
(1941) 01 PAT CK 0021
In the Patna High Court

Jiwachh Mahtha

APPELLANT

Vs

Banwari Sah Ramlagan Ram and Others

RESPONDENT

Date of Decision : 29-01-1941

Acts Referred:

Citation : AIR 1941 Patna 285

Hon'ble Judges : Meredith, J;Chatterjee, J

Bench : Full Bench

Judgement

Meredith, J.—This is an appeal by an insolvent against an order of the learned Additional District Judge of Darbhanga, dated 11th December 1939, u/s 41(2)(a) of the Act, refusing an absolute discharge. The appellant filed his application for adjudication on 20th August 1935. He was adjudicated insolvent on 5th December 1936, and directed to apply for his discharge within one year. He did not do this. He applied only on 21st December 1937, sixteen days late, stating in his application as a reason for the delay that he had been suffering from fever. He was directed to file a separate application, explaining his failure to apply in time, and on 17th January 1938 he did file a petition with an affidavit again ascribing the delay to his illness. Upon this petition the order passed by the Court was:

Separate petition showing cause of delay filed. Admit the discharge petition. Issue notice to creditors fixing 19th February 1938 for hearing.

2. When the matter came up for hearing, the contesting respondent (creditor 18) opposed the discharge. The learned Judge observed that the first ground for refusing final discharge was that the application was time barred, since the petition for final discharge had not been filed within the time fixed. This ground, he said, was to his mind decisive, because he did not consider that sufficient cause had been shown for the delay. Apart from this, he considered that absolute discharge should be refused, because the insolvent had not filed registers and accounts regarding the shop kept by him before adjudication, and also he appeared to have run a rice and dal shop while under adjudication. For all the

above reasons, he said, he refused an absolute order of discharge.

3. The order of the learned Judge is defective in several respects. First of all, the ground mentioned by him as decisive for refusing discharge, namely the delay in the application, is not one of the grounds specified in Section 42 at all for refusing to grant an absolute order for discharge. It might have been a ground for annulling the adjudication. But that is an aspect of the matter which the learned Judge did not consider at all. The main ground given for the order is therefore not a sound one, and the point which should have been considered in that connexion, namely whether the adjudication should have been annulled, was not considered.

4. It has been argued that by the order of 17th January, which was to admit the discharge petition and issue notice for hearing, time must be taken to have been extended by the Court and the delay to have been condoned. If that were really so, then it would not have been open for the learned Judge in his final order to consider that question afresh and come to a different conclusion.

5. In fact, however, I am satisfied that until the order under appeal the question of the sufficiency of the cause for delay had never received judicial consideration from the Court at all, and the order in the order-sheet was a mere routine order placing the whole matter for consideration after notice. No doubt even in a case where the application for time has not been filed until after the expiry of the time fixed, it is still open to the Court in a proper case to allow time, provided that the adjudication has never been actually annulled u/s 43. This has been laid down by this Court in *Gopal Ram Vs. Magni Ram and Others*, . But whether that should or should not be done upon the merits is a question for consideration.

6. In the second place, the order of the learned Judge is an incomplete order. It simply refuses to grant an absolute discharge, but does not specify any further conditions, and does not settle the future position of the insolvent. It can hardly have been the intention of the learned Judge that the appellant should remain an undischarged insolvent for the rest of his life. The Act has provided for cases of this kind in Section 41 in the provisions of Section 41(2)(b) and, (c). If the learned Judge was of opinion that an absolute discharge should be refused under Clause (a), then he should have considered the possible application of Clause (b) or Clause (c), or both, to the case, and passed an order accordingly.

7. Furthermore, it appears from the report of the receiver that there were certain assets of the insolvent for which up to that date he had been unable to realize anything. Amongst these assets were included certain lands, and it appears from the evidence of the contesting creditor in this matter that he was willing to take these lands in part satisfaction of his claim. This also would afford an additional ground for considering the application of Section 41(b) or (c) to the case.

8. In the circumstances the most equitable course, in my opinion, is to set aside this order, and remand the case for fresh consideration in the light of these observations. It is stated on behalf of the appellant that the respondent-creditor

18 has never proved his debt, though it may be noted that in the very application for adjudication of the appellant he stated that he was under arrest in execution of this creditor's decree. It is also stated for the appellant that out of the amount owing to this creditor a sum of about Rs. 300 has been realized by the creditor in execution proceedings against the insolvent's brother. Both these matters are matters which it will be open to the appellant to place before the learned Judge for consideration when the case comes up for re-consideration under this order. The parties will bear their own costs of this appeal.

Chatterjee J.

I agree.