

(2010) 12 CAL CK 0033

Calcutta High Court

Case No: GA No's. 20, 104, 130, 134, 135, 290, 409, 410, 432, 433, 434, 435, 436, 442, 481, 482, 548, 990, 991, 1220 and 1629 of 2010 and IC No's. 9, 10, 145 and 199 of 2008 and 34, 50, 63, 149, 191, 206, 318, 412 and 678 of 2009

In Re : Krishnendu Sircar and
Rekha Sircar and Others etc. etc.

APPELLANT

Vs

RESPONDENT

Date of Decision: Dec. 7, 2010

Acts Referred:

- Evidence Act, 1872 - Section 3
- Penal Code, 1860 (IPC) - Section 421, 422, 423, 424
- Presidency Towns Insolvency Act, 1909 - Section 106, 15, 15(3), 18, 20
- Presidency Towns Insolvency Rules - Rule 103, 104, 74, 74(1), 94

Citation: (2011) 2 CHN 254

Hon'ble Judges: Sanjib Banerjee, J

Bench: Single Bench

Advocate: Abhrajit Mitra, P.K. Srivastava, P. Goswami and Sarvopriya Mukherjee, in GA Nos. 290, 442 and 482 of 2010, Balai Chandra Roy, General, Pratik Dhair and Ritwik Pattyanayak, Bikash Ranjan Bhattacharya, Indranil Nandi and A.L. Mukherjee, Rupak Ghosh and Avijit Dey, in GA Nos. 990 and 991 of 2010, Samit Talukdar, Paritosh Sinha, Hasnuhana Chakraborty and Jaydeep Ray, for the Appellant;

Judgement

Sanjib Banerjee, J.

There is a common thread that runs through the clutch of insolvency petitions. Indeed, the common thread travels beyond these petitions and envelopes other debtors' petitions claiming insolvency filed in the last three years.

2. What started apparently innocuously has blown the cover off a colossal saga of procured orders, intrigue and possible conspiracy. Orders of adjudication in insolvency matters were apparently up for sale, complete with posters on walls and

lampposts, advertisements in newspapers and soliciting on the internet. A century-old practice of this Court has been turned on its head and the process abused whereby orders of adjudication on debtors' claims of insolvency have appeared as items of merchandise.

3. The several debtors' petitions claiming insolvency carry IC numbers. The applications made in the insolvency proceedings carry GA numbers, every GA application being pegged to an insolvency petition. In the first matter, involving the son and mother duo of Krishnendu and Rekha Sircar, five sets of creditors have applied for investigation into the circumstances relating to the order of adjudication and the conduct of the proceedings. The creditors have also sought annulment of the order of adjudication. The apparently innocent application that triggered off the avalanche of protest by creditors and brought to light what had been passed off as a judicial process was a plea by the petitioning-debtors in IC No. 145 of 2008 seeking a stay of the criminal proceedings launched against them by their creditors. On such debtors' original application, GA No. 2079 of 2009, a limited stay of the criminal proceedings was granted on August 14, 2009. GA No. 20 of 2010 was brought by the mother and son duo for a continuation of the blanket immunity against criminal proceedings. This opened the floodgates as private banks and finance companies came pouring in complaining of a vicious clique, involving some lawyers and officials, that peddled in adjudication orders to debtors unwilling to repay their creditors. GA No. 2079 of 2009 has since been withdrawn by the petitioning-debtors consequent whereupon GA No. 20 of 2010 has no further legs to stand on. But the lid has come off one of the biggest conspiracies carried out in these hallowed precincts.

4. GA No. 104 of 2010 is an application by HDFC Bank u/s 87 of the Presidency-Towns Insolvency Act, 1909 with a prayer for annulment of the order of adjudication of the debtors as insolvents. GA No. 130 of 2010 is an application of similar import by ABN Amro Bank NV. ICICI Bank has carried GA No. 134 of 2010, Standard Chartered Bank has brought GA No. 135 of 2010 and India Bulls Financial Services Limited has filed GA No. 481 of 2010 for similar purpose.

5. Cholamandalam DBS Finance Limited has applied for recalling the order of adjudication on another debtor's petition for insolvency by way of GA No. 482 of 2010. Kotak Mahindra Bank Limited has applied in the third insolvency matter for enforcement of the strict rules that would ensure payment of the dues of the creditors if the insolvent is able to afford the same. Kotak's application is numbered as GA No. 290 of 2010. ICICI Bank has brought GA No. 409 of 2010, GA No. 410 of 2010, GA No. 432 of 2010, GA No. 433 of 2010, GA No. 434 of 2010, GA No. 435 of 2010 and GA No. 436 of 2010 for annulment of the orders of adjudication in seven insolvency cases and for an investigation into the conduct of the proceedings. Citi Bank NA has applied by way of GA No. 442 of 2010 in one insolvency case. Reliance Consumer Finance, a division of Reliance Capital Limited, has instituted GA No. 548

of 2010, GA No. 991 of 2010 and GA No. 990 of 2010 in three sets of insolvency proceedings. Since the matter was considered to be serious and it appeared that some advocates may have been involved and there may have also been an element of criminality involved, notices were issued to the Bar Council of West Bengal and to the State. The State of West Bengal has applied by way of GA No. 1629 of 2010 for leave to examine the records relating to the insolvency proceedings and to seize them. The Bar Council of West Bengal did not deem it important to participate in the proceedings notwithstanding it being evident that some lawyers may have been at the centre of the inglorious practice that has now come to light.

6. The matter started with the debtors in IC No. 145 of 2008 mentioning for the continuation of the blanket ban on criminal proceedings against them by their creditors, which they had obtained in GA No. 2079 of 2009. Following the extension being declined on oral mentioning, these debtors have carried a formal application for extension of the interim order by way of GA No. 20 of 2010.

7. The application has no detail as to the quantum of debts or a sworn statement as to creditors. The extreme indulgence sought was declined at the ad-interim stage and the matter was subsequently directed to appear in the list. On January 11, 2010 the records relating to the insolvency proceedings were called for. Since the debtors were represented in Court through the son in person, the particulars as to the previous advocate were sought.

8. The debtors in IC No. 145 of 2008 had several creditors and advocates representing one or more of creditors noticed the debtors" names in the cause list. By January 27, 2010 the creditors, including ABN Amro Bank NA and ICICI Bank Ltd., had applied with scratchy details of what they called was an alarming practice that was being followed in insolvency matters. The creditors were given leave by the order dated January 27, 2010 to use supplementary affidavits.

9. By an order dated February 2, 2010 the Official Assignee was directed to be present with all records relating to IC No. 145 of 2008 on the returnable date. Upon the supplementary affidavits being filed and some disquieting facts coming to the fore, Learned Advocate General was required to be given notice and requested to appear on February 17, 2010. A special officer was also appointed on February 15, 2010 to take charge of the records from the offices of the Official Assignee and the Registrar-in-Insolvency of this Court. The Special Officer has taken custody of the records, including some of the records from the Registrar-in-Insolvency of this Court.

10. The lead role among the creditors has been taken by Standard Chartered Bank in its application in the case of the mother and son combine of debtors. The Bank has pointed out that IC No. 145 of 2008 was filed on November 20, 2008 and the debtors were adjudicated as insolvent by an order of November 24, 2008.

11. The order of adjudication of November 24, 2008, in a standard form, needs to be noticed since the other orders are almost identical:

On the petition of the debtor themselves filed the twentieth day of November 2008 and numbered one hundred forty five of 2008. An Adjudication Order dated 24.11.08 is hereby made against, Krishnendu Sircar, son of Prodyut Kumar Sircar, aged about 45 years and Smt. Rekha Sircar wife of Prodyut Kumar Sircar, aged about 75 years, lately residing at 52/1B, South Sinthee Road, Kolkata-700 050 and formerly carrying on business under the name and style of M/s. M & M Associates of 52/1B, South Sinthee Road, Kolkata-700 050, both the outside the jurisdiction of this Hon"ble Court and at present residing at C/o. Mr. Soumendra Nath Sadhu, 11/1E, Northern Avenue, P.O.-Chitpur, Kolkata-700037, last year within the ordinary original Civil Jurisdiction of this Hon"ble Court.

12. The bank says in its application that it had made enquiries in the office of the Official Assignee as to the steps taken by the Official Assignee in the insolvency proceedings to protect the rights of the creditors but could not make any headway. It speaks of another creditor, HDFC Bank Ltd, having made a written request for inspection of the records by a letter of November 16, 2009 to which there was no response from the Official Assignee. Standard Chartered Bank has also relied on another letter of November 26, 2009 issued by advocates representing HDFC that the office of the Official Assignee did not offer inspection of the relevant papers to such creditor on November 20, 2009. There is no reply from the Official Assignee to either letter, nor have the affidavits subsequently filed by the Official Assignee thrown any light on such matter.

13. Standard Chartered Bank complains in its application that the relevant insolvency case had been filed in abuse of the process and the order of adjudication obtained by the mother and son duo was for their convenience and it had been facilitated by the offices of the Official Assignee and the Registrar-in-Insolvency, with scant regard to the provisions of the said Act of 1909 and the Rules framed thereunder.

14. Paragraphs 7 and 8 of Standard Chartered Bank's application make interesting reading. The creditor claims that there is a cartel operating in and around West Bengal which "promises to give relief to debtors from making payment of their outstanding dues to banks and other institutions by getting the said debtors declared as insolvents." This bank alleges that habitual defaulters who regularly take loans from banks and financial institutions with the intention of not repaying the same "are the mainstay of the said cartel operation." The bank suggests that the "cartel has devised some mechanism to dispose of insolvency petitions (within) an alarmingly short period of time probably in nexus with some insiders." The bank refers to advertisements published in newspapers and has appended copies of some advertisements to its application. The advertisements, published in the classified columns of a Bengali newspaper, appear one after the other. There are at

least six advertisements appearing in a single column of the newspaper which has been referred to by Standard Chartered Bank. The first of them announces that for personal loan or credit card problems a solution is available within 15 days through the "insolvency route." The brazen announcement proceeds to mention that if the extent of indebtedness is less than Rs. 5 lakh, then the total fees payable would be five per cent of the amount and if the sum is in excess of Rs. 5 lakh the fees payable would be three per cent of the amount. There is a mobile telephone number (98365 59307) which is indicated. Another advertisement claims to have been issued by a solicitor firm having an internet address at www.lawpoint.webnode.com. Two mobile numbers (98306 77690 and 98747 47404) have also been furnished in such advertisement.

15. Standard Chartered Bank expresses an apprehension in its application that insolvency petitions filed by the debtors at the instance of the cartel are supported by incorrect and false information and records. The bank refers to some insolvents indicating only a select list of creditors to ward off payment to them while continuing to enjoy credit facilities from and making repayments to other creditors. The bank says that offices of both the Official Assignee and the Registrar-in-Insolvency have been involved in the acts of fraud perpetrated by the debtors with the connivance of some lawyers and officials attached to the offices of the Registrar and the Official Assignee. The bank complains of the procedure and formalities required to be complied with having been observed in the breach. Standard Chartered Bank refers to Section 87 of the Act of 1909 and says that in view of the facts pertaining to all the insolvency matters that have been filed from the beginning of the year 2008 an investigation should be carried out and appropriate steps be taken against all concerned. Section 87 of the Act provides as follows:

87. Control of Court:

(1) If any official assignee does not faithfully perform his duties and duly observe all the requirements imposed on him by any enactment, rules or otherwise, with respect to the performance of his duties, or if any complaint is made to the Court by any creditor in regard thereto, the Court shall enquire into the matter and take such action thereon as may be deemed expedient.

(2) The Court may, at any time, require any official assignee to answer any enquiry made by it in relation to any insolvency in which he is engaged, and may examine him or any other person on oath concerning the insolvency.

(3) The Court may also direct an investigation to be made of the books and vouchers of the official assignee.

In the supplementary affidavit filed on behalf of Standard Chartered Bank in IC No. 145 of 2008, it has been averred at paragraph 4, *inter alia*, as follows:

(a) Various people being agents and touts who are part of a cartel which is operating in the State of West Bengal are holding out that they have connections with people in power and position at all levels. They are assuring persons who have taken loans and/or availed of other credit facilities from banks and financial institutions exemption from repayment of the said loans and/or credit facilities by getting the said the debtors declared insolvents irrespective of whether the debtors have sufficient assets out of which the loans and/or credit facilities can be repaid and/or whether the debtors can actually be declared as insolvents in the facts and circumstances of the cases. In lieu of the said purported services, the touts and agents are charging a percentage of the aggregate loan availed of by the debtor concerned from the banks and financial institutions (usually 3% or 5%) depending on the amount involved, whereas the actual Court expenses involved in the process is about only Rs 250-300. Newspaper advertisements published on January 10,2010 are collectively annexed hereto and marked with the annexure "A".

(b) It appears that these touts and/or agents do have connection with some people in position and/or power with whose aid they are proceeding to have the debtors adjudicated as insolvents. The entire process of adjudication is done in a very short time sometimes in 5-6 days and, to the best of the knowledge of ABN, without following the procedure laid down under the law. No inquiries are made regarding the financial capability of the debtors to repay the loans and/or the assets and properties of the debtors.

(c) In most of the cases even the addresses of the debtors given in the application are false. Most of the debtors do not reside and/or work for gain and/or carry on business within the jurisdiction of this Hon"ble Court. In order to attract the jurisdiction of this Hon"ble Court, in most of the cases, a false address of the debtor concerned is given. In fact when it was found that the addresses of Sri Krishnendu Sircar and Smt. Rekha Sircar was incorrect. Upon inquiry at transpired that one Mr. Sadhu resides at the said given address.

16. Copies of advertisements published in Bengali newspaper "Anandabazar Patrika" have been appended to the supplementary affidavit. Advertisements have also been published in Hindi newspaper "Sanmarg" on behalf of one Mandal & Associates which is claimed to be a government-registered law firm. Telephone numbers of the contact persons and particulars of the website have also been indicated. The bank has downloaded pages from the website of Mandal & Associates of whom one Gopal Chandra Mandal is said to be the chief mentor. His credentials indicate that he "has created a niche in the field of Law Insolvency (Bankruptcy)." There is a claim that the firm had filed 120 insolvency cases in the year 2009 on which adjudication orders had been passed. A brief sketch of the procedure in insolvency is indicated with the suggestion that since the 1909 Act has "limited territorial jurisdiction so it is important to find an experienced lawyer who can handle your case ..." The procedure spelt out to prospective clients mandates that all

fees must be paid before filing the bankruptcy petition and the efficacy of taking the bankruptcy route is summarised as: "The filing of bankruptcy stops almost all collection and legal proceedings pending against you. Section 18 will stay all suits and proceeding pending against the insolvent and Section 25 will protect the insolvent from arrest and detention." To convince a prospective client that the procedure was foolproof and efficacious, the following paragraph appears in the literature available on the website:

Filing for a bankruptcy can allow a person to make a fresh start by having the court dismiss or remove most of your debts. There is no shame when it comes to filing of bankruptcy. The richest and most powerful people file for bankruptcy as well when needing for a fresh start. It is important to understand that situations arise and times can be difficult in a bankruptcy case. Hiring an experienced lawyer is the first right step in a bankruptcy case in India.

17. Standard Chartered Bank has also referred to posters abounding on walls around central Calcutta and even further and bills stuck on lampposts which announce that there is a legal way of getting rid of problems relating to personal loans. One of the telephone numbers that appears in a sample bill is 94328 61932.

18. Standard Chartered Bank and several other creditors have tabulated the list of insolvency cases filed during the last ten years. The trend that it reveals is shocking. After the outrageous increase in the number of filings during the last two calendar years, new institutions have completely dried up after the power of the Registrar to make the adjudication orders has been suspended. Only a solitary petition by a debtor has been filed in this Court after February, 2010. By an order in the present set of proceedings made in February of this year, debtors" petitions were required to be placed before the Judge assigned insolvency matters for any order of adjudication to be made thereon. The list tells its own story:

YEAR No. OF CASES

12	2000	15	2001	8	2002	16	2003	11	2004	29	2005	18	2006	12	2007	43	2008	202
----	------	----	------	---	------	----	------	----	------	----	------	----	------	----	------	----	------	-----

19. The creditors point out divers irregularities in both the insolvency petitions and in the procedure adopted by the Official Assignee and the Registrar-in-Insolvency. Some of the more startling anomalies, that ought to have been checked by the concerned officials but have not been, are as follows:

i. The address given by the debtors, whether as place of residence or place of work or place of business, in the insolvency petitions is invariably different from the actual address of the debtors furnished to the creditors at the time of obtaining credit facilities. The Official Assignee and the Registrar-in-Insolvency have not attempted to ascertain the veracity of the allegations and mechanical orders of adjudication have been made. The authority of this Court to receive an insolvency petition is on the basis of the address of a petitioning- debtor, but such jurisdictional fact does not

appear to have been ascertained in any of the cases.

ii. The particulars of all the creditors have not been disclosed by the petitioning-debtors and no attempt was made by the concerned officials to ascertain the same. The creditors assert that some of the debtors have named only a few creditors in their insolvency petitions though they continue transactions with other creditors who have not been named in the petitions. This, in itself, is a subversion of the process that the concerned officials ought to have guarded against.

iii. The particulars of the assets are invariably not disclosed by the petitioning debtors. In many cases the bank accounts are kept concealed. The creditors have demonstrated that a number of petitioning-debtors own or are in possession of substantial assets which have not been reflected in the petitions.

iv. From the beginning of the year 2008 not a single petition by a petitioning debtor has been rejected.

20. The creditors and learned Advocate-General representing the State say that there was complete abdication of the judicial authority delegated to the Registrar-in-Insolvency. They point out that Section 15 of the Act of 1909 requires a petitioning debtor to prove that he is entitled to present the petition and the court may thereupon make an order of adjudication. Section 15(3) mandates that unless there is a direction to the contrary, a petitioning debtor shall produce all his books of accounts and shall file such lists of creditors and debtors and afford such assistance to the court as may be prescribed, failing which the court may dismiss his petition. The manner in which the insolvency petitions have been received and the orders of adjudication continued indefinitely in complete disregard of the Act and the Rules thereunder framed by this Court demonstrates not only a rot but something even more sinister.

21. Learned Advocate General submits that the word "prove" has to take colour from the definition of "proved" found in Section 3 of the Evidence Act, 1872. A petitioning debtor would have proved that he was entitled to present the petition if, after considering the matters before it, the court either believed that he was so entitled, or considered it so probable that a prudent man ought, under the circumstances to act upon the supposition that the debtor was so entitled. There is an element of consideration - an application of mind to the matter to come to a conclusion - that is fundamental to the discharge of a judicial duty. This is singularly absent in the orders of adjudication that have rolled out of the insolvency factory that had been set up in this Court.

22. Section 20 of the Act obliges the publication of the notice of every order of adjudication in the Official Gazette. On a construction of the statute and the rules applicable to this Court, it is evident that it was the judicial duty of the Registrar to ensure that the publication was made and the administrative function of the Official Assignee to see to it that it was published. It has not occurred to the two officials

who have manned the post of Registrar during the relevant time to take steps or issue directions for the advertisement of the orders of adjudication, whether or not there may have been some administrative difficulty in the publication of the Official Gazette. Rule 99 of the Insolvency Rules provides that upon an adjudication order being made the Official Assignee shall forthwith send notice thereof to the Calcutta Gazette and to such newspapers the court may direct, or in default of such direction, to such newspapers as the Official Assignee may think fit. There is a form of the notice in the appendix to the Rules. The inspection taken by the creditors and the State of the records relating to the insolvency proceedings from or about the year 2008 do not reveal the existence a solitary publication in the Calcutta Gazette or even any direction or instruction in such regard.

23. Section 26 of the Act commands that a meeting of the creditors shall be held to consider the circumstances of the insolvency and the insolvent's schedule and its explanation thereof and, generally, as to the mode of dealing with the property of the insolvent. The records do not show that there was even a single meeting of creditors convened despite the insolvency petitions in the relevant years being in excess of 1250 in number. Section 27 of the Act envisages a public examination of the insolvent. Notice is required to be given to creditors for examination of the insolvent where the insolvent may be examined as to his conduct, dealings and property. The examination is required to be held as is soon as conveniently possible after the expiration of the time for filing the insolvent's schedule following the order of adjudication. The procedure adopted by the concerned officials betray a complete lack of awareness of these salutary provisions or, worse still, a total disregard thereof.

24. Rule 103 of the Insolvency Rules stipulates that every insolvent shall be furnished by the Official Assignee with instruction for the preparation of his schedule of affairs. The schedule is to be in a form indicated in the appendix and the verified schedule is required to be filed with the Registrar. Section 24 of the Act says that such schedule shall be submitted within 30 days of the date of the order of adjudication on a petition by the debtor. The records of the insolvency cases during the relevant years show the schedule of affairs having been filed only in the odd case and even where the schedules have been filed, the Registrar has not forwarded the same to the Official Assignee. The provisions are so strict in the statute that Section 24(3) thereof says that if the insolvent fails to comply with the requirement of furnishing the schedule of assets, the court may make an order of his committal to civil prison. Such order can be made either on an application by the Official Assignee or at the behest of any creditor. Since the Official Assignee, as the records show, was completely oblivious to his duties under the Act and the Rules, it may have been possible for the creditors to make such application that would have prompted the insolvency matters to stay on course. But in the absence of advertisements of the orders of adjudication and the issuance of notices to creditors, this valuable right of the creditors was not afforded to them. Section 24(4)

of the Act goes to the extent of providing that upon the insolvent failing to prepare or submit his schedule of affairs, the Official Assignee may, at the expense of the estate, cause such a schedule to be prepared. The records do not show any attempt at such preparation of schedule by the Official Assignee in any case.

25. Rule 104 of the Insolvency Rules obliges the Official Assignee to apply to the Registrar to appoint a day and hour for holding a public examination of the debtor envisaged u/s 27 of the Act. In no case during the relevant years has the Official Assignee made such application. The other connected duties of the Official Assignee include notices of the public examination being issued to the creditors and making a public notification of the time and place of the public examination. There is nothing on record to show that any such measures were adopted in the insolvency cases during the relevant period.

26. The records, including a number of those inspected by this Court, do not reveal that any attempt was made in any case for the discovery of the insolvent's properties in accordance with Section 36 of the Act of 1909. The concerned officials have acted in derogation of their duties under the Act and the Rules though the authority to issue commissions and letters of request for the examination on commission or otherwise of any person are available u/s 37 of the Act.

27. Section 58 of the Act instructs the Official Assignee to take possession of the deeds, books and documents of the insolvent and all other parts of his property capable of manual delivery. u/s 59 of the Act there is authority to grant a warrant to any prescribed officer or any police officer to seize the property of an insolvent in the custody of any other person or to break open any house or building or room where any part of the property of the insolvent may be housed. To put it generously, the Registrar appears to have been unaware of such provisions. Section 68 of the Act commends the Official Assignee to realise the property of the insolvent with all convenient speed. Nothing in the records shows that any thought in such direction even crossed the minds of the two judicial officers who were posted as Official Assignees during the period under scrutiny. Section 79 of the Act empowers the Official Assignee to administer the estate of an insolvent. The administration includes the mandate to investigate the conduct of the insolvent and to report to court whether there was reason to believe that the insolvent had committed any act which constituted an offence under the Act of 1909 or under Sections 421 - 424 of the Penal Code. It did not dawn on the concerned officials as to the purpose of the Act and the Rules. Again, to put it charitably, it was lost on the two officers who functioned as Registrar during such time and the other two who functioned as Official Assignee that the essence of the Act was to protect the person genuinely unable to pay with safeguards therein to scout out the unworthy that take recourse to the insolvency procedure. The concerned officials appear to have abdicated their authority and played along with undeserving debtors seeking to subvert the process.

28. As narrated above, these matters began quietly in court as will appear from an order dated January 11, 2010 requiring the records relating to IC No. 145 of 2008 to be produced. By January 27, 2010 there was a flood of applications for stay or annulment of the order of adjudication relating to the mother and son duo of petitioning-debtors as the creditors gathered more information as to the modus operandi in insolvency matters in this Court; supplementary affidavits poured in on February 2, 2010. The court noticed that the applying-creditors had sought an enquiry into the circumstances relating to IC No. 145 of 2008 and requested the Official Assignee to be present on the adjourned date. The mother and son duo of debtors, sensing danger, quietly withdrew their application for a stay of the criminal proceedings against them on February 2, 2010. The contours of the scheme devised in insolvency matters appeared to be apparent to court by February 15, 2010 when an order in IC No. 199 of 2008 recorded that some startling facts had been revealed by the applying-creditors. The initial recording of something being amiss is reflected in the order of February 15, 2010:

The applicant (creditor) says that there has been an unusual proliferation of insolvency matters, probably resulting from advertisements published in newspapers inviting defaulters in instalment payments or credit card defaulters to apply and obtain orders that would give them relief. The applicant seeks to demonstrate that the workings in the offices of the Official Assignee and the Registrar Insolvency have not been above board.

29. A senior member of the Bar was immediately appointed special officer for the purpose of taking custody of registers and records. The special officer was directed to ensure that the Official Assignee and the Registrar kept apart all petitions and applications relating to insolvency matters filed in the last three years. The Official Assignee and the Registrar were restrained from receiving petitions from debtors and a direction was issued that the judicial officer officiating as Official Assignee be not transferred from his post. By an order dated February 16, 2010, learned Advocate General was requested to appear when the matter was due to be taken up next. The order dated February 19, 2010 noticed the spurt in insolvency cases in the years 2008 and 2009. A direction was issued for the names of the users of the mobile telephones and landlines to be disclosed by the appropriate agencies to the Joint Commissioner (Organisation) of Kolkata police. A notice was also issued to the Bar Council of West Bengal. The Registrar, Original Side, was directed to cause notices to be published in leading newspapers, including two English, two Bengali and two Hindi dailies, inviting all concerned petitioning-debtors to be represented on the adjourned date. The Official Assignee and the Registrar-in-Insolvency were directed to file affidavits to explain the following:

a. The reasons for the sudden spurt in the number of debtors' insolvency petitions filed in Court since April 1, 2008;

- b. The exact extent of adjudication or other official business undertaken by such officials in respect of every application received;
- c. The steps under the Presidency Towns Insolvency Act, 1909 and the Insolvency Rules of this Court taken by such officials and the steps taken to ensure the adherence to the provisions of the Act and Rules;
- d. In particular, the officials should disclose how public examination of the debtors have been conducted and how notices have been issued to the creditors for such purpose;
- e. Any other information that such officials may volunteer to demonstrate how the matters have been approached by them.

30. In course of the several hearings commencing February 26, 2010 a number of the petitioning-debtors appeared and were examined. Krishnendu Sircar, the son in the mother-son combine of debtors, claimed that he was a resident of Northern Avenue in Paikpara, which is beyond the northern extremity of the territorial jurisdiction exercised by this Court on its Original Side, and did not carry on any business since June, 2008. He narrated that he visited the office of the Official Assignee in the Bank shall court premises to file his petition and, after the initial formalities, he presented himself before the Registrar-in- Insolvency in this Court. He claimed to have been in the presence of the Registrar for about 15 minutes when the Registrar asked him questions as to whether the statements made in his application were correct. By the order passed on February 26, 2010 the order of adjudication in IC No. 145 of 2008 was directed to remain stayed since it was evident from Sircar's statement in court that this Court did not have the jurisdiction to receive his petition. On the same day another debtor who had been adjudged insolvent, Biswajit Sarkar, was partially examined. Affidavits were received from the Official Assignee and the Registrar-in-Insolvency and it was noticed, in the second of the two orders passed on February 26, 2010, that public examinations of the insolvents had not been conducted at all and the Official Assignee had claimed that the practice followed was to waive the examination without obtaining any consent from the creditors. The second order recorded that the Official Assignee had referred to a letter dated August 25, 2009 by which he had apparently informed the secretary in charge of the judicial department of the State Government that there may have been something amiss in the manner in which insolvency proceedings were being received.

31. On March 3, 2010, when the matter was next taken up, a number of creditors were examined. The order of such date noticed that the oral evidence of the debtors revealed the palpable irregularity in the procedure. The court expressed anguish at the debtors examined blurting out the same answers, sometimes without the relevant questions having been put to them. A *prima facie* view was taken that the orders of adjudication relating to all the debtors who were examined on such day

appeared to be without basis. All orders of adjudication made by the Registrar-in-Insolvency in debtors" petitions instituted on or after April 1, 2008 were directed to remain stayed. The State was encouraged to investigate into the matter with the caveat that the conduct of the judicial officers was not to be gone into.

32. The next order of March 9, 2010 recorded that some of the papers had been made available by the special officer for being inspected by court. The court's anguish was expressed in the following paragraphs:

There are certain facts which come to light upon inspection. It appears that from or about the year 2008 not one debtor" s application to be declared insolvent has been rejected. That, in itself, is unusual. It is also a matter of concern that there is not a single order available from or about the year 2007 where reasons have been recorded by the Registrar (Insolvency) for adjudicating a petitioning debtor as insolvent. There is a form of the order which is indicated in the Insolvency Rules, but that is the form when the order is drawn up. That there is a form of the order appearing in an appendix to the Insolvency Rules does not absolve the authority adjudicating upon the matter to furnish reasons as to why the petitioning debtor was liable to be declared insolvent. There does not appear to be any application of mind, whether by the official assignee in mechanically forwarding the matters to the Registrar (Insolvency) or by the Registrar (Insolvency) in mechanically passing orders according to the form. There is no application of mind in either case, far less the application of any judicial mind in respect of a judicial matter that has been delegated to the Registrar (Insolvency) by the Chief Justice of this Court under the provisions of the Presidency Towns Insolvency Act, 1909.

In fact, as to whether the petitioning debtors were entitled to invoke this jurisdiction appears to be in serious doubt in almost all cases. Permanent addresses of the petitioning debtors have been mentioned in the petitions. Temporary addresses have been indicated and there does not appear to be any attempt either by the Official Assignee or by the Registrar (Insolvency) to ascertain the veracity of the assertion contained in the petitions that the petitioning debtors were residents or worked for gain or carried on business within jurisdiction. The factual basis for invoking the territorial jurisdiction of this Court seems not to have engaged the attention of either the Official Assignee or the Registrar (Insolvency).

33. It was noticed in the same order that during the relevant period from the year 2008 there were two officers who officiated as Registrar-in-Insolvency and two judicial officers who had manned the post of the Official Assignee. All four were directed to file affidavits to justify the manner in which they dealt with the petitioning-debtors" applications for being declared insolvent. The order instructed the four officers to "attempt to dispel the doubts that obviously arise as to the manner in which the debtors" petitions were approached and adjudicated ..." .

34. In course of the inspection of the records it was noticed that one Anil Kumar Mahensaria, the petitioning-debtor in IC No. 19 of 2007, had substantial debts including to the Joint-Director General of Foreign Trade for several crores of rupees. Mahensaria was subsequently represented in the proceedings and even applied for the order of adjudication in his case to be resurrected. Such request was declined and an appeal was carried therefrom. In the appellate court order of May 13, 2010 in APOT No. 298 of 2010, GA No. 1612 of 2010, it was directed that the proceedings initiated in relation to IC No. 145 of 2008 would remain stayed in so far as it affected Mahensaria. In the wake of such appellate direction, Mahensaria's matter has been delinked from the present group of matters and has been placed in the list to be taken up separately. By a subsequent order of March 30, 2010, in exercise of the powers conferred, inter alia, by Section 87 of the Act of 1909, the court directed that since the Registrar had been restrained from taking up matters of adjudication, fresh applications received from debtors were to be processed by the Official Assignee and forwarded to court for them to be dealt with the Judge assigned insolvency matters. On April 28, 2010 leave was given to all debtors affected by the order staying the orders of adjudication to apply for vacating the stay. Leave was also given to the four officials to be represented in the proceedings. The two judicial officers who had functioned or continues to function as Official Assignee have subsequently been represented in court; the two officials of the department have neither appeared in person nor otherwise been represented.

35. The State has obtained inspection of the records, both from the special officer and from the Registrar-in-Insolvency. Copies of the records sought have also been permitted to be taken by the State for the purpose of the investigation. Some original records have also been allowed to be temporarily taken out and returned later for detailed examination by the investigating agency particularly relating to the handwriting and signatures.

36. It is now necessary to notice what the four concerned officials have had to say in their affidavits. Abhijit Chakravarty, the present Registrar-in-Insolvency, has filed two affidavits, one affirmed on February 26, 2010 and the other on March 22, 2010. At paragraph 3 of his first affidavit he says that all records relating to the insolvency proceedings have been taken away by the special officer and, at the time of preparing the affidavit, he did not have copies of the records "that would allow me to answer with any particular any of the queries formulated by His Lordship." With such caveat in place, the said Registrar dealt with the five counts specified in the order dated February 19, 2010. Chakravarty says that he has been in office since August 1, 2008 and he did not know why the incidence of insolvency petitions had risen since April 1, 2008. In his first affidavit, Chakravarty says that the procedure as known to him is that a debtor seeking to be adjudged insolvent would first require to approach the office of the Official Assignee whereupon "if the debtor satisfies the Official Assignee," a fee of Rs. 50/- is taken from the debtor and the debtor is required to prepare a document in accordance with Form No. 7A of the Rules

affirmed the same and file it in the computerised filing section for a number to be assigned to the petition. The petition would thereafter be placed before the Registrar-in-Insolvency when the Petitioner was required to present himself before the Registrar. As Registrar, Chakravarty says he would first ascertain the identity of the Petitioner from a suitable document and, upon being satisfied as to the identity, would consider the following:

- a. Whether the case fell within the jurisdiction of the Hon"ble High Court on the basis of where the debtor has ordinarily resided and/or carrying on business or had a dwelling house within one year immediately before presentation of the said application.
- b. Whether the debt and/or debts alleged to be due by the debtor amounts to or exceeded Rs. 500/- or was less than that.
- c. Thereafter I would check whether the originals of the receipt for payment of Rs. 50/- to the Official Assignee (and/or his department) and the Certificate Issued by the Official Assignee referred to in paragraph 8(i) of this affidavit, accompanied the said applications as Annexures.

37. As to the steps taken in terms of the Act and the Rules, it appears that his understanding was that he was only required to cause a copy of the order of adjudication to be sent to the Official Assignee and it was for the Official Assignee to take further steps in the matter. He claims that his next responsibility would arise after the publication of the advertisement in the Gazette or, in the absence of the advertisement, to file a memorandum in such regard sent by the Official Assignee. He informs that since he took over neither was any issue of the Calcutta Gazette containing any advertisement nor was any memorandum in lieu thereof forwarded to him by the Official Assignee but he did not enquire in writing as to why the ordained procedure was not followed. His first affidavit reveals that he was aware of the requirement that a schedule of affairs needs to be submitted by each insolvent but, "in reality however, many such schedules of affairs in case of many such debtors have not been submitted/filed." He suggests that his subsequent authority to take up the matter would have arisen upon any request by the Official Assignee but he did not "remember receiving any application for annulment or discharge during my tenure till today." He has stated that during his tenure there has been no public examination of any insolvent, though it was the duty of the Official Assignee to make an application in such regard. He says he does not remember any application for such purpose having been made to him by the Official Assignee. At paragraph 11 of the first affidavit Chakravarty has tendered his "unqualified apology if it is found that I have been negligent." He has complained of the Insolvency Department in this Court being severely under-staffed.

38. In his second affidavit, Chakravarty has repeated the procedure that he apparently inherited and the manner he went about assessing the petitions placed

before him. He has relied on Rules 74 and 94 of the Insolvency Rules of 1910. His understanding of the relevant provisions was that on a debtor's petition to being declared insolvent "an adjudication order had to be made forthwith ... without requiring any further proof of the allegations except that the debtor has affirmed it to be true ..." He has contrasted the assessment required in taking up debtor's petitions with the considerations relevant to assess a creditor's petition and his second affidavit speaks of his understanding that he was "required to pass ... an "adjudication order" and not judgment containing reasons for the order."

39. N.K. Ghosal, the present Official Assignee, has affirmed two affidavits on February 25, 2010 and on March 22, 2010. He has detailed his understanding of the procedure and has claimed that the public examination of insolvents was waived u/s 106 of the Act of 1909 though Section 106 applies only to small insolvencies and the wording of it makes it clear that it would only be the court (meaning the Judge and not any Registrar) who would have the authority to waive any public examination. He has complained of being saddled with several duties, including as Administrator General and Official Receiver, in addition to being the Official Assignee. His first affidavit speaks of his having noticed posters soliciting adoption of the insolvency procedure to be rid of claims by creditors. He says that he had written letters on August 25, 2009 and September 14, 2009 to the Judicial Department of the State Government to draw attention to the insolvency procedure "being used as a weapon of misappropriation of public money." Though the State Government had initially indicated that such letters were not in its records, a recent affidavit has acknowledged receipt of both the letters. The second affidavit used by the present incumbent as Official Assignee points out that the Official Assignee is not vested with any authority to allow or reject any petition relating to insolvency and that the Official Assignee had no occasion to undertake any adjudication or record any reasons in respect of any matter.

40. Moloy Marut Banerjee, the other judicial officer who had officiated as the Official Assignee during the relevant period, says in his affidavit that though he assessed the veracity of the statements contained in debtor's petitions as to jurisdiction, he "had no authority under the law for verifying the veracity of the assertion contained in the debtor's application ..." At paragraph 9 of his affidavit, it is said in connection with IC No. 145 of 2008 that "the banks and financial institutions also remained silent for a considerable period of time and it does not appear that they approached this Hon'ble Court for any order of annulment before 11.1.2010 or for creditors meeting or for discovery of insolvents property."

41. Tapan Kumar Chandra, who was Registrar-in-Insolvency during the relevant period till July 31, 2008, has referred in his affidavit to the authority delegated to the Registrar u/s 6(1) of the Act of 1909. It is his understanding that public examinations of debtors are to "be held in open court and not in chambers and ... the power to hold public examination of Debtors is outside the power of the

Registrar-in-Insolvency." Chandra has referred to Rule 74(1) of the Insolvency Rules which provides, "where a petition is filed by a debtor the Court shall forthwith make an adjudication order thereon." He claims that since the department would scrutinise the petitions and they would be placed before him only if they were in proper form, he was governed by Rule 74(1) to immediately make an order of adjudication if there was no negative report from the Official Assignee or the Insolvency Department.

42. On behalf of Citi Bank the history of the law on this branch has been sought to be placed. Several passages have been referred to from Mulla on the Law of Insolvency in India (3rd Ed.). The venerable author says that the first-known rules for recovery of debts in this country were contained in the Manu Samhita. In the olden days a claim by a creditor against a debtor in this country would be carried to the king and, after the proof of the debt, the king would cause the money to be realised from the debtor and make over the same to the creditor. The procedures adopted in other jurisdictions have also been recounted. In Roman law the only remedy of a creditor whose debt was admitted or who had obtained a judgment upon his debt was to levy execution against the debtor's person. If the latter did not pay his creditors within the specified time, the creditors were at liberty to cut the debtor's body into pieces. Roman law later developed to devise a mechanism whereby the property of the debtor could be seized and sold but such procedure was to apply only in some specified cases. The origin of bankruptcy proceedings is seen in the introduction of the procedure known as cessio bonorum in or about 48 BC which enabled a debtor to become a bankrupt on his own petition by surrendering the whole of his property to his creditors. He was thus relieved of the liability of arrest but his subsequent acquisitions remained open for adjustment against his debts except such amount as was necessary for his subsistence. The Act of 1909 in this country was preceded by the Indian Insolvency Act, 1848. The later Act was based on the bankruptcy laws in England. Mulla says that the primary defect of the previous Act was that it was more for the benefit of the debtors than for the benefit of the creditors. Even while presenting the Tagore law lectures in 1929, Mulla suggested that though the law relating to insolvency required modification, no amount of legislation could "do any substantial good unless a change is made in what may be called the subsidiary machinery for the administration of the insolvency law in India." The visionary warned that unless necessary reform was introduced, "the insolvency Court will continue to be a place of pilgrimage for debtors to enter at one door with offerings of debts for the god residing in it, and to depart at the other door, discharged from all their debts and all their sins."

43. Apart from the provisions of the Act of 1909 and the Insolvency Rules being copiously placed by the creditors, several judgments have also been carried by them. The judgment reported at Kumarathal Vs. Balasubramania Gounder and Others, has been placed for the proposition that an adjudication has to be only upon relevant facts being noticed and a decision being rendered thereon in consonance

with the provisions and the scheme of the Act. A judgment reported at AIR 1947 All 383 District Board, Bijnor v. Mohammad Abdul Salam has been relied upon for the recognition by the Division Bench therein that the law relating to bankruptcy in this country, as in England, is essentially the creation of statute and is founded on the Roman principle of cessio bonorum which means the surrender by the debtor of all his goods for the benefit of his creditors in return for immunity from process. In the judgment reported at [In Re: Prafulla Chandra Mitra](#), it was observed that a petitioning-debtor has to come to court with utmost candour. The creditors rely on the judgment to suggest that if the entire process is seen to be for the benefit of creditors, the machinery involved in this Court should have been alive to ensure that the creditors' interests were protected. The creditors say that the perfunctory manner in which the insolvency petitions were undeservingly decorated with immediate orders of adjudication and the failure of the machinery of this Court to ensure adherence to the stringent provisions of the statute suggest that the officials acted in derogation of the mandate and the purpose of the Act.

44. Another judgment reported at AIR 1923 Cal 703 (Re: Ballav Chand Serowgee) has been cited to demonstrate that there is a judicial exercise that is required to be performed at the time of adjudication. The creditors refer to a judgment reported at [Sidick Haji Husein Vs. The Official Assignee of Bombay](#), Bombay to show the extent of exercise of the judicial power to assess a debtor's petition and the seriousness with which such matters should be attended to. A judgment reported at AIR 1917 Cal 117 Malchand v. Gopal Chandra Ghoshal is next placed for the proposition that whether a petitioning-debtor ought or ought not to be adjudicated as insolvent needs to be determined on the basis of the material presented by the debtor and the assessment thereof in the context of the prevailing law. The Division Bench in that case held that it is not obligatory to allow an application in insolvency merely because the debtor satisfies certain conditions specified in the statute; it is the duty of the court to consider whether the application for insolvency constitutes an abuse of the process of court.

45. The proliferation of debtors' petitions in the last few years, the unthinking manner in which orders of adjudication have been made thereon for the asking and the failure of the system to protect the interests of the creditors warrant an annulment of all the orders of adjudication passed on debtors' petitions instituted on or after April 1, 2008. Two of the applications, GA No. 990 of 2010 and GA No. 991 of 2010, involve orders of adjudication of March 17, 2008. Since the debtors in the said two insolvency matters have not appeared to contest the prayer for annulment of the orders of adjudication despite service, the two orders of adjudication in these two cases are also annulled. In view of the appellate court direction, the matter relating to Anil Kumar Mahensaria (IC No. 19 of 2007) is not considered here and such debtor's application for recalling an order staying the order of adjudication passed on his petition has been required to appear on a future date. It is recorded that though some of the debtors covered by the advertisements issued pursuant to

directions of court had appeared at the initial stage and some of them were examined in court, none of the debtors has appeared to contest at the final stage of the hearing. It is made clear that it will be open to all debtors who had obtained orders of adjudication on petitions filed on or subsequent to April 1, 2008 to apply afresh for the matters to be considered on merits.

46. The creditors have made several suggestions as to the modification of the procedure in insolvency matters and some of them have been endorsed by the State. One of the principal suggestions is that, like in probate proceedings, the orders of adjudication may be prepared by the Registrar-in-Insolvency but placed before the Judge taking insolvency matters for the orders to become effective only upon the Judge's signature. It has also been suggested that the Insolvency Rules should be amended to provide for a notice to all creditors prior to the order of adjudication being made with an additional power conferred on the Judge taking insolvency matters to grant a stay of limited duration in the matter of the prosecution of civil proceedings by creditors till the order of adjudication is made. It has also become necessary that the particulars that ought to be furnished by a petitioning-debtor should be revised in the rules so that the genuine debtor is afforded the relief and the unworthy fails to clear the hurdle. In any event, the existing rules are dated and need modification to bring them closer to the times.

47. Since the matter of reframing the rules or reconsidering them is within the exclusive domain of the Hon'ble the Chief Justice, let a copy of this judgment be placed forthwith by the Registrar, Original Side, before the Hon'ble the Chief Justice for his consideration. For a period of a year from now, unless new insolvency rules are put in place by then, all orders of adjudication on debtors' petitions should be made by the Judge taking insolvency matters with the preparatory work therefore being carried out by the Official Assignee and the Registrar-in-Insolvency. If it is deemed unnecessary for new or modified insolvency rules to be put in place within a year from date, the procedure under the existing rules, including the Registrar-in-Insolvency making the orders of adjudication, will come back in force. At any rate, orders of adjudication have to be made upon the application of judicial mind and reasons in support thereof have mandatorily to be furnished if the Registrar-in-Insolvency makes such orders.

48. As would appear from the nature of the allegations levelled by the creditors, there may have been a dishonourable scheme that may have been devised by certain persons for conferring undeserving benefits on debtors unwilling to pay. The State should take every measure possible to complete the investigation expeditiously and take appropriate steps against those who may be found to have been involved. It will also be open to the investigating agency and the State to institute appropriate proceedings against all concerned upon complying with the requisite formalities. Though the culpability or the lack thereof on the part of the four concerned officials will be ascertained in course of the investigation, it is

inescapable that there was dereliction of duty on the part of the four officials, irrespective of whether they were or were not involved in something more sinister. For such officials" failure to discharge their duties in accordance with the applicable law and procedure, the authorities exercising superintendence over these officials should take appropriate steps in accordance with law. The finding that these officials have been found to have not discharged their duties and obligation in accordance with law should find place in their career records.

49. The matters that came to light in course of the present proceedings cannot be seen in isolation of the general goings-on in the society. Debtors exasperated by overzealous methods adopted by creditors may have been driven to some corrupt persons who had devised a scheme to subvert the system. It is a commentary on the times that there were open advertisements, complete with telephone numbers that invited debtors to rid themselves of their debt burden by abusing the legal machinery, and yet it escaped the attention of those responsible for the sanctity of the system. Even more worrying is the fact that letters were addressed by the Official Assignee to the Judicial Department (the existence whereof was initially denied but subsequently admitted) and no initiative was taken to make any inquiry.

50. Since the matter pertains to the subversion of the process of this Court, the State will be obliged to next report on the state of the investigation into the matter to the Judge taking insolvency matters within six weeks from date. If it is found that the investigation has not progressed satisfactorily, appropriate steps may be taken to direct the investigation to be taken up by another agency. A copy of this judgment be immediately forwarded to the office of Learned Advocate-General for onward transmission to the investigating agency.

51. The petitions in IC No. 145 of 2008, IC No. 678 of 2009, IC No. 199 of 2008, IC No. 63 of 2009, IC No. 412 of 2009, IC No. 34 of 2009, IC No. 50 of 2009, IC No. 149 of 2009, IC No. 191 of 2009, IC No. 206 of 2009, IC No. 318 of 2009, IC No. 9 of 2008 and IC No. 10 of 2008 are dismissed and orders adjudication made therein are all set aside. All insolvency petitions filed by debtors on or after April 1, 2008 are also dismissed and the orders of adjudication made therein are set aside. All concerned debtors will have liberty to file afresh in accordance with law.

52. The special officer and the joint special officers will stand discharged upon the return of the records of the Registrar-in-Insolvency that the State was permitted to obtain. The records should be returned within a period of a week from date, if not already returned. Each of the applying creditors will pay 300 GM towards the final remuneration of the special officer and 150 GM each towards the final remuneration of the joint special officers.

53. The embargo on the present Official Assignee being transferred from his post is lifted, but any future assignment should be considered in the light of the finding recorded against such judicial officer.

54. GA No. 104 of 2010, GA No. 130 of 2010, GA No. 20 of 2010, GA No. 134 of 2010, GA No. 135 of 2010, GA No. 481 of 2010, GA No. 482 of 2010, GA No. 290 of 2010, GA No. 1629 of 2010, GA No. 442 of 2010, GA No. 409 of 2010, GA No. 410 of 2010, GA No. 432 of 2010, GA No. 433 of 2010, GA No. 434 of 2010, GA No. 435 of 2010, GA No. 436 of 2010, GA No. 548 of 2010, GA No. 991 of 2010, GA No. 1220 of 2010 and GA No. 990 of 2010 are disposed of accordingly without any order as to costs.

55. The applying creditors or any of them may mention the matter six weeks hence before the Judge then taking insolvency matters to ensure that the report on the state of the investigation is furnished before the Court for consideration of the future course of action.

56. Urgent certified photocopies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.