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SHER ALI v. JAGMOHAN RAM.

We are in complete accord with the view expressed at pages 691 and 692 of the report and with the reasons set out there.

Both upon principle and authorities, we have no doubt that the order in controversy was in substance a decree as defined in the Code of Civil Procedure and was appealable as such.

As the applicant did not pursue the right remedy, he cannot be permitted to come up to this Court in revision and challenge the order under section 115 of the Code of Civil Procedure. We dismiss this application with costs.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice King.

1930 *December*, 16.

MOHAN LAL (APPLICANT) *v.* MADHAVA PRASAD AND OTHERS (OPPOSITE PARTIES)*

Provincial Insolvency Act (V of 1920), section 35—Annulment of adjudication—Grounds on which an annulment order can be passed.

The only grounds upon which an adjudication of insolvency can be annulled are those mentioned in section 35 of the Provincial Insolvency Act, and the court has no jurisdiction to annul the adjudication of an insolvent on the ground that he was dishonest in his dealings, that he was entering recklessly into transactions and incurring debts which he never hoped to repay, that he had destroyed his account books, and that he showed certain debts as due to him although he had already realised them, as none of these facts would have furnished a ground for dismissing the insolvency petition.

Mr. *K. Verma*, for the appellant.

Mr. *Gadadhar Prasad*, for the respondents.

BANERJI and KING, JJ. :—This is an appeal against an order passed by the learned District Judge of Benares on the 25th of October, 1929, annulling an order of adjudication passed in respect of one Mohan Lal under the Provincial Insolvency Act, 1920.

*First Appeal No. 28 of 1930, from an order of Harish Chandra, District Judge of Benares, dated the 25th of October, 1929.

Mohan Lal presented an insolvency petition on the 26th of November, 1924. He showed the debts due from him as about Rs. 32,000, and showed assets, mainly in the shape of debts due to him, amounting to about Rs. 24,000. On 21st November, 1925, the District Judge adjudged the applicant an insolvent and ordered him to apply for his discharge within one year. The applicant did apply within the prescribed period. The period was extended from time to time upon the motion of the official receiver and successive applications for discharge were made. The last application was made on the 17th of September, 1928. On the 8th of April, 1929, the official receiver submitted a report recommending that "as the actions of the insolvent have not been very fair and straightforward", the insolvency should be annulled, or the insolvent should be discharged and permission should be granted to the official receiver to sell the assets of the insolvent.

The learned District Judge found that the insolvent had been dishonest in his dealings. The insolvent stated that he had sold Rs. 9,000 worth of goods to a certain State without obtaining any receipt and without making any note of it in his account books, or keeping any memorandum of the transaction, and these omissions showed, in the Judge's opinion, that the insolvent was dishonest. Moreover the Judge found that an item of Rs. 10,000, which was shown in the schedule as being due from a certain Raja, had been paid by the Raja into the treasury but had been refunded in the year 1923. The District Judge remarks that it is not clear to whom the money was paid, but apparently he held that it must have been paid to the insolvent himself. The District Judge states that either the insolvent has no assets, which shows that he was entering recklessly into transactions with various persons and incurring debts

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which he never hoped to pay, or that he had realized all the amounts and has destroyed his account books so that no evidence may be available. Upon these grounds the Judge annulled the adjudication.

It has been urged that the District Judge had no jurisdiction to annul the adjudication upon the grounds stated by him. In our opinion the contention is well founded. The only section, applicable to the case, under which the District Judge could have annulled the adjudication is section 35. Under that section the Judge could have annulled the adjudication if, in the opinion of the court, the debtor ought not to have been adjudged insolvent. There are no other grounds upon which the court could, in the circumstances of this case, have legally annulled the adjudication.

Even if the facts found by the District Judge are correct, they do not in our opinion furnish any legal ground for annulling the adjudication, because they do not show that the debtor ought not to have been adjudged insolvent. It may be accepted that the insolvent was dishonest in his dealings, and that he had no assets and that he destroyed his account books and that he was entering recklessly into transactions and incurring debts which he never hoped to repay. It may further be conceded that he realised certain debts due to him before presenting the insolvency petition and nevertheless showed those debts as still due to him. None of these facts would have furnished the court which passed the order of adjudication any grounds for dismissing the insolvency petition. The debtor was entitled under section 10 to present the petition as he was unable to pay his debts, and his debts amounted to Rs. 500. These facts have never been doubted. The court therefore could not have dismissed the petition under section 25(2). The facts found may furnish grounds for refusing an absolute

order of discharge, but they furnish no grounds for dismissing an insolvency petition and consequently no grounds for annulling an adjudication. The ruling of the Judicial Committee in *Chhatrapat Singh Dugar* v. *Kharag Singh Lachmiram* (1) may be referred to in support of our view.

We therefore allow the appeal and set aside the order of the court below annulling the adjudication. The District Judge should now proceed to pass orders on the application for discharge. The appellant will get his costs of this appeal.

Before Mr. Justice Banerji and Mr. Justice King.

LACHHMI NARAIN (PLAINTIFF) *v.* BENI RAM (DEFENDANT)*

1930 *December*, 17.

Partnership—Death of one of two partners—Minor son left as heir—Business continued by surviving partner—Liability to heir of deceased partner for share of profits made—Trusts Act (II of 1882), section 88, illustration (f)—Contract Act (IX of 1872), sections 241, 247.

Upon the death of one of two partners in a business, leaving a minor son as his heir, the business was not wound up but was carried on by the surviving partner, all the assets being retained and employed in the business. *Held*, that in view of the provisions of section 88, illustration (*f*), of the Trusts Act, the survivor carrying on the business was liable to account to the heir of the deceased partner for his share of the profits made by the survivor.

Section 247 of the Contract Act could not apply to the case, as upon the death of one of two partners, there remained no partnership in existence, to the benefits of which the minor could be deemed to have been admitted.

Section 241 of the Contract Act had no application to the facts of the case, in which the minor had sued for accounts and share of profits.

Messrs. *S. N. Seth* and *Damodar Prasad Saxena*, for the appellant.

Dr. *K. N. Katju* and Messrs. *U. S. Bajpai*, *M. N. Kaul* and *G. S. Pathak*, for the respondent.

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*First Appeal No. 30 of 1929, from a decree of Raja Ram, Subordinate Judge of Cawnpore, dated the 18th of September, 1928.

(1) (1916) I.L.R., 44 Cal., 535.