

(1940) 12 CAL CK 0002

In the Calcutta High Court

Case No : Appeal from Original Order No. 41 of 1940

Mohammed Siddique Yousuff

APPELLANT

Vs

The Official Assigner of Calcutta

RESPONDENT

Date of Decision : 17-12-1940

Acts Referred:

Citation : (1940) 12 CAL CK 0002

Final Decision : Dismissed

Judgement

Derbyshire, C.J.—This is an appeal from a decision of Mr. Justice Panckridge given on July 25th, 1940, whereby on the application of the Official Assignee of Calcutta the assignment of a decree and its benefits made by the insolvent decree-holder Ali Mohammed Hashim in favour of one Mohammed Siddique Yousuff was set aside as falling within the mischief of sec. 56 of the Presidency Towns Insolvency Act. The facts are set out in the judgment of Mr. Justice Panckridge.

2. As to whether the assignment in question was within sec. 56 of the Presidency Towns Insolvency Act, I for my part do not look upon it quite in the same light as the learned Judge did. But I do not find it necessary under the circumstances to discuss that part in this proceeding.

3. The assignment itself was made within three months of the petitioning creditor's application to have him adjudged insolvent, and it is one of the acts on which the debtor was adjudged an insolvent. That being so, there was the decision that that act was void as a fraudulent preference under sec. 56. Although the appealing creditor in this case was not a party to that decision he must have learned of it at the time he learned of these insolvency proceedings, yet he took no steps to have that part of the adjudication proceedings annulled. I think he is bound by the decision in Ex parte Learoyd: In re Foulds (1).

4. The time allowed to appeal from that decision is twenty-one days. He has taken no steps to appeal against it specifically, and in these proceedings it was

only suggested that he should be given leave to appeal on the third day of the hearing of these Appellate proceedings. If we were to grant him the leave to appeal against the relevant part of the order of adjudication, it would be leave on the ground that he was out of time. He is very much out of time.

5. The idea of appealing against that part of the adjudication order is an afterthought when he got into this Court and realised the difficulties of his position. My own view is that the application is too late, and although he offers to pay the costs thrown away, I am of the opinion that he is too late and that leave to appeal against the relevant part of the order of adjudication should be refused.

6. The result is that the Appellant is bound by the decision in *Ex parte Learoyd; In re Foulds* L.R. 10 Ch. Div. 3 (1878) and the appeal must be dismissed with party and party costs. Certified for two Counsel.

The application is dismissed.

7. *Mc Nair, J.* -- I agree with the learned Chief Justice that there is considerable difficulty in holding, as the learned trial Judge has held, that the dominant motive of the insolvent was to benefit one creditor in preference to another or others.

8. Some of the facts certainly suggest that the dominant motive of the insolvent was to benefit himself by obtaining a cash payment and leaving this country and his creditors to fight over what assets there might be. The learned trial Judge when he delivered judgment considered the question from two aspects. First, whether this was in fact a fraudulent preference within the meaning of sec. 56 of the Presidency Towns Insolvency Act and, secondly, whether the adjudication order operates so as to be a binding decision on the grounds on which it was based.

9. The adjudication order was made on June 13th, 1939, and contained the following words:

It appearing to the Court that the following act of insolvency have been committed by the said debtor : That with intent to defeat or delay his creditors including the said adjudicating creditor on the 20th day of January, 1933, the said debtor at No. 1B, Old Post Office Street., Calcutta, made and signed an Indenture of Assignment to effect a transfer of his property substantially that is to say his right, title and interest in the judgment and decree in Suit No 610 of 1938 of this Court in its original jurisdiction wherein the said debtor is the Plaintiff and Narayandas Khandelwala & Co, are the Defendants in favour of one Mohammed Yousuf Siddique of No. 29, Robert Street in Calcutta, knowing that at the date of such execution he was unable to pay from his own moneys his debts as they became due and that such transfer was made with the intention of preferring the said Mohammed Yousuf Siddique over other creditors.

10. There are four other grounds, but the only ground with which we are concerned in this appeal is the question of whether or not the transfer of January

20th, 1939, was made with the intention of preferring one creditor over others.

11. The order of adjudication has definitely held that there was the intention of preferring one creditor over others and that it was an act of insolvency. A notice of the adjudication order was published in the Calcutta Gazette on July 28th, 1939. The petitioning creditor, who is the present Appellant, was not a party to the proceedings when the adjudication order was passed. But he amits that previous to the passing of the order, and throughout, he had notice of all proceedings, and it is also admitted that once the order had been made, he as a person aggrieved, had the right to come in and appeal against that order. If he was dissatisfied with the adjudication order being based on the ground that the transfer to him was a fraudulent preference, he could have come in and appealed from the order. He has not done so. But at a very late stage in the hearing of this appeal he has applied for leave to appeal against the order of adjudication. I agree with the learned Chief Justice that at this late stage that application should not be allowed.

12. The question which he wishes to agitate in his appeal against the adjudication order is the question which was agitated for several days both before the trial Judge and before this Court. It appears to me inequitabe that at this late stage he should be permitted to reopen the same question by way of an appeal from the order of adjudication.

13. The reason which he gives for not having appealed against the adjudication order is that he was advised that the decision of the Court of Appeal in *Ex parte Learoyd: In re Foulds* (1) was no bar to his opposing the present application of the Official Assignee and that the order of adjudication would not operate as *res judicata*.

14. *Ex parte Learoyd* L.R. 10 Ch. Div. 3 (1878) has been followed in these Courts. It is good law in England, and it has been held on many occasions to be good law in this country also, and it has been held that the notice appearing in the Calcutta Gazette of an adjudication order is conclusive evidence of the order having been made, not only as against immediate parties but also as against creditors, subject to this, that any person feeling himself aggrieved has the right to come in and appeal against that order. Learned Counsel for the Appellant has argued that *Ex parte Learoyd* (1) is not applicable in this case because in that case there was only a single act of bankruptcy alleged, and that had that act not been held to be binding the adjudication would have been void.

15. In the present case, since there are five acts of bankruptcy, he suggests, if I rightly understand him, that there is no objection to the Court deleting the particular act of bankruptcy of which he complains and retaining the adjudication order on the other four grounds. I can find no justification for this contention in the language of the learned Lords Justices who decided *Ex parte Learoyd* L.R. 10 Ch. Div. 3 at 9 (1878). That decision was based on the construction of secs. 10 and 11 of the English Bankruptcy Act, 1869, but the language of those sections

has been closely followed in secs. 116 and 51 of the Presidency Towns Insolvency Act which applies to the case before us. At page 9 of the judgment in *Ex parte Learoyd : In re Foulds* (1), James, L.J., says:

The act of bankruptcy alleged was that the bankrupt absented himself from his dwelling-house on a particular day, with intent to defeat or delay his creditors, and by the adjudication it was conclusively settled that he had committed that not of bankruptcy.

16. It seems to me that there is just as conclusive a finding when there is more than one act of bankruptcy alleged, and that by the adjudication it is conclusively settled that the insolvent has committed all the acts of bankruptcy on which the adjudication is based. The creditor or any stranger who feels that he has been adversely affected by that decision has his right of appeal.

17. In *Ex parte Tucker*: *In re Tucker* L.R. 12 Ch. Div. 308 (1879) the question came before the Court of Appeal and it was held that a person who considered himself aggrieved by an adjudication of bankruptcy might be allowed to appeal although the time within which an appeal could be taken had expired. In that case the application for leave to appeal against the adjudication order, though not made within the time limited for bringing an appeal, was made at the time when the trustee in bankruptcy was applying -- as the Official Assignee was applying more than a year ago in the present application -- for an order declaring that the property which had been transferred was really the property of the insolvent and formed part of his estate.

18. It appears that in that case it was admitted that the order of adjudication so long as it existed was conclusive against the applicant and that the acts of bankruptcy alleged to have been committed had been in fact then committed.

19. It is also noteworthy that in *Ex parte Tucker* L.R. 12 Ch. Div. 308 (1879) the acts of bankruptcy on which the adjudication order was founded were two in number:

(1) that W. Tucker did on the 24th September, 1878, with intent to defeat or delay his creditors depart from his dwelling house,

(2) that did not on the 15th October with intent to defeat or delay his creditors depart out of England.

20. The creditor who sought to appeal against the order of adjudication did not contest the act of bankruptcy in October but he contested the earlier act in September. James, L.J., was again a party to the decision and although the Court merely decided that the time to appeal should be extended, it is clear from their judgments that they were of opinion that the order of adjudication was, unless the appeal were allowed, conclusive against the applicant that both the acts of bankruptcy had in fact been committed. The view which I take appears to be dissented from by a Bench of the Madras High Court in the case of *The Official Assignee of Madras v. O.R.M.O.R.S. Firm* ILR 60 Mad. 541 at p. 617 (1926). That

decision has been commented on by many of the text-book writers and also by the Rangoon High Court in *Official Assignee, Rangoon v. A. A. Thevar Bros.* [1937] Rang. L.R. 65. The learned Judges at page 547 of the report in the Madras case say as follows: --

The whole question really resolves itself into whether the legislature by the use of the expression "duly made" in sec. 116, contemplated not merely that the acts of bankruptcy on which the order of adjudication is founded should be regarded as acts of bankruptcy but also further to give such findings the legal consequences of a decision against the parties who have not had any opportunity of being heard in the matter. We consider that such an interpretation and such far-reaching consequences are not warranted by the mere use of the expression "duly made".

21. With respect I find myself unable to agree with the conclusion of the learned Judges. The parties who have not had an opportunity of being heard at the time of the adjudication are able under the provisions of the Presidency Towns Insolvency Act, if they are aggrieved, to come in and be heard by appealing against the order of adjudication, and, speaking for myself, it appears to me that it would not be giving full weight to the words "duly made" unless it imported the consideration that the acts of bankruptcy named in the order were the acts of bankruptcy on which the order was founded.

A man cannot be "duly " ad judged a bankrupt

says James, L.J., in *Ex parte Learoyd* L.R. 10 Ch. Div. 3 (1878)

unless the great requisite of all exists that he has committed an act of bankruptcy. That is the capital offence of which he must have been guilty before he can be " duly " adjudged a bankrupt. That he has been "duly" adjudged a bankrupt necessarily involves the previous commission of an act of bankruptcy.

The "far reaching consequences" of the interpretation which appears to me to follow the literal construction of the words of sec. 116 and sec. 51 of the Presidency Towns Insolvency Act were present to the minds of the learned Judges who construed in *Ex parte Learoyd* (1) the similar provisions of the English Act.

No doubt a certain amount of hardship will result from this construction" said Thesiger, L.J. "But the answer to that is, that it is open to any person aggrieved by the adjudication to apply to the court to annul it. And there is this further answer, that in the administration of bankruptcy the interests of individual creditors have to bow to the interests of the general body of creditors and we must therefore expect to find some cases of hardship

and again James, L.J.

It is said that inconvenience and hardship will result from putting a literal construction upon" the words of Sections 10 and 11 of the English Act -- "If there

is any hardship which is not sufficiently met by the provisions of sec. 71 and the decision of this Court in Ex parte Ellis L.R. 2 Ch. Div. 797 (1876). that is a matter to be dealt with by the Legislature ...

22. Ex parte Learoyd L.R. 10 Ch. Div. 3 (1878) was decided in 1878 and neither in England nor in India has the Legislature thought fit to introduce legislation to nullify the effect of that decision. It is only reasonable to presume that in practice the hardships which were anticipated have not been found to exist.

23. I agree that the appeal should be dismissed with costs and also the very belated application for leave to appeal against the order of adjudication. Solicitors: N.C. Bural & Pyne for the Appellant; Chaudhuri & Chaudhuri for the Respondent.