

(1938) 01 PAT CK 0007
In the Patna High Court

Makhan Lal Govindram

APPELLANT

Vs

Bhagwan Singh Mistri and Others Creditors and Another

RESPONDENT

Date of Decision : 05-01-1938

Acts Referred:

Provincial Insolvency Act, 1920 — Section 50, 50(2), 75

Citation : AIR 1938 Patna 471

Hon'ble Judges : Yarma, J;Wort, J

Bench : Full Bench

Judgement

Wort, J.—The question in this appeal is with regard to two debts which are stated to have been proved in the insolvency proceedings against the petitioner who is the appellant in this Court.

2. The matter came before the learned Judge in the Court below on, an application to expunge the two debts to which I have made reference. The first question which was argued in the appeal was that the appeal was incompetent. Reliance was placed upon Section 50, Provincial Insolvency Act read together with Section 75. The contention of the respondents on this point is that the words "upon the application of a debtor" in Sub-section 2 of Section 50 refer only to the previous sentence, that is to say, to the case of a composition or scheme. A great deal of support is given to that argument by reference to English authorities on this matter. The English Rules 24, 25 and 26, Bankruptcy Act, have been enacted in Section 50, Provincial Insolvency Act.

3. In England the right of a creditor to apply to the Court for the expunging of proof exists only in the case where the trustee or the receiver (to use the expression adopted in India) declines to interfere or in the case of a composition or scheme. But the point does not strictly arise, as the District Judge, being in some doubt with regard to the merits of the application of the creditor, referred the matter to the receiver who made a report recommending that one at least of the debts should be expunged from the schedule.

4. The other Section which we have to construe for the purpose of the preliminary objection is Section 75, Insolvency Act. On the authorities it seems to me that the correct view to take of Section 50 (taking the Section by itself) is that the creditor has locus standi only in cases where the receiver declines to interfere in the matter or in the case of a composition or scheme.

5. Now, it is contended that if that be the case, the right of appeal given u/s 75 of the Act is limited to those persons who have locus standi u/s 50. Now, whatever may be the correct view of Section 50, it seems to me that the argument to which I have just made reference is an impossible one and for this reason. Clause 1 of Section 75 of the Act gives the debtor, any creditor, the receiver or any other person aggrieved a right of appeal from a Court subordinate to the District Court to the District Court. There can be no doubt in my opinion that the words "or any other person aggrieved by a decision" are quite immaterial for the purposes of this argument, because the very first expression in the Section is "the debtor" and therefore quite clearly the debtor has a right of appeal from a Court subordinate to the District Court to the District Court. Now, the sub-section with which we are particularly concerned is Sub-section (2) which provides:

Any such person aggrieved by any such decision or order of a District Court as is specified in Schedule 1, come to or made otherwise than in appeal from, an order made by a subordinate Court, may appeal to the High Court.

6. If we are to construe those words as meaning that the debtor may appeal or the creditor may appeal or the receiver may appeal if he is the person aggrieved (and that is the contention which is put forward before us), then I think the argument would be sustainable that a person who was not a party to the proceedings or had no locus standi u/s 50 could not appeal. But, as I have already stated, it is impossible to come to that conclusion, because it would give the debtor a right of appeal if the matter came before a Court subordinate to the District Court, but would give him no right of appeal if the matter in the first instance came before the District Court. I cannot imagine that the Legislature ever had such an intention, and I think the view that I take is supported by the actual words of the sub-section "any such person". I think they must be taken to include those persons in the first sub-section of Section 75. The next question is whether these two debts which are the subject-matter of the order of the learned District Judge are to be expunged or not.

7. The learned Judge has declined to expunge either of them. The first is the debt of Gouri Sankar. This appears to have arisen under a building contract. Gouri Sankar was to put up a certain building, and under the terms of the agreement exhibited in this case, the actual price of the work and material was to be fixed by arbitration, that is to say, by an arbitrator appointed by agreement of both parties. The only contention that Mr. Bose can make with regard to this matter is not that the debt should be expunged as a whole but that the amount for which the estate in insolvency is liable should be determined by arbitration. I

think a great deal could be said in support of that argument, had not certain circumstances existed in this case; and the circumstances to which I refer are these: that very soon after the insolvency proceedings were started the creditor gave notice to the insolvent to agree to an arbitrator fixing the amount under the contract. This was ignored.

8. Mr. Bose contends that the insolvent had excuses for ignoring this notice; but, in my judgment, in the circumstances of the case, having regard to the fact that the insolvency proceedings are going on, the insolvent cannot now make the objection which he makes through Mr. Bose, his advocate. Ordinarily speaking in a contract of this kind, when one of the parties refuses to appoint an arbitrator under the arbitration clause, then the other parties are entitled to appoint a person and that person can proceed with the arbitration. But, in the circumstances of this case, as I say, the position is somewhat different and in my judgment, having regard to the decision of the learned Judge, and having regard to the circumstances, he (the insolvent) is not entitled to make that objection.

9. One of the arguments addressed to us by Mr. Bose in this regard is that the learned Judge was wrong in stating that the insolvent did not contend that the amount which was being charged and which was entered in the schedule as a debt was unfair. He has rightly pointed out that on no occasion had the insolvent opportunity to give evidence in the matter; but the argument, if I may say so, is fallacious because the learned Judge does not say that the insolvent omitted to give evidence as to the unfairness of the amount claimed; the learned Judge stated that he did not take the trouble to contend that it was unfair.

10. As I understand the order made in this respect, the learned Judge intended to mean that the insolvent was not in a position to contend that it was unfair. In all the circumstances of the case, I think the appeal, so far as this matter is concerned, fails. As regards the debt of Bhagwan Mistri, the matter is entirely different. Bhagwan Mistri never purported to prove this debt; one other creditor named Rekhraj came forward with an affidavit stating that the insolvent was truly indebted to the said Bhagwan Mistri of Jamshedpur in a sum of Rs. 500, that is to say Rs. 400 principal and Rs. 100 interest, and then proceeded to state that this will appear from the account books. There is no statement in the affidavit as to whether the deponent had authority to swear this affidavit or prove the debt, and indeed the books of account which were filed show that they are not the books of account of Bhagwan Mistri but the books of account of Bekhraj; and from the books of account it is shown that the debt is owed by Bhagwan to the deponent.

11. It is true, there is the mention of the name of Bhagwan Singh, but neither in the books nor in the affidavit is there any statement to the effect that the deponent advanced the sum of money to the insolvent on behalf of Bhagwan Singh. Had they been the books of Bhagwan Singh himself, there would have been some corroboration of the statement in the affidavit. But being what they are, there is no corroboration whatever in the statement and, as I have already

pointed out, there is nothing to indicate what authority Bekhraj had to depose in this affidavit. It is stated by the learned advocate on behalf of the respondents that the statement was made before the Judge that he was an agent for Bhagwan, but of that fact we can take no notice.

12. In my opinion the proof contemplated by Section 49 is not present in this case and I think the insolvent in this appeal is entitled to have this debt expunged from the schedule. In the circumstances of the case the appeal succeeds in part.

13. The appeal is dismissed with costs as against Gouri Sankar and allowed with costs as against Bhagwan Singh.

Yarma, J.

I agree.