

MANU/BH/0083/1927

Equivalent Citation: AIR1928Pat338, (1928) ILR 7 PAT 375, 107Ind. Cas.830, 107Ind. Cas.830

IN THE HIGH COURT OF PATNA

Decided On: 14.12.1927

Appellants:**Gopal Ram**
Vs.
Respondent:**Magni Ram and Ors.**

Hon'ble Judges/Coram:

Jwala Prasad , L.C. Adami and Stewart Macpherson , JJ.

JUDGMENT

Jwala Prasad, J.

1. This is an appeal against the order of the District Judge of Saran, dated the 25th of September, 1926. passed in an insolvency proceeding. The order runs as follows: "The application for discharge has been made after the date fixed by the Court. The order of adjudication be cancelled and this be published in the Bihar and Orissa Gazette."

2. A preliminary objection has been taken by the respondents that the appeal to this Court is incompetent, and the ground urged is that the appeal comes under Section 75 Clause (3) of the Act under which it was essential for the appellant to obtain leave of this Court to appeal. This would be so if the order of the Court came under Section 43 of the Act, which relates to an annulment of an order of adjudication. Mr. De on behalf of the appellant says that the order of the Court below virtually came under Section 41 of the Act, which relates to the discharge of an insolvent, and that consequently under Schedule. I of the Act no leave of the Court was necessary for an appeal. This contention is based upon the fact that the insolvent's application, dated the 25th September, 1925. related to his discharge. The order of the Court, dated the 21st November, 1926. dealing with this application is a mixed order disallowing discharge of the appellant and cancelling the order of adjudication. True, the petition of appeal and the grounds set forth therein deal practically with the application for discharge and prays that the Court ought to have extended the time for an application to discharge by the insolvent and should have discharged him but the order of adjudication cannot be ignored and this being the case, the appeal would come under Section 43 of the Act and hence the leave of the Court would be necessary. In that case Mr. De relies upon the order of this Court, dated the 8th December, 1926. and says that when the Bench presided over by Mullick, A.C.J. and Sen, J, admitted the appeal directed notice to issue, the leave requisite was virtually granted for Order XLI, Rule 11, had no application to the case, There is a good deal of force in this contention. The appeal so far has been treated as if leave was granted. I think in the circumstances of this case we should construe the order of this Court referred to above under Order XLI. Rule 11 as granting leave. Even if that be not sufficient, I would, after having heard the entire case consider that sufficient case has been made out by the appellant for obtaining leave to appeal and hereby grant the leave.

3. I would now come to the merits of the appeal. On the 6th of January, 1923, the Court passed an order adjudicating the appellant an insolvent. That order did not

specify the time within which the insolvent was to apply for his discharge as is required by Section 27, Clause (1) of the Act. Such an order, however, was passed on the 21st of August, 1925. more than two years and half from the date of the order of adjudication. By this order the Court fixed the 31st October, 1925. as the date before which the application for discharge should be made by the insolvent. From 31st October to 2nd November, 1925, were holidays, and the case was taken up on the 3rd November, 1925, when the Court passed the following order "31st October to 2nd November, 1925, were holidays; taken up today, petition for discharge not yet filed. Issue notice for the 21st November, 1925, to show cause why the adjudication should not be annulled." On 21st November, 1925, the appellant filed a petition stating: "The petitioner begs to submit that he has been served with a notice requiring him to show cause why the insolvency proceedings should not be cancelled. He begs to submit that as he fell ill he could not file a petition for 'discharge' before. He, therefore, files this petition and prays that he may be 'discharged' under Section 74(b)." Section 74(b) mentioned in this application is obviously a mistake, and we fail to find out what section was really meant. It has already been observed that in the order of the 6th of January, 1923, the Court did not specify the time within which the debtor should have made an application for his discharge. Section 27 is imperative. The period within which the debtor should apply for his discharge must have been mentioned along with the order of adjudication Under Clause (2) of that section the Court is empowered to extend the period fixed under Clause (1) of Section 27 within which the debtor shall apply for his discharge. The order of the 21st August, 1925, specifying for the first time the period within which the debtor was to apply for his discharge, was not passed along with, but more than two years after, the order of adjudication under Clause (1) of Section 27, and thus the Court contravened the provisions of law contained in that Clause On the 3rd of November, 1925, when this period expired the Court directed notice to issue upon the insolvent, fixing the 21st November, 1925, to show cause why the adjudication should not be annulled. There is no provision for issuing a fresh notice upon the insolvent calling upon him to show cause why the adjudication should not be annulled, and hence here again the order of the Court of the 3rd of November, 1925, has no sanction in the Act. Be that as it may, the Court did not, as a matter of fact annul the adjudication under Section 43 read with Section 37 of the Act upon the expiry of the period fixed by it for the insolvent to make an application for his discharge, no application having been made for it. On the other hand, it virtually extended the time for the annulment till the 21st November, 1925, and gave an opportunity for the insolvent to obtain further extension of time under Clause (2) of Section 27 to apply for his discharge upon sufficient cause being shown in that behalf. I could not think of any other interpretation of the order of the Court calling upon the insolvent to show cause why the adjudication should not be annulled. The insolvent availed himself of the opportunity offered to him and showed cause by his application of the 21st November, 1925. stating in effect that not only that the order of adjudication should not be annulled but that he should be discharged, giving an explanation for not having made an application earlier. The Court treated it as an application for discharge and issued the usual notice upon such an application under Section 41(1) for hearing the application and any objection there to. On the 25th September, 1926, when the application for discharge was heard, the Court cancelled the Order of adjudication, upon the ground that the application for discharge was made after the date fixed by the Court. It did not enter into the merits of the insolvent's application. Mr. De contends that the Court was bound to dispose of his application and, if it had found that the petitioner was prevented from making an application earlier for his discharge or extension of time on account of his illness the Court should have

extended the time originally fixed by it for that purpose.

4. Mr. Shambhu Saran on behalf of the respondents repels this contention and urges that no application for extension of time having been made before the 3rd of November, 1925, fixed by the Court for making such an application for discharge, the application of the insolvent was incompetent and not fit to be entertained, inasmuch as the Court had no power to entertain such an application made after the period fixed by it had expired. This contention is based upon Section 43 of the Act, which says that the order of adjudication "shall be annulled" upon the failure of the insolvent to make an application for an order of discharge within the period specified by the Court. The contention would be perfectly sound if the Court had passed an order of annulment after the expiry of the period specified by the Court for an application to be made by the insolvent for his discharge. In Other words, the application of the insolvent of the 21st of November, 1925, would not have been maintainable if before that date the Court had passed the order of annulment under Section 43. The Court, however, had not till then passed any order of annulment. The matter was, therefore, pending and the question of the annulment of the order of adjudication was not disposed of The Court had seisin of the case and it had, to my mind, power to extend the time originally fixed by it for the insolvent to make an application for discharge in spite of the fact that the time originally fixed by the Court had expired and no application for discharge was made by that time.

5. Sub-section (2) of Section 27 gives to the Court power upon sufficient Cause being shown "to extend the period within which the debtor shall apply for his discharge." It does not by any express words restrict the power of the Court to grant time for such an application to be made by reason of the fact that the period originally fixed had expired. The discretion to enlarge the time is large and unfettered, and we cannot read into the clause words restricting the power of the Court. That power can only be curtailed, or, as a matter of fact, withdrawn, when the Court's power to deal with the question of adjudication has come to an end by reason of its having passed the final order annulling the order of adjudication, and so long as that order is not passed by the Court it has the power vested in it by, Clause (2) of Section 27 to extend the period originally fixed from time to time regardless of whether the extension is given after, the" time originally fixed had expired or not, The interpretation sought to be placed upon Section 43 of the Act by Mr. Shambhu Saran could only be accepted if the Court was not required to pass an order of annulment after the failure of the insolvent to make an application within the period specified by the Court. The annulment of adjudication would not ipso facto come into operation without an express order of the Court to that effect under Section 43 of the Act. This is clear from the section itself and it, gains support from Clause (2) of Section 37 which says " Notice of every order annulling an adjudication shall be published in the Local Official Gazette and in such other manner as may be prescribed," so that an order annulling an adjudication has to be passed by the Court and so long as that order is not passed the question, as observed above, remains pending before the Court in spite of the expiry of the period fixed by the Court for the insolvent to make an application for his discharge. No doubt, the decision in In re Ram Krishna Misra MANU/BH/0121/1924 : 88 Ind. Cas. 70 : 4 Pat. 51 : A.I.R. 1925 Pat. 355 : 6 P.L.T. 776 seems to support the contention of Mr. Shambhu Saran but in that case Clause (2) of Section 27 does not seem to have been considered nor the other provisions of the Act such as contained in Sections 37(2) 5(1) and 10(2) The decision is based merely upon a consideration of Section 27 read with Section 47 of the Act. In this case the Court had not specified the time within which the insolvent was to make an application for his discharge in the order of adjudication, as is

expressly required by Clause (1) of Section 27; so the right of the insolvent to make an application for his discharge is not barred by reason of his not complying with the order made by the Court under that clause, and the penalty prescribed by Section 43 of the Act of annulling the adjudication does not come into operation, for that section obviously refers to the expiry of the time fixed under Clause (1) of Section 27. Assuming that Section 43 did apply, it is to be read along with Clause (2) of Section 27 under which the Court has power to extend the period of limitation originally fixed by it. Though Section 43 says: "The order of adjudication shall be annulled upon the failure of the debtor to apply for his discharge within the time fixed by the Court", Section 27(2) gives to the Court power to extend the time originally fixed. The power of the Court is not in any way hampered in extending the time by reason of the time originally fixed having expired. Such was the interpretation put upon it by the Calcutta High Court in *Abraham v. Sookias* MANU/WB/0292/1923 : 81 Ind. Cas. 584 : 51 C. 357 : A.I.R. 1924 Cal. 777 by Mr. Justice Krishnan of the Madras High Court in *Arunagiri Mudaliar v. Kandaswami Mudaliar* MANU/TN/0515/1923 : 83 Ind. Cas. 955 : 19 L.W. 418 : 34 M.L.T. 170 : (1924) M.W.N. 331 : A.I.R. 1924 Mad. 63 and the Lahore High Court in *Lakhi v. Molar* 86 Ind. Cas. 115 : 26 P.L.R. 126 : A.I.R. 1925 Lah. 416. Mr. Justice Waller took a contrary view in the aforesaid Madras case. These decisions and particularly the decision of Mr. Justice Krishnan proceed upon the principle enunciated by their Lordships of the Judicial Committee in *Bhugwandas Bagla v. Haji Abu Ahmed* 16 B. 263 : 8 Ind. Dec. 654, *Badri Narain v. Sheo Koer* 17 C. 512 : 17 I.A. 1 : 5 P.C.J. 493 : 8 Ind. Dec. 881 (P.C.), *Raja Har Narain Singh' v. Chaudarain Bhagwant Kuar* 13 A. 300 : 18 I.A. 55 : 6 P.C. J. 14 : 15 Ind. Jur. 283 : 7 Ind. Doc. 189 and *Rajab Ali v. Amir Hossein* 17 C.1 : 5 I.C.J. 389 : 8 Ind. Dec 539 (P.C.). In *Raja Har Narain Singh v. Chaudarain Bhagwant Kuar* 13 A. 300 : 18 I.A. 55 : 6 Sar. P.C.J. 14 : 15 Ind. Jur. 283 : 7 Ind. Doc. (N.S.) 189 their Lordships observed that an extension of time might be granted even after the period originally fixed had expired provided only that such extension was asked for and granted before the award was in fact made, and in *Badri Narain v. Sheo Koer* 17 C. 512 : 17 I.A. 1 : 5 Sar. P.C.J. 493 : 8 Ind. Dec. (N.S.) 881 (P.C.) as well as in *Rajab Ali v. Amir Hossein* 17 C.1 : 5 Sar. I.C.J. 389 : 8 Ind. Dec. (N.S.) 539 (P.C.) their Lordships re-affirmed the principle even where the word "shall" was used in Sections 54 and 41 of the then Code of Civil Procedure. By analogy reference may be made to Section 3 of the Second Schedule to the Code of Civil Procedure which says that the Court shall fix a time as it thinks reasonable for the making of an award and "shall specify such time in the order." The Court, undoubtedly, has power to extend the period originally fixed in the order of reference before the award is actually made even if an application for the extension of the time is made after the expiry of the time originally fixed. This is illustrated and made clear by an extreme case *Nilmoni Dora v. Methi Sahu* (M.A. No. 19 of 1925, decided by this Court on the 5th, July, 1926, unreported). In that case the order of adjudication prescribed one year within which to apply for discharge. There was an appeal preferred to the High Court against the order of adjudication by a creditor of the insolvent which was ultimately dismissed. The respondent applied to the District Judge for his final discharge stating that he could not apply earlier as the appeal to the High Court by the creditor was pending. The creditor then applied under Section 43 of the Provincial Insolvency Act for annulment of the order of adjudication on the ground that the insolvent had not applied for his discharge within the time prescribed by the Court. Two days later the insolvent made another application asking for extension of time under Section 27(2) of the Act for making his application for discharge. The Court granted the prayer for extension holding that sufficient cause had been shown inasmuch as the insolvent had to wait for the result of the appeal preferred by the creditor against the order of adjudication. Against that order the

creditor appealed to this Court urging that after the period prescribed for the application for discharge had expired the Court had no power to grant an extension of time. This Court upheld the order granting an extension of time. The insolvent in that case did not apply for his discharge within the time fixed by the Court, because the creditor had preferred an appeal against the order of adjudication of his insolvency. The adjudication was ultimately upheld by this Court and the appeal of the creditor was dismissed. If upon the interpretation sought to be put upon Section 27 the application for discharge, or for an extension of the period originally fixed for such an application, was incompetent and Section 43 ipso facto came into operation, the order of adjudication against the insolvent would necessarily have been annulled, although it was already affirmed in appeal by this Court. This would be an absurdity. If the appeal preferred against the order of adjudication was a sufficient cause for entitling the insolvent to obtain an extension of time after it had expired, there is no reason why any other cause, such as, illness, etc. should not entitle him to get such an extension. No doubt. it was argued in that case that the appeal against the order of adjudication re-opened the time fixed for an application for discharge. That would, of course, be a good ground for extending the period fixed and would rather show that the Court can grant an extension of time even after the expiry of the period originally fixed. In that case I went upon the larger question and that was that the Court's power to extend the time did not cease with the expiry of the time originally fixed until the final order cancelling the adjudication was passed. I would also refer to the inherent power of the Court to extend the period fixed even after its expiry, which always existed and was recognized by judicial decisions the effect of which was to give a statutory sanction to it in Section 148 of the Code of Civil Procedure which says "where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed, or granted may have expired." Again, although the words in Section 43 are "the order of adjudication shall be annulled," it adds "and the provisions of Section 37 shall apply accordingly." "There fore, as already observed, the order of adjudication does not ipso facto come into operation by the expiry of the period fixed but has to be determined, and until it is so determined the Court has the seisin of the case and has power to extend the time under Section 27 regardless of the expiry of the period originally fixed. With great respect to the learned Judges who decided the case of *In re Ram Krishna Misra* MANU/BH/0121/1924 : 88 Ind. Cas. 70 : 4 Pat. 51 : A.I.R. 1925 Pat. 355 : 6 P.L.T. 776. I am afraid the aforesaid points were not brought to the notice of their Lordships.

6. I am, therefore, of opinion that the Court's power to entertain an application for the extension of time originally fixed by it and for discharging the appellant had not spent itself by reason of the original time fixed having expired and no application having been made for extension thereof before its expiry. Upon a true construction of the application of the insolvent, dated the 21st November, 1925, he was entitled to a determination by the Court of his explanation as to why he did not make an application before either for extension of the period or for his discharge. That application could not mean anything else but an application for his discharge upon extending the period originally fixed by the Court for his making an application. The Court cancelled the order of adjudication simply because it thought that the time fixed had expired and no application for discharge was made before the expiry thereof. I have already shown that the view as to its power to extend the period for making an application for discharge is wrong, as it is not supported by the provisions in the Act or by the authorities on the subject.

7. The order of the learned District Judge of the 25th September, 1926, must, therefore, be set aside, and the case remanded to the Court below to dispose of the application of the insolvent, dated the 21st November, 1925, on merits. If the Court comes to the conclusion that the appellant has failed to substantiate the application made by him the Court would dismiss his application and would refuse to grant further time to make an application for his discharge. If, on the other hand, the Court thinks that there was sufficient reason for the petitioner not to have made an application before the 25th November, 1925, the Court would in its discretion fix another time within which the insolvent should make an application, failing which the Court will dispose of the case in accordance with the provisions of the Act.

L.C. Adami, J.

8. I agree. I would only like to observe that the difficulty which has been put before us in this case would never have arisen had the Court below exercised more care and paid due attention to the provisions of the Provincial Insolvency Act. In the first place, it omitted to specify in the order of adjudication the date or the period within which discharge was to be applied for by the debtor as required under Section 227, so that really the order of adjudication was altogether defective; and secondly, when on the 3rd of November, 1925, the Court found that no application for discharge had been made, according to the plain provisions of the law the Court was bound to annul the adjudication. The steps taken by the Court in calling upon the judgment-debtor to show cause were altogether unwarranted by the Act.

Stewart Macpherson, J.

9. I also agree. I add a few observations on the main point for determination.

10. That point is whether after the expiry of the period prescribed in Section 27(1) of the Provincial Insolvency Act the Insolvency Court may still exercise the power conferred by Section 21(2) of extending the period.

11. I was hitherto inclined to hold that the case in *In re Ram Krishna Misra* MANU/BH/0121/1924 : 88 Ind. Cas. 70 : 4 Pat. 51 : A.I.R. 1925 Pat. 355 : 6 P.L.T. 776 had been rightly decided and that annulment under Section 43, which provision was clearly enacted to meet the special situation, was automatic, just as abatement is under the provisions of Order XXII, Rules 3 and 4 of the Code of Civil Procedure. But no order of the Court directing that the suit or appeal shall abate, is necessary, whereas Section 37(2) of the Provincial Insolvency Act speaks of an order annulling the adjudication. If under Section 43 annulment of the adjudication followed automatically on the expiry of the period prescribed under Section 27(1), the Legislature would not have employed in Section 37(2) the expression "the order annulling the adjudication." In my judgment, therefore, an order of the Court is required under Section 43, annulling an adjudication.

12. Now, ordinarily the Court will after the expiry of the period prescribed pass, as it is entitled to do, forthwith and without any notice, an order of annulment though sometimes it is prudently directed when passing the order of adjudication that if the debtor does not apply in time, the case be put up, for order under Section 43 immediately after the period prescribed has expired. After an order of annulment, the debtor's only recourse, apart from an appeal under Section 75(3), is to apply to the Court for leave under Section 10(2) to file another insolvency petition. In such a case, therefore, the time cannot be extended under Section 27(2). But it has occasionally occurred (generally) owing to in consonance with the new Act) that the

order annulling the adjudication is delayed. In such circumstances, since there is no annulment till an order of annulment is passed, the order of adjudication stands and the proceeding remains pending on the file of the Insolvency Court with the result that Section 27(2) is still applicable and enables the Court to enlarge the period within which the debtor may apply for his discharge.

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