APPELLATE CIVIL.

Before Costello A. C. J. and Edgley J.

AHMAD MAHOMED PARUK

v.

PRAPHULLA NATH TAGORE.*

1937

May 31.

Privy Council—Leave to appeal—Substantial question of law—Insolvency—Rules—Code of Civil Procedure (Act V of 1908), s. 110—Indian Evidence Act (I of 1872), s. 114—Calcutta Insolvency Rules, 1910, r. 79.

Where in an insolvency proceeding the debtor had been wrongly prevented by the Judge from putting in his affidavit (instead of the *notice* required by r. 79 of the Calcutta Insolvency Rules) and from relying upon the statements contained in that document,

held that the error was not a substantial question of law as contemplated under s. 110 of the Code of Civil Procedure for granting leave to appeal to the Judicial Committee of the Privy Council.

The exclusion of the affidavit in no wise prevented the debtor from making an answer at the hearing, had he chosen to do so; he could still have given oral evidence in rebuttal of the case put forward by the petitioning creditor at the hearing, even though the requisite "notice" had not been filed by him.

In re *Dale*, Ex parte *Dale* (1) and Ex parte *Learoyd*, In re *Luttman* (2) followed.

APPLICATION FOR LEAVE to APPEAL TO HIS MAJESTY IN COUNCIL, by the insolvent.

The facts of the case and the arguments at the hearing of the application for leave appear fully in the judgment.

Isaacs and *S. C. Mitter* for the appellant.

S. N. Banerjee (*Sr.*) and *K. Bose* for the respondent.

*Application for Leave to Appeal to His Majesty in Council, in Appeal from Original Decree, No. 70 of 1936.

(1) (1876) 3 Ch. D. 322. (2) (1880) 13 Ch. D. 321.

1937

Ahmad Mahomed Paruk v. *Praphulla Nath Tagore.*

COSTELLO A. C. J. This is an application by Ahmad Mahomed Paruk for Leave to Appeal to His Majesty in Council against a judgment and decree of this Court given on March 2, 1937, affirming an order made by McNair J. on August 12, 1936, whereby Ahmad Mahomed Paruk was adjudicated insolvent at the instance of the petitioning creditor, Raja Praphulla Nath Tagore. The petition was presented on August 3, 1936. On that date an order was made by Lort-Williams J. that the petition should be heard on August 11, 1936. Notice of the petition was given to the debtor on August 4, 1936, and, accordingly, r. 79 of the Calcutta Insolvency Rules, 1910, came into operation. That rule reads as follows :—

> When a debtor, having been served with a petition, intends to show cause against the same, he shall file a notice with the Registrar, specifying the statement in the petition which he intends to deny or dispute, and transmit by post to the petitioning creditor and his attorney, if known, a copy of the notice three days before the day on which the petition is to be heard.

Under the terms of that rule, therefore, Ahmad Mahomed Paruk ought to have given notice to the petitioning creditor and to his attorney of those statements in the petition which it was his intention to deny or dispute. Rule 79 is, to all intents and purposes, the same as r. 169 of the English Bankruptcy Rules, 1915. It is to be observed that the rule refers to a notice and not to an affidavit. The debtor failed to give notice of the kind required by r. 79 within three days from August 4, 1936. But on August 10, 1936 (taking the statement of the learned counsel appearing on behalf of Ahmad Mahomed Paruk as correct), the debtor attempted, or rather sought, to file an affidavit which was intended to be the kind of document contemplated by r. 79. He was not allowed to file that document, because it was out of time.

When the matter came before McNair J. on August 11, 1936, the debtor again made an attempt to have the document accepted and taken into consideration by the Court. McNair J. rightly or

1937

Ahmad Mahomed Parak v. Praphulla Nath Tagore.

Costello A. C. J.

wrongly refused to take that document into consideration. The hearing of the petition was proceeded with on August 11th and extended till midday of August 12th, when the order of adjudication, to which I have referred, was pronounced by McNair J. The debtor appealed to the Court of appeal. The matter came before the Chief Justice and Panckridge J. on March 2nd of this year and they gave the judgment which is now under consideration by us for the purpose of determining whether this is a fit case in which the debtor who has failed in two Courts should be allowed to carry the matter further—to His Majesty in Council.

The matter, of course, falls to be determined in the light of the provisions of s. 110 of the Code of Civil Procedure, and because we are here considering a judgment of this Court which affirmed the judgment of the Judge of first instance, it is necessary for us to consider and determine whether there is any substantial point of law in the case so as to render it possible for the matter to go to the Judicial Committee of the Privy Council. There is no dispute as regards the valuation of this matter. Mr. Banerjee appearing on behalf of the petitioning creditor has conceded that the value of the property, which is the subject matter of these proceedings, is more than Rs. 10,000. All we have to decide, therefore, is whether there is a substantial point of law in the case.

Mr. Isaacs, appearing on behalf of the insolvent, stated in the opening of his argument that there were two points, and he stated them in these terms: (i) whether the petitioning creditor has to prove that the debt due to him was owing not merely at the date when the petition was presented but also at the date of the hearing: and (ii) whether under the rules and, in particular, under r. 79 (to which I have already referred) the Court has power to exclude an affidavit which the debtor desires to put in, merely on the ground that it was sought to be filed out of time.

1937

Ahmad Mahomed Paruk v. *Praphulla Nath Tagore.*

Costello A. C. J.

In the course of the argument before us, however, it appeared that the first of the two points of law originally stated by Mr. Isaacs was not in any way the real point of law which he was attempting to put before us as being a ground for sending the case to England, and when we came to examine the judgment of the Chief Justice and Panckridge J., it became quite clear that the first point of law, as stated by Mr. Isaacs, was never in controversy either in this Court or in the Court of first instance, and, indeed, in my opinion, it is not a matter in regard to which there is any room for doubt whatsoever. The law is that there must be a debt of Rs. 500 or upwards existing not only at the time when the petition was presented, but at the time of the hearing of the petition and at the moment of time immediately prior to the making of an order of adjudication. That is the law, and it is quite clear from two authorities, one of which Mr. Isaacs referred to in course of his argument and the other Panckridge J. referred to in his judgment. The first is the case of Ex parte *Hammond*, In re *Hammond and Nevard* (1), and the other is the case of In re *Stables*, Ex parte *Smith & Sons* (2). It follows, therefore, that the first point of law stated by Mr. Isaacs disappears from our consideration altogether. What Mr. Isaacs really urged before us was that, assuming that proposition of law, namely, that the debt must subsist right up to the moment of adjudication, the creditor had not proved—at any rate not sufficiently proved—by due process of law that the debt did, in fact, exist at the time of the hearing of the petition. So the point of law, which Mr. Isaacs finally said was a matter which ought to be reviewed by the Judicial Committee of the Privy Council, is whether or not the learned Judge was right in coming to the conclusion that the creditor had sufficiently established the debt or rather whether the Appellate Court was right in coming to the conclusion that McNair J. was justified, as the

(1) (1873) L. R. 16 Eq. 614. (2) (1894) 1 Manson 68.

1937

Ahmad Mahomed Paruk
v.
Praphulla Nath Tagore.

Costello A. C. J.

matter was presented before him, in making the order of adjudication which he thought fit to make on August 12, 1936.

The other point of law raised by Mr. Isaacs, namely, whether the learned Judge was right in rejecting the affidavit, was in a sense decided by this Court in favour of Mr. Isaacs' client, because the learned Chief Justice and Panckridge J. came to the conclusion that McNair J. ought not to have prevented the debtor from putting in his affidavit and from relying upon the statements contained in that document.

As regards the first question, the position appears to have been this: By his petition of August 3, 1936, the petitioning creditor averred that Ahmad Mahomed Paruk was justly and truly indebted to him in the sum of Rs. 1,03,647-1-1 (being the total amount of several decrees) and certain acts of insolvency were also alleged. The petition was heard on August 11th. At the hearing of the application on that date, that is to say, only eight days after the date of the petition, there was before the Court the sworn statement of the petitioning creditor as regards the existence of the debt. In the circumstances, it was not, in our opinion, unreasonable for the learned Judge to have dealt with the matter upon the basis of the provisions of s. 114 of the Indian Evidence Act, and, in particular, in the light of Illus. (*d*) of that section which, after all, merely puts into formal language a proposition which is really a matter of common sense. Applying that proposition one comes to the conclusion that, in all probability, a debt of more than a lakh of rupees owing on the August 3, 1936, was still owing on the 11th August. The position at the hearing was that it was never disputed by the debtor that that was the state of affairs and what is still more remarkable—in the light of subsequent events—in the affidavit which purported to be a notice under r. 79, there was a

1937

Ahmad Mahomed Paruk v. *Praphulla Nath Tagore.*

Costello A. C. J.

clear admission that the debt was in fact owing and, therefore, if the debtor had been allowed by McNair J. to put in that affidavit, he himself by his own admission in that affidavit, would have entirely established the case of the petitioning creditor as regards the existence of the debt at all material times. The Court of appeal (the Chief Justice and Panckridge J.) took the view that the learned Judge could rightly act upon the affidavit of the petitioning creditor or at any rate, on presumptions arising out of the provisions of s. 114 of the Indian Evidence Act coupled with the fact that the hearing of the petition proceeded throughout upon the assumption that the debt was in fact still owing on August 11, 1936. In our opinion, the decision arrived at by the Court of appeal as regards the question whether McNair J. was right in making the adjudication order upon the basis that the debts were still subsisting was really a decision upon a question of fact, and, therefore, no point of law, still less a substantial point of law, arises as regards that part of the case.

The other matter is the rejection of the affidavit. The Court of appeal came to the conclusion that the learned Judge ought not to have rejected it. Whether that was so or not, in my opinion, makes very little difference. If I had to decide the matter, I dare say I might have come to the conclusion that the question whether or not the affidavit should be accepted and taken into account after the date on which it ought to have been filed under the provisions of r. 79 was entirely a matter in the discretion of the learned Judge who was dealing with the case. In any event, however, the fact that the learned Judge refused to take the affidavit into consideration could not have prejudiced the debtor in any way at all. Having regard to the fact that it contained an admission of the debt, in some ways it was clearly to the advantage of the debtor that the affidavit should have been excluded. Mr. Isaacs said that it was

1937

Ahmad Mahomed Paruk
v.
Praphulla Nath Tagore.

Costello A. C. J.

all very well, but in the affidavit there were statements which were intended to show that no acts of insolvency had been committed and so even if the debt was still due on the 11th August, there nevertheless ought not to be an order of adjudication. The exclusion of the affidavit, in my opinion, however, in no wise prevented the debtor from making an answer at the hearing, had he chosen to do so. He was not precluded from giving oral testimony on his own behalf. I think it is altogether wrong to deal with the matter as if the document which the debtor sought to file on August 10, 1936, was a sworn deposition containing evidence which alone could rebut the case of the petitioning creditor. The Rule only requires that "a notice" should be given in order that the petitioning creditor may know whether the debtor is intending to deny or dispute the petitioning creditor's case and to what extent. If looked at in that way, the rejection of the "affidavit" does not amount to the shutting out of evidence or the preventing of the debtor from giving any further evidence. He could still have given evidence at the hearing, even though the notice had not been filed. That is clear from two English cases. One is the case In re *Dale*, Ex-parte *Dale* (1). In that case, the debtor had intended to dispute the petitioning creditor's case. He had so informed his own solicitor. The solicitor had omitted to give notice of the kind required by r. 169 of the English Bankruptcy Rules, 1915. Thereupon when the matter came before the Registrar of the County Court, the learned Registrar ruled that the debtor did not dispute the petitioning creditor's case and declined to allow him to give any oral testimony. On appeal, Bacon C. J. came to the conclusion that the debtor had been wrongly shut out, and he sent the matter back in order to afford the debtor an opportunity of giving oral testimony in regard to his position. The other case is Ex parte *Learoyd*, In re *Luttman* (2). That is a similar case. Only there,

(1) (1876) 3 Ch. D. 322. (2) (1880) 13 Ch. D. 321.

1937

Ahmad Mahomed Paruk v. *Praphulla Nath Tagore.*

Costello A. C. J.

the debtor had at first given notice of the kind required by r. 169 of the English Bankruptcy Rules but subsequently withdrew it. When the petition came on for hearing there was before the Court no notice. The Registrar, accordingly, stated that the debtor could not give evidence to rebut the case of the petitioning creditor. That case went on appeal to the Court of appeal. It came before Lord Justice James, Lord Justice Baggallay and Lord Justice Cotton. The Lords Justices held that the mere absence of notice did not preclude the debtor from giving evidence on his own behalf.

It is obvious, therefore, that in the present instance the absence of the "affidavit" was no sufficient reason for the debtor Ahmad Mahomed Paruk failing to give oral testimony before McNair J., in rebuttal of the case put forward by the petitioning creditor. He never in fact tendered any such evidence. It follows, therefore, that he can have no legitimate grievance based on the fact that the affidavit was rejected.

The result is that the second point of law which Mr. Isaacs sought to have agitated before the Judicial Committee fails to be a substantial point of law within the contemplation of s. 110 of the Code of Civil Procedure.

We are quite clearly of opinion that this application must be rejected with costs. The costs will be paid by the Official Assignee to the petitioning creditor out of the insolvent's estate.

EDGLEY J. I agree.

Leave refused.

Attorney for appellant: *P. C. Ghose.*

Attorneys for respondent: *Mitter & Bural.*

G. S.