
(1899) 08 CAL CK 0010
In the Calcutta High Court

Amrita Lal Mukerjee

APPELLANT

Vs

Rakhali Dassi Debi

RESPONDENT

Date of Decision : 30-08-1899

Acts Referred:

Provincial Insolvency Act, 1920 — Section 7

Citation : (1900) ILR (Cal) 217

Hon'ble Judges : W. Maclean K.C.I.E., C.J.; Banerjee, J

Bench : Division Bench

Judgement

Maclean, K.C.I.E., C.J.—This is a suit for an account. The taking of the account was referred to a Commissioner. Subsequently to that reference proceedings in bankruptcy were taken against the plaintiff, and a vesting order was made, "vesting the property in the Official Assignee. Subsequently to that an application was made by the defendant on the 20th May 1898, that the Official Assignee should be made a party to the suit. That came on before the Court on the 13th June 1898. After one or two adjournments, neither the applicant nor the Official Assignee appeared, and the Court, purporting to act u/s 370 of the Code of Civil Procedure, dismissed the suit.

2. The first question is whether the Court was right in holding that section applied, and, secondly, whether it was right in dismissing the suit as coming within the purview of that section. I think not. I think that Section 370 of the Code only applies to a case where there is an actual bankruptcy or insolvency. The language of the section, to my mind, clearly indicates that. It indicates that there must be a completed bankruptcy or insolvency, in which there is an Assignee or Receiver appointed. That does not apply to a case such as the present, where there has been an application to declare the plaintiff an insolvent and a vesting order made, but the proceedings are subsequently annulled and the plaintiff is not declared either a bankrupt or an insolvent. I think this is clear from the language of Section 370, coupled with the language of Section 7 of the Insolvency Act (11 and 12 Vic., C. 21), which says that if "after the making of

any such vesting order, the petition of any such petitioner shall be dismissed by the said Court, such vesting order made in pursuance of such petition shall from and after such dismissal be null and void to all intents and purposes." He(sic) petition was subsequently dismissed, and in my opinion Section 370 of (sic) does not apply to such a case as that.

3. But, then, was the suit properly dismissed for non-appearance(sic) of the plaintiff. I think it was, nor has that been contested by the(sic) His contention is, that it must be treated as a dismissal, not under (sic) of the Code, but as a dismissal mark Section 102. If it be a dismissal (sic) Section 102, then Section 103 would apply, and the appellant would (sic). entitled to show that he was prevented by sufficient cause from appearing when the suit was called on for hearing. The learned Judge in the Court below has considered that the case does not fall within Sections 102 and 103 of the Code. He has, therefore, not gone into the question whether or not there was sufficient cause, and that is the main ground of the appeal in the present case. I think he was wrong in that view, that is in the view that this was a dismissal u/s 370. I think that under the circumstances it must be taken to have been a dismissal u/s 102, in which case I think Section 103 applies. There must be a remand in order that the Judge may go into the question of whether the plaintiff was prevented from appearing when the suit was called on for sufficient cause. The costs of this appeal will abide the result.

Banerjee, J.

4. I am of the same opinion. The question before us is whether the present application for setting aside the order made by the Court below on the 13th of June 1898 dismissing the, suit was entertainable u/s 103 of the Code of Civil Procedure., The Court below has answered that question in the negative, being of opinion the, the order was made, not u/s 102 of the Code of Civil Procedure, or which alone Section 103 is applicable, but u/s 370 of the Code to which Section 103 has no application. As pointed out in the judgment of the learned Chief Justice the order of the 13th of June 1898 dismissing the suit for default of appearance could not have been made u/s 370 of the Code of Civil Procedure, when that section had no application to a case like this, in which no adjudication, declaring the plaintiff an insolvent, had been made.

5. That being so, the question now arises whether the order dismissing the suit can be treated as one made u/s 102 of the Code of Civil Procedure, and whether, even if it could be so treated, it is open to the appellant to treat it as such by his present application, or whether his remedy was not by way of appeal from that order or review of judgment.

6. The learned Vakil for the respondent contends that, granting that the order could not have been made u/s 370 of the Code, under which it purports to have been made, still as it purports to have been made under that section, the only remedy for the present appellant was either by an appeal from that order, or by

an application for review of judgment.

7. There might have been some force in that contention, if the non-applicability of Section 370 of the Code to the case could have prevented the order from, being what it was, that is to say, if it could be said that because Section 370 of the Code was not applicable to the case, therefore the Court ought not to have dismissed the suit. But clearly that could not have been so. The plaintiff failed to appear on the day fixed for the hearing of the case, and the Official Assignee made no application to be allowed to appear in place of the plaintiff, and the only course left open to the Court was to dismiss the suit for default of appearance. The order, therefore, that was made was the only order that could have been made under the circumstances. The only thing that is wrong in the order is, that a wrong section is relied upon in support of (sic) The proper section to which the Court ought to have referred was Section (sic) the Code of Civil Procedure, which would import Section 102 into the (sic) being so, I do not think that there is any force in the contention urged (sic) the respondent that the only remedy against the order of the 13th (sic) by way of an appeal or by an application for review. As that (sic) was made and must be regarded as having been made u/s 102, (sic) application for setting it aside u/s 103 of the Code was clearly entertainable.