 31(1), *and* 39(4)—*Provincial Insolvency Act*, 1920 (*Act V of* 1920), *sections* 33(3), 47(1) *and* 64—*conditional order of discharge, whether debts proveable after—debt not time-barred at date of adjudication of insolvency whether proveable after expiry of period of limitation—Secured creditor, removal of name of, from list of creditors—whether may prove for unrealised balance—Mortgage debt, partial realization of, by execution sale, whether balance proveable in insolvency proceedings—Civil Procedure Code* 1908 (*Act V of* 1908), *Order XXXIV, rule*, 6.

* Appeal from Original Order no. 241 of 1923, from an order of G. J. Monaham, Esq., I.C.S., District Judge of Monghyr, dated the 27th August, 1923.

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The "discharge" contemplated by section 24(3) of the Provincial Insolvency Act 1907 (which corresponds to section 33(3) of the Act of 1920), is the final discharge of the insolvent and not a conditional discharge.

Under section 39(4) of the Act of 1907 (corresponding to section 64 of the Act of 1920) a creditor is entitled to tender proof of his debt at any time during the administration of the insolvent's estate so long as there are assets to be distributed and no injustice is done to third parties, even after a conditional order of discharge has been passed.

Sivasubramania Pillai v *Theethiappa Pillai*(1), followed.

Where a debt was not time-barred up to the date of the order adjudging the debtor to be an insolvent it may be proved at any time during the continuance of the insolvency proceedings.

Sivasubramania Pillai v. *Theethiappa Pillai*(1), followed.

Section 31(1) of the Act of 1907 [corresponding to section 47(1)] of the Act of 1920 does not debar a secured creditor who has had his name removed from the list of creditors and who has realised his security, from proving for the balance in the insolvency proceedings.

The absence of a decree under Order XXXIV, rule 6, Civil Procedure Code, 1908, does not debar the mortgagee decree-holder from proving the balance of his debt in the debtor's insolvency proceedings.

Appeal by the judgment-debtor.

The appellant, Babu Lal Sahu, was adjudged an insolvent by an order, dated the 11th December, 1913. In the schedule attached to the insolvency petition filed by the appellant he had included a mortgage debt due to the respondent Krishna Prashad, under a mortgage deed, dated November, 1911. The respondent, however, instituted a suit on the 18th December, 1913, in the Court of the Subordinate Judge to enforce his mortgage. A preliminary mortgage decree was passed in his favour on the 23rd January, 1914, and a final decree for sale was made on the 7th September, 1914. On the 3rd September, 1917, he applied before the District Judge in the insolvency proceedings for

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expunging his name from the schedule of creditors, and on the 17th September, 1917, the District Judge ordered that the name of the respondent, Krishna Prashad, be removed from the schedule. The respondent thereupon executed his mortgage decree and brought the mortgage property to sale. The sale was held on the 24th April, 1918, and a sum of Rs. 560 was realized thereby. On the 23rd August, 1919, the District Judge made a conditional order of discharge in favour of the appellant in these words :

"Pleader heard. No objection filed. Insolvent discharged on condition that his subsequent earnings or income or after-acquired property will still be subject to proceedings in this Court at the instance of the creditors."

On the 4th of June, 1923, the respondent, Krishna Prashad, filed a petition before the District Judge in the insolvency proceedings stating that a sum of Rs. 1,767-13-0, on account of principal and interest, was still due to him under the mortgage decree after the sale of the mortgage property and that he was informed that since the order of discharge the insolvent had acquired properties set out in Schedule I attached to his petition, and praying that the insolvent might be ordered to make over the said properties to the Court and the same might be applied towards the liquidation of the debt and that the petitioner, namely, the respondent, might be permitted to prove his debt. Notice of this application was given to the insolvent who filed a petition of objection on various grounds. These objections were disallowed by the District Judge who by his order, dated the 27th of August, 1923, allowed the application of the respondent and permitted him to prove the balance of his debt.

Against this order of the District Judge the insolvent appealed to the High Court.

Cur. adv. vult.

Manohar Lal, for the appellant.

Shiva Narayan Bose, for the respondent.

August, 4. KULWANT SAHAY, J. (after stating the facts, as set out above, proceeded as follows): The points

argued by the learned counsel for the appellant are: first, that the respondent could not be allowed to prove his debt after the order of discharge made by the District Judge on 23rd August, 1919; secondly, that the debt is not proveable under the Act inasmuch as it is barred by limitation; thirdly, that before proving the debt it was necessary for the respondent to obtain a decree under Order XXXIV, rule 6, of the Code of Civil Procedure; and fourthly, that having got his name removed from the schedule of creditors in the Insolvency Court the respondent could only look to the security and could not claim any dividend.

It is necessary to state at the outset that the insolvency proceedings were commenced and the order of discharge was made in the present case under the Provincial Insolvency Act III of 1907, but at the time the present application was made by the respondent in June, 1923, the Act of 1907 had been repealed and Act V of 1920 was in force. In order to consider the effect of the discharge made on the 23rd of August, 1919, we have to look to the provisions in the Act of 1907 whereas in considering the present application of the respondent for leave to prove his debt, it is contended that we are to be guided by the Act of 1920. There is, however, no difference in the provisions of the two Acts as regards the effect of a conditional order of discharge.

The provision for discharge in the Act of 1907 is contained in section 44 of the Act, which section corresponds with sections 41 and 42 of the Act of 1920. Section 44, sub-section (2) (c), of the Act of 1907, prescribes that the Court may grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the insolvent, or with respect to his after-acquired property, which exactly corresponds with the provisions of section 41, sub-section (2) (c), of the Act of 1920. Now, the effect of a discharge is to release the insolvent from all debts entered in the schedule (section 45 of the Act of 1907; section 44 of the Act of 1920) but

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a conditional discharge does not release the insolvent. Section 24(3) of the Act of 1907 which materially corresponds with section 33(3) of the Act of 1920 provides that any creditor of the insolvent may, at any time before the discharge of the insolvent, tender proof of his debt and apply to the Court for an order directing his name to be entered in the schelude as a creditor in respect of any debt proveable under this Act and not entered in the schedule and the Court after causing notice to be served on the insolvent and the other creditors, and hearing their objections (if any) shall comply with or reject the application. Therefore, under the provisions of the Act, it was open to the respondent to apply to the Insolvency Court for leave to prove his debt at any time before the discharge of the insolvent. The discharge contemplated by section 24(3) of the old Act [sections 33(3) of the new Act] is the final discharge and not the conditional discharge of the insolvent, the effect of such conditional discharge being that the insolvency proceedings are not terminated. Section 39(4) of the Act of 1907 which corresponds with section 64 of the Act of 1920 authorizes certain creditors to prove their debt before the declaration of the final dividend by the Receiver and this shows that debts can be proved even after the order of discharge in certain cases and in the present case no final dividend appears to have been made up to the date when the application was made by the respondent in June, 1923, and it does not appear from the proceedings in the insolvency proceeding that any final dividend has yet been declared. In the decision of the Madras High Court in the case of *Sivasubramania Pillai* v. *Theethiappa Pillai* (1) their Lordships, after an elaborate consideration of all the authorities on the point, have come to the conclusion that the conditional order of discharge, like the one in the present case, does not debar the creditor from proving his debt in insolvency and that a creditor is entitled to tender proof of his debt at any time during the administration so long as there are assets to be

(1) (1923) 75 Ind. Cas. 572.

distributed and no injustice is done to third parties. I am, therefore, of opinion that the first contention raised by the learned counsel for the appellant cannot be sustained.

The second contention of the learned counsel for the appellant is that the debt is barred by limitation and is not proveable under the Act. His contention is that the sale of the mortgaged property in execution of the mortgage decree having taken place on the 24th April, 1918, the respondent could proceed against the person and other properties of the insolvent only after obtaining a decree under Order XXXIV, rule 6, of the Code of Civil Procedure, and that an application for a decree under Order XXXIV, rule 6, could be made only within three years from the date of sale of the mortgaged properties, and this not having been done his debt is barred by limitation and that he could not be allowed to prove a barred debt. The answer to this contention is contained in section 28 of the Act of 1907 which corresponds with section 34 of the Act of 1920. This section provides that:

> "all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts proveable under this Act."

The only limitation in sub-section (*2*) of section 28 in the Act of 1907 being that demands in the nature of unliquidated damages arising otherwise than by reason of a contract or breach of trust shall not be proveable under this Act, while the limitation in clause (*1*) of section 34 of the Act of 1920 is that debts which have been excluded from the schedule on the ground that their value is incapable of being fairly estimated and demands in the nature of unliquidated damages arising otherwise than by reason of a contract or a breach of trust shall not be proveable under this Act. Therefore, if the debt was alive and not barred at the time when the order adjudging the appellant an insolvent was made it can be proved at any time during the continuance of the insolvency proceedings. This view is also supported by the case of *Sivasubramania Pillai* v.

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Theethiappa Pillai (1) referred to above. This contention of the learned counsel for the appellant must also be overruled.

The third objection taken on behalf of the appellant is that the respondent could not be allowed to prove the debt before obtaining a decree under Order XXXIV, rule 6, of the Code of Civil Procedure. Now, the necessity of obtaining a decree under Order XXXIV, rule 6, of the Code of Civil Procedure, is to realize the debt by means of execution proceedings. A decree under Order XXXIV, rule 6, does not create a debt but merely authorizes the decree-holder to realize it by means of execution in the ordinary way. The absence of a decree under Order XXXIV, rule 6, will not in law debar a creditor from proving his debt in insolvency proceedings. All that is necessary for the purposes of insolvency proceedings is to prove the existence of the debt and, therefore, the absence of decree under Order XXXIV, rule 6, of the Code of Civil Procedure, will not debar the respondent from proving his debt in the present proceedings.

The last objection taken by the appellant is equally unsustainable. Under section 31, clause (*1*), of the Act of 1907 which corresponds with section 47, clause (*1*), of the Act of 1920, where a secured creditor realizes his security, he may prove for balance due to him after deducting the net amount realized. The fact of his getting his name removed from the list of scheduled creditors and proceeding to realize his security will not debar him of the statutory right to prove for the balance due to him in the insolvency proceedings. I am, therefore, of opinion that the order made by the learned District Judge is correct and the grounds taken by the learned counsel for the appellant are unsound and cannot prevail.

The appeal must be dismissed with costs.

JWALA PRASAD, A. C. J.—I agree.

Appeal dismissed.

(1) (1923) 75 Ind. Cas. 572.