

ORIGINAL CIVIL

Before Sir John Beaumont, Chief Justice, and Mr. Justice Blackwell.

1935
October 11

BYRAMJI BOMANJI TALATI (ORIGINAL APPLICANT), APPELLANT *v.* *
THE OFFICIAL ASSIGNEE OF BOMBAY (ORIGINAL RESPONDENT),
RESPONDENT.*

Presidency-towns Insolvency Act (III of 1909) sections 17, 46 (3), 51—Insolvency proceedings—Limitation—Debt provable in insolvency—Doctrine of relation back—Creditor—Debt not barred at date of act of insolvency, but barred at date of adjudication.

Under sections 17 and 51 of the Presidency-towns Insolvency Act (III of 1909), the insolvency commences on the date of the commission of an act of insolvency. At that date the property of an insolvent vests in the Official Assignee who has to distribute it among the creditors who prove their debts. If a creditor's debt is not barred at the date of the act of insolvency on which a debtor is adjudicated an insolvent, even though it may be barred at the date of the order of adjudication, such a debt can be proved in the insolvency.

Ex parte Ross. In the matter of *Coles*,⁽¹⁾ *Ex parte Lancaster Banking Corporation.* In *re Westby*,⁽²⁾ and *Benson*, In *re. Bower v. Chebwynd*,⁽³⁾ approved and applied.

PROOF of debt in insolvency proceedings.

J. P. Karkaria advanced to R. A. Cooper a sum of Rs. 1,000 on November 19, 1928. Cooper committed an act of insolvency on August 18, 1931, viz., that there was an attachment on his property for twenty-one days. On this act he was adjudicated insolvent on March 27, 1933, on a petition presented by a creditor of his on October 14, 1931. Karkaria lodged a proof of his claim in the insolvency proceedings. His claim was opposed by the other creditors of Cooper. On March 13, 1935, the Official Assignee admitted his claim for Rs. 1,165 (being Rs. 1,000 for principal and Rs. 165 for interest) on the ground that as the debt was in time on the date of the commission of the act of insolvency,

*O. C. J. Appeal No. 30 of 1935. Ins. No. 760 of 1931.

⁽¹⁾ (1827) 2 Gl. & J. 330.

⁽²⁾ (1878-79) 10 Ch. D. 776.

⁽³⁾ [1914] 2 Ch. 68.

the claimant was entitled to prove it in insolvency proceedings despite the fact that on the date of the order of adjudication, it was barred by limitation. This was based on the ground that the order of adjudication made on March 27, 1933, would relate back to the date on which the act of insolvency was committed, viz., August 18, 1931.

From this finding of the Official Assignee, the opposing creditor appealed to the Judge dealing with Insolvency. The matter came on for hearing before N. J. Wadia J., who, on May 29, 1935, delivered the following judgment dismissing the appeal with costs.

N. J. WADIA J. This is an appeal against an order of the Official Assignee in Insolvency No. 760 of 1931, allowing a claimant Mr. J. P. Karkaria to prove a claim of Rs. 1,165 in the insolvency, although on the date of the order of adjudication the claim was barred by limitation. The amount of Rs. 1,000 was lent by Karkaria to the insolvent Rustomji Ardeshir Cooper on November 19, 1928. On October 14, 1931, the petitioning creditor Talati filed the insolvency petition against Cooper for an act of insolvency committed on August 18, 1931. On March 27, 1933, Cooper was adjudicated insolvent. Admittedly on the date of adjudication Karkaria's claim was barred by limitation. The Official Assignee has allowed the claim to be proved on the ground that under section 51 of the Presidency-towns Insolvency Act the order of adjudication made on March 27, 1933, would relate back to the date on which the act of insolvency was committed, viz., August 18, 1931, and on that date the claim was in time.

Section 46 of the Act deals with the debts provable in insolvency and sub-section (3) provides that

“ save as provided by sub-sections (1) and (2), all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an

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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 in insolvency."

Section 51 says that—

"the insolvency of a debtor, whether the same takes place on the debtor's own petition, or upon that of a creditor or creditors, shall be deemed to have relation back to and to commence at the time of the commission of the act of insolvency on which an order of adjudication is made against him."

The effect of section 51 read with section 17 of the Act is that the Official Assignee is deemed to be the owner of the property of the insolvent from the date on which the first available act of insolvency is committed, and can as such owner challenge transactions entered into by or with the insolvent even prior to the date of adjudication. It was contended on behalf of the appellant that the doctrine of relation back laid down by section 51 applies only to the title of the Official Assignee and that it cannot have the effect of reviving a claim against the debtor which had become barred at the date of adjudication. But the effect of sections 17 and 51 is that a person who has received money from a debtor after the commencement of the insolvency may, in certain circumstances, be held liable to return it. Sir Dinshah Mulla in his Commentary on the Law of Insolvency says (p. 416, paragraph 585), when dealing with the general results of the doctrine of relation back :

"A debtor cannot after the commencement of his insolvency enter into any transaction in respect of his property which will bind the Official Assignee or Receiver, and a person dealing with him from that date may find himself in a precarious position. If he pays money to the debtor he gets no discharge for it and may have to pay again to the Official Assignee or Receiver ; if he receives money from the debtor, he is liable to return it ; if he buys property he gets no title as against the Official Assignee or Receiver, unless in each of these cases the transaction comes within the protection section."

That being so it would be a serious hardship to a creditor if limitation were allowed to run against him after the

commencement of the insolvency but before adjudication. Sir Dinshah Mulla says (p. 181, paragraph 257) :

“ The Indian Limitation Act, 1908, has no application to proof of debts, and it is open to a creditor who was not barred at the commencement of the insolvency to come in and prove his debt *in insolvency* at any time so long as there are assets available for distribution ”;

and again, para. 433 (6), at p. 286 :

“ a debt which is barred at the commencement of the insolvency is not provable, but if the debt was not barred at the commencement of the insolvency lapse of time will not deprive the creditor of his right of proof.”

The view taken by the Official Assignee appears to me to be correct. The appeal will be dismissed with costs.

THE petitioning creditor appealed.

N. P. Engineer, for the petitioning creditor, appellant.

M. C. Setalvad, *H. D. Banaji* and *K. B. Bharucha*, for the claimant-creditor, *J. P. Karkeria*.

The Official Assignee appeared in person.

Engineer. On November 9, 1928, there was a loan by the claimant-creditor to the insolvent. On August 18, 1931, the insolvent committed an act of insolvency, namely, that there had been an attachment of his property for twenty-one days. On October 14, 1931, the petitioning creditor presented a petition for adjudication. On March 27, 1933, an adjudication order was passed. At the date when the act of insolvency was committed the claimant-creditor's claim was in time but was barred at the date of adjudication. A creditor whose claim is barred cannot prove in insolvency. Refers to section 46 of the Presidency-towns Insolvency Act. The Indian Limitation Act does not apply to insolvency. The authorities show that a claim which is barred on the date of adjudication cannot be proved.

[BEAUMONT C. J. The Indian Limitation Act does not extinguish the right but merely bars the remedy.]

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The Official Assignee and the Judge dealing with this insolvency invoked the doctrine of relation-back and admitted the claimant's claim. Refers to *Sivasubramania v. Theethiappa*⁽¹⁾ (case under the Provincial Insolvency Act). If a debt is provable at the date of the adjudication order it does not become barred. Reference was made to the following sections of the Presidency-towns Insolvency Act; sections 46 (9), 51, 52 (2), 53, 56, 57 and 17. Section 51 deals with the doctrine of relation-back. It deals with the title of the Official Assignee. It has nothing to do with the time of proving. It is open to a creditor to file a suit without the leave of the Court after an act of insolvency is committed and while a petition for adjudication is pending and before an order of adjudication is made. The Act makes a distinction between "commencement of insolvency" and "time of adjudication". No question of hardship should weigh with the Court. Reference was made to section 78 (2) of the Provincial Insolvency Act. The mere fact that an act of insolvency is committed does not stop time from running.

[BEAUMONT C. J. referred to Mulla's Law of Insolvency, p. 286.]

A creditor may put a plaint on file after an act of insolvency is committed and await the result of the petition. Reference was made to Form No. 45 appended to the Rules framed by the Bombay High Court under the Presidency-towns Insolvency Act. Interest is allowed up to the date of an order of adjudication and not up to the date when the act of insolvency was committed. Ex parte *Ross*: In the matter of *Coles*⁽²⁾; *Dewdney*, Ex parte: *Seaman*, Ex parte⁽³⁾; *Jhan Bahadur Singh v. The Bailiff of the District Court of Toungoo*,⁽⁴⁾ Ex parte *Lancaster Banking Corporation*. In

⁽¹⁾ (1923) 47 Mad. 120 at pp. 128, 129, 134, 135.

⁽²⁾ (1827) 2 Gl. & J. 330.

⁽³⁾ (1808-9) 15 Ves. 479.

⁽⁴⁾ (1927) 5 Ran. 384 at p. 386.

re *Westby*⁽¹⁾; In re *Crosley*. *Munns v. Burn*⁽²⁾; and *Benzon*,
In re. *Bower v. Chetwynd*.⁽³⁾

Setalvad. The question is whether there is anything in section 46 (3) of the Presidency-towns Insolvency Act which prevents the claimant from proving his claim. In other words was the debtor subject to the claim at the time of adjudication. The Statute of Limitation ceases to apply during bankruptcy. The Official Assignee takes hold of the property of the insolvent as a trustee for his creditors and no limitation runs against him. What is then the time when the Official Assignee becomes a trustee? I submit it is when the trust is created, namely, when the first act of insolvency was committed. See section 51. I submit that sections 17 and 51 should be read together. It would be anomalous if the Official Assignee could require me to pay back moneys paid to me by the debtor after an act of insolvency was committed and before the adjudication order was made saying that he held in trust for the creditors, whereas I could not come in and prove my debt in insolvency, because it was barred at the date of the adjudication order. Reference was made to Williams on Bankruptcy, 14th Edition, p. 220; Halsbury 2nd Edition, Vol. II, p. 262; and Mulla's Law of Insolvency, pp. 411-412. To ascertain whether a debtor is subject to a debt within the meaning of section 46, you must look to the time of commencement of the insolvency.

Engincer, in reply. Refers to Halsbury, 2nd Edition, Vol. II, page 268, para. 349. Section 47 of the Presidency-towns Insolvency Act corresponds to section 38 of the English Bankruptcy Act. Refers to *Daintrey*, In re. *Mant*, Ex parte,⁽⁴⁾ and section 49 (6) of the Presidency-towns Insolvency Act. A trust in favour of the Official Assignee

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BOMBAY⁽¹⁾ (1878-9) 10 Ch. D. 776 at p. 784.⁽²⁾ [1914] 2 Ch. 68.⁽³⁾ (1887) 35 Ch. D. 266.⁽⁴⁾ [1900] 1 Q. B. 546 at p. 572.

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is created when the order of adjudication is made. See Mulla's Law of Insolvency, p. 180.

[BEAUMONT C. J. The real difficulty is that if a debtor paid the creditor after an act of insolvency, the creditor must pay it back to the Official Assignee after the order of adjudication is made.]

The payment would be an acknowledgment by the debtor and the creditor can in such a case come in and share rateably with the other creditors.

BEAUMONT C. J. This appeal raises a short point of insolvency law, on which there appears to be no direct authority. The question is, whether a creditor can prove for a debt which was barred by limitation at the date of the order of adjudication, but was not so barred at the date of the act of insolvency on which the adjudication was founded. The debt in question was incurred by the debtor on November 19, 1928 ; on August 18, 1931, there was an act of insolvency, on which a petition for adjudication was presented on October 14, 1931 ; and an order of adjudication was made on March 27, 1933. The point is not likely to arise frequently, because, as a rule, adjudication follows promptly, if it follows at all, upon an act of insolvency ; but in this case there were special circumstances, which resulted in a delay of nearly two years between the act of insolvency and the order of adjudication. The Official Assignee held that the debt was provable, and his decision was upheld by the Insolvency Judge, from whose judgment this appeal is brought.

The case arises under the Presidency-towns Insolvency Act, 1909. Section 17 of the Act provides that—

“ On the making of an order of adjudication, the property of the insolvent wherever situate shall vest in the official assignee and shall become divisible among his creditors, and thereafter, except as directed by this Act, no creditor to whom the

insolvent is indebted in respect of any debt provable in insolvency shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt or shall commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose."

Then section 51 deals with the date of the commencement of the insolvency, and provides :—

"The insolvency of a debtor, whether the same takes place on the debtor's own petition, or upon that of a creditor or creditors, shall be deemed to have relation, back to and to commence at—

"(a) the time of the commission of the act of insolvency on which an order of adjudication is made against him, or,

"(b) if the insolvent is proved to have committed more acts of insolvency than one, the time of the first of the acts of insolvency proved to have been committed by the insolvent within three months next preceding the date of the presentation of the insolvency petition."

Then the section, under which the question directly arises, is section 46, sub-section (3), which provides :—

"Save as provided by sub-sections (1) and (2),—(which are not material for the present purpose)—all debts and liabilities, present or future, certain or contingent, 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, shall be deemed to be debts provable in insolvency."

It is well settled that debts which are barred by limitation are not provable in insolvency, because the debtor is not subject to such debts ; and the question we have to determine is the date at which time ceases to run in favour of the insolvent. If the material date is the date of the order of adjudication, then the claimant's debt is not provable ; but if the material date is the date of the commission of the act of insolvency, then the debtor was still subject to the debt at the time at which he was adjudged, and the debt is provable.

In my opinion, the principle on which this case ought to be determined is well settled. Under section 17 and section 51 of the Presidency-towns Insolvency Act, the

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insolvency commences on the commission of the act of insolvency, and at that date the property of the insolvent vests in the Official Assignee, whose duty it is to administer it, and distribute it amongst the creditors who prove their debts. As from that date the Indian Limitation Act has no application, and the relationship of debtor and creditor ceases to exist. That principle was laid down as long ago as 1827 in *Ex parte Ross*. In the matter of *Coles*,⁽¹⁾ where the Lord Chancellor says (p. 332)—

“Whatever may be the technical objection, the effect of commission clearly is to vest the property in the assignees for the benefit of the creditors; they are, therefore, in fact, trustees: and it is an admitted rule, that unless debts are already barred by the statute of limitations when the trust is created, they are not afterwards affected by lapse of time.”

The principle was also stated by Vice-Chancellor Bacon in *Ex parte Lancaster Banking Corporation*. In *re Westby*.⁽²⁾ The material passage in the judgment is at p. 784, and is in these terms:—

The *Statute of Limitations* has nothing to do with the bankruptcy laws. When a bankruptcy ensues, there is an end to the operation of that statute, with reference to debtor and creditor. The debtor's rights are established and the creditor's rights are established in the bankruptcy, and the *Statute of Limitations* has no application at all to such a case, or to the principles by which it is governed.”

The case of *Ex parte Ross*⁽¹⁾ was also referred to in this connection with approval by the Court of Appeal in England in *Benzon*, In *re. Bower v. Chetwynd*.⁽³⁾

Channel J., in delivering the judgment of the Court, at p. 75, says this:

“As to the second point, cases were quoted beginning with *Ex parte Ross*,⁽¹⁾ which shew that in the bankruptcy a debt does not become barred by the lapse of time if it was not so barred at the commencement of the bankruptcy, and of this there can be no doubt, but this is only *in the bankruptcy*.”

No doubt that is a dictum only, but it recognizes in clear terms what seems to me the correct principle to apply.

⁽¹⁾ (1827) 2 Gl. & J. 330.

⁽²⁾ (1878-9) 10 Ch. D. 776.

⁽³⁾ [1914] 2 Ch. 68.

Mr. Engineer for the petitioning creditor has relied on other sections of the Presidency-towns Insolvency Act as indicating that the true date for determining the question of limitation is the date of the order of adjudication. He relies particularly on section 49, sub-section (6), which provides that—

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“Where there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date on which the debtor is adjudged an insolvent . . .”

That sub-section fixes an arbitrary date ; and the fact that the legislature selected the date of adjudication as the date from which interest was to run in case of a surplus can have no bearing on the question with which we have to deal. Mr. Engineer has relied also on a decision of the English Court of Appeal in *Daintrey, In re. Mant, Ex parte*⁽¹⁾ where the Court was dealing with the section relating to mutual dealings, viz. section 38 of the English Act, which is in the same terms as section 47 of the Presidency-towns Insolvency Act. For the purpose of section 38 of the English Act, it was held that the material date at which the question of mutual dealings was to be considered was the date of the receivership order. The reason for selecting that date is given by Wright J. at p. 555 in these terms :

“If the line were to be drawn at different times for the two purposes of proof and set-off, the result might be unjust. If it were drawn for the purposes of set-off at the ‘commencement of the bankruptcy,’ as defined by section 43, there would be three months (under the Act of 1869, section 11, it would have been twelve months) during which one side of a cross-account would be growing for purposes of proof, and yet the other side would be cut short for purposes of set-off. If it were not drawn until adjudication, the injustice would be the other way, but it might be equally great.”

The Court of Appeal accepted Wright J.’s view that the material date for the purpose of considering mutual set-off was the date of the receivership order, an intermediate date

⁽¹⁾ [1900] 1 Q. B. 546.

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between the commencement of the bankruptcy and the order of adjudication, which does not exist under the Presidency-towns Insolvency Act. Whether the principle of *Daintrey*, In re,⁽¹⁾ would apply to India substituting for the date of the receivership order, the date of the adjudication order, it is not material to consider. The case, in my opinion, has no real bearing upon the question whether a debt not barred at the date of the act of insolvency should be held to be provable.

In my opinion, the principle to be applied is the one to which I have referred, and the decision appealed from is, therefore, right. It is no doubt something of an anomaly that if the petition for adjudication had been dismissed, the claimant's debt would have been time barred. But that arises from the fact that the claim of a creditor against his debtor when not insolvent is of a different character from his claim to share in the distribution of the debtor's estate in insolvency.

The appeal must be dismissed with costs.

The claimant-creditor to have his costs out of the Rs. 500 deposited by the appellant in Court.

BLACKWELL J. I agree, and have nothing to add.

Attorney for appellant : Mr. *G. B. Pandya*.

Attorneys for Official Assignee : Messrs. *Ardeshir, Hormusji, Dinshaw & Co.*

Appeal dismissed.

B. K. D.

⁽¹⁾ [1900] 1 Q. B. 546.