Madras High Court
Sivasubramania Pillai vs Theethiappa Pillai (Dead) And ... on 6 March, 1923
Equivalent citations: 75 Ind Cas 572, (1923) 45 MLJ 166
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JUDGMENT Oldfield, J.

1. This insolvency originated in the arrest by 1st respondent of the insolvent, here appellant. On the latter's adjudication however, only two creditors, now represented by other respondents, proved debts, the appellant refraining from proving his, until after a dividend of less than half an anna had been distributed and about nine years had elapsed. Evidently what has led him now to tender proof of his debt under Section 24(3) of the Provincial Insolvency Act III of 1907 is that on the 20th September, 1918, the lower Court granted the insolvent what is described as a conditional discharge, the condition being that he should, subject to his right to an allowance of Rs. 25 per month for maintenance of himself and his family, place at the disposal of the Court all property he might afterwards acquire. This discharge was granted on the application of the insolvent based on the expectation that in case of his discharge his mother would relinquish a life estate, to which he was entitled in reversion, in his favour; and the appellant evidently thought it worth while to prove in order to obtain a share in these new assets. The lower Court held that he was entitled to do so notwithstanding the two points urged before it and here, that his claim was made after the order of discharge of 20th September, 1918 and that recovery of his debt would in proceedings other than insolvency be barred by limitation.

2. A preliminary objection has been taken to this appeal by the insolvent on the ground that he is not a "person aggrieved" within the meaning of Section 46(2) of the Act, because he has no interest in the distribution of assets, which have vested in the Official Receiver for his creditors, whoever they may be. But that is unsustainable. For under Section 41 he will eventually be entitled to any surplus remaining after the creditors, who have proved, have been satisfied and will be deprived of such surplus if the proof of another creditor, whose claim may diminish or exhaust it, is wrongly admitted. Another formal objection to the proceedings is, that the Official Receiver has not, so far as appears been a party to them at any stage. But, as all the creditors concerned have had notice of them, we simply note this irregularity and proceed.

3. First, as regards the order of 20th September, 1918, it is, we may observe, defective, because it contains no definite provision for or directions to the Official Receiver regarding the manner in which it is to be given effect; and it should probably have been framed with reference to Section 44(5) explicitly as imposing a condition and also suspending the discharge, until that condition had been fulfilled by the execution of the anticipated release in favour of the Official Receiver or otherwise for the benefit of the creditors. But its terms have already been stated and its meaning is clear. First, a point referred to by the lower Court, although in doubtful language, this order is consistent with the future declaration of a final dividend, since it contemplates the realization of further assets for distribution in one; and, it may be added, it is clear from the text of the order, by which the insignificant dividend already distributed was declared, that it was not final. Next, the order of 20-9-1918 was not one of absolute discharge. For it was in terms conditional, and expressly contemplated the continuance of the insolvent's disability to acquire property except for the benefit

of his creditors and subject only to the reservation of a monthly income for himself and his family. Those terms are, as already stated, anomalous and it is doubtful what exact change in the insolvent's position they were intended to effect and whether they were intended to do or did more than release him from liability for his scheduled debts, those debts being made payable only from the property, which he was expected to acquire. Certainly, however, and this is the material point, there is nothing to indicate an intention on the part of the Court or other parties to the order to release such property from proveable debts or to make any charge in respect of them except as regarded the liability of the insolvent himself. It is then impossible to accept the first argument for the insolvent (appellant), that this order constituted such a discharge, as is referred to in Section 24(3) as fixing the stage in the insolvency, after which no more proofs, such as the respondents,' could be received,

4. That argument is moreover open to objection on the further ground that the reference to discharge in that section does not fix that stage. No doubt the section is at first sight explicit - "Any creditor may, at any time before the discharge of the insolvent, tender proof of his debt." But those words must be read in the light of Section 39(4), under which debts, if notified, as was the respondents' in the present case, can be proved until a final dividend is declared and the fact that it will in many cases be harsh and useless to postpone the grant of discharge until its declaration. For, although it may be impossible for the purpose of Section 44(3)(a) to ascertain the proportion between assets and liabilities at an early stage in the insolvency, it may be clear that the insufficiency of the former has arisen from causes, for which the insolvent is not responsible; and there will then be no reason for postponing his discharge, if he asks for it, as he can do under Section 44(1), at any time after the order of adjudication. We have not, it is worth observing, been shown that this reference to the right to prove before discharge corresponds with anything in the Presidency Act or English Law; and it is possible that it was worded with reference to the description of debts proveable under the Act in Section 28(1) as including those, to which the debtor becomes subject before his discharge by reason of obligations incurred before his adjudication. See Section 46(3), Presidency Act III of 1909 and Section 30, (4) & (5) Geo. V, Clause 59. In any case the general law of insolvency contemplates proof of debts at any time, so long as there are assets to be distributed and no injustice is done to other parties. Ex parte Boodam : Re Taylor 2 Deg F and J 625 and McMurdo In re, Penfield v. Mc. Murdo (1902) 2 Ch. 684. We accordingly hold as a fair construction and one, which will reconcile the policy of the Act and Section 39(4) with Section 24(3), that the words we are concerned with in the latter are not restrictive, but, as Vaughan Williams, J. said in the second of those decisions of similar words, "as soon as may be after the making of a receiving order" in the Bankruptcy Act of 1883, Schedule II Rule 1 merely directory and that "noncompliance with them does not in any way deprive any creditor of his right or limit his right."

5. That contention failing, it is argued next that the respondent's debt is not proveable, because it would be time barred in other proceedings, or more definitely, because the decree, in which it is merged, would be unexecutable after the twelve years, which have elapsed since its date, under Section 48 C.P.C. That twelve years elapsed between the respondent's decree and the presentation of his proof is no doubt true. But we are still of opinion that his debt is proveable under Section 28(1) of the Act The definition in that section of a proveable debt contains no reference to the date, at which the proof is presented or to any date except that of ,the adjudication, when respondent's debt, embodied in the decree which he had lately been executing, was certainly recoverable; and the view

that the existence of the debt at the date of adjudication alone is material is in accordance with English authority on the similar provision of the English Law. The matter is dealt with generally In Ex parte Ross 2 Gl. And Jameson's 46 and 330, that decision, it may be observed, being unaffected by the facts that (1) the debts in question had not, like the respondent's debt been merged in a decree and that they represented obligations which became enforceable only after the date of the adjudication, but before that of the discharge, the Indian and English definitions of proveable debts alike including such liabilities. On the other side reliance has been placed on Benzon In re : Bower v. Chetwynd (1914) 2 Ch. 68; and no doubt reference was made to the principle that, if the statute begins to run, it continues, whatever happens, to do so; and that principle would be applicable in the case before us, because the twelve years period available to respondent for execution of his decree had opened before appellant's petition was filed. But the principle was applied in the case then under disposal, only because that case was, what the case before us is not, one of an administration suit and not of insolvency. If the question had been of insolvency, Ex parte Ross 2 Gl. And Jameson's 46 and 330 would, as the earlier part of the judgment shows, have been followed and it would have been held that a debt not barred at the commencement of the insolvency does not in and for the purpose of the insolvency become barred by lapse of time. Respondent has then relied on the decision in Subbarayan v. Natarajan (1922) I.L.R. 45 M. 785 : M.L.J. that Section 48 contains an unqualified prohibition of execution of decrees over twelve years old. But the answer is that, when (as we hold) the respondent can prove for his decree-debt in the insolvency, no question of his right to execute is raised. In these circumstances we must, following Exparte Ross, hold that his debt is proveable within the meaning of Section 28(1).

6. The result is that the appeal fails and is dismissed with costs of legal representatives of 1st respondent.

Venkatasubba Rao, J.

7. I agree and I would like to state my reasons for the conclusion at which we have arrived.

8. It was first contended by Mr. K.V. Krishnaswami Aiyar for the insolvent-appellant that under Section 24(3) of the Provincial Insolvency Act, 1907, a creditor would be bound to tender proof of his debt before the discharge of the insolvent and that as in the present case, proof was submitted after the insolvent's discharge the creditor's application should not have been entertained. In the view I am taking, it is immaterial that the discharge in the present case was conditional. The relevant portion of Section 24(3) is as follows : "Any creditor of the insolvent may at any time before the discharge of the insolvent tender proof of his debt and apply to the Court for an order directing his name to be entered in the schedule as a creditor in respect of any debt provable under this Act and not entered in the schedule." I am unable to interpret this provision as rendering it obligatory upon a creditor to tender proof before the discharge of the insolvent. Under Section 44 a debtor may at any time after the order of adjudication apply for an order of discharge. There is nothing in the Act to prevent an order of discharge being passed at a very early date after the order of adjudication, and it seems to be inconsistent with the scheme of the Act to hold that a creditor who does not prove his debt before an order of discharge is deprived altogether of his remedy. I need only refer to Section 39. Clauses (3) and (4) of that section set forth the disabilities of the creditor guilty of laches

in the matter of proving his debt. Clause 3 while giving him a certain right provides that he shall not be entitled to disturb any dividend declared previous to the proof of his debts. Clause 4 refers to a declaration of a final dividend. It must be first observed that no inflexible rule is laid down as regards the point of time when a final dividend is to be declared. The clause only provides that when the receiver has realised all the property of the insolvent or so much thereof as can be realised without needlessly protracting the receivership, he shall declare a final dividend. The matter is largely one of discretion to be exercised by the Court. When a final dividend is to be declared in a particular case, will depend upon the circumstances of that case. It is next material to observe that the penalty prescribed for neglect or omission to prove a debt before making a final dividend is, that that dividend shall be declared without regard to the claim of the creditor who has failed to prove the debt. These are the provisions which limit or affect the right of a creditor who fails to tender proof of his debt before a specified point of time.

9. Mr. K.V. Krishnaswami Iyer's second contention was, that if a creditor omits to prove his debt before the declaration of a final dividend he is barred from doing so. There is he warrant for this position in the sections to which J have referred. It is unnecessary to deal with this contention further than to say that this argument is entirely destructive of the first argument to which I have referred. According to the first contention based on Section 24(3), the discharge of the insolvent is the furthest point of time beyond which no debt can be proved, whereas the second contention fixes the declaration of a final dividend under Section 39(4) as an event subsequent to which a proof of a debt cannot be tendered. In my opinion, neither of these arguments is sound. No limitation is fixed for the creditors to come in and prove their claims. This is the English rule, and we have been shown nothing to induce me to hold that under the Provincial Insolvency Act a different rule is intended.

10. Rule 1 of the second schedule to the English Bankruptcy Act, 1883, runs thus : "Every creditor shall prove his debt as soon as may be after the making of a receiving order." It will be noted that the word used is 'shall.' But in McMurdo In re : Pen field v. McMurdo (2902) 11 Ch. 684 Vauyhan Williams, L.J. held that the rule was "merely a directory clause, a clause noncompliance with which does not in any way deprive any creditor of his right or limit his right." He observed that in his experience of bankruptcy practice there never was any doubt as to the right of a creditor to come in and prove at any time during the administration. This rule was stated to be subject to certain conditions which are not material for the present purpose. See also Halsbury, Vol. 2, paragraphs 380 and 394.

11. No Indian cases were cited to us. But I find that in Lakshmanan v. Muthu (1887) I.L.R. 11 M. 1 a Bench of this Court observed that it is open to a creditor at any time while the assets are undistributed to prove his debt and added "this is the course in all bankruptcy and insolvency proceedings." I am not quite clear how the statement in the judgment that even it a schedule had been framed it was still open to the creditor so long as assets were available to apply to be admitted on the schedule under Section 352 of the Civil Procedure Code of 1882, is reconcilable with the Article 174 of the Limitation Act of 1877 which prescribed for an application under Section 353 of the said Code a period of 90 days from the date of the publication of the schedule. But 1 am referring to the case only for the purpose of showing that it was regarded as a settled doctrine that apart from any particular statute, in bankruptcy proceedings no limitation was fixed for creditors to prove their

debts. 1 may state that the Provincial Insolvency Act III of 1907 repeals not only the provisions of the Civil Procedure Code relating to insolvency but also Article 174 of the Limitation Act of 1 877.

12. I also find that in Parshudi Lal v. Chuni Lal (1883) I.L.R. 6 All. 142, a distinction was drawn between applications under Section 353 of the Civil Procedure Code of 1882 governed in regard to limitation by Article 174 prescribing a period of 90 days and applications under Section 353 to which Article 178 prescribing a period of three years was held applicable. An argument based upon Parshadi Lal v. Chuni Lal (1883) I.L.R. 6 All. 142 that an application by a creditor to prove his debt is governed by Article 181 of the present Limitation Act, was not advanced before us, and possibly the omission to advance this argument was due to the fact that Article 181 is held applicable only to applications under the Civil Procedure Code and that as at present the insolvency law is contained in the Insolvency Act and not in the Civil Procedure Code, Article 181 can have no application.

13. The object underlying Section 24 of the Provincial Insolvency Act is the same as that which underlies Rule 1 of the second schedule to the English Bankruptcy Act, 1883, namely, to enjoin upon creditors to tender proof as early as possible, a course tending to convenience in the administration of the insolvent's estate; and the provision clearly does not enact a rule of limitation.

14. I therefore hold, as my learned brother has done, that the creditor's application to prove his debt was not made beyond the time allowed by the law, and this ground of appeal consequently fails.

15. The next argument of Mr. K.V. Krishnaswami Iyer was that the debt itself was barred, and as there was no subsisting debt there could be no proof of debt. In my opinion, this argument is also untenable. The creditor's debt was merged in a decree, and it was argued that under Section 48, C.P.C., the decree became extinguished. This argument cannot be accepted because Section 48 deals only with execution and lays down that no order for the execution of the decree shall be made upon an application presented after the expiration of 12 years from certain dates which however it is immaterial to specify for the present purpose.

16. Then the general argument remains that a barred debt cannot be proved in insolvency. I shall say nothing in regard to the question as to whether the pendency of insolvency proceedings does or does not save a debt from the bar of limitation. In the present case the debt is sought to be proved in the insolvency itself and no claim is based upon the debt in a separate proceeding. Ex parte Ross 2 Gl. & Jameson's Bankruptcy cases pp. 46 & 330 to which Mr. Srinivasagopalachariar referred us, clearly held that in bankruptcy a debt did not become barred by lapse of time if it was not barred at the commencement of the bankruptcy. The same view was taken in Ex parte Lancaster Banking Corporation, In re Westby 10 Ch. D. 776 which was also relied on by the learned Counsel. A very clear statement of the principle is contained in the following passage in the judgment of Bacon, C.J. in that case. "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 authority of these decisions has not in the slightest degree been shaken by Benson In re Bower v. Chetwyned (1914) 11 Ch. 68. On the contrary the judgment in it while holding that the pendency of the bankruptcy proceedings did not save a claim

made in the course of an administration suit from being barred by the Statute of Limitations carefully distinguished Ex parte Ross and other cases similar to it as being cases where the proof was in the bankruptcy itself. I cannot do better than quote the following passage from the judgment : "As to the second point, cases were quoted beginning with Ex parte Ross 2 Gl. & Jameson's Bankruptcy cases pp. 46 & 330, which show that in the bankruptcy a debt does not become barred by 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."

17. The rule contained in Section 28(1) as regards debts proveable under the Act is consistent with the rule deducible from the English cases. All debts to which the debtor is subject when he is adjudged an insolvent (quoting only the material portions) are debts proveable under the Act. Under the section therefore it must be a debt to which the debtor was subject on the date of the adjudication. If the debt was then subsisting it is proveable in insolvency.

18. On these grounds the second contention of the appellant also fails.

19. I therefore agree that the appeal should be dismissed with costs of the legal representatives of the 1st respondent.