Calcutta High Court
Gangadas Seal And Anr. vs Percival And Ors. on 17 March, 1926
Equivalent citations: AIR 1927 Cal 32
Author: Greaves
JUDGMENT Greaves, J.

1. These four appeals arise out of adjudication orders passed in insolvency by the District Judge of Chittagong on the 24th November last. Appeals Nos. 36 and 39 are appeals by one Gangar das Seal who was adjudicated on the 24th November 1925; Appeals Nos. 37 and 38 are appeals by Gurudas Seal who was adjudicated on the same date. The adjudications were made at the instance of the creditors. It appears that Gangadas, Gurudas, and Hara Gobinda were joint in estate and they carried on, as members of a joint Hindu family, a certain business. They had incurred debts; and on the 7th of September 1923 an application was made to the Court for the adjudication of Gangadas, Gurudas and Hara Gobinda, the applications for adjudication of all the three being included in the same petition. It was held that no adjudication order could be made' under the circumstances on one petition; and accordingly the names of Gurudas. and Hara Gobinda were struck out and the petition of the 7th September 1923 proceeded as against Gangadas alone. On the 29th September 1923 an. application was made for adjudication of Gurudas and it is to this application that Appeal No. 37 relates. The acts of insolvency alleged were with regard to two transfers, dated the 9th June 1923 and the 23rd August 1923. On the 6th of October 1923 a petition was presented for adjudication of Gurudas Seal. Appeal No. 33 arises out of this petition. On the 8th October 1923 an application was made for adjudication of Gangadas and Appeal No. 39 arises out of the adjudication order made on this petition.

2. Five points are urged before us in these appeals. It is said first of all that except as regards the petition of the 7th September 1923, which now relates to Gangadas alone, the applications are barred by limitation, because they were made more than three months after the acts of insolvency alleged or rather the act of insolvency relating, to the transfer of the 9th June 1923. Secondly, it is said that all the four adjudication orders are vitiated by the failure of the Court to examine the debtors under the provisions of Section 24, Sub-section (2) of the Provincial Insolvency Act. Thirdly, it is said that the adjudication orders are bad, because the period of discharge is not specified in the order-in accordance with the directions given in Section 27 of the Act. Fourthly, it is said that there was no finding that the debtors were unable to pay their debts; and fifthly, it is said that the petitioners for adjudication in a peals Nos. 88 and 39 were not present and, therefore, the adjudication orders are bad on that ground.

3. I shall deal first with Appeal No. 36. Here no question of limitation arises, as one of the acts of insolvency alleged, the transfer of 9th June, was within three months of the presentation of the petition. So far as the question of discharge is concerned, there is nothing in this as the time has subsequently been fixed for applying for the discharge. There is nothing in the point with regard to the proof of inability to pay debts, as oral evidence was given with regard to this and no cross-examination was directed against this evidence; and there is nothing, I think, in the last point, because there was evidence before the Court apart from that of the petitioners which would justify the Court in making the adjudication order. The only difficulty then is with regard to the failure to

examine the debtors under the provisions of Section 24 Sub-section (2). This is mandatory; for the sub-section provides that the Court shall examine the debtors if they are present and Sub-section (4) provides that a memorandum of the substance of debtors' examination shall be made by the Judge and shall form part of the record of the case. Prima facie, therefore, the obligation to examine the debtors if they are present is mandatory; and the failure to do so prima facie would vitiate the order of adjudication. But it is said that this is a provision inserted in the interest of the creditors and that it is only for them to complain and not the debtor if he is not examined.

4. We were referred to the provisions of Section 350 of the old Civil P.C., and to the case of Gouri Kant Burman v. Damodar Das Burman [1900] 5 C.W.N. 90 as an authority for the contention put forward on behalf of the respondent. I do not think, however, that that case or Section 350 of the old Code is of any assistance to us Section 350 occurs in a chapter of the old Code headed "Insolvent Judgment-debtor", and Section 350 is a section which stands by itself and clearly, therefore, it was open to the Court to hold that Section 350 only applies to the judgment-debtor himself making the application and not to the application for adjudication by a creditor. In Section 24 of the Provincial Insolvency Act, we are dealing with a single section which contains amongst other things the provision in question; and although it is true that Sub-section (b) and (c) and Sub-section (1) of Section 24 only apply to the creditor and not to the debtor, I feel a difficulty in saying, having regard to the exact words of Sub-section (2), that failure to examine may not be a ground of complaint by the debtor himself. Upon the evidence before us which is uncontradicted, the debtors were present during the whole of the hearing, although their pleader did not argue as their application for adjournment was refused. But I think that the sub-section is mandatory and that if, as here, the debtors were present in Court, there was an obligation on the District Judge to examine them and that his failure to do so would vitiate the order of adjudication. Accordingly we think that the order of adjudication in respect of which Appeal No. 36 arises must be set aside, and the matter will go back to the Court below in order that the District Judge may examine the debtor under Section 24, Sub-section (2), if he is present and then pass orders on the petition.

5. So far as the other appeals, Nos. 37, 88 and 39 are concerned, we think having regard to the order passed by a Divisional Bench of this Court with regard to Hara Gobinda's appeal, a similar course as prescribed by the order in that case should be pursued with regard to these appeals, and that they should go back in order that the learned District Judge may consider the alleged act of insolvency of the 23rd August 1923, as he was directed to do by the Divisional Bench in Hara Gobinda's case; and during such investigation he should examine the debtors under Section 24, Sub-section (2) if they are present in Court.

6. The result, therefore, is that we set aside the orders of adjudication in all these appeals and the matters will go back for the examination and investigation which I have indicated and the appeals will be finally disposed of after this has been done.

7. Costs of those appeals will abide the result.

8. We assess the hearing fee at one gold mohur in each case.

Mukerji, J.

9. I agree.