APPELLATE CIVIL.

1910, *June 4.*

(Before Mr. Justice Karamat Husain and Mr. Justice Chamier.)

GIRWARDHARI AND ANOTHER (APPLICANTS) *v.* JAI NARAIN AND OTHERS (OPPOSITE PARTIES).*

Act No. III of 1907 *(Provincial Insolvency Act), section* 15—*Insolvency—Grounds for dismissing petition.*

Under the Provincial Insolvency Act, 1907, transfer of property by the debtor with intent to defraud his creditors or reckless contracting of debts or giving unfair preference to any of his creditors or committing any other act of bad faith are grounds for refusing an absolute order of discharge but not grounds for refusing to make an order of adjudication. Where, therefore, a petitioner for a declaration of insolvency feigned ignorance about the existence of his account books and prevaricated about other matters, *held* that his petition could not be dismissed on these grounds, the object of the Legislature, by enacting the Insolvency Act, being to make it easier to obtain an order of adjudication. *Ex parte King*; *Re Davies* (1), *Ex parte Griffin*; *Re Adams* (2) and *Ex parte Tyte* (3) referred to.

THE appellants presented a petition to be declared insolvent under the provisions of the Provincial Insolvency Act, 1907, in the court of the District Judge of Mainpuri. That court dismissed the petition upon the ground that one of the applicants (Girwardhari Lal) had 'feigned ignorance about the existence of his account books and prevaricated on other matters. The applicant appealed to the High Court urging that this was not under the Act above referred to an admissible reason for dismissing the petition.

Mr. *M. L. Agarwala* (Babu *Girdhari Lal Agarwala* with him), for the appellants :—

Section 351 *(d)* of the old Code of Civil Procedure, on which the lower court has relied in dismissing the petition, is not applicable, as the Provincial Insolvency Act had already come into force. A petition for adjudication of insolvency made by the debtor himself under Act III of 1907 cannot under any circumstances be dismissed, except for the sole reason that the debtor was not entitled under the Act to present it. The court had no jurisdiction to refuse or dismiss such an application after

* First Appeal No. 13 of 1909 from an order of L. Marshall, District Judge of Mainpuri, dated the 30th of November, 1908.

(1) (1876) L. R., 3 Ch. D., 461. (2) (1879) L. R., 12 Ch. D., 480.
(3) (1880) L. R., 15 Ch. D., 125.

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it had been rightly presented. Section 15 of Act III of 1907 clearly says that the court is to be satisfied "by the debtor" of the existence of any sufficient cause for not making the order. The words "or is satisfied by debtor.....ought to be made," which are between two commas, run together. It is clear that sub-section (1) refers only to petitions by a creditor. Sub-sections (1) and (2) read together, show this to be the case. Sub-section (1) corresponds to section 7, clause (3) of the English Bankruptcy Act of 1883, and the latter expressly contemplates creditors' applications alone. In section 15, sub-section (1) there is no comma after the word petition; had there been a comma, then it could not be argued that a petition by a debtor was not also contemplated by that sub-section. The words contained in section 351(*d*) of the old Code of Civil Procedure, do not find a place in section 15 of Act III of 1907. The Indian courts have inherent powers to prevent abuse of the process of courts. *Vide* section 151 of the new Code of Civil Procedure.

I rely upon the case of *Ex parte Painter*; *In re Painter* (1). There it was practically held that debtor's application, if rightly presented, shall not be dismissed except where the petition is so foreign to the purposes of the Insolvency Court as to amount to an abuse of the process of the Court. In the present case the petition was dismissed for grounds which might be sufficient grounds for punishing the debtor under section 43; that would be the proper remedy; but the Court could not dismiss the petition.

Mr. *Nehal Chand* (for Babu *Jogindro Nath Chaudhri*), for the respondents, submitted that punctuation should not be taken as forming part of a statute. He referred to Maxwell: *Interpretation of Statutes*, fourth edition, p. 62. Section 15 corresponded to section 20 of the English Bankruptcy Act. He referred to Wace: *The Law and Practice of Bankruptcy*, p. 74. The words "ought not to have been adjudged insolvent" in section 42, sub-section (1) showed that the Legislature intended and contemplated cases in which the order of adjudication should be properly refused. They also showed the intention of the Legislature that those causes or reasons for which the order might

(1) (1895) 1 Q. B., 85, at p. 88.

be annulled could also be taken into consideration before making the order and be properly made the ground for refusing to make the order; *Nathu Mal* v. *The District Judge of Benares* (1).

Further, such conduct of the debtor as was complained of in the present case would amount to an abuse of the process of the Insolvency Court; and the petition could for that reason be thrown out in the exercise of the inherent power of the court to prevent abuse of its process. He referred to Wace: *The Law and Practice of Bankruptcy*, p. 62.

Mr. *M. L. Agarwala* replied.

CHAMIER, J.—This is an appeal against an order of the District Judge of Mainpuri dismissing an insolvency petition presented by the appellants under the Provincial Insolvency Act (III of 1907).

The learned Judge appears to have been under the impression that the proceedings were governed by the Code of Civil Procedure, 1882, for in dismissing the petition he refers to section 351 of that Code. We must, however, consider whether the dismissal of the petition can be supported under the Provincial Insolvency Act. The grounds stated for dismissing the petition are that the appellant Girwardhari Lal feigned ignorance about the existence of his account books and prevaricated on other matters.

Section 12 of the Provincial Insolvency Act provides that when an insolvency petition is admitted, the court shall make an order fixing a date for hearing the petition and notice of the order shall be given to the creditors by publication in the Local Official Gazette and in such other manner as may be prescribed. The learned District Judge fixed a date for the hearing of the petition, but failed to give notice in the manner directed by that section. No objection having been made on this account, we may disregard this irregularity.

Section 14 provides that on the day fixed for the hearing of the petition the Court shall require proof that the creditor or the debtor, as the case may be, is entitled to present the petition;

(1) (1910) I. L. R., 32 All., 547.

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that in case the petition has been presented by a creditor the debtor has been served with notice of the order referred to in section 12 and that the debtor has committed the act of insolvency alleged in the petition. The section provides also that the Court shall examine the debtor, if he is present, as to his conduct, dealings and property in the presence of such creditors as appear at the hearing, and the creditors shall have the right to question the debtor thereon. The provisions of this section seem to have been complied with by the Court. Section 15, sub-section (1) provides that where the Court is not satisfied with the proof of the right to present the petition or of the service of notice on the debtor as required by section 12, sub-section (3) or of the alleged act of insolvency, or is satisfied by the debtor that he is able to pay his debts or that for any other sufficient reason no order ought to be made, the court shall dismiss the petition.

Sub-sections (2) and (3) have no bearing upon the present case.

Section 16 provides that when a petition is not dismissed under the preceding section, and the debtor is unable to propose any composition or scheme which shall be accepted by the creditors and approved by the Court in the manner thereinafter provided, the Court shall make an order of adjudication.

In the present case there is no question about the right of the debtors to present the petition or of the alleged act of insolvency or of service of notice on the debtors, for they were the petitioners. If, therefore, section 15 exhausts the grounds on which the Court can dismiss an insolvency petition which has been admitted and can refuse to make an order of adjudication, the Court cannot dismiss an insolvency petition by a debtor on the ground that he has suppressed his accounts or contracted debts recklessly or continued to trade after knowing himself to be insolvent or on any similar ground. In *Nathu Mal* v. *The District Judge* of *Benares* (1) RICHARDS and GRIFFIN, JJ., expressed the opinion that a court should dismiss an insolvency petition by a debtor on proof that he has fraudulently transferred part of his property so as to put it out of the reach of his creditors, destroyed his books of accounts or committed other similar acts of bad faith. They

(1) (1910) I. L. R., 32 All. 547.

observed as follows:—"We wish to clearly express our opinion that the learned Judge was clearly wrong in granting the petition of Nathu Mal and declaring him an insolvent. Section 15 of Act III of 1907 provides amongst other things that if the Court is of opinion for any sufficient reason that an order of adjudication should not be made, the Court shall dismiss the petition." As they were dealing with an appeal against a conviction under section 43 of the Act the remarks which I have quoted were not necessary for the disposal of the appeal. In these circumstances I understand that we are not bound to adopt the view expressed by them. After careful consideration, I find myself unable to accept the construction which they put upon the Act. It appears to me that the last 33 words of sub-section (1) of section 15 refer only to the case of an insolvency petition presented by a creditor. The words "that for any sufficient cause" appear to me to be governed by the words "satisfied by the debtor"—that is to say, the cause referred to is a cause to be shown by the debtor. In my opinion the words "satisfied by the debtor" govern the whole of the remainder of the sub-section.

The scheme of the Act differs entirely from the scheme of the sections of the Code of Civil Procedure, 1882, which relate to insolvency matters. Under section 351 of that Code the Court could grant an insolvency application only on being satisfied that the debtor had not transferred any part of his property with intent to defraud his creditors and had not recklessly contracted debts or given an unfair preference to any of his creditors and had not committed any other act of bad faith regarding the matter of the application. Under the Insolvency Act, 1907, these appear to be grounds for refusing an absolute order of discharge (see section 44), but not grounds for refusing to make an order of adjudication. The latter part of sub-section (1) of section 15 of the Act of 1907 reproduces almost word for word section 7, sub-section (3) of the English Bankruptcy Act of 1883, which plainly refers to an insolvency petition presented by a creditor. In my opinion the latter part of sub-section (1) of section 15 of the Indian Act has no reference to an insolvency petition presented by a debtor. Authority for dismissing a

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debtor's petition for "any sufficient cause" must be found if at all elsewhere.

It has been held in England, both under the Act of 1869 and under the Act of 1883, that an insolvency petition, whether presented by a debtor or by a creditor may be dismissed if it has been presented, not with the *bonâ fide* view of obtaining an adjudication but for an inequitable or collateral purpose. For example, in *Ex parte King*; *Re Davies* (1) a creditor's petition was rejected which had been put in for the purpose of extorting money from the debtor. In *Ex parte Griffin*; *Re Adams* (2) a similar petition was rejected, the object of which was to put unfair pressure on the debtor. In *Ex parte Tynte* (3) the petitioning creditor had exhausted all his remedies under a decree obtained against the debtor and the Court declined to allow him to take proceedings against the debtor under the Bankruptcy Act. There are also other cases in which insolvency petitions have been dismissed as an abuse of the process of the Court. In England the power to dismiss such petitions has been regarded as inherent in the court. It may be that the Indian Courts have similar authority under section 47 of the Act of 1907, read with section 151 of the Code of Civil Procedure, 1908, or otherwise. But assuming that the Indian Courts have such authority, I do not think that the petition of the present appellants can be dismissed on the ground that it was presented for an inequitable or collateral purpose or can be dismissed as an abuse of the process of the Court. It is quite clear that the operation of the Act of 1907 is not intended to be confined to those cases in which a person has become insolvent through no fault of his own or has been guilty of no act of bad faith. The object of the Legislature seems to have been to make it easier than before for a debtor or creditor to obtain an order of adjudication and to confer upon the courts larger powers of control over a person who has been adjudicated an insolvent and to authorize them to refuse to grant an absolute order of discharge in many cases in which the debtor could, under the Code of 1882, have claimed an order of discharge as of right.

(1) (1876) L. R., 3 Ch. D., 461. (2) (1879) L. R., 12 Ch. D., 480.
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I would allow this appeal, set aside the order of the Court below and make an order of adjudication under section 16 of the Insolvency Act against both the appellants. I would give the appellants their costs in this Court.

KARAMAT HUSAIN J.—I agree.

BY THE COURT.—The order of the Court is that the appeal is allowed, the order of the Court below is set aside with costs and the appellants are adjudicated insolvents under section 16 of the Insolvency Act.

Appeal allowed. Order set aside.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Griffin.

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June 6.

BRIJ LAL SINGH AND ANOTHER (PLAINTIFFS) *v.* BHAWANI SINGH AND OTHERS (DEFENDANTS.)*

Mortgage—Redemption—Clog on the equity of redemption—Two mortgages—Covenant to pay the second mortgage before the first—Consolidation.

Under a covenant contained in a mortgage of the year 1867 the mortgagees took possession of the mortgaged property. Subsequently the mortgagors took a further advance from the mortgagees and gave them a second mortgage on the same property in which they covenanted that they would pay off the amount due on the second mortgage before redeeming the first. *Held*, on suit by the mortgagors to redeem the mortgage of 1867, that this was an admissible covenant and not a clog on the equity of redemption. *Bhartu* v. *Dalip* (1) distinguished. *Muhammad Abdul Hamid* v. *Jairaj Mal* (2) referred to.

In second appeal the plaintiffs mortgagors were allowed to amend their plaint so as to include a prayer for redemption of both the mortgages.

THE facts of this case were as follows:—

Under a simple mortgage executed on August 2nd, 1867, the mortgagee was competent to take possession if the mortgage money was not paid within a certain time. A subsequent simple mortgage was executed by the same mortgagors in favour of the same mortgagees with the stipulation attached that money due on the second bond was to be paid before the prior mortgage could be redeemed. The money was not paid under the first mortgage bond within the time specified and the mortgagees took possession of the property. The representatives of the mortgagors brought this suit for redemption

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* Second Appeal No. 1041 of 1909 from a decree of Jagat Narayan, second Additional Judge of Aligarh, dated the 8th of June, 1909, reversing a decree of Muhammad Husain, Munsif of Etah, dated the 19th of January, 1909.

(1) Weekly Notes, 1906, p. 278. (2) Weekly Notes, 1906, p. 267.