APPELLATE CIVIL.

Before Sir Guy Rutledge, Kt., K.C. Chief Justice, and Mr. Justice Brown.

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Apl. 24.

H. OPPENHEIMER

v.

M. E. MOOLA SONS, LTD. (IN LIQUIDATION).*

Companies Act (VII of 1913), s. 229—Presidency Towns Insolvency Act (IX of 1909), s. 49, Second Sched., rr. 20, 23—Winding up proceedings—Interest due to a secured creditor, up to what date payable—Principal and interest up to date of sale realizable from the security—Unsecured balance to include interest only up to date of winding up.

In the liquidation proceedings of an insolvent company a secured creditor, after having exhausted his security cannot in proving as regards the balance of his debt unsatisfied include interest after the date of the winding up order. So far as the unsecured portion of their debts is concerned the provisions of the Insolvency Act generally do not suggest any intention of putting secured creditors on a more favourable footing than unsecured.

In re Savin, L.R. [1872] 7 Ch. Ap. 760 ; *Ram Chand* v. *Bank of Upper India*, 3 Lah. 67—*referred to.*

Hay for the appellant.

Leach for the respondents.

CHARI, J. on the Original Side on a reference by the Official Liquidator held that a secured creditor, though he can claim interest up to the date of payment when he seeks to recover what is due to him from the proceeds of the sale of the secured property, must confine his claim when he seeks to prove against the other property as an unsecured creditor to the principal and interest which have accrued up to the date of adjudication, or liquidation, as the case may be, deducting therefrom the amount realized by the sale of the property.

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* Civil Miscellaneous Appeal No. 181 of 1928 from the order on the Original Side in Civil Miscellaneous No. 78 of 1927.

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The appellate Court confirmed this decision. The judgments of both the Courts are as follows :—

December 5, 1928. CHARI, J.—The question involved in this case is an interesting one, and there are no direct authorities on the point.

Messrs. Moola Sons, Limited, is a company in liquidation and it is an admitted fact that it is an insolvent company. In these circumstances, according to section 251 of the Indian Companies Act, the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and in respect of other matters as are for the time being in force under the law of insolvency with respect to the estate of persons adjudged insolvent.

There are two applicants before me, both of whom are secured creditors. Each of them had a mortgage of immoveable property and they realized their security by sale of the property. The property was sold for a good deal less than the amount due to them, and they are now claiming to prove for the balance against the other assets of the insolvent company.

The Official Liquidator disallowed their claim to prove for interest after the winding up order, that is, the 21st of June 1927. The way he calculated their claim was :—he calculated the principal amount and the interest due up to the date of the winding up order, which corresponds to the date of adjudication in insolvency, and from the total of that amount he deducted the amount realized. He then allowed the creditors to prove for the balance only. The claimants being aggrieved asked the Official Liquidator to refer his order to me, and it had accordingly been referred for my decision.

The law on this subject goes back to very early cases in English Law. Mr. P. D. Patel contends that

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he is a secured creditor; that under section 17, proviso, his powers to realize or otherwise deal with the security are not in any way affected; that he could have realized the full amount of the principal due to him and the interest up to date of realization from the secured property; and that he is, therefore, entitled to deduct the interest, which has accrued due after liquidation, from the amount realized, first, then apply the balance to the principal and interest due up to the date of liquidation, and prove for the balance.

It will be noticed in the first place that the proviso merely preserves to the creditor his power to realize or otherwise deal with the property. It has no bearing on the question as to what he could claim against the other assets of the company.

Section 23 of the Second Schedule of the Presidency Towns Insolvency Act enacts that interest at a specified rate can be claimed up to the date of adjudication; and that thereafter interest on debts ceases to run. That section applies only to unsecured debts; but, after realization, when proving for the deficit, a secured creditor is in the same position as an unsecured creditor.

In the English Acts the provisions were the same. There also it was provided that interest shall cease from the date of the vesting order, and the rights of the secured creditors were also preserved by the rules.

The question arose in the case of *In re Savin* (1). The Vice-Chancellor, Sir James Bacon, in an elaborate judgment accepted the very contention which Mr. Patel is now pressing on me, namely, that a mortgagee having the full right to realize his debt

(1) [1872] 7 Ch. App. 760.

from the secured property could claim interest up to the date of realization, deduct it, and prove for the balance. The Vice-Chancellor also explained certain other cases, which seem to lay down a contrary rule. The matter was taken up in appeal and Lord Justice James and Lord Justice Mellish reversed the decision of the Vice-Chancellor. They held that the rule in bankruptcy was that interest subsequent to bankruptcy cannot be proved. They did not think it worthwhile to consider whether it was a just or an unjust rule ; but the rule being what it was, they held that in the case of a secured creditor, though his right to realize the full amount from the secured property was not impaired by the mortgagor's bankruptcy, when he came to prove for the balance, he could only claim interest up to the date of bankruptcy.

In the case of *In re London, Windsor and Greenwich Hotels Company* (1), the facts were exactly similar to those of this case. There also a company in liquidation was an insolvent company, and a secured creditor, who had exhausted his security without getting full satisfaction for his debt, sought to prove for the deficiency against the general assets of the company. Stirling, J., held, on a review of the authorities and the rules, that the secured creditor must limit his proof to what was due for the principal and interest at the commencement of the winding up order after deducting therefrom the proceeds of the sale realized from the security and the costs.

Mr. P. D. Patel draws my attention to two cases, the first being, *Jugal Kishore and another* v. *Bankim Chandra* (2). It was there held that a mortgagee was entitled as a secured creditor to receive out of the proceeds of the sale of the mortgaged property his

(1) [1892] 1 Ch. Divn. 639. (2) (1919) 41 All. 481.

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principal, interest and costs, the interest being calculated up to the date of payment—a proposition which is indisputable and is not disputed. That ruling has no bearing on the question which I have to decide.

Similarly, *In the matter of Bulabat Sagermull* (1), the question for consideration before the learned Chief Justice, who was then sitting as an Insolvency Judge, was the interest to be given to a secured creditor when he seeks to bring the property to sale. The question now before me was not considered by the learned Chief Justice in that case.

In *Ram Chand* v. *Bank of Upper India, Limited, Delhi*, and *the Diamond Jubilee Flour Mills, Company, Limited, Delhi* (2), reference is made to an earlier case in the Punjab, where, apparently, the point now before me was decided in the way I am now deciding. The remarks of the learned Judges, however, as regards this point were, so far as that case was concerned, merely *obiter dicta.*

I am, therefore, of opinion that a secured creditor, though he can claim interest up to the date of payment when he seeks to recover what is due to him from the proceeds of the sale of the secured property, must confine his claim when he seeks to prove against the other property as an unsecured creditor to the principal and interest which have accrued up to the date of adjudication, or liquidation, as the case may be, deducting therefrom the amount realized by the sale of the property.

I, therefore, confirm the Official Liquidator's decision.

The Official Liquidator is entitled to advocate's costs five gold mohurs in each of the two applications,

(1) (1924) 2 Ran. 197. (2) (1922) 3 Lah. 67.

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and these costs can be taken by him from the assets in his hands.

RUTLEDGE, C.J.—The only point for decision in this appeal is whether the learned trial Judge was right in holding that in compulsory liquidation a secured creditor after having exhausted his security cannot in proving as regards the balance of his debt unsatisfied include interest after the date of the winding up order. Admittedly this is in accordance with English decisions *In re Savin*, [1872] L.R. 7 Ch. App. 760 and in L.R. [1892] 1 Ch.D. 639. The point does not seem to be covered by authorities in the Indian Courts. The following remarks of Mr. Justice Broadway in *Ram Chand* v. *Bank of Upper India* (1), supports the view taken by the learned trial Judge, "So far as possible the rules of bankruptcy have been held applicable to liquidation matters. When a company goes into liquidation, a secured creditor may realise his security and prove for any balance there may be outstanding. If he realises his security and has to prove for a balance, the remaining assets of the company would only be liable for such principal and interest as was due on the date of the winding-up order. A secured creditor in the case of a liquidation is on the same footing as in that of insolvency proceedings. He may if he chooses disregard the liquidation proceedings and proceed against his security and that is the position taken up by the Bank in the present case". The last sentence shows that the passage quoted was not necessary for the decision arrived at, yet I consider that it is a clear and correct statement of the law in India as well as England. In some matters the legislation of India departs a long way from that of England. As regards

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Company Law and Insolvency, India has closely imitated English precedents. Consequently English decisions must carry great respect and weight. If it were intended to depart from the English rule on this question one would have expected words in section 229 of the Indian Companies Act to indicate this and not a close following of the meaning of section 206 of the English Act of 1908.

For these reasons I see no reason to differ with the decision of the learned trial Judge. The appeal accordingly fails and must be dismissed with costs, five gold mohurs to come out of the estate.

BROWN, J.—I agree. The provisions of rule 20 of the Second Schedule to the Presidency Towns Insolvency Act might at first appear to be against this view. That section deals with the sale of mortgaged property by a secured creditor and states that the monies arising from the sale shall be applied firstly in payment of costs and similar charges, "and in the next place in payment and satisfaction, so far as the same extend, of what shall be found due to such mortgagee, for principal, interest and costs, and the surplus of the sale moneys (if any) shall then be paid to the Official Assignee. But if the moneys to arise from such sale are insufficient to pay and satisfy what is so found due to such mortgagee, then he shall be entitled to prove as a creditor for such deficiency, and receive dividends thereon rateably with the other creditors".

If this rule stood by itself, it would seem to me clearly to indicate that the secured creditor was entitled to prove for the difference between the amount realised and the amount of his debt with interest up to the date of sale, but this seems to be opposed to other provisions of the Act and Rules. Rule 23 of

the same Schedule contemplates the allowing of interest to ordinary creditors only up to the date of the adjudication, and under the provisions of section 49, Clauses 5 and 6 of the Act, "Subject to the provisions of this Act, all debts proved in insolvency shall be paid rateably according to the amounts of such debts respectively and without any preference".

"6. Where there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date on which the debtor is adjudged an insolvent at the rate of six per centum per annum on all debts proved in the insolvency."

This rule clearly could not be observed in the case of a secured creditor, who has proved for the balance after realising his security, if he has already been allowed to prove for interest at the mortgage rate long after the date of insolvency. I think it must be held that the intention of the Legislature was in this matter to follow the Company and Insolvency Law of England and to lay down the general principle that unsecured creditors should in the first instance claim interest only up to the date of insolvency or of winding-up, as the case may be. So far as the unsecured portion of their debts is concerned, the provisions of the Act generally do not suggest any intention of putting secured creditors on a more favourable footing than unsecured.

For these reasons, I agree that the appeal must fail and be dismissed with costs, five gold mohurs to come out of the estate.