1872.
The Advocate General v. Fatimá S. Begam.

A declaration was accordingly made that the defendant, Fatimá Sultáni Begam, was entitled to select a Mutawali of the mosque from the persons related to her late husband by blood or affinity, such selection to be sanctioned by the Court, and (in case the relators desired it) a decree for a reference to the Commissioner to take the accounts of the rents of the garden and bungalows, the defendant, Fatimá to be charged an occupation rent during such time as she had been in occupation of the bungalows and garden, or either of them. The costs of the suit were also provided for.

Attorneys for the plaintiff, *Keir, Prescott, and Winter.*

Attorneys for the defendant, Fatimá, *Craigie Lynch and Owen.*

Attorneys for the defendant, Agá Fatte Ali *Thacker and Chalk.*

March 16.

[ORIGINAL CIVIL JURISDICTION.]

Appeal Suit. No. 189.

T. F. PUNNETT, Official Liquidator of the Mercantile Credit and Financial Association (Limited) ... .*Appellant.*

VINÁYAK PÁNDURANG..................................*Respondent*

Act XXVIII. of 1865, *Sec.* 24—*Final Discharge of Trader-Liability to future calls.*

An insolvent Trader, who has obtained his discharge under Sec. 24 of Act XXVIII. of 1865, is not liable for calls made, after he has obtained his discharge, in respect of shares held by him in a Joint Stock Company, when the order for the winding up of such Company has been made prior to the time of the Insolvent Trader obtaining his discharge.

THIS was an appeal from an order of Sargent, J., made in Chamber on the 23rd of November 1871, whereby he made absolute a summons directing the name of Vináyak Pándurang to be struck out of the list of contributories of the Mercantile Credit and Financial Association (Limited).

1872.
T. F. Punnett
v.
Vináyak
Pándurang.

Vinayak Pándurang was a holder of 275 shares in the above Association. The Association was in 1867 ordered to be wound up, and the name of Vináyak Pándurang was, on the 8th of August 1867, placed upon the list of contributories in respect of 275 shares. It so remained upon the list down to the hearing of the summons.

The estate of Vináyak Pándurang was on the 14th of November 1866 ordered to be wound up under Act XXVIII. of 1865, and he obtained his discharge under that Act on the 26th of February 1870. Whilst the estate of Vináyak Pándurang was in the hands of his trustees, the Liquidator of the appellant's Company sent in a claim against the estate in respect of a second call of Rs. 150 per share on the 275 shares held by Vináyak Pándurang, as also in respect of other debts due by him to the Company, and received a dividend on their claim. In the final account filed by the trustees the gross claim of the appellant's Company was entered. The particulars of that claim were not set out in that account, but such particulars had been set out in previous accounts filed by the trustees. No mention was made of any call or anticipated call on the trader's 275 shares, nor was any provision made for paying a dividend on any such call.

A third call of Rs. 40 per share was made upon the contributories of the appellant's Company on the 9th of November 1871, payable on the 9th of December 1871, and a notice to pay the call was served upon Vináyak Pándurang, whereupon he took out the Judge's summons above referred to.

The appeal was heard by Westropp, C.J., and Lloyd, J., on the 16th of March 1872.

Ferguson (with him *Latham*), for the appellant:—As the trustees of the trader have filed their final account, they are free from all liability in respect of the call: Act XXVIII. of 1865, Section 22. No provision has been made for it in the winding up of the trader's estate, though such provision might have been made: *Dadabhai Byramji's case* (a). The trader, I submit, notwithstanding his final discharge, continues liable.

(a) Coram Westropp, C. J., and Sargent, J., 1869.

1872.
T. F. Punnett
v.
Vináyak
Pándurang

The call is a transaction. No mention is made of it in the final accounts, and Section 24 of the Act has, therefore no application. He cited VI. Geo. IV., chap. 16, s. 51; Walker and Webster's Dictionary, Tit. "Transaction"; 11 and 12 Vict., c. 21, ss. 47 and 60; *Parbury's case* (*b*).

Macpherson, for the respondent, contended that the transaction in respect of which the present liability arose was the contract that the trader entered in to with the Company when he became owner of shares in it, and that, though such contract was not specifically mentioned in the final account, there was sufficient therein stated to give notice to any one inspecting that account of the fact of the trader having entered into that contract, and, that being so, Section 24 of the Act completely protected the trader. He refeared to the case of *Baba Saheb Damaskar* (*c*).

Ferguson, in reply—

WESTROPP, C. J.:—The question before us arises in an attempt on the part of the Liquidator of the Mertautile Credit and Financial Association (Limited) to render one Vináyak Pándurang liable, as a contributory in that Association, in respect of a call (being the third call) made on certain shares which Vináyak Pándurang held when his estate was ordered to be wound up under the provisions of Act XXVIII. of 1865, and which call has been made since Vináyak Pándurang obtained his discharge under that Act.

It seems to us that, under Act XXVIII. of 1865, the contingent liability of Vináyak Pándurang to calls in respect of these shares was a matter which might have been estimated and proved, and that the Liquidator would have been entitled to dividends in respect of that estimated liability. The English Companies' Act of 1862 was the first legislative enactment which allowed of proof being made in Bankruptcy in such cases. After referring to the decisions prior to that Act, Mr. Lindley, at p. 1161 of his work on Partnership, says: "The difficulties arising from the conflict of these decisions are, however, apparently removed by the Companies'

(*b*) 3 De G. F. & J. 80. (*c*) 8 Bom. H. C. Rep. O. C. J. 117.

1872.
T. F. Punnett
v.
Vináyak Pándurang.

Act of 1862, for by Section 75 of that Act it is expressly declared that the liability of any person to calls where a Company is being wound up is to be deemed a debt accruing due from him at the time his liability commenced, but payable when the calls are made, and the estimated value of his liability to future calls as well as calls already made are, in the event of his bankruptcy, provable against his estate; and it has been settled by judicial decisions that a person's liability commences within the meaning of the above section when he becomes a member." For that proposition he cites the cases of *ex-parte Canwell* (d) and *Williams* v. *Harding* (e), and proceeds: "If this be so, all calls made under the winding up of a Company are provable against the estate of a bankrupt shareholder, although the calls and the winding-up order are subsequent to the adjudication. But if a bankrupt shareholder continues to hold his shares after he has obtained his order of discharge, he must, it is apprehended, be liable to calls made under a subsequent winding-up order." The latter proposition has no bearing in the present case, for here the winding up of the Company and the proceedings under Act XXVIII. of 1865 were contemporaneous; there were no longer any shares for the trader, on his obtaining his final, discharge, to retain, as the Company became a defunct Company before that event occurred, and the calls were subsequently made in respect of shares in that defunct Company. If the Insolvent Trader had had shares in a living Company, and had continued to hold them after obtaining his final discharge, then Section 24 of Act XXVIII. of 1865 would not perhaps protect him; but here the Insolvent Trader and the Company, if I may so express myself, both died together. The present claim would, therefore, have been provable in Bankruptcy in England.

Now section 40 of the Indian Insolvent Debtors' Act provides that all such debts as might be proved under a fiat of bankruptcy according to the provisions of the 6th Geo. IV., c. 16, or any other statute or statutes then in force, or *thereafter to be passed,* relating to bankrupts, may be

(d) 10 Jur. N. S. 481. (e) L. Rep. 1 Ho. Lo. Ca. 9.

proved under the Indian Insolvent Debtors' Act. The provision in Section 75 of the English Companies' Act is, in our opinion, an enactment relating to bankruptcy, and a debt falling within the purview of that section is a debt that, as being provable under a fiat in bankruptcy, is also proveable under a petition in insolvency.

Now Act XXVIII. of 1865 makes no special provision for the proof of debts, nor does it lay down what debts shall be proveable in the winding up of an estate under its provisions; but in Section 15 it is enacted that the Court shall have jurisdiction, at any time during the liquidation of any trader's estate, to entertain any application of the trader, or of any person claiming to be a creditor, &c,; and Section 25 provides that the Judge or the Court to whom an application is made or referred shall have power to make any order which could be made by a Commissioner of the Court for the Relief of Insolvent Debtors under Statute 11 and 12 Vict, c. 21; and we think that, looking to these sections, any debt which might be proved under the Indian Insolvent Debtor's Act might also have been proved under Act XXVIII. of 1865. This is the conclusion we formerly arrived at in the case of the *Commercial Bank* v. *Byramji Dadabhai*. We there held that a claim in respect of calls on shares held by Byramji Dádábhái, which calls were made after his estate began to be wound up, was provable against his estate, and also the estimated extent of his liability in respect of future calls. We, therefore, think that the Liquidator might have proved in respect of this contingent liability. If he could not have done so, we do not think that it would have been now possible to exclude Vináyak Pándurang from liability.

The only matter that remains to be considered is the effect of Section 24 of Act XXVIII. of 1865. Is a call which is made after the Insolvent Trader's discharge a liability from which he is protected? That section enacts that the order of discharge shall operate to discharge the trader and all property and effects acquired by him subsequent to the filing of the order therein first mentioned from all debts, claims, or demands in respect of the transactions included in the

1872.
T. F. Punnett
v.
Vinayak
Pandurang.

account filed by the trustees. It is clear that the trader personally, and his effets acquired subsequent to the vesting order, are protected from debts mentioned in the final account; but the difficulty arises on the meaning of the word "transactions." It is admitted that the contingent liability in respect of these shares is not in so many words mentioned in the final accounts; but it has been seen that the liability of a shareholder within the meaning of Section 75 of the English Companies' Act is a liability incurred by him upon becoming a member of the Company. His liability is a liability in respect of the contract he thereby enters into, and does not merely arise when a call is made to enforce that contract.

That being so, the "transaction" in respect of which the liability arises is the contract the trador entered into with the company when he became owner of these shares. Now no doubt, in the final account before us, that contract is not specifically mentioned, but it is substantially included in it; for, on reference to the account, we find a sum of Rs. 40,000 mentioned as the sum due to the Official Liquidator of the Mercantile Credit and Financial Association upon which he has received dividends, and it is not denied that that amount includes the liabilites of the trader in respect of the second call made upon these very shares. Now the mention of the payment of calls in respect of these shares is substantially a mention of the original liability of the Insolvent Trader in respect of those shares. We think that we should be defeating, and not forwarding, the intentions of the Legislature, if we were to admit of captious objections as to the manner in which a liability is mentioned in the final account of the trustees. It is sufficient if the liability or the transaction out of which it arises is substantially mentioned, and that it is here substantially mentioned we have no doubt. We must remember that these accounts are not a schedule filed by the Insolvent Trader himself. Though the trustees rely upon him for information as to what transactions he has been engaged in, it is they who frame the accounts. And if they have substantially included in their account the contract made by the insolvent by mentioning payments made by them in

respect of that contract, we think that is sufficient to protect the Insolvent Trader. To hold otherwise would be to defeat the intention of the Legislature.

Under these circumstances we think that Sir Charles Sargent was right in the decision at which he arrived, and his decision must be affirmed and this appeal dismissed with costs.

Order accordingly.

Attorneys for the Official Liquidator, *Mantsty and Fletcher.*

Attorneys for Vináyak Pándurang, *Leathes and Crawford.*

[APPELLATE CIVIL JURISDICTION].

April 9.

Referred Case.

GÁNGJI VITHAL ....*Appellant.*
SITÁRÁM SHRIDHAR...................................*Respondent.*

Costs as between Pleader and Client—Remedy of Pleader—Quantum meruit—*Regulation II. of* 1827, *Sec.* 52—*Act I. of* 1846, *Sec.* 7.

The provisions of Regulation II. of 1827, Sec. 52, clauses 1 and 2, and of Act I. of 1846, Sec. 7, regarding the award of pleader's costs by way of a percentage, relate only to costs as between party and party, and (inasmuch as Sec. 52 of Regulation II. of 1827 is, by Sec. 6 of Act I. of 1846, expressly rendered inoperative for any purpose except for the purposes of Sec. 7 of the latter Act) there is not any statutable provision for costs as between pleader and client, so that, in the absence of an agreement between them, the pleader is left to his remedy on a *quantum meruit.*

THIS was a reference made by W. M. P. Coghlan, Judge of the District of Thána, under the provisions of Section 28 of Act XXIII. of 1861.

The reference was considered by WESTROPP, C.J., and LLOYD, J.

The facts fully appear from the judgment of the Court.

WESTROPP, C.J.—This is a reference made to us by the District Judge of Thána under Section 28 of Act XXIII. of 1861, in an appeal to him in a suit brought by a pleader against his client to recover remuneration for professional services rendered to the defendant in a miscellaneous application in an ordinary civil suit.