

Malchand and anr. Vs. Gopal Chandra Ghosal and anr.

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Court : Kolkata

Decided On : Nov-17-1916

Reported in : 39Ind.Cas.199

Judge : Lancelot Sanderson, C.J. and ;Asutosh Mookerjee, J.

Appellant : Malchand and anr.

Respondent : Gopal Chandra Ghosal and anr.

Judgement :

Sanderson, C.J.

1. This is an appeal from a judgment of Mr. Justice Greaves, which was delivered on the 14th day of March in this year.
2. The appeal was based upon two grounds: first, that the learned Judge had refused an order to discharge the insolvents: and, secondly, that he had made an order annulling the adjudication in insolvency.
3. The learned Counsel who appeared for the insolvents, the appellants, has not pressed the first ground. Therefore, it is not necessary for us to say anything about it.
4. The point which has been argued is the second one, namely, that the learned Judge ought not to have made an order annulling the adjudication.

5. The argument is based upon two grounds. First, it is argued that the learned Judge had no jurisdiction to make the order: secondly that if he had jurisdiction he ought not to have exercised it in the way in which he did, namely, by making an order of annulment.

6. The facts in this case are some what peculiar. It appears that the appellants, the insolvents, were adjudicated bankrupt as long ago as the 25th of June 1906. On the 7th August 1906 they obtained their personal discharge. But there never was any final discharge, and apparently, those proceedings seem to have got into abeyance by the consent of all parties concerned. Then, on the 12th December 1912, the appellants again presented a petition, and upon that petition they were again adjudicated insolvents. The debts of the respondent creditors had been incurred before December 1912. I do not know the exact date, but it was certainly before the date of the second insolvency. On the 2nd of February 1915, over two years after the adjudication, the Official Assignee applied to the Court for the annulment of the adjudication on the ground that the rules of the Court had not been complied with, and the particular rule in question was Rule 142A, which provides: where an insolvent does not apply to the Court for his discharge under Section 38 of the Act for a period of eighteen months from the date of the order of adjudication, the Court on the application of the Official Assignee or of a creditor may annul the adjudication or make such order as it may think fit. '

7. An application was made under that rule, and the learned Judge who heard the application made an order annulling the adjudication. Therefore the second insolvency came to an end by the order of the Court. Seven days after the adjudication was annulled, the creditors, the respondents in this appeal, brought a suit against the debtors, and on the 22nd of February a notice of the suit was issued and served upon the debtors. On the same date the debtors began to take steps with a view to the presentation of another petition in insolvency, and on that date they deposited the sum of Rs. 50 with the Official Assignee. On the 5th of March the debtors presented their third petition, and an adjudication was made on the same day. On the 13th of March the creditors, the respondents in this appeal, put in a petition asking that this order of adjudication should be annulled. The proceedings then apparently came before Mr. Justice Chaudhuri, and at his

suggestion, an application was made by the debtors that the order of the 2nd of February 1915 annulling the adjudication should be reviewed. The learned Judge heard the application for review and came to the conclusion that there was no ground to justify him in reviewing the order, and he dismissed the application. The result was that the order of the 2nd of February 1915 annulling the second insolvency stood.

8. Then the matter came before Mr. Justice Greaves, and an application was made to him by the debtors for their discharge, which he refused, and that point, as I have already said, has not been argued in this appeal. An application was made by the creditors, the respondents in this appeal, that the adjudication of the 5th of March should be annulled.

9. The learned Judge came to the conclusion that the order of adjudication ought not to have been made, and he set it aside. The grounds upon which he based his judgment were as follows: 'Here you have two insolvents adjudicated on their own petition, guilty of an offence under the Insolvency Act in preferring an old creditor, with what object except to advantage themselves in some way it is difficult to say. They have got no books of account, and so far as I can see, they seem to me to be seeking to take advantage of the provisions of the Insolvency Act in order to shelter themselves from such proceedings as the creditors may be advised to take against them. '

10. Now, it is not necessary for me to say whether I entirely agree with the ground on which the learned Judge based his judgment, for I think that the appeal ought to be dismissed on another ground altogether. It is admitted that the application for the third adjudication order, viz., that of the 5th of March 1915, was made on the same materials as the application for the second adjudication order. The debts were the same; the creditors were the same and the learned Judge has treated the third insolvency and the second insolvency practically as one insolvency. The learned Counsel who argued this appeal has not disputed that that was in fact a fair way of looking at it. Then the result is this, that on the 2nd of February 1915, an order was made by this Court putting an end to the insolvency, and then on the 5th of March, practically a month afterwards, an order was made adjudicating the

debtors insolvents. There was no difference in the circumstances--the same debts, the same creditors; and the application was made on the same materials as the application for the second insolvency. The question arises whether the learned Judge in these circumstances had jurisdiction to make an order annulling the adjudication. In my opinion he had. The section under which he acted was Section 21, which provided that 'Where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent are paid in full, the Court may, on the application of any person interested, by order annul the adjudication. ' These words are in effect the same words which were used in the English Bankruptcy Act of 1883, Section 35. In the case *Ex parte Painter, Painter, In re* (1895) 1 Q.B. 85 at p. 91 ; 64 L.J. Q.B. 22 ; 71 L.T. 581 ; 1 Manson 499 ; 43 W.R. 144 ; 15 R. 16 it was held that the Court had jurisdiction under that Act to make the order of annulment, if it thought that the application for bankruptcy was made as an abuse of the process of the Court: or, to use the orders of the learned Judge, Mr. Justice Vaughan, 'for a purpose foreign to the Bankruptcy Laws. ' I am of opinion that the learned Judge in this case had jurisdiction to make the order, if he thought that the application for the third insolvency was an abuse of the process of the Court. Now, was it an abuse of the process of the Court under the circumstances of this case? I listened with great attention to the learned argument of the learned Counsel, and the main part of his argument was that a debtor, if he comes to the Court and shows that he is unable to pay his debts, is entitled, for his protection, to get adjudication in insolvency. Therefore, I put to him, in order to test the principle, whether, if on the 2nd of February 1915, an order was properly made annulling the order of adjudication in insolvency, the same debtor could come to the Court on the following day on exactly the same facts, alleging that he was unable to pay his debts and was entitled to an order of adjudication in insolvency. The learned Counsel was not prepared to argue that he was. Then I ask, what is the difference in principle if the second order is made on the 5th March instead of the day following the 2nd February: provided no new circumstances have arisen; I see no difference. In this case no new circumstances had arisen between the 2nd of February and the 5th of March. In my judgment the learned Judge was right in annulling the adjudication in insolvency.

11. But, the point with which I have now been dealing, was not apparently taken before Mr. Justice Greaves--certainly it is not referred to in his judgment--and it was only argued at a late period of this appeal, and, in these circumstances, I think that the appeal must be dismissed without costs.

Moukerjee, J.

12. I agree that the order of Greaves, J., must be maintained, though not on the grounds assigned by him.

13. The order was made for annulment of an adjudication under Section 21(1) of the Presidency Towns Insolvency Act, 1909, which provides that where, in the opinion of the Court, a debtor ought not to have been adjudged an insolvent, the Court may, on the application of any person interested, by order annul the adjudication. Whether a debtor ought or ought not to have been adjudged an insolvent must obviously be determined with reference to the point of time when the order of adjudication was made. Section 14 defines the conditions on which a debtor may present a petition for insolvency. Sub-section (1) of Section 15 then lays down that a debtor's petition shall allege that the debtor is unable to pay his debts; and if he proves that he is entitled to present a petition, that is, if he establishes the conditions, mentioned in Section 14, the Court may thereupon make an order for adjudication, unless, in its opinion, the petition ought to have been presented before some other Court having insolvency jurisdiction. Consequently, if the debtor alleges and proves that he is unable to pay his debts and that his debts amount to Rs. 500, he is *prima facie* entitled to an order of adjudication. In the present case, it is not disputed that the debts amount to upwards of Rs. 500, and the debtors are unable to pay their debts. Consequently the order of adjudication was *prima facie* properly made. But it is urged that the order of adjudication should not have been made, because the application whereon it was obtained was in essence an abuse of the process of the Court. This raises the question whether it is obligatory upon a Court to grant an application in insolvency merely because the debtor satisfies the Court that the conditions mentioned in Sections 14 and 15 exist in his case.

14. Under the Law of England it is well settled that when the presentation of a petition is an abuse of the process of the Court, the Court may decline to make any order on it or may rescind the receiving order made on the petition. This principle was recognized in the cases of *In re Betts, Ex parte Official Receiver* (1901) 2 K.B. 39 70 L.J.K.B. 511 ; 49 W.R. 447 ; 84 L.T. 427 ; 17 T. L. R 383 ; 8 Manson 227, *Ex parte Painter, In re Painter* (1895) 1 Q.B. 85 at p. 91 ; 64 L.J. Q.B. 22 ; 71 L.T. 581 ; 1 Manson 499 ; 43 W.R. 144 ; 15 R. 16, *In re Hancock, Ex parte Hillearys* (1904) 1 K.B. 585 ; 73 L.J.K.B. 245 ; 52 W.R. 546 ; 90 L.T. 89 ; 11 Manson 1, *In re Archer, Ex parte Archer* (1904) 20 T.L.R. 390 and has been applied by all the Indian High Courts. It was indicated as applicable to the Provincial Insolvency Act in the case of *Samir-ud-din v. Kadar Moyee Dassi* 7 Ind. Cas. 691 ; 12 C.L.J. 445 ; 15 C.W.N. 244; and has been recently accepted by two Full Benches, one of the Madras High Court, the other of the Allahabad High Court, in the cases of *Ponnuswami Chetty v. Narayanaswami Chetty* 21 Ind. Cas. 293 ; 25 M.L.J. 545 ; 14 M.L.T. 305. and *Tirloki Nath v. Badri Das* 23 Ind. Cas. 4 ; 36 A. 250 ; 12 A.L.J. 355 [see also *Re Aranvayal Sabhapathy Moodliar* 21 B. 297 ; 11 Ind. Dec. (N.S.) 201]. We must take it then as well settled that not with standing proof of the existence of the conditions mentioned in the Statute, the Court is not bound to pass an order of adjudication where the application constitutes an abuse of the process of the Court; and it is the duty of the Court to have regard to this aspect of the matter when the question is raised. Let us consider the position of the appellants from this point of view.

15. In the case before us, the appellants applied for adjudication under the Indian Insolvency Act, 1848, on the 25th June 1906. They obtained an order in their favour as also an order for final discharge on the 7th August 1906. This proceeding appears to have been subsequently abandoned, under circumstances which have not been explained, on the 2nd December 1912; after the Presidency Towns Insolvency Act had come into operation, they again applied to be adjudged insolvents. It may be mentioned here that in the interval their circumstances had materially altered; apparently, the amount of their debts, as also the number of their creditors, had increased.

16. The order for adjudication was made as a matter of course; but no steps were taken for the payment of the dues of the creditors. The consequence was that on the 2nd February 1915 an application was made to the Insolvency Court by the Official Assignee for an order under Rule 142A of the Rules of the Court. This rule provides that where an insolvent does not apply to the Court for his discharge under Section 38 of the Act for a period of eighteen months from the date of the order of adjudication, the Court, on the application of the Official Assignee or of a creditor, may annul the adjudication or make such order as it may think fit. The Court granted the application of the Official Assignee and the adjudication order was annulled. On the 9th February 1915 the respondents, who are the principal creditors of the appellants, instituted a suit to enforce their claim and the summons was served shortly afterwards. The result was that on the 5th March 1915, the appellants again made an application to be adjudged insolvents. The application recited the previous history in this matter, and the Court made the order for adjudication as a matter of course. On the 13th March 1915 the creditors made an application under Section 21 for annulment of the order of adjudication. In my opinion, there is no escape from the conclusion that the application of the 5th March 1915 was an abuse of the process of the Court. It is admitted that there had been no change whatever in the circumstances of the petitioners; in fact the allegations whereon the application of the 2nd December 1912 was based were absolutely identical with those mentioned in the application of the 5th March 1915. If an application of this character were entertained, the result would be inevitable that an insolvent would be encouraged to make an application for insolvency, to obtain an adjudication order, to take no substantial steps thereafter, or to abandon the proceedings, and, when pursued by his creditors again, to seek relief in the Insolvency Court, whenever convenient to him. It would be lamentable if the Court were to countenance conduct of this character or to encourage litigants to trifle with the Court in this manner. In the case before us, the order for annulment was properly made on the 2nd February 1915; there is no suggestion that the rule was improperly applied; and we have the significant fact that the order was confirmed on review. If, then, the order of the 2nd February 1915 stands, it is difficult to see how the application of the 5th March, based on no fresh materials, could be properly maintained. On these grounds I hold that the order of Greaves, J., must

be supported.

17. But I desire to make it perfectly clear that I do not accept the view which appears to have commended itself to Greaves, J., namely, that an adjudication order may be properly annulled under Section 21 on the ground that the insolvent has shown undue preference to one creditor and has thus misconducted himself. This is not a ground on which an adjudication order can be legitimately refused, but is a matter to be taken into consideration only at a later stage of the proceedings in insolvency; this view was adopted in the cases of *Samir-ud-din v. Kadar Moyee Dassi* 7 Ind. Cas. 691 ; 12 C.L.J. 445 ; 15 C.W.N. 244, *Udai Chand Maity v. Ram Kumar Khara* 7 Ind. Cas. 394 ; 12 C.L.J. 400 ; 15 C.W.N. 213, *Tirloki Nath v. Badri Das* 23 Ind. Cas. 4 ; 36 A. 250 ; 12 A.L.J. 355 and *Ponnuswami Chetty v. Narayanswami Chetty* 21 Ind. Cas. 293 ; 25 M.L.J. 545 ; 14 M.L.T. 305.

18. As regards costs, I am inclined to take the view that the respondents are not entitled to their costs in this Court. The ground on which they now succeed was not urged in the Court below and was put forward in this Court only at a late stage of the argument after all the facts had been investigated. The appeal will, therefore, be dismissed without costs.

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