1935.

SHYAMAPADA DE, IN THE MATTER OF.

COURTNEY TERRELL, C. J., DHAVLE AND AGARWALA, JJ.

from carrying on that useful occupation; but if they enter the profession of the law as pleaders then they must make up their mind to conduct the business of the pleader and nothing else. There is the most distinct rule of the Court by which a person who, after having been admitted as a pleader or mukhtear, accepts any appointment or enters into any other trade or business must give notice to the High Court and the High Court has the power thereupon to suspend him from practice or pass any other suitable order. Here the pleader has clearly been trying to run two businesses at the same time—the business of pleader and the business of an insurance agent—and such a practice is in the highest degree injurious to the interest of the profession and to the interest of the public. We are satisfied that the pleader has been guilty of professional misconduct and we suspend him from practice for a period of six months from this date.

Reference accepted.

FULL BENCH.

1935.

October, 17. November, 11.

Before Courtney Terrell, C.J., Dhavle and Agarwala, JJ.

MOHAMMAD ALAM,

v.

BABULAL MARWARI.*

Provincial Insolvency Act, 1920 (Act V of 1920), section 24(4), proviso—Judge, whether entitled to take evidence on behalf of creditors at the adjudication stage—discretion.

The proviso to sub-section (4) of section 24 of the Provincial Insolvency Act, 1920, runs thus :—

" Provided that, where the debtor is the petitioner, he shall, for the purpose of proving his inability to pay his debts, be required to

*Appeal from Original Order no. 249 of 1933, from an order of W. W. Dalziel, Esq., I.C.S., District Judge of Monghyr, dated the 11th August 1933.

1935.

MOHAMMAD ALAM v. BABULAL MARWARI.

furnish only such proof as to satisfy the Court that there are prima facie grounds for believing the same and the Court, if and when so satisfied, shall not be bound to hear any further evidence thereon ".

Held, that the meaning of the proviso is merely that the Court is enabled to deal summarily with the opposition by the creditor, that is to say, the Court must listen to such evidence as the debtor may care to adduce and the debtor may be cross-examined and if the Judge is satisfied after such hearing, he may refuse to hear any further evidence and may grant the adjudication, but this is very far from saying that the Judge, if he shall be inclined to hear any evidence presented by the creditor, is not entitled to hear such evidence; he may, if he likes, hear the evidence as he may think fit in the circumstances which will vary according to the difficulty of the case.

Narayan Mistri v. *Ram Das*(1), [judgment of Kulwant Sahay, J.] and *Bhagirath Chaudhry* v. *Jamuni Musammat*(2), overruled.

Gobind Prasad Gir v. *Kishun Lal Dhokri*(3), referred to.

Ganesh Lal Sarawgi v. *Sanehi Ram*(4) and *Jagarnath Sahu* v. *Beni Prasad*(5), discussed.

Appeal by the debtor.

The facts of the case material to this report are set out in the judgment of Courtney Terrell, C.J.

The case was in the first instance heard by Courtney Terrell, C.J. and Varma, J. who referred it to the Full Bench.

On this reference.

H. R. Kazimi, for the appellant: The Provincial Insolvency Act contemplates two stages of enquiries; first, when the debtor has to make out a prima facie case as to his inability to pay his debts,

(1) (1928) I. L. R. 7 Pat. 771.
(2) (1927) 8 Pat. L. T. 184.
(3) (1924) 69 Ind. Cas. 622.
(4) (1932) I. L. R. 12 Pat. 107.
(5) (1933) I. L. R. 12 Pat. 866

and, secondly, when the Court or the Receiver has to find out what the assets of the insolvent are. At the preliminary stage the Court has to make up his mind on the materials that may be placed by the debtor. The creditor is not entitled to adduce any evidence at this stage.

[CHIEF JUSTICE.—The Court *has* to be satisfied about the inability.]

Clause (*2*) of section 24 indicates that the legislature intended to give a limited right to the creditor at the stage of preliminary enquiry.

[DHAVLE, J.—If the debtor does not admit any of the assets to be his own, then according to you there is an end of the matter.]

The Court may nevertheless disbelieve him.

[CHIEF JUSTICE—Why cannot the creditor say these are his assets?]

Because the law does not allow him this right. I venture to submit that in any case the decision in *Ganesh Lal Sarawgi* v. *Sanehi Ram*(1) goes a little too far as the proviso to section 24 gives the Judge the discretion to call for the evidence. That can only be if the debtor fails to satisfy the Judge on the materials placed by him.

[DHAVLE, J.—How can the Judge be prima facie satisfied if the creditor is ready to offer evidence to the contrary? It will be impossible for the creditor to persuade the Court to hold that the debtor has not produced sufficient evidence as to his inability unless he is allowed to show it by evidence.]

It is my duty to satisfy the Court; if I fail so to satisfy, my application will stand dismissed. It is a matter between the Court and the debtor. The creditor is not entitled to show by evidence that I have failed to discharge my duty.

(1) (1932) I. L. R. 12 Pat. 107.

1935.

MOHAMMAD ALAM v. BABULAL MARWARI.

[DHAVLE, J.—The Court has to decide this point, namely, whether the debtor has discharged the burden, by reference not only to the debtor's *ex parte* evidence but also such evidence as the creditor may choose to offer.]

This is not borne out by the proviso to section 24.

My next point is that an enquiry as to concealment of assets or bad faith cannot be gone into at the stage of adjudication; it has to be deferred till the stage when the discharge is applied for. I rely on *Keramat Ali Khan* v. *Baidya Nath Biswas*(1), *Bhagirath Chaudhry* v. *Jamuni Musammat*(2) and on the judgment of Kulwant Sahay, J. in *Narayan Mistri* v. *Ram Das*(3).

[CHIEF JUSTICE—The case of *Bhagirath Chaudhry* v. *Baidya Nath Biswas*(2) does not lay down that for the purpose of satisfying itself as to debtor's inability, the Court cannot go into that question.]

The Lahore High Court has consistently taken the same view—*Ram Rattan* v. *Nathu Ram*(4).

[DHAVLE, J.—This case is against you on the first point.]

Yes.

[DHAVLE, J.—When the only fraud alleged by the creditor goes to disprove the inability of the insolvent, how can the Court shut it out in deciding the issue?]

These matters can be gone into at a later stage.

[DHAVLE, J.—What is there in the Act to suggest that what can be gone into at a later stage cannot be gone into at an earlier stage also?]

The legislature could not contemplate a multiplicity of proceedings. If on taking evidence the

(1) (1925) 95 Ind. Cas. 297.
(2) (1927) 8 Pat. L. T. 184.
(3) (1928) I. L. R. 7 Pat. 771.
(4) (1928) 109 Ind. Cas. 552.

Judge records a finding as to the nominal or fraudulent nature of a transaction, that finding would be final, and therefore, a proceeding at a later stage under section 53 would not be necessary.

[DHAVLE, J.—Whatever finding the Judge records at this stage will be for the purpose of satisfying himself prima facie as to the inability of the debtor; but this will not prevent the Court from holding a detailed enquiry for the purposes of section 53 and the like.]

Harihar Prasad Sinha, for the respondent: The proceedings under the Indian Act are not *ex parte* as under the English Law. In India they have to be conducted in the presence of the creditors.

[CHIEF JUSTICE—What is your contention as regards the proviso to section 24?]

I venture to submit that there is nothing in the section to prevent the Court from allowing the creditor to adduce evidence. Clause (*3*) contemplates that the objection of the creditor is also an important factor to be taken into consideration before the application is disposed of. What the proviso means is that if the evidence bearing on the question of inability satisfies the Court one way or the other the Court might stop further evidence of the creditor. I concede that the decision in *Ganesh Lal Sarawgi* v. *Sanehi Ram*(1) goes a little too far, but all the same it does not make much difference for practical purposes.

[CHIEF JUSTICE—Undoubtedly the Court has got a discretion in the matter. But if it allows the creditor's evidence to go in, the debtor can have no grievance.]

Exactly. I rely on *Sita Ram* v. *Hukum Chand*(2) and *Kanshi Ram* v. *Jugal Kishore*(3).

(1) (1932) I. L. R. 12 Pat. 107.
(2) (1927) A. I. R. (Lah.) 354.
(3) (1933) A. I. R. (Lah.) 629.

1935.

MOHAMMAD ALAM v. BABULAL MARWARI.

[CHIEF JUSTICE—It seems clear that in Lahore the power of the Court to hear the evidence of the creditor is recognised.]

Yes.

[CHIEF JUSTICE—On the other question do you simply confine your argument to the point that the Court may, while holding the enquiry into the alleged inability and for the purpose of finding out whether the debtor is really insolvent, enquire into fraudulent concealment of assets?]

Yes; I cannot place my case higher.

[Reference was made to the judgment of Macpherson, J. in *Bhagirath Chaudhry* v. *Jamuni Musammat*(1) and to the decisions in *Govind Prasad Gir* v. *Kishun Lall Dhokri*(2) and *Jagarnath Sahu* v. *Beni Prasad*(3).]

H. R. Kazimi, in reply.

S. A. K.

Cur. adv. vult.

COURTNEY TERRELL, C. J.—This is an appeal from an order of the District Judge of Monghyr, refusing the petition of the appellant for an adjudication in insolvency. The District Judge heard the appellant from whom it was elicited in cross-examination by the creditors that he had assigned the greater part of his property to his wife in satisfaction of an alleged dower debt. The Judge allowed the creditors to offer evidence and upon this evidence he came to the conclusion that the transfer of the property was a mere *farzi* transaction, that the appellant was in fact still in possession of and controlling the property, and the Judge was not satisfied that the appellant was unable to pay his debts. He therefore rejected the petition.

It has been contended on behalf of the appellant that the Judge at that stage of the inquiry was not

(1) (1927) 8 Pat. L. T. 184.
(2) (1924) 69 Ind. Cas. 622.
(3) (1933) I. L. R. 12 Pat. 866.

entitled to take evidence on behalf of the creditors and even if so entitled should not have found that the transfer to the wife was *farzi*, and further that even if so entitled the finding of fact was unjustified. As to the last point, I am entirely in agreement with the learned Judge. It is unnecessary to go into the facts beyond stating that on the evidence at that stage before the Court the transfer was of a *farzi* nature and the property really remained with the appellant.

The substantial dispute has been upon the proper construction to be put upon the proviso to sub-section (4) of section 24 of the Provincial Insolvency Act—

"Provided that, where the debtor is the petitioner, he shall, for the purpose of proving his inability to pay his debts, be required to furnish only such proof as to satisfy the Court that there are prima facie grounds for believing the same and the Court, if and when so satisfied, shall not be bound to hear any further evidence thereon".

It is contended that the Judge must form his opinion upon the evidence supplied by the debtor petitioner and must confine himself to that evidence only. It is conceded that the petitioner may be subjected to cross-examination but it is contended that at that stage of the proceedings the Judge should not have admitted any evidence offered by the creditors.

Now there have been some decisions of this Court which would seem to imply that the appellant's argument is well founded. The principal of these is the case of *Narayan Mistri* v. *Ram Das*(1) decided by Kulwant Sahay and Macpherson, JJ. Kulwant Sahay, J. after reading the proviso went on to read sub-section (*2*).

"The Court shall also examine the debtor if he is present, as to his conduct, dealings and property in the presence of such creditors as appear at the hearing, and the creditors shall have the right to question the debtor thereon",

and sub-section (*2*) of section 25—

"In case of a petition presented by a debtor, the Court shall dismiss the petition if it is not satisfied of his right to present the petition."

(1) (1928) I. L. R. 7 Pat. 771.

1935.

MOHAMMAD ALAM v. BABULAL MARWARI.

COURTNEY TERRELL, C. J.

In that case also the Court had examined a certain transfer made by the debtor with a view to finding out whether it was *benami* or not. Sahay, J. was of opinion that there was no provision in section 24 to enable the creditors to produce evidence in support of their allegation that the transfer was *benami* but that their activities were limited to cross-examination. On the facts he found on the evidence as it stood that it was not possible to hold that the transfer was in fact *benami*. Macpherson, J. agreed to the order setting aside the order of the District Judge but he clearly indicated that he did not agree with the reasoning of Sahay, J. He further expressed the view that the decision in the case of *Bhagirath Chaudhry* v. *Jamuni Musammat*(1) upon which Sahay, J. had founded his judgment was not rightly decided. In this case of *Bhagirath Chaudhry* v. *Jamuni Musammat*(1), decided by Adami and Scroope, JJ., the learned District Judge had allowed evidence to be given on both sides to show whether a transaction as to a part of the property of the debtor was *benami* or not. The Judge finding that it was *benami*, held that the debtors had sufficient funds to pay their debts and dismissed their application. Adami, J., in giving judgment, used this expression " At the stage of the application for adjudication no very careful inquiry is necessary with regard to the inability to pay debts. If the Court is satisfied that a prima facie case is established by the debtor, the Court will adjudicate him to be an insolvent; and indeed the consideration of the further question as to whether there has been a concealment of property and as to title to property is deferred till the stage when the discharge is applied for ". Now to the extent that the District Judge's inquiry in so far as it went into the question of title and in so far as it decided that question was certainly erroneous. The only question before the Court was as to whether the debtor was able to pay his debts, and in my opinion the decision of the learned Judges

(1) (1927) 8 Pat. L. T. 184.

1935.

MOHAMMAD ALAM v. BABULAL MARWARI.

COURTNEY TERRELL, C. J.

that the District Judge should not have gone into the question at all was wrong. I agree with the opinion of Macpherson, J.

In an earlier case, *Gobind Prasad Gir* v. *Kishun Lal Dhokri*(1) the Court dealing with the words "unless he is unable to pay his debts" pointed out that they were for the first time introduced into the present section 10, sub-section (*1*), by the Act of 1920—

> "A debtor shall not be entitled to present an insolvency petition unless he is unable to pay his debts",

and that the Court should not pronounce adjudication until satisfied upon this point. This case, however, did not deal with the question of whether the creditor was entitled to adduce evidence.

More recently in the case of *Ganesh Lal Sarawgi* v. *Sanehi Ram*(2) I said :—

"There has been a tendency for Courts administering the Insolvency Act to believe that the hearing of a petition is a more or less formal matter and that if the petition is, as it were, merely verified by the evidence of the debtor the Court is bound to accede to the petition. That is not the case. It is the duty of the Court to be satisfied prima facie and after following the necessary procedure and making the necessary investigation to come to a conclusion that the statements by the debtor are true. After all the procedure of insolvency is for the protection of creditors quite as much as for the protection of debtors. It is unfortunately more often used by debtors than by creditors with the consequence that the interest of the creditor has a tendency to be forgotten." The case was remanded to be reheard and I said—"the matter should be reheard and the applicant who will be in a position to adduce such evidence as he may be advised for the purpose of

(1) (1924) 69 Ind. Cas. 622.
(2) (1932) I. L. R. 12 Pat. 107.

1935.

MOHAMMAD ALAM v. BABULAL MARWARI.

inducing the Judicial Commissioner, acting on the principles I have stated, to make the order in his favour. The creditors will be equally entitled to call such evidence as they think fit to throw discredit upon the statements in the petition."

COURTNEY TERRELL, C. J.

[This case was followed in *Jagarnath Sahu* v. *Beni Prasad*(1).] In using the expression "the creditors will be equally *entitled* to call such evidence etc.," I think I went too far. The meaning of the proviso is merely that the Court is enabled to deal summarily with the opposition by the creditor, that is to say, the Court must listen to such evidence as the debtor may care to adduce and the debtor may be cross-examined and if the Judge is satisfied after such hearing he may refuse to hear any further evidence and may grant the adjudication, but this is very far from saying that the Judge, if he shall be inclined to hear any evidence presented by the creditor, is not entitled to hear such evidence. He may, if he likes, hear the evidence and may hear as much evidence as he may think fit in the circumstances which will vary of course according to the difficulty of the case.

In the case before us, the Judge exercised the discretion given to him and after hearing the evidence tendered by the debtor and such evidence of the creditor as he chose to admit he found that he was not satisfied that the debtor was unable to pay his debts. The order, therefore, was correct and the appeal must be dismissed with costs to the contesting respondents.

DHAVLE, J.—I agree.

AGARWALA, J.—I agree.

Appeal dismissed.

(1) (1933) I. L. R. 12 Pat. 866.