

Re: Khushalchand B. Daga

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Court : Mumbai

Decided On : Sep-09-1965

Reported in : (1965)67BOMLR896

Judge : Patel and; Bal, JJ.

Appeal No. : O.C.J. Insolvency No. 65 of 1960

Appellant : Re: Khushalchand B. Daga

Judgement :

Patel, J.

1. The matter has been referred to a Division Bench as it involves an important question of the practice and procedure followed in the Insolvency Court.

2. The facts are few and may shortly be stated. On the petition by B.R. Herman and Mohatta (India) Private Ltd., the applicant before us, Khushalchand B. Daga, was adjudicated insolvent on July 6, 1960. On September 2, 1960, the insolvent took out a notice of motion for annulment of the adjudication. Apparently, the notice of motion is yet not disposed of but, the insolvency proceedings were stayed by the Court. The Punjab National Bank Ltd., who is the opponent before us, made a claim against the insolvent in the sum of Rs. 58,56,000 on the basis of guarantee furnished by Mm against a loan to Model Mills. The bank also accepted that it held security of debentures of the Model Mills of the face value of Its.

22,25,000. Before the applicant was adjudicated insolvent, on October 4, 1958, a petition for winding up of the Model Mills was filed. On July 7, 1959, the Government appointed the Authorised Controller by a notification and on July 28, 1962, the Company Court sanctioned a Scheme framed by him. This Scheme was supported by the Bank. The Bank it seems agreed to accept the debt due to it after deducting the value of the debentures which it held, that is Rs. 38,31,000, to be paid by 25 per cent, in cash and the balance of 75 per cent, in five yearly instalments secured by fresh debentures. On March 27, 1962, the bank filed proof of the present claim and desired that the same should be admitted by the Official Assignee, so that its claim against the insolvent may not be barred by time. The Insolvency Court permitted the same, and an appeal against its judgment has failed. Consequent upon this order, the Official Assignee started investigation of the claim. For this purpose, he examined Kidar Nath Suri, Manager of the Bank, after issuing a notice to the insolvent. After the proceedings had gone on for some time, a preliminary objection was raised on behalf of the insolvent that the Official Assignee had no jurisdiction to investigate the claim as tribunal by recording evidence of witnesses, by relying on the decision in *Sooniram Ramniranjandass v. Alagu Nachiyar Koil.* : (1938)40BOMLR1236 . The Official Assignee ruled otherwise and proposed to proceed with the investigation.

3. The insolvent took out a notice of motion questioning the decision of the Official Assignee which came up for hearing before our brother Tarkunde J. on March 16, 1965, and he directed that as the matter involved an important question it should be heard by a Division Bench. It has now accordingly been placed before us.

4. The answer to the question in issue depends upon the relevant provisions of the Presidency-towns Insolvency Act, 1909. In the Act, there is a clear distinction between the Insolvency Court and the Official Assignee, the Court, being this High Court, Section 6 enables the Chief Justice to delegate some of the functions which the Court is entitled to perform to a subordinate officer of the Court, and the decision or order of such officer is deemed to be that of the Court. Section 8 deals with review and appeals. Sub-section (2) provides for an appeal against the order of a subordinate officer who is delegated the functions of the Court, to the Insolvency Judge and a further appeal, by his leave, to a Bench; and Clause (b)

provides for an appeal against the decision of the Insolvency Judge without his leave. Section 7 vests in the Court the fullest power to determine all questions, whether of priority or otherwise, whether of law or facts, for the purpose of doing full justice or making complete distribution of property in any case. With the limitation, we are not concerned. Consistently with the purpose of the Insolvency Act, immediately on the order of adjudication, it vests the property of the insolvent in the Official Assignee by Section 17-but it vests in him for the sole purpose of its becoming divisible amongst his creditors.

5. The Official Assignee is appointed by the State Government under Section 77, and is a corporation sole and has perpetual succession by reason of Section 77-A. He has well defined duties to perform under the Act. He has to realise all property of the insolvent capable of manual delivery and of documents and books of account, etc., belonging to the insolvent, and manage the same until distributed. Section 69 requires him to declare and distribute dividends amongst creditors who have proved their debts with all convenient speed. Section 48 provides that the method of proving debts would be as laid down in the Second Schedule. The Second Schedule consists of 27 Rules. The usual mode of proof of debt is by lodging with the Official Assignee an affidavit verifying the debt. Rule 4 enables the Official Assignee at any time to call for production of vouchers, and Rule 25 requires him to examine every proof and grounds of the debt and in writing admit or reject in whole or in part or require further evidence in support of it. If he rejects a proof, he is required to state in writing the grounds for his rejection. Section 78 of the Act provides that the Official Assignee may, for the purpose of affidavits, verifying proofs, petition or other proceedings under this Act, administer oaths. Presumably, the practice of investigating the claims of creditors, by even requiring them in some cases to take oath and subject themselves to cross-examination and produce witnesses is based on the wording of Rule 25 of the Second Schedule and Section 78.

6. In *Van Laun Inre. Chatterton, Ex parte* [1907] 2 K.B. 23, the Court of appeal while considering the rejection by the trustee in bankruptcy of the proof of debt of a solicitor who refused to produce certain documents called for by the trustee, Cozens-Hardy, M R says . (p. 30).

All that we now decide is, that the trustee is entitled to say, 'I will not admit your proof until you have given me reasonable means of satisfying myself whether the debt in respect of which you are proving is to any and what extent justifiable and reasonable.'

7. He then observes that no estoppel available against the insolvent operated against the assignee, and says (p. 30):

No judgment recovered against the bankrupt, no covenant given by or account stated with him, can deprive the trustee of this right.

8. Buckley L.J. puts it this way (p. 31). ∴ [He] is entitled to say 'It is my business to see that' those who seek to rank against this estate are persons who are really creditors of that estate.

9. In the case of a judgment, he observed (p. 31):. It is not necessary to show fraud or collusion. It is sufficient,... to show miscarriage of justice-that is to say, that for some good reason there ought not to have been a judgment... and that that was also true of an account stated or of a covenant.

This seems to be settled law in England. There are decisions in India which have followed the same principles, and for sound reasons. The Official Assignee should have the right of scrutinizing the claims, so that collusive claims or untenable claims may be avoided in the interest of fair distribution of the assets among the creditors. It is clear, therefore, that the Official Assignee, in order to decide whether or not the proof of debt affirmed before him as owing to the creditor should be accepted or rejected, should, from the nature of things, be in a position to investigate the matter properly, and unless there is anything in the Act itself preventing him from taking evidence on oath in case of necessity, the right cannot be denied.

10. The first ground of attack on this practice is that the Official Assignee is not a judicial officer exercising judicial functions and, therefore, not entitled to embark upon such an enquiry. True that he is a Court neither by the definition section which defines 'court' nor by delegation of the powers of the Court under Section 6.

But merely because he performs, in some measure, administrative functions, it would not be proper to say that he is not entitled to hold an inquiry. It is true that when the Insolvency Act speaks of proving and proof of debts under Section 48, the words are not used as they are understood in the law of evidence. They have a technical meaning, as held in *Govind Prasad v. Pawankumar* (1943) 46 Bom. L.R. 306. which was a case under the Provincial Insolvency Act. The creditor is said to have proved his debt when he lodges a proof as prescribed by the Act. Whether to accept the same or not is for the Official Assignee to consider, and for that purpose he must make a proper inquiry.

11. Another ground urged is that under Rule 25 of the Second Schedule, the Official Assignee is not required to give reasons if he accepts the proof of the debt but has to do so only if he rejects it. This can hardly be regarded as an indication of the fact that he is not entitled to make a proper inquiry into the debt, if necessary even by examining witnesses. His position is peculiar. He represents the estate of the insolvent who is expected to assist him in the realisation of the property. Where he accepts the proof the creditor proving it cannot be aggrieved, and, any other creditor who may think that the debt has been improperly admitted is entitled under Rule 27 to apply to the Court to expunge or reduce the proof. Even the insolvent would not probably be able to challenge the acceptance of the debt except under special circumstances, in view of the fact that he is given the limited power of applying to have the same expunged or reduced if there is a composition or scheme under the Act. See *A debtor v. Dodwell* [1949] 1 All E.R. 510 and *Re. A Debtor*. [1949] 1 All E.R. 652 See also *Williams on Bankruptcy*, 17th edn., p. 574. It may be that for these reasons he is not required to give reasons, if he accepts proof of the debt.

12. It is argued that the scope of an appeal against his decision under Section 86 is much different from the scope of an appeal under Section 8 from the decision of an officer with delegated powers of the Court and, therefore, we should deny him the power to take evidence. That seems hardly to be a ground for so doing, even assuming that there is a difference in the nature of the two appeals. Indeed, there is this difference that the decision of the Insolvency Judge on an appeal against the decision of the officer exercising delegated powers of the Court is subject to

appeal only if he grants leave, while in the case of a judgment rendered by the Insolvency Judge in an appeal against the decision of the Official Assignee, an appeal would lie under; Clause (b) of Section 8(2), An argument was made that an appeal under Section 86 would be almost an original proceeding where everything will have to be gone into over again and there would be duplication of the process of the Court. It is said that there may be large number of creditors who would want to take part in the proceedings and the matter would assume undue proportions resulting in waste of time, and the same process may have to be gone through before the Court. This contention overlooks the fact that the creditors are represented by the Official Assignee, and that the matter is between himself and the proving creditors. They are not entitled to cross-examine the proving creditors or their witnesses, though they may instruct the Official Assignee. Interests of other creditors are safeguarded by Rule 27 which enables any creditor disputing the debt to apply to the Court to 'expunge the same. Similarly, the debtor may help the Official Assignee by placing relevant matters before him to enable him to ask relevant questions to the proving creditor and decide whether he should accept or reject the proof, In the appeal, the Court would consider all the circumstances of the case and may or may not permit evidence to be taken before it. It must be remembered that, (by the Act itself, no specific procedure has been laid down for determining an appeal under Section 86 of the Act, and the Judge will have, therefore, fullest jurisdiction to consider whether or not the party in default before the Official Assignee should be allowed to produce further evidence before him.

13. Another ground urged is that Rule 116 framed under Section 112 of the Act prescribes a form of proof of debts. Under Rule 119, the Official Assignee is required, within seventy days after receiving a proof in writing of the debt, either to admit or reject it wholly or in part or require further evidence in support thereof. No doubt, the whole procedure prescribed by the Insolvency Act and the Rules has the laudable purpose of administering the estate as quickly and effectively as possible. But this object has seldom been achieved. Merely because it is intended that the administration should be completed early, the power in the Official Assignee, if he has any, to take evidence, cannot be denied.

14. Mr. Advocate-General pressed into service Section 78 of the Act. He says that the section should be read as enabling the Official Assignee to administer oath for the purpose of (1) affidavits for proof of debts, (2) petitions or (3) legal proceedings, and he says the rule of ejusdem generis should be applied. Mr. Nariman asks us to construe it grammatically and read it as enabling him to administer oath for the purpose of (1) affidavits for the proof of debts, (2) affidavits for petitions, (3) affidavits for legal proceedings. We think it is more reasonable to construe the section in the latter way, as the first construction must involve the assumption that there are petitions or legal proceedings before the Official Assignee which he can try or hear, for which there is no justification.

15. Strong reliance has been placed on the decision of the Privy Council in *Sooniram Ramniranjandass v. Alagu Nachiyar Koil*. The facts in that case are that a firm of bankers and money-lenders was adjudicated insolvent. In the Schedule of creditors, they showed a Hindu temple as unsecured creditor. The debt was entered in the books of the firm as credit to the temple by way of charity held as deposit. Interest on that sum was computed as in the case of an ordinary customer. On behalf of the temple, a claim was made under Section 52 to recover the full deposit of the amount from the Official Assignee on the ground that the amount was held by the firm as a custodian of an endowment or a trustee. Evidence before the Official Assignee consisted of the books of the insolvent and some oral evidence. The Official Assignee upheld the claim of the temple. Against the order of the Official Assignee an appeal was made under Section 86, which was heard by Braund J. as Insolvency Judge who rejected the claim of the temple. In further appeal, which was heard by the Chief Justice and Dunkley J., there was a difference of opinion, and it was heard by another Judge who agreed with the Chief Justice. The appeal was allowed and the decision of the Official Assignee was restored. The Privy Council considered the matter from two points of view (1) as if the matter were under Section 52 of the Act and (2) as if it were one of proof of debts under Rule 25 of the Schedule. We are not concerned with the first aspect of the matter. Referring to the second aspect, Sir George Rankin says (p. 1238):.Even if the matter could be regarded as, a mere question of admitting or rejecting a proof, when the Official Assignee acts under Rule 25 of the second schedule, it seems more reasonable and more in accordance with a sound

interpretation of Section 86 and with English practice under statutory provisions couched in the same terms that the 'appeal' from the 'act or decision' -of the Official Assignee to the Judge should be by motion and that the oral evidence necessary could be taken before the Insolvency Judge himself.

Strong reliance has been placed by Mr. Nariman on this passage in support of his contention. It is wrong, however, to, read the passage as laying down that the Official Assignee is not entitled to make such inquiry which he deems necessary for discharging his duty and that for that purpose he is not entitled to take evidence. The objection is to his determining the matter as if he were a tribunal. If their Lordships had intended to lay down anything like this, they would have straightway proceeded to overrule all the evidence received by the Official Assignee and have the matter re-heard by the Insolvency Judge in the first instance. It is clear, however, as pointed out by their Lordships in the later portion of the same paragraph, that the case cannot be concluded by regarding the Official Assignee as a trial Judge whose estimate of the witnesses' evidence must, *prima facie*, be accepted. Subject to this caution, there can be no reason to deny the power claimed by the Official Assignee to take evidence.

16. Reliance is also placed on some observations in *Yokohama Specie Bank Ltd. v. Curlender & Co.* : AIR1926 Cal898 on the question of proof. The judgment is of Rankin J., as he then was. The case arose out of an application for commission by the appellant-Company, the proving creditor, for examining witnesses in Japan. We have carefully read the observations of the learned Judge but we do not find anything in it to suggest that the Official Assignee is not entitled, if he deems it necessary, to take evidence.

17. If, as is contended on behalf of the insolvent, that the Official Assignee is merely entitled to call for documents and vouchers, Rule 4 of the Schedule would as well have served the purpose. Having regard to Rule 25 and the duty imposed upon him to decide whether the debt is genuine and owing to the creditor, we hold that he is entitled to hold an inquiry and for that purpose receive evidence on oath. We, however, agree, with respect, with the observations of Rankin J. in *Yokohama Specie Bank Ltd- v. Curlender & Co.*, that he ought not to allow the creditor, or the

debtor the latter except under special circumstances-to cross-examine the witnesses of the proving creditor and convert the process into a long drawn out proceeding. He must act as a 'man of business' and consider the matter from a practical point of view. The object of the special procedure for proof of debts in the Insolvency Acts is to ensure that such matters are quickly disposed of and no needless harassment is caused to the proving creditors. We do not see why, in the present case, there should have been such a long hearing before the Official Assignee. The Secretary or Manager of the Bank should have been required to make relevant statement in his affidavit of proof and produce verified documents and statement of accounts. The Official Assignee could then have questioned the insolvent in respect of the same and if he thought clarification was necessary on any matter from the Bank he could have called for such additional material as he deemed necessary or called the manager of the Bank and examined him in the light of the insolvent's statements, and then made up his mind whether to accept or reject the proof. The long meetings and pointless examinations and cross-examinations were hardly necessary.

18. The Official Assignee will act in accordance with our judgment.

19. Subject to the above, the notice will stand discharged with costs. Costs to be tacked on to the security. We quantify the cost before us and Mr. Justice Tarkunde at Rs. 500.

20. Solicitors for the insolvent: Vakil Dodabhoy & Co.

21. Solicitors for the Bank : Mulla & Mulla & Craigie Blunt & Caroe.

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