(1924) 05 CAL CK 0009

Calcutta High Court

Case No: None

In Re: Ex parte Harsukdas Balkissendas — APPELLANT

Vs

RESPONDENT

Date of Decision: May 9, 1924

Acts Referred:

- Presidency Towns Insolvency Act, 1909 - Section 13

Citation: 83 Ind. Cas. 941

Hon'ble Judges: C.C. Ghose, J

Bench: Single Bench

Judgement

C.C. Ghose, J.

This an application for an order that the firm of Chowdhury & Co., may be adjudicated as insolvents.

2. The facts which have been opened before me by learned Counsel who appeared in support of the application areas follows : On the 21st August 1923 a decree was obtained in Suit No. 2239 of 1923 by Messrs. Harsukdas Balkissen-das who are the petitioning creditors for a sum of Rs. 10,000, being the amount due on a hundi executed on the 4th May 1923 by Messrs. Chowdhury & Co. In. execution of the said decree, the decree-holders applied for leave to attach certain properties belonging to the judgment-debtors and then in the hands of Mr. R.N. Mitter, Barrister-at-law, who had been appointed Receiver in another suit of the assets belonging to Messrs. Chowdhury & Co. On or about the 29th November 1923, the Receiver was served with a notice requiring him not to part with certain articles of furniture which had been attached by the decree-holders in execution of the said decree, until the further orders of this Court. The attachment was levied on the 30th November 1923. On the 13th December 1923, the decree-holders applied for and obtained an order from this Court to the effect that the Sheriff might be at liberty to remove the said articles of furniture for sale thereof. The Receiver on coming to know of this order,

applied to this Court, on notice to the decree-holders'' Attorneys, for an order staying the removal of the said articles of furniture. Thereupon after hearing the Receiver as well as the decree-holders'' Attorneys, an order was made staying the removal of the said articles of furniture and giving leave to the Receiver to pay the amount of the decree by two instalments, that is to say, a sum of Rs, 5,000 was to be paid within ten days from the said 13th December 1923, and the balance of Rs. 5,000, within three weeks therefrom. The Receiver failed to pay the first instalment of Rs. 5,000, as directed by the last mentioned order but what he did was this--he wrote through his Solicitors on the 22nd December 1923, to the decree-holders'' Attorneys, enclosing a cheque for Rs. 5,000 dated the 2nd January 1924. The decree-holders'' Attorneys, in acknowledging the receipt of the letter and of the said cheque, pointed out that the Banks were open on the 28th and 29th December 1923, and they regretted that the Receiver had not carried out the terms of the order of the 13th December 1923. The decree-holders'' Attorneys, however, kept the cheque with them without prejudice to their client''s right to contend that the order of the 13th December 1923 had not been complied with. The Receiver did not take any further action till the 12th January 1924 when he sent to the decree-holders'' Attorneys a sum of Rs. 5,500 in Government Currency Notes and asked that the attachment should be forthwith removed. Prior to this, an application had been presented to this Court on behalf of Messrs. H.V. Low & Co., Ltd., praying for the adjudication of the firm of Chowdhury & Co., as insolvents. The Receiver came to know of this application on the 11th January 1924, and lie thereupon interviewed Rai Bahadur Suklall. Karnani, who, I am informed, owns the controlling interest in Messrs. H.V. Low & Co., Ltd., and an adjustment of the claim of Messrs. H. V; Low & Co; Ltd., was effected. Thereupon on the 15th January 1924, Messrs. H.V. Low & Co. Ltd., instructed their Attorneys to withdraw the petition which had been filed on behalf of Messrs. H.V. Low & Co., Ltd., praying for the adjudication of the firm of Messrs. Chowdhury & Co., as insolvents. The decree-holders, on coming to know of this move on the part of Messrs. H.V. Low & Co. Ltd,, wanted to be substituted on the 15th January 1924, in place of Messrs. H.V. Low & Co., Ltd. But ultimately on the 18th January 1924, the decree-holders presented the present petition which was made returnable on the 21st January 1924. Meanwhile, the attachment in execution of the decree in Suit No. 2239 of 1923 not having been removed, the Receiver made an application in the said suit for an order that the decree-holders be ordered to receive from the Receiver the sum of Rs. 10,000, being the amount of the decree, or in the alternative, the Receiver should be given liberty to deposit in Court the sum of Rs. 10,000 to the credit of the said suit and. that upon such deposit or payment being made, the attachment should be removed. The last mentioned application (notice whereof had been given for the 21st January 1924) was disposed of by me in Chambers on the 25th January 1924 (the formal judgment being-delivered on the 30th January 1''924) when I ordered that the Receiver should have liberty to deposit to the credit of Suit No. 2239 of 1923 the entire amount of the decree with interest at the rate, provided for by the decree from the date of the decree up to the 30th

January 1924, together with all costs,, charges and expenses, as provided for in Rule 20, Chapter XVII of the Rules of this Court and that the Receiver should have liberty to pay in a further sum representing interest on the decretal amount for a period of three months from the 30th January 1924, at the then rate, namely, 8 per cent. It was also ordered that the decree-holders should not be entitled to withdraw any portion of the moneys paid in by way of interest on the decretal amount from the 30th January 1924, without the further order of this Court. The Receiver, in accordance with the said order, paid in the entire amount of the decree with interest as specified above into the hands of the;Sheriff. There was another decree which had been obtained in Suit No. 2339 of 1923 by the petitioning creditors on the 3rd December 1923, for Rs. 7,500 against the firm of Chowdhury & Co. The judgment-debtors through the Receiver offer- ed to pay this sum of Rs. 5,000 to the decree-holders on the 23rd January 1924. This offer was refused and, subsequently, the Receiver applied to this Court on the 28th January 1924 to bring the said :sum of Rs. 7,500 to the credit of the said Suit No. 2339 of 1923.

3. As I have said, the present application for the adjudication of the judgment-debtors as insolvents, was presented on the 18th January 1924, and in paragraph 6 of the petition the following act of bankruptcy on the part of the judgment-debtors is relied upon for the purposes'' of an order u/s 10 of the Presidency Towns Insolvency Act, adjudging the judgment-debtors as insolvents, namely, that the said firm has allowed the moveable properties situate at their place of business at No. 8, Old Court House corner, to remain under attachment since the 30th November 1923 in execution of a decree obtained by Messrs. Harsukdas Balkissendas against the said firm in Suit No. 2239 of 1923."

4. In opposition to the present application the judgment-debtors have filed a number of affidavits and in reply to which, the applicants have filed certain affidavits. On behalf of the petitioners, it was argued before me that they were entitled to require the deponents to attend and to cross-examine at any rate, Nilmoney Chowdhury, who is a member of the firm of Chowdhury & Co., and who had filed an affidavit in opposition. Sir B. C. Mitter who appeared as the leading-Counsel for the petitioners stated that he would be content if an opportunity were given to cross-examine Nilmoney Chowdhury. I directed that Nilmoney Chowdhury should attend accordingly. Nilmoney Chowdhury attended before me and was cross-examined at very great length. He was ill for a considerable time and owing to his illness the cross-examination had to be put off for several weeks. This and the fact, that I was absent from Court on leave for 32 days in February and March, are responsible for the delay that has taken place in disposing of this matter.

5. This application has been pressed with very great vigour, but on behalf of Messrs. Chowdhury & Co., the learned Acting Advocate-General has contended that the particular act of bankruptcy-relied upon by the petitioning creditors, who are the

decree-holders, is of no avail to them, because before the expiry of the period of three weeks from the 30th November 1923 which was the date of attachment, an application had been made by the Receiver on the 13th December 1923 and an order had been obtained thereon in the presence of the decree-holders'' Attorneys, staying the removal of the articles of furniture which had been attached and giving leave to the Receiver to pay in the amount of the decree by certain specified instalments It is argued that the order of the 13th December 1923 was if not actually an order by consent, as a matter of fact, accepted by the decree-holders and was acted upon by them. The first instalment of the monies payable was due on the 23rd, December 1923; but as the Receiver was leaving town on the 22nd December 1923 and as the Courts would not re-open after the Christmas holidays till the 2nd January 1924, the Receiver sent a cheque on the 22nd December 1923 for Rs. 5,000, being the amount which would fall due on the 23rd December 1923, but he made the cheque payable on the 2nd January 1924. This cheque, according to the learned Acting Advocate General, should not have been retained by the decree-holders, if, as a matter of fact, they had decided not to wait till the 2nd January 1924 for the purpose of cashing the cheque and not to act upon the order of the 13th December 1923. The second instalment became due on the 12th January 1924 and on that date a sum of Rs. 5,500 in cash was tendered to the decree-holders'' Attorneys, but the latter refused to receive the same. Difficulties were created thereafter and on the 14th January 1924 a sum of Rs. 10,000 in cash was tendered to the decree-holders but was not received by them. In these circumstances, the learned Acting Advocate-General has contended that the decree-holders could not avail themselves of the fact of the judgment-debtors'' properties having been attached for a period of not, less than 21 days in execution of the decree of this Court for the payment of money u/s 9 (e) of the Presidency Towns Insolvency Act. In the second place, he has further argued that two courses were open to the decree-holders, i.e., either to take the money or to proceed with the sale and that assuming that there was any default in the payment of the decretal amount, the default was on the part of the Receiver and that there was no default on the part of the judgment-debtors. Thirdly, it has been contended that at any time, from and after the 25th January 1924, (that being the date of my order giving liberty to the Receiver to deposit to the credit of Suit No. 2239 of 1923 the entire amount of the decree with interest) the decree-holders could have withdrawn the decretal amount from Court and could have entered satisfaction of the decree, without incurring any risk of being called upon to refund the same, and that if they had done so, no question of the decree-holders '' having been given or allowed fraudulent preference could have been raised by any other creditor. It is, therefore, contended that the persistence of the decree-''holders in proceeding with the present application can only be accounted for on the assumption that the decree-holders are animated with an ulterior object in trying to have the judgment-debtors adjudged as insolvents.

6. Now, u/s 13 of the Presidency Towns Insolvency Act, the Court is bound to require proof of the debt of the petitioning creditor and of the act of insolvency alleged in the petition or if more than one act of insolvency is alleged in the petition, some one of the alleged acts of insolvency. It is further laid down in that section that the Court shall dismiss the petition if it is not satisfied with the-proof of the debt of the petitioning creditor or of the act or acts of insolvency alleged in the petition, or if the debtor appears and satisfies the Court that he is able to pay his debts, or that he has not committed an act of insolvency or that for other sufficient cause, no order ought to be made. It seems to me, therefore, that if I am satisfied about the debt of the petitioning creditor and about the particular act or acts of insolvency alleged in the petition of the creditors, I ought to make the order asked for, unless there-are materials before the Court showing that the present bankruptcy proceedings are being used for the inequitable purpose of extortion or of exercising improper pressure over a debtor or are of such a nature as come within the category of proceedings which are vexatious or oppressive or constitute an abuse of the process of the Court. If I am right in the view I take of the provisions of Section 13 of the Presidency Towns Insolvency Act namely that I ought to confine myself to the particular act of insolvency alleged in the petition, (and be it noted that only one act of insolvency is alleged in the petition) then I do not think it is incumbent upon me to embark upon a long and roving enquiry into the general financial,. condition of the judgment-debtors. It is. quite true that I allowed the principal member of the firm of Messrs. Chowdhury & Co., to be cross-examined at length before me. I did this because if a different view of the scope and effect of Section 13 of the Presidency Towns Insolvency Act be taken hereafter, it would probably be found convenient to have all the materials on record in order to enable judgment to be pronounced.

7. Now, because of the importance with which this case has been invested at the instance of the petitioning creditors, and of the unusual vigour shown by them, I have retained a clear recollection of every thing that has taken place in respect of this matter since the 13th December 1923. On the morning of. that date Mr. Sen,. Attorney for the decree-holders, made an application in Chambers an obtained an order from me that the Sheriff be at liberty to remove the articles of furniture which had been attached and which were in the possession of the Receiver, to the Court house for sale thereof. At the time I made the order, the Receiver was not present in Court, but he came to know subsequently of the fact that I had made this order. Thereupon,. later, on the same day, the Receiver mentioned this matter to me and asked that the order which I had made in the morning might be stayed. I said that I could not make any order, varying the order which I had made in the morning, in the absence of the decree-holders. The Receiver then went and fetched the decree-holders'' Attorney Mr. Sen. Thereupon, in the presence of the Receiver and of, Mr. Sen, and without any objection on the part of Mr. Sen, I made the order staying the removal of the said articles of furniture and giving leave to the Receiver

to pay the decretal amount by certain instalments, as hereinbefore recited. It is true that the order was not made by consent; but if it had been objected to by Mr. Sen, I would not have made the order. Now, if the Receiver knew his business and had been possessed of ordinary care and diligence, this application could not have been presented; but, be that as it may, I am clearly of opinion having regard to the events which happened subsequently and which I have briefly summarised as above, that the decree-holders certainly acquiesced in my order of the 13th December, 1923, and were trying to act, if indeed they were not acting, on the said order. It is, therefore, in my opinion, not open to the petitioning creditors to hark back to the order of attachment of the 30th November 1923 and make that the foundation of an act of bankruptcy u/s 9 (e) of the Presidency Towns Insolvency Act. In my judgment a creditor, who has acted in any way which would be equivalent to an assent, recognition or approval of a certain arrangement, or who had taken advantage or was willing to take advantage of the arrangement described in my order of the 13th December 1923, in order to realize the moneys due to him without recourse in the first instance being had to the attached properties being put up for sale, should not be allowed to turn round and proceed in bankruptcy as if \\ there had been a clean slate from the start. It is undeniable that the jurisdiction in bankruptcy is entirely discretional. And in exercising this discretion I am bound to look into the circumstances as a whole. No doubt, it is perfectly true that a creditor who takes legitimate steps for enforcing payment of the debt due to him is entitled, if his demands are not satisfied, to proceed in bankruptcy; but on the other hand, if as a matter of fact, indications are not wanting on the affidavits on record, which show that the present proceedings in bankruptcy and the persistence in them are spiteful, that in itself is a sufficient cause for refusing on the petition of the creditors to make an adjudication order. It is said that having regard to the decision Ex pa He Lows (1890) 62 L.T. (N.S.) 263 : 38 W.R. 560 : 7 Morrell 25 the petitioning creditors could not be called upon to accept payment of the decretal amount inasmuch as the attachment had continued for a period of not less than 21 days. Now, no doubt, after the committal of an act of bankruptcy and pending the period during which such an act is available for adjudication, a creditor, who is aware thereof, is, under ordinary circumstances, justified in declining to receive payment of his debt from the debtor and may proceed to present his petition. The rule, however, is not an inflexible one, because circumstances may exist which would justify the Court in refusing to make an adjudication order after a tender to the petitioning creditor of his debt and costs. See in this connection the cases of Exparte Brigstoke (1877) 35 L.T. 831 : 46 L.J. Bk. 50 : 4 Ch.D. 348 : 25 W.R. 265 and Brook v. Emerson (1906) 95 L.T. 821. Now, if nothing else had happened in this case, perhaps it might have been maintained that the creditors were justified in the action they took; but where, as in this case, there was real and tangible pressure on the part of the creditors by means of attachment of the judgment-debtors'' moveable properties, and which pressure was bound to exercise an appreciable influence upon the minds of the judgment-debtors and thus would have rendered their principal motive not the view

to prefer, the transaction, if it had happened, namely, the satisfaction of the debt by the judgment-debtors and the receipt of the decretal amount by the creditors, could not, in my opinion have been considered a fraudulent preference and could not have been set aside at the instance of any other creditor. And I am certain that,'' from at any rate, the 25th January 1924 when I gave leave (vide my judgment dated the 30th January 1924) to the judgment-debtors, through the Receiver, to satisfy the decree, it was open to the decree-holders to take the money and to enter-satisfaction of the decree without under going any risk whatsoever. That the decree-holders did not choose to enter satisfaction of the debt is, to my mind, having regard to the entire circumstances of the case, the clearest evidence of malice and spite on the part of the decree-holders. Therefore, I am constrained to come to the conclusion that the present proceedings are vexatious and oppressive and they constitute an abuse of the process of the Court.

8. A great deal has been said about the judgment-debtors being in insolvent circumstances and much time was taken up in discussing it at length The witness Nilmoney Chowdhury who was cross-examined before me, admitted that there were debts; but he stated that his assets amounted to about Rs. 50, 00, 000. Now if I were-not obliged to confine my attention to the particular act of bankruptcy alleged in the petition of the creditors, as I conceive I am I should certainly have taken this circumstance of indebtedness, into my consideration. As I pointed out, the language or Section 13, Sub-section 4 is against the contention that I am bound to look into anything outside the act of insolvency alleged in the petition. Therefore, I do not propose to go into the numerous points or circumstances, to which attention has been drawn during the cross-examination of Nilmoney Chowdhury But I assume I am wrong, even then on the facts disclosed on the affidavits I do not think this is a case in which an adjudication order ought to be made. The only effect of an adjudication order would be that the collieries would not be worked and the assets, which are really more than sufficient, would be destroyed.

9. With regard to the second point taken by the learned Acting Advocate-General, I cannot agree with him that the default such as it was, was not the default of the judgment-debtors. The effect of the order of the 13th December 1923 was that either the judgment-debtors were entitled to pay in the decretal amount by two instalments, or in default, must take the risk of having the attached properties sold by the Sheriff. The Receiver was merely the agent of the parties; but the default, such as it was, was the default of the judgment-debtors.

10. For the reasons given above I refuse the application of the petitioning creditors and direct them to pay the costs.