APPEAL FROM INSOLVENCY JURISDICTION

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Shah.

1953

Feb. 17

JIVRAJ GORDHANDAS GORADIA AND ANOTHER, APPELLANTS (DEBTORS) *v.* MESSRS. GAGANMAL RAMCHAND A FIRM, RESPONDENTS (ORIGINAL APPLICANTS).*

Presidency Town's Insolvency Act (III of 1909), ss. 8 (1), 92:12—Dismissal of creditor's petition for adjudication—Application for setting aside order of dismissal and substituting applicants in place of petitioning creditors—Whether order of substitution can be made after dismissal of original petition—Whether party wishing to be substituted in place of petitioning creditors can avail itself of the act of insolvency on which petitioning creditor's relied—Rule of Practice to be adopted before dismissing petitions for want of prosecution suggested.

A creditor's petition for adjudicating the appellants insolvents was presented on December 3, 1951 on the ground that the appellants had committed certain acts of insolvency on November 24, 1951. This petition was dismissed on April 1, 1952. On October 11, 1952, the respondents applied to the Insolvency Judge for setting aside the order of dismissal and substituting them in the place of petitioning creditors. On the contentions that the order of substitution can only be made when the petition is pending before the Court and not after its dismissal and that the respondents could not be substituted in place of the petitioning creditors as they could not avail themselves of the acts of insolvency on which the petitioning creditors relied as the foundation of their petition.

Held, that under s. 8 (*1*) of the Presidency Towns Insolvency Act, 1909, the Court had jurisdiction to set aside the order of dismissal passed on April 1, 1952, and after setting aside the order it was competent to substitute the respondents in place of petitioning creditors, even though the respondents could not have availed themselves of the act of insolvency on which the original petitioning creditors relied.

In re magham: Ex parte Maugham[1] and *In re Maund: Ex parte Maund,*[2] referred to.

L. C. T. R. M. S. Chettyar v. *A. S. Chettyar Firm,*[3] *Maung Gyi* v. *A. L. K. P. Chettyar Firm,*[4] *Keshav Bhagat* v. *Sitaram*[5] *Venkata Hanumantha Rao* v. *Gangayya*[6] and *Ganga Nath* v. *Zaluu Singh,*[7] followed.

When a petitioning creditor does not want to prosecute his petition the Courts might adopt a rule of practice whereby he should be directed to advertise (and in his absence the official assignee or the Insolvency clerk should advertise) the fact that the petitioning creditor wanted to apply for dismissal of his petition and sufficient time should be given in order to enable any other creditor to apply to the Court for substitution.

* Appeal No. 8 of 1953: Insolvency No. 119 of 1951.

(1) [1888] 21 Q. B. D. 21.
(2) [1895] 1 Q. B. 194.
(3) (1929) 7 Rang. 785.
(4) (1933) 11 Rang. 407.
(6) (1945) 47 Bom. L. R. 441.
(5) [1928] 51 Mad. 594.
(7) [1932] 54 All. 72.

1953

JIVRAJ GORDHANDAS GORADIA v. MESSRS. GAGANMAL RAMCHAND

Chagla C. J.

Jivraj Gordhandas Goradia and Ranchhoddas Lawji (debtors—appellants) were carrying on business as piece goods merchants in the name and style of Nalinichandra Harikishindas & Co. They were indebted to Kishinchand Chellaram (India) Ltd. (petitioning creditors) in the sum of Rs. 8,891-2-0. Kishinchand Chellaram (India) Ltd. filed a petition on December 3, 1951 for adjudging the debtors insolvents, setting out the acts of insolvency committed by the debtors on November 24, 1951. The Petition was ordered to stand over for recording evidence. On April 1, 1952 the Advocate for the petitioning creditors stated that he did not desire to lead any evidence in the matter and the petition was thereupon dismissed on that day.

Messrs. Gaganmal Ramchand (Applicants—respondents) took out a notice of motion on October 11, 1952 for rescinding or setting aside the order of dismissal dated April 1, 1952 and for substituting the applicants in place of the petitioning creditors to proceed with the petition. The applicants also relied on an affidavit dated January 6, 1953, by Purshottamdas Chotomal an accountant in the company of the petitioning creditors, who stated that sometime in March 1952 the debtors settled the claim of the Petitioning Creditors and paid a sum of Rs. 5,350 (8 as in a rupees towards claim and balance for their attorneys costs) on April 2, 1952. Pursuant to the said settlement the petitioning creditors allowed the petition to be dismissed on April 1, 1952 for want of prosecution. On January 6, 1953 the Insolvency Judge vacated the order dated April 1, 1952 and granted leave to the applicants to be substituted in place of the petitioning creditors and to proceed with the petition. The debtors appealed.

K. T. Desai, for the appellants.

P. N. Bhagwati, with *P. R. Vakil,* for the respondents.

Chagla C. J. A creditor's petition was presented for adjudicating the appellants insolvents on December 3, 1951. This petition was dismissed on April 1, 1952. On October 11, 1952 the respondents applied to the Insolvency Judge to set aside the order of dismissal and to substitute them in place of the petitioning creditors. The Insolvency Judge granted that application on January 6, 1953 and from that order this appeal is preferred.

The first contention of Mr. Desai is that the Court had no jurisdiction to grant this application in view of the fact that the

1953

JIVRAJ GORDHANDAS GORADIA v. MESSRS. GAGANMAL RAMCHAND

Chagla C. J.

application for substituton was made after the petition was dismissed, and reliance is placed on s. 92 of the Presidency-towns Insolvency Act. That section provides that

> "Where the petitioner does not proceed with due diligence on his petition, the Court may substitute as petitioner any other creditor to whom the debtor is indebted in the amount required by this Act in place of the petitioning creditor."

Mr. Desai is right when he contends that s. 92 refers only to a subsisting petition, and that the order of substitution contemplated by that section can only be made in a petition which is pending before the Court. But in our opinion the order made by the learned Judge, in the first instance, falls under s. 8 and not under s. 92. Section 8 (*1*) provides that the Court may review, rescind or vary any order made by it under its insolvency jurisdiction, and it has been laid down both here and in the English Courts that the jurisdiction conferred by this section is a very wide and far-reaching jurisdiction. It is also in our opinion a very salutory jurisdiction. It must never be forgotten that when a petitioning creditor files a petition for adjudication of a person insolvent he is not in the same position as a plaintiff in a suit. A plaintiff in a suit is *dominus lite* and he has every right to proceed with the suit or to withdraw it or to allow to be dismissed for default, but a petitioning creditor is not a *dominus lite* in that sense. Once he presents a petition, the order that he seeks is not only for his benefit but for the benefit of the general body of creditors, and the Insolvency Court at all times has jurisdiction over that petition and can control it and regulate it. If the Court was satisfied that the order made by it on April 1, 1952, was not a proper order and that it should not have been made, it had got jurisdiction under s. 8 (*1*) to rescind that order and to restore the petition which was dismissed. Therefore, in substance, what Mr. Justice Desai did was to exercise jurisdiction under s. 8 (I). He rescinded the order made by the Insolvency Judge on April 1, 1952, and the petition which was dismissed being revived he allowed the respondents under s. 92 to be substituted as petitioners in place of the petitioning creditors.

The other contention raised by Mr. Desai is that the petitioners even under s. 92 cannot be substituted as petitioners because they cannot avail themselves of the act of insolvency on which the petitioning creditors originally relied. Mr. Desai says that under s. 12 of the Presidency Towns Insolvency Act

a petition must be grounded on an act of insolvency which has occurred within three months before the presentation of the petition, and if the respondents had desired to file an independent petition of their own on October 11, 1952, they could have obviously not relied on the act of insolvency on which the petitioning creditors relied, and therefore, Mr. Desai says that the respondents should not have been substituted in place of the petitioning creditors. For this purpose reliance has been placed on two English decisions. The first is a decision reported in *In re Maugham Ex parte Maugham.*[1] In that case what was really decided was that the power given to the Court under s. 104 of the Bankruptcy Act 1883, which correspondents to s. 8 (*1*) of our Act, could only be exercised by the Court which made the original order. In that particular case the order dismissing the petition was made by the Registrar of the County Court and a County Court Judge rescinded that order under s. 104 of the Bankruptcy Act and the Court held that that order was without jurisdiction. The other observations of Mr. Justice Cave at p. 23 in view of this decision are really obiter. The observations are that "the effect of restoring the petition was to extend the time for filing the petition beyond the statutory period of three months from the date of the act of bankruptcy and a petitioner cannot be permitted by substituting himself in place of the original petitioning creditor to extend the time laid down in the statute. Even in making this observations Mr. Justice Caves was at pains to point out that even if upon such an application fraud is alleged, the Court would strain its jurisdiction to the utmost. These observations were relied upon in a subsequent decision in *In re Maund, Ex-parte Maund.*[2] In that case the petition was presented by a creditor alleging that the debtor was indebted to him in a certain sum. Then it was discovered that it would be difficult to prove the minimum amount of the debt which was necessary in order to entitle the creditor to maintain the petition. An attempt was then made to bring other creditors on the record so that the amount of the debts should be increased. It was on these facts that the English Court of appeal held that the petition could not be allowed to be amended and other petitioning creditors to be brought on the record. What is to be borne in mind is that in this particular case the petition was not maintainable at its inception and what was sought to be done by the amendment was to convert a petition which was not maintainable into a petition which

[1] [1888] 21 Q. B. D. 21.

[2] (1895) 1 Q. B. 194.

1953

JIVRAJ GORDHANDAS GORADIA v. MESSRS. GAGANMAL RAMCHAND

Chagla C. J.

was maintainable. It is true that Mr. Justice Vaughan Williams in his judgment relies on the observations of Mr. Justice Caves in *In re Maugham*, but on the facts the case is clearly distinguishable. Mr. Desai relies on the fact that leading commentators like Halsbury and Williams on Bankruptcy have cited with approval the observations of Mr. Justice Cave as representing the correct state of the law in England. But in our opinion, with great respect, when one looks at the actual decisions it is difficult to take the view that they represent a decision on the point which we are considering. What is more, all the High Courts in India which had to consider a similar question have taken the view contrary to the view taken by the English Courts.

In *L. C. T. R. M. S. Chettyar* v. *A. S. Chettyar*,[1] Mr. Justice Heald, Officiating Chief Justice, and Mr. Justice Mya Bu, after considering the case of *In re Maugham* and *In re Maund*, distinguished both the cases and refused to accept the position that a substitution could not take place if the party applying to be substituted could not avail himself of the act of insolvency and they held that the effect of the substitution would be that the party substituted takes the place of the first petitioner *ab initio* and is entitled to prosecute the original petition as if it were his own petition so that no question of the necessity for a fresh act of insolvency could arise. Mr. Desai has relied on a subsequent judgment of that High Court in *Maung Gyi* v. *A. L. K. P. Chettyar Firm*,[4]. That decision laid down that where a petition for the adjudication of a debtor filed by a creditor had been dismissed by the Court, another creditor could not apply under s. 16 of the Provincial Insolvency Act which corresponds to s. 92 of the Presidency-towns Insolvency Act, to be substituted in place of the original creditor. It further laid down that that section applied where the proceedings were pending and not where they had terminated by the dismissal of the petition. In that case the Court was only called upon to construe s. 16 of the Provincial Insolvency Act and, as pointed out, there can be no doubt that on a construction of s. 16 or the corresponding s. 92 substitution could only take place in a pending petition and not a petition which had terminated by dismissal. But the Court did not consider whether the Insolvency Judge had jurisdiction to set aside the order of dismissal. It is true that in the Provincial Insolvency Act there is no section corresponding to s. 8 (*1*) of the

(1) [1929] 7 Ran. 785. (2) [1933] 11 Ran. 407.

Presidency-towns Insolvency Act but apart from s. 8 (*1*) the Court has inherent jurisdiction to set aside its own order. For this purpose see the view taken by Mr. Justice Rajadhyaksha in *Keshav Bhagat* v. *Sitaram*[1]. Then there is the judgment of Mr. Jusctice Ramesam in *Venkata Hanumanthu Rao* v. *Gangayya*[2]. The conditions that Mr. Justice Ramesam and Mr. Justice Jackson who decided this case laid down for substitution were that the debt of the creditors substituted should not be barred by limitation at the date of the original petition even though the debt might be barred by limitation at the date of substitution provided the creditor applying to be substituted was otherwise qualified to be a petitioning creditor under the Act. This Bench of the Madras High Court refused to accept the observations of Mr. Justice Caves in *In re Maugham*[3] as laying down the correct law on this subject. The same view of the law has been taken by the Allahabad High Court in *Ganga Nath* v. *Zalim Singh*[3].

Therefore, in our opinion, Mr. Justice Desai had the jurisdiction under s. 8 (*1*) to set aside the order of dismissal passed on April 1, 1952, and having set aside that order he was competent to substitute the present respondents in place of the petitioning creditors, even though the respondents could not have availed themselves of the act of insolvency on which the original petitioning creditors relied as the foundation of their petition.

Turning to the facts, it has been alleged by the respondents that some time in March 1952 whilst the petition was still pending, the debtors settled their claim with the petitioning creditors and paid a sum of Rs. 5,350 being 8 annas in the rupee towards the petitioning creditors' claim and the balance of attorneys' costs. This amount was paid on April 2, 1952, a day after the petition was dismissed. This allegation made by the respondents is completely borne out by the affidavit made by *Purshottamdas Chotomal* who is the accountant in the company of the petitioning creditors, and he says on oath that pursuant to this settlement the petitioning creditors allowed the petition to be dismissed on April 1, 1952, for want of prosecution. Therefore the reason why the advocate for the petitioning creditors was instructed to make a statement before Mr. Justice Coyajee who dismissed the petition that he had no

[1] [1945] 47 Bom. L. R. 441.
[2] [1928] 51 Mad. 594.
[3] (1888) 21 Q. B. D. 21.
[4] [1932] 54 All. 72.

1953

JIVRAJ GORDHANDAS GORADIA v. MESSRS. GAGANMAL RAMCHAND

Chagla C. J.

evidence to lead was not based upon the inability of the petitioning creditors to prosecute the petition, but was based upon the fact that a settlement had already been arrived at between the petitioning creditors and the debtors and it was agreed that as soon as the petition was dismissed the petitioning creditors were to be paid off. In our opinion it is difficult to imagine a grosser case where an Insolvency Judge has been persuaded to dismiss a petition by keeping back from him the true facts which occasioned the application for the dismissal of the petition. There cannot be the slightest doubt that if the facts which are now put on affidavit were present to the mind of Mr. Justice Coyajee, he would never have dismissed the petition. He would at least have directed the petitioning creditors to give notice of the fact that the petition was going to be put on board for dismissal. That would have given an opportunity to the other creditors if they were so minded to come forward and apply to lead evidence to adjudicate the debtors insolvents. But Mr. Justice Coyajee was persuaded to pass an order of dismissal because he was told that there was no evidence which the petitioning creditors could lead in order to substantiate the allegation that the debtors had committed an act of insolvency.

Mr. Desai says that there has been gross delay in this case on the part of the respondents to come before the Court with their application. The petition was dismissed on April 1, 1952, and the application was made on October 11, 1952. There is considerable force in Mr. Desai's contention that the respondents have nowhere alleged in these proceedings as to when actually they came to know that the petition was dismissed, and Mr. Desai says that his clients alleged that the respondents were also trying to put pressure upon the appellants to settle their claim. Now if this was a case where the respondents were to obtain any benefit solely for themselves by the order that they have obtained, we might have interferred and might have held that laches disentitled the respondents to the order which they have obtained. But the jurisdiction under s. 8 (*1*) is so wide that the Court could exercise that jurisdiction *suo motu* even without the application of any party. If the attention of the Court was drawn by the respondents that an order had been improperly obtained, it would be sufficient for the Court to exercise its jurisdiction under s. 8 (*1*), and it must be borne in mind that the order that the learned Judge

has made is not to enure only for the benefit of the respondents. The order is for the general body of creditors and whatever laches the respondents may be guilty of, the order made by the learned Judge will ultimately enure for the benefit of all the creditors of the appellants. In any view of the case the learned Judge below has thought fit to exercise his discretion under s. 8 (*1*) to set aside the order passed by Mr. Justice Coyajee on April 1, 1952, and there is nothing on the record which makes us take the view that the discretion was not properly or judicially exercised.

We should like to suggest to the Judges doing insolvency work that they might adopt a rule of practice whereby, if a petitioning creditor does not want to prosecute his petition or when he wants the petition to be dismissed for want of evidence, before an order of dismissal is made the petitioning creditors should be directed to advertise the fact that they want to apply for dismissal of the petition and sufficient time should be given to enable any other creditors to apply to the Court for substitution. It is not desirable that any petition preferred by a creditor should be dismissed either for default or for want of evidence without proper notice being given to other creditors of the debtor. If the petitioning creditor is absent, then the Court can direct the Official Assignee or the Insolvency Clerk to give the necessary notice so as to enable other creditors of the debtor to know that the petition presented by the petitioning creditor is not being prosecuted.

The result is that the appeal fails and must be dismissed with costs. Liberty to the respondents' attorneys to withdraw the sum of Rs. 500 deposited by the appellants and to apply the same in part satisfaction of their costs.

Attorneys for appellants: *Haridas & Co.*

Attorneys for respondents: *Mulla & Mulla.*

Appeal dismissed.

P. M. P.