In Re: Mogi and Co.

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Court : Kolkata

Decided On : Mar-01-1926

Reported in : 96Ind.Cas.459

Judge : N.R. Chatterjea, Acting C.J. and; George Clause Rankin, J.

Appellant : In Re: Mogi and Co.;The Yokohoma Specie Bank Ld.

Respondent : ;s. Curlender and Co.

Judgement :

N.R. Chatterjea, Acting C.J.

1. This appeal arises out of certain insolvency proceedings under the following circumstances.

2. The insolvents Mogi & Co. carried on business in Japan and several other branches in various parts of the world. They banked with the appellants, The Yokohama Specie Bank Ltd. in the latter's branches at each place.

3. The respondents, Messrs. Curlender, & Co. obtained a decree against Mogi & Co. for one lac and 84 thousand rupees on the Original Side of this Court and obtained an order for attachment before judgment of their assets in Bombay. The Yokohama Specie Bank (who may be referred to as 'the Bank') claimed a lien on the goods attached under a deed of hypothecation dated the 14th July, 1920, and the claim was allowed.

4. On the 10th February, 1921, Mogi & Co. were adjudicated insolvents at the instance of Curlender & Co.

5. After the adjudication, the Official Assignee obtained a declaration that the deed of hypothecation referred to above was invalid as against him, and the Bank was directed to account for the dealings with the goods.

6. It appears that before the adjudication, the general creditors of Mogi & Co. in Japan appointed a, Re-adjustment Committee consisting of several creditors including the Bank. A. circular letter was issued by them calling upon the creditors of Mogi & Co. to empower the Committee to act, and it seems that they executed a power of 'trusteeship' in favour of the Committee. The Committee appears to have carried out in Japan a liquidation of Mogi & Co.'s debts, paid a dividend of 12 per cent, in January, 1922, and a final dividend of 2'688 per cent. in October, 1922. The dividends received by the Bank amount to about 15 lacs of rupees. Messrs. Curlender & Co. did not join in the proceedings nor receive any dividend. They have since lodged a proof of debt which has been admitted by the Official Assignee.

7. On the 14th January 1925 the Bank lodged a proof of debt, claiming that after all securities had been realised, it still had over one crore and 52 lacs of rupees due to it, and relied upon a copy of the report of the Re-adjustment Committee to show that that was the balance due to it.

8. On the 23rd April, 1925 on the objections of Curlender & Co. the matter stood over in order that the Bank might apply for issue of a Commission to prove its claim but no steps having been taken by it, Curlender & Co. applied to the Court (1) for an order expunging the proof of the Bank's claim or for an order on the Bank to pay to the Official Assignee the amount of dividend received by it in Japan to the Official Assignee and (2) for an order that the Bank's claim for the advance made by it under the deed of hypothecation should be expunged and (3) for an order directing the Bank to produce all documents and papers in support of its claim before the Official Assignee. After the service of notice of the above application, the Bank applied for Letters of Request to issue for the examination of the President of its Bank at Yokohama and another member of the Re-adjustment

Committee for proof of its. claim.

9. Curlender & Co. asserted in their affidavit that the dividends paid to the Bank and other creditors by the Re-adjustment Committee were in full satisfaction of their claims. The Bank denied that it was so. Mr., Justice Pearson was of opinion that the dividends were paid in full discharge of the claims of the creditors who participated in the proceedings before the Re-adjustment Committee, and that they were not entitled to participate further in the insolvency proceedings here. He was further of opinion that assuming that the Bank did not receive the dividends in full satisfaction of its claim, the Bank must bring in the dividends already received in Japan, before it can be allowed to participate in any division of the insolvents' property here. He, however, refused to make an unconditional order upon the Bank to pay over to the Assignee the dividends received by it in Japan, but disallowed the Commission and the Letters of Request on the ground that there was no use in allowing the exceedingly long and expansive examination in Japan to go on, unless the Bank was willing to accede to the contention which it had resisted before him.<

10. The Bank has accordingly preferred this appeal and cross-objections have been put in by Messrs. Curlender & Co.

11. It is contended on behalf of the Bank that it is entitled to prove its claim, and that the question of its right to participate in the dividends here should be decided after evidence is taken, as there are no materials at present for determining it.

12. It is contended by Mr. Pugh on behalf of Messrs. Curlender & Co. that the Bank is bound to bring the dividends it received in Japan before it can prove its claim in the Insolvency Court, that treated as a mercantile firm carrying on business in India and having submitted to the jurisdiction of the Insolvency Court, it is bound to account to the Assignee for the money received in Japan, and that an action for money had and received may be maintained by the Assignee against the Bank, and that in any case it cannot get any dividends until the other creditors have received such dividend as is proportionate to the amount received by the Bank. The Counsel for the Official Assignee joined with Mr. Pugh in pressing us to decide the matter.

13. In the case of Banco de Portugal v. Wadddl (1880) 5 A.C. 161 at pp. 166, 167 : 49 L.J. Bk. 33 : 42 L.T. 698 : 28 W.R. 477, Lord Cairns said 'As I understand the law, it would at all times have been perfectly competent to the holders of those bills having received under the Bankruptcy Administration in Porlugal a certain dividend, to come and prove upon the Bankruptcy Administration in England if a Bankruptcy Administration was taking place here, and the only question would be the terms upon which they should prove,' and referring to the case of Selkrig v. Davies (1814) 2 Dow. 230 : 3 E.R. 848 : 2 Rose 291 : 14 R.R. 146, observed: 'The terms are perfectly clear that a person who after having proved under a foreign bankruptcy, claims to prove in a bankruptcy of the same debtors in England, he may do so; but he may do so upon the terms of bringing in, for the purpose of dividend, the sum which he has received abroad. As was said by Lord Eldon It has been decided that a person cannot come in under an English Commission without bringing into the common fund what he has received abroad and Lord Eldon goes on to point out, what is obviously the case, that a creditor, because he happened personally to be in England, would not be obliged to bring this sum into the common fund--he might keep it if he liked-he might ignore the English Bankruptcy altogether if he pleased but if he did not ignore it, if he sought to take advantage of it, if he sought to have some benefit from it...he must bring into the common fund that which he had already received in respect of the obligations of the same debtors.

14. In the case of Cockerell v. Dickens 2 M.I.A. 353 : 3 Moo P.C. 98 : 1 Mont. D. & D. 45 : Morton 407 : 1 Sar. P.C.J. 203 : 18 E.R. 334 : 13 E.R. 45, however, Baron Parke in delivering the judgment of the Judicial Committee observed:'The principle is that one creditor shall not take a part of the fund which otherwise would have been available for the payment of all the creditors, and at the same time be allowed to come in pari passu with the other creditors for satisfaction out of the remainder of that fund: and this principle does not apply where that creditor obtains by his diligence something which did not and could not form a part of that fund.'

15. Under Section 17 of the Presidency Towns Insolvency Act (Act III of 1909) 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 no creditor shall have any remedy against such property except with the leave of the Court. But this can have operation only with respect to property affected by our law.

16. With regard to immoveable properties situate in a Foreign country, the law is thus stated in Westlake's Private international Law, 7th Edition, 182 'Any Creditor, British or alien, may retain any payment which he can obtain out of the non-British immoveables of a bankrupt or company being wound up, and if it is only partial may receive dividends in the bankruptcy or winding up on the residue of his debt pari passu with the other creditors.'

17. So far as moveable property is concerned the general principle is that it is subject to that law which governs the person of the owner. In Westlake, at page 183, it is stated that a creditor who after the commencement of an English Bankruptcy and not by virtue of any charge prior to the bankruptcy or of a judgment in rem obtains payment out of the bankrupt's moveables in a non-British country, must account for such payment, if he seeks to receive dividends on the residue, if any, of his debt, but may otherwise retain it, and this whether or not the payment was obtained by legal proceedings or whether or not the title of the trustees was asserted in such proceedings if any; but that if he is a British Creditor (or one domiciled in England or one who in his character of creditor must be regarded as English because the debt is owed to a house of business in England of which he is a member) and obtains payment out of the bankrupt's moveables in a non-British country under the circumstances stated above, he must pay over the amount to the trustees in bankruptcy whether or not he seeks to receive dividends on the residue, if any, of his debt.

18. It appears, however, that where by the law of the Foreign country a person other than the Official Assignee is entitled to payment out of moveable property there, he cannot be ordered to refund it to the Official Assignee. In Sill v. Worswick (1791) 126 E.R. 379 at p. 394 : 1 H. Bl. 665 : 2 R.R. 816, it was observed 'it by no means follows that a Commission of bankrupt has an operation in another country against the law of that country. I do not wish to have it understood, that it follows

as a consequence from the opinion I am now giving (I rather think that the contrary would be the consequence of the reasoning I am now using), that a creditor in that country, not subject to the bankrupt laws nor affected by them, obtaining payment of his debt, and afterwards coming over to this country, would be liable to refund that debt. If he had recovered it in an adverse suit 'with the Assignees, he would clearly not be liable. But if the law of that country preferred him to the Assignee, though I must suppose that determination wrong, yet I do not think that my holding a contrary opinion would revoke the determination of that country, however I might disapprove of the principle on which that law so decided.'

19. I do not think it necessary to refer to the authorities any further at the present stage, as evidence has not been gone into. Both Mogi & Co. and the Bank are incorporated in Japan though with branch offices in various parts of the world. It is not shown that the law of Japan or the places where the assets were realised recognises the right of the Official Assignee It does not appear whether Mogi & Co' executed any trust-deed, what the terms of the trust were when the deed of trust was executed, what assets have been realised, by the Re-adjustment Committee, whether such assets consisted Of immoveable property wholly or partly in Japan or elsewhere or included assets in India, whether the property in Japan from which the Bank obtained dividends was according to the law of Japan common fund available to the Assignee in Insolvency for the benefit of creditors generally. There is nothing to show that the Official Assignee could successfully sue the Bank for the money received by it in Japan or that the Bank received any money which could be regarded as a part of the common fund available to creditors generally and in consequence of which the payment of dividends to it could be postponed until the other creditors received dividends proportionate to what it had received. In the absence of materials upon the points, the question whether the Bank is bound to bring in the dividends obtained by it in Japan before dividends are paid to it in the insolvency proceedings here, or whether payment to it should be postponed until other creditors have received proportionately cannot be determined.

20. With regard to the 1 lacs of rupees for which the Bank obtained a deed of hypothecation, it is true that the dead has been found to be invalid. But the amount is said by the Bank to be due to it over and above the 1 crore and 52 lacs of

rupees, and I do not see why the Official Assignee should not consider the claim in the ordinary way when dealing with the rest of the claim.

21. I am of opinion that the Bank is entitled to prove its claim and the Official Assignee, should consider the proof. The result is that Appeal No. 129 of 1925 should be allowed and the motion of Messrs. Cur-lender & Co. dismissed with costs of both Courts. The cross-objections are dismissed with costs.

appeal No. 130 of 1925.

22. I have had the advantage of reading the judgment of my learned brother, and I agree with it. The order of Mr. Justice Pearson will be discharged and the Official Assignee directed to proceed with the consideration of the Bank's proof. No costs to any party in this case.

Rankin, J.

23. In this case an order of adjudication was made in this Court against a firm called Mogi & Co., on the 10th, February, 1921. It was made upon the petition of Messrs. S. Curlender & Co., creditors who have since lodged a proof oil debt which has been admitted by the Official Assignee. The Yokohama Specie Bank Ltd., on the 14th January, 1925, lodged a proof of debt claiming that after all securities had been realised, the insolvents were indebted to it in a sum of Rs. 1,52,23,923. Before the Official Assignee had decided whether to admit or reject this proof, Messrs. S. Curlender & Co., on 7th August, 1925, launched a motion before the Judge in Insolvency asking (inter alia) for an order for expunging the proof of the Yokohama Specie Bank's claim or for an order that the aforesaid Bank do pay to the Official Assignee the amount received by them on account of dividends. The other directions for which they asked may be postponed for the present. The motion was dealt with on 26th August, 1925, at the same time as an application by the Yokohama Specie Bank, Ltd., for directions as to the mode in which their claim should be proved and for the issue of Letters of Request to take evidence in Japan.

24. The learned Judge had decided, first, that an unconditional order upon the Bank to pay over to the Official Assignee the dividends in question received by the Bank in Japan must be refused. Secondly, that the Bank is not entitled to take part in these insolvency proceedings until it does pay over these dividends. He has accordingly directed the Official Assignee not to take any steps to adjudicate on the proof tendered by the Bank.

25. From this order the Bank has brought Appeal No. 129 of 1925 and Messrs. Section Cur-lender & Co. have filed a Memorandum of Cross-objection.

26. The amount of the dividends in question is not proved but it is apparently a considerable sum and at the opening of this appeal it seemed to me a pity that a matter of importance should be decided upon slight and incomplete materials apart altogether from the question whether the Bank had a right to a better opportunity of adducing evidence from Japan or elsewhere. In any case it was evident that this question, if decided, could not be decided in such a way as to bind one creditor only. However, Counsel for the Official Assignee after obtaining instructions joined with Counsel for Messrs. S. Curlender & Co. in pressing us to decide the matter on this appeal Counsel for the Bank maintaining that evidence from Japan would be necessary before anything could be decided against him and that the learned Judge had no sufficient materials upon which to base his decision.

27. In the result, Lam of opinion that as against Messrs. 8. Curlender & Co. and as against the Official Assignee we are, in a position to decide as follows: First, that the learned Judge was right in refusing to make an order upon the Bank to pay over to the Official Assignee the dividends in question Secondly, that the learned Judge was wrong in ordering the Official Assignee to stay all proceedings upon the Bank's proof unless the Bank first paid over to him the dividends in question. Thirdly, that if the proof of the, Bank after due investigation be admitted, a question will then arise as to whether the Bank is entitled to receive any dividend in respect thereof until the other creditors shall first have received such dividend as is proportionate to the amount already received by the Bank For the decision of this question sufficient materials are not before us nor does it require to be decided now.

28. What then are the facts proved by the evidence adduced on these matters?. We know that the order of adjudication was made on 10th February, 1921. There is no mention in the affidavits of the date of presentation of the petition or of the date of the acts of insolvency on which the order was based or as to whether any earlier act of insolvency has been established since which was available at the date of the petition. We know nothing as to the date of commencement of this insolvency save that it was not later than 10th February 1921 We know that the insolvents are a 'firm' called Mogi & Co here, and in Japan called it would seem, Mogi Gomei Kaisha, who are the insolvents we do not know at all except that they are the persons who at the date of the order were the partners (B.R. 151). It is, however, conceded at the bar that the head office has been in Japan and that the Calcutta office and some twenty other offices all over the world were branch offices. I do not understand it to be disputed that the partners are Japanese. Again though I cannot find that it is properly in evidence, it is conceded that the Yokohama Specie Bank Ld or the institution which here and in some other places goes by that name is really a Company incorporated in Japan with its Head Office in Japan. At several places in Japan and in China and in the United States as well as in Calcutta, Bombay, Montreal, London and elsewhere the insolvents carried on business and became indebted to the Bank. At some time in 1920, apparently about October, a meeting of the creditors of Mogi & Co. held in Japan appointed a Re-adjustment Committee. This Committee would appear to have carried out in Japan a liquidation of Mogi & Co.'s affairs. It paid not only to Japanese Creditors but also it would appear to creditors, e.g., in Calcutta who applied therefor, a dividend of 12 per cent, in January, 1922, and a further 2688 percent, in October, 1922. It seems that the creditors who came in under this arrangement did so by executing in favour of the Committee a 'power of trusteeship.' What this exactly was cannot be determined on the evidence nor do we know whether Mogi & Co. executed any Trust Deed or other form of assignment. If they did, we do not know its date. We know nothing of the assets of Mogi & Co. realised by the Committee. These may have been wholly or partly assets in Japan or in China or in London or anywhere else, but there is not a scrap of evidence that the Committee intermeddled with any Indian or any British assets. It may be that the whole or part of the assets consisted in immoveable property in Japan and elsewhere or it may

be that there was nothing but moveable property. What sum was realised from the Bank's securities appears presumably from the figure given in its proof of debt. What sum it actually got as dividend on its unsecured debt does not appear, presumably it got 14,688 per cent, upon something. The Committee and its proceedings are stated by the Bank's Accountant, Massami Kawada, to be sanctioned by the laws of Japan but beyond this there is no evidence upon the subject. That its proceedings were illegal under the law of Japan there is nothing whatever to suggest.

29. This is in effect the evidence upon which the Official Assignee and Messrs. Section Curlender & Co. claim to have proved that they are entitled to cut short all investigation of the Bank's proof and to get an order for payment to the Official Assignee of the unascertained amount received' by the Bank from the Committee by way of dividend.

30. In my judgment this is not a case of election between different estates and a creditor lodging a proof can only be required to hand over money or other property to the Official Assignee as a condition precedent to his proof being considered in cases where the money or other property rightfully belongs to the Official Assignee, that is, where independently of any claim to prove the alleged creditor could, if, in this country, be sued and decreed to pay the money or deliver up the property where the money or other property received has not been wrongfully received but has nevertheless been derived from what falls to be regarded in equity as another part of the total fund available to creditor's proof if allowed upon terms which postpone the receipt of dividend sufficient to place them upon an equal footing with the creditor in question.

31. The authorities seem to me to support the following propositions.

32. First, Section 17 of the Presidency Towns Insolvency Act (III of 1909) vests in the Official Assignee, the property of the insolvent wherever situate and goes on to say that 'no creditor shall have any remedy against that property.' This Statute is a Statute of the Indian Legislature. To adopt the phrase of Baron Parke in Cockerell v. Dickens 2 M.I.A. 353 : 3 Moo P.C. 98 : 1 Mont. D. & D. 45 : Morton 407 : 1 Sar. P.C.J. 203 : 18 E.R. 334 : 13 E.R. 45, it operates wherever, but not elsewhere,

that. Legislature could give the law. This is the principle which English Law itself applies to foreign bankruptcies which do not prevent the Courts from making or oblige the Courts to rescind a receiving order at all events where the Foreign country is not the debtor's domicile In re Artola (1890) 24 Q.B.D. 640 : 59 L.J.Q.B. 254 : 62 L.T. 781 : 7 Morrell 80.

33. Secondly, as regards immoveables in a Foreign country, such as Japan, the view of international law taken by English and British Indian Courts is that our Statutes do not operate unless indeed it is shown that the Foreign Law will give them effect. This I take to be the view of the Judicial Committee in the case already cited (cf. Westlake, page 182).

34. Thirdly, as regards moveables in a Foreign country, the basic principle is mobilia sequuntur personam. Prima facie these are governed by the law of the insolvent's domicile: Phillips v. Hunter (1895) 2 H. BI. 402 : 126 E.R. 618 : 2 R.R. 353, Sill v. Worswick (1791) 126 E.R. 379 at p. 394 : 1 H. Bi. 665 : 2 R.R. 816, Cockerell v. Dickens 2 M.I.A. 353 : 3 Moo P.C. 98 : 1 Mont. D. & D. 45 : Morton 407 : 1 Sar. P.C.J. 203 : 18 E.R. 334 : 13 E.R. 45.

35. Fourthly, if the moveable property of an insolvent domiciled here is dealt with by the Courts of a Foreign country in which it is situated in a manner contrary to the rights which our law would have given to the Official Assignee the person to whom it is adjudged does not hold it wrongfully as against the Official Assignee nor can he be made to deliver up what the Foreign Court has given to him except in a case where he too is domiciled here and the rights of both parties can be limited to those given to them by our law: Sill v. Worswick (1791) 126 E.R. 379 at p. 394 : 1 H. Bi. 665 : 2 R.R. 816. Phillips v. Hunter (1895) 2 H. Bi. 402 : 126 E.R. 618 : 2 R.R. 353. In a proper case coming within this exception our law will act in personam either to restrain proceedings being had or continued abroad or otherwise to give effect to our own law.

36. Fifthly, except in such a case as I have just mentioned by way of exception, where the moveable property of an insolvent domiciled here is situate in a Foreign country by whose law a person other, than the Official Assignee is entitled to obtain possession of it or to receive payment out of it, such a person cannot be

made to refund it to the Official Assignee even if he brings what he has received into this country. This was Lord Loughborough's opinion in Sill v. Worswick (1791) 126 E.R. 379 at p. 394 : 1 H. Bi. 665 : 2 R.R. 816. In such a, case the burden of proving what the Foreign Law is would be upon the person seeking to shelter under it Hunter v. Potts (1791) 4 T.R. 182 : 2 R.R. 353 : 100 E.R. 962, Phillips v. Hunter (1895) 2 H. Bi. 402 : 126 E.R. 618 : 2 R.R. 353. Lloyd v. Guibert (1865) 1 Q.B. 115 : 6 B. & S. 100 : 35 L.J.Q.B. 74 : 13 L.T. 602 : 122 E.R. 1134 : 141 R.R. 352.

37. In the present case we are dealing with a Japanese firm and a Bank incorporated in Japan. It is true that in each of the countries where they had branch offices they have for certain purposes and in some sense a domicile. There is no definite evidence in the case of either as to where the ultimate and supreme direction or management was located but we know that they were both Japanese concerns with head offices in Japan and numerous branches all over the world. It must be conceded that had the insolvents' affairs been liquidated in Japan by any process of law analogous to bankruptcy, the receipt of, dividends there under would have been in no way wrongful on the part of the Bank and postponement of dividends would have been the proper course, Banco de Portugal v. Waddell (1880) 5 A.C. 161 at pp. 166, 167 : 49 L.J. Bk. 33 : 42 L.T. 698 : 28 W.R. 477, Ex parte Wilson; In re Douglas (1872) 7 Ch. 490 : 41 L.J. Bk. 46 : 26 L.T. 489 : 20 W.R. 564. Can it be laid down that a liquidation by arrangement or a creditor's deed is on a different footing altogether? la it really the view of our law that a creditor in Japan or in China had prima facie no right to transact further business with Mogi & Co. from the moment the adjudication order was made in Calcutta? That a Japanese creditor could not even sue for his debt in the country of his own and the debtor's domicile without the leave of the Calcutta Court, that he should prima facie have regarded even the Japanese assets as under administration by this Court, and resorted here with his proof of debt? I do not doubt that it is the duty of the Official Assignee to get in moveable property abroad if he can. Nor do I doubt that our' law proceeds historically on the basis of an assignment of all his property by the debtor. But if the principle be mobilia sequuntur personam, and if this be the view of international law accepted by our Courts, it is surely necessary as against a Japanese Bankto prove that the law of the place or places where the

assets were recovered recognises the title of the Official Assignee notwithstanding that the domicile of the insole vents was Japanese and that they have in fact made no voluntary assignment before a claim can be established to treat the recovery as wrongful assuming that the dissenting judgment of Eyre, C.J., in Phillips v. Hunter (1895) 2 H. Bl. 402 : 126 E.R. 618 : 2 R.R. 353, was wrong the case being one between Englishmen, it is still for a case of the present type and on the present point unanswerable in my view] and if the recovery be not shown to be wrongful, upon what principle can the case be treated differently from a case of double bankruptcy or a case where a foreign creditor has obtained payment abroad by execution after the commencement of the bankruptcy: Ex parte Wilson; Inre Douglas (1872) 7 Ch. 490 : 41 L.J. Bk. 46 : 26 L.T. 489 : 20 W.R. 564. Banco de Portugal v. Waddell (1880) 5 A.C. 161 at pp. 166, 167 : 49 L.J. Bk. 33 : 42 L.T. 698 : 28 W.R. 477. The language used in Selkrig v. Davies (1814) 2 Dow. 230 : 3 E.R. 848 : 2 Rose 291 : 14 R.R. 146, and in the older case having reference to English creditors of English brankruptcy cannot govern such a case as the present cf. as to Selkrig's case (1814) 2 Dow. 230 : 3 E.R. 848 : 2 Rose 291 : 14 R.R. 146. Westlake on International Law, 7th Ed., at p. 177. But in any case the language used in the old cases as to 'refunding what he has received and coming in equally with the rest of the creditors' cannot be taken, at the foot of the letter in modern bank, ruptcy practice and applied to foreign creditors of persons domiciled abroad. 'Bringing into the common, fund' is a principle of distribution and nothing more in such cases as the present, as is indeed, amply shown by the judgments in Ex parte Wilson; In re Douglas (1872) 7 Ch. 490 : 41 L.J. Bk. 46 : 26 L.T. 489 : 20 W.R. 564, and Banco de Portugal v. Waddell (1880) 5 A.C. 161 at pp. 166, 167 : 49 L.J. Bk. 33 : 42 L.T. 698 : 28 W.R. 477.

38. In my opinion, this motion has been brought upon wholly insufficient materials and as the Official Assignee and Messrs. S. Curlender & Co. have, persisted in claiming a decision now I think the decision should be given now against them. The question as to the advance made under the deed of hypothecation of 14th July, 1920, which has been set aside will be decided in the ordinary way when the Official Assignee comes to admit or reject the proof. So, too, with the question whether the Bank has, by accepting dividends in Japan, agreed to release the balance of its debt.

39. In Appeal No. 129 of 1925 the proper order, in my opinion, is to allow the appeal and dismiss the motion with costs both here and below. The Cross-objections should be dismissed with costs.

Rankin, J.

40. This appeal is against an order whereby the learned Judge in insolvency has dismissed the application of the Yokohama Specie, Bank, Ld. for directions as to the manner in which its proof of debt shall be evidenced and for Letters of Request for the examination of witnesses in Japan.

41. The proceedings disclose that there has been some misapprehension as to the proper practice in dealing with a proof, of debt, and as to the rights of one creditor to dispute proof lodged by another. The affidavit of Mr. Curlender appears to proceed, on the view that the Official Assignee has to preside over a formal litigation between creditors as to their respective proofs of debt. I do not know where this idea comes from: it may have been the practice under the old Statute 11 & 12 Vic. C. 21 and it may be that something very like it is contemplated by the Provincial insolvency Act (Act V of 1920) but this sort bellum omnium contra omnes is entirely out of place under the Act of 1909 which embodies the scheme of the English Bankruptcy Acts, a plain and business-like scheme. A main object in vesting all the insolvent's property in the Official Assignee and in requiring him lo admit or reject proofs is to avoid any such proceedings. The Official Assignee is to make up his own mind, to satisfy himself as to the justness, of the claim, just as any other Receiver may have to do. He has to examine the proof. His, duty is, to put no creditor to unnecessary delay or expense. If he admits a proof any other creditor may apply to have the proof expunged. If he rejects the proof there is an appeal to the Judge. It is at. this stage and not before that technical questions of proper evidence may arise and any creditor litigating in this manner about another creditor's proof does so at his own risk as to costs. Before that; stage is reached every creditor has prima facie to bear the cost of proving his own debt (Scheduled II, 26), other creditors are entitled to inspect a proof and, of course, may and should give all relevant information and assistance to the Official Assignee. The Official Assignee may use Section 36 to obtain information as to any proof. Again

on taking proper steps the Official Assignee may have the benefit of Counsel's opinion on any points of law. Nothing could be more proper in a case like the present than for the Official Assignee to ask the Bank's, representative to come to his office to go through the relevant papers, give explanations and take his view as to the further evidence required to satisfy him and as to the most convenient way of obtaining it. It is doubtless very well' that he should record a minute of what takes place but if other creditors are to be there at all, a course of very doubtful wisdom, they must be prevented from turning such proceedings in to an unauthorised form of litigation. They can litigate at the right time before the Court and until that time comes, they may well be content with giving to the Official Assignee any information they have got and leaving the rest to him unless indeed they desire to apply-under Section 36 themselves. At the present stage the Official Assignee should make up his own mind, as a reasonable business man as to the matters on which he desires further evidence and the kind of evidence necessary to convince him.

42. In my opinion, this proof of debt should go back to the Official Assignee to continue his examination thereof. By way of assistance to him in showing hew he ought to look at the matter I will take the case, for example, of the report of the Re-adjustment Committee. The Official Assignee, when, the document is produced, must makeup his mind whether he is really satisfied that it is the report or a true copy thereof. If he is hot, then one sensible thing would be to ask for an affidavit from Japan verifying it as being a true copy of the report. As regards the truth of the contents of the report or any particular facts arising there; on, he will doubtless require an affidavit of some one who took a responsible part in the Committee's work in Japan. Again, if the account between the insolvents and the Bank at any particular place has to be scrutinized, presumably, to begin with, a, certified copy of the account would be sufficient to enable the Official Assignee to feel sure that the document is not a fabricated document. If he wants a further and a better list or particulars as regards the Bank's securities, how they were realised or otherwise, he may call for it and let it be verified by some one whom he can take to be a responsible man, in a reasonable manner by an affidavit or in some such way. He will in this way go as far as he can in the ordinary line of a business-man applying his own common sense in a matter where he has to form his own opinion. He has

to satisfy himself. Of course when he has done all he can do in this way, it may be that he will want to examine some witnesses in Japan, or he may think it fair and proper to reject the proof. In the end he will admit or reject the proof in whole or in part and anybody desiring to challenge his-decision will then under the ordinary rules of the Court get the most ample opportunity to do so but upon the ordinary terms.' I consider that the proper order in this, appeal is to discharge the order of the learned Judge and to direct the Official-Assignee to proceed with the consideration of the Bank's proof and to allow no costs in either Court to any party.