

(1929) 10 MAD CK 0042
In the Madras High Court

R. Viswanatha Chetty

APPELLANT

Vs

The Official Assignee of Madras and Another

RESPONDENT

Date of Decision : 20-10-1929

Acts Referred:

Presidency Towns Insolvency Act, 1909 — Section 11(b)

Citation : AIR 1930 Mad 544 : (1930) 31 LW 229 : (1930) 58 MLJ 189

Judgement

1. The question raised in this appeal is whether one K. Subbaraya Chetty was properly adjudicated an insolvent. The appellant is a creditor of the

debtor and it appears that on the 26th of January, 1929, he obtained a decree for Rs. 10,000 against him. Two days later, that is, on the 28th

January, the debtor filed his own petition to be adjudged an insolvent, and he was adjudicated insolvent on the same date. In para. 12 of his

petition the debtor made the following statement:

The liabilities of the petitioner amount to about Rs. 55,000 but many of the debts have to be carefully enquired into and investigated and assets

which the petitioner is likely to get as his half share in the properties left by his father will be about Rs. 40,000 and the same is not sufficient to

discharge the liabilities.

2. On the 18th February the appellant moved the Court to annul the adjudication, alleging in his affidavit in support of motion that the adjudication

was without the jurisdiction of the Court inasmuch as the debtor was ""a permanent resident"" of Tiruvattiyur. On the 21st February the debtor filed

his schedule in which he declared that on the date of the order of adjudication his liabilities were Rs. 49,100 and his assets were estimated to

produce Rs. 76,550. On the 8th March the debtor filed a counter-affidavit in

which, in denial of the allegation in the appellant's affidavit, he asserted that he had been ""a permanent resident of Madras living at No. 47, Erulappan Street, Madras"" and that it was owing to warrants obtained by his creditors that he was temporarily staying at Tiruvattiyur. In reply to this affidavit the appellant, on the 15th March, filed a further affidavit in which, in para. II, he submitted that, according to the debtor's admission in his schedule, his assets exceeded his liabilities and that he should not have been adjudicated an insolvent. The learned judge dismissed the appellant's motion upon the ground that admittedly the insolvent had two houses in Madras and had lived there within a year before the presentation of the petition, and he thought it unnecessary to hear evidence that the debtor had been in occupation of the houses. He declined to consider the other objection, because the appellant had not raised it in his affidavit. Two points have been argued before us in appeal: firstly, that the evidence establishes that for more than a year before the presentation of the petition the debtor ""has ordinarily resided"" at Tiruvattiyur outside the limits of the High Court's insolvency jurisdiction; and, secondly, that the debtor's adjudication having been obtained upon an untrue allegation as to his inability to pay his debts ought to be annulled.

3. It appears from the documentary evidence tendered by the appellant that from July, 1926 to April, 1928, letters and documents were being addressed to the debtor at his house No. 11, South Mada Street, Tiruvattiyur. The debtor in his affidavit has explained that this was only a temporary residence for the purpose of keeping away from the warrants of his creditors. That may very well be the explanation, but the debtor's motive in taking up his residence in a particular place cannot affect the question whether he is to be deemed to have ""ordinarily resided"" there; and in our view the evidence justifies the conclusion that for more than a year before January, 1929, Tiruvattiyur is the place where the debtor ""has ordinarily resided"".

4. The words of Section 11 (b) of the Presidency Towns Insolvency Act are--
The debtor, within a year before the date of the presentation of the insolvency petition, has ordinarily resided or had a dwelling-house...within the limits of the ordinary original civil jurisdiction of the Court.

5. But the Act [vide Section 13 (5)] contemplates the possibility of the debtor

having ordinarily resided in one place and having had a dwelling-house in another. We think that it is sufficient for the requirements of Section 11 (b) that the debtor has had a dwelling-house within the High Court's jurisdiction limits, available for his occupation as a dwelling-house should be choose to dwell there, although he has ordinarily resided elsewhere and has not actually dwelt in the house within the year previous to the presentation of the insolvency petition. This view appears to us to be justified by *In re Nordenfelt* (1895) 1 Q.B. 151 where it was held by the Court of Appeal that the debtor having in fact abandoned his dwelling-house and gone abroad could not be deemed to have had a dwelling-house within the jurisdiction. But the decision there turned on the fact of abandonment. "The debtor had, no doubt," said Rigby, L.J., "had a dwelling-house at Beckenham, and he might very easily after he went away to Paris have adopted the house again as his dwelling-house. But when it appears, as it does, that he offered all his furniture in the house for sale, and had that which was not sold packed up in such a way that it could not, without some trouble and expenditure, be placed in a position to be used, I am satisfied that he had abandoned the house as his dwelling-house before the commencement of the critical year. I am satisfied also that he did nothing during the year to adopt it again as his dwelling-house".

6. It appears to us upon the evidence that the debtor had a house in Erulappan Street, Madras, available as his dwelling-house within the year preceding the insolvency petition. This is admitted by the appellant in his plaint, dated 17th January, 1929, and there is certainly no evidence that he had abandoned it as a dwelling-house when he went and took up his residence in Tiruvattiyur. We, therefore, hold that the Court had jurisdiction to adjudicate him an insolvent.

7. The question then is whether the debtor ought to have been adjudicated an insolvent. A debtor commits an act of insolvency u/s 9 (in) (f) of the Act "if he petitions to be adjudged an insolvent" and he may be adjudicated an insolvent on that petition (section 10). But a debtor is not entitled to present an insolvency petition unless (inter alia) his debts amount to five hundred rupees [section 14 (a)]. Section 15 (1) provides:

A debtor's petition shall allege that the debtor is unable to pay his debts, and, if the debtor proves that he is entitled to present the petition, the

Court may thereupon make an order of adjudication, unless in its opinion the petition ought to have been presented before some other Court having insolvency jurisdiction.

7. The reason for the requirement of the debtor's allegation that he is unable to pay his debts is that a debtor-petitioner's only justification for obtaining the benefit of the Insolvency Act is his inability to pay his debts. It is plain from the debtor's schedule in the case before us that the statement in para. 12 of his petition was a most misleading and inaccurate allegation. If his schedule, which has the sanction of the debtor's solemn affirmation, is to be taken as what it is stated to be, "a full, true and complete statement" of the debtor's affairs on the date of the order of adjudication, it is obvious that he was not "unable to pay his debts" at the time of adjudication, for the estimated assets are very considerably larger than the amount of liabilities. Now it has been held by a Bench of this High Court in *Alamelumanga Thayarammal v. Balusami Chetti* (1927) 108 I.C. 208 that the required allegation by the petitioner-debtor of inability to pay his debts is not a mere matter of form, but goes to the foundation of the debtor's right to claim the benefit of the Insolvency Act. In that case it was found that the debtor's statement of inability to pay her debts was deliberately false. But we do not think it makes any difference whether the allegation is deliberately untrue or whether the debtor's misstatement is due to carelessness or to an honest mistake. The learned Judges in *Alamelumanga Thayarammal v. Balusami Chetti*'s (1927) 108 I.C. 208 case appear to have proceeded on the ground that the Insolvency Act is only applicable in cases of a debtor's inability to pay his debts. We do not altogether agree with this line of reasoning, because it is only necessary to look at the acts of insolvency described in Section 9 of the Act and at Section 13 (4) (b) to see that a debtor may be adjudicated upon a creditor's petition, notwithstanding that the debtor is a solvent person when he commits the act of insolvency. We prefer to base our decision upon the principle stated by Cave, J., in *In re Bond* (1888) 21 Q.B.D. 17 that the Court ought not to make an adjudication except upon a proper petition, and that when it appears that the adjudication has been wrongfully made, the Court ought to rescind it. The adjudication here was made upon a petition which was not a proper petition. It was an abuse of the process of

the Court; and we accordingly set aside the adjudication. The appeal is allowed with costs throughout. Costs to be taxed.