INSOLVENCY JURISDICTION.

Before Mr. Justice Bayley.

1888. *January* 11, 25.

IN *RE* DEWCURN JEWRA'J AND HEERJEE DEWCURN, (INSOLVENTS).

Insolvency—Indian Insolvent Act (Stat. 11 and 12 Vic., C. 21)—Expunging names of creditors from schedule—Official Assignee a trustee for creditors admitted in schedule.

The applicant was a creditor of the insolvents, who filed their schedule in Bombay in July, 1868. The schedule contained the names of twenty-six creditors, twenty of whom were residents in Karáchi and six in Multán. The debts amounted, in the aggregate, to Rs. 51,819-13-0, and were all admitted, some of them being of trifling sums. The applicant was the largest creditor on the schedule, his debt amounting to Rs. 27,500. The insolvents obtained their personal discharge in March, 1869. Since the date of the insolvency one dividend had been declared, *viz.* a dividend of one per cent., in 1870. Only one creditor had applied for and received that dividend. On the 15th July, 1886, the applicant for the first time applied for a dividend on his claim. He was then, after so long a time, unable to adduce any proof in his own possession, in support of his claim, but was ultimately allowed by the Official Assignee to prove his claim from the insolvent's books. Having thus proved his claim against the estate, the applicant obtained a rule on the 5th October, 1887, calling on the other creditors of the insolvents to show cause why they should not come in and prove their claims, or, in default, why their names should not be expunged from the insolvents' schedule.

Held, discharging the rule, that the Court had no power to expunge the name of a creditor where no fraud was proved or alleged in regard to their claims.

The Official Assignee holds the assets of an insolvent as a trustee for all the creditors admitted on the insolvent's schedule, whether or not they have actually proved their claims.

RULE obtained by Káloorám Mahánandrám, a creditor of the insolvents, on the 5th October, 1887, calling upon each and all of the creditors of the said insolvents to appear and show cause "why they should not come in and prove their claims against the said insolvents, and, in default of such appearance, to prove their claims as aforesaid, why the names of such creditors as aforesaid should not be expunged from the said insolvents' schedule."

The Court ordered that notice of this rule should be served on all the creditors of the insolvents.

1888.

IN RE DEWCURN JEWRÁJ AND HEERJEE DEWCURN.

The insolvents filed their petition on the 27th February, 1868, under the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21,) and on the 22nd July, 1868, they filed their schedule. They obtained their discharge on the 15th March, 1869.

From the schedule it appeared that the number of creditors on the estate was twenty-six, all of whom were residents of Multán and Karáchi; that the aggregate amount of admitted debts due by the insolvents to the creditors was Rs. 51,819-13-0.

The Official Assignee filed an affidavit, in which he stated that a dividend of four *per cent.* on the said sum of Rs. 51,819-13-0 had been declared in the year 1870, but that since that time only one creditor had applied for and received the dividend. He further stated that the applicant Káloorám Mahánandrám, who was the largest creditor on the estate, applied, for the first time on the 15th July, 1886, for payment of the dividend on his claim of Rs. 27,500; that he was unable, after so long a time, to adduce any proofs in his own possession in support of his claim, but that ultimately he had been allowed to prove his claim from the insolvents' books of account which were in the office of the Official Assignee.

After having thus proved his claim, the applicant Káloorám Mahánandrám obtained the rule above set forth on the 5th October, 1887.

Notices of the rule were duly sent by registered post addressed to the creditors whose names appeared in the schedule. The Official Assignee in his affidavit stated that only seven of such creditors had actually received and signed acknowledgments of the receipt of such notice. These creditors, however, had taken no further steps in the matter.

There was no proof that the other creditors had received the notice. Two of the seven creditors had written to the Clerk of the Court stating that they could not go to Bombay or instruct counsel, because of the expense, and requested that the Court would admit their claim, and send them the dividend due.

Lang appeared for the applicant in support of the rule.

Inverarity appeared for the Official Assignee.

1888.

IN RE DEWCURN JEWRAJ AND HEERJEE DEWCURN.

There was no appearance for any of the other creditors.

Inverarity for the Official Assignee showed cause:—As representing the absent creditors the Official Assignee submits that the Court has no power to do what is asked for by this rule. There is no section in the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21,) which enables the Court to expunge the names of creditors from the schedule in such a case as this, or to make such an order as is asked for. Section 38 of the Act enables objections to the schedule to be made in cases where creditors have been omitted from it. Section LXI[1] is the only section under which, in other cases, objection can be taken to the schedule, and under this section and under Rule 36[2] such objection

(1) Section LXI:—And be it enacted, that whenever it shall appear to the court, either by the accounts of any assignee or assignees, or otherwise, to be probable that a dividend may be beneficially made amongst the creditors, it shall be lawful for the court to appoint a day for the purpose of making a dividend, and to cause notice thereof to be given in such manner as it shall direct; and on the day appointed the assignee or assignees shall deliver in, upon oath or solemn affirmation, as the case may be, a true statement in writing of all money received by him or by them respectively, and when, and on what account, and how, the same have been employed; and the court shall examine such statement, and compare the receipts with the payments, and shall ascertain what balances, if any, have been from time to time in the hands of such assignee or assignees respectively; and on the said day all parties interested shall be heard, and all objections to the schedule of the insolvent, and to the accounts or conduct of the assignee or assignees; and any claims of any creditors which shall not have been previously determined shall be heard and determined either by such court immediately, or on a reference to the examiner or other officer of the court; and it shall be lawful for the court to examine the insolvent, the assignees, and any witnesses, either on oath or affirmation, and either at that time to declare a dividend, and to direct that the same shall be paid by the assignee or assignees, or to postpone such declaration or direction of the same until a further hearing, and to make such order as shall be just.

(2) Rule 36:—Whenever it shall appear to the Official Assignee, that a dividend may be beneficially made amongst the creditors, he shall apprize the Court; or if it shall appear to any creditor or Insolvent, such party shall be at liberty to state the same to the Court by motion or petition, and the Court, if it shall be of opinion that a dividend may be beneficially made, will appoint a day for the further hearing of such application, and direct that notice shall be given twice in the *Government Gazette*, in the English and one Native language, of such further hearing for the purpose of making a dividend, and of the day fixed for the same, such day not being less than eight days from the second publication of such notice; and upon such further hearing, the Insolvent or the Assignee, and any

can only be taken at the time a dividend is declared. One dividend has been declared on this estate; but that was so long ago as 1870, and no objection to the schedule was taken then or has been since until now. The applicant cannot object to the schedule now.

All the creditors in the schedule are interested in the estate. Their debts are admitted by the insolvents, who have inserted them in their schedule. Upon those debts the Court has declared a dividend. It has thus by its order recognised them as creditors on the estate, and the Official Assignee has become a trustee of that dividend for them. It is true that only one creditor, besides the applicant, has claimed payment of the dividend, but the others have not by non-claim lost their right. The dividend is so small that it is not worth while as yet for them to go to the expense of claiming it. The applicant himself did not claim his dividend until 1886. He is the largest creditor, on the schedule, claiming Rs. 27,500, and yet he has delayed for sixteen years. The others are creditors for very small sums, and they will probably apply by and bye. But the applicant as soon as he has himself found it worth while to apply takes out this rule to force them to come in at once, or be excluded altogether. He hopes thus to get a larger share. There is no doubt they are creditors. The applicant does not suggest that their debts are fictitious or fraudulent. Under these circumstances the admission in the schedule, coupled with the order of the Court declaring a dividend upon them, is sufficient to establish their claim as creditors. They must be taken to have proved their claims: see also section 44. What right has the

creditor of such Insolvent or Insolvents, may attend the Court, and be heard by himself or counsel, and the Assignee shall produce, for the inspection of the Court, the several statements required by the 41st section of the Act of 11 Vic., c. 21, and all objections to the schedule of the Insolvent, and to the accounts or conduct of the Assignee, and any claims of creditors, which shall not have been previously determined, shall be then heard and determined, either by the Court immediately, or upon a reference to the examiner; and the Court will either declare a dividend, and direct the same to be paid by the Assignee, or will postpone such declaration and direction until a further hearing, and will make such order in the matter as to the Court shall seem fit.

1888.

IN RE DEWCURN JEWRÁJ AND HEERJEE DEWCURN.

applicant, who does not allege that these debts are fictitious or fraudulent, to call upon them to give further proof? The *onus* is now on him (if he objects) to establish his objection. Rule 39(1) shows that the fact of no claim having been made to the dividends does not destroy our right to them, or entitle a creditor to ask that they shall be paid over to him.

[BAYLEY, J.:—That rule has been abrogated, and has not been acted on for ten years.]

It was in force in 1870, when the dividend was declared, and even though not now in force it shows that unclaimed dividends are a trust in the hands of the Official Assignee for the creditors on the schedule. Except those creditors are objected to at the proper time, as provided by section 41 of the Act and Rule 36, or their debts are shown to be fictitious or fraudulent, their claim stands good. A claim cannot be expunged—Archibold on Bankruptcy, p. 206. Statutory authority to expunge a claim is necessary. There is such in England: see Stat. 12 and 13 Vic., c. 106, sec. 178, but there is none in India.

Lang, for the applicant, in support of the rule:—The argument on behalf of the Official Assignee does not distinguish between a claim made and a claim proved. I admit that the Official Assignee is a trustee of the dividends which have been declared. But he is a trustee only for those creditors who

(1) Rule 39:—The Official Assignee shall, on the expiration of six calendar months from the declaration of a dividend, file in Court an account, upon oath, of every dividend then in his hands unclaimed, specifying the names of all creditors to whom such unclaimed dividends are due, as well as the amount of the debt due to each such creditor, and shall publish the same in such numbers of the *Gazette* as shall be first and second successively printed next after such six months; and if any such dividend shall have remained unclaimed for the space of twelve calendar months next following such declaration, every such unclaimed dividend shall be invested in Government securities, which securities shall be deposited with the Sub-treasurer to the credit of the matter of the insolvent estate in which it shall have been declared, accompanied with a memorandum or account specifying each creditor's name to whom each such unclaimed dividend belongs: Provided always, that out of the amount of such unclaimed dividend, accounts so filed and published as aforesaid, the Assignee or Assignees shall deduct the cost and charges of preparing and advertising such account, and that out of the account so to be paid in and credited, he or they shall further deduct the costs and charges of preparing such memorandum or subsequent account.

have *proved* their claims in the mode provided by the statute and the rules: see Rule 16[1]. The mere entry of the debt in the schedule is not enough. Until the required formal proof is given, the alleged creditor has no rights, and cannot be recognised. The claim does not become a debt until proved. Until duly proved, as required by the rules, no dividend would be paid on any claim. The applicant was obliged to prove his claim under Rule 16. It was only to creditors who had proved their claims, and thus made them "debts" that Rule 39 applied. It is suggested that the order declaring a dividend was a recognition of the claims of the creditors in the schedule equivalent to proof of their claim. But that is not so. The order merely declared that a dividend at a certain rate was payable on the total amount of debts shown in the schedule; but that dividend only became due and claimable on such debts as should be duly proved under the rules, and until this was done the Official Assignee would not pay it. My client has duly proved his claim: and he is entitled to ask the Court to give the other claimants a reasonable time to prove their claims, and if they will not, then to strike out their claims altogether. Statutory power is not required for this. The Act could not be worked otherwise: see Archbold on Bankruptcy, p. 195, as to the practice in England, and see Stat. 12 and 13 Vic., c. 136, sec. 164, and see also Robson on Bankruptcy, pp. 374, 375. An order, similar to that we now ask, was made by this Court in the case of *Kessowrám Bápurám*, an insolvent, on the 20th March, 1878, and in the case of *Cándás Nárrondás* on the 13th January, 1886. Counsel referred to *Wild* v. *Banning*[2].

Cur. adv. vult.

25th January, 1888. BAYLEY, J.:—In this case a rule was obtained, on the 1st October, 1887, by Káloorám Mahánandrám,

(1) Rule 16:—Every person who shall make claim upon the estate of any Insolvent shall file the same with the Clerk of the Court, and such claim shall be verified by affidavit or solemn affirmation, if the creditor be a person whose solemn affirmation may by law be received in lieu of an affidavit; and no creditor shall be heard in the matter of such insolvency until he shall have so filed such claim and affidavit, or solemn affirmation as aforesaid.

(2) L. R., 2 Eq., 577.

1888.

IN RE DEWCURN JEWRÁJ AND HERRJEE DEWCURN.

one of the creditors of the insolvents, calling upon the other creditors to appear and show cause why they should not come in and prove their claims against the insolvents, and in default of such appearance why the names of such creditors should not be expunged from the insolvents' schedule.

The petition of the two insolvents was filed so long ago as February, 1868, and in July of that year they filed their schedule as required by the Statute. From the schedule it appears that the creditors are twenty-six in number, twenty of whom are residents in Karáchi and six in Multán, and that the debts of the insolvents (all of which are admitted, but some of which are of very trifling sums), amount in the aggregate to Rs. 51,819-13. The insolvents obtained their personal discharge on the 15th March, 1869.

It appears that since the date of the insolvency only one dividend has been declared, *viz.*, a dividend of four per cent. in the year 1870; but only one creditor for Rs. 1,500 applied for and received this dividend.

On the 15th July, 1886, the present applicant, who is the largest creditor on the insolvents' estate, for the first time applied for the payment of a dividend on his claim. With reference to this application the Official Assignee in his affidavit says:—

"That one Káloorám Mahánandrám, who lately traded in the name of Dhunirám Bujáji, a creditor on the estate of the said insolvents, applied to me for the first time on the 15th day of July, 1886, for the payment of a dividend on his claim against the estate of the said insolvents, but he was unable after so long a time to adduce any proof in his own possession in support of his said claim. Some correspondence then passed between the attorneys of the said Káloorám Mahánandrám on the one hand and myself on the other on the subject of the said proof, and ultimately I allowed the said Káloorám Mahánandrám to prove his claim from the books of account of the said insolvents which are still in my possession."

Having thus proved his claim against the estate, the applicant, Káloorám Mahánandrám, on the 5th October, 1887, took out the present rule, the substance of which I have already stated.

1888.

IN RE DEWCURN JEWRÁJ AND HEERJEE DEWCURN.

When granting this rule I ordered that notice of it should be served on all the creditors. It appears, however, that only seven of them have acknowledged the receipt of the notice.

Rule 16 of the Insolvency Rules provides as follows :—

"Every person who shall make claim upon the estate of any insolvent shall file the same with the Clerk of the Court, and such claim shall be verified by affidavit or solemn affirmation, if the creditor be a person whose solemn affirmation may by law be received in lieu of an affidavit; and no creditor shall be heard in the matter of such insolvency until he shall have so filed such claim and affidavit, or solemn affirmation as aforesaid."

None of the creditors, except two, of whom one is the present applicant, have as yet complied with this rule; and the object of the present application is to compel them to do so, or in default to expunge their names from the list of creditors.

There are, then, two questions to be considered, *viz.*, (1) whether this Court has power to make the order asked for, and (2) if it has the power, whether under the circumstances such an order ought to be made.

Now a point was raised during the argument in this matter as to the position of the Official Assignee. He is admittedly a trustee of the property in his hands, but it was contended on the one hand that he was a trustee only for such of the creditors as have proved their claims as required by the rules of this Court; and on the other that he is a trustee for all the creditors admitted on the insolvents' schedule. I think the latter view is the correct one. In the case of *In re General Rolling Stock Company*(1), Mellish, L. J., says that in cases "where the assets of a debtor are to be divided amongst his creditors, whether in bankruptcy or insolvency or under a trust for creditors, or under a decree of the Court of Chancery, in an administration suit, the rule is that every body who had a subsisting claim at the time of the adjudication, the insolvency, or the administration decrees, as the case may be, is entitled to participate in the assets, and that the Statute of Limitations does not run against this claim,

(1) L. R., 7 Ch. Ap., at pp. 649, 650.

1888.

IN RE DEWCURN JEWRÁJ AND HEERJEE DEWCURN.

but, as long as assets remain unadministered he is at liberty to come in and prove his claim, not disturbing any former dividend." It is clear, then, that in this case all the creditors in the schedule are beneficially interested in the assets held by the Official Assignee, and that he holds as a trustee for them all. It is true that in two cases cited by Mr. Lang from the records of this Court I ordered certain claims to be struck out of the schedules filed by insolvents; but in those cases there were affidavits not contradicted, on which it was sworn that the claims in question were fraudulent; while in the present case the claims are admitted by the insolvents, and there is no suggestion by the applicant of fraud in connection with them, and we must, therefore, assume that they are just and valid claims against the estate. All Civil Courts have power to relieve against fraud (Kerr on Fraud, pp. 3 and 4, 2nd ed.), but the question that arises here is as to the power of the Court where there is no fraud, and it is clear that the cases which have been referred to are not in point.

The question, then, is, has this Court power to expunge the names of creditors from the schedule of an insolvent where no fraud is proved or even alleged with regard to their claims?

There is no doubt that the Courts in England have the power to expunge claims under certain circumstances. But this power has been expressly conferred upon them by statute: see Statute 6 Geo. IV, c. 16, sec. 60; Stat. 12 and 13 Vic., c. 106, sec. 183; Stat. 24 and 25 Vic., c. 134, sec. 155; Stat. 46 and 47 Vic., c. 52, sec. 39; and Rules 23 and 24 of Schedule 2. It thus appears that the Courts have been authorized to exercise this power since the year 1825. Prior to that year, however, the Courts had no such power. In the case of *Ex parte Graham*[1], which was decided by Lord Eldon in 1813, it was held that "Commissioners cannot expunge a proof. As long as it remains upon the proceedings it must be considered as a debt." So Archbold says: "Before the 6th Geo. IV, c. 16, the Commissioners could not expunge a proof without the consent of the parties, the only remedy was by petition to the Lord Chancellor. Under this clause (he is

(1) 1 Rose, p. 456.

alluding to section 183 of 12 and 13 Vic., c. 106,) the Court may expunge the petitioning creditor's debt, but the Court has authority by this section only where the objection is that the whole or part of the debt proved is not justly due from the bankrupt."[1]

It may be said, however, that the debts of the creditors in the schedule in this case are at present merely claims. They have not as yet been proved. A claim is one thing, a proof is another, and all claims must be proved. From the case of *Ex parte Dobson*[2] it would appear, however, that the Court in England had no power to expunge a claim. That case was decided in 1834, at which time Stat. 6 Geo. IV, c. 16, was in force, which statute, as I have already said, expressly gave the Courts power to expunge in certain cases. Sir George Rose (at p. 668) is reported to have pointedly made the distinction between proof and claim. He said: "The petitioner has not proved, only *claimed*. He has a right to prove;" and in his judgment (see p. 670) the Chief Judge said: "Nor can the other part of the prayer as to expunging the claim be granted." Sir John Cross (at p. 671) said: "Then they ask that the claim may be expunged, to which the respondents object that the Court have no jurisdiction to expunge a claim. I am not prepared to go that length; but it is not necessary here to decide that point." I notice that the marginal note on page 670 is to the effect that "a mere claim cannot be expunged."

The first Indian Insolvency Act was Stat. 9 Geo. IV, c. 73, which was passed in 1828. It is remarkable that this statute does not give the Indian Courts the power to expunge which, as I have pointed out, had been conferred upon the Courts in England only three years before by Stat. 6 Geo. IV, c. 16, sec. 60. The Insolvent Act now in force, (Stat. 11 and 12 Vic., c. 21,) passed in 1848, appears to have been based, to a great extent, upon the Stat. 9 Geo. IV, c. 73. Section 55 of the latter Act, I notice, is almost *verbatim* the same as section 44 of our present Act. But there is not in our present Act, any more than in the former Act, any provision whatever authorising this Court to expunge a claim or a debt from a schedule. How, then, can I hold that this Court has power to do what it is asked to do in

(1) Archbold's Bankruptcy (11th ed.), p. 204. (2) 1 Mon. & Ayr., 666.

1888.

IN RE DEWCURN JEWRÁJ AND HEERJEE DEWCURN.

this case? Whether the omission to give this power to the Indian Courts was due to the existence of Act XXVII of 1841, is a point on which I offer no opinion. It has been suggested, I believe, that that Act is no longer in force. It is clear that the Government of India is not of that opinion, for in the volume for 1887 of the "Unrepealed Acts", recently published, I find this Act included.

I hold that I have no power to expunge the names of any of the creditors in this schedule, and I discharge the rule.

Rule discharged.

Attorneys for the applicant:—Messrs. *Payne, Gilbert, and Sayáni.*

Attorneys for the Official Assignee:—Messrs. *Craigie, Lynch, and Owen.*

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

1887. *May* 3.

VISHNU CHINTÁMA'N, (ORIGINAL DEFENDANT), APPLICANT, *v.* BA'LA'JI BIN RA'GHUJI, (ORIGINAL PLAINTIFF), OPPONENT.*

Mortgage—Clause of conditional sale in mortgage—Suit by mortgagee for declaration of title—Decree ordering delivery of property to mortgagee in default of payment of mortgage-debt by mortgagors within one month—Default of payment by mortgagors—Effect of such default—Mortgaged property taken by mortgagee in execution of such decree not as mortgagee but absolutely—Subsequent suit for redemption barred—Res judicata—Limitation Act XV of 1877, Sched. II, Art. 134—Landlord and tenant—Tenant denying landlord's title—Right of landlord to evict.

In 1863 Báláji and Gyanu mortgaged certain land to one Gopál under a mortgage-deed, which provided that, if the mortgage-debt was not paid at the stipulated time, the land should become the absolute property of Gopál, the mortgagee.

In 1871 Gopál filed an ejectment suit against Báláji and Gyanu and one Hari, alleging that he had become owner of the land by operation of the above clause, and that he had subsequently let it to Hari, who now in collusion with the other two defendants, (the mortgagors), denied his title. The ejectment suit was subsequently converted into one for a declaration of Gopál's title as owner as against

* Application, No. 80 of 1886.