

section 22(4), but he can very well say that as the imperative notice under section 23(2) was not issued to him, he could ignore the notice issued under section 22(4) and in that sense was prevented by sufficient cause from complying with that notice. Whether a valid notice under section 23(2) was a condition precedent or whether it was only imperative under the circumstances of the present case it is clear that the assessee was denied a valuable right and he was, therefore, prevented by sufficient cause from complying with the notice issued under section 22(4), and this is our answer to the third question.

The assessee is entitled to his costs as certified. Counsel for the department is entitled to Rs.500 as his fees. Six weeks are allowed to him to file the certificate.

REVISIONAL CIVIL

Before Mr. Justice Collister

SHANKAR LAL ((APPLICANT) *v.* BANSIDHAR AND OTHERS
(OPPOSITE PARTIES)*

1937
RAJMANI
DEVI
v.
COMMISSIONER OF
INCOME-TAX

1937
May, 6

Provincial Insolvency Act (V of 1920), sections 27, 43, 53—Adjudication on creditors' petition—Creditors taking steps to initiate proceedings for avoidance of fraudulent transfers—Annulment of adjudication meanwhile for failure to apply for discharge—Notice must be given in such a case to petitioning creditors before annulment.

Where a person was adjudged an insolvent on a creditors' petition, and thereafter the petitioning creditors were, to the knowledge of the court, taking steps and making arrangements through the official receiver to initiate proceedings for the avoidance of certain alleged fraudulent transfers or fraudulent preferences, but meanwhile the order of adjudication was annulled, without giving notice to the petitioning creditors, because the insolvent had failed to apply for a discharge by the date fixed therefor: *Held* that in such a case the court, before making the order of annulment, ought to have issued notice to the petitioning creditors to show cause why such an order should not be made, and the failure to give such notice

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was a material irregularity on account of which the order should be set aside.

Mr. *B. S. Darbari*, for the applicant.

Mr. *Din Dayal*, for the opposite parties.

COLLISTER, J.:—The point taken in this revision is that the District Judge of Agra in his judgment, dated 26th February, 1936, has erred in dismissing an appeal against an order of annulment in an insolvency proceeding.

On the 10th July, 1931, Bohrey Shankar Lal, who is the applicant before me, and Ganga Ram applied for an order of adjudication in insolvency against Bansidhar, opposite party No. 1. On the 4th March, 1932, Bansidhar was adjudged insolvent and he was directed to apply for discharge within one year. It appears that certain alienations had been made by the insolvent which it was sought to set aside under section 53 or section 54 of the Act. On the 12th October, 1932, notice was sent at the request of the official receiver to the two petitioning creditors to pay necessary expenses for proceedings under section 53 or section 54. On the 26th October, 1932, the official receiver reported to the insolvency Judge that the creditors had given no proof in support of their application to have the alienations set aside and he prayed that the application be filed. On the 7th December, 1932, the proceedings for setting aside the alienations were re-opened at the request of the official receiver, who had been approached by one or both of the petitioning creditors. On the 8th February, 1933, the official receiver informed the court that he had fixed the 14th of February for attachment of such property as was free from encumbrance (from the proceeds whereof the cost of setting aside the alienations was to be met) and that Bohrey Shankar Lal had deposited Rs.20 as expenses and he requested that information be given to Bohrey Shankar Lal's counsel. The court directed that information be sent accordingly and that the official receiver's report should be submitted by the 5th April,

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1933. Meanwhile on the 7th March, 1933, the office reported that no application for discharge had been made by the insolvent and that no application for enlargement of time had been made by the petitioning creditors; and on the 10th March, 1933, the official receiver reported that in accordance with the office report the order of adjudication should be annulled under section 43 of the Act. The insolvency court directed that the matter be put up on the 15th March, and on that date the order of adjudication was annulled—apparently in the absence of the petitioning creditors.

On the 27th April, 1933, the petitioning creditors applied to the insolvency Judge to set aside the order of annulment dated 15th March, 1933; but the court disallowed that application and directed that the creditors should file a fresh application for the adjudication of Bansidhar. On the 19th May, 1933, the petitioning creditors again applied, apparently by way of review, for setting aside the *ex parte* order of annulment, dated 15th March, 1933; but on the 6th October, 1933, the insolvency court passed an order to the effect that "The order, dated 27th April, 1933, must stand."

Thereafter the petitioning creditors appealed to the District Judge and the latter, purporting to act under order XLI, rule II of the Civil Procedure Code, allowed the appeal without having issued notice to Bansidhar. That order was for obvious reasons set aside by a Bench of this Court of which I was a member and the District Judge was directed to re-hear the appeal. The appeal has now been heard according to law and has been dismissed.

It is urged by learned counsel for the applicant that the insolvency court was not competent to annul the adjudication without notice to the petitioning creditors and has further argued that under section 27(2) of the Act the court had power to extend the time for discharge even after the expiry of the period allowed to the insolvent for applying for his discharge. Learned counsel for

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the applicant has cited authority of various High Courts in support of the latter proposition and I unhesitatingly accept it. On the other hand, my attention has been drawn to section 43(1) of the Act which provides: "If the debtor does not appear on the day fixed for hearing his application for discharge or on such subsequent day as the court may direct, or if the debtor does not apply for an order of discharge within the period specified by the court, the order of adjudication shall be annulled, and the provisions of section 37 shall apply accordingly." Acting under the provisions of that section, the insolvency court on the 15th March, 1933, annulled the order of adjudication.

It is contended for the opposite party that, where an adjudication has been annulled under section 43, no extension of time can be granted. It is also argued that under section 27(2) the petitioning creditors, who were of course aware of the period allowed for discharge, were at liberty to move the court within that period for an extension of time. This is of course perfectly true. It is also true that after annulment no extension of time can be granted. But the question remains, was the order of annulment good and proper? Bansidhar was adjudged insolvent not on his own petition, but on the petition of his creditors, and the latter wanted to have certain alienations set aside and had moved the official receiver in this matter. In *S. V. A. R. S. Firm v. Maung Pan* (1) a Bench of the Rangoon High Court held that "Where an application under section 53 of the Provincial Insolvency Act, in relation to an alleged fraudulent transfer of property, is pending, the court, before annulling the insolvent's order of adjudication for failure to apply for discharge within the appointed time, should issue specific notice of the course proposed to be adopted to any interested creditor to show cause against such course being adopted."

(1) (1927) 101 Indian Cases, 589.

It is true that in the present case proceedings under section 53 or section 54 of the Act had not been actually initiated, but preliminary steps were being taken. The 5th April was fixed for submission of the receiver's report, but meanwhile, on 15th March, the adjudication was annulled because the insolvent had not applied for discharge within the time allowed.

The appeal to the District Judge was against the order of 6th October, 1933, which affirmed the order of 27th April, 1933. Under the latter order the application for setting aside the *ex parte* order of 15th March, 1933, was dismissed. It is pointed out on behalf of the opposite party that an appeal lay from the order of 15th March and from the order of 27th April, but no appeal was filed. This is true, but if the order of 6th October, 1933, was wrong and was liable to be set aside, the order of 27th April and the *ex parte* order of 15th March would automatically fall.

I think that section 43 of the Act should be read with section 27, and in the present case I am of opinion that, having regard to the fact that Bansidhar was adjudged insolvent on a petition by his creditors and the fact that steps were apparently being taken with a view to initiate proceedings under section 53 or section 54 of the Act, notice ought to have been issued to the petitioning creditors before the adjudication was annulled.

I think that there has been a material irregularity and accordingly I allow this application with costs and set aside the lower court's order, dated 26th February, 1934, and the order of annulment.

The insolvency court will issue notice to the insolvent and the petitioning creditors and the official receiver to show cause why the adjudication should not be annulled and will then exercise its discretion, having regard to the probability or otherwise of proceedings being taken under section 53 or section 54 of the Act, as to whether or not to annul the said adjudication.

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