Ahamed Mahammad Paruk Vs Praphullanath Tagore

Court: Calcutta High Court

Date of Decision: May 7, 1933

Acts Referred: Presidency Towns Insolvency Act, 1909 â€" Section 9(e)

Citation: AIR 1935 Cal 84

Hon'ble Judges: Lort-Williams, J; Lord-Williams, J; Costello, J

Bench: Full Bench

Judgement

Costello, J.
This is an appeal against a judgment of Panckridge, J., dated 22nd August 1933. That judgment was given by the learned

Judge when exercising the Insolvency Jurisdiction of this Court and in connexion with a petition for adjudication, presented by one Praphullanath

Tagore against Ahamed Mahammad Paruk. The petition set out that Paruk was justly and truly indebted to the petitioner to the extent of Rupees

1,05,647-15-9, being the total amount of several decrees which had been obtained by the petitioner in a number of suits, particulars of which are

set forth in para. 2 of the petition. The petition alleged that within three months of the date of the presentation of the petition, Paruk had committed

certain acts of insolvency. They are set forth in this form:

(a) that in execution of the decree obtained by me against the said Ahamed Mahammad Paruk and others for Rs. 10,270-1-9, in Rent Suit No. 2

of 1932, in the Court of the first Subordinate Judge of Faridpur, which was subsequently transmitted to this Court for execution and numbered as

Execution Case No. 18 of 1933, the said premises No. 22, Canning Street, Calcutta, belonging to the said Ahamed Mahammad Paruk were

attached on 11th May 1933, and his Motor Car No. 24843 was attached on 12th May 1933, and these attachments are still subsisting.

(b) that the decree obtained by me in Rent Suit No. 12 of 1932, against the said Ahamed Mahammad Paruk and others in the Court of the First

Subordinate Judge of Backerganj, was executed and numbered as Execution Case No. 9 of 1933 of that Court, and, in the said execution, taluk

named Idrak comprised in touzi No. 813 and taluks comprised in touzi Nos. 4537 and 4688 of the Backerganj Collectorate, belonging to the said

Ahamed Mahammad Paruk and others were attached on 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th April 1933, and the attachment is still subsisting.

2. The act of Insolvency on which the petitioning creditor based his petition, was that the properties of the debtor had been attached for a period

of not less than twenty-one days in execution of decrees of the Court for the payment of money. That is the act of insolvency described in Section

9, Sub-section (e), Presidency-towns Insolvency Act. There seems to be no dispute as regards the fact of the attachment. The answer set up by

Paruk is contained in an affidavit, dated 11th August 1933. In para. 3 of that affidavit, he totally denied that he was indebted to Praphullanath

Tagore in the sum of Rs 1,05,647-15-9 being the total amount of decrees set forth in para. 2 of the petition. He then proceeded to state that the

suits were false suits filed against him, and that ex parte decrees were obtained without his knowledge, fraudulently, in conspiracy and in collusion

with one Maulvi Mahammad Fazlul Karim. The appellant had been denying that the money was payable to the petitioner immediately. Put shortly,

the petition was that Paruk was setting up that all the decrees obtained by Tagore were obtained by him fraudulently and that, consequently, they

were invalid, and there were no debts due from him to the petitioning creditor, and so there was nothing on which the petition could rightly be

founded. The learned Judge, at the hearing of the petition, having expressed himself satisfied as to the fact of attachment, stated:

The situation is however complicated by the fact that debtor has instituted suits to set aside the rent decrees on various grounds. He has obtained

injunctions, restraining the petitioning creditor from further proceeding with the execution of those decrees in respect of which the attachments have

been effected.

3. It appears therefore that the debtor had in fact instituted a number of suits attacking the decrees which had been obtained against him by the

petitioning creditor; and with regard to those decrees which were used for the purpose of constituting acts of insolvency, it is said that he had given

security, no doubt for the full amount which had been ordered to be paid under those decrees. We are now informed that, with regard to one of

them, the suit which was instituted for setting it aside, has been heard and dismissed with the result that the decree in effect has been confirmed.

Seeing that the debtor put into Court a sum of Rs. 10,000 which is sufficient to cover the amount of the decree, it may well be argued, so far as

that decree is concerned, that there is no existing debt, though the authorities go to show that, generally speaking, it is not sufficient to say that the

debtor is in a position to pay the debt but he must show that he will immediately pay the debt, if he wishes to be in a position to say that there is a

security by which he is able to discharge that particular debt. One would think that the right view of the matter is that, so long as a decree is

subsisting, there will necessarily be a debt, unless of course means have been provided for discharging the particular decree. The learned Judge in

his judgment says:

I must attach some importance to the fact that the debtor has taken steps to challenge all the decrees. I must also give weight to the fact that,

although the attachment prima facie constitutes an act of insolvency, yet the petitioning creditor has been restrained from further proceeding with

the execution of those particular decrees, obviously because, as the result of the suit, it may turn out that the petitioning creditor has no claim to the

amount of the decree.

4. [As regards one other decree it has been said that the matter has also already been adjudicated upon but, with regard to that, we have no

precise information before us.] Having taken that view, the learned Judge proceeded to make an order. He says:

I think that all things being considered the fairest order to make is an order for stay u/s 13, Sub-section (6), Presidency-towns Insolvency Act. As

a condition of that stay, the debtor must furnish security, to the satisfaction of the Register, in the sum of Rs. 10,000 within a month. Costs

reserved. In default of such security being furnished there will be an order of adjudication and the petitioning creditor will add his costs to his claim.

5. Against that order the debtor has appealed and the matter is now before us.

6. Two points have been argued by Mr. Page: first of all, he urged that the latter part of the order is such that it was not within the power of the

learned Judge to make, that is to say, Mr. Page was arguing that the matter did not properly fall within the purview of Sub-section (6) of Section

13. That sub-section says this:

Where the debtor appears on the petition and denies that he is indebted to the petitioner, or that he is indebted to such an amount as would justify

the petitioner in presenting a petition against him, the Court, on such security (if any) being given as the Court may require for payment to the

petitioner of any debt which may be established against the debtor in due course of law, and of the costs of establishing the debt, may, instead of

dismissing the petition, stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt.

7. Mr. Page has conceded that the first part of the order made by the learned Judge is unexceptionable. But he says that there should have been no

order providing for adjudication in the event of the debtor not complying with the condition of stay given in the first part of the order. It is to be

observed that obviously Sub-section (6), Section 13 contemplates that there may be a stay for a period and that after that the question shall be

tried out as to whether or not there was such a debt as would found a petition in insolvency. It may be that, in the circumstances of the case, the

learned Judge had justification to postpone the final determination of the matter rather than dismiss the petition. The debtor had denied the debts

because he said that the decrees were invalid by reason of fraud on the part of the plaintiff in the suits. But obviously, unless and until the decrees

are set aside, they must be taken to be good in law. It may be that it would be reasonable to, postpone the question whether or not the debtor

ought to be adjudicated insolvent until after the question of the validity of the various decrees has been heard and determined

8. Mr. Banerjee pointed out to us that question had been determined, in the Court of first instance in Suit No. 2 of 1932. But he has also pointed

out that as regards one of the decrees, namely, in Suit No. 1 of 1933 of the Court of the First Subordinate Judge, Backerganj, its validity has never

been seriously challenged, but, on the contrary, it appears from what is stated in Para. 6 of the affidavit of Ramendranath Basu, dated 14th August

1933, as set out on p. 9 of the paper-book, that the debtor made certain statements in connection with execution proceedings, in the Court of

Small Causes of this city, which would indicate that he recognized the debt under that decree. So far as that decree is concerned, it must, I think,

be taken as binding on him.

9. As regards the debts in the form of decrees, which the debtor is still challenging, we are of opinion that the right form of the order to he made,

when the provisions of Sub-section (6) are being called into operation, is the form of order which was indicated in the case of Rustomji Ardeshir

Cooper v. Madhavji Damodar (1928) 34 B LR 1436. In that case the respondents, who had been the petitioning creditors, had obtained a decree

with costs against the appellant in the appeal Court. The appellant appealed to the Privy Council against the decree. The respondents attached

certain property of the appellant for their taxed costs, but satisfaction not having been made within the usual period they filed an insolvency petition

against the appellant and got an ex parte order of adjudication under Sections 9(e) and 10, Presidency Towns Insolvency Act, 1909. The

appellant applied for a discharge of the adjudication order, contending that the order should not have been made pending his appeal to the Privy

Council, but the Commissioner in Insolvency refused to discharge the order. There was an appeal from him which came before the Bombay High

Court, in its appellate jurisdiction, and it was there held that the order ought to be discharged and that the proper order to be made in the

circumstances of the case was one staying the insolvency petition generally, with ""liberty to apply,"" provided adequate security was given by the

alleged insolvent. The actual provision in Sub-section (6), Section 13 contemplates that there should be a stay for such period as may be necessary

for the determination of the other matters in issue between the parties and that ultimately there shall be a trial on the question relating to the debt.

We are clearly of opinion therefore that the order made by the learned Judge cannot be supported and it must be set aside. By reason of another

point taken by Mr. Page, we think that the whole order should be set aside and not merely altered by excising that part of it which directs

conditional adjudication.

10. The other point taken by Mr. Page is that the petition itself, on which these proceedings were founded, is bad, and therefore no order involving

adjudication could in any case be made. The point relied upon by Mr. Page is that Section 12, Presidency Towns Insolvency Act, sets out the

conditions upon which a creditor can make a petition and in Sub-section (2), Section 12, it is enacted that:

If the petitioning creditor is a secured creditor, he shall in his petition either state that he is willing to relinquish his security for the benefit of the

creditors in the event of the debtor being adjudged insolvent or give an estimate of the value of the security. In the latter case, he may be admitted

as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same way as if he were an

unsecured creditor.

11. The object of that sub-section is of course this: The creditor cannot have it both ways. He has got his security. He must therefore use it to

discharge the debt either wholly or pro tanto according to the value of the security or he must relinquish it. If he retains his security and uses it to

discharge his debt as far as the security goes then if there is any balance remaining unsatisfied he can use that to constitute a debt for the amount of

the deficit for the purpose of founding proceedings in insolvency. In the present case Mr. Page has taken exception to the statement in para. 3 of

the petition. The petitioning creditor, Praphullanath Tagore there said this:

I do not, nor does any person on my behalf, hold any security on the said debtor''s estate or any part thereof for the payment thereof. That the said

money is payable to me immediately.

12. That, says Mr. Page, is an incorrect statement and for the reason that the suits or the decrees which constitute the debt upon which the petition

was founded are described as rent suits,"" or at any rate, the particular suits in connexion with which the attachment relied upon took place, are

described as ""rent suit."" Admittedly all the suits were, in fact for the recovery of arrears of rent. Indeed, I find in the list set out in para. 2 that the

heading of the first column is ""rent suit."" Then follows the numbers of the respective suits and the year in which they were instituted. The petitioning

creditor was the landlord who was suing one of his tenants or a number of co-tenants for rent. Section 65, Bengal Tenancy Act, applies to holdings

in respect of which the suits were brought. Section 65 provides:

Where a tenant is a permanent tenure-holder, a raiyat holding at fixed rates or an occupancy raiyat, he shall not be liable to ejectment for arrears of

rent, but his tenure or holding shall be liable to sale in execution of a decree for the rent thereof and the rent shall be a first charge thereon.

13. By virtue of the provisions of that section, Mr. Page has argued that Praphullanath Tagore is a secured creditor, as regards the debts upon

which he is bringing the insolvency proceedings, because in Section 2, Sub-section (g), Presidency Towns Insolvency Act, ""secured creditor"" is

described as including a landlord who under any enactment for the time being in force has a charge on land for the rent of that land."" Mr. Page says

that the petitioner is a landlord and he has a statutory charge on the property for the rent. He is therefore a secured a creditor and must comply

with the provision of Sub-section (2), Section 12.

14. It seems clear that has not been done. It has been argued by Mr. Banerjee and various authorities have been placed before us in support of the

contention that in this particular instance the landlord is not a secured creditor, in that he has no security because of the fact that he has lost, or at

any rate become disentitled to avail himself of the effect of Section 65, Bengal Tenancy Act, for the reason that Praphullanath Tagore, as regards

some of his suits, at any rate, did not make all the cosharer tenants defendants, but merely picked out the present appellant and sought to make him

solely liable for the whole:rents due. It is to be observed, however that, as regards Suit No. 12 of 1932, it is stated in para. 4 of the petition, which

I have already read, that the decree was obtained against Paruk and others, and Mr. Page has informed us that it appears from the record that

there were in fact a number of defendants in some of the suits at any rate. This does indeed seem to be the case from a statement, made in para. 6

of the affidavit of Ramendranath Basu. It appears that in making the application to the Court of Small Causes, Calcutta in connexion with the

execution proceedings relating to Suit No. 1 of 1933, in the Court of the Subordinate Judge of Backerganj, Paruk said that there were several

other defendants but the plaintiff had chosen to execute the decree against him alone by transferring the decree to this Court.

15. It would therefore seem that there was considerable doubt as to whether or not in all or any of the suits, the plaintiff has in fact lost his right u/s

65 by reason of his not having impleaded all the co-sharer tenants in what he himself described as the rent suits. If they were properly described as

rent suits, it may well be that the plaintiff had indeed a remedy u/s 65, Ben. Ten. Act, and so it would not be correct for turn to say that he had no

security. In connexion with this point we were referred to the correspondence passing between the solicitors of the parties and particularly to a

letter which was written by the present appellant''s solicitors on 3rd May 1933. In course of that letter the solicitors said

our client does not appreciate the nervous anxiety on your client''s part when your client has got as security the property in respect whereof the rent

is due to your client.

16. That clearly was a definite statement indicating that the view of Paruk was that the plaintiff as landlord had gos security by reason of the

provisions of Section 65, Ben. Ten. Act. In reply to that letter of 3rd May 1933, the respondent''s solicitors wrote a letter, dated 8th May 1933,

wherein in no way, did they challenge the assertion of the other side Mr. Page relied upon the case of Moor v. Anglo-Italian Bank (1879) 10 Ch D

681, where Sir George Jessel, M.R. at p. 689, says:

The rule in bankruptcy requires the judicial authority in bankruptcy-the Registrar or the Judge, as the case may be-before he adjudicates a man a

bankrupt, to see that there is a proper unsecured debt in the manner I have explained. But if the adjudication is made without this being looked

into, the only result is that the adjudication is bad, and you may set it aside in due time. It does not deprive the petitioning creditor of anything that I

am aware of, and you must carefully distinguish between the notion of forfeiture and the decisions on the doctrine of election in bankruptcy which

relate to a totally different subject.

17. But I would point out that this passage in the judgment of Sir George Jessel has been strongly commented upon in In re, A Debtor (1922) KB

109, the headnote of which says that:

Where a petitioning creditor had inadvertently omitted to mention in his petition a security which he in fact held, but which had been given many

years ago in respect of another matter, and was admittedly valueless:

Held: that a receiving order made upon the petition was not invalidated by the omission, inasmuch as the Court had power to amend the petition

even after the making of the receiving order.

18. Lord Sterndale, M.R., in that case said:

This case does not present any merits I do not know whether I may deal with a dictum of so great an authority as Jessel, M.R., and say I am sorry

to see such a technical objection raised on the strength of that dictum. The petitioning creditors in their petition omitted to mention a security which

had been given 15 years ago in respect of another matter altogether, which did however in form cover this particular debt. It was a matter of no

importance, but, as the receiving order was made without this security having been mentioned in the petition, it is said that the receiving order is

bad.

19. He goes on to say that the objection was founded upon a dictum of Jessel, M.R., in Moor v. Anglo-Italian Bank (1879) 10 Ch D 681, where

he says

in the next place, I am not aware of any rule in bankruptcy that forfeits the petitioning creditor''s debt.

20. Later on, Lord Sterndale continued:

It is said that dictum goes to this: that if any security be omitted although of no importance or value, any order or proceeding on the petition is bad.

If the learned Master of the Rolls meant his statement to extend to that, I think, with the greatest respect that one must always have for any dictum

of Sir George Jessel, that it went too far. But it seems to me that he never intended it to go so far. The question is, suppose there were an omission

of something of no value, something not affecting the matter in any way, does that make the receiving order altogether bad? I think that in a case

like that Sir George Jessel would himself have said ""No, my dictum was never intended to go so far as that.

21. I respectfully adopt all that Lord Sterndale said, and I agree that if the position was that the petitioning creditor inadvertently, and not

deliberately, omitted to include or mention a security it might not be right that the proceedings should be wholly set aside. In the present case

however no application has been made before us for the amendment of the petition. On the contrary, Mr. Banerjee says that the petition is correct

as it stands. It is either correct or it is very much incorrect. It may well be that the petitioning creditor, as landlord, has a security which covers the

whole of the debts due to him. On the other hand he may have lost that security, either as regards all the decrees or as regards some of them as he

has not made all the persons concerned, parties to the proceedings. The main question for us is whether or not the entire order should be set aside.

There is no doubt that the question of whether there is a debt has been left open by Panckridge, J., and up to now there is no definite finding upon

it.

22. We have come to the conclusion therefore that we should set aside the order in its entirety, not only because it was never contemplated by

Sub-section (6), Section 13, Presidency-towns Insolvency Act, that a conditional adjudication order should be added, by way of sanction, to an

order for furnishing security in connexion with the postponement of the determination of the question as to whether or not there was a debt but also

because we think that the whole of these proceedings may be bad from the start by reason of the statement in the petition as to the petitioner''s

position touching the matter of security for the debts due. Having set aside the order, we direct that the matter go back to the Judge exercising the

Insolvency Jurisdiction, so that he may come to a finding first of all as to whether the petition is in proper shape, particularly having regard to the

statements contained in para. 3 and, secondly, as to whether there are any existing debts upon which an application for adjudication can properly

be based. The learned Judge will, of course, at the same time come to a finding as to whether the acts of insolvency as alleged are sufficient. It will

then be for him either to make an order for adjudication or to dismiss the petition. There was a cross-objection on the part of the petitioning

creditor asking that this order should beset aside and an order of adjudication should be made forthwith by this Court As regards that, the

petitioning creditor has failed to satisfy us and the cross-objection is dismissed

23. We think therefore that the right order to make as to costs is that each party should bear his own costs throughout.

Lort-Williams, J.

24. I agree.