

Pathuma Bibi and ors. Vs. Muthuswami Chettiar, Minor by Guardian Nallammal Achi Through Her Authorised Agent V. Nallathambi Chettiar

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Court : Chennai

Decided On : Nov-25-1938

Reported in : (1939)1MLJ907

Appellant : Pathuma Bibi and ors.

Respondent : Muthuswami Chettiar, Minor by Guardian Nallammal Achi Through Her Authorised Agent V. Nallathambi Ch

Judgement :

Pandrang Row, J.

1. The petitioners in this petition are the heirs of one Pichaikanni Rowther who was sought to be adjudicated insolvent on an application by a creditor who is the respondent in this petition. The debtor died during the pendency of the petition and his heirs were brought on record. There was a long delay before the trial began and after five witnesses had been examined on the side of the petitioning creditor the parties appear to have come to an agreement which is recorded in the following terms:

If the counter-petitioners pay the petitioner Rs. 1,100 from the estate of the Pichaikanni Rowther towards the amount due for decree and costs vagaira in O.S. No. 385 of 1935 on the file of the District Munsif's Court, Melur, within 16-2-1937

the decree must be deemed to be discharged, and the petition stands automatically dismissed. If the amount is not paid as above within the period as aforesaid, the petitioner shall be entitled to realise the entire amount due under the decree with full costs and interest and the estate of Pichaikanni Rowther shall automatically be declared insolvent with costs to the petitioner. To this effect have we agreed.

2. The petition was ordered to be called on 17th February in view of this agreement and as 17th February was declared to be a holiday for election, it was taken up on the 23rd February on which date the following order was passed:

The petitioner-creditors vakil brings to my notice that the amount as per endorsement has not been paid. The respondent's vakil says the parties want more time. It cannot be given. In the circumstances the deceased first respondent Pichaikanni Rowther is adjudged insolvent. The Official Receiver is appointed receiver of the estate. Time for discharge is six months. Costs of this petition to come out of the estate. Vakils fee Rs. 10.

3. It will be seen from the final order passed by the Subordinate Judge that he was under the impression that because the parties had agreed that adjudication should follow automatically on the failure to make the deposit within the time allowed the only thing to be done in the circumstances was to adjudge the estate of Pichaikanni Rowther the deceased debtor insolvent. It is obvious that adjudication as insolvent cannot be brought about by mere consent of the parties. The fact that the agreement was filed in Court does not give it any further effect than it would otherwise have. This point is conceded by the learned Advocate who appears for the respondent before me and also in the judgment of the District Judge on appeal. The District Judge however was of opinion that because the learned Subordinate Judge had used the expression 'in the circumstances' in his final order he may be deemed to have considered the evidence already taken by him before he ordered the adjudication. Even assuming that this is the correct construction to be placed on this expression 'in the circumstances,' it does not follow that the adjudication should remain as it is because it is obvious that the present petitioners were not given any opportunity to adduce evidence to rebut the

evidence adduced on the side of the petitioning creditor.

4. Apparently on the 23rd February, 1937, their vakil asked for more time to make the deposit and the learned Subordinate Judge refused to grant more time and straight away proceeded to adjudicate the estate as insolvent. It cannot be said therefore the petitioners had a reasonable opportunity to put forward evidence in support of their case. The order made without giving such an opportunity to one party cannot remain as it is. It is therefore set aside as well as the order in appeal; the learned Subordinate Judge should restore the petition to his file and dispose of it according to law, after giving both parties (it being not clear that the petitioning creditor had really closed his case on the 23rd February, 1937) opportunity to adduce evidence in support of their respective contentions. Costs in this Court and costs hitherto incurred in the Subordinate Judge's Court and in the District Court will be costs in the cause and abide the event, and should be provided for in the revised order to be passed by the learned Subordinate Judge.