SUPREME COURT OF INDIA

Kaushal Kishore

Vs.

Ram Dev

C.A.No.91 of 1956

(S. R. Das, C.J.I., S. J. Imam, P. B. Gajendragadkar and A. K. Sarkar, JJ.)

24.05.1958

JUDGEMENT

A. K. SARKAR, J.:

1. This case has had a somewhat curious course inasmuch as the two lower courts of appeal were under a clear misapprehension as to the finding of a fact by the trial court. It arises out of an application for adjudication of certain persons (hereinafter called the debtors) as insolvents.

2. The petition in insolvency was by some of the respondents as the creditors of the joint family said to be constituted by the debtors. It was filed on or about 19-5-1950. The relationship between the debtors inter se will appear from the genealogical table set out below :

The petition stated that the debtors constituted a joint family which carried on three separate businesses under the names and styles of Bhowani Pershad-Nanna Mal, Bhowani Pershad Shiv Shankar and Rama Electric Works. The case made in the petition was that Bhowani Pershad was the karta of the joint family and the other members of the family were all karkuns or managers of its businesses and affairs. The petition set out five acts of insolvency of which we are concerned only with one, all Courts below having held that the others had not been proved. The act of insolvency with which we are concerned was stated in the petition in the following terms:

"The respondents have for about the last one month absolutely stopped payment of debts and have informed all the creditors severally as well as jointly of this fact."

3. This act of insolvency was sought to be established by calling witnesses to prove that on 18-4-1950, some of the creditors along with certain other persons met Bhowani Pershad and Shiv Shankar and demanded payment of their dues whereupon the latter told them that they had no money and could not make any payment and the creditors could do what they liked. With regard to this act of insolvency the trial Court stated that it did not believe that such a thing ever happened and that it had not been proved that the debtors had given notice that they had suspended payment of their debts. It also observed that,

"Even if it be assumed for the sake of argument that Shiv Shankar had stated that he had no money at the time when the demand was made it does not amount to an act of insolvency."

The trial Court therefore held that the facts alleged had not been proved and even if they had been

they would not have amounted to a notice of suspension of payment of debts within the meaning of S. 6(3) of the Provincial Insolvency Act, that is to say, the act of insolvency alleged. In this view of the matter the trial Court dismissed the petition in insolvency. The petitioning creditors went up in appeal to the District Judge, Karnal at Gurgaon from the judgment of the trial Court. It appears from the judgment of the learned District Judge that he thought that the trial Court had believed the evidence led by the petitioners as to the act of insolvency referred to above but had dismissed the petition in the view that the facts established by that evidence did not prove more than a declaration of inability to pay, and did not therefore amount in law to an act of insolvency. The learned District Judge went into the question of law and came to the conclusion that the trial Court was wrong in its view of the law and that the facts, which he thought the trial Court had found to have been established, amounted to an act of insolvency within the meaning of the statute. The learned District Judge was obviously wrong in thinking that the trial Court had found that the evidence led by the petitioning creditors had established the incident of 18-4-1950 mentioned earlier. In fact the trial Court had come to quite the opposite finding, that is to say, it had found that the incident had not been proved.

4. The matter was then taken to the High Court at Simla by Kaushal Kishore and the other debtors. The High Court does not appear to have noticed the error into which the District Judge had fallen. The High Court stated in its judgment that "The Insolvency Court held, that the words used by these respondents did not amount to an act of insolvency and that mere inability to pay or refusal to pay was not an act of insolvency". In this the High Court was in error for the trial Court had not held that the debtors had used any words at all. The High Court therefore had fallen into the same error as the District Judge as to the finding of fact by the trial Court. The High Court itself however referred to various parts of the evidence and came to the conclusion that the evidence established facts which in law amounted to a notice of suspension of payment of debts and therefore there was an act of insolvency. In the result it confirmed the order of the District Judge.

5. From this judgment Kaushal Kishore, Brij Kanwar, Kanwar Kishore and Bhowani Pershad have appealed to this Court with leave granted under Art. 136(1) of the Constitution. Learned Counsel for the appellants has contended that the evidence led did not establish any of the facts which the petitioning creditors set out to do. He pointed out that the trial Court which heard the evidence, did not believe the witnesses called by the petitioning creditors and that the court of first appeal did not examine the facts itself but proceeded on an erroneous impression that the trial Court had believed the evidence. In both these contentions learned counsel for the appellants was clearly right. In our view, for the reasons earlier stated the High Court was under the same misapprehension as the District Judge. This undoubtedly affected the examination of the evidence by the High Court itself. We have, therefore to examine the evidence ourselves.

6. The fact which the petitioning creditors set out to establish was the incident of 18-4-1950. The petitioning creditors sought to prove that on that date Mohan Lal, Gujjar Mal, Nand Kishore, Ram Dev and Murari Mal and some others went to the debtors' shop of Bhowani Pershad-Shiv Shanker and there met Bhowani Pershad and Shiv Shankar and asked for payment of the moneys due to them and thereupon Shiv Shankar and Bhowani Pershad stated that they had no money and would not pay and that the creditors could do whatever they liked. The question is whether this incident happened. The first witness produced by the petitioning creditors on this point was Phul Chand son of Kidar Nath. He gave evidence on 4-5-1951. He said his wife's brother Umrao Singh was a creditor of the debtors. About a year ago he made a demand from the debtors but did not get any reply. He does not say which of the debtors he met. Neither does he say that any of the debtors said anything in reply to the demand for payment. Therefore the evidence of this witness does not establish the statements

alleged to have been made by Bhowani Pershad and Shiv Shanker. He does not say that any one else was with him when he is said to have made the demand. With regard to this witness the trial Court remarked that he was an interested witness. There is nothing to show that this remark was not justified. The High Court stated that this witness had said that he was told that the debtors were not making any payment. The High Court was obviously in error in this. All that the witness appears to have stated is as follows:

"The respondents are not making payment to the creditors nowadays."

The witness therefore did not intend to say that he was told by the debtors that they were not making any payments to their creditors. He only intended to convey that in fact at or about the time he was giving evidence which was a year after the date of the alleged incident, the debtors were not making payment to their creditors. With this we are not concerned. The High Court also remarked that the witness was not cross-examined on this part of his evidence. We are in agreement with learned counsel for the appellants that there was nothing to cross-examine. The absence of cross-examination dies not establish the incident. The evidence of this witness does not, in our view, establish the facts on which the petitioning creditors rely. Indeed learned counsel for the petitioning creditors conceded that this witness was not speaking about the incident of 18-4-1950, at all.

7. The next witness called by the petitioning creditors is also of the name of Phul Chand but he is the son of Sham Sunder. He stated that in April 1950, Mohan Lal, Gujjar Mal, Nand Kishore, Ram Dev and Murari Mal and he himself went to Bhowani Pershad-Shiv Shankar, which obviously meant the shop of that name, and asked Shiv Shankar to pay but Shiv Shankar replied that he had no money with him at that time and that the creditors could do whatever they liked. This witness stated that he was a Chaudhry of Anaj Mandi at Rewari and a member of the Trade Conciliation Committee of that place. With regard to this witness the trial Judge stated that he was a man of ordinary status and did not appear to be above approach or corruption. From the materials on the record we are unable to say that this remark of the trial Judge was not justified. However that may be, it would appear that the incident spoken to by him could not have taken place if the other Phul Chand was right for the latter said that the shop of Bhowani Pershad Shiv Shankar had been closed for six years prior to May 1951. This witness did not mention the presence of Bhowani Pershad.

8. Then we come to Balmukand. He also said that several people went to make the demand and Shiv Shankar stated that there was no money at that time, and that the creditors could do what they liked. He definitely stated that Bhowani Pershad was not present when the demand was made. The High Court erroneously thought that this witness had said that Bhowani Pershad was present.

9. Then came Gujjar Mal who said that when the party went to make the demand of payment of the debt they met Bhowani Pershad and Shiv Shankar both and both of them said that they had no money with them and that they would not pay. Clearly Gujjar Mal contradicted Balmukand with regard to the presence of Bhowani Pershad.

10. Another witness was Budh Ram. All that he said was, "the opposite party refused to make the payment. They said they would not pay the amount." The evidence of the last witness Ram Dev was to the same effect.

11. On this state of the evidence we are of opinion that it cannot be said that it has been proved that any demand was made on Shiv Shankar or Bhowani Pershad, or that they said that they had no money or would not pay and that the creditors could do what they liked. That witness contradicted

each other as to the presence of Bhowani Pershad, as to the possibility of going to the shop of Bhowani Pershad-Shiv Shankar, that is to say, whether it was running or had been closed, as to what was said and by whom. The last two witnesses did not at all say of whom the demand was made or who gave the reply to the demand. On this evidence it is impossible to adjudicate a person as insolvent. This view receives great support from the manner in which the giving of the notice of suspension of payment of debts is alleged in the petition. There no incident happening on any particular date is mentioned, nor is it said who it was that spoke the words which are said to amount to an act of insolvency. This statement in the petition would show the petitioning creditors' case to have been that the notice of suspension of payment of debts was being given for a whole month. This could not have happened if the facts spoken to by some of the witnesses had actually happened.

12. We, therefore, come to the conclusion that it has not been proved that the debtors made any statement that they were suspending payment of their debts and this appeal should be allowed on that ground only.

13. In this view of the matter the question whether the statement alleged if proved, would amount in law to an act of insolvency does not arise. Nor is it necessary for us to go into the other question which was discussed in the courts below, namely, whether by reason of a partition in the family of the debtors none but Shiv Shankar alone could be adjudged insolvent.

14. In the result this appeal is allowed and the order adjudging the debtors insolvents is set aside in its entirety. The appellants will get the costs of the appeal.

Appeal allowed.

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