1871. July 7.

In re THE MERCANTILE CREDIT AND FINANCIAL ASSOCIATION (LIMITED).

Bábá Sáheb Dámáskar's Case.

Winding up—Insolvency—Personal Discharge—Liability of Insolvent to pay subsequent Calls—Indian Companies' Act (X. of 1866, Secs. 78 and 100)—Act 11 & 12 Vict., c. 21, s. 47.

An insolvent, a holder of shares in a joint stock company, on the 21st of May 1866, obtained his personal discharge under Sec. 47 of the Indian Insolvent Debtors' Act, but his name still continued on the register of the company, the Official Assignee not having elected to take the shares. The company was subsequently (on the 13th of April 1867) ordered to be wound up.

Held that the insolvent's liability to pay calls on the shares still continued, notwithstanding his personal discharge.

BA'BA' SA'HEB DA'MA'SKAR, on the 2nd of April 1866, applied for, and on the 21st day of May 1866 obtained, his personal discharge under Sec. 47 of the Act for the relief of Insolvent Debtors in India.

The order of discharge directed that the person of the said Bábá Sáheb should, until further order to the contrary, be protected from being arrested for and in respect of all the debts mentioned or referred to in his schedule, and the judgment should be entered up against the Official Assignee for the amount of the debts stated in the schedule.

Previously to his petitioning the Insolvent Court for relief, and at the time of obtaining his discharge, Bábá Sáheb was the registered holder of twenty shares in the Mercantile Credit and Financial Association (Limited), a company registered under Act XIX. of 1857. No mention was made of these shares in the schedule of Bábá Sáheb.

On the 13th day of April 1867 the Mercantile Credit and Financial Association was ordered to be wound up by the court under Act X. of 1866 (on a petition for that purpose presented on the 16th of March 1867), and the name of Bábá Sáheb was subsequently placed upon the list of contributories in respect of twenty shares.

On the 22nd of July 1867 a call of Rs. 150 per share was made upon the contributories of the Association, payable as

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to Rs. 75 on the 5th of August, and as to the remaining Rs. 75 on the 1st of November following.

On the 20th of December 1867, Mr. Bendir (the Official Liquidator of the Association at that time) wrote to the Official Assignee claiming to rank against the estate of Bábá Sáheb in respect of the call that had been made on the shares standing in his name, and the Official Assignee, in the usual course, registered the claim on Bábá Sáheb's estate, but no further steps were taken in the matter, and no payment was made by the Official Assignee. No assets of the insolvent were collected by the Official Assignee.

According to the practice of the office of the Official Assignee, no claim is ever paid unless and until it is verified by the affidavit of the claimant.

On the 20th of March 1871, a summons in Chambers was taken out by Mr. Punnett, the Official Liquidator of the Association, calling on Bábá Sáheb to show cause why execution should not issue against him on the call-order of the 22nd of July 1867.

It was admitted that no steps had been taken by the Official Assignee to take over the shares in question, or to have them transferred into his own name.

The summons was adjourned into court, and came on for argument before BAYLEY, J., on the 22nd of June 1871.

Ferguson, in support of the summons :—Waiving all technical difficulties that might be urged against allowing Bábá Sáheb in a proceeding of the sort to appeal in effect from the order placing his name on the list of the contributories of the Association, I contend that he is liable, notwithstanding his having obtained his discharge in insolvency, to pay this call. (I.) He is not discharged by the provisions of the Insolvent Act, for a personal discharge only relieves from responsibility in respect of the debts mentioned in the schedule, and these shares do not appear in Bábá Sáheb's schedule. (II.) The property in the shares remained in the insolvent notwithstanding his insolvency, and he continued the holder of them. Property of this nature does not pass

to the Assignee until he signifies his acceptance of it: *Sayles* v. *Blane* (*a*); *Midland Great Western Railway Company* v. *Gordon* (*b*). In general nothing passes to the Assignee but what is beneficial. Here there has been no election or acceptance: *Boorman* v. *Nash* (*c*); *Herbert* v. *Sayer* (*d*). The claim is not barred by the discharge under Sec. 48 of the Insolvent Act. It has been so held in *Parker* v. *Ince* (*e*), which was decided under a similar section, 6 Geo. IV., c. 16, ss. 51 and 56: *South Staffordshire Railway Company* v. *Burnside* (*f*); *The General Discount Company* v. *Stokes* (*g*). Lastly, the claim is not barred by Secs. 98 and 100 of Act X. of 1866. It has been so decided in several cases decided under the corresponding sections of the English Act, ss. 75 and 77 of 25 & 26 Vict., c. 89: *Martin's Patent Anchor Company (Limited)* v. *Morton* (*h*); *Hastie's Case* (*i*); *Financial Corporation* v. *Lawrence* (*j*).

Marriott, contrà:—The Liquidator has elected to proceed against the estate; the insolvent is thus discharged, and the Official Assignee, by registering the claim, has elected to take the shares. By Sec. 6 of the Insolvent Debtors' Act, *all* the property of the insolvent vests in the Official Assignee when the schedule is filed. If this claim is not inserted in the schedule it can now be amended. But it is not necessary for me to rely upon the Insolvent Act, for Secs. 98 and 100 of the Companies' Act completely protect the insolvent, and provide for debts not entered in the schedule. The cases cited are not in point, for here the insolvency of Bábá Sáheb is still going on, as he has not obtained his final discharge. The winding up and the insolvency are contemporaneous.

Ferguson in reply.

Cur. adv. vult.

(*a*) 19 L. J., Q. B. 19. (*b*) 16 M. & W. 804.
(*c*) 9 B. & C. 145. (*d*) 5 Q. B. 965. (*e*) 4 H. & N. 53.
(*f*) 5 Ex. 129. (*g*) 17 C. B., N. S., 765.
(*h*) Law Rep. 3, Q. B. 306. (*i*) Law Rep. 7, Eq. 3.
(*j*) Law Rep., 4 C. P. 731.

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7th July 1871. BAYLEY, J. (after stating the facts as given above, proceeded):—Upon this state of facts, and it being admitted that Bábá Sáheb's name still remains on the list of contributories of the Association, the question is whether Bábá Sáheb is now liable to payment of the call made on the 22nd of July 1867, notwithstanding that he has obtained his order of discharge under Sec. 47 of the Insolvent Debtors' Act.

In order to answer that question it becomes necessary to consider three points:—1*st*, Is Bábá Sáheb now the holder of twenty shares in the Financial Association; 2*nd*, If he is, is the Association barred from making a claim upon him on the ground that the call was proveable under Sec. 48 of the Insolvent Debtors' Act; and 3*rd*, Do Secs. 98 and 100 of the Indian Companies' Act (Act X. of 1866), which have been relied upon, afford any defence to this application.

The two first of the above questions are so closely blended with one another that I proceed to consider them together. Sec. 16 of Act X. of 1866 enacts that the Articles of Association of a company "when registered shall bind the Company and the members thereof to the same extent as if each member had subscribed his name thereto, and there were in such Articles contained a covenant on the part of himself, his heirs, &c., to conform to all the regulations contained in such Articles, subject to the provisions of this Act. All moneys payable by any member to the company in pursuance of the conditions and regulations of the company, or any of such conditions or regulations, shall be deemed to be a debt due from such member to the company." Bábá Sáheb, at the time of his insolvency, was the registered holder of twenty shares, and, therefore, in respect of unpaid calls fell within the meaning of this section. The nature of the liability of a shareholder to pay calls is well stated in the case of *The South Staffordshire Railway Company* v. *Burnside* (*k*). The court there says: "The contract on which the shareholder's obligation is founded is not to pay a certain fixed sum upon a future contingency, but such sum or sums as may be required

(*k*) 5 Exch. 129.

from himself and all the other shareholders from time to time, not exceeding a certain sum, and regulated by the wants of the company. At the time of the bankruptcy it was uncertain what the sum would be which the defendant would be called upon to pay, and no certain debt was then contracted. * * * However, it does not seem to be necessary that it should be capable of valuation; therefore, we do not decide that the case does not fall within the 56th section on that ground, but on the other ground of the uncertainty of the claim we are of opinion it does not. The situation of the bankrupt in this respect bears a close resemblance to that of a lessee who has become bankrupt, who continues liable after his certificate to the payment of rent accruing due subsequently to the bankruptcy. The contract to pay rent *in futuro* is not a debt contracted at the time of the bankruptcy, and could not be proved under the fiat against him."

The liability to pay calls is again clearly stated by Chief Justice Erle in *The General Discount Company* v. *Stokes* (*l*). He there says: "Then was the liability of this shareholder to be called upon to contribute to the funds of the company a liability to pay money upon a contingency within the meaning of this provision? * * * Where a party is a holder of shares in a joint stock company, his liability to pay money depends upon more contingencies than one—there may, or may not, be a call made; and the bankrupt might not be the holder of the shares when a call is made. There may be no existing liability at the time of the bankruptcy, but a liability may arise from the concurrence of those two contingencies. * * * It must be a claim depending upon whether or not the company is in a prosperous condition or not. Thus it will depend upon a variety of contingencies, whereas the Act of Parliament seems to have contemplated but one contingency. It may be a hardship on the shareholder to be made to rest under this undefined liability. He, however, has his remedy by paying each call by a fresh bankruptcy." And Mr. Justice Byles in the same case says: "Here there are two contingencies at the least—one, whether a call would ever be

(*l*) 17 C. B., N. S., 765.

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made—the other whether, if a call were made, the bankrupt would at the time be the holder of the shares. If, therefore, any case could be imagined in which the existence of two contingencies would prevent its falling within the 178th section, this is that case. Further, if the bankrupt be discharged, he is discharged from all the liability that ever can happen in respect of these shares, and then we are driven to this, that the bankrupt will hold his shares (for the assignees may not choose to interfere), and yet he is freed from all liability in respect of all calls past and future." The question in that case was the same as the question here.

The position of an insolvent holder of shares is also well stated in *Hastie's Case* (*m*), in which the Lords Justices confirmed the previous decision of the Master of the Rolls in the same case. They there held that a bankrupt must be retained as a contributory to a company where the bankruptcy preceded the winding up of the company, and there was nothing to show that the calls were capable of valuation at the date of the bankruptcy.

A similar expression of opinion is to be found in a case decided by the present Lord Chancellor when one of the Lords Justices.* He there says: "While the concern is a going concern, the amount of liability to future calls is incapable of being estimated; but when the company is being wound up this state of things is altered, and the contributory is a debtor for an amount which the Legislature assumes to be capable of being estimated."

I conclude this portion of my remarks by referring to the case of *The Financial Corporation, Limited*, v. *Lawrence* (*n*), in which Mr. Justice Byles lays down the law in these terms: "Until the winding up of the company the liability of the shareholder is not calculable. It not only depends on a great variety of circumstances, such as the prospects of the company and the position of the other shareholders, but the ownership of shares may even be a source of gain. This case

(*m*) Law Rep., 4 Ch. App. 274.

* *Ex parte Pickering*, L. R. 4, Ch. App. 58, 61.

(*n*) Law Rep., 4 C. P. 731.

seems on principle, therefore, to be similar to the case which has been cited of *Mudge* v. *Rowan* (*o*). There nobody could estimate the value of the contingency upon which the liability of the defendant depended at the date of the bankruptcy, and the Court of Exchequer, therefore, held that the debt was not proveable. Applying the principle of that decision to the case now before us, it seems to me that the defendant's liability was not calculable till the winding up of the company had taken place, and that this debt, therefore, would not have been proveable under a bankruptcy at the date of the deed." Mr. Justice Montague Smith, in the same case, after quoting the remarks of Lord Justice Wood which I have referred to, says: "I understand him to mean that until a company has begun to be wound up, the liability to future calls cannot be proved, because it cannot be estimated, and that the company is not to be considered as a creditor in respect of it, but that this is altered as soon as the winding up is commenced; and it is so because, as soon as the company begins to be wound up, the liability of the shareholders, which was not then an existing obligation, is altered by the statute into a different species of liability." These authorities appear to me conclusively to establish the proposition that Bábá Sáheb could not have obtained his discharge from his liability in respect of these shares under the provisions of the bankruptcy law in England, as his liability to pay calls at the time he filed his petition in insolvency and obtained his discharge was, in respect of these shares, incapable of valuation, inasmuch as there was then no certainty that he would be called upon to pay any calls in respect of them. The Indian Insolvent Act I shall presently refer to.

Now, has the Official Assignee been substituted as a shareholder instead of Bábá Sáheb, or has the liability in respect of these shares been transferred to him? I think not. The position of the Official Assignee is that he cannot be compelled to take upon himself the burden of an onerous undertaking. In *Boorman* v. *Nash* (*p*) it was held that a

(*o*) Law Rep. 3, Exch. 85. (*p*) 9 B. & Cr. 145.

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burdensome contract could not be foisted on the Official Assignee against his will. And in *Hastie's Case* (*q*) the Master of the Rolls, after many months taken for consideration, says: "It is obviously impossible to put the assignee on the list of contributories. He cannot be compelled to take the shares. He has repudiated them, and cannot be made liable for anything in respect of them" (p. 6); and again, at page 11, he says, speaking of Sec. 77 of the English Companies' Act, 1862: "I think that this does not deprive the assignees of their inherent power of electing whether to take the shares or not; and that if they decline to take them they cannot be compelled to do so. And after their refusal to take the shares, and after they have fully administered the estate of the bankrupt and distributed it amongst the creditors, it would be monstrous that a subsequent failure should make the assignees contributories, and thereby liable personally to pay those calls—assignees who have no property of the bankrupt remaining, and who have always refused to be mixed up with the affairs of the company." In the case I have cited from the 5th Exchequer Reports, Mr. Baron Parke concisely expresses the position of the Official Assignee in this respect, where he says(p. 135): "A *damnosa hæreditas* does not pass to the assignees without their assent." Indeed it was not seriously contended before me that such was not the law, but it was said that the Official Assignee had assented to take these shares, and the fact of Mr. Bendir having claimed againt the estate of the insolvent by the letter of the 20th of December 1867, and of that claim having been registered by Mr. Gamble, was strongly relied upon, the book in which the claim was registered having been put in at the hearing of the summons, as well as a letter written by the Official Assignee to Mr. Bendir, in which it was stated that the Company's claim had been so registered. This being a matter of the practice of an officer of the court, I sent during the argument for Mr. Gamble, and in answer to me he stated in court that before an application to share in an insolvent's estate was admitted, it was necessary for the

(*q*) Law Rep. 7, Eq. 3.

claimant to make and file an affidavit of his claim. This Mr. Bendir did not do, and his claim was never admitted. If Mr. Bendir had wished to come in as a creditor upon the estate, he should have applied to come in under Sec. 38 of the Insolvent Act, and have caused the insolvent's schedule to be amended by the insertion of his claim. Mr. Bendir did not take any such step, the schedule was not amended, and the insolvent continued to be upon the list of contributories. This conduct of Mr. Bendir was to some extent relied upon, though to what extent I did not clearly understand, to show an election on his part to absolve the insolvent and proceed against his estate; but I do not think that argument is well founded, and as to the Official Assignee, the authorities show that in the above transaction there was nothing to render him liable, as mere interference with shares (even if there was any such interference here) does not render an Official Assignee liable. In the *South Staffordshire Railway Company* v. *Burnside* (*suprà*) the Official Assignee did far more than Mr. Gamble has done here, and yet the jury held that he had not accepted the shares, and the court held that on the facts there was no sufficient evidence to warrant the jury in coming to any other conclusion. *Turner* v. *Richardson* (*r*) was referred to in that case. There the assignees advertised the sale by auction of the lease of certain premises of which the bankrupt was lessee (without stating themselves to be the owners or possessed thereof), and, no bidding offering, they never took possession in fact of the premises. It was held that this was no more than an experiment to ascertain whether the lease was beneficial or not to the creditors, and did not amount to an assent on the part of the assignees to take the term.

In the present case the shares were never in the possession of the Official Assignee, and I am of opinion that there has been no transfer of the liability in respect of these shares, either statutory or otherwise, to the Official Assignee.

This brings me to consider whether there is anything in

(*r*) 7 East 335.

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the Indian Insolvent Debtors' Act which discharges an insolvent from a liability of this nature from which he would not be absolved by the English Bankruptcy Acts, and it, for that purpose, becomes necessary to look closely at the words of the 47th and 48th sections of the Indian Act. (His Lordship read the sections.) That section (the 48th) is in substance the same as the corresponding section in the Act of Geo. IV., the only difference being that the words used in the 48th section are "sum or sums of money," whereas the English Act uses the words "debt or debts." That being so, the question under the two first heads I proposed for consideration is simply this. Was the claim in respect of these shares proveable in bankruptcy at the time of the Insolvency of Bábá Sáheb? I am of opinion it was not. It was not then a claim capable of valuation. It was not, in fact, a claim at that time. I, therefore, think that the two first questions must be answered thus:—That Bábá Sáheb is now the holder of twenty shares in the Financial Association, and that the company is not barred from making a claim upon him on the ground that the call was proveable under Sec. 48 of the Insolvent Debtors' Act.

That brings me to the third question, namely, whether Secs. 98 and 100 of the Indian Companies' Act (Act X. of 1866) afford any defence to this application. These sections were said to be identical with Secs. 75 and 77 of the English Companies' Act of 1862. I have compared these sections together, and find that they are so, excepting only certain alterations necessary to adapt them to India. Mr. Marriott relied upon these two sections, and argued that a personal discharge under the Indian Insolvent Act was different from a final discharge under the English Acts, and that, under Sec. 100, the Official Assignee ought to be deemed to be a contributory in lieu of the insolvent in respect of these shares. He argued that the company had been admitted to prove against the estate of the insolvent, and, that, therefore, the insolvent was no longer liable. He further argued that the cases cited for the Official Liquidator were not in point, as in them the proceedings

in bankruptcy had terminated before the orders for winding up the companies were made, but that here the proceedings in Bábá Sáheb's insolvency are still going on, as no final discharge under Sec. 60 has been granted to him. I do not think that such arguments are well founded. The sections of the English Act (identical in substance, as I have said, with the corresponding sections of the Indian Act) have been the subject of most careful consideration in 1868 and 1869 in England. And four distinct courts have there held that when the final discharge of a bankrupt shareholder has been granted prior to the commencement of the winding up of a company, there is no statutory transfer of the shareholder's liability, and the assignees are not in that case contributories. The first case was in the Court of Queen's Bench, and is the case of *Martin's Patent Anchor Company* v. *Morton* (*s*), where Mr. Justice Blackburn says: "The following sections, 76 and 77, show that Sec. 75 refers to the bankruptcy still pending when the winding up takes place, while the assignees have still assets, and in such a case the company may prove for the estimated amount of the bankrupt's liability to future calls. Sec. 77 places the assignees in the position of the bankrupt as a contributory, for they are to be 'deemed to represent the bankrupt for all purposes of the winding up,' which could not be the case when the bankruptcy had taken place years before; and, therefore, it seems to me Sec. 75 does not apply to the present case, where the shareholders had been adjudged bankrupt and discharged before the winding up commenced." He then makes a remark not entirely approved of by subsequent authorities, and I, therefore, do not refer to it. In *Hastie's Case* (*suprà*) the Master of the Rolls came to the same conclusion, though he felt great doubt upon the subject. It was there held that a member of a limited company who has become bankrupt and obtained his discharge, and whose estate has been fully administered by the assignee, remains liable, in the event of the company being subsequently wound up, to be made a contributory in respect of his shares

(*s*) Law Rep. 3, Q. B. 306.

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not fully paid up, and is not exonerated, under Sec. 75 of the Companies' Act, unless the assignee has been substituted for him, under Sec. 77 of the Companies' Act. That learned Judge put the case as one not foreseen and not provided for by the Legislature.

Hastie's Case was argued on appeal before Lord Justice Giffard (*t*) and the other Lord Justice, and they affirmed the decision of the Master of the Rolls; and although on points of law the opinion of the Master of the Rolls has not unfrequently been disapproved of by a court of appeal, yet the concurrence of his opinion with that of the Lord Justice Giffard tends strongly to show that their conclusion is correct. The Lords Justices were pressed with the provisions of Sec. 77 (and that was the section on which Mr. Marriott relied). In reference to that they say: "That may well be admitted without leading to the conclusion that Mr. Hastie's name ought not to be on the list of contributories, for without laying down a general rule that the 77th section applies to every bankruptcy, there may be circumstances under which the bankruptcy may precede the winding up, and the 77th section be applicable. It would be applicable if the assignees chose to take to the shares. It would be applicable to such calls as were made before the bankruptcy, as, for instance, if the Directors called up the whole or part of the capital and their calls were not met; again it would be applicable if, for any reasons or under any circumstances, the calls or any of them were capable of valuation at the date of the bankruptcy." But here none of these special circumstances exist, and Mr. Gamble has not elected to take the shares.

The latest case on this subject was in the Court of Common Pleas—*The Financial Corporation, Limited,* v. *Lawrence* (*u*); there A, being the holder of shares in a company, executed an inspectorship-deed. After the execution of the deed a call was made upon A's shares. Subsequently, but before the property included in the deed had been distributed among the creditors, the winding up of the company commenced; it was held that the call was not barred by the deed. In that

(*t*) 4 Ch. App. 274. (*u*) Law Rep. 4, C. P. 731.

case Mr. Justice Byles makes a remark which is applicable to and refutes the argument of Mr. Marriott with reference to the final discharge of the insolvent not having been obtained: "A bankrupt obtains his discharge as soon as he has made a full disclosure of his estate, and before it has been distributed. I cannot see, therefore, how the fact of the bankrupt having obtained his discharge in those cases should affect the question:" p. 735.

These cases show what is the proper construction to be put upon Sec. 77 of the English, and Sec. 100 of the Indian Companies' Act, and I do not think that any good reason has been shown why they should not also apply to the case of a discharge under Sec. 47 of the Insolvent Act. The groundwork of these decisions is that at the time of the insolvency there was no claim capable of valuation, or which could have been inserted in the insolvent's schedule; that an insolvent is only discharged from debts proveable under the insolvency, and that those debts only are proveable which are capable of valuation at the date of the insolvency. I think, therefore, that these cases are authorities in favour of the Official Liquidator, and that Mr. Ferguson was entitled to rely upon them; and, considering as I do that they have been correctly decided, I think that I am bound by them. The result, therefore, is that Bábá Sáheb still remains a contributory, notwithstanding the events that have happened, his case being one not provided for by Act X. of 1866, the Official Assignee having declined, as he lawfully might, to take those shares. There has no statutory transfer or statutory release of his liability taken place. Bábá Sáheb's name being on the list of contributories, the burden lay upon him to show that it ought to be removed from it, and the name of some other person substituted. This he has failed to do. There has no sufficient cause been shown against the summons, which must, therefore, be made absolute with costs.

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