

INSOLVENCY JURISDICTION.

*Before Mr. Justice Russell; and, on appeal, before Sir L. H. Jenkins,
Chief Justice, and Mr. Justice Starling.*

*IN RE KALIDAS KESHOWJI.**

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April 15.

Insolvency—Proof of claim by creditor against insolvent—Time within which such proof to be made—Indian Insolvent Act (Stat. 11 & 13 Vic., c. 31), section 40—English rules not applicable—English Bankruptcy Act, 1883 (Stat. 46 & 47 Vic., c. 52).

One Kalidas Keshowji became insolvent and filed his schedule on the 22nd July, 1896. In the schedule one Jehangir Hormasji Mody was entered as a creditor for Rs. 1,500. He, however, did not either prove or dispute this amount in his lifetime, and he died in May, 1897, leaving a will of which the applicants were executors. In 1898 a dividend on the insolvent's estate was declared and paid, but no claim on behalf of the deceased Jehangir Hormasji Mody was sent in by his executors. Subsequently the executors put in a claim on behalf of their testator as creditor in the insolvent's estate for Rs. 87,381. On the 18th July, 1901, the Official Assignee disallowed this claim. The executors, on the 19th February, 1902, applied to the Court that the claim should be admitted. The Official Assignee contended that the application was too late; that under section 40 of the Indian Insolvent Act the rules framed under the English Bankruptcy Act of 1883 were applicable to India, and that under these rules (Rule No. 230) the applicants should have appealed against his order disallowing the claim within twenty-one days.

Held, that the English rule (No. 230), which limited the time for application to prove against an insolvent's estate, did not apply to India, and that the first application was, therefore, not barred by time and should be dealt with on its merits by the Commissioner in Insolvency.

The insolvent Kalidas Keshowji and two other persons traded together in Bombay under the name of Kalidas Lakhmichand and Company and in Madras under the name of Narsey Jagjiwan and Company.

On the 18th February, 1896, Kalidas filed his petition, and on the 24th February, 1896, the other two partners were adjudicated insolvents. The schedule was filed on the 22nd July, 1896, and in it one Jehangir Hormasji Mody was entered as a creditor for Rs. 15,000. He did not either prove or dispute this amount in his lifetime, and he died in May, 1897, and Bai Bhikaiji and

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Pestonji Jehangir Hormasji were, by his will, appointed his executors.

On the 12th January, 1898, a first dividend of three per cent. was declared, and notices of the fact were sent to all the creditors. The above-mentioned executors of Jehangir Hormasji Mody, however, stated that they did not receive any notice, and no claim for the dividend on behalf of his estate was sent in. The practice in the Official Assignee's office for creditors making a claim was to prove it when they applied for payment of dividend.

Subsequently, the executors of Jehangir Hormasji Mody put in a claim on his behalf as creditor on the insolvent's estate for Rs. 87,881-5-3. Several meetings were held before the Official Assignee, who inquired into the claim and on the 18th July, 1901, disallowed it.

The executors of Jehangir Hormasji Mody applied on the 19th February, 1902, to the Commissioner in Insolvency (Russell, J.) for leave to prove their claim for Rs. 87,881-5-3 against the insolvent's estate.

The Official Assignee contended that under section 40 of the Indian Insolvent Act (Stat. 11 & 12 Vic., c. 21) the rules framed under the English Bankruptcy Act of 1883 (Stat. 46 & 47 Vic., c. 52) were applicable in India, and that under these rules the only course open to the applicants was to have appealed within twenty-one days after his decision disallowing the claim, and that not having done so they were now barred by limitation.

The applicants contended that the English rules did not apply in India and that under the Indian law they might now prove their claim, but they submitted that if the English rules did apply, the Court under the circumstances would grant them leave to appeal, although the twenty-one days had expired.

Lawndes for the applicants:—We wish to prove our claim of Rs. 87,881-5-3 upon the insolvent's estate. We sent it in to the Official Assignee, but he made an order disallowing it on the 18th July, 1901. We now ask for a rule calling on the insolvent to show cause why we should not be admitted as creditors on the schedule for the above amount. The Official Assignee alleges that our application is now barred, contending that under section 40 of the Indian Insolvent Act (11 & 12 Vic., c. 21)

the English rules made under the Bankruptcy Act of 1883 (Stat. 46 & 47 Vic., c. 52) apply in India, and that under these rules (see Rule No. 230) we should have appealed from his decision within twenty-one days, and that not having done so we have now no remedy. We contend that the English rules do not apply, and that there is no limit of time under the Indian law for such an application as this. The question then is, do the English rules apply? We submit that they do not, and that section 40 of the Insolvent Act (Stat. 11 & 12 Vic., c. 21) was not intended to make them applicable. Sections 76 and 91 of the Indian Insolvent Act (Stat. 11 & 12 Vic., c. 21) provide for the making of rules of practice for Indian Courts. It could not have been intended by section 40 of the same Act to empower another authority to make another set of rules which might clash with the rules framed under sections 76 and 91. The English Bankruptcy Act in force when the Indian Insolvent Act was passed gave no power to make rules. It is contended that section 40 of the Indian Act incorporates rules made under a power given by the later English Act of 1883 (section 127). The rules framed under the English Act of 1883 are inconsistent with the Indian Act and clash with the rules framed by the Bombay Court. The English rules are made from time to time to suit English requirements and in accordance with English law. They obviously cannot apply in India: see rules as to proof of debts, Nos. 219 to 231.

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Macleod, Official Assignee, in person *contra*:—All claims against an insolvent's estate must be proved quite independently of what is stated in the schedule. The question here is whether claims may be made upon an insolvent's estate at any time, or whether there is any period of limitation to such claims. The Indian law by itself gives no period of limitation, but section 40 of the Indian Insolvent Act expressly provides that all claims which might be proved under any English statute then or afterwards to be in force are to be provable in the manner provided by such statute. The English Bankruptcy Act now in force was passed in 1883. Section 127 of that Act gives power to make rules which are to have effect as if part of the Act. The Bankruptcy Rules of 1886 were framed under that provision. These rules (Nos. 219 to 231)

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prescribe the manner in which claims are to be proved and the period within which they must be proved. I submit that section 40 of the Indian Insolvent Act makes them applicable here. If they are not applicable, then there is no period of limitation, and a claim might be proved after the estate had been distributed among the creditors. He referred to section 39 of the English Bankruptcy Act, 1883, and the schedule to that Act.

RUSSELL, J. :—(After stating the facts, His Lordship continued): Section 40 of the Indian Insolvent Act (Stat. 11 & 12 Vic., c. 21) is as follows :

All such debts, dues, and claims as might be proved under a fiat of bankruptcy bearing even date with the insolvent's petition or the adjudication (as the case may be), according to the provisions of the said Act passed in the sixth year of the reign of his late Majesty King George the Fourth intituled 'An Act to amend the law relating to bankrupts,' or any other statute or statutes now in force or hereafter to be passed relating to bankrupts, may also be proved as is hereinbefore mentioned *in the same manner and subject to the like deductions, conditions, and provisions as in the said statutes are or may be set forth and prescribed.*

Do the words in this section (which refers to the proof of debts) "in the same manner and subject to the like deductions, conditions and provisions as in the said statutes are or may be set forth and prescribed" incorporate the rules under the Bankruptcy Act, 1883? The answer to this question involves the construction of certain sections of the English Bankruptcy Act, 1883 (Stat. 46 & 47 Vic., c. 52).

Section 127 of that Act says :

(1) The Lord Chancellor may from time to time and with the concurrence of the President of the Board of Trade make, revoke, and alter general rules for carrying into effect the objects of this Act.

(2)

(3)

(4) Provided always that the said general rules so made, &c., shall not extend the jurisdiction of this Act.

Sub-clause 2 provides that all general rules shall have effect as if enacted by the Act.

By section 168 (2) it is provided that "the schedules to this Act shall be construed and have effect as part of this Act."

Schedule II to the Act provides for proof of debts, and Rule 24 of that schedule provides that if a creditor is dissatisfied with the decision of the trustees in respect of a proof, the Court may, on the application of the creditor, reverse or vary the decision. The time fixed for an appeal from the rejection of proof is by Rule 236 (subject to the power of the Court to extend the time) twenty-one days from the date of decision complained of.

The general rules, therefore, are to be made, &c., for carrying into effect the object of this Act. I think that the English Legislature must be taken to have known of the existence and the provisions of the Indian Insolvent Act, and had it been intended that the rules under the English Act should apply to the Indian Act, one would have expected to have been added "after the object of this Act" words such as "and any Act or Acts incorporated therewith." Again, the general rules are not to extend the jurisdiction of the English Act, and section 2 provides that "this Act shall not, except so far as is expressly provided, extend to Scotland and Ireland." If Mr. Macleod's contention is correct that the general rules extend to India, would this not amount to an extension of the jurisdiction of the Act? One has only to go through the general rules under the English Act to see that many of them would and must be wholly inapplicable to proceedings under the Indian Insolvent Act.

Again, by section 76 of the Indian Insolvent Act (Stat. 11 & 12 Vic., c. 21) power to make rules thereunder is vested in His Majesty's Supreme Courts at Calcutta, Madras and Bombay, and are to be transmitted to the President of the Board of Commissioners for the affairs of India to be laid before His Majesty for approbation, correction or revision. If rules to be applicable to India under the Indian Insolvent Act were submitted to the Lord Chancellor and the President of the Board of Trade in England, I can imagine that the reply of those high officers would be brief but conclusive. I cannot believe that the Legislature, either in India or in England, could possibly have intended to introduce into India a period of limitation for appeals from the rejection of a proof which is solely intended and adopted for the English Act. If the rules in England can be altered or amended (as they can be), it is easy to imagine cases in which creditors in

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this country might be affected by rules of which nobody in this country had ever heard or contemplated.

In my opinion Mr. Macleod's contention fails, and I must hold that the executors of Jehangir Hormasji Mody are entitled to appeal from his rejection of their proof.

Even if this is not the correct view, I would grant an extension of the time for appeal under the circumstances of the case; although I cannot but sympathise with the endearour on the part of the Official Assignee to get some finality in proceedings such as the present. I make no order as to costs.

The Official Assignee appealed. The appeal was heard by Jenkins, C.J., and Starling, J.

Macleod, Official Assignee, in person.

Lowndes for the respondents (applicants).

The arguments were the same as in the lower Court.

JENKINS, C.J.:—The only question in this appeal is whether the limit to the time within which a creditor can seek to substantiate before the Commissioner in Insolvency a debt rejected by the Official Assignee is that prescribed by the English Bankruptcy Rules. The Official Assignee asserts that it is, but the Commissioner has decided against him; hence this appeal.

Section 40 of the Indian Insolvent Act (Stat. 11 & 12 Vic., c. 21) provides that:

And be it enacted that all such debts, dues and claims as might be proved under a fiat of bankruptcy bearing even date with the insolvent's petition or the adjudication (as the case may be), according to the provisions of the said Act passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled *An Act to amend the law relating bankrupts*, or any other statute or statutes now in force or hereafter to be passed relating to bankrupts, may also be proved as is hereinbefore mentioned, in the same manner and subject to the like deductions, conditions and provisions as in the said statutes are or may be set forth and prescribed.

The English Bankruptcy Act, 1883 (Stat. 46 & 47 Vic., c. 52), section 39, provides that:

With respect to the mode of proving debts, the right of proof by secured and other creditors, the admission and rejection of proofs, and the other matters referred to in the second schedule, the rules in that schedule shall be observed.

Section 127 (1) provides :

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The Lord Chancellor may from time to time, with the concurrence of the President of the Board of Trade, make, revoke and alter general rules for carrying into effect the objects of this Act.

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Rules have been made under this section, and by one of those now in force it is provided that, subject to the power of the Court to extend the time, no application to recover or vary the decision of an official receiver or trustee in rejecting a proof shall be entertained after the expiration of twenty-one days from the date of the decision complained of.

In this case the Official Assignee rejected the proof on the 18th July, 1901, and the creditor's application to the Commissioner was on the 19th of February, 1902—more than the twenty-one days prescribed by the English rule. The question then is, does this rule apply? In terms it cannot, for there has not here been the decision of "an official receiver or trustee." No such officer exists. But beyond that I think the reference to "conditions and provisions" in section 40 does not import mere rules of procedure, but only those general rules of bankruptcy law applicable for the time being to the proof of debts in England.

I think, therefore, the learned Commissioner was right so far as he decided that the application to him was not barred by time. But the actual order he has made is, in my opinion, wrong: he should not have sent the case back to the Official Assignee for adjudication, but should have dealt with it himself, requiring (if he deemed it necessary) either further affidavits or an oral examination of the witness. His order, therefore, will be set aside and the case sent back to him for disposal. The respondent to add the costs of this appeal to his debt if his claim is allowed by the Commissioner; otherwise no order as to costs.

STARLING, J.:—In this case a creditor under an insolvency carried in a claim before the Official Assignee against the estate of the insolvent, which was rejected. For the time nothing further was done, but when a final dividend was about to be declared, the creditor moved the Court to be entered as a creditor for the amount he claimed. To this the Official Assignee objected that, under section 40 of the Insolvent Act, the English

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rules in bankruptcy applied, and under them the application to the Court ought to have been made within twenty-one days from the rejection of the claim by the Official Assignee. The Court, however, overruled the contention of the Official Assignee and referred the claim back to him for adjudication; and against this order the Official Assignee has appealed.

Section 40 of the Indian Insolvent Act (Stat. 11 & 12 Vic., c. 21) provides that all claims provable under the Act of Geo. IV therein referred to, "or any other statute or statutes now in force or hereafter to be passed relating to bankrupts, may also be proved as is hereinbefore mentioned in the same manner and subject to the like deductions, conditions and provisions as in the said statutes are or may be set forth and prescribed."

Now the Bankruptcy Act, 1883 (Stat. 46 & 47 Vic., c. 52), which contains the law at present in force in England, consists of the statute and certain schedules, and under the provisions of the Act certain rules of procedure have been framed, and the question to be now determined is whether those rules are included in the terms of the last portion of section 40. As to the schedules, section 168 (2) of the Bankruptcy Act, 1883, provides that the schedules to the Act shall be construed and have effect as part of the Act, and Mr. Lowndes admitted that the schedules, so far as they relate to the proof of debts, were a part of the Act and provide the deductions, conditions and provisions regulating the proof of debts in the Insolvent Court here under the provisions of section 40 of the Indian Act.

As to the rules under the Bankruptcy Act, 1883 (Stat. 46 & 47 Vic., c. 52), section 127 provides for the making, revoking and altering general rules for carrying into effect the objects of the Act. These naturally must be local in character and concerned with details rather than principles. They must be influenced by the Courts and persons already in existence who have to deal with bankruptcy, and also by those specially brought into existence by the Act and by the local surroundings of those Courts and persons. Consequently these rules would not be so applicable to foreign tribunals as the more general provisions of the Act itself. As to their effect, we find they are to be "judicially noticed"—a phrase which is inapplicable to anything which forms part of a

general Act; and they are to have effect as if enacted by the Act, which seems to me to indicate that, though they are to be treated as having equal legislative sanction with the Act, they are not to form part of it. It is clear that whatever difficulties there may be in applying the English Act and schedules to the Insolvent Court here, those difficulties would be increased greatly if rules of procedure and administration framed for Courts and officials which do not exist here had to be applied to this Court.

Consequently this appeal must fail so far as it is based upon any limitation in point of time in the application by the creditor to the Court provided by the Bankruptcy Rules; but the order of the Commissioner is, in my opinion, wrong in so far as it sends the claim back to the Official Assignee for adjudication. If clause 24 of the second schedule to the English Bankruptcy Act, 1883 (Stat. 46 & 47 Vic., c. 52), applies, then it is clear that the Court must at this stage deal with the matter; but if it does not apply by reason of the interpretation of the word "Court" given in the Act, then I am of opinion that section 38 of the Indian Insolvent Act (Stat. 11 & 12 Vic., c. 21) provides the course to be pursued. That section provides for a creditor making a claim upon the estate of the insolvent and proving his debt or demand. How or before whom that is to be done the Act does not provide; but it provides that any objection to the existence or amount of a debt may be made to the Court, *i.e.*, the Insolvent Court, which shall hear and determine the same.

The order, therefore, must be set aside and the matter referred back to the Commissioner of the Insolvent Court for him to hear the matter on its merits by way of motion and thereon to pass such order as to him may seem just.

The *Official Assignee* in person.

Attorneys for the applicants—*Messrs. Pestonji, Rustim & Koiah.*

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