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KESRI v. GANGA SAHAI.

BY THE COURT.—The appeal is allowed, the decree of the court below is set aside, and the suit of the plaintiffs dismissed with costs.

Appeal decreed.

APPELLATE CIVIL.

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April 9.

Before Mr. Justice Richards and Mr. Justice Tudball.

NATHU MAL (OPPOSITE PARTY) *v.* THE DISTRICT JUDGE OF BENARES (PETITIONER.)*

Act No. III of 1907*—(Provincial Insolvency Act), section* 43 *(2)—Insolvency—Inquiry as to alleged fraudulent acts committed by debtor—Procedure—Evidence.*

Held that proceedings under section 43 (2) of the Provincial Insolvency Act, 1907, should not be based merely upon the evidence given on behalf of the creditors when opposing the debtor's application to be adjudged an insolvent, but evidence as to the specific acts alleged against the debtor should be recorded *de novo*. *In the matter of Rash Behari Roy* (1) referred to.

THE facts of this case were as follows:—

The appellant, Nathu Mal, made an application on the 21st of September, 1908, to be adjudged an insolvent. The application was, owing to some formal defects, returned to him on the next day. A fresh application was thereafter made on 21st January, 1901. In disposing of this application the Judge found that it was clearly proved that the applicant had been guilty of very bad faith; that he had in his second application suppressed assets shown in the first application; and that he had, shortly before the second application, fraudulently disposed of valuable movable property to certain alleged creditors. The Judge however made, on the 11th of March 1909, the order of adjudication prayed for and appointed a receiver. The receiver called upon the insolvent to produce his account books; he did not do so, although in his deposition he had admitted keeping regular account books, but produced only "a sort of memorandum book" instead. The receiver reported the matter to the Judge, who commenced proceedings under section 43 (2) of the Provincial Insolvency Act (III) of 1907). He framed four charges or counts against the

* First Appeal No. 114 of 1909 from an order of E. H. Ashworth, District Judge of Benares, dated the 2nd of September, 1909.

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vent:—(*a*) production of fraudulent memoranda of accounts before the receiver; (*b*) fraudulent disposal of assets shown in the first petition; (*c*) suppression of account books, and (*d*) act of bad faith in suppressing the first petition, which he was called on to produce before the order of adjudication had been made. The Judge dealt with these charges mainly upon the evidence which was taken on the occasion of the adjudication of insolvency, and sentenced the insolvent by his order, dated the 2nd of September, 1909, to six weeks' simple imprisonment. The insolvent preferred this appeal to the High Court under section 46 (2) of Act III of 1907.

Babu *Lalit Mohan Banerji*, for the appellant, contended that the sentence was based mainly on the evidence that was given on the side of the creditors when they were opposing the application for adjudication. That evidence was produced about six months before the proceedings under section 43 (2) were taken. The purposes of the two proceedings were distinct and the evidence given in the one could not properly be made the basis of the order in the other. In the later proceedings, when the charges were framed by the Judge, the correct procedure should have been for him to take fresh evidence and adjudicate upon the different charges on that evidence alone. The appellant had no opportunity of cross-examining the witnesses with a view to his meeting the charges now brought against him; for he could not then anticipate what future charges would be brought against him. Under these circumstances the order imposing a sentence was illegal. *In the matter of Rash Behari Roy* (1).

Mr. *W. Wallach* (Government Advocate) for the respondent, conceded that the proof of the four charges was based mainly on the evidence that was taken at the time of the adjudication of insolvency; although, he contended, at least one of the charges was fully established by additional evidence taken in connection with the present proceedings. It would be more satisfactory if fresh evidence were taken on all the charges framed and the sentence based on such evidence.

Babu *Lalit Mohan Banerji*, replied that the additional evidence which had been taken, did not by itself fully establish any one of the charges.

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RICHARDS and TUDBALL, JJ:—Nathu Mal, appellant here, applied under section 16 of Act III of 1907 for an order of adjudication of insolvency. The learned District Judge made the order applied for notwithstanding very strenuous objections on the part of the creditors. The learned Judge says in his judgement of the 11th March, 1909:—"I therefore hold that there are no sufficient grounds for refusing an order of adjudication." The next sentence proceeds as follows:—"At the same time I must place here on record that it is clearly proved that the applicant is guilty of very bad faith." He then proceeds to set forth the facts which show that the applicant was fraudulently concealing documents which would throw light on the state of his assets and was also fraudulently understating the amount of his assets. We wish to clearly express our opinion that the learned Judge, holding the opinion he did, was clearly wrong in granting the petition of Nathu Mal and declaring him insolvent. Section 15 of Act III of 1907 provides, amongst other things, that if the Court is of opinion for any sufficient reason that the order of adjudication should not be made the Court should dismiss the petition. In our opinion the facts set forth in the order of the learned Judge to which we have just referred were ample grounds for dismissing the petition, and the petition under the circumstances ought to have been dismissed. After the order of adjudication a receiver was appointed and he reported to the learned Judge that the insolvent had not produced his books. This led to proceedings under section 43, clause (2). The learned Judge framed what we may call four charges. In the order appealed from he deals with these charges and he sentenced the insolvent to six weeks' simple imprisonment. This is the order appealed against. The main ground of appeal argued here is that the sentence is based mainly on the evidence that was given on behalf of the creditors when they were opposing the application for adjudication. The appellant contends that when the Judge framed charges against him he ought to have taken the evidence on each of the charges *de novo*. Reliance is placed on a ruling—*In the matter of Rash Behari Roy an insolvent* (1). In that case it was held that the provisions of the XI and XII Vict., Cap. 21, section 50, were in

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the nature of a penalty and that the insolvent could not be convicted unless he was shown by legal evidence to have committed an offence on some specific occasion. It is no doubt true that in the present case the evidence was taken in the presence of Nathu Mal and he had an opportunity of cross-examining the witnesses. On the other hand at that time there was no charge against him of having committed any offence under section 43 of the Provincial Insolvency Act. It may well be that the cross-examination would have been different if Nathu Mal had known that the evidence was being recorded as the foundation for a sentence under section 43. We think that Nathu Mal may well have been prejudiced. The learned Judge, as we have already pointed out, was prepared to make and actually did make an order of adjudication, notwithstanding the evidence adduced by the creditors, and no action was taken by the learned Judge at that time, and it was not until after the receiver's report that the present proceedings were instituted. It cannot be disputed that the order of imprisonment is mainly based on the evidence that was taken on the first occasion. The only question which we have any doubt about is whether or not we should send the case back for a decision *de novo*. While we quite agree with the remarks of the learned Judge that insolvents acting in a fraudulent manner and committing offences under section 43 should certainly be punished, we do not think under the circumstances that it would be in the interests of public justice that we should send the case back. Of course our order will not affect in any way the discretion of the court below as to withholding the order of discharge. We accordingly allow the appeal, set aside the order of the learned District Judge, dated the 2nd of September, 1909. The applicant will bear his own costs. The bail order is discharged.

Appeal allowed.