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In Re: Gopaldas Aurora

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Court : Kolkata

Decided On : Apr-23-1925

Reported in : AIR1926Cal640,94Ind.Cas.793

Judge : Buckland, J.

Appellant : In Re: Gopaldas Aurora

Judgement :

Buckland, J.

1. This is an appeal under Section 8 of the Presidency Towns Insolvency Act against an order of the Registrar in Insolvency refusing to adjudicate the petitioner insolvent upon his own petition. That the matter is one with which the Registrar has been duly empowered to deal is not in question.

2. The petition is in form No. 7 to be found in the appendix of forms to the Insolvency Rules of this Court made under Sections 112 and 114 of the Act, and, as pointed out by learned Counsel, it contains averments which will bring the application within the relevant sections of the Act, and are, therefore, necessary for the purpose of obtaining the order.

3. Section 9 states that a debtor commits an act of insolvency: '(f) if he petitions to be adjudged an insolvent.' Section 10 provides that subject to the conditions specified in the Act if a debtor commits an act of insolvency, he may present an

insolvency petition and the Court may on such petition make an order adjudging him an insolvent. Any difficulty that might arise in combining this with Section 9 (f) is avoided by the explanation to Section 10, which says that the presentation of a petition by the debtor shall be deemed an act of insolvency within the meaning of the section. Consequently provided certain other conditions are fulfilled, the mere fact of the presentation of a petition for adjudication is enough on which to make the order.

4. Section 11 contains certain restrictions upon, jurisdiction. The only part of the section to which I need refer is Sub-section (b), tinder which the Court has no jurisdiction-to make the order unless the debtor within a year before the date of the presentation of the insolvency petition has ordinarily resided or had a dwelling house or has carried on business either in person or through an agent within the limits of the Ordinary Original Jurisdiction of the Court. The petition in this case states that the petitioner lately carried on a co-parcenary business as a merchant under the name and style of Gopinath Pursottamdas at No. 113, Monahardas Katra, in Calcutta, and has for the greater part of the past six months ordinarily resided at 101, Harrison Road, Calcutta.

5. Further conditions which must be fulfilled are to be found in Section 14, and to entitle him to present a petition, the debtor must either owe Rs. 500 or have been arrested and imprisoned in execution of the decree of a Court for the payment of money or an order of attachment in execution of such a decree must have been made and be subsisting against his property. The first condition is that which this petitioner states has been fulfilled, for his petition says that he is unable to pay his debts, which exceed Rs. 500. That he must state under Section 15, which goes on to provide that if the debtor proves that he is entitled to present the petition, which means that the necessary conditions obtain, the Court may thereupon make an order of adjudication, subject, however, to another Court having insolvency jurisdiction being that to which the application should preferably be made.

6. Rule 74 of the Rules of this Court provides that where a petition is filed by a debtor, the Court shall forthwith make an adjudication order thereon, and the rule appears to contemplate that if the petition is in form in the sense that the Court has

jurisdiction and the conditions prescribed by the Act have been fulfilled, the order shall go as a matter of course. This would appear to be in accordance with the view expressed by the Judicial Committee of the Privy Council in Chhatrapat Singh Dugar v. Kharag Singh Lachmiram 39 Ind. Cas. 788 : 44 I.A. 11 : 44 C. 535 : 21 C.W.N. 497 : 21 M.L.T. 36 : 15 A.L.J. 87 : (1917) M.W.N. 100 : 32 M.L.J. 1 : 19 Bom.L.R. 174 : 25 C.L.J. 215 : 10 Bur.L.T. 25 (P.C.). That was a case under the Provincial Insolvency Act, but for the present purpose no distinction need be drawn between that and the Presidency Towns Insolvency Act. It is pointed out in the judgment of the Board, which was delivered by the late Chief Justice of this Court, that the Act entitles a debtor to an order of adjudication when its conditions are satisfied. His Lordship continued:

This does not depend on the Court's discretion, but is a statutory right; and a debtor who brings himself properly within the terms of the Act is not to be deprived of that right on so treacherous a ground of decision as an abuse of the process of the Court.

7. It appears that that was the ground upon which in that case the petition was refused both by the District Court of Murshidabad and by this Court on appeal. That is not the ground upon which the Registrar has dealt with this application, though he seems to have taken into consideration matters which, according to the judgment of their Lordships of the Judicial Committee, are not relevant to his decision.

8. The Registrar has referred to Section 99, which provides that any two or more persons being partners or any person carrying on business under a partnership name may take proceedings or be proceeded against under this Act in the name of the firm, and contains a further provision for disclosure of the names of the members of the firm. This is only an enabling section akin to Order XXX, of the C.P.C., and does not purport to prescribe anything that is to be done or left undone in order to obtain an adjudication order where a debtor who is a member of a partnership firm or where the members of a partnership firm apply for an order of adjudication. But the registrar, by his reference to Rule 150 of the Rules of this Court seems to have regarded this as an insolvency petition filed on behalf of a

firm of debtors. If that were the case, he would be correct in requiring under the rule that the petitioner should state the names of the partners. Apparently his reason for having regarded it as though it were a petition filed on behalf of a firm is because the lists annexed to the petition are admittedly those of debts due by and outstandings due to the firm. This does not necessarily mean that the petition is made on behalf of a firm. Learned Counsel has said that there is no partner-snip firm and drawn my attention to the statement in the petition that the debtor was carrying on a co-parcenary business, and submitted that there is no evidence of the existence of a contractual partnership to which the Act and rules refer. In any event he has submitted that it would be open to a partner to apply to be adjudicated an insolvent and that in such a case he would be right in setting out the debts due by his firm, for the reason that under the ordinary law they would be debts for the full amount of which he would be personally liable. When the case is that of a coparcenary business and not a contractual partnership, he contends that the position is even more favourable to his client for which proposition he relies upon Sat Naram v. Behari Lal .

9. I am disposed to think that this contention is correct, but as this appeal, like the application, is ex parte, I have not had the advantage of hearing the matter argued from the standpoint of any person interested in placing the contrary view before me, which may occur at a later stage of this case or even in other proceedings. Should such occasion arise, it may be necessary to re-consider the opinion which I have expressed.

10. The Registrar has also stated that it is the settled practice of this Court since the year 1915 to insist upon the books of an insolvent who is a trader being made over to the Official Assignee before the adjudication order is passed, and in support of that proposition he has referred to the judgments of my learned brother Mr. Justice Rankin In Re: Bhuramull Bavka No. 39 of 1919, dated the 16th May 1919 unreported and In Re: Joseph Perry No. 32 of 1919, dated the 28th May 1919 unreported. If my learned brother's information in the latter case is correct and insolvency is regarded as a privilege in India, that may explain the readiness of persons desirous of availing themselves of the privilege to make over their books of account to the Official Assignee even before the privilege is conferred

upon them. But where it is contended that there is no obligation to make over the books of account to the Official Assignee before the order is made, the matter assumes a different aspect. A practice founded upon the willingness of debtors cannot be regarded as being settled practice obligatory upon persons-who do not wish to comply with it. There is no rule of the Court which so requires, and were such a rule made, it would be a matter for consideration whether such additional condition could be super-imposed upon the Act which does not demand it. The two judgments referred to by the Registrar do not, in my opinion, support the proposition for which they have been cited. Each case was one of a person who already had been adjudicated an insolvent. In Re: Joseph Perry No. 32 of 1919, dated the 28th May 1919 unreported my learned brother merely referred to this matter incidentally, and I do not read his judgment as definitely holding that there is an obligation in law or practice on a debtor to hand over his books to the Official Assignee before the adjudication order is made. Both in that and in the other case cited, he was dealing with books withheld from the Official Assignee by an insolvent after adjudication which is a very different matter, and, in my opinion, there is nothing establishing that it is the duty of an unwilling debtor to hand over his books to the Official Assignee before he has been adjudicated an insolvent.

11. Lastly, the Registrar has referred to Suit 'No. 2910 of 1924.

12. The Registrar may be perfectly right in the conclusions which he has drawn from the materials which he has examined in 'that case, or, on the other hand, it may be, as learned Counsel has stated, no doubt upon instructions, that the facts upon which the Registrar's observations are based are incorrect. It appears that the Registrar's knowledge was due to the circumstance that he happened to have settled an order of Mr. Justice Ghose in that suit in February last. It also appears to be purely fortuitous that the same officer was concerned with that order and this application, but so far as this application is concerned anything which the Registrar learnt in that connection must be regarded as extra-judicial and cannot be utilised as the foundation of his order. I must not, however, be taken as meaning that no reference whatever can be made to external matters, assuming, of course, that they are relevant, but if an order is to be founded upon them they should be duly brought to the notice of the parties and the parties given an opportunity of

furnishing an explanation. I do not know whether that was done in this case; it may be that it was, but in any event the matters referred to have no relevancy upon this application, whatever use may be made of them by persons entitled to be heard at any subsequent stage of the proceedings.

13. The question of the adjudication of a debtor upon his own petition is a comparatively simple matter, and as has been pointed out by the Privy Council in the case cited, if the conditions of the Act are satisfied, the debtor is entitled to the order. All that need be done, therefore, upon a debtor's application is to see whether those conditions are fulfilled, and if so, to make the order. It may be that, in substance, though prematurely, the Registrar was perfectly correct in the view that he took of the matters to which he refers, but they can subsequently be brought to the notice of the Court, and if it should appear that the debtor had no right to apply for an order of adjudication, or that circumstances exist which would justify the Court in so doing, the Court has full power under Section 21 to annul the adjudication order.

14. For the foregoing reasons, I set aside the order of the Registrar, dated the 6th April 1925, and the usual order of adjudication will be made.

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