

Nathmull Vs. Goneshmull Jivanmull

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Court : Kolkata

Decided On : Aug-08-1921

Reported in : AIR1921Cal106,66Ind.Cas.886

Judge : Asutosh Mookerjee and ;Panton, JJ.

Appellant : Nathmull

Respondent : Goneshmull Jivanmull

Judgement :

1. This appeal is directed against an order of dismissal made on a petition to set aside an adjudication order under the Presidency Towns Insolvency Act. It appears that an application was made by a creditor of the alleged insolvent for an adjudication order. Notice of that application was served at 150 Cotton Street where it was, asserted the appellant carried on business. The case for the appellant is that his residence was at 4 Banstollah and that there was, in law, no service of notice, with the consequence that the adjudication order cannot stand. In this connection, our attention has been drawn to Rule 75 of the rules under the Presidency Towns Insolvency Act, That rule contemplates a personal service on the alleged insolvent, and substituted service is permissible only if personal service cannot be effected. If personal service cannot be effected, the Court may extend the time for hearing the petition, or if the Court is satisfied by affidavit or other evidence that the debtor is keeping bat of the way to avoid such service or service of any other legal process, or that for any other cause prompt personal

service cannot be effected, it may order substituted service to be made by delivery of the petition to some adult inmate at his usual or last known residence or place of business or by registered letter or in such other manner as the Court may direct, and such petition shall then be deemed to have been duly served on the debtor.

2. In the case before us, it is conceded on behalf of the respondent that the procedure prescribed in this rule was not followed. But it has been contended that the validity of the order for adjudication cannot be challenged on two grounds, namely, first, that the omission to serve the notice did not invalidate the adjudication order, because, it amounted to a formal defect or irregularity within the meaning of sub-Section (1878) 9 Ch. D. 466 : 47 L. J. Bk. 115 : 39 L. T. 1865 27 W. R. 157. of Section 118 of the Presidency Towns Insolvency Act; and secondly, that the omission has, been waived by the insolvent.,

3. As regards the first ground, we are not prepared to hold that the omission to serve the notice contemplated by sub Section 3 of Section 13 of the Presidency Towns In-Solvency Act is a formal defect or irregularity within the meaning of Section 118. This notice is the first notice which the Legislature contemplated was to be received by the alleged insolvent before the proceedings culminated in an adjudication order against him. It is of fundamental importance that an order of this description should not be made to the prejudice of an alleged insolvent till notice of the institution of the proceedings has been served on him, There is no authority directly in point, but our attention has been drawn to the case of *Jerningham, Ex parte, Jerningham, In re* (1878) 9 Ch. D. 466 : 47 L. J. Bk. 115 : 39 L. T. 1865 27 W. R. 157., which was decided under another Statute, but which indicates that a notice of this description at the initial stage should not be regarded as something the omission of which maybe treated as a mere formal defect or irregularity. The cases of *Kirkwood, Ex parte, Mason, In, re* (1879) 11 Ch. D. 724 : 40 L. T. 566 : 27 W. R. 806. and *Vanderlinden, Ex parte, Pogose, In re* (1882) 20 Ch. D. 289 : 51 L. J. Ch. 760 : 47 L. T. 138 : 30 W. B. 930. are clearly distinguishable. In the former case it was held a mere formal defect that the debtor was described in the petition as a cattle dealer and not cattle dealer and farmer. In the second case, it was held a formal defect that a petitioning creditor did not state in his petition his willingness to estimate his security, though he gave notice thereof to the debtor before the

hearing. We are not prepared to hold that these cases have any analogy to the case before us. The decision in *Kissory Mohan Soy, In re* 36 Ind. Cas. 990 : 20 C. W. N. 1155 : 44 C, 286, that an order for discovery under Section 36 may be made ex parte is clearly distinguishable, and does not support the contention that the adjudication order made in the present case without service of the initial notice prescribed by Section 13 is a good order.

4. As regards the second ground, the burden lies upon the creditor to establish that the insolvent has waived this defect in the proceedings. Mr. Sarkar has maintained that there was no such waiver as the appearance before the Registrar at the subsequent stage was under protest, and we are not satisfied that there was in fact a waiver in this case.

5. We hold accordingly that this appeal must be allowed and the order dismissing the application to set aside the adjudication order reversed. The application will stand granted. But the consequence of this order will not be to dismiss the application of the petitioning creditor. The parties will be restored to the position which they occupied when the order for service was made under Section 13, sub-Section 3. The petition will stand revived and will be dealt with in accordance with law from that stage. The appellant is entitled to the costs of this appeal including reserved costs, if any.