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to collect any such fee from him. The suit of the plaintiff-respondent was bound to fail, and the judgment and decree of the Township Court of Yenangyaung were not in accordance with law. The judgment and decree of that Court are reversed, and the suit of the plaintiff-respondent is dismissed with costs throughout, advocate's fee in this Court two gold mohurs.

APPELLATE CIVIL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Bagnley.

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June 22.

MAUNG HMOOT *v.* THE OFFICIAL RECEIVER, MANDALAY. *

Insolvency—Joint petition by debtors for adjudication—Order of discharge not necessarily termination of insolvency proceedings—Examination of a person regarding property after discharge of insolvent—Discharge of one joint insolvent—Refusal of discharge of other insolvent—Application to set aside transfer effected by the discharged insolvent—Jurisdiction of the Court to pass order—Pendency of insolvency—Onus of proof—Prima facie *case made by official receiver—Onus of adducing evidence in rebuttal—Provincial Insolvency Act (V of 1920), ss. 53, 59A.*

A joint petition for adjudication of several joint debtors is permissible in law.

Brojendra Nandan Saha v. *N. B. Das*, 39 C.W.N. 104 ; *Maung Kyi Oh* v. *S.M.A.L. Chetty*, I.L.R. 2 Ran. 309—*referred to.*

An order of discharge does not necessarily put an end to the proceedings in insolvency.

K.P.S.P.P.L. Firm v. *C.A.P.C. Firm*, I.L.R. 7 Ran. 126 ; *Rowe & Co., Ltd.* v. *Tan Thean Taik*, I.L.R. 2 Ran. 643—*referred to.*

Under s. 59A of the Provincial Insolvency Act the Court can in a proper case make an order for the examination of a person known or suspected to have in his possession any property belonging to the insolvent, or who could give information respecting the insolvent or his dealings even after the discharge of the insolvent ; and the Court can also order the examination of the insolvent himself.

In re Coulson, (1934) 1 Ch. 45 ; *Re Haripada Rakshit*, I.L.R. 44 Cal. 374 ; *Shadanchandra Bhandari* v. *S. Golabrai*, I.L.R. 60 Cal. 936—*referred to.*

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* Civil Misc. Appeal No. 24 of 1936 from the order of the District Court of Mandalay in Civil Misc. Case No. 8 of 1935.

In a joint insolvency where the Court has granted discharge to one of the insolvents, and has refused it to the other, the Court has jurisdiction to entertain an application by the Official Receiver to set aside a transfer under s. 53 of the Act made by the person who has obtained his discharge. An order passed on such an application must be deemed to be made during the pendency of the insolvency proceedings.

Jivanji v. *Ghulam Hussain*, 47 I.C. 771—*referred to.*

Where the Official Receiver has proved facts from which bad faith can legitimately be inferred, the burden of adducing cogent evidence in rebuttal of the *prima facie* case made out by the Receiver lies on the other party.

Mohammad Aslam Khan v. *Miau Feroz Shah*, I.L.R. 13 Lah. 687 ; *Sati Prasad* v. *Gobinda*, I.L.R. 56 Cal. 805 ; *Yellappa* v. *Tippanna*, I.L.R. 53 Bom. 213—*referred to.*

Sanyal for the appellant. A joint petition by two debtors for adjudication as insolvents is permissible. *Brojendra Nandan Saha* v. *Nikunja Behari Das* (1). When discharge is granted to one of such debtors, the insolvency proceedings, so far as he is concerned, come to an end. Therefore an application to set aside a transfer made by him cannot be entertained by a Court after his discharge. Under s. 53 of the Provincial Insolvency Act the onus of proof as to bad faith as well as want of consideration lies on the receiver and that burden has not been discharged. *Official Receiver* v. *P.L.K.M.R.M. Chettyar Firm* (2) ; *Pope* v. *Official Assignee* (3) ; *Hagemeister* v. *U Po Cho* (4).

Kale for the respondent. There was but one joint petition of insolvency made by father and son. The father's discharge being refused, the insolvency proceedings were still pending, and the receiver had not been discharged. He was therefore entitled to apply to the Court to set aside a fraudulent transfer made by the son, although the son had obtained his discharge.

K.P.S.P.P.L. Firm v. *C.A.P.C. Firm* (5).

(1) 39 C.W.N. 104.
(2) I.L.R. 9 Ran. 170.
(3) I.L.R. 12 Ran. 105.
(4) I.L.R. 12 Ran. 625.
(5) I.L.R. 7 Ran. 126.

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Under s. 36 of the Presidency-Towns Insolvency Act the Court has power to summon the insolvent, even after his discharge, and to examine him as to his dealings and property. The corresponding provision in the Provincial Insolvency Act is s. 59A. *Shadanchandra Bhandari* v. *Sewnarain Golabrai* (1).

GOODMAN ROBERTS, C.J.—This is an appeal by one Ko Hmoot against a judgment of the District Court of Mandalay, dated November 26th, 1935, annulling a transfer made to the appellant by his brother-in-law one Maung Pa and his wife Ma Tin Gyi of a house in which the transferors were then and have since continually been residing. The date of the transfer was June 28th, 1932, and on October 25th of the same year Maung Pa and his father Maung Mya filed a joint petition for insolvency in pursuance of which they were adjudicated insolvents on November 18th, 1932.

The Official Receiver now says that the transfer made to the appellant is voidable under section 53 of the Provincial Insolvency Act which says :

" Any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged insolvent on a petition presented within two years after the date of transfer, be voidable as against the receiver and may be annulled by the Court."

It is desirable to notice that on the authority of *Brojendra Nandan Saha and another* v. *Nikunja Behari Das and others* (2) a joint petition for adjudication of several joint debtors is not of itself bad in law. A joint petition of this kind in Burma seems to be rather unusual although it has been held that a Burmese Buddhist married couple when

(1) I.L.R. 60 Cal. 936. (2) 39 C.W.N. 104.

jointly indebted to the petitioning creditor and jointly committing an act of insolvency may have one petition in insolvency filed against them. *Maung Kyi Oh and one* v. *S.M.A.L. Arunchallam Chetty* (1).

The present case, as I have said, is one not of husband and wife but of father and son, and it appears from the joint insolvency proceedings that the son stood surety for his father and their liability was joint. As joint insolvents they were directed to apply for their discharge, but when they did so various cases for annulment were decided.

It appeared that in June 1932 Maung Mya and his son owed the Ngwedaung Co-operative Society about Rs. 30,000 ; on June 27th Maung Mya nevertheless made two transfers of his property—a sale of a house to his daughter and of a granary to his son—but both these transfers were set aside under section 53 of the Provincial Insolvency Act by the Court. This matter was taken into account by the learned District Judge at the joint application for discharge, and he refused the discharge of Maung Mya on January 7th, 1935.

On the very day after those sales, June 28th, 1932, Maung Pa (the son of Maung Mya) and his wife Ma Tin Gyi executed the transfer which is now under review, and which the Official Receiver succeeded in getting the District Court of Mandalay to set aside under the same section of the Act. This matter was not taken into account by the learned District Judge at the joint application for discharge because he was not made aware of it : and accordingly not being aware of it he granted to Maung Pa an absolute order of discharge dated January 7th, 1935.

(1) (1924) I.L.R. 2 Ran. 309.

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A preliminary objection was taken before us by Mr. Sanyal who appears for the appellant, because the present proceedings begin with an application for annulment of a transfer which is dated 26th February, 1935. His argument is that the Official Receiver is *functus officio* so far as the son's share in the insolvency is concerned, and that though no order of discharge has been made in the case of the father such an order has been made in respect of the son and such order must have some effect so far as the son is concerned. And he argued with great ingenuity that after Maung Pa's discharge any person who had taken a transfer of property from him prior to the insolvency was entitled to suppose that the period in which the validity of the transfer might be impugned had come to an end by operation of law.

In *Duraivya Solagan* v. *Venkatarama Naiker and others* (1) it was held that an application under section 36 of the Provincial Insolvency Act, 1907 (which corresponds to section 53 of the Act of 1920), was an application to which no period of limitation applied and one which might be made at any time during the pendency of the insolvency proceedings. This case was followed in *Pitta Ramaswamiah* v. *Subramania Aiyar* (2), which on this point must be taken as having been correctly decided.

Now, having regard to the situation here we have to determine whether the application under section 53 has been made during the pendency of the insolvency proceedings when one of the joint insolvents has obtained his discharge but when at the same time the other insolvent has not.

(1) 60 I.C. 123. (2) 79 I.C. 443.

It is settled law that the discharge of an insolvent does not put an end to the Court's power to give directions as to the distribution of assets among the creditors. As was said in *Rowe & Co., Ltd.* v. *Tan Thean Taik* (1) it must often occur that valuable assets are still in the hands of the Official Assignee and in process of realization at the date when the insolvent applies for his final discharge. An order of discharge therefore does not necessarily put an end to the proceedings in insolvency. See also *K.P.S.P.P.L. Firm* v. *C.A.P.C. Firm* (2).

By section 4 of the Provincial Insolvency Amendment Act of 1926 a new section 59A was inserted in the Act of 1920 which runs as follows:

"(1) The Court, if specially empowered in this behalf by an order of the Local Government, or any officer of the Court so empowered by a like order, may, on the application of the receiver or any creditor who has proved his debt, at any time after an order of adjudication has been made, summon before it in the prescribed manner any person known or suspected to have in his possession any property belonging to the insolvent, or supposed to be indebted to the insolvent, or any person whom the Court or such officer, as the case may be, may deem capable of giving information respecting the insolvent or his dealings or property, and the Court or such officer may require any such person to produce any document in his custody or power relating to the insolvent or to his dealings or property.

(2) If any person so summoned, after having been tendered a reasonable sum, refuses to come before the Court or such officer at the time appointed, or refuses to produce any such document, having no lawful impediment made known to and allowed by the Court or such officer, the Court or such officer may, by warrant, cause him to be apprehended and brought up for examination.

(3) The Court or such officer may examine any person so brought before it or him concerning the insolvent, his dealings or property, and such person may be represented by a legal practitioner."

(1) (1924) I.L.R. 2 Ran. 643. (2) (1929) I.L.R. 7 Ran. 126.

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This section is substantially the same as section 36 of the Presidency-Towns Insolvency Act, 1909.

Then in *Re Haripada Rakshit. Ex parte Binodini Dassee* (1) it was held that the Court can in a proper case make an order for the examination of such a person even after the discharge of the insolvent. Moreover it can even order the examination of the insolvent himself—*Shadanchandra Bhandari and another* v. *Sewnarain Golabrai and the Official Assignee* (2)—and this latter decision follows the English practice and is in agreement with *In re Coulson. Ex parte Official Receiver (Trustee)* (3). I do not think it can be seriously urged that such orders are not made during the pendency of the insolvency proceedings. A legal proceeding is said to be pending as soon as it has begun and until it has concluded, that is to say, so long as the Court having original cognizance of it can make an order on the matters in issue or to be dealt with therein. See *Jivanji Mamooji* v. *Ghulam Hussain Sheikh Tayab* (4). The pendency of the insolvency proceedings subsists therefore so long as there is jurisdiction for the Court to make orders therein apart altogether from the date of discharge.

In my opinion it is unnecessary to examine the various problems which may arise when in a joint insolvency application is made for discharge and an order is made to discharge one and not the other joint insolvent. But it must not be supposed that such an order is to be permitted to hamper the Official Receiver from investigating the *bona fides* of a transfer from one of the insolvents and applying for its annulment when similar transfers made by the other insolvent have been annulled under

(1) (1916) I.L.R. 44 Cal. 374.
(2) 37 C.W.N. 718 ; (1933) I.L.R. 60 Cal. 936.
(3) (1934) 1 Ch. 45.
(4) 47 I.C. 771.

section 53 of the Provincial Insolvency Act. This being so, the preliminary objection fails, and the question as to the annulment of the transfer remains to be reviewed.

The District Judge has correctly stated the law when he said

"it is now settled law that the burden of proving that the transfer was made in bad faith and for no valuable consideration lies on the Official Receiver."

See *Official Assignee of the Estate of Cheah Soo Tuan* v. *Khoo Saw Cheow* (1); *Official Receiver* v. *P.L.K.M.R.M. Chettyar Firm* (2) (Privy Council affirming the decision of the High Court); *Pope* v. *Official Assignee, Rangoon* (3); and *H. Hagemeister* v. *U Po Cho and others* (4).

I pass to examine the question as to how the Official Receiver discharged the onus laid upon him in consonance with these cases.

First he proved that Maung Mya owed the Ngwedaung Co-operative Society Rs. 30,000 when making transfers (C.M. 15 and C.M. 16 of 1934) on June 27th, 1932, which were held void. Next he showed that Maung Pa sold his house to his brother-in-law on the 28th June. Maung Pa says it belongs to his wife, but the deed of sale sets out that it was their joint property. Maung Pa continued to live in the house with his wife. There was no proof of rent having been paid by Maung Pa to the appellant. At the time of the sale of the house there appeared to have been no attempt to see whether there was any other possible purchaser, and no satisfactory reason was given for the sale of

(1) (1931) A.C. 67.
(2) (1930) 9 Ran. 170.
(3) (1933) I.L.R. 12 Ran. 105.
(4) (1934) I.L.R. 12 Ran. 625.

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the house at all considering that Ma Tin Gyi said that she was possessed of family estate and could not therefore be said to be in want. In addition to this there was some evidence that Ko Hmoot could not afford to buy the house. He admitted in evidence that he never paid income-tax but said that although he was a shop keeper and paddy broker he never kept accounts. The District Judge asked himself whether it was likely that the appellant would pay Rs. 2,000 in 1932 at a time of admitted financial depression for a property which had only fetched Rs. 450 in 1921, and having reviewed all the circumstances and the facts given in evidence he came to the conclusion that the transfer had not been made for valuable consideration.

There was one phrase in his judgment which appeared to raise a difficulty :

> " Now in the case of the two transfers by Maung Mya it has been held that the facts show that these transfers were not made in good faith. The circumstances of the present transfer are so similar to the two transfers by Maung Mya that a presumption may legitimately be drawn that it partakes of the same character and the burden of rebutting this presumption is shifted to the respondent."

In my opinion the judgment taken as a whole shows that the District Judge knew that it was for the Official Receiver to prove that the transaction was in bad faith. The Official Receiver proved a case which in the absence of any special explanation was a sufficient *prima facie* case. It was impossible to prove by direct evidence that there was a conspiracy to defraud creditors and the proof of such a fact depended upon inferences. The Official Receiver could only prove facts from which bad faith might be inferred and in the absence of reasonable explanation this was the reasonable

inference to draw. In these circumstances I am of opinion that the District Judge was right in saying "the burden to rebut the presumption shifted to the respondent." All that is meant by this phrase is that a stage has been reached in which if the respondent in the Court below—Ko Hmoot—had nothing to say and no reply to make, it could legitimately be held that the Official Receiver had discharged the onus of proof laid upon him—an onus which remains constant throughout the trial in the sense that whatever evidence has been called and whatever stage the proceedings may have reached it is for the Official Receiver to satisfy the Court that the affirmative which he seeks to prove has been established. In *Yellappa Ramappa and others* v. *Tippanna* (1) Lord Shaw said :

"In any case *onus probandi* applies to a situation in which the mind of the judge determining the suit is left in doubt as to the point on which side the balance should fall in forming a conclusion. It does happen that as a case proceeds the onus may shift from time to time. There never is any duty upon the part of the judge to be blind to facts established before him, * * *."

In *Mohammad Aslam Khan and others* v. *Mian Feroze Shah* (2) Sir Lancelot Sanderson said :

"A question was raised as to the party upon whom the *onus* in respect of this matter rested. Their Lordships do not consider it necessary to enter upon a discussion of the question of *onus* because the whole of the evidence in the case is before them and they have no difficulty in arriving at a conclusion in respect thereof."

Reference may also be made to the judgment of Mr. Justice Cuming in *Sati Prasad Garga* v. *Gobinda Chandra Shee* (3).

(1) (1928) I.L.R. 53 Bom. 213, 220. (2) (1932) I.L.R. 13 Lah. 687, 698.
(3) (1928) I.L.R. 56 Cal. 805, 811.

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The point sought to be made by the present appellant is that the District Judge misdirected himself as to the burden of proof. I am of opinion that, on the contrary, he fully understood the position. The misconception in the argument for the appellant has arisen through confusing the burden of proof on the pleadings, which remains constant, with the burden of proof as it is used in the more restricted sense of the burden of adducing cogent evidence in rebuttal of a *prima facie* case made out by one's opponent. If in adducing such rebutting evidence a doubt is created in the mind of the Court as to which version to accept, then the party on whom the burden of proof on the pleadings rests has failed to discharge that burden; but if having established a *prima facie* case on the pleadings such *prima facie* case remains unanswered, or if the answer given (in this case by the transferee) is such as to fall short of creating any serious doubt in the mind of the Court, then the burden of proof on the pleadings (in this case laid upon the Official Receiver) has been discharged.

When the District Judge heard the Official Receiver he decided that a *prima facie* case had been made out, and he asked the appellant for his version. Having heard it and read the evidence he came to the conclusion that he had no doubt that the case set up by the Official Receiver deserved to succeed and that the transfer ought to be annulled under section 53 of the Provincial Insolvency Act, 1920. We shall not interfere with that decision and the appeal is accordingly dismissed. We assess the costs at ten gold mohurs.

BAGULEY, J.—I agree with my Lord the Chief Justice that this appeal must be dismissed.

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With regard to the *mala fides* of the transaction, I have not the slightest doubt. The only difficulty has been the question of whether after the insolvent, Maung Pa, had got his discharge an application for the setting aside of a transfer made by him could be considered by the insolvency Court. The difficulty is increased by the fact that quite recently this Bench has decided that after an insolvent has received his discharge a creditor cannot be allowed to prove his debt as against the estate and had this insolvency matter been one of the ordinary type I have still some lurking doubts as to whether an application for setting aside a transfer could be entertained after the insolvent had received his discharge. So far as the present case is concerned, however, this difficulty seems to be removed because the insolvency was a joint one. For some reason best known to themselves, Maung Pa and his father, Maung Mya, filed a joint petition to be declared insolvent. Only one receiver was appointed for the case. Maung Mya has not received his discharge. It has, in fact, been refused, so there can be no question but that the receiver's powers are still in existence. The case can in no possible way be said to have come to an end for it is obvious that a case cannot come to an end piece-meal. For this reason I see no difficulty in this case in holding that the application for setting aside the transfer is not made too late.

[His Lordship concluded the judgment with a criticism of the work of the Official Receiver in the case.]