

(1971) 04 BOM CK 0008

In the Bombay High Court

Case No : A.F.O. No. 107 of 1971 and A.O. No. 108 of 1971

Devidas Narayan Kango

APPELLANT

Vs

Brijlal Lakdu Bhavsar and Others

RESPONDENT

Date of Decision : 22-04-1971

Acts Referred:

Provincial Insolvency Act, 1920 — Section 41

Citation : AIR 1973 Bom 72 : (1972) 74 BOMLR 110 : (1972) ILR (Bom) 800 : (1972) MhLj 315

Hon'ble Judges : K.K. Desai, J

Bench : Single Bench

Advocate : R.V. Desai, for the Appellant; V.K. Joshi, for the Respondent

Judgement

1. The order of the Insolvency Court on Miscellaneous Application No. 114 of 1966 dated April 10, 1968, and the appellate order of the Extra Assistant Judge, Jalgaon, dated August 29, 1970, disclose pathetic ignorance of both the Courts about the objects and purposes of the law of insolvency and particularly the provisions therein in connection with discharge of insolvents and realisation and collection of assets of an insolvent by appointment of a receiver.

2. One Brijlal Bhavsar and his son Bhagwand Sudhakar carried on business as members of a joint and undivided Hindu family. On February 12, 1964, these three persons applied for an order of their own adjudication as insolvents on the ground that they were unable to pay and discharge their debts having suffered heavy losses in business. One of the debts mentioned in the insolvency petition was of Rs. 1,200/- due to the creditor Devidas Narayan Kango. An order of adjudication was made on January 7, 1965. The order provided that the debtors should apply for final discharge within six months from the date of the order. By Miscellaneous Application No. 114 of 1966 instituted on June 29, 1965, the three insolvents applied for discharged. In the application particulars of the debts due and inability to pay debts was admitted. It was further alleged that the insolvents were not in possession of any property of any kind for discharging their liability

to pay debts. At the hearing of the application, affidavits were tendered on behalf of the creditors Devidas Narayan Kango and Somnath Rango Choudhari with intent to oppose an order of absolute discharge. The Insolvency Court held that the allegation of the insolvents that they did not own any property was incorrect and that the insolvents had continued to trade in Agarbatti continuously even after the date of the adjudication order. The Insolvency Court refused discharge by the order dated May 4, 1968. By the appellate order dated August 29, 1970, made in Civil Appeal No. 336 of 1968, the Extra Assistant Judge observed that proper inquiry was not held in respect of the debt claimed by creditor Devidas Kango. He observed that the contention of the insolvents was that by reason of the bar of limitation and otherwise the debt claimed by Devidas Kango was in law not in existence. He, therefore, observed : "In my opinion, therefore, it will be necessary to investigate this point in details. The appeal preferred by the insolvents, therefore, deserves to be allowed." In consequence of the above observation, the learned Judge directed the Insolvency Court to hold a fresh inquiry in the matter of the debt claimed by Devidas Kango and then consider the application for discharge.

3. In the matter of the above application for discharge, the creditors Somnath Choudhari and Devidas Kango filed an application Ex. 17 on September 25, 1967, for appointment of a receiver of the estate of the insolvents. They annexed to their application a schedule of what according to them were the properties of and was the estate of the insolvents. By their affidavit in reply Ex. 20, the insolvents contended that the properties mentioned in the schedule were not of their ownership and receiver, if any appointed would not be entitled to take possession of these properties. Their case was that these properties belonged to Annapurnabai, the wife of insolvent Brijlal Bhavsar. The contentions made by the creditors and the insolvents as above were not inquired into the adjudicated upon. Creditors Devidas Kango filed in second application Ex. 43 on February, 18, 1968, for appointment of a receiver. He supported that application by an affidavit giving particulars. These applications for appointment of a receiver were disposed of by the Insolvency Court by the same order by which it disposed of the application for discharge. The Insolvency Court having held that the debtors were carrying on business continued to belong to and was of the ownership of the debtors, appointed receiver and directed that "the property be attached and the creditors be accordingly paid." By the appellate order dated August 29, 1970, this order has been reversed mainly on the ground that a proper inquiry had not been held on the question of the properties mentioned in the applications for appointment of Receiver being of the ownership of the debtors. The learned Extra Assistant Judge directed an inquiry to be held for investigation into the above question and set aside the order appointing receiver and attaching properties. These questions were disposed of by the single appellate order dated August 29, 1970, but have not been separately challenged in the present two appeals file by creditor Devidas Kango.

4. It is submitted on behalf of this creditor that the admission made by the

Insolvents in their application for discharge that in connection with discharging the liability regarding all the debts disclosed by them they were not possessed of and did not own any property whatsoever was an admission of facts on the basis whereof the Insolvency Court was entitled to refuse the order of discharge to the insolvents. The order setting aside the refusal of discharge should accordingly be set aside. In connection with the question of appointment of receiver, the submission was that in the matter of the insolvency of the debtor which commenced with the adjudication order dated January 7, 1965, and which related back to the date of the petition, i.e., February 12, 1964, appointment of a receiver of the estate of the insolvents was absolute necessity for collection and realisation of the estate and/or properties of insolvents for distribution amongst the creditors. The learned Extra Assistant Judge was accordingly wrong in setting aside the order of appointment of receiver.

5. The submission on behalf of the insolvents is that the learned Extra Assistant Judge is right in his finding that the questions of debt due to Devidas Kango and of the debtors' contention that the properties disclosed did not belong to them were liable to be adjudicated upon in the first instance before the application for discharge and appointment of receiver could be disposed of. There is no substance in these contentions made on behalf of the insolvents, as I will presently point out.

6. In connection with applications for discharge made by insolvents u/s 41 of the Provincial Insolvency Act, it is always necessary for Insolvency Courts to remember that one of the main purposes and objects of the law of insolvency is to protect an insolvent debtor from ordinary coercive process of execution and litigation that may be instituted by his creditors in normal circumstances. The direct purpose of an order of discharge is to enable an insolvent debtor once against to indulge into business activities freed from liability to pay his prior debts. It is for this reason that in sub-section (2) of Section 44 it is provided that "x x x x x , an order of discharge shall release the insolvent from all debts provable under this Act". The applications for discharge have to be considered by Insolvency Courts in the light of the above true purpose and object of the insolvency law. The Section 42 mentions the facts and circumstances in which an insolvent debtor should as an undesirable trader not be given an absolute discharge and an order should be made in accordance with provisions in sub-section (2) of Section 41. The contents of Section 42 show that in ordinary and normal cases, insolvent debtors should be released from all provable debts by orders of discharge so that they are enabled once again to trade freely, in spite of their past insolvency. The above discussion goes to show that in the matter of an application for discharge deep inquiries relating to the debts claimed by creditors and denied by insolvents should never be held. Such inquiries are entirely irrelevant to the purpose of and/or questions involved in an application for discharge. The matter of proof of debts is governed by different sections of the Act. Obviously, the two Courts below were entirely ignorant of this apparently clear position in insolvency law. For clarification, it requires to be recorded that

ordinarily, on the matters of applications for discharge, oral evidence of contesting parties should never be recorded. It should be sufficient for insolvency Court to find out by reading the affidavits filed as to whether facts and circumstances mentioned in Section 42 existed. The existence or otherwise of these facts and circumstances is not required to be adjudicated upon as on a trial of issues. The reason for the above observation is that unless these facts and circumstances appear to exist, in normal cases, the Insolvency Court is bound to give an order of discharge without any conditions. If the circumstances seem to exist, the discharge can be made conditional. In this connection, a final trial of issues is never necessary. In this very connection, the scheme of Rule 23 made by this Court under the Provincial Insolvency Act should be always adhered to. The rule provides that an application for discharge should not ordinarily be heard until after the schedule of creditors has been framed and the receiver has submitted his report. If the Courts below had read this rule and certain other provisions, they would have realised that immediately upon an order of adjudication being made, an absolute duty is cast on the court by insolvency law to collect and further realise the properties and/or estate of insolvents. Now, this can never be done by Court except by appointing a receiver for that purpose and receiver is helped by the insolvent and his creditors in getting information and particulars about the estate and properties of insolvents. The scheme of insolvency law is that upon the order of adjudication being made, the estate of insolvents would vest in the Court. The insolvent debtor is bound immediately to file schedules of his debts and properties. The estate vested in the court can only be realised and collected by appointment of receiver, who, in his turn, would have to proceed to collect the estate in accordance with the scheme of the insolvency law. It is apparent that the relevant facts and particulars about the estate and/or properties of insolvents can be gathered by receiver by assistance rendered by creditors and insolvents. In this connection, private and public examination of insolvents and creditors and persons who might have had dealings with insolvents can always be held. This also would ordinarily be done only after a receiver is appointed. It is quite apparent that the learned Extra Assistant Judge has, whilst making the order dated August 29, 1970, not realised and was not aware of the above scheme of insolvency law. Both the courts allowed the applications for appointment of receiver to be mixed up with the application for discharge. Both the courts did not realise that the one application had nothing to do and had no bearing on the other application. The learned Extra Assistant Judge was not aware that as has been held in the cases of *Thana Velayudha Nadar Vs. V.S. Subramania Pillai and Others*, *Mullapalli Gopalan Nayar Vs. Koppathil Gopalan Nayar*, *Mullapalli Gopalan Nayar Vs. Koppathil Gopalan Nayar*, *Mul Chand and Another Vs. Official Receiver and Others*; and *Kapur Chand v. Mohammad Khan AIR 1939 Lah 432*; and on the principle to be found in Section 42 (1) of the Presidency Towns Insolvency Act, it was ordinary right of an insolvent to make renewed applications for discharge upon expiry of reasonable time after prior order refusing discharge. In the present matter, the application for discharge that was made on 29-6-1965, was refused by the

Insolvency Court on May 4, 1968, and the learned Extra Assistant Judge directed fresh inquiry by his appellate order dated August 29, 1970. The learned Judge failed to realise that it was open for the learned Judge himself in the matter of appeal before him to see all the circumstances of the case and as to decide whether the facts and circumstances mentioned in Section 42 were disclosed on the affidavits and whether the insolvents were not entitled to unconditional discharge or whether the refusal of discharge by the Insolvency Court was not proper. The directions for further inquiry have been given only because the learned Judge was entirely ignorant of the above scheme of the insolvency law in connection with applications for discharge.

7. It is first necessary to notice that an appeal has not been instituted by the insolvents from the order directing further inquiries in the matter of their application for discharge. That order, therefore, cannot be set aside in the present appeals. The Insolvency Court is directed to dispose of the prior application for discharge without holding any inquiry into the questions directed by the learned Extra Assistant Judge. The Insolvency Court will be at liberty to invite fresh affidavits in connection with application for discharge. The Court will consider the application in the light of the above observations and the Rule 23 of the Bombay Provincial Insolvency Rules. The order of the learned Extra Assistant Judge, in so far as it sets aside the order of the Insolvency Court appointing receiver, is wrong and is set aside. The receiver will be receiver of the whole of the estate of the insolvents with authority to proceed to collect the estate of the insolvents.

8. In connection with the two applications mentioned above, it was irrelevant to investigate and inquire into the question of Devidas Kango, the appellant in these appeals, being the creditor of the insolvents. His debt is admitted in the petition. That admission entitled him to appear and be heard in the matter of the application for discharge. It is required to be repeated that in the matter of application for discharge the Insolvency Court has a right to gather all relevant information from whatever sources available. The information given is not liable to be accepted only upon proofs given as on a trial of issue. The Insolvency Court is entitled to form its opinion also on a report to be made by receiver of the estate. It is on prima facie impressions that an application for discharge is liable to be disposed of by Insolvency Court. Under the circumstances, the direction given by the Extra Assistant Judge for ascertaining whether the debts claimed by Devidas Kango existed or not was not warranted and that direction is set aside. In that connection, the learned Judge was wrong in thinking that the Law of Limitation continues to apply in respect of debts provable in and to be claimed in insolvency. The learned Judge was wrong in thinking that whilst making an order for appointment of a receiver of the estate of an insolvent it was necessary for the Court to decide contradictory allegations made by parties as regards the ownership of the properties alleged to belong to the insolvents. The question of this ownership will require to be investigated at the instance of the receiver of the estate after he will have made investigations and gathered facts in support of

the creditors" case that the properties belonged to the insolvents. The directions given by the learned Extra Assistant Judge for making these investigations in connection with the appointment of receiver were premature and contrary to the law of insolvency. These investigations will take place at a subsequent stage. Those directions are also set aside.

9. In the result, these two appeals are allowed except to the extent that the matter of the application for discharge will have to be once again considered by the trial Court. The order of the insolvency Court appointing receiver is confirmed. The receiver will be "of the estate of Insolvents". There will be no order as to costs.

10. No order on the Civil Application.

11. Ordered accordingly.