

FULL BENCH

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

1938

SHEIKH FAZAL AZIM (APPELLANT) v. RANA UMANATH
BUX SINGH AND OTHERS (RESPONDENTS)*

February, 22

*Provincial Insolvency Act (V of 1920), sections 27 and 43—
Period fixed for application for discharge by insolvent—Court,
if has discretion to extend the period—Adjudication of insol-
vent, whether annulled automatically on expiry of period for
discharge—Order for annulment of discharge, whether neces-
sary.*

(*Per Full Bench*):—A court has jurisdiction to extend the time originally fixed under section 27 of the Provincial Insolvency Act, for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under section 43 of the Provincial Insolvency Act. *Girja Charan v. Sheoraj Singh* (1), and *Amjad Ali v. Mohammad Ali* (2), overruled. *Ram Krishna Misra ex parte* (3), and *Gopal Ram v. Magni Ram* (4), referred to. *Palani Goundan v. Official Receiver of Coimbatore* (5), *Abraham, A. J. E. v. H. B. Sookias* (6), *Lakhi v. Molar* (7), *Sohna Ram Ishar Das v. Tara Chand* (8), *Laduram v. Sakharam* (9), *Chettiar, K. K. S. A. R. A. v. Maung Myat Tha* (10), *Wally Mohamed Cassim v. Haji Ayoob Haji Abba & Co.* (11), *Saligram v. Official Receiver* (12), *Madho Prasad Vyas v. Madho Prasad* (13), and *Chinnappa Reddi v. Kolakula Thomasu Reddy* (14), relied on.

(*Per THOMAS, A. C. J.*):—Though the provisions of section 43 of the Provincial Insolvency Act are mandatory, still the annulment of adjudication does not occur as a matter of course but has to be the subject of a specific order of the court; in other words it does not operate as an automatic annulment on the failure of the debtor to apply for a discharge.

The case was originally heard by a Bench consisting of Hon'ble Thomas, A. C. J. and Smith, J., who referred an important question of law involved to a Full Bench

*Miscellaneous Appeal No. 61 of 1935, against the order of K. N. Wanchoo, Esq., I.C.S., District Judge of Rae Bareilly, dated the 15th of July, 1935.

(1) (1928) 5 O.W.N., 686.

(2) (1927) 4 O.W.N., 993.

(3) (1924) I.L.R., 4 Pat., 51.

(4) (1928) A.I.R., Pat., 338.

(5) (1930) A.I.R., Mad., 389.

(6) (1923) I.L.R., 51 Cal., 337.

(7) (1925) A.I.R., Lah., 416.

(8) (1929) A.I.R., Lah., 399.

(9) (1932) A.I.R., Nagpur, 22.

(10) (1927) A.I.R., Rang., 136.

(11) (1933) A.I.R., Rang., 133.

(12) (1926) A.I.R., Sind., 94.

(13) (1933) A.I.R., All., 230.

(14) (1927) I.L.R., 51 Mad., 839.

for decision. The referring order of the Bench is as follows:

THOMAS, A. C. J. and SMITH, J.—This is an appeal under section 75(3) of the Provincial Insolvency Act (V of 1920), against the order of the learned District Judge of Rae Bareilly, dated the 15th of July, 1935.

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One Fazal Azim was adjudicated an insolvent on the 30th of August, 1933, and on the 29th of September, 1934, he applied for discharge,—the time allowed for discharge was one year. It appears that at the time when he applied for discharge the file was in the Chief Court, and the office of the District Judge was unable to put up any report. When the file went back from the Chief Court, and the application was taken up, the question arose whether under the circumstances of the case the time could be extended. The learned District Judge, relying on two decisions of this Court, *Amjad Ali v. Mohammad Ali* (1) and *Girja Charan and another v. Sheoraj Singh* (2), held that he had no power to extend the time, and accordingly dismissed the application. The applicant-appellant has now come up in appeal.

It has been contended on behalf of the appellant that it was discretionary with the learned Judge to have extended the time, and under the peculiar circumstances of this case he should have done so. On behalf of the respondents reliance was placed on the two decisions of this Court quoted above. In *Amjad Ali v. Mohammad Ali* (1), it was held by a Bench of this Court that the provisions of section 43(1) of the Provincial Insolvency Act were mandatory, and that the debtor had complete discretion to apply for discharge when he liked, provided he applied within the period specified by the court. The word "shall" in section 41 of the Act imposed a duty upon the insolvent the breach of which involved the consequence pointed out in section 43. The Hon'ble Judges who decided that case relied on a decision of the Patna High Court reported in *Ram Krishna Misra, ex parte* (3). In the case reported in *Girja Charan v. Sheoraj Singh* (2) which is also a Bench case, it was held that "a court has no discretion to extend the time granted to an insolvent for his applying to obtain an order for his discharge. If the order of discharge is not applied for within the specified period the adjudication as to insolvency is to be annulled and on such annulment the consequences stated in section 37 Provincial Insolvency Act are to follow." The above

(1) (1927) 4 O.W.N., 993.

(2) (1928) 5 O.W.N., 686.

(3) (1924) I.L.R., 4 Pat., 51.

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two cases undoubtedly support the view taken by the learned District Judge, but we find that section 27 of the Act was not considered in these cases. Section 27 lays down that:

“(1) If the court does not dismiss the petition, it shall make an order of adjudication and shall specify in such order the period within which the debtor shall apply for his discharge”,

(2) The court may, if sufficient cause is shown, extend the period within which the debtor shall apply for his discharge . . .”

The second clause undoubtedly gives power to the court to extend the period.

The decision reported in *Anjad Ali v. Mohammad Ali* (1), as already stated, was based on the case reported in *Ram Krishna Misra, ex parte* (2), but we find that this case was considered in *Gopal Ram v. Magni Ram and others* (3), and not followed. In the case reported in *Palani Goundan v. Official Receiver of Coimbatore and another* (4), it was held that “a court has jurisdiction to extend the time originally fixed under section 27 for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under section 43 of the Insolvency Act.” The same view appears to have been taken by the Lahore, Rangoon and Allahabad High Courts, and by the Judicial Commissioner's Court at Nagpur, vide *Sohna Ram Ishar Das v. Tara Chand and others* (5), *Wally Mohammad Cassim v. Haji Ayoob Haji Abba & Coy. and another* (6); *In re Narain Das Mohan Lal of Benares* (7); and *Laduram v. Sukharam* (8). As we doubt the correctness of the two Bench decisions of this Court reported in 4 and 5 O. W. N., to which reference has been made, we refer the following question for decision to a Full Bench under section 14(1) of the Oudh Courts Act:

Whether a court has jurisdiction to extend the time originally fixed under section 27, Provincial Insolvency Act, for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under section 43 of the Provincial Insolvency Act?

Respondents nos. 5 and 31 have not been served. When the case is fixed before the Full Bench notice will be sent to them. As the other respondents have been served, it will not be neces-

(1) (1927) 4 O.W.N., 993.

(3) (1928) A.I.R., Pat., 338.

(5) (1929) A.I.R., Lah., 399.

(7) (1933) A.I.R., All., 231.

(2) (1924) I.L.R., 4 Pat., 51.

(4) (1930) A.I.R., Mad., 389.

(6) (1933) A.I.R., Rang., 133.

(8) (1932) A.I.R., Nagpur, 22.

sary to issue fresh notices to them. Respondent no. 1 is represented by a counsel. He will be informed of the date of hearing.

Messrs. *I. A. Abbasi* and *Siraj Husain*, for the appellant.

Mr. *P. N. Chaudhri*, for the respondents.

THOMAS, A.C.J. :—It is not necessary to give the facts of the case as only an abstract question of law has been referred to a Full Bench by a Divisional Bench, which is as follows:

“Whether a court has jurisdiction to extend the time originally fixed under section 27, Provincial Insolvency Act, for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under section 43 of the Provincial Insolvency Act?”

The contention on behalf of the learned counsel for the applicant-appellant is that the court has jurisdiction to extend the time originally fixed under section 27 of the Provincial Insolvency Act for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under section 43.

This reference is made necessary because of the view taken by this Court in *Amjad Ali v. Mohammad Ali* (1) and *Girja Charan and another v. Sheoraj Singh* (2) in opposition to the opinion of the other High Courts.

The learned counsel for the appellant relies on the following cases:

Palani Goundan v. Official Receiver of Coimbatore and another (3), *Gopal Ram v. Magni Ram and others* (4), *A. J. E. Abraham v. H. B. Sookias* (5), *Lakhi v. Molar and another* (6), *Sohna Ram-Ishar Das v. Tara Chand and others* (7), *Laduram v. Sakharam* (8), *K. K. S. A. R. A. Chettiar v. Maung*

(1) (1927) 4 O.W.N., 993.

(3) (1930) A.I.R., Mad., 389.

(5) (1923) I.L.R., 51 Cal., 337.

(7) (1929) A.I.R., Lah., 339.

(2) (1928) 5 O.W.N., 686.

(4) (1928) A.I.R., Pat., 338.

(6) (1925) A.I.R., Lah., 416.

(8) (1932) A.I.R., Nagpur, 22.

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Myat Tha and another (1), *Wally Mohamed Cassim v. Haji Ayoob Haji Abba and Coy. and another* (2), *Saligram v. Official Receiver* (3) and *Pt. Madho Prasad Vyas v. B. Madho Prasad* (4).

The contention of the learned counsel for the respondents is that the provisions of section 43 of the Provincial Insolvency Act are mandatory and the debtor must apply for discharge within the period specified by the court. In support of this contention the learned counsel has relied on the two decisions of this Court as noted above, viz. *Amjad Ali v. Mohammad Ali* (5) and *Girja Charan v. Sheoraj Singh* (6) and also a case of the Patna High Court reported in *Ram Krishna Misra, ex parte* (7) and a case of the Madras High Court reported in *T. Chinnappa Reddi v. Kolakula Thomasu Reddy* (8).

Section 27 of the Provincial Insolvency Act is as follows:

“27(1) If the court does not dismiss the petition, it shall make an order of adjudication and shall specify in such order the period within which the debtor shall apply for his discharge.

(2) The court may, if sufficient cause is shown, extend the period within which the debtor shall apply for his discharge, and in that case shall publish notice of the order in such manner as it thinks fit.”

Clause (2) of this section clearly gives the court a discretion to extend the period within which the debtor shall apply for his discharge if he shows sufficient cause.

I shall first deal with the cases relied on by the learned counsel for the appellant:

The first case of the Madras High Court reported in *Palani Goundan v. Official Receiver of Coimbatore* (9) undoubtedly supports the view urged by the learned

(1) (1927) A.I.R., Rang., 136.

(3) (1926) A.I.R., Sind., 94.

(5) (1927) 4 O.W.N., 993.

(7) (1924) I.L.R., 4 Pat., 51.

(2) (1933) A.I.R., Rang., 133.

(4) (1933) A.I.R., All., 230.

(6) (1928) 5 O.W.N., 686.

(8) (1927) I.L.R., 51 Mad., 839.

(9) (1930) A.I.R., Mad., 389.

counsel for the appellant. It was held in this case that a court has jurisdiction to extend the time originally fixed under section 27 for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under section 43 either under section 5. Insolvency Act taken with section 148 of the Code of Civil Procedure or under section 27(2) of the Act. It was further held that section 43 of the Act does not operate as an automatic annulment on the failure of the debtor to apply for a discharge. In this case the application was presented beyond the period fixed for presenting the application under section 27 of the Act.

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In the second case of the Patna High Court reported in *Gopal Ram v. Magni Ram* (1) it was held that the annulment of adjudication does not *ipso facto* come into operation by the expiry of the period fixed under section 27(1) of the Act but has to be determined, and until it is so determined the court has the seisin of the case and has power to extend the time under section 27, regardless of the expiry of the period originally fixed and of the failure of the insolvent to apply for extension thereof before the expiry of the period originally fixed. In this case *Ram Krishna Misra, ex parte* (2) on which the learned counsel for the respondents relies, was considered and it was stated that in that case clause (2) of section 27 did not seem to have been considered nor the other provisions of the Act such as contained in sections 5(1) and 10(2). The case was not followed.

In the third case reported in *Abraham v. Sookias* (3) it was held that "the court has the power, under section 27, clause (2) of the Provincial Insolvency Act of 1920, to extend the time to apply for discharge even after the expiry of the period of the order for discharge."

In the fourth case reported in *Lakhi v. Molar* (4) it was held that the extension for good reasons, of the

(1) (1923) A.I.R., Pat., 338.

(2) (1924) I.L.R., 4 Pat., 51.

(3) (1923) I.L.R., 51 Cal., 337.

(4) (1925) A.I.R., Lah., 416.

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period fixed by the adjudication order for an application for discharge is contemplated by section 27(2) of the Act. It is not a fatal defect that the application for extension is made after expiry of the fixed date. Section 148 of the Code of Civil Procedure establishes this principle and there is nothing repugnant to it in the provisions of the Insolvency Act.

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In the fifth case reported in *Sohna Ram Ishar Das v. Tara Ghand* (1), it was held that a court can extend the time for applying for discharge even when the time originally fixed by the court for this purpose has expired. The decisions reported in *Lakhi v. Molar* (2) and *Gopal Ram v. Magni Ram* (3), were referred to with approval. The view taken by the Madras High Court and Oudh Chief Court was considered and not followed.

In the sixth case reported in *Laduram v. Sakharam* (4) it was held that section 27(2) authorizes a court to extend the time for an application for discharging an adjudicated insolvent even if an application for extension of time is made after the period specified for the application for the order of discharge has expired. The cases reported in *Gopal Ram v. Magni Ram* (3) and *Palani Goundan v. Official Receiver of Coimbatore* (5) were followed.

In the seventh case reported in *Chettiar v. Marung Myat Tha* (6), it was held that an application to extend time for discharge after the expiry of the period fixed is maintainable even at the instance of a creditor.

In the 8th case reported in *Wally Mohamed Cassim v. Haji Ayyob Haji Abba and Coy.* (7) it was held that a court has power to extend the time and that though the provisions of section 43 of the Act are mandatory, still the annulment of adjudication does not occur as a matter

(1) (1929) A.I.R., Lah., 399.

(2) (1925) A.I.R., Lah., 416.

(3) (1928) A.I.R., Pat., 338.

(4) (1932) A.I.R., Nagpur, 22.

(5) (1930) A.I.R., Mad., 389.

(6) (1927) A.I.R., Rang., 136.

(7) (1933) A.I.R., Rang., 133.

of course, but has to be the subject of a specific order of the court.

In the 9th case reported in *Saligram v. Official Receiver* (1), it was held that "the words 'shall be annulled' in section 43 are to be construed as directory and discretionary and not mandatory or preemptory. So the court in its discretion in the circumstances of a particular case, where the debtor has failed to apply for his discharge within the time originally fixed, has power to extend the time within which the debtor must apply for his discharge."

In the tenth case reported in *Madho Prasad Vyas v. Madho Prasad* (2), it was held that section 43 read with section 27 makes it clear that there is no automatic annulment of the order of adjudication; and hence it is open to the Insolvency Court to extend the time for applying for a discharge even after the expiry of the period originally fixed.

It is thus clear that the view taken by the Madras, Patna, Calcutta, Lahore, Rangoon, Sind and Allahabad High Courts is that a court has jurisdiction to extend the time originally fixed under section 27 for an application by a debtor for discharge, after the expiry of that time but before an order of annulment is passed under section 43 of the Act.

The learned counsel for the respondents, as stated above, has relied on *T. Chinnappa Reddi v. Kolakula Thomasu Reddy* (3), *Amjad Ali v. Mohammad Ali* (4) *Girja Charan v. Sheoraj Singh* (5) and *Ram Krishna Misra, ex parte* (6).

In the Madras case reported in *T. Chinnappa Reddi v. Kolakula Thomasu Reddy* (3), it was held that the provisions of section 43 of the Provincial Insolvency Act were mandatory and the court had no power to extend the time for an application by the insolvent for his discharge,

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(1) (1926) A.I.R., Sind, 94.

(3) (1927) I.L.R., 51 Mad., 839.

(5) (1928) 5 O.W.N., 686.

(2) (1933) A.I.R., All., 230.

(4) (1927) 4 O.W.N., 993.

(6) (1924) LL.R., 4 Pat., 51.

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after the period specified in the order of adjudication for such an application had expired. It is not necessary for me to discuss this case at length because this view was not accepted in a later case reported in *Palani Goundan v. Official Receiver of Coimbatore and another* (1).

The Hon'ble Judges who decided the case reported in *Amjad Ali v. Mohammad Ali* (2) based their decision on the view taken in the Patna case—*Ram Krishna Misra, ex parte* (3). There is no discussion or mention of section 27 of the Provincial Insolvency Act. The case reported in *Ram Krishna Misra, ex parte* (3), has been over-ruled in *Gopal Ram v. Magni Ram* (4).

The decision reported in *Girja Charan and another v. Sheoraj Singh* (5) is based on the view taken in *Amjad Ali v. Mohammad Ali* (2) and *Ram Krishna Misra, ex parte* (3). There is no discussion of section 27 of the Act in this judgment also.

In my opinion though the provisions of section 43 of the Provincial Insolvency Act are mandatory, still the annulment of adjudication does not occur as a matter of course, but has to be the subject of a specific order of the court; in other words it does not operate as an automatic annulment on the failure of the debtor to apply for a discharge.

My reply to the reference is that a court has jurisdiction to extend the time originally fixed under section 27 of the Provincial Insolvency Act, for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under section 43 of the Provincial Insolvency Act.

ZIAUL HASAN, J.—I agree.

YORKE, J.—I agree.

By COURT. (THOMAS, A. C. J. and ZIAUL HASAN and YORKE, JJ.):—Our reply to the reference is that a court

(1) (1930) A.I.R., Mad., 389.

(2) (1927) 4 O.W.N., 993.

(3) (1924) I.L.R., 4 Pat., 51.

(4) (1928) A.I.R., Pat., 338.

(5) (1928) 5 O.W.N., 686.

has jurisdiction to extend the time originally fixed under section 27 of the Provincial Insolvency Act, for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under section 43 of the Provincial Insolvency Act.

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Before Mr. Justice G. H. Thomas, Chief Judge and
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LALA RAM NARAIN (DEFENDANT-APPELLANT) v. THAKUR
CHANDRIKA PRASAD AND OTHERS (PLAINTIFFS-RESPONDENTS)*

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United Provinces Agriculturists' Relief Act (XXVII of 1934), sections 30 and 33—Mortgage—Sections 30 and 33 of United Provinces Agriculturists' Relief Act, whether apply to mortgages—Usufructuary mortgagee giving lease of mortgaged property to mortgagor—Rent reserved in lease, whether interest—Rent, whether can be reduced under section 30—Usurious Loans Act (X of 1918) as amended by U. P. Amendment Act (XXIII of 1934)—Interest—Rate of interest, when excessive.

Section 33(1) of the United Provinces Agriculturists' Relief Act applies to every agriculturist-debtor who is entitled to sue for account under a written engagement whether the written engagement amounts to a mere promissory note, a simple bond, a simple mortgage-deed, a usufructuary mortgage-deed or a mortgage by way of conditional sale. *Dharam Singh v. Bishan Sarup* (1), followed. *Laluchand v. Girjappa* (2), and *Hari v. Lakshman* (3), referred to.

Section 30 of the United Provinces Agriculturists' Relief Act is applicable to usufructuary mortgages. When a usufructuary mortgagee executes a lease of the mortgaged property in favour of the mortgagor and the rent reserved is no more than the return to be made to the mortgagee over and above what is actually lent by him then this "rent" comes within the definition of interest and can be dealt with according to the provisions of section 30 of the United Provinces Agriculturists' Relief Act.

*First Civil Appeal No. 59 of 1936, against the decree of Mr. Abid Raza, Additional Civil Judge of Sitapur, dated the 29th of February, 1936.

(1) (1937) A.L.J., 882.

(2) (1895) I.L.R., 20 Bom., 469.

(3) (1881) I.L.R., 5 Bom., 614.