INSOLVENCY JURISDICTION.

Before Mr. Justice Dunkley.

1939
Apl. 6.

IN THE MATTER OF MAUNG TIN U AND MAUNG SOE WIN.*

Insolvency—Order suspending discharge for specific period or until payment of dividend—Automatic operation of discharge—Formal application or further order unnecessary—Rangoon Insolvency Act, s. 39 (1) (b) and (c)—Sufficient sum to pay dividend, expenses and commission—Discharge of insolvent—Surplus sum belongs to debtor—"Creditors" only those who have proved their debts—Creditors who have not proved—Reservation of funds for them—Practice illegal—Interim dividend—Surplus after payment in full—Rangoon Insolvency Act, ss. 69, 71, 73, 76, 122—Rules 198, 202.

Whenever an order suspending a discharge is made, either under clause (*b*) or clause (*c*) of s. 39 (*1*) of the Rangoon Insolvency Act, under clause (*b*) when the specific period has expired, and under clause (*c*) when the dividend of four annas in the rupee has been paid or a sum sufficient to pay such a dividend has come into the hands of the Official Assignee, then the suspension automatically terminates and the discharge becomes effective. No formal application for a final discharge and no further order of the Court are required to complete the discharge.

In re Dodsley, Insol. Ca. 152 of 1928, H.C. Ran.; *In re Hawkins*, (1892) 1 Q.B.D. 890; *Muradally* v. *Lang*, I.L.R. 44 Bom. 555, referred to.

In a case falling under s. 39 (*1*) (*c*) of the Rangoon Insolvency Act, as soon as the Official Assignee has in his hand a sum sufficient to declare the required dividend of four annas in the rupee, *plus* the expenses of the proceedings and his commission, the discharge of the insolvent is complete and if any further sums should come into the Official Assignee's hands they are the property of the insolvent and must be refunded to him. The word "creditors" in the section can only mean the creditors who have proved their debts.

S. 71 (*1*) (*a*) of the Act provides for the only case in which funds have to be or can be preserved. It however refers to interim dividends and not to the final dividend. As soon as the final dividend has been properly declared, the administration of the estate in insolvency is ended. The provisions of s. 122 of the Act or of any other sections do not authorize a retention of funds in favour of a creditor who has not proved his debt up to the time of the declaration of the final dividend.

The surplus under s. 76 is the surplus of moneys which have been lawfully received by the Official Assignee and not the moneys improperly received by him after the discharge has become absolute.

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* Insolvency Cases Nos. 195 and 196 of 1927.

Jagannathan for the insolvents.

DUNKLEY, J.—These two petitions may be dealt with together. They arise out of Insolvency Case No. 195 of 1927, in re Maung Tin U, and Insolvency Case No. 196 of 1927, in re Maung Soe Win. The two insolvents are brothers, and the circumstances of both insolvencies are the same. In both cases the discharge of the insolvent was suspended. The order in Maung Tin U's case was an order regularly made under the provisions of section 39 (*1*) (*c*) of the Rangoon Insolvency Act. It is dated the 7th March 1928, and reads as follows :

" His discharge is suspended till a dividend of four annas in the rupee is paid to the creditors."

In Maung Soe Win's case, the order which was passed, on the 10th March 1931, reads as follows :

" Insolvent must pay 0-4-0 in the rupee of the debts mentioned in the schedule before he can apply for his discharge."

With the greatest respect, this is not an order which can be made under the provisions of section 39 (*1*) of the Rangoon Insolvency Act. There was no appeal against the order, and it has been acted upon since 1931, and, therefore, it is now scarcely open to me to review it ; but, in my view, it must be construed also as an order made under section 39 (*1*) (*c*), that is, that the discharge was suspended until a dividend of not less than four annas in the rupee had been paid to the creditors. Consequently, in both cases, I hold that the orders on the discharge applications of the insolvents were, in effect, both orders that the discharge of the insolvents should be suspended until a dividend of not less than four annas in the rupee had been paid to the creditors. Both the insolvents were clerks employed in the

1939

IN THE MATTER OF MAUNG TIN U.

DUNKLEY, J.

Irrawaddy Flotilla Company, and in each case an appropriation order against the insolvent's salary was issued. In both cases, by this means the Official Assignee has recovered a sum more than sufficient to declare a dividend of four annas in the rupee on all the debts mentioned in the schedules of the insolvents.

The insolvents have now applied for their final discharge and also for a refund to them of the surplus remaining in the Official Assignee's hands after the declaration of this dividend of four annas in the rupee. There is a special prayer in the applications in regard to one of the creditors of both insolvents who has waived his claim, but, as I shall presently point out, it is unnecessary to consider this special prayer because no creditor has proved his debt.

At the request of the Official Assignee, I propose to try and lay down certain general rules of practice which will govern these two cases and all similar cases where a discharge has been suspended.

In the first place, whenever an order suspending a discharge is made, either under clause (*b*) or under clause (*c*) of section 39(*1*) of the Rangoon Insolvency Act, under clause (*b*) when the specified period has expired, and under clause (*c*) when the dividend of four annas in the rupee has been paid or a sum sufficient to pay such a dividend has come into the hands of the Official Assignee, then the suspension automatically terminates and the discharge becomes effective. No further order of the Court is required to complete the discharge. This has been pointed out by my brother Braund in his order of the 5th May, 1936, in the case of *In re E. A. Dodsley* (1). If further authority is required for this proposition, reference may be made to the case of *Muradally Shamji* v. *B. N. Lang* (2), where the learned

(1) Insol. Ca. No. 152 of 1928, H.C. Ran. (2) (1919) I.L.R. 44 Bom. 555.

Judge laid down that the practice of the High Court to require the insolvent whose discharge has been suspended to appear and obtain the final and absolute discharge after the expiry of the period of suspension being in contravention of the law was unlawful and ought not to be given effect to. With the greatest respect, I adopt these words and hereby direct that, so far as this Court is concerned, the practice of making a formal application for a final discharge, when the discharge has been suspended either under clause (*b*) or under clause (*c*) of section 39 (*1*), must cease. In the case of *In re Hawkins. Ex parte Official Receiver* (1), the Court of Appeal came to the same conclusion in a case which, in reference to the Rangoon Insolvency Act, fell under section 39 (*1*) (*c*) ; the learned Lords Justice unanimously held that as soon as an amount sufficient to pay the dividend required had come into the hands of the Trustee in Bankruptcy then the discharge of the insolvent automatically and immediately became absolute.

Secondly, under the provisions of section 52 (*2*) (*a*) of the Rangoon Insolvency Act, the property of the insolvent divisible amongst his creditors, *i.e.*, the property which should come into the hands of the Official Assignee, includes property which may be acquired by or devolve on the insolvent before his discharge. What the insolvent acquires after his discharge cannot devolve on the Official Assignee. As I have said, the discharge becomes effective by efflux of time, when the order suspending discharge is made under clause (*b*) of section 39 (*1*), or by the Official Assignee having received, by realization of the insolvent's property, a sum sufficient to pay a dividend of four annas in the rupee to the creditors, if the order of

(1) (1892) 1 Q.B.D. 890.

1939

IN THE MATTER OF MAUNG TIN U.

DUNKLEY, J.

suspension of discharge is made under clause (*c*) of section 39 (*1*), *plus*, of course, in the latter case, the expenses of the proceedings and such commission as is lawfully due to the Official Assignee. In my opinion, in section 39 (*1*) (*c*), the word "creditors" means, and can only mean, the creditors who have proved their debts, because a person does not become a creditor of an insolvent merely because the insolvent has entered that person's name in the schedule, and he only becomes a creditor, meaning thereby a person who can rank for dividend in the insolvent's estate, when he has proved his debt. The provisions of section 69 and following sections of the Act make this clear. In regard to the practice which ought to be adopted in such cases by the Official Assignee to declare a final dividend, the correct practice has been set out with care and precision by my brother Braund in his order of the 5th May, 1936, in the case of *In re E. A. Dodsley* (1), to which I have already referred, and, with the greatest respect, I concur in his remarks on this matter and direct that this practice shall in future be followed by the Official Assignee.

Now, after a sum sufficient to declare a dividend of four annas in the rupee has been received by the Official Assignee, the discharge of the insolvent is absolute, and whatever is subsequently acquired by the insolvent is the property of the insolvent, and the creditors have no interest in it. If the Official Assignee inadvertently receives any such property subsequently acquired by the insolvent, he holds it for the insolvent and not for the creditors, and it must be refunded to the insolvent. This is particularly important in the case of salary-earners whose discharge has been suspended under section 39 (*1*) (*c*), and who

(1) Insol. Ca. No. 152 of 1928, H.C. Ran.

1939

IN THE MATTER OF MAUNG TIN U.

DUNKLEY, J.

are, either voluntarily or under an appropriation order, paying sums periodically to the Official Assignee. As soon as the Official Assignee has in hand a sum sufficient to declare the required dividend of four annas in the rupee, *plus*, of course, the expenses of the proceedings and his commission, the discharge of the insolvent is complete and if any further sums should come into the Official Assignee's hands they are the property of the insolvent and must be refunded to him. This has been laid down by the Court of Appeal with the utmost clarity in the case to which I have already referred—*In re Hawkins. Ex parte Official Receiver* (1). In that case, the insolvent's discharge was suspended until he had paid to the Trustee in Bankruptcy a sum sufficient to enable the Trustee to pay to his creditors a dividend of five shillings in the pound. Before a sum sufficient to enable the Trustee to declare this dividend had been received by him, a considerable legacy was left to the insolvent and the question before the Court of Appeal was whether this legacy vested in the Trustee in Bankruptcy or not. Lord Esher M.R. and Lopes L.J. held that the whole of the legacy vested in the Trustee in Bankruptcy because it was property acquired before the discharge became absolute, although they were agreed that the discharge became absolute as soon as the Trustee received the legacy. On the other hand, Fry L.J. considered that in law it must be held that this legacy was acquired by the insolvent in two distinct parts, at two different times, and that only such sum as was sufficient to enable the Trustee in Bankruptcy to declare the dividend of five shillings in the pound devolved upon the Trustee, and that the balance of the legacy was the property of the insolvent to which neither the Trustee nor his creditors had any title.

(1) (1892) 1 Q.B.D. 890.

1939

IN THE MATTER OF MAUNG TIN U.

DUNKLEY, J.

Consequently, on the authority of this case, it is clear that when, under the Rangoon Insolvency Act, the discharge of the insolvent becomes absolute upon the Official Assignee receiving a sum sufficient to pay a dividend of four annas in the rupee [in cases where the discharge has been suspended under the provisions of section 39 (*1*) (*c*) of the Act], then, as soon as the Official Assignee has received this sum all sums subsequently acquired by the insolvent belong to the insolvent and do not devolve upon the Official Assignee. I do not say that in such cases it is never possible for the creditors to receive a dividend of more that four annas. It may be that, owing to an unexpected windfall, such as that which occurred in the case of *In re Hawkins* (1), or owing to some creditors who have proved subsequently waiving their claims, or some similar cause, it may be possible for the Official Assignee to pay a dividend of more than four annas in the rupee out of moneys properly received by him prior to the discharge becoming absolute, and out of such moneys he is entitled, and is, in fact, compelled, to pay, as far as possible, up to sixteen annas in the rupee to the creditors who have proved their debts. On this point I consider that the order which I myself passed in *Dodsley*'s case (2) on the 30th April, 1937, is erroneous.

Thirdly, in these cases, the Official Assignee has stated that the present practice of his office is "to reserve for those creditors who do not prove their claims on the amounts shown in the insolvents' schedule with the Official Assignee's commission of five per cent." In my opinion, this practice is contrary to the spirit and intention of the Insolvency law and cannot be defended under any provision of the Act.

(1) (1892) 1 Q.B.D. 980. (2) Insol. Ca. No. 152 of 1928, H.C. Ran.

1939

IN THE MATTER OF MAUNG TIN U.

DUNKLEY, J.

Section 71 (*1*) (*a*) provides for the only case in which funds have to be or can be reserved. This section says that the Official Assignee shall, in calculating and distributing dividends, retain in his hands sufficient assets to meet debts provable in the insolvency and appearing from the insolvent's statements or otherwise to be due to persons resident in places so distant that in the ordinary course of communication they have not had sufficient time to tender their proofs. This section, however, follows section 69 and is in co-relation thereto, and it refers only to interim dividends and not to the final dividend. "Final dividend" is dealt with in section 73 of the Act. When the final dividend has been properly declared, after due notice given in accordance with the provisions of rule 198 of the Insolvency Rules of this Court, no creditor has a right to come forward and tender proof of his debt and claim to participate in the dividends which have been declared. As soon as the final dividend has been properly declared, the administration of the estate in insolvency is ended. Such reservation of amounts for the benefit of creditors who have not proved their debts is not a reservation of "unclaimed dividends" which are dealt with in section 122 of the Act. This latter section refers to dividends due to creditors who have proved their debts, but who did not come forward to claim their dues when the dividend was declared. The provisions of the section do not authorize a retention of funds in favour of a creditor who has not proved his debt up to the time of declaration of the final dividend.

Fourthly, section 76 of the Act refers to the treatment of the "surplus" remaining in the Official Assignee's hands, and this surplus must not be confused with the moneys with which I have dealt in my second point, namely, moneys improperly received after the discharge has become absolute. It refers to the surplus

1939

IN THE MATTER OF MAUNG TIN U.

DUNKLEY, J

of moneys which have been lawfully received by the Official Assignee. Section 76 says that "the insolvent shall be entitled to any surplus remaining after payment in full of his creditors, with interest, as provided by this Act and of the expenses of the proceedings taken thereunder." In this section, the word "creditors" plainly means creditors who have proved their debts, because the Official Assignee is not authorized to make any payment to any creditor who has not proved his debt. Creditors who have proved their debts must be satisfied, as far as possible, in full, *i.e.*, to the extent of sixteen annas in the rupee, out of the property of the insolvent in the hands of the Official Assignee which has come into his possession strictly in accordance with the provisions of the Act. Only those creditors who prove their debts before the time allowed under section 73 has expired are entitled to participate. When such creditors have been paid in full, if anything remains in the Official Assignee's hands, that sum is the surplus and must be refunded to the insolvent. Of course, the Official Assignee is entitled first to deduct the proper expenses of the insolvency proceedings. He is also entitled, under rule 202 of the Insolvency Rules of this Court (as amended), to deduct a commission of five per cent on all moneys which rightly come into his hands or ought to have come into his hands (although they may be received subsequently) before the insolvent's discharge became absolute, for all such moneys are "distributable by him as dividends."

Applying the above principles to the present cases, both the insolvents have long ago received their absolute discharge and no further order of this Court granting them their final discharge is necessary. It is unnecessary in these particular cases to consider whether the Official Assignee has wrongly received any amounts which belong to the insolvents because they

1939

IN THE MATTER OF MAUNG TIN U.

DUNKLEY, J.

were acquired by them after their discharge had become effective, because in neither insolvency has any creditor come forward to prove his debt. The action which the Official Assignee must now take is this: He must first deduct from the amount in his hands in each insolvency the expenses (if any) of the insolvency proceedings and his commission at the rate of five per cent on the amount properly realized by him under section 39 (*1*) (*c*), in accordance with the instructions given in this order, and he must then refund the whole of the balance of the two estates to the two respective insolvents.