

**FULL BENCH.**

*Before Young C. J., Addison and Monroe JJ.*

KEWAL KISHAN—Appellant,

*versus*

SPECIAL OFFICIAL RECEIVER, PUNJAB,

AND OTHERS—Respondents.

**First Appeal from Order No. 192 of 1938**

*Provincial Insolvency Act (V of 1920), SS. 28 (7) and 34 (2) — Doctrine of "Relation-back" enacted in S. 28 (7) — Whether governs S. 34 (2).*

*Held*, that a debt incurred between the date of petition and the date of adjudication, as in the present case, is not provable under the provisions of s. 34 (2) of the Provincial Insolvency Act as that section is governed by s. 28 (7) of the same Act for all purposes.

*Nizam v. Babu Ram* (1) and *Byramji Bomanji Talati v. The Official Assignee of Bombay* (2), followed.

Other case-law, discussed.

AMAR NATH CHONA, for the Appellant:—The point for decision in this case was whether the debt of the creditor-appellant incurred by the insolvent between the date of petition and the date of adjudication was governed by s. 34 (2) by itself or whether s. 34 (2) was governed by s. 28 (7). My submission is that s. 28 (7) does not govern s. 34 (2) as s. 34 comes later in the Act. Clause (7) merely governs the provisions of s. 28 itself: See *Madhu Sardar v. Khatish Chandra Banerjee* (3) and *Hemraj Champa Lal v. Ram Kishen Ram* (4). It was held in these cases, that s. 28 (7) does not govern s. 51. In view of these authorities, the Legislature amended s. 51 by the Bankruptcy Amendment Act, 1926, by substituting "the date of admission of the petition" for "the date of the order of adjudication." But the Legislature left the words "the date of such adjudication" intact in s. 34 (2) and therefore, the intention of the Legislature is clear that that section is not governed by s. 28

(1) I. L. R. (1933) 14 Lah. 730.

(3) I. L. R. (1915) 42 Cal. 289.

(2) I. L. R. (1936) 6 Bom. 444.

(4) (1917) 36 I. C. 369.

(7) otherwise these words would also have been substituted as in the case of s. 51.

The same was the case with regard to s. 53. The Legislature amended this section also and inserted the words " on a petition presented " in the section, leaving s. 34 (2) as it is. Again, if sub-s. (7) was to govern the rest of the Act it would have been an independent section by itself and not only a sub-section.

It was laid down in *K. N. K. I. Chetty v. Ba Tin* (1), *Jamshedji Framji v. Pestonji Cowasji* (2) and *Venkatachalam Chettyar v. Collector, Bussain* (3) that s. 28 (7) of the Act does not govern s. 34.

NAZIR AHMAD, KHWAJA, Special Official Receiver, for Respondents:—The Legislature by amending ss. 51 and 53 has shown the clear intention that s. 28 (7) governs even the sections that come later. S. 28 deals only with the question of adjudication and its effect and, therefore, the provisions of sub-s. (7) of that section could not have been better placed than in this section. Unless expressly enacted otherwise, an order of adjudication must relate back to and take effect from the date of the presentation of the petition for all purposes under s. 28 (7). S. 28 (2) bars the charging of the property of the insolvent after the date of the petition. If it were to be held that s. 28 (7) does not govern s. 34, nothing would prevent the insolvent between petition and adjudication from incurring liabilities. This would defeat the intention of s. 28 (2) and the whole purpose of the Act with it.

The insolvent, as from the date of the petition is civilly dead, and cannot after petition act in respect of his property in such a way as to bind the Official Receiver or his creditors: See *Nizam v. Babu Ram* (4), *Byramji Bomanji Talati v. The Official Assignee of Bombay* (5) and *Dimarwashi Venkata Hanumantha Rao v. Yerugalapati Gangayya* (6), in favour of the proposition that s. 34 is governed by s. 28 (7). If s. 28 (7) governs s. 34 under some circumstances, it must govern that section under all circumstances.

AMAR NATH CHONA, replied.

(1) (1921) 61 I. C. 640.

(2) 1932 A. I. R. (Bom.) 511.

(3) 1937 A. I. R. (Rang.) 50.

(4) I L. R. (1933) 14 Lah. 730.

(5) I. L. R. (1936) 60 Bom. 444.

(6) I. L. R. (1928) 51 Mad. 594.

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*First appeal from the order of Khwaja Nazir Ahmad, Special Official Receiver, Punjab and Delhi Provinces, Lahore, dated 15th August, 1938, rejecting the claim.*

The order of Monroe J. referring the case to a Full Bench, dated 17th April, 1939.

Two claims have been rejected by the Special Official Receiver. They arise in respect of debts incurred by the insolvent after presentation of the petition and publication of the statutory notification in the *Punjab Gazette*. The debt alleged to be due to Pt. Devi Chand is secured by two promissory notes, one for Rs.600, dated the 13th August, 1937, and the second for Rs.400 by a promissory note, dated the 14th January, 1938. L. Kewal Kishan held a promissory note for Rs.500, dated the 29th of January, 1938. The amount was advanced to the insolvent for payment of land revenue and the loan was obtained by the insolvent after a refusal of the District Judge to direct the Receiver to pay the amount until the insolvent had given a proper account of his income. It does not appear that the creditors alleged ignorance of the insolvency proceedings. Section 34 of the Provincial Insolvency Act, which differs from the corresponding section, section 46, of the Presidency Towns Insolvency Act, makes provable all debts and liabilities to which the debtor is subject when he is adjudged an insolvent or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication. There is no reference in the section to the date of the presentation of the petition, but it has been argued for the Special Official Receiver that the doctrine of relation back must be applied. In *K. N. K. I. Chetty v. Ba Tin* (1) a Division Bench of

the Burma Chief Court rejected this view : in *Jamshedji Framji v. Pestonji Cowasji* (1) a Single Judge of the Bombay High Court also rejected this view, and the Special Official Receiver relied on a Division Bench decision of this Court. *Nizam v. Babu Ram* (2). In an interesting and, if I may respectfully say so, a carefully reasoned judgment Mr. Justice Bhide, with whose judgment Mr. Justice Addison concurred, reached the conclusion that sub-section (7) of section 28, which enacts the doctrine of relation back, governs section 34. The question at issue in that case was whether a debt which became barred by limitation after presentation of the petition and before adjudication was provable under section 34. The doctrine of relation back cannot be applied in relation to section 34 in one set of circumstances and not in another. The principle laid down in *Nizam v. Babu Ram* (2) was, it seems to me, necessary for the decision reached in that case and I am bound by it.

As the question is one of considerable importance and there is a conflict of view, I think that this case ought to go to a larger Bench and I refer it to the learned Chief Justice to make such order as he thinks fit.

#### THE JUDGMENT OF THE FULL BENCH.

YOUNG C. J.—In this case the Special Official Receiver has rejected the claims of two creditors, Devi Chand and Kewal Kishen, in the proceedings in the insolvency of one Sohan Lal.

On the 15th April, 1937, the petition was filed and on the 20th of April it was admitted. Notification of the petition was published in the Gazette on the 3rd of June of the same year. On the 5th of March, 1938,

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Sohan Lal was adjudicated insolvent. The debts on which Devi Chand's claim is founded were incurred on the 13th of August, 1937, and the 14th of January, 1938, and that of Kewal Kishen on the 29th of January, 1938. Thus these debts were incurred between the date of the petition and the date of adjudication.

Section 34 (2) of the Provincial Insolvency Act provides :

“ Save as provided by sub-section (1), all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged insolvent, or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable under this Act.”

Section 28 (7) provides :

“ An order of adjudication shall relate back to, and take effect from, the date of the presentation of the petition on which it is made.”

The point, which has to be decided, is whether the debts of these two creditors are governed by section 34 (2) by itself, or whether section 34 (2) is governed by section 28 (7). It has been argued by counsel for the appellants that section 28 (7) does not govern section 34 (2), his argument being that section 28 (7) merely governs section 28 itself and does not and cannot govern section 34 which comes later in the Act.

The history of the question of how far section 28 (7) governs the rest of the sections in the Provincial Insolvency Act is not without interest. The point

arose as to the effect of section 28 (7) on section 51 of the Provincial Insolvency Act: and in the cases reported as *Madhu Sardar v. Khitish Chandra Bannerjee* (1) and in *Hemraj Champa Lal v. Ramkishen Ram* (2) it was held that section 28 (7) did not govern section 51. These decisions were doubted in the case reported as *Sankaranarayana Aiyar v. Alagini Aiyar* (3): the Legislature at that stage intervened and amended section 51 by the Provincial Insolvency (Amendment) Act, 1926, by omitting "the date of the order of adjudication" from section 51 and substituting "the date of admission of the petition."

As regards section 53 of the Act, the cases reported as *Hemraj v. Krishan Lal* (4) and *Naqindas Dahyabhai v. Gordhandas Dahyabhai* (5) decided that section 28 (7) did not govern section 53. On the other hand, in the cases reported as *Sankaranarayana Aiyar v. Alagini Aiyar* (3), *Rangiah v. Appaji Rao* (6), *Rakhal Chandra Purkait v. Sudhindra Nath Bose* (7) and *Sheonath Singh v. Munshi Ram* (8) other High Courts held that section 28 (7) did govern section 53. Again, the Legislature intervened and amended the wording of section 53 by inserting the words "on a petition presented" in that section. Thus the intention of the Legislature as regards these two sections of the Act has been made clear.

The argument which has been presented to us is that if sub-section (7) was meant to govern the rest of the Act, it would have been elevated to the dignity of a section and this important provision would not have been contained in a mere sub-section. I can find no

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(5) I. L. R. (1925) 49 Bom. 730.

(2) (1917) 38 I. C. 369.

(6) I. L. R. (1927) 50 Mad 300.

(3) (1919) 49 I. C. 283.

(7) I. L. R. (1919) 46 Cal. 991.

(4) I. L. R. (1929) 10 Lah. 106 (F. B.)

(8) I. L. R. (1920) 42 Al. 433

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validity in this argument. Section 28 deals solely with the question of adjudication and its effect. No better place for this provision could be found than in its present position in the Act. The clear enactment that an order of adjudication shall relate back to, and take effect from, the date of the presentation of the petition must affect the order of adjudication for all purposes unless otherwise expressly enacted. The effect is that the date of the order of adjudication shall by legal fiction be taken to be the date of the presentation of the petition.

If the contrary were held, a peculiar situation would arise. Section 28 (2), which provides that no creditor, during the pendency of the insolvency proceedings, shall have any remedy against the property of the insolvent in respect of the debt, clearly bars the charging of the property of the insolvent after the date of the petition. This has been enacted to protect the creditors' interests. If section 28 (7) did not govern section 34, there would be nothing to prevent the insolvent between petition and adjudication from incurring debts to any amount which would defeat not only the intention of section 28 (2) but the whole purpose of the Act. Again, the insolvent by operation of section 28 (2) cannot create a mortgage which will affect his estate, but if in that mortgage there was a personal covenant to pay the debt, the creditor, though not able to proceed under the mortgage, could prove his debt in the insolvency proceedings if section 28 (7) did not govern section 34 (2), and so affect the estate and the interests of the other creditors.

The effect of the Provincial Insolvency Act is that the insolvent as from the date of the petition is civilly dead and cannot after the petition enter into any transaction in respect of his property which will bind

the Official Receiver or his creditors. Any person dealing with the insolvent after that date does so at his peril. In *Ponsford, Baker & Co. v. Union of London and Smith's Bank, Limited* (1) it was held that a secured creditor was not entitled to receive payment of his debt from his debtor or to hand over the securities after notice of an act of bankruptcy on the part of the debtor, this being the consequence of the debtor having incapacitated himself from tendering the money. It seems to be obvious, therefore, that if a debtor cannot tender money himself to obtain the return of the securities pledged, he cannot incur debts himself during this period and so affect the rest of his creditors.

The question whether section 28 (7) governs section 34 or not has been considered in the cases reported as *Nizam v. Babu Ram* (2), *A. Subramania Ayyar v. S. Meenakshisundaram Chettiar* (3), *Byramji Bomanji Talati v. The Official Assignee of Bombay* (4) and *Rangiah Appaji Rao* (5). The first three of these authorities decided that section 34 was governed by section 28 (7) and that accordingly certain debts which were barred by time at the date of adjudication, but not at the date of the presentation of the petition, were provable in the insolvency. In my opinion, if section 28 (7) governs section 34 under these circumstances, it must govern section 34 under all circumstances.

In the case reported as *Dinarazhi Venkata Hanumantha Rao v. Yerugalapati Gangayya* (6) the original petitioner wished to withdraw and another creditor wished to have his name substituted as the petitioner. The debt of the second creditor was

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(1) (1906) L. R. 2 Ch. D. 444.

(4) I. L. R. (1936) 60 Bom. 444.

(2) I. L. R. (1933) 14 Lah. 730.

(5) I. L. R. (1927) 50 Mad. 300.

(3) I. L. R. [1937] Mad 679.

(6) I. L. R. (1928) 51 Mad. 594.



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barred by time at the date of his application to be substituted for the original creditor but not at the time of the presentation of the petition by the original creditor: it was held that the substitution could take place because section 34 was governed by section 28 (7) and, therefore, the debt of the second creditor was provable in the insolvency and for that reason he could be substituted for the original petitioner. With these authorities I respectfully agree.

The contrary view, however, has been held in *K. N. K. I. Chetty v. Ba Thin* (1), *Jamshedji Framji v. Pestonji Cowasji* (2) and *Venkatachalam Chettyar v. Collector, Bassain* (3). In all these authorities, the decisions were arrived at because in the Presidency Towns Insolvency Act, section 46 (2), there is a specified provision to the following effect: "A person having notice of the presentation of any insolvency petition by or against the debtor shall not prove for any debt or liability contracted by the debtor subsequently to the date of his so having notice." The learned Judges in these cases were strongly influenced in their decision by the fact that there was not a similar provision in the Provincial Insolvency Act. The Presidency Towns Insolvency Act, however, follows more strictly the English Law of Bankruptcy. In English Law the principle of "relation back" has, as its *terminus a quo*, the act of bankruptcy which might take place within three months before the date of the petition. The act of bankruptcy, therefore, might be unknown to *bonâ fide* creditors at the time they were dealing with the insolvent. This cannot apply to the Provincial Insolvency Act, the principle of "relation back" in this Act applies to the date of the petition

(1) (1921) 61 I. C. 640.

(2) 1932 A. I. R. (Bom.) 511.

(3) 1937 A. I. R. (Rang.) 50.

only and not previously. It is for this reason that the provision of the Presidency Towns Insolvency Act set out in section 46 (2) has not been included in the Provincial Insolvency Act. The omission of this provision from the Provincial Insolvency Act therefore cannot, in my opinion, be good ground for holding that section 34 (2) is independent of section 28 (7). The wording of section 28 (7) is very precise and—apart from any other consideration—clearly expresses in my opinion the intention of the Legislature that it should govern adjudication for all purposes.

I, therefore, hold that section 28 (7) does govern section 34 and that therefore the Special Official Receiver has rightly rejected these two claims.

With regard to costs, the Special Official Receiver has appeared both before the learned Single Judge of this Court and before us. He is entitled to costs in both Courts, which I assess at Rs. 100.

ADDISON J.—I agree.

MONROE J.—I agree.

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*Appeal dismissed.*