(1978) 01 CAL CK 0042

In the Calcutta High Court

Nemai Chandra Sadhukhan APPELLANT

Vs

Chhatrapati Sadhukhan RESPONDENT

Date of Decision : 05-01-1978

Acts Referred:

Provincial Insolvency Act, 1920 — Section 13, 20, 6, 9

Citation : 82 CWN 283

Hon'ble Judges : B. C. Roy, J;A. K. Sen, J

Bench : Division Bench

Advocate : Dipankar Ghaosh, Samir Kumar Mukherjee and Nirmal Kumar Manna, for the Appellant;B. C. Dutt, Biswajit Ghosh and Debashis Mitra, for the Respondent

Final Decision : Allowed

Judgement

1. This is an appeal by one of the debtors against order No. 15 dated November 15, 1976, passed in Insolvency Case No. 38 of 1976 disposing of the petition filed by the debtors on November 8, 1976, for vacating the order appointing the Official Receiver as interim Receiver of the properties and assets of the debtors mentioned in the petition.

2. The creditor Chhatrapati Sadhukhan filed an application u/s 13 (2) of the Insolvency Act, 1920 being Insolvency case No. 38 of 1976 in the 6th Court of the Additional District Judge, Alipore for adjudging the debtors opposite parties Nos. 1 and 2, Nemai Chandra Sadhukhan and Gour Chandra Sadhukhan as insolvent alleging that they had committed acts of insolvency by refusing to pay the sum due to the petitioner, by declaring to the petitioner on July 30, 1976 that they suspended payment of their debts to the petitioner and by closing down the business sites at 88, B. T. Road, Lakhikantapor-Bijoygunj Bazar and Akra in order to defraud the creditors. In the said case an application u/s 20 of the (Provincial) Insolvency Act to be hereinafter referred to as "the said Act" has been filed for appointment of an interim Receiver to realize the entire sum of Rs. 67,000/- due to the petitioner from out of the properties and assets of the debtors mentioned

therein. It has been alleged in the petition that the debtors in order to defraud the creditors have transferred assets and properties in the benami of their wives. By order No. 6 made ex-parted on September 17, 1976, the Official Receiver was appointed Receiver of the properties and assets of the debtors. The debtors opposite parties Nos. 1 and 2 made an application for vacating the said order as well as for stay of operation of the said order mainly on the grounds that the acts alleged in the petition did not constitute acts of insolvency as specified in Section 6 of the Act. It has also been stated therein that the business site at Lakhikantapur-Bijoygunj Bazar ceased to operate since 1972 and the license of the said business was into renewed since January, 1973. It has also been stated that no business was carried on in Premises No. 88 B. T. Road due to non-availability of electricity therein and the business of Akra though stopped temporarily will be resumed soon. The allegations of transfer of assets of business and properties by the debtors are absolutely vague as no particulars about the dates of such transfers and in whose favour such transfers have been made have not been stated at all and as such these allegations could not form as acts of insolvency within the meaning of the said Act. It has also been alleged that he court has no jurisdiction to entertain the case as the cause of action has accrued at 106-D, Raja Dinendra Street, and the opposite parties 1 and 2 reside at 60/17, Gouribari Lane which are within the Presidency Town of Calcutta.

3. By order No. 15 the Additional District Judge, 6th Court, Alipore stayed the operation of the order until further orders in regard to the properties or assets at 60/17, Gouribari Lane and 106-D, Raja Dinendra Street being held to be outside the jurisdiction of the court. The said order has not been vacated in so far as the properties or assets at Lakhikantapur-Bijoygunj Bazar, 88, B. T. Road, Baguihati Bazar and Akra and the properties and assets at 242/F, Acharya Profulla Chandra Road are concerned. It has also been held that he other pleas taken in the petition could not be decided at the present stage of the insolvency case when appropriate materials in respect of them are yet to come and the application was thus disposed of.

It is against this order this appeal has been preferred by one of the debtors and leave has been duly obtained from this Court.

4. Mr. Dipankar Ghose, learned counsel appearing in support of the appeal has contended that the allegations made in the insolvency petition did not constitute any act of insolvency as specified in the said Act and as such the application is not maintainable. The order of appointment of interim Receiver is not in accordance with law and the impugned order disposing of the application for vacating the interim order are bad and unwarranted.

5. It has also been contended by Mr. Ghose that the allegations made in the insolvency petition did not disclose the date of commission of the alleged acts of insolvency as required under the said Act. The petition is to be presented within three months of the commission of the acts of insolvency otherwise the application will not be entertained. In the petition it is not stated clearly when

the debtors transferred their properties and assets in the benami of their wives in order to defraud or defeat the creditor petitioner nor the names of the transferees and the specific properties or assets alleged to have been transferred has been stated in the said petition. The insolvency petition is not in compliance with the mandatory requirements of Sub-section (2) of Section 13 of the said Act and as such the order of appointment of interim Receiver is liable to be set aside.

6. Mr. B. C. Dutt, learned counsel for the Respondent No. 1 has contended that the statements and allegations made in the insolvency petition particularly in Sub-paras (d) and (e) of paragraph 5 clearly establish that the debtors committed acts of insolvency as specified in the said Act. In the petition it has been stated that debtors expressly declared to the creditor petitioner that they have suspended payment of their dues to him. It has also been alleged therein that the debtors closed down the business sites at certain places mentioned therein order to defraud the creditors. These acts of the debtors constitute acts of insolvency within the meaning of clauses (b) and (g) of Section 6 of the Insolvency Act. In the application for appointment of interim receiver it has been alleged that the opposite parties in order to defraud the creditors transferred assets and properties in the benami of their wives. The insolvency petition is in conformity with the provisions of the Insolvency Act. The order appointing interim receiver is not illegal and unwarranted and the impugned order dismissing the application for vacating the said order is not bad.

7. An insolvency petition for adjudging the debtor an insolvent may be made before the court either by the debtor or by creditor adjudging the debtor an insolvent provided the debtor has committed acts of insolvency as specified in Section 6 of the Provincial Insolvency Act, 1920. It has also been provided in Section 9 of the said Act that the petition has to be presented before the court within three months of the commission of the acts of insolvency otherwise the petition will be barred. It is also incumbent on the petitioner if he is the creditor to specify the acts of insolvency and the date of their commission in the petition. The application for adjudging the debtors as insolvent has been filed by the creditor on August 16, 1976 and in paragraph 5 of the said petition the acts of insolvency committed by the debtor have been stated. Sub-paras (a), (b) and (c) of the said paragraph merely state that the debtor opposite parties Nos. 1 and 2 have not paid any sum either in payment of dues or of interest accrued thereon and they have refused to pay the dues when demanded by sending letter. In Sub-para (d) it has been alleged that the debtors told the creditor on July 30, 1976 that they had suspended payment of their dues to him. In Sub-para (e) it has been alleged that the debtor in order to avoid payments and to defraud the creditors have already closed down their business at Lakhikantapur-Bijoygunj Bazar, 88, B. T. Road which the petitioner has come to know on August 10, 1976 on enquiry at the locale. The question is whether these allegations made in the petition constitute acts of insolvency within the meaning of Section 6 of the said Act to enable the creditor to present the petition for adjudging the debtors as insolvent. Refusal to pay the sum due to the petition who is one of the creditors

and the express declaration to him that the debtors have suspended payment of his debt do not mean suspension of payment of debts to all their creditors as required under Clause (g) of Section 6 of the said Act and as such this allegation does not constitute an act of insolvency committed by the debtors. Reference may be made in this connection to the case reported in AIR 1932 643 (Lahore) , where it has been observed that the notice of suspension of payment of debts may be oral or in writing; but it must be a notice deliberately given and must amount to an intimation to the creditors that the debtor intends to suspend the payment of his debts due to all his creditors. The notice must be such that the creditor may infer that the debtor intended to suspended payment of all his debts. Similar view has been expressed in AIR 1934 87 (Rangoon) . It has been observed that debtor does not commit an act of insolvency merely by suspending payment of his debts. u/s 6 (g) of the Act a debtors commits an act of insolvency only if he gives notice to any of his creditors that he has suspended payment or about to his creditors generally and the time, place and particulars of the notice should be accurately specified.

8. As to allegation regarding the closure of the business sites in some places to defraud the creditors it has been pleaded that the business at Lakhikantapur-Bijoygunj Bazar ceased to operate in 1972 and the licence of the business expired in January 1973. It has been also stated in the application for vacating the order of interim receiver that no business could be stated in the premises at 88, B. T. Road hired in 1969 due to non-availability of electricity and the said tenancy was surrendered in 1970. The above business having ceased to operate long before the loan-in-question was advanced cannot be taken as acts of insolvency u/s 6 of the Act for the purpose of presenting the insolvency petition. Moreover, the said allegations even if construed as acts of insolvency being committed long before three months prior to the presentation of this petition cannot be the subject matter of the insolvency petition. Moreover, the particulars as to the date of commission of the insolvency being not specified as required u/s 13 (2) of the said Act the application is not in accordance with the provisions of the said Act. In the application for appointment of interim receiver u/s 20 of the said Act, it has been alleged that immediately after execution of the pronote with a motive to defraud the petitioner, the debtors have transferred and invested their assets and properties in the benami of their wives and also in the benami of others. The pronote was executed in January, 1975 and the insolvency application was filed on August 16, 1976 and as such these allegations even if assumed as constituting as acts of insolvency have been committed long before three months of he date of presentation of the petition and so u/s 9 (1) (c) of the said Act the application is not maintainable. Furthermore no particulars as to the date of the alleged transfer and in whose favour the alleged transfer have been made had been given in the said petition as required u/s 13 (2) of the said Act. The adjudication of a person as insolvent will have serious consequences and as such the requirements provided in the Insolvency Act are to be strictly complied with as has been observed in M.O. Veerayya Chetty and Another Vs. N.S.R.

Doraiswamy Reddiar and Others, . It has been observed in AIR 1932 643 (Lahore) :-

Adjudication of a debtor as an insolvent at the instance of the creditor involves considerable disgrace and legal disabilities to the debtor; Therefore it is all the more necessary that the act of insolvency alleged to have been committed by him should be clearly and precisely described in the insolvency petition to enable the debtor to meet the charges brought against him, and unless the facts alleged within the ambit of the statute the court should stay its hands both in the matter of adjudication and the appointment of interim receiver. The responsibility in such cases lies on the petitioning creditors to clearly allege and prove the act of insolvency.

9. In a Bench decision of This Court in 35 C.W.N. 567, Krishnadas Roy v. Charushila Pal Chowdhury; Rankin C.J. observed that in an application for adjudication of insolvency the exacts acts of insolvency and the dates of such acts should be carefully particularized otherwise the application will be dismissed. We have already held that the creditor petitioner has failed to allege in this petition specifically the acts of insolvency and the dates of its commission by the debtors clearly. Moreover, the acts of insolvency being not alleged to have been committed within three months prior to the date of the presentation of the insolvency petition, the alleged acts cannot be regarded as acts of insolvency within the provisions of Section 6 of the said Act. In such circumstances the order appointing the Official Receiver as interim receiver is bad and unwarranted and as such the impugned order No. 15 upholding the said order of interim receiver is also illegal and bad.

10. In the premises all the contentions raised on behalf of the appellant having succeeded the appeal is allowed. The judgment and order of the court below is set aside and the order appointing the Official Receiver as interim Receiver of the assets and properties of the debtors is hereby vacated. In the circumstances of the case the parties will bear their respective costs.

Anil K. Sen, J.

11. I agree.