
(1938) 05 MAD CK 0021
In the Madras High Court

S.Rm.Rm. Chockalingam Chettiar

APPELLANT

Vs

A.R.P.L.S.P. Muthiah Chettiar (deceased) and Others

RESPONDENT

Date of Decision : 03-05-1938

Acts Referred:

Citation : (1939) ILR (Mad) 144 : (1938) 48 LW 263 : (1938) 2 MLJ 390

Hon'ble Judges : Venkatasubba Rao, J

Bench : Division Bench

Judgement

Venkatasubba Rao, J.—This raises an important question bearing upon the power of the Court to allow an insolvency petition to be amended. The petition in the lower Court was presented by a person who described himself as a creditor of the insolvent. He alleged that Rs. 16,000 odd was due by the insolvent to a certain firm of which he claimed to be the sole proprietor; it was upon this assertion that he founded his claim to be solely entitled to the debt. The petition was filed on the 24th November, 1930, but on that date, an arbitration enquiry was pending, in regard to a dispute between the petitioner and a certain third party who claimed an interest in the partnership. By an award made on the 28th November, 1930, the petitioner became solely entitled to the debt on which the insolvency petition was founded. It being assumed that the petition as originally filed is incompetent (it is unnecessary in the view we have taken to discuss this point), the question arises whether the petitioner can be allowed to amend his petition and proceed with it. On the facts stated, the petition would require to be amended by the petitioner being allowed to state that four days after the presentation of the petition, the entire right to the debt vested in him by reason of the award. The learned District Judge allowed the petition to be amended, but according to him the amendment that was needed was to change the date from the 24th into the 28th. In our opinion the lower appellate Court's view that the petition could be amended, is right, although the particular amendment indicated by the learned Judge is wrong.

2. The petition was founded on alleged acts of bankruptcy that occurred on the

17th September, 1930, and the 13th October, 1930, that is, within three months of the petition. Even should the date of its filing be taken as the 28th November, the petition would still be within time.

3. In *Ex parte Dearle : In re Hastings* (1884) 14 Q.B.D. 184 a bankruptcy petition was filed by a person who was a mere trustee of the debt for his sister, and the Registrar dismissed it, holding that the cestui que trust was a necessary party. The Court of Appeal agreed with the Registrar that the petition as filed was incompetent, but long after the three months period, gave leave to amend the petition. The debtor's counsel is reported to have contended:

The amendment would be equivalent to the presentation of a new petition, founded on an act of bankruptcy more than three months old.

4. That the trustee had no right to present the bankruptcy petition is, as already stated, declared by the Court of Appeal Brett, M.R., observes that the trustee was not a good petitioning creditor alone, but that the cestui que trust ought, to have joined in the petition. Similarly, Lindley, L.J., says that it has been the settled rule in bankruptcy that in order to maintain a bankruptcy petition in respect of a debt due to a trustee, the cestui que trust must join in the petition. In spite of this, however, leave to amend was granted, Lord Coleridge, C.J., observing:

A blunder by no means unnatural has been made in the construction of the Act; it is a mere slip." (*Ex parte Dearie : In re Hastings* (1884) 14 Q.B.D. 184.

5. The Court of Appeal in a yet later decision re-affirmed this principle and allowed a similar amendment. (*In re Ellis* (1887) 4 Morrell's Bankcy Rep., p. 283.) *Ex parte Owen* (1884) 13 Q.B.D. 113 though not directly in point through some light upon the matter in hand. There the petition as originally filed was properly constituted, but before the hearing, the interest of one of the partners of the creditor firm (petitioners) became vested in a trustee. The Registrar, even in the absence of the trustee, made a receiving order. The Court of Appeal held that the trustee was a necessary party and that the proper course was to correct the irregularity by joining him as a petitioner. Leave was accordingly given to amend the petition (*Ex parte Owen* (1884) 13 Q.B.D. 113). The appellant, however, strongly relies upon *In re Maund* (1895) 1 Q.B.D. 194 which of course is an authority to the extent to which it goes; but surely it cannot be suggested that it has the effect of impairing the value of the decisions of the Court of Appeal. In the case of *Maund, In re* (1895) 1 Q.B.D. 194 certain creditors, the aggregate of whose debts was of the requisite amount, filed the bankruptcy petition. Some of the alleged debts, it was found, had in fact no existence. The Registrar allowed the petition to be amended by the names being added of two other persons as petitioning creditors. At the time of application for amendment was made, more than three months had elapsed from the date of the committal of the act of bankruptcy on which the petition was founded. The learned Judges of the Queens Bench Division held that the Registrar's order was wrong. The

point of distinction between the Court of Appeal decisions and this case is most clearly brought out in the very terse judgment of Wright, J. The learned Judge observes:

As I understand the matter, every debt sought to be added, as ground of the petition, after three months from the date of the Act of bankruptcy, is unavailable for that purpose ; but if within that period a debt has been made ground of the petition, and it afterwards becomes desirable to add another party to the petition in respect of that debt, leave may be given to join that other party as a petitioner where it will not lead to any injustice.

6. Vaughan Williams, J., puts the test in words very similar; Is the effect of the amendment to introduce creditors as petitioning creditors who could not themselves present a petition after the three months have elapsed? To express the same idea differently, is its effect to introduce a debt which, after the same period has elapsed, would not be a debt upon which the petition could be founded? If that is what is sought to be done, the Court will not grant leave to amend. But if on the contrary, as Wright, J., in the passage quoted above observes, within that period a debt has been made a ground of the petition and it afterwards becomes desirable to add another party, the case stands on an entirely different footing. In the case before the learned Judges it was sought to introduce new creditors and new debts, and leave on the principle mentioned above, was refused. The facts here bring the case directly within the principle of the two cases, already cited, of the Court of Appeal. Here there is, as in those cases, "a good petitioning creditor's debt" (per Brett, M.R., in *Ex parte Dearie*: *In re Hastings* (1884) 14 Q.B.D. 184 referred to above). The petitions there were not properly constituted owing to the cestuique trust not having been joined; the defect in the present case is the non-joinder of the other partner. The parallel seems to be complete and we must respectfully dissent from *Rm. V. Vaithinatha Aiyar and Others Vs. Kochi S. Vaithinatha Aiyar and Another*, a decision of Cornish, J. The learned Judge's attention was not called to the crucial cases on the point - the decisions of the Court of Appeal. The lower Court has thus acted rightly in granting leave to amend; but as already stated, all that need be done is to allow the petitioning-creditor to amend his petition by adding that the inchoate right which he had previous to the petition, became perfected in virtue of the award delivered four days later. As observed by Lord Coleridge, C.J., in *Ex parte Dearie* : *In re Hastings**, the person who has made the blunder must pay for it and the lower Court has very properly directed the petitioning-creditor to pay the costs that have been thrown away. The contention of the petitioner therefore fails.

7. Next it has been argued for him that in regard to the merits the lower appellate Court's order of remand is wrong. There can be no doubt, as the District Judge suggests, that in the trial Court the petitioning creditor thought, not unreasonably, that the contest was in regard to the preliminary question alone. The various entries in the B. Diary support the lower appellate Court's

inference and the Subordinate Judge, it seems to us, dealt with the merits, not because they were gone into, but because he imagined that to make his judgment complete he had to touch on them.

8. The petition will be amended in the lower Court within one month from the re-opening of the Sub-Court.

9. In the result, the Civil Revision Petition fails and is dismissed with costs.