

APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Harington and Mr. Justice Brett.

*In re H. R. COBBOLD, AN INSOLVENT.**

1908
Nov. 23.

Insolvency—Indian Insolvent Act (11 and 12 Vict., c. 21), s. 73—Practice—Appeal by petition—Petition by creditor not included in schedule—Jurisdiction of High Court in its Appellate Jurisdiction—Distribution of Dividends.

On an application for relief under section 73 of the Insolvent Act, to the High Court in its appellate jurisdiction by a creditor, whose claim at the time of the final discharge was by some inadvertence not entered in the schedule, the insolvent, however, having notice of and acknowledging the claim and knowing of the omission:—

Held, that the High Court, in its appellate jurisdiction, had jurisdiction to intervene, and to order that the creditor be entered in the insolvent's schedule, and that he do rank as creditor, as well in respect of past as of future dividends.

INSOLVENCY.

THIS was an application to the Appeal Court, under section 73 of the Insolvent Act, made by the Milwaukee Bag Company whose name was not included in the insolvent's schedule of creditors, as a party "aggrieved" by the order of final discharge of the insolvent.

The Milwaukee Bag Company was an American Company carrying on business at Milwaukee in the United States of America.

On the 2nd April 1906, Henry Ralph Cobbold filed his petition in Insolvency, and thereupon a vesting order was made, directing that the estate and effects of the insolvent be vested in the Official Assignee. On the 4th September 1906, the insolvent filed his schedule of creditors omitting, however, the name of the Milwaukee Bag Company whose claim against the insolvent amounted to 39,292 dollars, the equivalent of over Rs. 1,22,000. On the 3rd February 1907,

* Appeal from Original Civil, No. 11 of 1908.

the insolvent was granted his personal discharge, and on the 7th February 1907, an order *nisi* was made for his final discharge.

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In May 1907, the American Company instructed a firm of solicitors in Calcutta, in connection with their claim, and subsequently forwarded to them an affidavit in proof of their claim. On the 3rd September 1907, the affidavit of claim was submitted to the Official Assignee who, however, replied that as the claim had not been entered in the insolvent's schedule an order of Court would be necessary to entitle the Company to rank as creditors. On the 5th September 1907, the affidavit of claim was forwarded by the solicitors of the creditor Company to the insolvent's solicitors. On the 9th January 1908, the latter replied that the insolvent had considered the claim and would admit it subject to the creditor Company undertaking to assent to his final discharge when the proper time came, and on the 23rd January 1908, they returned the affidavit of claim to the solicitors of the creditor Company. On the 28th February 1908, the Company's solicitors forwarded to the insolvent's solicitors for approval an engrossed form of petition for the amendment of the schedule of the insolvent by the inclusion of the Company's claim, so as to enable the Company to obtain the benefit of any dividend declared or to be declared by the Official Assignee out of the insolvent's estate.

On the 3rd March 1908, the insolvent through his solicitors applied for his final discharge and thereupon an order was passed by Fletcher J. making the order *nisi* absolute.

On the 11th March 1908, the insolvent's solicitors returned the petition of amendment of the creditor Company to the latter's solicitors with a letter in the following terms: "We find ourselves in a very awkward position, as before signing your petition we thought it necessary to send same to the Official Assignee for inspection and he did not return same until after final discharge had been applied for and granted, and he now says that it is too late to amend the schedule. We now return

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the petition signed and shall be glad to assist you in any way we can in getting the schedule amended."

Thereupon, the Milwaukee Bag Company made the present application, praying *inter alia*, (i) that the order of final discharge, dated the 3rd March 1908, may be cancelled and that the petition of the insolvent for final discharge may be returned to the Insolvent Court for re-hearing, (ii) that the Company may be entered in the insolvent's schedule as creditors to the amount of 39,292 dollars and rank as creditors for the purpose of receiving future dividends, (iii) that the Official Assignee may be directed out of moneys in his hands belonging to the insolvent's estate to pay to the Company past dividends upon their debt at the same rate as the dividends paid upon debts already proved before any further dividend is declared or paid.

Mr. Gregory (*Mr. Camell* with him), for the creditor Company. At the time of applying for and obtaining his final discharge, the insolvent had full notice of the Company's claim, and full knowledge that the Company had not been included in the schedule of creditors. The Company took all the steps necessary to have their claim included, and through some inadvertence this was not done. One of two courses was open to the creditor Company: to come in and prove their claim under section 41 of the Insolvent Act, or to appeal by petition under section 73, from the order of final discharge as "persons aggrieved." It is not desired to open up the insolvency proceedings by pressing for the cancellation of the order of final discharge, unless it be necessary. The creditor Company would be satisfied with an order in terms of prayers 2 and 3 of their petition.

Mr. Stokes, for the insolvent, consented to an order being made in terms of prayers 2 and 3 of the petition.

MACLEAN C.J. This really is not an appeal from a decision of Mr. Justice Fletcher, for he passed no order in the matter. It is an application under section 73 of the Insolvent Act and we have ample jurisdiction to make the order which we propose

to do. The Official Assignee has not appeared before us but the insolvent has and he does not object to the order.

It is quite clear from the correspondence and the evidence in the case that the present appellants considered that they ought to have been entered in the schedule of the creditors in respect of the amount they claimed and those who represented the Official Assignee took the same view, and in fact a petition was presented for amending the schedule in that respect. It appears, however, that the application for the final discharge of the insolvent came on, on the 3rd of March in this year and apparently the matter escaped the attention of the parties and of the Court and nothing was done in the matter. The creditors, the present appellants, now come and ask us to intervene under section 73 of the Insolvent Act. We think justice demands that that should be done, and, the appellants not desiring to cancel the order of discharge, and we think properly, an order should be made in terms of prayers 2 and 3 of their petition.

The costs of both parties may be paid out of the estate in the hands of the Official Assignee.

HARINGTON AND BRETT JJ. concurred.

Application allowed.

Attorney for the appellant : *S. S. Hodson.*

Attorneys for the respondent : *Orr, Dignam & Co*

J. C.

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