1931

COMMISSIONER OF INCOME-TAX, BOMBAY PRESIDENCY v. THE NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD.

*Beaumont C. J.*

income-tax as profits or gains of a business under section 6 (iv) and section 10 of the Indian Income-tax Act XI of 1922—in the negative. I answer the second question—whether such income or any part thereof is liable to be assessed to income-tax or super-tax as income profits or gains under any other and if so under which of the provisions of the said Act—by saying that such income is not liable to assessment. I answer the third question raised—whether in law the existing assessment is valid and binding on the Company—by saying that an assessment equal in amount to the existing assessment is binding on the Company.

As regards costs, there will be no order.

MURPHY, J. :—I also answer the questions put to us in the same way as has been done by My Lord the Chief Justice for the same reasons to which I have nothing to add.

*Answers accordingly.*

J. G. R.

## APPELLATE CIVIL.

*Before Mr. Justice Patkar and Mr. Justice Broomfield.*

1931
*February* 18.

GUSTASP BEHRAM IRANI (ORIGINAL DEFENDANT NO. 2—JUDGMENT DEBTOR), APPELLANT *v.* BHAGWANDAS SOBHARAM (ORIGINAL PLAINTIFF—DECREE-HOLDER), RESPONDENT.*

*Presidency-towns Insolvency Act (III of 1909), sections 17, 46 (3)—Adjudication order—Creditor applying for leave to sue—Application allowed with costs—Discharge of insolvent—Execution of decree for costs, maintainability of.*

Costs awarded to a creditor of an insolvent in an application for leave to sue made after the adjudication order are not a provable debt within the meaning of sub-section (3) of section 46 of the Presidency-towns Insolvency Act, 1909, and as such they can be enforced against the insolvent after and notwithstanding his discharge.

*Re Bluck; Ex parte Bluck*[1]; *British Gold Fields of West Africa, In re*[2]; *A Debtor, In re*[3]; *Pilling, In re*[4] and *Vint* v. *Hudspith*,[5] relied on.

*Buckwell* v. *Norman*,[6] distinguished.

*Appeal No. 314 of 1929, from Original Decree.

(1) (1887) 57 L. T. 419.
(2) [1899] 2 Ch. 7 at p. 11.
(3) [1911] 2 K. B. 652.
(4) [1909] 2 K. B. 788.
(5) (1885) 30 Ch. D. 24.
(6) [1898] 1 Q. B. 622 at p. 624.

1931

GUSTASP BEHRAM
v.
BHAGWANDAS SOBHARAM

APPEAL against the decision of V. S. Nerurkar, First Class Subordinate Judge at Poona.

Proceedings in execution.

Bhagwandas, the respondent, was a creditor of appellant (defendant No. 2) to whom large sums of money were advanced on the latter's properties at Poona. Appellant being unable to pay the debt applied in insolvency to the Official Assignee at Bombay. He was adjudicated an insolvent on July 15, 1924. On August 9, 1926, the respondent Bhagwandas applied to the Court for leave to sue the Official Assignee and the mortgagor on his mortgage in the Court at Poona. The application was heard and the Court passed an order granting leave to sue and ordered that the costs of the application be tacked on to the mortgage debt due to the applicant by the insolvent's estate.

On September 4, 1926, Bhagwandas filed a suit in the Court of First Class Subordinate Judge at Poona as a secured creditor and obtained decree on October 27, 1927. The creditor was awarded a mortgage decree to the extent of Rs. 1,12,822-10-9 and also Rs. 513-5-9 for costs incurred by him in the High Court in the application for leave to sue in the matter of the insolvency of the appellant.

The appellant was discharged on September 7, 1926, On March 30, 1929, Bhagwandas presented an application for execution of the entire decree in which he also prayed that the costs in High Court insolvency matter awarded by the decree be allowed to be recovered from the person and other properties of the appellant, judgment-debtor.

The Subordinate Judge allowed execution to proceed.

The defendant No. 2 appealed to the High Court.

*Mehta*, with *Damkewala & Co.*, for the appellant.

*J. G. Rele*, for the respondent.

PATKAR, J. :—This is an appeal in execution of darkhast No. 567 of 1929, suit No. 1205 of 1926.

The appellant in this case was adjudged an insolvent on July 15, 1924, and filed a schedule mentioning all the mortgages in suit on December 12, 1924. On August 9, 1926, the respondent Bhagwandas applied for leave to sue the Official Assignee and the mortgagors under section 17 of the Presidency-towns Insolvency Act. The Court passed an order Exhibit 35 allowing leave, and further ordered that the costs of the application be tacked on to the mortgage debt due to the applicant by the estate of the said insolvent. On September 4, 1926, the respondent Bhagwandas filed a suit as a secured creditor and obtained a decree on October 27, 1927. He was awarded a mortgage decree to the extent of Rs. 1,12,822-10-9, and a personal decree in respect of the balance due after deducting the amount realised from the mortgaged property, and also in respect of Rs. 513-5-9 the amount of costs incurred in the High Court in the application for leave to sue in the matter of the insolvency of defendant No. 2. On September 7, 1926, the appellant was discharged. On March 30, 1929, an application was made for execution of the decree including the costs of the application for leave to sue the Official Assignee and the mortgagors. We are concerned in this appeal with regard to the item of Rs. 513-5-9 costs awarded by the High Court in the application for leave to sue. The learned Subordinate Judge disallowed the contention of the appellant who was a discharged insolvent and allowed execution to proceed.

It is contended in this appeal that the decree is a nullity as the High Court in allowing the leave ordered the costs of the application to be tacked on to the mortgage debt due to the respondent by the estate of

1931

GUSTASP BEHRAM *v.* BHAGWANDAS SOBHARAM

*Patkar J.*

the said insolvent, and that a personal decree with respect to the costs of the application ought not to have been passed. This objection ought to have been raised by the appellant-defendant in the suit. He did not raise that contention and the decree was passed against him and must be executed as it stands. Further, the order passed in the application for leave to sue does not necessarily preclude the Court from passing a personal decree with regard to the amount of costs in the application for leave to sue.

It is next contended that even if the decree is not a nullity the mode of execution is erroneous, and that the decree-holder ought not to be allowed to execute the decree against the property of the insolvent after his discharge. It is urged that under Schedule II of the Presidency-towns Insolvency Act, rule 9, a mortgagee, after he finds that the realisation of the mortgaged property is not sufficient for the payment of the mortgage amount, can prove for the balance of the mortgage money as a debt in insolvency. It is further contended that under section 46, clause (*3*), of the Presidency-towns Insolvency Act the decretal debt would be provable in insolvency and under section 45, clause (*2*), the order of discharge shall release the insolvent from all debts provable in insolvency.

The question, therefore, arises whether the decretal debt with regard to the costs in the application for leave to sue is a provable debt within the meaning of sub-section (*3*) of section 46. Apart from authority, in order that a debt should be provable, it must appear that the insolvent was subject to such debt or liability at any time before his discharge by reason of any obligation incurred before the date of the adjudication. The debt or the liability would not be provable if the debtor becomes subject to it after his discharge or if he becomes

subject to it by reason of any obligation incurred after the date of the order of adjudication. In the present case the order for costs was passed after the date of the adjudication, and the obligation to pay the debt was incurred at the time when the order for costs was passed. The liability, therefore, to pay the costs accrued on August 9, 1926, after the appellant was adjudged an insolvent on July 15, 1924. Though the word 'debt' includes a judgment-debt according to section 2 (b) of the Act, the obligation to pay the costs is one which accrued after the debt of the adjudication and in respect of which there could be no proof in insolvency, and which remained a debt enforceable against the insolvent after and notwithstanding his discharge.

According to the decision of *Re Bluck; Ex parte Bluck*[1] if a man brings an action he does not place on himself the obligation to pay the costs. The obligation arises when the judgment is given against him.

In *British Gold Fields of West Africa, In re*[2] it was observed as follows (p. 11):—

"If the action against a person who becomes bankrupt is unsuccessful, no costs become payable by him or out of his estate, and no question as to them can arise. But if an unsuccessful action is brought by a man who becomes bankrupt, then, if he is ordered to pay the costs, or if a verdict is given against him before he becomes bankrupt, they are provable . . . On the other hand, if no verdict is given against him and no order is made for payment of costs until after he becomes bankrupt, they are not provable. In such a case there is no provable debt to which the costs are incident, and there is no liability to pay them by reason of any obligation incurred by the bankrupt before bankruptcy; nor are they a contingent liability to which he can be said to be subject at the date of his bankruptcy."

The same view is taken in *A Debtor, In re*[3] and also in *Pilling, In re*[4] and *Vint* v. *Hudspith.*[5]

The case cited on behalf of the appellant in *Buckwell* v. *Norman*[6] is distinguishable on the ground that the order for costs was passed before the receiving order was

(1) (1887) 57 L. T. 419.
(2) [1899] 2 Ch. 7.
(3) [1911] 2 K. B. 652.
(4) [1909] 2 K. B. 788.
(5) (1885) 30 Ch. D. 24.
(6) [1898] 1 Q. B. 622 at p. 624.

1931

GUSTASP BEHRAM v. BHAGWANDAS SOBHARAM

*Patkar J.*

made, and the debt was, therefore, provable in insolvency notwithstanding the personal disqualification for proving it. Under sub-section (*2*) of section 46 the respondent having notice of the presentation of the insolvency petition would not be in a position to prove the debt or liability contracted by the debtor subsequent to the date of his so having notice.

In the present case the debt is not provable as the liability was incurred after the date of adjudication, and there is also the personal disqualification under sub-section (*2*) of section 46 for proving it.

We think, therefore, that the liability incurred by the order for costs in the application for leave to sue is not a provable debt within the meaning of sub-section (*3*) of section 46 of the Presidency-towns Insolvency Act, and, therefore, the order of discharge would not release the insolvent from that debt.

The order, therefore, of the lower Court seems to be right and this appeal must be dismissed with costs.

BROOMFIELD, J. :—The relevant facts and the dates have been stated by my learned brother. The appellant has raised two contentions. In the first place he contended that the trial Court had no power to pass a personal decree against the appellant in view of the order of the High Court of August 9, 1926, directing that the amount of costs incurred in connection with the application to the High Court for leave to sue should be tacked on to the mortgage debt. It appears to me to be very doubtful whether this order of the High Court necessarily meant that a personal decree for the amount of costs could not be passed in addition. But in any case it is clear that the appellant defendant No. 2 in the suit ought to have raised that contention at the hearing of the suit and ought also to have appealed against the decree. It is to be noted that a specific prayer was made

in the suit for this particular amount of costs. Defendant No. 3, who was a puisne mortgagee, contended that the plaintiff could not get priority over him in respect of this claim and a special issue was raised on that point which was decided in favour of defendant No. 3. But defendant No. 2, the present appellant, neither appeared nor gave any instructions to his pleader and after the decree had been made he did not file any appeal. The decree in respect of these costs cannot be described as a nullity and its validity cannot be questioned in execution.

Then, secondly, it was contended that instead of executing the decree the plaintiff was bound to prove the debt in the insolvency. This argument was based on Schedule II, rule 9, of the Presidency-towns Insolvency Act and section 45, clause (*2*), of the Act. Rule 9 of the schedule provides as follows :—

"If a secured creditor realizes his security, he may prove for the balance due to him after deducting the net amount realized."

Section 45, clause (*2*), provides :—

"Save as otherwise provided by sub-section (*1*), an order of discharge shall release the insolvent from all debts provable in insolvency."

Counsel argued that by reason of the High Court's order of August 9, 1926, the debt in respect of the costs became part of the secured debt and the plaintiff, therefore, could have proved for the balance after realization of the security. But it is clear, I think, that this rule 9 in the schedule must be read subject to section 46 of the Act which defines what are provable debts. The rule can only mean that the creditor can prove for the balance if the balance consists of a provable debt.

The question, therefore, is whether this particular debt was provable in the insolvency. Clause (*2*) of section 46 is as follows :—

"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."

1931

GUSTASP BEHRAM v. BHAGWANDAS SOBHARAM

*Broomfield J.*

This clause would appear to stand in the way of any attempt by the plaintiff to prove this particular debt in the insolvency. The case of *Buckwell* v. *Norman*[1] shows that the fact that a party cannot prove a debt by reason of the provisions of this clause (*2*) does not necessarily mean that the debt is not a provable debt within the meaning of clause (*3*) of section 46. But this particular debt with which we are concerned does not come within the terms of clause (*3*). In spite of the very wide definition of the word "liability" in the explanation to section 46 it seems to me to be impossible to hold that the liability to pay these costs is one to which defendant No. 2 became subject by reason of any obligation incurred before the date of his adjudication. The only obligation incurred before the order of adjudication which was made on July 15, 1924, was the obligation to pay the mortgage debt. The plaintiff's application in which the costs were incurred and the Court's order on it were both more than two years after the date of the adjudication order. That this debt is not a provable debt seems to me to be sufficiently clear from the language of section 46, and if any authority is needed it will be found in the cases cited in the arguments to which my learned brother has referred. If the debt is not a provable debt then clause (*2*) of section 45 has no application and the appellant's objection to the execution of the decree is untenable.

I agree with the order proposed by my learned brother.

*Appeal dismissed.*

B. G. R.

(1) [1898] 1 Q. B. 622.