

FULL BENCH

Before Mr. Justice G. H. Thomas, Chief Judge, Mr. Justice Ziaul Hasan and Mr. Justice R. L. Yorke

1938
August, 22

THAKUR RAGHURAJ SINGH, (APPELLANT) v. MR. ABDUL RAHMAN AND OTHERS, (RESPONDENTS)*

Provincial Insolvency Act (V of 1920), section 16—Substitution of creditor under section 16—Express order for substitution, whether necessary—Continuation of proceedings on application of creditor seeking substitution, if enough—Successive substitutions, if allowable—Conditions for substitution, under section 16.

An express order of substitution is not necessary under section 16 of the Provincial Insolvency Act. Substitution can be inferred from the court continuing proceedings on the application of the creditor applying to be substituted under that section.

Substitution contemplated by section 16 is that a creditor who has been substituted in place of the original creditor can in his turn be substituted by another creditor and so on.

The object of section 16 of the Provincial Insolvency Act is to prevent other creditors from being injured by the action of one creditor who by reason of collusion or otherwise may not diligently prosecute the petition.

In the wording of section 16 of the Provincial Insolvency Act the Legislature have definitely laid down one condition for the substitution of a creditor and only one, viz., that his debt shall be not less than "the amount required by this Act." But the amount referred to is required not only by the Act, but by section 9 of the Act, and it is not that the Legislature intended to prescribe all the conditions set forth in section 9 yet mentioned only this one. *In re Maugham* (1), *in re Maund* (2), *Ganga Nath v. Zalim Singh* (3), *Dinavazhi Venkata Hanumantha Rao v. Verugalapati Gangayya* (4), and *Firm of Salamatmal Janimal v. Ex parte Firm of Gobindram Dharam Das*, (5), referred to.

The case was originally heard by a Bench consisting of ZIAUL HASAN and YORKE, JJ., who referred certain

*Miscellaneous Appeal No. 31 of 1935, against the order of H. G. Smith, Esq., I.C.S., District Judge of Sitapur, dated the 25th of February, 1935.

(1) (1888) 21 Q.B.D., 21.

(2) (1895) 1 Q.B.D., 194.

(3) (1931) I.L.R., 54 All., 72.

(4) (1928) I.L.R., 51 Mad., 594.

(5) (1931) 139 I.C., 851.

questions of law involved to a Full Bench for decision. The referring order of the Bench is as follows:

ZIAUL HASAN and YORKE, JJ. :—This is a miscellaneous appeal against an order of the learned District Judge of Sitapur under section 16 of the Provincial Insolvency Act.

The facts may briefly be stated as follows:

On the 31st of July, 1933, Girdhari Lal and Damodar Das, creditors of the present appellant, applied under sections 9 and 13 of the Insolvency Act for the appellant being adjudged an insolvent. On the 23rd of November, 1933, another creditor of the appellant named Gobardhan Das made a similar application and added a prayer under section 16 of the Act to the effect that if Girdhari Lal and Damodar Das withdraw their application, the petitioner may be treated as a petitioner and substituted in their place. On the 22nd of December, 1933, Girdhari Lal and Damodar Das applied for leave to withdraw their application. On this application an order was passed on the 27th of January, 1934, to the following effect:

“File. If he does not desire to appear he may (not) do so”,

and a date was fixed for the hearing of Gobardhan Das's application. There were several adjournments in the case and eventually issues were framed on the 8th of September, 1934, and 3rd November, 1934, was fixed for disposal of the case. On the 3rd of October, 1934, Sitaram respondent made an application under sections 7, 9, 13, 15 and 16 of the Act and on the 13th of October, 1934, the other two respondents, Dwarka Das and Baijnath, made a similar application.

On the 31st of October, 1934, Gobardhan Das applied for permission to withdraw and was allowed to do so. Subsequently some other creditors made an application under section 16 but we are not concerned with their application in the present appeal. On the same date the present respondents applied to be substituted for the “original creditor” and this application of theirs was allowed by the learned Judge by his order, dated the 25th of February, 1935. This is the order which is the subject of the present appeal. In this appeal the following two questions of law arise for determination:

- (1) Is an express order of substitution necessary under section 16 of the Provincial Insolvency Act or whether substitution can be inferred from the court continuing proceedings on the application of the creditor applying to be substituted under that section? and

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(2) Whether the substitution contemplated by section 16 can only be in place of the original petitioner or whether a creditor who has been substituted in place of the original creditor can in his turn be substituted by another creditor and so on.

These questions are important and as we feel some doubt on them and as there are no cases decided by any of the High Courts directly on the point, we refer the above questions for decision by a Full Bench. Let the case be laid before the Hon'ble Chief Judge for the constitution of the Full Bench for decision of the above questions.

Mr. *Radha Krishna Srivastava*, for the appellant.

Mr. *M. Wasim*, for the respondents.

THOMAS, C.J.:—This miscellaneous appeal, against an order of the learned District Judge of Sitapur, dated the 25th of February, 1935, came up for hearing before a Bench of this Court, and the Bench has referred the following two questions to a Full Bench:

(1) "Is an express order of substitution necessary under section 16 of the Provincial Insolvency Act or whether substitution can be inferred from the court continuing proceedings on the application of the creditor applying to be substituted under that section?"

(2) "Whether the substitution contemplated by section 16 can only be in place of the original petitioner or whether a creditor who has been substituted in place of the original creditor can in his turn be substituted by another creditor and so on?"

The facts briefly are that on the 31st of July, 1933, Girdhari Lal and Damodar Dass presented a petition under sections 9 and 13 of the Provincial Insolvency Act against Thakur Raghuraj Singh, the present appellant, who is the taluqdar of Sitarasoi in the district of Sitapur. Girdhari Lal and Damodar Dass were creditors of Thakur Raghuraj Singh, and they alleged that within three months before the filing of the petition

Thakur Raghuraj Singh had committed various acts of insolvency.

On the 23rd of November, 1933, Gobardhan Dass, another creditor, presented a petition under sections 9, 13 and 16 of the Act. It appears from paragraph 3 of the petition that Gobardhan Dass apprehended that Girdhari Lal and Damodar Dass might withdraw their petition. On the 22nd of December, 1933, Girdhari Lal and Damodar Dass actually made an application that they should be allowed to withdraw it, and on the 27th of January, 1934, the following order was passed:

“File. If he (they) does not desire to appear he (they) may (not) do so”,

and a date was fixed for the hearing of Gobardhan Dass's application. There were several adjournments in the case, and eventually issues were framed on the 8th of September, 1934, and the Court fixed 3rd November, 1934, for disposal of the case.

In the meantime on the 3rd of October, 1934, another creditor, Sita Ram, respondent, presented a petition under sections 7, 9, 13, 15 and 16 of the Act, and on the 13th of October, 1934, yet other creditors, Baijnath and Dwarka Dass, the other two respondents, presented a petition under those same sections.

On the 31st of October, 1934, Gobardhan Dass applied to be allowed to withdraw his petition, and by an order of that same date the learned District Judge allowed his petition to be withdrawn. When the case came up for hearing on the 3rd of November, 1934, some more creditors appeared, and presented a petition under section 16 of the Act, but we are not concerned with that application in the present appeal. On the same date the present respondents applied to be substituted for the “original creditor”, and this application of theirs was allowed by the learned District Judge by his order, dated the 25th of February, 1935. This is the order which is the subject of the present appeal.

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It is not necessary for me to discuss the first point under reference at any length because the learned counsel for both the parties have conceded that it is not necessary that an express order of substitution under section 16 of the Provincial Insolvency Act should be passed.

Thomas,
C. J.

The contention of the learned counsel on behalf of the appellant is that there can be no application for substitution under section 16 of the Act when the original application has been withdrawn under section 14. I do not agree with this contention. Section 14 of the Provincial Insolvency Act clearly lays down that "no petition, whether presented by a debtor or by a creditor, shall be withdrawn without the leave of the court."

Girdhari Lal and Damodar Dass in my opinion were not allowed to withdraw their petition. The order passed on their application was merely "File", and according to the order-sheet, it was directed that if he (they) does not desire to appear he (they) may (not) do so. It cannot be said that those men were expressly allowed to withdraw. The word "file" does not mean withdrawal of an application. It simply means left on record.

It therefore follows that the original application of Girdhari Lal and Damodar Dass was pending when the order under appeal was passed, and it never ceased to subsist, and the creditors are entitled to be substituted as petitioners, according to section 16 of the Provincial Insolvency Act. A petition under the Insolvency Act is for the benefit of all the creditors, and no fraud should be allowed to be practised.

It is true that no definite order substituting Gobardhan Dass as a petitioner was ever made, but the proceedings were in fact continued on his application, and those proceedings were alive at any rate up to the 31st of October, 1934, the date of Gobardhan Dass's withdrawal. He was thus impliedly allowed to carry on.

The applications of Sita Ram, Baijnath and Dwarka Dass were made before that date, and there can be no bar to their substitution under section 16 of the Act as petitioners.

The learned counsel for the appellant has relied on two English decisions reported in *in re Maugham* (1) and *in re Maund* (2), while the learned counsel for the respondents has relied on the following decisions:

Ganga Nath and another v. Zalim Singh and another (3); *Dinavazhi Venkata Hanumantha Rao v. Verugalapati Gangayya and others* (4), and *re Firm of Salamattmal Janimal v. Ex parte Firm of Gobindram Dharam Das and another* (5).

The two decisions relied on by the learned counsel for the appellant were considered and distinguished in the Allahabad case reported in *Ganga Nath v. Zalim Singh* (3). It was held by a Bench of the Allahabad High Court that "in the wordings of section 16 of the Provincial Insolvency Act the only condition laid down, as a requisite for the person to be substituted for the original petitioner who does not proceed with due diligence on his petition, is that such person must be a creditor to whom the debtor may be indebted in the amount required by the Act in the case of a petitioning creditor. It is not necessary that such creditor should have himself presented a petition for the adjudication within three months of the act of insolvency or that at the time of the substitution he should be entitled according to section 9(1)(c) of the Provincial Insolvency Act to present an insolvency petition." This case undoubtedly is in favour of the respondents.

In the case reported in *Dinavazhi Venkata Hanumantha Rao v. Verugalapati Gangayya* (4), it was held that "where a creditor applied to have his debtor adjudicated an insolvent but would not proceed with

(1) (1888) 21 Q.B.D., 21.

(3) (1931) I.L.R., 54 All., 72.

(2) (1895) 1 Q.B.D., 194.

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his petition, another creditor, whose debt was not barred by limitation on the date of the original petition, can be substituted as petitioner, under section 16 of the Provincial Insolvency Act (1920), and be allowed to continue the petition, even though his debt might be barred by limitation on the date of the substitution, provided he was otherwise qualified to be a petitioning creditor under the Act.

The case reported *in re Firm of Salamatmal Janimal v Ex parte Firm of Gobindram Dharam Das* (1) is more or less on the same lines as the case reported in *Dinavazhi Venkata Hanumantha Rao v. Verugalapati Gangayya* (2).

The facts of the present case are distinguishable from those *in re Maugham* (3) on the ground that the petition in the present case has not yet been dismissed while *in re Maugham's* case (3) the petition had been dismissed. In the case reported *in re Maund* (4), it was held that "the court will not amend a bankruptcy petition by adding as petitioners, after three months have elapsed from the date of the act of bankruptcy upon which the petition is founded, creditors whose debts are other than those in respect of which the petition was presented," though one of the learned Judges qualified this by saying that "if within that period (three months) a debt has been made ground of the petition and it afterwards becomes desirable to add another party to the petition in respect of that debt leave may be given to join that other party as a petitioner where it will not lead to any injustice."

In my opinion the object of section 16 of the Provincial Insolvency Act is to prevent other creditors from being injured by the action of one creditor who by reason of collusion or otherwise may not diligently prosecute the petition. If it is to be regarded as a new petition, this object is frustrated, and there is no pur-

(1) (1931) 139 I.C., 851.

(2) (1928) I.L.R., 51 Mad., 594.

(3) (1888) 21 Q.B.D., 21.

(4) (1895) 1 Q.B.D., 194.

pose of having a section of the kind. If the original petition had proceeded up to the adjudication or if another creditor whose debt was not barred by the date of substitution had been substituted, and he had obtained an order of adjudication, the applicants' debt which was not barred by the date of the petition could be proved. The learned counsel for the appellant has not been able to cite a single case of any Indian High Court in support of his contention. In my opinion there is no need to have recourse to the view of the law that has been taken in the English courts when the decisions of the Indian courts are quite clear and consistent with the wording of the section of the Provincial Insolvency Act.

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It was next contended on behalf of the appellant that section 16 of the Provincial Insolvency Act allowed only one substitution and not *ad infinitum*. Stress was laid on the words "*the petitioner*," which, according to the learned counsel, meant the original petitioner. I do not agree with this contention. In my opinion there can be any number of substitutions. The word "substitution" means removing or erasing the name of the original creditor. In the wording of section 16 of the Provincial Insolvency Act the Legislature have definitely laid down one condition for the substitution of a creditor and only one, viz., that his debt shall be not less than "the amount required by this Act." But the amount referred to is required not only by the Act. but by section 9 of the Act, and it would be indeed remarkable if the Legislature had intended to prescribe all the conditions set forth in section 9 and yet mentioned only this one. In my opinion the wording of this section is definitely in favour of the respondents.

My answer therefore to the first question is that an express order of substitution is not necessary under section 16 of the Provincial Insolvency Act and that substitution can be inferred from the court continuing

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proceedings on the application of the creditor applying to be substituted under that section.

My answer to the second question is that substitution contemplated by section 16 is that a creditor who has been substituted in place of the original creditor can in his turn be substituted by another creditor and so on.

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ZIAUL HASAN, J.:—I agree.

YORKE, J.:—I agree.

BY COURT:—Our answer to the first question is that an express order of substitution is not necessary under section 16 of the Provincial Insolvency Act and that substitution can be inferred from the court continuing proceedings on the application of the creditor applying to be substituted under that section.

Our answer to the second question is that substitution contemplated by section 16 is that a creditor who has been substituted in place of the original creditor can in his turn be substituted by another creditor and so on.

REVISIONAL CRIMINAL

Before Mr. Justice Ziaul Hasan

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SHEO RAM AND OTHERS, (APPLICANTS) v. KING-EMPEROR
THROUGH KALIDIN (COMPLAINANT-OPPOSITE-PARTY)*

Criminal Procedure Code (Act V of 1898), section 350(1)(a)—Transfer of case from one Magistrate to another—Trial de novo before second Magistrate—Accused cannot compel summoning a witness produced in first court whom prosecution do not want to produce and rely upon—Court not relying on witness not produced in second trial—Trial, if vitiated.

Section 350(1)(a) does not require that even a witness on whom the prosecution does not rely and whom it does not wish to produce though produced before the first court should also be produced in the second court. The trial in the second

*Criminal Revision No. 73 of 1938, of the order of S. M. Ahmad Karim, Esq., Sessions Judge of Unao, dated the 1st of June, 1938.