APPELLATE CIVIL.

Before Hon'ble Goodman Roberts, Chief Justice, and Mr. Justice Baguley.

THE BANK OF CHETTINAD, LIMITED,

v.

KO TIN AND ANOTHER.*

1936

May 21.

Insolvency—Proof by creditor of his debt—Admissibility of proof as long as receiver has funds—No proof admissible after final discharge—Provincial Insolvency Act (V of 1920), s. 33 (3) and s. 63.

S. 33 (3) of the Provincial Insolvency Act prevents a creditor from proving his debt after the insolvent has been given a final discharge. S. 63 of the Act allows a creditor to prove his debt at any time as long as there is money in the hands of the receiver. But this section only regulates the rights of the creditors *inter se*, and does not render superfluous the words "at any time before the discharge of the insolvent" in s. 33 (3) of the Act

Babu Lal v. *Prashad*, I.L.R. 4 Pat. 128; *In re Cobbold*, I.L.R. 36 Cal. 512; *Jhan Bahadur Singh* v. *Bailiff of District Court of Toungoo*, I.L.R. 5 Ran. 384; *In re McMurdo*, (1902) 2 Ch. 684; *Sivasubramania* v. *Theethiappa*, I.L.R. 47 Mad. 120—*distinguished.*

Kale for the appellant.

Leong for the 2nd respondent.

BAGULEY, J.—This appeal arises out of an insolvency proceeding. The insolvent was Maung Lu Tin, and he filed his own application naming four creditors, U Po Hla, Ko Tin, the Bank of Chettinad and the M.C.P.R. Firm. He was duly adjudicated insolvent and a schedule of creditors was drawn up on the 25th March, 1935, in which the debts of Ko Tin and the Bank of Chettinad only were mentioned. The other two creditors did not prove their debts.

The Bank of Chettinad had a mortgage over two houses, and they mentioned this in their proof

* Civil Miscellaneous Appeal No. 6 of 1936 from the order of the District Court of Myingyan in Insolvency Case No. 7 of 1933.

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of debts. The amount due on the mortgage was Rs. 800 plus a certain amount of interest not stated. They also had a simple money decree for Rs. 450 with costs.

The assets of the insolvent were three houses, two being the houses mortgaged to the Bank of Chettinad, and one other. A receiver was appointed and each of these three houses was put up for sale apparently free from all encumbrances. The Bank asked the Court to set aside the sale of the properties which had been sold by the receiver under the orders of the Court because the two houses mortgaged to them had been sold free of their mortgage. The Bank asked that the sale of these two houses should be set aside and they should be resold subject to their mortgage. The then District Judge in an order passed on the 25th March, 1935, held that under section 47 of the Provincial Insolvency Act the Bank had relinquished their security for the general benefit of the creditors and had proved their whole debt. He therefore declined to interfere with the sale held by the receiver.

The next step taken by the Bank was to ask that the whole of the sale-proceeds of the two houses mortgaged to them might be made over to them because of their mortgage. At the same time the M.C.P.R. Firm sought to have their debt added to the schedule of debts, and the Bank also asked for payment to them of the whole of the sale-proceeds of the house which was not mortgaged to them on the ground that they were the only creditors who had proved their debts. On the 11th November, 1935, the present District Judge passed an order dealing with these three points, and it is against this order that the present appeal has been

filed. He found in the first place that the Bank of Chettinad were not entitled to the full sale proceeds of the two houses mortgaged to them because they had relinquished their mortgage. He found as a fact that Ko Tin had proved his debt and therefore was entitled to share in the assets. He also allowed the M.C.P.R. Firm to prove their debt so as to share with the other creditors in the distribution of the assets.

It seems quite clear with regard to the first point that the matter has been decided against the Bank by *res judicata* owing to the order passed by the former District Judge on the 25th March, 1935. Undoubtedly under section 47 (2) of the Provincial Insolvency Act a secured creditor may relinquish his security and prove the whole of his debt. On the 25th March, 1935, the District Judge found as a fact that the Bank had done so. This order may be right or may be wrong ; but it could have been appealed against, and was not appealed against, and it is now too late to appeal against the order of the 25th March, 1935. The question therefore whether the Bank has relinquished its security has been determined finally and conclusively against the Bank, and cannot now be re-agitated.

So far as the right of Ko Tin to share in the distribution of the assets is concerned, it is quite clear that Ko Tin did prove his debts and the debt due to him appears in the schedule of debts proved and the order of the District Judge on that point must be supported.

The remaining question of whether the M.C.P.R. Firm should be allowed to prove their debt is not so simple. What appears to stand in the way of the firm being allowed to prove their debt now is the fact that on the 28th May, 1935, the insolvent was given a final order of discharge and the M.C.P.R.

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Firm did not apply for leave to prove their debt until the 17th September, 1935. It is argued that section 33 (*3*) of the Provincial Insolvency Act prevents a creditor applying for the first time to be entered on the schedule after the insolvent has been discharged. The wording of the section runs :

" Any creditor of the insolvent may, at any time before the discharge of the insolvent, tender proof of debt and apply to the Court for an order directing his name to be entered in the schedule * * *."

The learned District Judge after quoting the relevant passage of the section states :

" Nevertheless it has been judicially held that this provision does not render it obligatory upon a creditor to tender proof before the discharge of the insolvent. To hold otherwise would be inconsistent with the provision of section 63 of the Act."

Unfortunately the learned District Judge did not give any reference to any case in which this point has been held judicially. Section 63 to which he refers is in Part III of the Act which deals with the adminstration of property, under the sub-heading which begins with section 61 of " Distribution of Property." The section runs as follows :

" Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid, out of any money for the time being in the hands of the receiver, any dividend or dividends which he may have failed to receive before that money is applied to the payment of any future dividends ; but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein."

It has been argued that this section enables a creditor to prove his debt at any time so long as there are any assets in the hands of the receiver out of which he can get paid.

It is of interest to note that we have been unable to find any reported case which is on all fours with the case now before us. In Mulla's Law of Insolvency, paragraph 328, it is stated with reference to section 33 (3) that sub-section (3) provides that any creditor may, at any time before the discharge of the insolvent, tender proof of his debt, but this does not mean that a creditor is precluded after the discharge of the insolvent from proving his debt. This, of course, is the opinion of the learned commentator to which due attention must be given ; but it is rather extraordinary that he is unable to quote any published ruling to support the opinion.

Dealing with the cases mentioned in the foot-note to this passage the first case is *Baranashi Koer* v. *Bhabadeb Chatterjee* (1). This case seems to be beside the point, the only portion of the case that is at all germane to the point in issue being the statement at page 759 :

" It is well-settled that a debt barred by the Statute of Limitation is not provable in bankruptcy proceedings. * * * But it is equally plain that the bar of time ceases to run (or to further run) after adjudication—as the effect of the bankruptcy is to vest the property of the bankrupt in the trustee. * * *."

This case is therefore of no assistance.

The next case quoted is *Jhan Bahadur Singh* v. *The Bailiff of the District Court of Toungoo* (2). In this case it is laid down that

" no period of limitation being prescribed for application by creditors to be brought on the schedule of creditors, the matter was intended to be left to the discretion of the Insolvency Court."

(1) 66 I.C. 758. (2) (1927) I.L.R. 5 Ran. 384.

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In this case the debtor had been adjudicated insolvent; no creditor had proved any debt; the case had been closed; the insolvent had never applied for his discharge; and in consequence the effect of section 33 (*3*) of the Provincial Insolvency Act never came up for examination.

The next case is of importance. It is *In re McMurdo* (1). As direct authority this is of no value because it has nothing to do with the estate of an insolvent person. It was a case in which the estate of a deceased person was being administered in Chancery. It is manifest, however, that a deceased person could never apply for his discharge and therefore the direct point now under consideration could not be before the Court for decision. The passage on which reliance is placed, however, is found on page 699 in the judgment of Vaughan Williams L.J.:

> "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, * * *."

This dictum would, of course, be conclusive in favour of the appellant if the law of bankruptcy in England were the same as the law as laid down in the Provincial Insolvency Act. In this particular case a creditor, who was a secured creditor, sought to prove the balance of his debt by a summons taken out in December 1901, the order of administration having been passed on the 25th July, 1889. Against his being allowed to prove the Bankruptcy Rules were quoted (*vide* page 689). Schedule II, r. 1, provided that "every creditor shall prove his debt as soon as may

(1) (1902) 2 Ch. 684.

be after the making of a receiving order," and rule 16 provided that "if a secured creditor does not comply with the foregoing rules he shall be excluded from all share in any dividend." The rules appear to be the same still (*vide* Schedule II, rules 1 and 17, pages 484, 488, Williams' Bankruptcy Practice, 14th edition). It would be seen, therefore, that under the English Law it is a matter for decision in every case as to whether on the facts laid before the Court a creditor has or has not proved his debt "as soon as may be." In *McMurdo's* case (1) although the creditor only sought to prove 11 years after the proceedings began it was held that he was proving "as soon as may be." He had been precluded from proving before owing to a lengthy international arbitration with regard to the seizing of the Delagoa Bay Railway by the Portuguese Government. Under the Provincial Insolvency Act, however, we have no provision that the creditor must prove "as soon as may be." What the Act says is that he may prove before the discharge of the insolvent; and if section 63 entitles a creditor to prove at any time whatsoever the words "before the discharge of the insolvent" in section 33 (3) will have no meaning whatsoever, and it is a cardinal rule for the interpretation of statutes that if words can be given a meaning they must be given that meaning and not be regarded as purely superfluous verbiage.

Another case quoted—*Sivasubramania Pillai* v. *Theethiappa Pillai* (2)—is unlike the present case, because there the debtor had not received a final order of discharge. He had only got a conditional order. This case was decided under the Act of 1907, but although the numbers of the relevant sections are different their purport is the same.

(1) (1902) 2 Ch. 684. (2) (1923) I.L.R. 47 Mad. 120.

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A case similar to this Madras case is *Babu Lal Sahu* v. *Krishna Prashad* (1). This was also a case under the Act of 1907, and it was held that the word "discharge" contemplated by section 24 (3) of that Act [33 (3) of the Act of 1920] is the final discharge of the insolvent and not a conditional discharge.

There is another case akin to this point reported as *In re R. R. Cobbold, an Insolvent* (2). This was a decision of a Full Bench of the Calcutta High Court. In this case the insolvent had obtained his final discharge on the 3rd March, 1908. There was one creditor, the Milwaukee Bag Company, which had submitted an affidavit of claim to the Official Assignee on the 3rd September, 1907. It was returned by the Official Assignee to the creditor stating that the order of the Court was necessary to entitle the company to rank as a creditor, and after this the claim was passed between the insolvent's solicitors and the creditor's solicitors without anything being done until after the insolvent had obtained his final discharge. The Court held that it had power to order the claim to be entered on the schedule because, it would seem, the claim had actually been made to the Official Assignee before the date of the discharge.

It would seem, therefore, that the matter appears to be *res integra*. If section 63 completely overrides section 33 (3) there is no meaning to be attached to the words "at any time before the discharge of the insolvent," because section 63 would give a creditor an absolute right to prove at any time so long as there was money in the hands of the receiver. On the other hand if section 63 is merely taken to regulate the rights of the creditors *inter se* it would do so quite effectively even if section 33 (3) prescribes a time limit which

(1) (1921) I.L.R. 4 Pat. 128. (2) (1908) I.L.R. 36 Cal. 512.

would override section 63 where the two come into opposition. This reading would give a perfectly understandable meaning to section 63 without in any way making completely superfluous the words "at any time before the discharge of the insolvent" in section 33 (*3*). It is true that in *McMurdo's* case (1) there are dicta which appear to make this reading incorrect, but one must not lose sight of the fact that the wording of the English Bankruptcy Act places on the Court the burden of deciding whether a creditor has proved his claim as soon as possible, and the English Act also contemplates a creditor being allowed to come in with the leave of the Court and on conditions, to which there is no corresponding power in the Provincial Insolvency Act.

For these reasons, I would hold that section 33 (*3*) prevents a creditor from proving his debt after the insolvent has been given a final discharge. This being the case the claim of M.C.P.R. Firm to prove their debt must be disallowed.

I would therefore alter the order of the lower Court and direct that the M.C.P.R. Firm be not allowed to prove their debt, and the receiver must proceed to work out the dividend on these lines. The appellant has been unsuccessful so far as the 1st respondent is concerned, but the 1st respondent has not put in any appearance. He has been successful so far as the 2nd respondent is concerned ; so the 2nd respondent must pay his costs, advocate's fee two gold mohurs.

GOODMAN ROBERTS, C.J.—I agree.

(1) (1902) 2 Ch. 684.