OFFICIAL RECEIVER, KANPUR AND ANOTHER

v.

ABDUL SHAKUR AND OTHERS

September 11, 1964

(P. B. GAJENDRAGADKAR, C.J., J. C. SHAH AND N. RAJAGOPALA AYYANGAR JJ.)

Provincial Insolvency Act (5 *of* 1920), *ss.* 33, 75(1) *and* 80— *Negotiable Instruments Act* (26 *of* 1881), *s.* 118— *Official Receiver—If bound to rely upon statutory presumption—High Court—Jurisdiction under s.* 75(1) *of the Insolvency Act.*

The second appellant, who had executed promissory notes in favour of the respondents was adjudicated an insolvent on a petition by them. The Official Receiver in exercise of the powers under ss. 33 and 80 of the Provincial Insolvency Act (5 of 1920) and under directions of the Insolvency Judge, inquired into the claims of the respondents and rejected them. On appeal, the Insolvency Judge directed the inclusion of their names in the schedule of creditors. The appeal to the District Court against the order of the Insolvency Judge was allowed. In second appeal to the High Court, it was held, that the inference drawn by the District Court from its findings was a matter of law and that therefore the High Court had jurisdiction under s. 75(1), to interfere with the order of the District Court. Relying upon the presumption in favour of creditors in s. 118 of the Negotiable Instruments Act (26 of 1881), the High Court set aside the judgment of the District Court. The Official Receiver and the insolvent appealed to the Supreme Court.

HELD : The appeal should be allowed.

Since all the findings of the District Court were findings of fact and the question whether a statutory presumption was rebutted by the rest of the evidence was also a question of fact, the High Court had no jurisdiction to set aside the judgment of the District Court. [259A-C].

Wali Mohammad v. *Mohammad Bakhsh,* (1930) L.R. 57 I.A. 86. approved.

Section 118 of the Negotiable Instruments Act, enacts a special rule of evidence which operates only between parties to the instrument or persons claiming under them in a suit or proceeding relating to the negotiable instrument. The section does not affect s. 114 of the Evidence Act, and in cases not falling within s. 118 of the Negotiable Instruments Act the Court may or may not presume that a promissory note was founded on good consideration. Therefore, in a proceeding relating to proof of debts, the question being not one between the insolvent and the proving creditor alone, and since the rights of other creditors of the insolvent have of necessity to be considered, the Court has jurisdiction to investigate whether there is a real debt. Even if for some reason the debtor himself is estopped from denying the debt, there could be no estoppel against the Insolvency Court. There is thus no statutory presumption of consideration in favour of the creditors under promissory notes in proceedings under s. 33 of the Provincial Insolvency Act for settlement of the schedule of creditors, and the Receiver exercising powers under s. 80 of that Act is not bound to admit the debts in the schedule merely because the insolvent or the creditors have failed to displace such a presumption. [261F-262C; 264E-G].

Case law reviewed.

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 257 of 1962.

Appeal from the judgment and decree dated February 19, 1957 of the Allahabad High Court in S. A. F. No. 4 of 1952.

S. T. Desai, and *J. P. Goyal*, for the appellants.

B *G. S. Pathak, B. Dutta, J. B. Dadachanji, O. C. Mathur* and *Ravinder Narain*, for respondent No. 2.

The Judgment of the Court was delivered by

Shah J. Respondents 1 to 3 in this appeal presented a petition C before the Insolvency Judge, Kanpur for an order adjudicating the second appellant—Kotwaleshwar Prasad—insolvent. In their petition they alleged that Kotwaleshwar had in the course of business dealings with them borrowed Rs. 15,000 on September 28, 1935 from respondents 1 and 3 and had executed a promissory note agreeing to repay the amount, and that he had borrowed Rs. 3,500 D on January 9, 1936 and Rs. 4,000 on April 7, 1936 from respondent 2, and executed similar promissory notes, that he had failed to repay the amounts due by him and with a view to defeat or delay his creditors secluded himself so as to deprive his creditors of the means of communicating with him, and had thereby committed an act of insolvency. The Insolvency Judge E by order dated October 8, 1937 adjudicated Kotwaleshwar insolvent and appointed the first appellant the Official Receiver, Kanpur, as receiver of his estate with powers under s. 80 of the Provincial Insolvency Act, 1920—hereinafter called 'the Act'.

The Receiver proceeded in exercise of the powers under s. 33 F read with s. 80 of the Act to frame a schedule of debts. The claims set up by the respondents were challenged by Kotwaleshwar and a creditor named Abdul Sayed, but the Official Receiver included the claims of the respondents in the schedule of debts, for in his view Kotwaleshwar had admitted the claims on October 8, 1937 before the Insolvency Court.

G In appeal under s. 68 to the Insolvency Judge the matter was remanded to the Official Receiver with directions to hold a fresh enquiry into the debts due to the respondents. The Official Receiver then held a further enquiry and rejected the claims of the respondents 1 to 3. He held that it was not proved that Kotwaleshwar had received consideration for the three promissory H notes. In the view of the Official Receiver the documentary evidence produced by Kotwaleshwar and the respondents established that the promissory notes were executed by Kotwa-

eshwar under the influence of respondents 1 to 3 and their servant Amir Hassan and that the evidence including the books of account of respondents 1 to 3 in support of the advance of consideration under the promissory notes was unreliable.

In appeal against the order of the Official Receiver, the Insolvency Judge, Kanpur directed that the names of respondents 1 to 3 be included in the schedule of creditors. In the view of the Insolvency Judge the presumption of consideration arising under s. 118 of the Negotiable Instruments Act supported the rest of the evidence which was directed to establish the genuineness of the signatures and the endorsements of execution on the promissory notes by Kotwaleshwar and on the receipts executed by him and that the *Kachi Rokar* of the respondents were adequately corroborated by the evidence of the creditors, their witness Abdul Rashid and others and that Kotwaleshwar had failed to discharge the burden which lay heavily on him to establish want of consideration.

Against the order of the Insolvency Judge an appeal was preferred to the District Court, Kanpur. During the pendency of the appeal respondents 1 and 3 were declared evacuees under the Administration of Evacuee Property Act and the Assistant Custodian of Evacuee Property in whom their property had vested was impleaded as a party respondent. In the view of the District Court the testimony of witnesses of the respondents in support of the plea of payment of consideration was unreliable and that the admission made by Kotwaleshwar before the Insolvency Judge on October 8, 1937 was procured by the exercise of undue influence and that the books of account relied upon by the respondents and the oral evidence in support thereof were unreliable. The District Judge observed that the presumption under s. 118 of the Negotiable Instruments Act in respect of the promissory notes did arise, but it stood in the circumstandes of the case weakened and the burden shifted to respondents 1 to 3, to prove affirmatively that the sums covered by the three promissory notes were in fact paid to the insolvent and that they failed to discharge the burden.

Against the order passed by the District Judge, a second appeal being No. 4 of 1952 was preferred under s. 75(1) proviso 2 of the Provincial Insolvency Act, 1920 to the High Court of Allahabad. The Division Bench hearing the appeal referred the following two questions to a Full Bench. These questions were :

(1) Whether the presumption mentioned in cl. (a) of s. 118, Negotiable Instruments Act, 1881 can be

A invoked in insolvency proceedings where an alleged debt against the insolvent is called in question by the official receiver or by a creditor or by the insolvent?

(2) If it can be invoked, would circumstances tending to make it doubtful that consideration passed under the B negotiable instrument even though coupled with a denial on the part of the maker of the instrument, suffice to deprive the creditor of the benefit of the presumption and require him to prove by evidence that consideration did actually pass?

C A Full Bench of the High Court by majority having recorded an affirmative answer on the first question, the second appeal was placed for hearing before a Division Bench of the High Court. The Division Bench observed that the District Court had recorded certain findings and from those findings it had inferred as a matter of law that the statutory presumption under s. 118 D of the Negotiable Instruments Act stood rebutted. The High Court then observed :

> "The correctness, or otherwise, of the preliminary inference must need (*sic*) be considered first. Scrutiny of that inference should however be prefaced with the observation that it is open to question not only because E the various findings, or at least the material ones, described as circumstances by the court below, whereon that inference was based suffer from one or the other of the legal defects pointed out above, but also because the inference drawn by that court as a result of its view that the statutory presumption stood rebutted was a finding on F a question of law and not on a question of fact. That inference, or finding, of the court below was that the onus of proving consideration had shifted on to the creditors. . . . . A finding which has to draw on a rule of law for the recording of it G or for the ascertainment of its truth is a finding on a question of law, any other a finding on a question of fact. The finding that onus has shifted has to draw on the rules of pleading and proof, of procedure and evidence, for the recording of it as well as for the ascertainment of its truth. It is therefore a finding on a question of law."

H The Court then held that in the case before it "not only had the insolvent failed to displace, or even to weaken, the presumption in favour of the creditors under s. 118 of the Negotiable Instru-

ments Act, but the consideration stood fully established, even if there was no initial presumption in favour of the creditors, by the evidence adduced by them and by the insolvent's own admission." With special leave, this appeal is preferred by the Official Receiver and Kotwaleshwar. A

The District Court found on the evidence that the insolvent's father died in 1933 leaving considerable properties, that the insolvent was at the time of his father's death a young man about 20 years of age, inexperienced and open to all the temptations of early life, that the insolvent "got mixed up" with Amir Hassan and others and "they initiated him into the mysteries of wine and women", that although the promissory notes were not executed "under the influence of drink", there were grounds for holding that he was under the influence of Amir Hassan when he signed them, that it was significant that the three premissory notes were executed in quick succession and at that time the insolvent was already indebted to other creditors to the extent of Rs. 6,000 that the respondents had no previous business relations with the insolvent, that although the creditors knew that the insolvent's share in the property left by his father was only Rs. 28,000 to Rs. 30,000 and that he was joint in estate with his brother, no kind of security was taken from the insolvent, nor was any enquiry made whether the said property was encumbered or not, that respondent 3 Abdul Wahid admitted that about 2½ months after the execution of the promissory note dated September 28, 1935 he came to know that the insolvent was executing "bogus and fictitious promissory notes" in favour of his friends to defraud his real creditors, and therefore it was incredible that further sums should have been advanced under the two subsequent promissory notes of the aggregate value of Rs. 7,500, that the insolvent was "fairly well off for his ordinary needs" and there was no apparent reason why he should have borrowed those considerable sums of money, that the respondents did not have sufficient funds or resources with them to advance either the amounts covered by the three promissory notes or those under the prior promissory notes of September 4, 1935 and September 15, 1935, that the thumb impression of the insolvent had been taken in addition to his signatures on the promissory notes, and that his signatures were also obtained on the *Rokar Bahi*, that the oral evidence produced by the respondents in proof of the payment of consideration did not inspire confidence, that the admission of the insolvent dated October 8, 1937 on the foot of which the order of adjudication was passed appeared to have been made in suspicious circumstances and it was an erroneous admission and therefore did not bind the insolvent and that the *Bahi* B C D E F G H

A *Khatas* of the creditors were of a suspicious character. All these findings were findings of fact. The District Court inferred from the facts found that the statutory presumption under s. 118 of the Negotiable Instruments Act had been weakened and the burden which lay upon the insolvent was discharged and it was not open to the High Court exercising jurisdiction under s. 75(1) proviso 1, B nor even under proviso 2, of the Provincial Insolvency Act to set aside the judgment of the District Court, for it is well settled that the question whether a statutory presumption is rebutted by the rest of the evidence is a question of fact : *Wali Mohammad* v. *Mohammad Bakhsh*(1).

C This would be sufficient to dispose of the appeal. But the question whether the Official Receiver is bound to give effect to the statutory presumption in respect of a negotiable instrument arising under s. 118 of the Negotiable Instruments Act when the negotiable instrument is sought to be relied upon by a creditor in the course of the insolvency proceeding in proof of the debts to D be entered in the schedule of creditors, has been fully argued before us and as the High Court has overruled an earlier decision of that Court : *Ram Lal Tandon* v. *Kashi Charan*(2), and as the question is of some importance, we deem it necessary to express our opinion on that question.

E Section 33 of the Provincial Insolvency Act by the first sub-section provides :

> "When an order of adjudication has been made under this Act, all persons alleging themselves to be creditors of the insolvent in respect of debts provable under this Act shall tender proof of their respective debts by producing F evidence of the amount and particulars thereof, and the Court shall, by order, determine the persons who have proved themselves to be creditors of the insolvent in respect of such debts, and the amount of such debts, respectively, and shall frame a schedule of such persons and debts :
>
> G . . . . . ."

The Act imposes a duty upon the court to frame a schedule of creditors and of the debts due to them which are provable under the Act. For that purpose the court has to hold an enquiry into the debts due by the insolvent which are provable.

H A proceeding under s. 33 of the Provincial Insolvency Act is not a proceeding between the insolvent and the proving creditor.

(1) L.R. 57 I.A. 86, 92. (2) A.I.R. 1928 All. 380.

The proceeding is between the creditors represented by the official receiver and the insolvent. When a creditor, seeking to prove a debt relying upon a negotiable instrument, or other evidence makes a claim for inclusion of the debt due to him, the court, or where he is authorised the receiver of the estate of the insolvent, has to be satisfied about the existence of the debt, the amount due, its particulars and that it is provable in insolvency. Section 33 does not indicate the quantum of proof which may be regarded as sufficient to prove a debt. A court may accept in proof of a debt a registered letter to the court and an affidavit verifying the debt (see s. 49 of the Act). That however is a matter of procedure, and does not lay down as to what is sufficient to prove the debt. In each case it is for the court or the receiver (subject of course to review in the manner provided by the Act) to consider whether the debt of which the creditor claims inclusion is proved. The decision of the question must of necessity depend upon the circumstances and the evidence led to prove the debt.

In the present case the High Court by majority took the view that in a proceeding under s. 33 when the promissory note is brought before the Court by the promisee, a presumption that the promissory note was made for consideration arises under s. 118 of the Negotiable Instruments Act and unless that presumption is rebutted by the promisor or by other creditors or by the receiver that the amount for which the promissory note is executed must be included in the schedule. In so holding the High Court primarily relied upon absence of any reference to the nature of the proceeding in which the presumptions are required to be raised in relation to negotiable instruments.

It must be noticed in the first instance that presumption under s. 118 of the Negotiable Instruments Act is a presumption of consideration : it does not in all cases prove the quantum of debt due by the insolvent at the date of insolvency. The Insolvency Court has, it must be remembered, to ascertain whether a debt is due by the insolvent, whether the debt is provable in insolvency, and the quantum of the debt due at the material date. In making this enquiry in its three aspects even the judgment of a court against the debtor may not be regarded as binding upon the Court. In *Ex Parte Lennox*(1), it was held that a judgment which the judgment debtor cannot set aside, may still be subjected to investigation by the court of Bankruptcy to enquire whether the debt on which the judgment was founded was a good debt, and if the Court be satisfied that it was not, the Court may refuse to make a receiving

(1) [1885] 16 Q.B.D. 315.

A order in respect of the debt. The principle of that case was extended in *In Re. Fraser Ex Parte Central Bank of London*(1). It was held in that case that "upon the hearing of a creditor's petition for a receiving order against a judgment debtor, the Court of Bankruptcy has power, at the instance of the debtor himself, to go behind the judgment and to inquire into the validity of the debt, B even though the debtor has previously applied in the action to set aside the judgment, and his application has been refused, and the refusal affirmed by the Court of Appeal." Lord Esher, M. R., observed at pp. 636-637 :

> "The decision (*Ex parte Lennox*) is based upon the C highest ground—*viz.*, that in making a receiving order, the Court is not dealing simply between the petitioning creditor and the debtor, but it is interfering with the rights of his other creditors, who, if the order is made, will not be able to sue the debtor for their debts, and that the Court ought not to exercise this extraordinary power unless it is satisfied D that there is a good debt due to the petitioning creditor. The existence of the judgment is no doubt *prima facie* evidence of a debt; but still the Court of Bankruptcy is entitled to enquire whether there really is a debt due to the petitioning creditor."

A debt to be entered in the schedule must therefore be a real E debt. A judgment against a debtor which is sought to be relied upon in proving a debt does not necessarily establish the existence of a real debt for the judgment may have gone by default, it may have gone by consent or it may have been procured for any other reason. In a proceeding relating to proof of debts the F question which arises being not one between the insolvent and the proving creditor alone, the rights of other creditors of the insolvent have of necessity to be considered. Even if for some reason the debtor himself is estopped from denying the debt there will be no estoppel against the Insolvency Court.

The Court therefore in each case has jurisdiction to investi- G gate whether there is a real debt: whether production of a judgment or a negotiable instrument or other evidence may be regarded as sufficient to regard the debt as proved is a matter for the Insolvency Court to decide. The question is not to be adjudged in the light of any estoppel which may operate against the insolvent or of any presumption. The Court in a given case may rely H merely upon a judgment or a negotiable or other instrument, and admit the debt to the schedule not because there is an estoppel

1. [1892] 2 Q.B.D. 633.

against the Receiver or the other creditors, or presumption of law in favour of the evidence produced, but because in its view in the light of the circumstances no further enquiry beyond proof of the judgment or negotiable instrument or other document evidencing the debt and proof of non-satisfaction of the debt since the date thereof is sufficient. The Court has power, however, to insist upon proof of the debt apart from the judgment or the negotiable or other instrument. The reason is that the Insolvency Court with a view to effectively distribute the estate of the insolvent among the creditors is entitled to go behind outward forms of transactions and to ascertain the truth of the debts sought to be proved, and the estoppel to which the insolvent may have subjected himself will not prevail against the Receiver. Whether the power should be exercised in the case of a judgment debt in a given case depends upon the discretion of the Court which has to be exercised on sound judicial principles. It is true that the Court ordinarily does not go behind a judgment against the debtor, on a bare suggestion by the debtor that the debt which is merged in the judgment did not exist or was bad. There must undoubtedly be circumstances *prima facie* justifying an enquiry. There must appear something that the judgment was procured by fraud or collusion, or that there has been miscarriage of justice. But a mere irregularity or error in form will not be a sufficient reason for going behind the judgment.

When a debt secured by a promissory note is sought to be proved, the Insolvency Court must enquire into the reality, and the quantum of consideration. What shape this enquiry may take will depend upon the circumstances of the case. In a given case the Insolvency Court may regard an affidavit setting out the particulars of the debt, and affirming execution of the promissory note by the insolvent, and asserting non-satisfaction of the debt, as sufficient. In other cases, the Court may enter upon a fuller enquiry which the circumstances of the case may demand. But in all cases of proof of debts under s. 33 the burden is upon the creditor. That burden may be discharged by the affidavit of the creditor viewed in the light of a presumption which the Court may raise under s. 114 of the Evidence Act, that a bill of exchange accepted or endorsed, was for good consideration. If that be the true effect of s. 33 of the Provincial Insolvency Act, and we think both on principle and authority that is the true effect, of necessity the presumption under s. 118 of the Negotiable Instruments Act that every negotiable instrument was made or drawn for consideration cannot avail against the Receiver of the estate of the insolvent.

A It is true that s. 118 of the Negotiable Instruments Act, unlike s. 119 to s. 122 which occur in Ch. XIII, does not refer to a proceeding in suit where the various presumptions directed have to be raised. The section is undoubtedly in terms general. But there is no reason to suppose that it was intended to apply to a proceeding which is not in the nature of a civil dispute between
B the parties to the negotiable instrument or their privies. The Negotiable Instruments Act is intended to codify the law merchant relating to dealings concerning negotiable instruments. The presumptions which are raised under s. 118 do undoubtedly set out special rules of evidence relating to negotiable instruments,
C but in our opinion the nature of the presumptions from their very nature operate in favour of or against the parties to the negotiable instrument or their privies and cannot generally apply to persons who do not claim under the parties to the instrument. In *Anumolus Narayana Rao* v. *Chattaraju Venkatappayya*(1) it was observed by Varadachariar J., that a suit on a promissory note
D instituted against an undivided son of a Hindu promisor governed by the *Mitakshara* law after the latter's death cannot be regarded as one against the heirs or representatives of the promisor, because it only seeks to enforce the Hindu law theory of pious obligation of the sons in respect of the property which the sons have taken by survivorship. The pious obligation can arise only on the
E assumption of the existence of a debt due by the father and in such a case the onus of proving the existence of the debt must *prima facie* be laid on the creditor who can call in aid the presumption permissible under the general law of evidence, namely, s. 114 of the Indian Evidence Act and not the presumption under s. 118 (a) of the Negotiable Instruments Act. The learned Judge
F observed :

> "Though this section is not, like sections 119 to 122, limited in terms to a suit upon the instrument, it seems only reasonable to hold that the special rules of evidence laid down in section 118 must have been
G intended to apply only as between the parties to the instrument or those claiming under them. In other cases the presumption can only be in the terms enacted in section 114 of the Evidence Act (*vide* illus. c) which by the use of the expression 'may presume' leaves it to the Court to apply the presumption or not according to circumstances."
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(1) I.L.R. [1937] Mad. 299.

Section 114 of the Indian Evidence Act authorises the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Under the third illustration of s. 114 the Court may presume that a bill of exchange accepted or endorsed was accepted for good consideration. But the section provides, that the Court shall also have regard to other material facts in considering whether the maxim does or does not apply in the particular case before it. It is therefore open to the Court to consider in its proper setting, the fact that the drawer of a bill of exchange was a man of business, and the acceptor was a young and ignorant person completely under the former's influence. This is one illustrative fact which the Court may consider in raising the presumption. There may be other circumstances which may also justify the Court in declining to raise the presumption. Mr. Pathak for the respondents urged that the Indian Evidence Act was enacted in 1872 and the Negotiable Instruments Act having been enacted in 1881, and as the two provisions conflict or overlap, s. 118 of the Negotiable Instruments Act must supersede s. 114 of the Evidence Act. We are unable to accept that contention. Undoubtedly s. 114 of the Evidence Act is a general provision which enables the Court to presume, though not obliged to do so, that a bill of exchange or a promissory note were founded on a good consideration. Section 118 of the Negotiable Instruments Act, however, enacts a special rule of evidence which operates between parties to the instrument or persons claiming under them in a suit or proceeding relating to the bill of exchange and does not affect the rule contained in s. 114 of the Evidence Act, in cases not falling within s. 118 of the Negotiable Instruments Act.

A B C D E F

In our view the High Court was in error in holding that a statutory presumption of consideration arose in favour of the respondents in the proceedings under s. 33 for settlement of the schedule of creditors, and the Receiver exercising power under s. 80 of the Act was bound to admit the debts in the schedule if the insolvent or the other creditors failed to displace that presumption.

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The appeal must therefore be allowed, the order of the High Court set aside, and the order of the District Court restored, with costs in this Court.

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Appeal allowed.