APPELLATE CIVIL.

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

HASHIM ISMAIL DOOPLY

v.

CHOTALAL.*

1937

July 13.

Public policy, agreement against—Conditional discharge of insolvent—Decree in favour of Official Assignee—Satisfaction out of after-acquired property and earnings—Fresh borrowing from creditor—Waiver by creditor of his claim in insolvency—Promise by debtor and his surety to pay the whole sum—Rights of other creditors—Legality of the agreement—Contract Act, ss. 23, 24—Rangoon Insolvency Act, s. 39 (1) (d).

An insolvent received a discharge conditional upon assenting to a decree in favour of the Official Assignee for the amount due in the insolvency, the decree to be satisfied out of the insolvent's future earnings and after-acquired property. Thereafter he borrowed a fresh sum of money from one of his creditors who agreed to waive his claim to the sum due to him from the Official Assignee as a creditor in the insolvency, in consideration of the debtor and his surety promising to pay to the creditor the whole of the sums due to him with interest.

Held, that the agreement was neither inconsistent with the provisions of the Insolvency Acts nor against public policy, and was enforceable against the surety. In effect the creditor obtained the right to proceed against the surety, instead of the right to demand payment from the after-acquired property of the debtor that might come in the hands of the Official Assignee. The agreement did not prejudice the rights of the other creditors in the insolvency

Jakeman v. *Cook*, 4 Ex. Div. 26; *Wild* v. *Tucker*, (1914) 3 K.B. 36, followed.

In re Gaske, (1904) 2 K.B. 478, referred to.

Krishnappa Chetti v. *Mudali*, I.L.R. 20 Mad. 84; *Mohunlal Shah* v. *Harilal Shah*, 27 Bom. L.R. 419; *Naoroji* v. *Mirza*, I.L.R. 20 Bom. 636, distinguished.

Foucar (with him *Soorma*) for the appellant. The agreement entered into by the insolvent with a creditor whilst the decree in favour of the Official Assignee passed under the provisions of s. 39 of the Presidency-towns Insolvency Act (now the Rangoon Insolvency

* Civil First Appeal No. 67 of 1937 from the judgment of this Court on the Original Side in Civil Regular Suit No. 419 of 1935.

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Act) remains unsatisfied is void as contrary to public policy. It is a necessary principle of insolvency law that all creditors should be treated alike, but in the present case the creditor, by his agreement with the insolvent, has obtained a preference over the other creditors and his undertaking to waive his claim to share rateably in the Official Assignee's decree does not alter the position.

Naoroji Thoonthi v. *Kazi Sidick Mirza* (1); *Krishnappa Chetti* v. *Adimula Mudali* (2); *Mohanlal Shah* v. *Harilal Shah* (3); *Peakman* v. *Hamson* (4).

The creditor is not entitled to any relief against the guarantor for the insolvent because the whole transaction is void. Agreements against public policy are void. Ss. 23, 24 of the Contract Act.

M. C. Naidu for the respondent. There is nothing against public policy in the agreement between the parties. The other creditors of the debtor who have a claim under the decree in favour of the Official Assignee are not in any way prejudiced by the agreement.

ROBERTS, C.J.—This is an appeal from a decision of Mr. Justice Braund who granted to the plaintiff Chotalal a decree for Rs. 36,229 with interest at the Court rate, being the total amount of the balance due upon five promissory notes dated December 9, 1929, made by the defendants. It is conceded that the suit was not time-barred since payments in respect of interest as such were made on December 8, 1932, and the suit was filed on December 7, 1935. The only point taken in the appeal has been that the consideration for which the notes were given is unlawful by reason of sections 23 and 24 of the

(1) I.L.R. 20 Bom. 636.
(2) I.L.R. 20 Mad. 84.
(3) 27 Bom. L.R. 419.
(4) 14 Eq. Ca. 485.

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Contract Act. It is admitted that the first defendant signed the notes.

In October 1925 the second defendant became insolvent on his own petition, the debts amounting to Rs. 55,600. The plaintiff was one of six creditors and Rs. 16,000 was shown as due to him by the insolvent in his schedule of creditors. In March 1928 the insolvent was granted a discharge conditional upon his consenting to a decree being passed against him for the full amount of his debts proved in the insolvency, and in conformity with section 39 (*1*) (*d*) of the Presidency-towns Insolvency Act.* After this conditional discharge and in the month of December 1929 the plaintiff agreed to lend the second defendant Rs. 4,500 in cash and to waive his claim to the sum due to him from the Official Assignee as a creditor in the insolvency, thereby enabling the amount of that decree to be reduced *pro tanto* ; and the defendants executed the promissory notes in suit, the first defendant doing so as a surety for the second defendant who was his brother-in-law. The principal sums appearing on the notes amounted to Rs. 28,600 ; the learned trial Judge was satisfied with the explanation given as to how the total was arrived at, and there is no attempt to attack the transaction other than by saying that the consideration for the notes was void as against public policy. This has simplified the issues before the appellate Court.

Before granting a decree the learned Judge required and obtained an undertaking by the plaintiff that he would at once apply to the Official Assignee for a reduction of the amount of the decree held by the latter by a sum equal to the amount of the principal moneys secured by the notes. This seems to have

* Now The Rangoon Insolvency Act. The case on the Original Side was decided and the appeal filed therefrom prior to 1st April 1937—*Ed.*

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been a slip. Reduction of the amount of the decree could only be applied for as far as Chotalal had any interest in the allocation of the moneys thereunder, that is to the extent of his debt proved in the insolvency, namely Rs. 16,000, and not to the extent of Rs. 28,600. So far as the balance of the decretal amount is concerned (Rs. 39,600), this sum when realized would be held by the Official Assignee on behalf of the other creditors.

Mr. Foucar on behalf of the appellant Hashim Ismail Dooply, who was the first defendant, contended that the agreement arrived at between the plaintiff and the second defendant was void as being of such a nature that, if permitted, it would defeat the provisions of the Insolvency Acts : or that it implied injury to the property of the other creditors in the insolvency : or that at any rate the Court should regard it as opposed to public policy. He cited a number of cases to show that before an insolvent had obtained his final discharge he could not lawfully agree to settle the claims of one creditor in consideration of such creditor agreeing not to oppose his final discharge, such agreement being made behind the backs of the Official Assignee and the other creditors—*Naoroji Nusserwanji Thoonthi* v. *Kazi Sidick Mirza* (1), *Krishnappa Chetti* v. *Adimula Mudali* (2) and *Mohanlal Motilal Shah* v. *Harilal Bhogilal Shah* (3). All the transactions which took place in the cases cited were tainted with fraud and all took place before the insolvent had obtained his final discharge.

It was, however, argued from these authorities that it was inconsistent with the provisions of the Insolvency Acts that an insolvent, who had received a discharge conditional upon assenting to a decree in favour of the Official Assignee for the amount due in the insolvency

(1) (1896) I.L.R. 20 Bom. 636. (2) (1896) I.L.R. 20 Mad. 84.
(3) 27 Bom. L.R. 419.

which the latter should distribute upon realizing the amount of the decree rateably amongst all the creditors, should borrow from one of his former creditors and as part of the consideration for the advance should agree to apply to the Official Assignee for a reduction of the decree. After-acquired property or future earnings, subject to such conditions as the Court may direct, is applied to paying off the Official Assignee as decree-holder, who may execute the decree with leave of the Court. It was urged that here the plaintiff was obtaining promissory notes jointly from both the defendants for a much larger sum than the debt proved in the insolvency of one of them together with the new loan of Rs. 4,500 would amount to, and that he was getting an advantage over the other creditors thereby.

It is fair to say that no allegation of fraud was made in the pleadings, nor attempted at the trial, and though there is a phrase in the memorandum of appeal which states that the notes were void as "presumably in fraud of creditors", we have to deal with the case on the footing that there was no fraud on the part of the plaintiff.

What in effect the plaintiff obtained was the right to proceed against the surety upon the notes instead of the right to demand payment on such of the second defendant's property as might find its way into the hands of the Official Assignee; and I agree with the learned trial Judge that this does not prejudice the rights of the other creditors. The surety was in no way connected with the insolvency of the second defendant. Moreover, although it has been urged that under section 43 of the Presidency-towns Insolvency Act it was the duty of the discharged insolvent to assist the Official Assignee in the realization of his property, this does not mean that acts done by him subsequent to his discharge are rendered thereby invalid but only that in

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some circumstances the discharge may be revoked. An order of conditional discharge is not a contingent order but an absolute one.

The case of *Jakeman* v. *Cook* (1) was one in which the defendant's affairs were liquidated by arrangement, and he obtained an order of discharge. He subsequently promised the plaintiff, who was a butcher, that if the latter would continue to supply him with meat on credit he would pay not only for the meat to be supplied but a prior debt proof of which had been admitted in the liquidation proceedings. Kelly C.B. said :

> " He says to one of his creditors, if you will supply me with food on credit I will pay you 'the old debt. Is not that a good consideration ? "

There had clearly been other creditors, and the principle of this case appears to me to be applicable in the present appeal.

In *Wild* v. *Tucker* (2) the present Lord Atkin (then Mr. Justice Atkin) held that a contract by a bankrupt in consideration of a loan of £15 to pay in full a debt of £913/11/0 due from him at the commencement of his bankruptcy and provable therein was a valid and enforceable contract, notwithstanding that the bankrupt was still undischarged. An attempt was made to distinguish this case on the ground that the larger debt was provable merely but that no proof had been lodged at the time of the contract. But the creditor could do one of three things : he could prove in the bankruptcy : he could enter into an independent contract for fresh consideration given to the insolvent and sue upon that : or he could forego his debt altogether. The contract was made after adjudication and the creditor was well aware that his new chose in action would keep alive the pre-existing debt even if the defendant obtained a

(1) L.R. (1878-9) 4 Ex.D. 26. (2) (1914) 3 K.B. 36.

subsequent discharge from the bankruptcy ; since debts incurred after adjudication are not provable in insolvency the object of the action was to secure a judgment which would outlive the discharge. This was an advantage which he was able to obtain which in no wise diminished the sums which other creditors might obtain in the bankruptcy, but it gave to the plaintiff a judgment which the discharge of the bankrupt would not render ineffective. It appears to me that the present is a somewhat similar case, in that the plaintiff here did not seek to prejudice the rights of other creditors, but by a new and independent contract (after discharge had taken place) secured for himself a more advantageous position by reason of his readiness to advance to the second defendant a further substantial sum.

Accordingly in my opinion the learned trial Judge was right in holding that the agreement entered into between the plaintiff and the second defendant was valid and enforceable. It follows that this appeal must be dismissed, but the consent decree in favour of the Official Assignee is only reducible by a sum equal to the amount for which the respondent proved in the insolvency. Costs eight gold mohurs with liberty to apply.

SHARPE, J.—In this action brought by one Chotalal against two defendants, Dooply and Patail, Mr. Justice Braund passed a decree for Rs. 36,229-15-6 against both defendants. The appeal before us is brought by the first defendant, Dooply, alone. The facts, so far as now material, are as follows :

On the 27th October, 1925, the second defendant became insolvent on his own petition. The debts in that insolvency amounted to an aggregate figure of Rs. 55,600-0-0 spread among six creditors. The

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plaintiff, now the respondent, was one of the six creditors and was shown by the second defendant himself in his schedule as a creditor for Rs. 16,000-0-0, part of which was due upon promissory notes and part upon a decree.

In March 1928, the second defendant secured his discharge under the provisions of section 39 (*1*) (*d*) of the Presidency-towns Insolvency Act, 1909, by consenting to a decree being passed against him in favour of the Official Assignee for Rs. 55,600-0-0, which was the full amount of the debts provable under the insolvency (there having been no distribution whatever among the creditors) such decree to be satisfied out of the second defendant's future earnings and after-acquired property.

On the 9th December, 1929, about twenty months after his discharge, nothing whatever having been paid by the second defendant to the Official Assignee towards satisfying his decree, the second defendant went to the plaintiff and told him that he and the first defendant wanted to open a milling store, and he asked the plaintiff for a fresh loan for that purpose. The plaintiff said that he would lend them Rs. 4,500-0-0 in two instalments, Rs. 2,500-0-0 immediately and Rs. 2,000-0-0 a few days later if he got, instead of his entirely fruitless claim in the second defendant's insolvency, a new obligation from both the defendants to pay the amount of the second defendant's original indebtedness to the plaintiff before his insolvency in 1925 together with interest on such amount from the date of that insolvency. A bargain was finally entered into on that basis, and both the defendants executed five promissory notes dated the 9th December, 1929, upon which the plaintiff subsequently brought the present suit. The appellant pleaded in paragraph 2 of his written statement (*a*) that there was no consideration for the promissory notes in suit

and (*b*) that, if there was any, the same was unlawful and the promissory notes therefore void.

Mr. Foucar for the appellant has conceded that here there was consideration and his only concern has been to show that that part of the consideration which related to the second defendant's original indebtedness to the plaintiff was of such a nature that, if permitted, it would have defeated the provisions of the Presidency-towns Insolvency Act and was opposed to public policy and that the promissory notes in suit are consequently void by reason of the provisions of sections 23 and 24 of the Indian Contract Act.

The Presidency-towns Insolvency Act was modelled on the English Bankruptcy Acts of 1883 and 1890, so that since 1909 the basic principles of the law of insolvency in the Presidency-towns and in the Town of Rangoon have been the same as those obtaining in England. It is, therefore, possible to turn for guidance in the present case to such English decisions as bear upon the point.

In the case of *Jakeman* v. *Cook* (1), Kelly, Chief Baron, said that he could see nothing contrary to the spirit of the bankruptcy laws in a debtor, who had given up all his property and obtained his discharge, saying to one of his creditors that if he would supply him with meat on credit he would pay him the old debt. The learned Judge was of opinion that that was a good consideration.

That case was considered by Mr. Justice Atkin, as he then was, in *Wild* v. *Tucker* (2), a decision given before the coming into force of the Bankruptcy Act of 1914, and, therefore, under the English Bankruptcy Acts of 1883 and 1890, on which, as I have pointed out already, the Presidency-towns Insolvency Act is based. In *Wild* v. *Tucker* (2), the debtor was still an undischarged

(1) 4 Ex. Div. 26. (2) (1914) 3 K.B. 36.

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bankrupt at the time of entering into a fresh agreement. At page 39 of the Report, Mr. Justice Atkin said that a promise to pay a debt from which the debtor is already discharged in bankruptcy is an enforceable promise, and he made reference to the case of *Jakeman* v. *Cook* (1) mentioned above. In the concluding paragraph of his judgment the learned Judge said :

"I am not prepared, in the absence of express authority, to invoke public policy in a new form to invalidate a contract between two business men of full capacity."

That decision, as might be expected, coming as it does from so eminent a lawyer, has stood unchallenged for almost a quarter of a century and I certainly propose to follow it in the present case. It is suggested that it is distinguishable because, in *Wild* v. *Tucker* (2), the person entering into the new agreement with the debtor had not proved in the bankruptcy. A person who is a creditor of another at the time of that other's insolvency is entitled either to abstain from proving in the insolvency, as in *Wild* v. *Tucker* (2), or to prove in it as here, and if he adopts the latter course and proves it is always open to him at any time to withdraw his proof, and in my judgment he is then in the same position as if he has never proved. Here the plaintiff proved but subsequently withdrew his proof and he is, therefore, now in the same position as he would have been if he had never proved. I am, therefore, unable to distinguish the present position in the case before us from the position in *Wild* v. *Tucker* (2). To my mind it is impossible to say here that any part of the consideration for the promissory notes in suit was of such a nature that, if permitted, it would defeat the provisions of the Presidency-towns Insolvency Act. It is equally impossible for this Court to regard such consideration

(1) 4 Ex. Div. 26. (2) (1914) 3 K.B. 36.

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as opposed to public policy. Here was a discharged insolvent getting an advance of Rs. 4,500-0-0 wherewith to set up in business, and, as was said by Lord Justice Vaughan Williams in *In re Gaske* (1), at page 482 :

> "After all, the overriding intention of the Legislature in all Bankruptcy Acts is that the debtor on giving up the whole of his property shall be a free man again, able to earn his livelihood, and having the ordinary inducements to industry."

Consequently, I agree with my Lord the Chief Justice that the learned Judge was right in passing a decree against both defendants for the amount which he did, and I also agree that there was an obvious slip in the judgment. The reduction in the amount of the decree held by the Official Assignee must clearly be Rs. 16,000-0-0 and not Rs. 28,600-0-0.

I think it only right to the plaintiff that I should add something about the word "fraud" which was frequently used in the course of argument before us. The consideration in the present case would have been unlawful if it had been fraudulent ; but it is to be observed that fraud was nowhere pleaded and no issue of fraud was before the learned trial Judge. The word, however, found a place in the third ground in the memorandum of appeal to this Court where it was alleged that the learned Judge should have held that the promissory notes in suit were void as being passed presumably in fraud of creditors—a somewhat unfortunate phrase. I think it right in Mr. Chotalal's interests that it should be known that the learned advocate for the appellant has in this Court quite properly stated that there is no suggestion of fraud against him. This appeal must be dismissed.

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(1) (1904) 2 K.B. 478.