

Kumar Sarat Kumar Roy Vs. Nabin Chandra Ram Chandra Shaha and Official Assignee of Calcutta

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Court : Kolkata

Decided On : Aug-31-1928

Reported in : AIR1928Cal786

Appellant : Kumar Sarat Kumar Roy

Respondent : Nabin Chandra Ram Chandra Shaha and Official Assignee of Calcutta

Judgement :

Rankin, C.J.

1. It appears that one Sailendra Krishna Roy was adjudicated an insolvent in this Court on 9th August 1921. This case arose out of an application made to the Registrar in Insolvency by a firm called Nabin Chandra Ram Chandra Shaha, creditors of the insolvent for an examination of the appellant Kumar Sarat Kumar Roy under Section 36, Presidency Towns Insolvency Act, upon certain matters. It appears that he appellant is the father-in-law of the insolvent. It appears further that on 25th January 1921 the insolvent purported to enter into a mortgage in favour of the appellant over certain properties in respect of a sum of 1 1/2 lacs. It seems that on 20th December 1922 an application for examination of the appellant was made by the Official Assignee but was afterwards withdrawn. A second application was made by the respondent creditor Nabin Chandra Ram Chandra

Shaha on 14th June 1923 and the appellant was examined before the Court under Section 36, Presidency Towns Insolvency Act between November 1923 and January 1924. In the meantime the appellant had brought a suit in a District Court against the Official Assignee and others to enforce his mortgage. That mortgage suit was decreed ex parte on the 20th September 1923. In February 1924 the Official Assignee brought a suit against the appellant to set aside that ex-parte decree on the ground, as, I understand, of fraudulent suppression of processes. This suit, however, was dismissed on 28th February 1927, and at the time with which we are concerned, that is when the present application was made in April 1927, that decree of dismissal was under appeal to the High Court which has not yet disposed of the appeal.

2. The application with which we are now concerned is an application to examine the appellant further with reference to the sum of 1 1/2 lacs of rupees alleged to have been lent by him to the insolvent and the application asks that five documents should be produced before the Court by the appellant at his examination. The application is based upon the ground that at the prior examination the creditor had not had sufficient opportunity to examine the appellant with reference to this sum which was really the sum comprised in the mortgage to the appellant. The Registrar made an order directing the appellant to attend at a given date for examination under the section. That order was made on 2nd May 1927, but it was not served upon the appellant till 4th July 1927.

3. Thereupon, on the 20th July, the appellant applied to the learned Judge exercising insolvency jurisdiction on the original side for an order that the order made by the Registrar should be vacated and that he should be relieved from appearing before the Registrar pursuant to the said order. When the application to the learned Judge was made it was framed in somewhat neutral language by reason of the fact that a decision of this Court in the case of *Rai Sukh Lal Karnani v. Official Assignee Calcutta* A.I.R. 1921 Cal. 58 had been given as to the nature of the proceeding by which such an order of the Registrar can be challenged before a Judge. In that case the learned Chief Justice Sir Lancelot Sanderson held that such an application to a Judge was not an appeal but a petition to set aside the order of the Registrar in Insolvency. Richardson, J., agreeing that such an

application was not an appeal within Sub-section (2), Section 8, Presidency Towns Insolvency Act, held that it was an application under, Clause 1 of that section for review of an ex-parte order.

4. In these circumstances the appellant moved the learned Judge but did not frame his application as a memorandum of appeal but framed it as I have stated. When the matter came before the learned Judge, it is quite clear that the case was not dealt with as being an appeal from the order of the Registrar and it is also clear that it was dealt with by the learned Judge on the basis of the view taken by Richardson, J., in a previous case, namely, that it was an application to review under Sub-section (1), Section 8. This can be seen not merely from the circumstance that the learned Judge was bound by the previous decision but from several other circumstances, one of which is that the learned Judge while acting on the decision expressed his doubt of its correctness; another is that he, while noticing that if the proceedings were an appeal he would have to deal with the question of limitation under Section 101, and Sub-section (5), Section 90 nevertheless did not deal with that question on the facts.

5. Moreover the learned Judge in the course of his judgment expressly stated:

I conceive that if this application is by way of review it is not sufficient to contend as though it were an appeal, that the order of the Registrar is one which should not have been made. A review and an appeal are proceedings of a different nature and the principles applicable to a review indicate that an application for a review cannot necessarily succeed upon the grounds upon which an appeal might be successful.

6. The learned Judge by his judgment dealt, subject to what I have already quoted, with the merits of the case. He came to the conclusion that on the merits the order of the Registrar should not be interfered with under Sub-section (1), Section 8. He appears also to have thought that if the examination should turn out to be unnecessary it would be possible for the Court to make an order by which the creditor would be mulcted in costs.

7. In these circumstances the appellant preferred an appeal to the Division Bench and upon that appeal the first question before the Division Bench was the question whether any right of appeal lay to the Court. I would have proceeded to deal with that question first but for the fact that the respondent's contention by his learned Counsel, Mr. Banerji, on this point depends to some extent on the question whether the decision in the case of Sukh Lal Karnani v. Official Assignee A.I.R. 1921 Cal. 58 is right or wrong I pass, therefore, to the question of the decision in that case. This is a matter which has been specifically referred as a question of law to this Full Bench and it has been referred in the following terms:

Whether an application to a learned Judge exercising insolvency jurisdiction on the original side for the discharge of an order made by the Registrar in Insolvency for the attendance of a witness under Section 38 of the Act is an appeal under Clause (a), Sub-section (2) Section 8, or is an application under Sub-section (1) of that section or is an application of another and what kind.

8. It may be observed that the order of the Division Bench referred the whole appeal to the Full Bench in addition to stating that question as a question of law.

9. The order made by the Registrar is made under the following statutory provisions : By Section 3 of the Act of 1909 the Court having jurisdiction in insolvency under this Act is this High Court and the phrase 'the Court' when used in the statute means the Court exercising jurisdiction under this Act; in other words, the High Court of Judicature at Fort William in Bengal. Under Section 4 of the Act, all matters in respect of which jurisdiction is given by this Act shall be ordinarily transacted and disposed of by or under the direction of one of the Judges; but by Section 6, the Chief Justice may direct that in any matter in respect, of which jurisdiction is given to the Court by this Act, an officer of the Court appointed by him in this behalf shall have all or any of the powers in this section mentioned. Then follows a very necessary and important provision:

and any order made or act done by such officer in the exercise of the said powers shall be deemed the order or act of the Court.

10. The powers which the Chief Justice is enabled to delegate to an officer include powers to make any order or exercise any jurisdiction which is prescribed as proper to be made or exercised in chambers, and by the rules of this Court the power to summon a witness and examine him under Section 36 of the Act is a power which is proper to be made or exercised in chambers. The terms of Section 36 of the Act are these that the Court may, on the application of the Official Assignee or of any creditor who has proved his debt, at any time after an order of adjudication has been made, summon before it the insolvent or any person known or suspected to have in his possession any property belonging to the insolvent or supposed to be indebted to the insolvent or any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property; and the Court may require such person to produce any documents in his custody or power relating to the insolvent, his dealings or property.

11. The result of these various sections of this enactment and of the order made by the Chief Justice in 1915 is that the Registrar is the Court for the purpose of Section 36. In these circumstances, we have to consider what provision is made by the statute for challenging orders made by the Registrar when exercising the powers given to the Court under Section 36. That provision is to be found in Section 8 of the Act. Section 8 of the Act, contains two separate and contrasted provisions. The first provision is a provision for rehearing which has long had a place in the English statute from which most of the Act of 1919 has been borrowed.

The Court may review, rescind or vary any order made by it under its insolvency jurisdiction.

12. It was contended, I think, on behalf of the appellant that this provision would not apply to the Registrar because the Registrar was not the Court. I dissent from that proposition altogether. Just as the Registrar is the Court referred to in Section 36, so he is the Court referred to in Sub-section (1), Section 8. That is not because the Registrar in the ordinary way or on general principles is the Court but because Section 6(1) of the statute has made him so as a matter of construction. I have no doubt, therefore, that that power is a power which is vested in the Registrar. I

would further point out, that apart altogether from any statutory provision, in the absence of a provision to the contrary, a judicial officer who makes an ex-parte order imposes a burden on a person who is not present before him, and that when the person affected brings the matter to his notice, it is always open to him to undo the order on the ground that the original order was made on insufficient materials or that for other reason it should not have been made. I have no doubt, therefore, that one remedy of the appellant here was to go back to the Registrar under Sub-section (1), Section 8, or on the basis of the fact that the appellant was the subject of an ex-parte order, to get him to set aside that order by showing that it ought not to have been made.

13. Now, the provision in Sub-section (1), Section 8, is a provision of no narrow character. It is quite true that when a Court has decided a matter in the presence of all the parties it will not readily listen to the party who has lost, making an application that the matter be reopened and reheard. At the same time this consideration has no place in cases of ex-parte orders and it is well settled under the same words of the English section that the powers given to the Court from time to time to alter or modify its own orders is circumscribed by no narrow limits. The leading case is the ease of *In re Tobias & Co. Ex-parte Tobias* [1891] 1 Q.B. 463 where Mr. Justice Cane, a great authority on the Law of Bankruptcy, speaking of these very words [in my judgment, the verbal changes have no materiality for the present purpose] says this:

This section gives the Court a discretion of the widest and most far-reaching character, and when properly exercised it is so beneficial in its operation and so calculated to advance the ends of justice, that I think it ought not to be restrained by construing in any niggardly spirit. One general - although not invariable - rule has been laid down for guiding the Court in the exercise of its discretion under this section, viz., - that the Court should not grant a rehearing where the only object of the applicant is to obtain another opportunity for appealing from the decision of the Judge, when he has let the time for appealing from the original decision go by. The universal practice of fixing a limit of time on the power to appeal is derived from the general maxim *interest reipublicae ut sit finis litium*, and the maxim should not be extended beyond the limit of its utility. Where litigants have gone to trial and the

Court has decided, between them, it is inexpedient that the defeated party should be allowed to reopen the litigation at any distance of time, when the position of the parties may have been materially affected by the lapse of time or the loss of material evidence. In such a case as this, however, where the refusal of the discharge operates as a punishment on the bankrupt, there can be no reason why the punishment should not be remitted at any distance of time, if it can be shown that the object of the punishment has been effected.

14. So that it must not be taken, so far as I am concerned, that the observation made by the learned Judge which I have already quoted is correct. It is not the case, in my judgment, that it is not sufficient to contend that the order of the Registrar is one which should not have been made. In my judgment, such an application, if made to the proper tribunal, would be an application which the Court would regard entirely on the merits remembering that it is necessary for the purpose of doing justice, particularly in cases of ex-parte orders. Now, that jurisdiction is clearly given to the same tribunal as made the order complained of. A case has been cited - the case of *Re Maugham* [1888] 21 Q.B.D. 21, where this has been laid down in England. In my judgment, the same meaning attaches to Sub-section (1), Section 8. It is contrary to the notion of a rehearing or of a review such as is contemplated in that Sub-section (1) that the application should be made to any tribunal except the tribunal that made the order. I do not mean to say that if an order is made by one Registrar his successor could not hear a motion to review. I do not mean to say that if an order is made by one Judge another Judge exercising the insolvency jurisdiction of the Court could not hear the review. But it must be made to the same tribunal and it never was intended to introduce a confusion by having an order reviewed by a Judge if it was made by the Registrar. The particular case in which it is necessary to have recourse to a higher tribunal than the Registrar in order (to use a neutral word), that his order may be revised is the matter dealt with by Sub-section (2), Section 8. That is in contrast to the first sub-section by reason of the fact that the right of appeal is given not merely to persons who are parties to the original order but to any person aggrieved thereby, and it is an important principle in insolvency that persons may be aggrieved by an order to which they are not parties; and if they are, there is a right of appeal. In this sub-section the Act of 1909 departs in some respects from its original. It

introduces an express provision that the right of appeal shall lie from an order made by an officer of the Court empowered under Section 6. It says that an appeal shall lie to the Judge and that no further appeal shall lie except by leave of that Court. I ask myself what reason can there be in a case where the Registrar under the authority conferred upon him in pursuance of Section 6, has exercised the power of the Court given by Section 36 of the Act, to say that the right to approach the Judge was anything different from the right of appeal given by Clause (a) of Sub-section (2), Section 8.

15. I am of opinion that by that clause it is clear that the Registrar and the Judge respectively are put in the position of an inferior and superior tribunal. It seems to me contrary to the intention of the enactment that a motion to a Judge to discharge an order of the Registrar should be deemed or taken to be in some other jurisdiction than the express jurisdiction under Clause (2), Sub-section (a), Section 8 of the Act. For these reasons I find myself unable to agree in the opinion of the learned Sir Lancelot Sanderson, C.J., and Richardson, J., in the case of *Bat Sukh Lal Karnani v. Official Assignee of Calcutta* A.I.R. 1921 Cal. 58. The learned Chief Justice did not state what was the character of the application if it was not an appeal. The view taken by Richardson, J., is that it is open under Sub-section (1) to apply to the Judge to review an order of the Registrar. For the reasons I have given I am unable to accept this view. This answers the question which has been referred to the Full Bench by the Division Bench. In my opinion an application to the Judge exercising insolvency jurisdiction to discharge an order made by the Registrar for the attendance of a witness under Section 36 is an appeal under Clause (1) of Sub-section (2) of Section 8.

16. I come now to deal with the question whether the Division Bench had any right to entertain an appeal from the order made by the learned Judge.

17. Two matters are involved in this question. It is quite clear that on the learned Judge's view he was bound to treat the case on the footing that he was not hearing an appeal under Clause (a). On that view the question whether he should give leave to appeal to the Division Bench could not arise. The learned Judge dealt with the matter as though he had power under Sub-section 1, and having

dealt with the matter as a review on the merits he dismissed the application. In my judgment the order which he made cannot be said to be an order of the character contemplated by Clause (a), Section 8. If it were anything else it seems clear that it would fall under Clause (b), Sub-section (2), Section 8 of the Act. He had treated this as though he had jurisdiction to make an order on review and from such order an appeal lies to this Court under Clause (b). I am therefore of opinion that the Division Bench had jurisdiction to entertain an appeal from an order of the character which the learned Judge passed.

18. That being so, the next question is as to the correct way to deal with the appeal. The learned Judge, had he not been bound by the previous decision of the Division Bench, would have (and according to my view of the law should have) dealt with the application before him in this way. He should have said:

If this application is a request that I shall rehear the matter that has been dealt with by the Registrar I dismiss it with costs on the ground that I have no jurisdiction to entertain it. This matter, however, can be regarded as an appeal under Clause (a), Sub-section (2), Section 8, from the Registrar. I will therefore enquire whether there is reasonable ground under Section 90 Sub-section (5) to extend the time for the appeal and; if so I will hear the appeal upon its merits as-an appeal.

19. Two questions, had he taken that course, would have arisen for decision. The first is whether the appellant has acted with due diligence in presenting his application to the Judge on 20th July 1927 after being served with the order on the 4th of that month. In my judgment the correct answer to that question is that the appellant has exercised due diligence and the time under Section 101 must be extended in his favour.

20. The next question which the learned Judge would have had to put to himself and to decide was the question of the merits of the order made by the Registrar. In my opinion the correct answer to that question is that the order made by the Registrar is erroneous and oppressive. It is clear that the sole purpose of the examination asked for was a further enquiry into the matter of Rs. 1,50,000 loan upon the mortgage of 25th January 1921. As to that the creditor and it may be other creditors, were minded to make a case that no money had been lent, that the

money which was made to appear as loan to the insolvent was really his own money and that the mortgage was a sham and fraud. That matter has been the subject of litigation since the year 1923. The mortgage suit has been decreed and the suit to set aside the decree has been dismissed and an appeal was pending from that decision in the ordinary way. Powers under Section 36 of the Act (Act 3 of 1909) are not to be used when parties are in litigation, as an extra method of discovery in addition to the ample facilities for discovery enjoyed by ordinary litigants under the Code of Civil Procedure. It has been held under a corresponding section of the English Act that while the trustee will be allowed to use the private examination section in order to make up his mind whether it is necessary to litigate or not to enable him to inform himself whether the circumstances in connexion with the debt were such as would entitle him to embark upon a litigation, once he has commenced litigation he must be content as a rule with the ordinary facilities for discovery and it is too late to urge that he should be allowed to cross-examine his opponent under the private examination section. I do not say that this principle can be regarded as a rigid rule, but it is a rule which has always to be borne in mind. I am bound to say that I have never heard of an examination in the exercise of the powers conferred under the private examination section when a mortgagee who is not bound to come into insolvency at all has brought his suit successfully to realize his security and the Official Assignee as a defendant in that suit has been taking further steps to get the decree set aside. It appears to me that this principle has been well settled in the English cases, *Re : Franks Ex parte Giltings* [1920] 46 Cal. 795. In *re Desportes* [1893] 10 Morrell. 40 and in many unreported cases. In this case the examination was sought at the last stage of this litigation. It was sought upon a petition which mentions nothing about the state of the litigation. In my judgment the application for an order to examine the appellant should have been refused. I think therefore that if the learned Judge had not been bound by the decision of the case in *Rai Suhh Lal Karnani v. Official Assignee* A.I.R. 1921 Cal. 58, he would have, and I think he ought to have on a correct view of the law, entertained this application as an appeal, extended the time for the appeal and set aside the order of the Registrar with costs. I may mention in this connexion that one of the things which, apparently weighed with the learned Judge was that if the examination turned out

to be unnecessary the respondent before him would be mulcted in costs. The learned Judge appears to have mistaken. I would only refer to the case of Anshu Prokash Ghose. In re [1920] 46 Cal. 795 where the principles governing costs under the private examination section in the insolvency and companies jurisdictions were examined.

21. The next question in these circumstances is what were the powers of the Division Bench. It appears to me that as the learned Judge made an order from which a right of appeal arose to the appellant, it was in the power of the Division Bench to make the order which in its opinion the learned Judge ought to have made, It was not, in my opinion, necessary that it should confine itself to a declaration that the learned Judge had no power to entertain an application for review of an order made by the Registrar or that it should leave the present appellant to go back to the Registrar to have the order set aside or that it should send the case back to the learned Judge to be dealt with as an appeal. I think that it was open to it to make the order which the learned Judge ought to have made namely that the order of the Registrar be set aside.

22. Mr. Banerji has pointed out that by the Appellate Side rules of this Court there is a provision in Rules 2 and 3 of Ch. 7 which says that if the question of law arises in an appeal from appellate decree the Court shall state the points and refer the appeal for the final decision of a Full Bench and if the question arises in an appeal from an original decree the question of law alone shall be referred and the Pull Bench shall return the case with an expression of its opinion upon the points of law for final adjudication by the Division Court which referred it.

23. Now the present case does not seem to me to be within the classes contemplated by these two rule³. These rules refer to the well-known first and second appeals. This is in one sense a second appeal though it is not a limited or special appeal. In another sense it is no doubt a first appeal or an appeal from an original order though it is not in any view an appeal from the original decree. It seems to me that in these circumstances the Division Bench was quite entitled to do what it did namely to act under the general language of Rule 1, Ch. 7 of the Appellate Side Rules.

Whenever one Division Court shall differ from any other Division Court upon a point of law or usage having the force of law, the case shall be referred for decision to a Full Bench.

24. In my opinion it is open to this Full Bench to make the order which the Division Court should have made in addition to answering the question referred by it. I would in this case in addition to giving the answer which I have indicated to the question which has been referred to the Full Bench make an order that the order by the Registrar for the examination of the appellant under Section 36, Presidency Towns Insolvency Act be set aside with costs which will include the costs before the learned Judge the costs of the Division Court and the costs of this Court.

C.C. Ghose, J.

25. I agree.

Suhrawardy, J.

26. I agree.

B.B. Ghose, J.

27. I agree.

Mukherji, J.

28. I agree.