(1947) 08 PAT CK 0001

In the Patna High Court

Prayag Mandar and Others APPELLANT

Vs

Mukteshwar Prasad and Others RESPONDENT

Date of Decision : 12-08-1947

Acts Referred:

English Bankruptcy Act, 1914 — Section 66(2)
Provincial Insolvency Act, 1920 — Section 61(6)

Citation : AIR 1949 Patna 63

Hon'ble Judges : Ray, J;Das, J

Bench : Full Bench

Judgement

Ray, J.—Both the appeals are by two sets of creditors in an insolvency proceeding. The appeals are directed against an order of Mr. V. Ramaswami I.C.S., dated 13th August 1943 in the insolvency cases Nos. n and 20 of 1933 in the district of Bhagalpur. The insolvents were a Firm J.N. Ram B.N. Ram. The application for insolvency was filed by some of the creditors. It appears that all debts entered in the schedule have been paid leaving a surplus in the hands of the receiver. The question for determination before the District Judge was payment of interest to the creditors out of the surplus left after payment of all debts entered in the schedule. This question is governed by Section 61(6), Provincial Insolvency Act (v [5] of 1920). The creditors contended that the interest at the statutory rate of 6 per cent. per annum as payable to them should be calculated on the respective amounts of debts entered in the schedule and the interest, was to run from the date on which the debtor was adjudged insolvent, that is 18th February 1935. Besides it had also been argued in the Court below by the creditors as the second alternative that they were entitled to the contract rate of interest from the date of adjudication up to the time of payment on the principal amount. The insolvents had urged in the Court below as they have done here that interest should be calculated not on the principal amount as mentioned in the hattchitha after the accounts had been settled between them and the creditors, as that amount included compound interest at 6 per cent, but that the previous transactions should be reopened allowing simple interest at the same rate on the principal sum advanced. Reliance had been placed by the insolvents in support of their this contention on Section 66(2), English Bankruptcy Act of 1914.

2. The creditors bad further argued that the word "interest" in Section 61(6) meant compound interest, and that they were accordingly entitled to compound interest at 6 per cent, on the respective amounts entered in the schedule.

3. The learned District Judge did not propose to decide if the creditors were entitled to the contract rate of interest u/s 48(2) of the Act but confined himself to the question that arose for decision u/s 61(6) of the Act. He dismissed the contention that the word "interest" occurring in the section would mean compound interest. This contention of the creditors has not been pressed before us. He also disallowed the prayer of the insolvents that the settled accounts should be re-opened and computation of principal and interest should be made taking the principal amount advanced as the basis and adding simple interest at 6 per cent, to it debiting the sum thus arrived at with the amounts paid. This contention on behalf of the debtors has, however, been repeated before us by Mr. G.P. Das though not with any seriousness. The learned District Judge, however, acceded partly to the insolvents'' contention to the extent that the debts entered in the schedule should be split up into principal, as claimed by the creditors, and the interest calculated on it up to 18th February 1935, the date of adjudication and that the creditors should be allowed interest at 6 per cent, to use the words of the District Judge, "not on the respective amounts entered in the schedule but on the principal amount alone." In coming to this view, he construed the word "debts" appearing in the Sub-section to bear the same meaning as the word bears in Sections 48(1) and 48(2) of the Act, namely, the principal amount alone.

4. On giving effect to this order of the learned District Judge, it appears that the schedule of debts is in effect re-opened, and in some cases the creditors have to refund part of the amounts already received by them as part of their debts proved under the Act and entered in the schedule. The question for determination is whether this part of the learned District Judge''s order is correct and whether effect can be given to the contention of the insolvents by re-opening the settled transactions between the parties in order to find out the original sum advanced, and to calculate interest, up to the date of adjudication or payment, thereon at 6 percent simple.

5. Mr. G.P. Das appearing for the insolvent respondents raised a preliminary point that the appeal having abated, and, therefore dismissed against a number of debtors (respondents) it must be taken to have abated as a whole or else there will be two conflicting decisions in the same case as against different debtors. Mr. S.C. Misra appearing for the creditors, to meet this objection, urges that the official receiver represents the insolvents in this appeal, and that the insolvents are unnecessary parties. So long as the receiver represents the insolvents'' estate, the appeal can never abate, that is, the orders of dismissal of the appeal, as against some of the debtors is of no legal efficacy oh the appeal as a whole.

Mr. G.P. Das relies upon Section 75 of the Act in support of his contention that the debtor as one of the persons aggrieved by an order effecting distribution of the surplus is a necessary party to an appeal from the order.

6. It is true that the debtors in their personal capacity can justly feel themselves aggrieved by the reversal of the order under appeal and to that extent can be interested in the appeal, but whether they are necessary parties is completely a different question. The dispute in question relates to the surplus in the hands of the receiver, after payment of the debts proved and incorporated in the schedule under the provisions of the Act. The question that strictly arises is who represents the property in the surplus, and in whom it is vested. On adjudication the insolvent''s estate vests in the Official Receiver or a special receiver appointed for the benefit of the creditors for the purpose of distribution of the estate amongst them. The debtor loses all power of disposition over them. Any external attack on the property is deemed to De an attack on the vested right of the receiver, and he is the person to defend any legal proceedings started against the property. The problem involved in this appeal has to be approached in this background. In the cases of In re Lead bitter (1878) 10 Ch. D. 388 and Ex parte Sheffield (1879) 10 Ch. D. 434 it has been held that on the making of an order of adjudication, the whole of the estate of the insolvent vests in the official assignee and the insolvent has no interest in it. A bankrupt can do nothing to enbarrass the administration of his estate. Even as regards the surplus, he has no property in it; he has nothing more than a mere hope or expectation. He cannot, therefore, be a person aggrieved by any act of the official assignee in the course of the administration of his estate.

7. For proper appreciation of the question at issue the scheme of the Provincial Insolvency Act ought to be taken into account. According to Section 4, Provincial Insolvency Act, it is the insolvency Court who shall have full power to decide on question of any nature whatsoever which may arise in any case of insolvency coming within the cognizance of the Court, and according to Sub-section (2) of the section, the decision of the Court shall be final between, on the one hand, the debtor and the debtor''s estate, and on the other and, all claimants against him or it and all persons claiming through or under them or any of ''them. It will be noticed that while the decision binds the claimants against the debtor or his estate and likewise the persons claiming through or under them, it does not bind persons claiming through or under the debtor. This provision of law has behind it a solid reason namely, that a debtor may be an insolvent but not his heirs, successors or legal representatives. If such latter class of persons are bound by a decision of the insolvency Court, they are bound only to the extent as the debtor''s estate is bound. This aspect of the law will necessarily have a bearing on the question whether a debtor''s legal representative, as a matter of necessity, has to be brought on record to represent the debtor as distinguished from a debtor''s estate. Section 17 of the Act provides:

If a debtor by or against whom an insolvency petition has been presented dies, the proceeding a in the matter shall unless the Court otherwise orders, be continued so far as may be necessary for the realisation and distribution of the property of the debtor.

This section does not necessitate bringing on to record the legal representative of the debtor for the carriage of the proceedings. This also throws a flood of light on the question at issue. In the case of S.A.S. Subbiah Aiyar v. The Official Receiver Tinnevelly AIR 1933 Mad. 25 the debtor died before adjudication, and the Court passed an order adjudicating the estate as insolvent and carried on the proceeding to its due termination. According to Section 16 of the Act, in the case of a petitioning creditor, if he does not proceed with due diligence on his petition, the Court may substitute as petitioner any other creditor to whom the debtor may be indebted in the amount required by this Act. According to Section 14, no petition, whether presented by a debtor or by a editor, shall be withdrawn without the leave of the Court. According to Section 28(2), on the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver. Sub-sections (3) and (4) of Section 28 are designed to merge the personal entity of the debtor in relation to all his properties either in existence at the date of the presentation of the petition on which the order of adjudication is made, or that may subsequent thereto be acquired by him or devolve on him after the date of the order of adjudication and before his discharge. All such properties shall vest in the Court or the receiver, as the case may be. That the receiver has the duty to look to the interest of the debtor appears from the provisions contained in Section 50 which provides:

Where the receiver thinks that a debt has been improperly entered in the schedule, the Court may, on the application of the receiver and after notice to the creditor, and such inquiry (if any) as the Court thinks necessary, expunge such entry or reduce the amount of the debt.

In a case where no receiver has been appointed or the receiver declines to interfere in the matter, the debtor can make an application to the Court for expunging the debts; vide Sub-section (2). According to Section 51 where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realised before the date of the admission of the petition for insolvency. According to Section 52, whatever property is in custody of Court in course of the execution of a decree should be made over to the receiver as soon as the executing Court gets notice that an insolvency petition by or against the debtor has been admitted. According to Sections 53 and 54, certain transfers made by the debtor, under circumstances stated therein are declared voidable by the receiver. As the receiver represents the debtor in relation to his estate vis a vis the creditors in insolvency proceedings, he represents the creditors too, in the matter of enforcement of the latter''s right in the said proceedings. According to Section 54A, the receiver is entitled to present a petition for annulment of transfers, payment, obligations or judicial proceeding under Sections 53 and 54, even though these petitions are stoically speaking for the benefit and in the interest of the creditors. According to Section 54A of the Act, it is only when he satisfies the Court that the receiver has been requested, and has refused to make such petition that any creditor may make a petition for annulment. According to Section 66, as soon as a receiver is appointed either at or after the order of adjudication, the property of the insolvent vests in him, and, according to Section 59, certain rights to sue or be sued also vest in the receiver. The section, so far as is material for the purpose of this appeal, reads:

Subject to the provisions of this Act, the receiver shall, with all convenient speed, realise the property of the debtor and distribute dividends among the creditors entitled thereto, and for that purpose may...(c) carry on the business of the insolvent so far as may be necessary for the beneficial winding up of the same; (d) institute, defend or continue any suit or other legal proceedings relating to the property of the insolvent; (g) mortgage or pledge any part of the property of the insolvent for the purpose of raising Story for the payment of his debts.

The receiver, therefore, fully represents the debtor. The latter can interfere only when he satisfies the Court that the receiver has declined to perform his duty called upon in the legitimate interest of his. Section 68 gives either the creditor or the debtor a right of appeal against the receiver. The section reads:

If the insolvent or any of the creditors or any other person is aggrieved by any act or decision of the receiver, he may apply to the Court and the Court may confirm, reverse or modify the act or decision complained of and make such order as it thinks just.

It will be noticed in this connexion that from the very nature of the proceedings a right to sue cannot survive to the legal representative of the debtor. If the insolvent dies during the pendency of the proceedings either before or after an adjudication, it does not follow that his heir or legal representative. can be considered an insolvent for the purpose of proceedingsThe only extent to which such an heir or representatives can represent the deceased insolvent is the interest in or right of administration of, the deceased''s estate. But such an estate, on the passing of the order of adjudication either against or in favour of the deceased debtor or his estate, as the case may be, vests either in Court (where |no receiver is appointed) or in the receiver. For the purpose of all business concerning the insolvency proceedings, the receiver becomes vested ''with all powers of transfer, administration, management of the estate and conduct of all suits or legal proceedings in relation thereto including right to sue or be sued. In such state of things, until the insolvent or his estate is dis. charged after payment in full of the debts of all the creditors, there is no estate which devolves either on the heir or the legal representative of the deceased insolvent. In the case of In re Leadbitter (1878) 10 Ch. D. 388. Bacon V. C. described the position in the following very weighty words:

In my opinion the applicant is entitled to know such thing. The fallacy of the argument is that this bill of costs was paid by the applicant''s trustee. The applicant in effect says: ''This money was paid by my trustee out of my property''. But the statute has no application to the case of a trustee in bankruptcy. The trustee in bankruptcy was not the applicant''s trustee the property was not the applicant''s property. It was the property of his creditors, and the money was paid out of what which had been once, but had ceased'' to be, the applicant''s estate. The applicant at the time of payment had no present interest in it nor any particle of it when the discharge was granted, he became entitled to the surplus no doubt, but the property out of which this payment was made by the trustee was not his property.

In the same case in appeal, Jessel, M.R. observed.

In the second place, the bankrupt is not a ''person interested'' in the property out of which the bill was paid. At the time when the bill was paid there was no surplus but only a possibility of a surplus. A legacy might be left, or a reversion might fall in, but at most, there was no more than a probability of a surplus. There was no surplus till all the debts had been paid in full; therefore pending the bankruptcy, the bankrupt was not a person interested in the property; the probability of a surplus could not make him so. This has been settled by other cases, especially by Rochfort v. Battershy (1849) 2 H.L.C. 388, where it was held that an insolvent was not entitled to any of the rights of a cestui que trust. He could have no-relief against the assignee in the Court of Chancery.

Similarly in the case of Ex parte Sheffield (1879) 10 Ch. D. 434 Jessel, M.R. observed:

The bankrupt has no property in the surplus. The trustee is not a trustee of it for him. He has nothing, more than a mere hope or expectation.

It follows, therefore, that at this stage there is no estate left by the deceased bankrupt which, can be represented by his personal representative. A similar view has been taken in some reported decisions in India which I propose to notice briefly. In the case of Jatindra Nath Saha Vs. Katihar Oil Mills Ltd. and Others, it was observed by a. Division Bench:

It may be mentioned that if there is a Receiver it insolvency appointed in the case, as was not the case here, the absence of heirs of one of the creditors would-not have rendered the appeal in fructuous and incompetent, if the Receiver representating all the parties-concerned was on record.

In the case of Kazi Abdul Sattar Vs. Dinajpur Trading and Banking Co. Ltd. and Others, the question that was debated at the bar was whether an appeal abated as against the heirs of the deceased respondents 9, 11, and 13 (creditors), their-Lordships said:

The Act is, however, silent with reference to the procedure which should be adopted in the matter of substitution of the heirs of deceased creditors. This being the case in my opinion, the criterion which should be adopted for the purpose of deciding whether such heirs should be substituted, is to ascertain whether or not the interests of such persons are likely to be adversely affected by their non-substitution.

In conclusion their Lordships said:

As stated above, the procedure as regards the issue of notices on creditors appears to have been prescribed primarily in order to afford them a reasonable opportunity to appear at the time of the hearing of the application for discharge. In my opinion, this procedure cannot be said to constitute such persons parties to the proceedings in the '' same sense that plaintiffs and defendants are parties in a civil suit. I do not think that the heirs of the deceased respondents can be affected in any way by their non substitution, and in my view, the fact that the heirs of the deceased respondents 9, 11 and 13 have not been impleaded in the case, cannot in any way affect the competency of the appeal.

In the case of Thakar Singh v. Ganya Singh AIR 1927 Lah 424 it was held:

Where in an appeal against an order of District Judge a creditor died and no legal representatives are brought on the record within the time fixed by law, the appeal does not abate as the real person who is interested in the appeal is the Official Receiver.

Besides the several provisions already referred to bearing upon the receiver''s competency to represent the debtor or the creditor, as the case may be, his position has been likened to that of an assignee. In the case of Amrita Lai Ghose v. Narain Chandra ChaJcravarti AIR 1919 Cal. 781 his Lordship Fletcher J. observed:

A Receiver under the Provincial Insolvency Act is exactly in the same position as the trustee in bankruptcy. The whole property of the insolvent is vested in him and he is the owner of the property until he is discharged. In the present case, the learned Judge of the lower appellate Court seems to have considered that the plaintiff was in contempt in instituting this suit against the Receiver without the previous sanction of the Judge having the carriage of the proceedings in which the Receiver had been appointed. That is obviously a mistake. That rule only applies to oases where the Receiver is appointed in an action and does not apply to a Receiver as mentioned in the Provincial Insolvency Act who is really what is known in the old English Law as an Assignee in bankruptcy.

8. In consideration of what I have said above, I am of opinion that non-substitution of the heirs of some of the debtors-respondents does not affect the appeal which, therefore does not abate. The decision binding the receiver binds the estate of the insolvents. Question of conflicting decisions does not arise.

9. There is another aspect of the question that is, that in this case it was a firm that was declared insolvent. It seems that the respondents debtors were members of the firm. The law of abatement does not strictly apply, in the sense in which applies to individual plaintiffs or defendants to the case of a firm.

Reference may be made to Clause 30, Rule 4 which provides:

Notwithstanding anything contained in Section 45, Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

The point, however has not been discussed at the Bar from this angle of vision. As from the record we do not know what sort of firm it was and who were the members of it, I do not like to rest my decision on this except to make a passing reference. In my view, therefore, the preliminary objection fails.

10. With regard to the merit of the appeal, I have no doubt that the appeal must succeed. Bare reference to Sub-section (6) of Section 6 will make it clear that the learned District Judge was not right to limit the claim of interest of the creditors to that part of the scheduled debts which formed the principal as distinguished from the interest. It is no doubt true that when the debts were entered in the schedule the aggregate amount consisted of two parts, principal and interest, but after they were proved and entered in the schedule, the total amount becomes "debts entered in the schedule." The meaning to be assigned to Sub-section (6) will be clear by keeping in view the provisions of Sub-section (5) which reads:

Subject to the provisions of this Act, all debts entered in the schedule shall be paid rateably according to the amounts of such debts respectively and without any preference.

It cannot be urged with any cogency that in this Sub-section the words "all debts entered in the schedule" have reference to the principal and not to the interest added to it. Sub-section (6) is:

Where there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date on which the debtor is adjudged an insolvent at the rate of six per. centum per annum on all debts entered in the schedule.

It would be preposterous to argue that the words "all debts entered in the schedule" will have one meaning in Sub-section (5) and another in Sub-section (6). It is clear, therefore that interest of 6 per cent, will run on the aggregate of the debts entered in the schedule as due to any particular creditor. Any other view would amount to re-open the schedule of debts which is an accomplished fact and cannot be re-opened at this stage.

11. Mr. Misra appearing for the appellants, however, does not press the ground taken up in the memorandum of appeal that the creditors are entitled to contract rate of interest, a question which has been rightly left open by the learned District Judge at this stage. Mr. Misra pressed no other point and Mr, G.R. Das appearing for the debtors did not press their cross-objections.

12. In the result, the cross-objections fail, the appeal succeeds and the order of the District. Judge is set aside, it being held that the creditors are entitled to get interest at the rate of 6 per cent, (the statutory rate mentioned in Sub-section (6) of Section 61) to be calculated on the aggregate of debts entered in the schedule from the date on which the debtors were adjudged insolvents. In the circumstances of this case, I make no order as to costs.

Das J.

I agree.

