
(1929) 11 MAD CK 0016
In the Madras High Court

Palani Goundan

APPELLANT

Vs

The Official Receiver of Coimbatore and Another

RESPONDENT

Date of Decision : 12-11-1929

Acts Referred:

Provincial Insolvency Act, 1920 — Section 27

Citation : AIR 1930 Mad 389 : (1930) ILR (Mad) 288 : (1930) 31 LW 365 :
(1930) 58 MLJ 369

Hon'ble Judges : Krishnan Pandalai, J; Horace Owen Compton Beasley,
J; Curgenvin, J

Bench : Full Bench

Judgement

Horace Owen Compton Beasley, Kt., C.J.—The question referred to us is
"Whether a Court has jurisdiction to extend the time originally

fixed u/s 27 of the Provincial Insolvency Act, for an application by the debtor for
discharge, after the expiry of that time, but before an order of

annulment is passed u/s 43, either u/s 5 of the Insolvency Act taken with Section
148, Civil Procedure Code, or u/s 27 (2) of the Act itself, or

otherwise." This reference is made necessary because of the view taken by
Courts other than the Madras High Court in opposition to the balance

of opinion in the Madras High Court.

2. The facts are that the insolvency petition was presented on the 5th January,
1923 and on this petition there was an order of adjudication on the

31st January, 1924 and one year's time was granted to the insolvent to apply for
his discharge. This time was further extended and the finally

extended period expired on the 30th June, 1927. No further applications, for
extension of time were made and nothing was done in the insolvency

until in 1928 an alienee applied for the annulment of the adjudication. Notice was

ordered to the insolvent to show cause against the annulment of the adjudication and then a creditor filed an application to extend the time for the application, for discharge.

3. We have now to consider whether the Court has any jurisdiction to extend the time for an application for discharge having regard to the fact that

the time specified by the Court expired on the 30th June, 1927 and the application for an extension of time was only made in 1928. The first

section to be considered is Section 43 (1) of the Provincial Insolvency Act which reads, ""If the debtor does not appear on the day fixed for hearing

his application for discharge or on such subsequent day as the Court may direct, or if the debtor does, not apply for an order of discharge within

the period specified by the Court, the order of adjudication shall be annulled, and the provisions of Section 37 shall apply accordingly."" Waller, J.,

in *Arunagiri Mudaliar v. Kandaswami Mudaliar* (1923) 19 L.W. 418 held that the Judge has no option u/s 43 but to annul the adjudication and that

he has no power u/s 27 to extend the period after it has expired. His reason for so holding is that Section 43 is in his view absolutely peremptory in

its terms and that the only course open to a Court, on default of the insolvent to apply for his discharge, is to annul the adjudication and that being

so no application for extension of the period can lie after it has expired. In the same case Krishnan, J., took the contrary view. In *Chinnappa*

Reddy v. Thomasu Reddy I.L.R.(1927) M. 839 : 54 M.L.J. 344 Kumaraswarni. Sastri and Wallace, JJ., agreed with Waller, J."s view in a

judgment which reviewed most of the decided cases upon this point and they held that the word ""shall"" in its ordinary signification is mandatory and

saw no reason why that word in Section 43 should not receive its ordinary interpretation. Phillips and Madhavan Nair, JJ., followed Waller, J."s

opinion in *Arunagiri Mudaliar v. Kandaswami Mudaliar* (1923) 19 L.W. 418 in *C. Venugopalachariar Vs. K. Chinnulal Sowcar and Others*, .

Vonkatasubba Rao and Reilly, JJ., considered this question in *Jethaji Peraji Firm Vs. Tirupuramallu Krishnayya (dead) and Others*, .

Vonkatasubba Rao, J., in the first place, observes that the adjudication does not get automatically annulled u/s 43 (1) on the expiry of the original

period. Next he holds that Section 27 (2) of the Provincial Insolvency Act, whilst saying that the Court may extend the time, does not say in

express terms that it may be extended either before or after the expiration of the period originally fixed, and in his view Section 148, Civil

Procedure Code, clearly allows the Court to enlarge the time irrespective of the fact that the application is made either before or after the expiry of

the period originally specified and for this (1889) L.R. 17 I.A. 1 (Privy Council) is direct authority. He holds, therefore, that it is open to the

Insolvency Court u/s 27 (2) of the Provincial Insolvency Act to extend the time on a proper application to that effect made at any time before the

adjudication is annulled u/s 43 (1). Reilly, J., is inclined to the view that the words ""shall be annulled"" in Section 43 of the Act are mandatory. In

the view of the majority of the Judges of this High Court who have considered this question, the answer to the question referred to us would be in

the negative.

4. But other High Courts, namely, Calcutta, Patna and Lahore, have taken the opposite view. This question was very carefully dealt with by a Full

Bench of the Patna High Court in Gopal Ram v. Magni Ram I.L.R.(1927) Pat 375 (F.B.) holding that the Court has power u/s 27 (2) of the

Provincial Insolvency Act to extend the time originally fixed by it for the insolvent to make an application for discharge in spite of the fact that the

time originally fixed by it may have expired and no application for discharge was, made by that time and that the power so conferred by Section 27

(2) can only be curtailed or withdrawn when the Court's power to deal with the question of adjudication has come to an end by reason of its

having passed the final order annulling the order of adjudication. It also held that the annulment of adjudication does not, u/s 43 (1) of the Act,

come into operation without an express order of the Court to that effect. All the decisions were carefully considered in the judgment of Jwala

Prasad, J. On page 381, he says:

The interpretation sought to be placed upon Section 43 of the Act by Mr. Shambhu Saran could only be accepted if the Court was not required to

pass an order of annulment after the failure of the insolvent to make an application within the period specified by the Court. The annulment of

adjudication would not ipso facto come into operation without an express order of the Court to that effect u/s 43 of the Act. This is clear from the

section itself and it gains support from Clause (2) of Section 37 which says

"Notice of every order annulling an adjudication shall be published in the local official Gazette and in such other manner as may be prescribed," so that an order annulling an adjudication has to be passed by the Court and so long as that order is not passed the question, as observed above, remains pending before the Court in spite of the expiry of the period fixed by the Court for the insolvent to make an application for his discharge.

5. It was strongly contended before us that this view of the Patna High Court is wrong and that directly the time has expired for the application for the discharge and the debtor has made default in making such an application, the order of adjudication is ipso facto annulled. But this contention quite overlooks Section 37 (2) of the Act to which Jwala Prasad, J., referred. That, in terms, refers to the order annulling the adjudication. It seems clear that no adjudication can be annulled without an order. If the annulment were automatic on the expiry of the period prescribed by Section 27

(1), the order annulling the adjudication specified in Section 37 (2) would be quite unnecessary. In *Abraham v. Sookias* I.L.R.(1923) C. 337

Chatterjea and Panton, JJ., took the same view as was taken afterwards in the case in *Gopal Ram v. Magni Ram* I.L.R.(1927) Pat. 375 (F.B.),

namely, that the Court has power to extend the time even after the expiry of the period originally fixed and that furthermore the annulment of the

adjudication is not automatic. On the latter point *Maharaj Hari Ram v. Sri Krishan Ram* I.L.R.(1926) A. 201 is in agreement with *Gopal Ram v.*

Magni Ram I.L.R.(1927) Pat. 375 (F.B.) and *Abraham v. Sookias* I.L.R.(1923) C. 337.

6. In my opinion, the view taken by the Calcutta, Patna and the Allahabad High Courts is the correct one. I think that too much importance has

been given in the decided cases in this Court to the question of whether the word ""shall"" in Section 43 (1) of the Act is to be used in a mandatory

sense or not. No doubt it is mandatory and gives the Court no option but to order an annulment of the adjudication, but that does not necessarily

imply that the Court cannot grant an extension of time before passing such an order. In my view, all that is intended by that section is that if no one

applies for an extension of time or no extension of time is given, the Court must then annul the adjudication. Section 27 (2) of the Act cannot be

lost sight of. That gives the Court power to extend the time within which the

debtor shall apply for his discharge and Section 43 (1) only compels

the Court to annul the order of adjudication, if the debtor does not apply for an order of discharge within the period specified by the Court and, in

my view, Section 27 (2) applies as much to cases beyond the extended period as to those within it so long as the application is made before any

order of annulment is made by the Court and the words ""within the period specified by the Court"" in Section 43 (1) mean the period extended by

the Court from time to time beyond the original period and up to the date of annulment.

7. I also agree with Venkatasubba Rao, J., in *Jethaji Peraji Firm Vs. Tirupuramallu Krishnayya (dead) and Others*, that Section 148 of the CPC

allows the Court to enlarge the time irrespective of the fact that the application is made after the expiry of the time originally fixed or afterwards

extended.

8. For the above reasons, I would answer the question referred to us in the affirmative.

Krishnan Pandalai, J.

9. I agree.

Curgenvén, J.

10. I also agree. The question is not, in my view, whether the terms of Section 43 (1) of the Act are mandatory. Granting that the Court is obliged

to annul an adjudication if the debtor does not apply for an order of discharge ""within the period specified by the Court,"" it remains to be decided

how that expression is to be construed. Sub-section (1) of Section 27 requires the Court, on making an order of adjudication, to ""specify in such

order the period within which the debtor shall apply for his discharge." Sub-section (2) empowers the Court to extend such period. ""The period

specified by the Court"" will clearly comprise not only the period originally specified under Sub-section (1), but any extension granted under Sub-

section (2). Then the only further question is whether such extension may be sanctioned even after the original period, together with any extension

already ordered, has expired. Section 5 of the Act attracts the provisions of the Code of Civil Procedure, and among them the power, conferred

by Section 148 of the Code, to grant an extension of time even though the period originally fixed may have expired. It is scarcely necessary to go

further than this; but if it were, the Privy Council judgment in (1889) L.R. 17 I.A. 1 (Privy Council) would support the view that power to enlarge a period after its expiry is implicit in such a provision as Section 27 (2). That case was decided under the old Code, which contained nothing corresponding to Section 148, and the point for decision was as to a Court's power retrospectively to enlarge the period for furnishing security u/s 549 (now Order 41, Rule 10). The section contained the direction if such security be not furnished within such time as the Court orders, the Court shall reject the appeal.

11. Purely upon a construction of the section their Lordships say that

The application to the Court to enlarge the time for giving security may be made either before or after the expiration of the time within which the

security has been ordered to be furnished, and the Court may thereupon enlarge the time according to any necessity which may arise where it is

just and proper that they should do so.

12. I can discover no reason for construing Section 43(1) of the Provincial Insolvency Act in any different manner.