

The Official Assignee of Madras and ors. Vs. the Official Assignee of Rangoon and anr.

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Court : Chennai

Decided On : Nov-21-1923

Reported in : AIR1924Mad118(1); (1924)46MLJ580

Appellant : The Official Assignee of Madras and ors.

Respondent : The Official Assignee of Rangoon and anr.

Judgement :

Walter Salis Schwabe, K.C., C.J.

1. A preliminary point is taken in this motion, that this Court has no jurisdiction to hear it. The motion is to set aside, an order made by the Court of Appeal, on appeal from an order of Bakewell, J. sitting in Insolvency, under Section 22 of the Presidency Towns Insolvency Act. The Court ordered that the adjudication of the insolvent by the Insolvency Court should be annulled on the ground that there had been a later adjudication in Burma and that it would be better and more convenient that the estate should be administered by that Court.

2. By Section 8, the Court may review, rescind or vary any order-made by it, in its insolvency jurisdiction and by Section 2, ' Court ' means ' the Court exercising jurisdiction under this Act. ' It is said that the original Insolvency Court which is the Court presided over by the Judge, appointed under Section 6, by the Chief Justice

to exercise jurisdiction in insolvency, can review, rescind or vary an order; but that where an appeal has been taken from that Judge and an order made by the Court of Appeal, there is no power to rescind, review or vary that order, either in the Court of Appeal or in the Judge sitting in insolvency. This would be a somewhat startling result, because the Court of Appeal may and does make orders clearly in the exercise of insolvency jurisdiction, such as an order adjudicating an insolvent, or as in this case, annulling an adjudication. I would want very clear words to make me construe the section as giving an inferior Court power to review, rescind or vary its orders, while refusing that same power to a superior Court. I can find no such words in the section. It is true that a Court of Appeal has no power as such to review, rescind or vary its orders, except under the particular circumstances provided by the Statute or Rules having statutory force, such as in the case of slips; but in insolvency, the legislature has chosen both here and in England to give this power of review, rescission or variation in insolvency, which is not given to other Courts; and in my judgment, it follows that this Court has the power to review, rescind or vary an order made by it, in the exercise of its insolvency jurisdiction, and, in my view, the order in this case was an order made in the exercise of its insolvency jurisdiction.

3. There is a direct authority on this point in England, *In re Maugham, Ex parte Maugham* (1888) 21 QBD 21 (23), where A. L. Smith, J. said:

If the registrar makes the order, he is the Court that makes it, and he alone is the Court which can review or rescind it and the same power is given to the Judge, the Divisional Court, and the Court of Appeal. But no one of these Courts can review, rescind or vary the order of any other, unless a right of appeal is clearly given by the statute.

4. That point came directly before the Court of Appeal in *In re Perkins* (1890) 7 Morr 78, where the Court of Appeal rescinded its own order, reversing the decision of the Registrar, and it held it had jurisdiction to adjudicate a man as bankrupt. The English section and the Indian section are in effect identical and I see no reason to take a different view of its proper construction. The preliminary point fails.

5. A Further preliminary point was taken that this power did not apply to matters, which came under Section 22; but in my judgment, the exercise of power under Section 22, is the exercise of power under the insolvency jurisdiction, and there is nothing in this point.

6. A further preliminary point is taken that the application to review or rescind is out of time. We have not at this moment sufficient materials to consider this point and we reserve it till later in the case.

7. This petition comes on before us in rather curious circumstances. An order was made in 1917, adjudicating two partners of the firm of T. A. R. A. R. M. namely, Ramanathan Chetty, since deceased, and his only son Annamalai Chetty. Insolvency proceedings were also taken in Burma against the firm. For some reason, for which we have no explanation, the proceedings in Madras which were ex parte, were not published and at any rate for some time, no further steps were taken, beyond the adjudication. The proceedings in Rangoon were however pressed and a considerable amount of work was done, under the order in that Court. At a later date, application was taken in the Insolvency Court here to stay the proceedings here, pending the completion of the proceedings in Rangoon, or to take some other course which would have the same result. In the end, the matter came before this Court on appeal from Bakewell, J., and this Court ordered that the adjudication in Madras should be annulled on certain terms, and the reason given was that the whole matter would be better disposed of in the Rangoon proceedings. Things have gone on, after that order in Rangoon and there seems to have been considerable amount of litigation; but, fairly soon, Annamalai Chetty took proceedings to have it declared that he was not a partner in the firm and therefore was not included in the order adjudicating the firm. The Official Assignee of Rangoon did not oppose that application, perhaps being satisfied that it made no difference to him as he got all that he was likely to get; but however that may be, ultimately, Annamalai Chetty was held definitely not to be an insolvent in Rangoon.

8. Now this petition is brought before this Court, under Section 8 of the Presidency Towns Insolvency Act, asking us to rescind or review the order of this Court

annulling the insolvency here. One of the grounds, on which it is put is this: The Court here thought, when it passed that order, that the insolvency in Rangoon was the same as the insolvency here. That in fact was not, because here there were two insolvents and there but one, because the Burma Court has found since that its order of adjudication applied only to Ramanathan Chetty and not to Annamalai Chetty; and if this had been known to this Court, at the time it made this order, it was bound to refuse that because under Section 33 of the Presidency Towns Insolvency Act, under which the Court purported to act, this Court had no power to act, unless the debtors were the same. The words of the section are:

When it is proved to the satisfaction of the Court that the insolvency proceedings are pending in any other British Court against the same person, the Court may annul the adjudication, or may stay all proceeding therein.

9. I think, they must be read to mean that the debtor or the debtors must be the same; for, I think it would be an absurd construction to hold, where there was an adjudication against A and B in one Court and against A only in another, it could under that section annul the insolvency of A and B. It follows therefore, we should be prepared to act under Section 8, if we were otherwise satisfied that it is right that we should. I am not considering now the question, whether in so doing we would impose any and what conditions. It may be a matter for further consideration hereafter. But Annamalai Chetty, who has appeared before us, being a person as much interested in this as anybody, but at the present moment he is not and never been an insolvent, says that the view that was taken in Burma was the right view and that he in fact was never a partner in the firm and if this Court had not annulled the order against him, he would have applied to this Court to have that order annulled and got it annulled. If he is right about that then, the position in respect of what this Court had done entirely changes; because it had then in effect acted in an insolvency in which Ramanathan Chetty was the debtor, and he being the only debtor in Rangoon, there would be no legitimate complaint on this ground, in respect of the action taken by this Court, because this Court it is true has annulled the adjudication against Annamalai Chetty which, under the circumstances, we hold it had no power to do; but, if that adjudication was itself wrong and one that ought never to have been made, it can 'do no one any harm, it

having been annulled by this Court's order. We therefore think it right that this question of fact should be investigated, so that we can decide, whether or not this order under Section 3 should be made; and we propose, by consent of all parties before us, to refer this matter to one member of this Bench for enquiry and report by him to the Bench and pending that enquiry, this appeal must be adjourned. The question for enquiry will be whether or not Annamalai Chetty was a partner in the firm of T. A. R. A. R. M. in 1917 or otherwise liable to be adjudicated as a member of that firm. All costs will be reserved.

10. A list of documents alleged to be in the custody of the Official Assignee of Rangoon will be furnished by the petitioners' vakil to the vakil for the Official Assignee of Rangoon; and this Court, so far as it can, directs that such of those documents as are relevant to the proposed enquiry shall be produced, on the enquiry. The parties will be at liberty to call oral evidence.

11. The case will be posted for hearing before one of us, on the 16th April. Any further application in regard to inspection of documents or anything of that kind must be made to my brother.

12. The case coming on for hearing after evidence, the Court delivered the following

13. This petition was adjourned so that Annamalai Chetty might have an opportunity of appearing, reserving the question of limitation for further argument, and also the question whether any and what terms should be imposed upon the petitioner in the order which we propose to make. A long and protracted hearing took place on the application of Annamalai Chetty, and the evidence before my brother Ramesam, J., was directed to the question whether or not Annamalai Chetty was, in fact, a partner of the firm and whether the firm had carried on business in Madras within one year prior to the order of adjudication. He heard this evidence and made, as it was arranged, a report to this Court. He came to the conclusion on the evidence that Annamalai Chetty was a partner and that the business had been carried on within one year. On the evidence and on his report I am quite satisfied that the conclusion he came to was the right conclusion. There is nothing more to be said in that matter.

14. It was then argued on behalf of Annamalai Chetty that he ought never to have been adjudicated as insolvent at all, because there was no proof of any act of insolvency. I think there is nothing in this point at all. There was ample proof before the Court of more than one act of insolvency.

15. The point of limitation was then dealt with both on behalf of Annamalai Chetty and on behalf of the Official Assignee of Rangoon. The point is whether this application, which is an application under Section 8 of the Presidency Towns Insolvency Act, is barred by the lapse of time since the passing of the order now under review. Under Section 8, there is power in this Court in insolvency to review, rescind, or vary any order made by it under its insolvency jurisdiction. If the Limitation Act applies at all to the exercise of powers under that section about which I express no opinion, the Article applicable would be Article 162, for a review of judgment by the High Court, the period of limitation for which is 20 days from the date of the order; or Article 173, for a review of judgment except in the cases provided for by Article 161 and Article 162 the period of limitation for which is 90 days from the date of the order. But there is a further statutory provision under Section 5 of the Limitation Act, that, if the Court is satisfied by the applicant that he had sufficient cause for not making the application within the prescribed period, it can extend the time. I am quite satisfied on the evidence before us that the Official Assignee of Madras had sufficient cause for not preferring the application earlier, the cause being that he first heard of the order of the Rangoon Court, and it was through no fault of his, that he did not hear earlier, just before this application was made.

16. There remains the question whether any condition should be imposed upon the petitioner in setting aside this order. It is suggested that we ought to stay all proceedings in the insolvency here until the Rangoon Court has finally finished the insolvency proceedings there. I think that there is no ground at all for any such order being made. But it may be open to the Official Assignee of Rangoon at some future date to satisfy the Insolvency Court here that some stay should be granted in respect of some part of the proceedings, though on the facts at present before me I am quite clear that I should refuse to make any such order. The effect of setting aside the order annulling the adjudication, will result in the whole of the

order being set aside. Under that order some provision was made for the costs of the Official Assignee, Madras, out of the assets. Of course, those costs which he has received will be a matter for which he will be accountable to the insolvency Court' here. It will be for the insolvency Court here to say whether those costs are costs which he has properly incurred and whether those costs should come out of the estate. Meanwhile, he will retain what he has got as part of the assets of the insolvent in his hands; whether the amount will be available for distribution is a matter for the insolvency Court and not for us.

17. It was contended on behalf of Annamalai Chetty and on behalf of the Official Assignee of Rangoon that the order of the Rangoon Court refusing to adjudicate Annamalai a bankrupt on the ground that he was not a member of the firm which had been declared insolvent in Rangoon was a final order under Section 41 of the Indian Evidence Act of 1872, which conferred upon or took away from Annamalai Chetty a legal character and, therefore, being made by the insolvency Court, it was a judgment in rem binding on all the world, whether the parties in subsequent proceedings were represented before the Court or not. In my judgment, this is not an order conferring upon Annamalai Chetty, or taking away from him, any legal character. It did decide and decide finally that, as far as the Rangoon Insolvency was concerned, Annamalai Chetty was not an insolvent. It is true that it based that finding on the view that he was not a partner; but I do not think that being a partner in a firm is a legal character within the meaning of Section 41. Further, we are now sitting to review the decision of this Court made in 1918 and we have to say what order that Court ought to have made then. At that time there was before the Court an order of this Court in insolvency that Annamalai was a partner, and I do not think that it is open to him on an application of this nature to say that subsequently it has been held by some other Court in another insolvency that he was not a partner in the firm. The result of holding otherwise would be extraordinary. In this case the way the Court in Rangoon arrived at its decision was by saying that Annamalai Chetty was a member of the joint family and that he had disclaimed any interest in the joint family property as against his creditors, that there was no evidence before it that he was a partner and, therefore, it declared that he was not a partner. It would be a very remarkable thing if that is a binding decision on all the world that a partnership did not exist. For instance, if a creditor, here or elsewhere,

were taking proceedings against Annamalai on the basis of the partnership, he could set up the decision of the Rangoon Court as a judgment in rem binding on the party here who was not a party in Rangoon. I do not think that was the intention of Section 41 at all nor do I think that the subsequent decision of the Rangoon Court is relevant to what we have to consider, namely, the position that existed before the Rangoon Court gave that decision.

18. I propose to order the costs of this petition to be paid by the Official Assignee of Rangoon except in so far as those costs have been incurred owing to the intervention in the matter by Annamalai Chetty. So far as the costs incurred in the inquiry as to whether Annamalai Chetty was a partner or not are concerned and whether the firm carried on business within a year, the petitioner will get those costs against Annamalai Chetty. As regards the scale, I am clear that this is a case of special difficulty and importance, and I am clear that this is a proper case to direct that a higher fee than the ordinary fee should be admissible and that two sets of fee should be allowed, whether or not it comes under our powers to so order is a matter which I am prepared to hear further argued, but I am not at present prepared to make any order.

Ramesam, J.

19. I agree and have nothing to add.

[C.M.P. Nos. 3235 of 1923 and 1546 of 1923 are not necessary for the purpose of this report.]

20. This petition coming on again for hearing for further arguments as to costs on Friday the 16th day of November, 1923 and this day (Wednesday the 21st November, 1923),

21. We have now heard further arguments on the question of the fees payable to a Vakil on an insolvency appeal, and the question is whether he is, or when more than one is employed, they are confined to the scale of fees payable to Vakils under the Appellate Side Rules. One of those rules is Rule 41 of Appendix II to those rules. By that rule,, on the appellate side of the High Court (except in

appeals from the Original Side) in cases of special difficulty or importance, certain extra fees are payable to the Vakils if so ordered. If this appeal to us is an appeal from the Original side within the meaning of that rule, it would seem to follow that the Vakil would be relegated to the ordinary scale for Vakils on the Appellate Side without the privilege of having a higher fee allowed in a suitable case.

22. Now, insolvency is a branch of work which is conducted by a particular Judge on the Original Side and has its own set of rules with statutory force. One of those rules is Rule 137 which, in effect, makes the High Court Fee Rules applicable in insolvency except certain specified rules, one of which is Rule 63, Rule 63 of the High Court Fee Rules is the rule, and the only rule, which provides for the scale of fees payable to Vakils on appeals, and by Rule 137 of the Insolvency Rules, for some reason, that rule was in terms made not applicable to insolvency matters. It is quite possible that the reason for it was. that, in insolvency matters on the original side, Vakils have no right of audience and it is possible, though I do not think it right to speculate on the reason for the legislature making that omission, that the omission of that rule in terms was due to the fact that Vakils do not appear in insolvency in the Court of first instance. However that may be, Rule 63 does not apply in Insolvency.

23. The next thing to be observed is that the Original Side rules, which govern the practice and procedure on the Original Side by the preamble are made to apply to varied jurisdictions of the Original Side, ordinary original, admiralty, testamentary, matrimonial, and to appeals from judgments, decrees and orders in the exercise of such jurisdictions, but there is no mention of insolvency jurisdiction, the reason no doubt being that insolvency jurisdiction is governed by rules of its own, and, insolvency matters were therefore left out of the ordinary rules applicable to the Original Side altogether.

24. Taking those facts into consideration, one has to consider what was the intention of Rule 41 dealing with practioners' fees and whether, in excepting appeals from the Original Side from those cases where the privilege obtaining a higher fee is in proper cases allowed, and whether it was intended to exclude at the same time appeals from insolvency. I think not. I think that the proper

construction of Rule 41 is that ' Original Side "means the Original Side when exercising the jurisdiction referred to in the preamble to the Original Side Rules, and that it was not intended to have and has no application at all to insolvency. That being so, the privileges under Rule 41, in my judgment, extend to appeals from insolvency.

25. I think this is a case of special difficulty and importance and it is right that there should be a special order as to costs, and it is a case in which a higher fee should be allowed than would ordinarily be admissible and it is certainly a case where it was right to employ more than one Vakil and a case in which two sets of fees should be allowed. We had figures before us in this case and we think that the right direction to the Taxing Officer in this case is that he should allow to the Vakils employed jointly a sum of Rs. 3,000.

Ramesam, J.

26. I agree.

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