

## APPELLATE CIVIL.

*Before Mr. Justice Dunkley.*

MAUNG PO SAI AND ANOTHER

v.

THE BANK OF CHETTINAD, LTD.\*

1935

June 4.

*Insolvency—Dismissal of petition by Assistant District Court—Adjudication by District Court on appeal—Second appeal to High Court—Provincial Insolvency Act (V of 1920), ss. 4, 25, 27, 75 (1)—Allegation of fraudulent preference in petition of insolvency, not a question of title—Debtor's ability to pay debts—Court's finding essential.*

No second appeal lies to the High Court against an order of adjudication passed on appeal by the District Court under s. 27 of the Provincial Insolvency Act from the order of the Assistant District Court dismissing a petition of insolvency under s. 25 of the Act. Where an order is made and can be lawfully made under some other section of the Act, s. 4 has no application to that order. The allegation of the adjudicating creditor in his insolvency petition that the debtor had made a fraudulent preference does not bring the case within the purview of s. 4. The transfer can only be set aside subsequent to adjudication upon a proper petition under s. 53 or 54 of the Act.

*P. Naik v. Official Receiver of Tinnevely, I.L.R. 54 Mad. 989—referred to.*

Under s. 25 (1) the Court is bound to dismiss a creditor's petition if the debtor is able to pay his debts. The Court must therefore come to a finding whether the debtor is able to pay his debts or not before proceeding to adjudicate him on the ground of an act of insolvency.

*Ba* So for the appellants.

*Chari* for the respondent.

DUNKLEY, J.—This is a second appeal against the appellate order of the District Court of Magwe, made under section 27 of the Provincial Insolvency Act, adjudicating the appellants, Maung Po Sai and Ma Ngai, as insolvents. The original petition in insolvency was made by the respondent creditor Bank before the Assistant District Court of Minbu, and the petition was dismissed under the provisions of section 25 of the

\* Civil Second Appeal No. 292 of 1934 converted into Civil Revision No. 207 of 1935 from the order of the District Court of Magwe in Civil Misc. No. 11 of 1934.

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Provincial Insolvency Act. Against this order dismissing the petition an appeal was filed in the District Court by the respondent Bank, and in the result the order of the Assistant District Court was set aside, and the appellants were adjudicated.

I may remark *en passant* that, the appeal in the District Court being a miscellaneous appeal against an order, the judgment of the learned District Judge should not have been followed by a decree, but should have been followed by a formal order adjudicating the appellants.

Now, Mr. Chari for the respondent Bank has taken a preliminary objection that no second appeal lies against an order of adjudication passed on appeal under section 27 of the Provincial Insolvency Act, and it seems to me that this objection is well founded. The section of the Act providing for appeals is section 75, and the second proviso of sub-section (1) of that section is as follows :

“ Provided, further, that any such person aggrieved by a decision of the District Court on appeal from a decision of a subordinate Court under section 4 may appeal to the High Court on any of the grounds mentioned in sub-section (1) of section 100 of the Code of Civil Procedure, 1908.”

The contention of Mr. Chari is that the original order of the Assistant District Court was an order under section 25 of the Act, and not under section 4. U Ba So, for the appellants, contends that, because the petition of the respondent Bank was based upon an act of insolvency involving a fraudulent preference, it was necessary for the Assistant District Court to decide questions of title to the appellants' property in deciding the petition to adjudicate the appellants, and that, consequently, the order of the Assistant District Court must be held to be an order under section 4 of the Act, as well as under section 25. To this contention I find

myself unable to accede, because the title to the property has not been decided on the petition to adjudicate. The transfers of the property have not been set aside, and they still remain valid and will continue to remain valid until a competent petition has been filed and decided, under section 53 or section 54 of the Act. Moreover, as has been pointed out in the case of *P. Alagirisubba Naik and four others v. The Official Receiver of Tinnevely* (1), the provisions of the Provincial Insolvency Act in regard to appeals would be reduced to an absurdity if it were held that every decision on an application under the Act involved a decision under section 4 on the ground of the comprehensive nature of the provisions of section 4. As has been pointed out in that decision, section 4, sub-section (1), specifically lays down that the powers conferred by that section are "subject to the provisions of this Act." Consequently, it must be held that when an order is made under some other section of the Act, and can lawfully be made under that section, then section 4 will have no application to that particular order. This view of the meaning of section 4 is supported by the provisions of Schedule I of the Act, which gives a list of decisions and orders of the District Court which are appealable to the High Court without leave. In this schedule an order under section 25 is mentioned separately from an order under section 4, and, as has been pointed out in the Madras case just quoted, it would be mere surplusage to mention other sections in the schedule if it were correct that all orders under these various sections were also orders passed under the provisions of section 4. I am therefore of opinion that no second appeal lies in this particular case.

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U Ba So for the appellants desires me to treat this second appeal as a revision, under the first proviso of section 75 (1) of the Act, and I feel that I must give way to his application in this matter.

The order of the Assistant District Court did not proceed solely upon the foundation that no act of insolvency had been committed; it proceeded upon the footing that the assets of the appellants exceeded their liabilities, and that, therefore, they were able to pay their debts. Now, the judgment in appeal of the District Court proceeded upon two grounds, *viz.*, firstly, that the respondent Bank had a right to present its petition to adjudicate the appellants; and secondly, that the appellants had committed an act of insolvency. In my opinion, these findings were not sufficient to dispose of the appeal in the District Court, for, under section 25, sub-section (1), of the Provincial Insolvency Act, in the case of a petition presented by a creditor, the Court shall dismiss the petition if it is satisfied by the debtor that he is able to pay his debts. Consequently, it was essential that the District Court should come to a finding as to whether the appellants were able to pay their debts or not. It has been pointed out to me in argument on behalf of the respondent Bank that the appellant Maung Po Sai, in his deposition made on the 25th April, 1934, stated that when he was pressed by the respondent Bank he told the agent of the Bank that he "could not pay off the debts." I am asked to hold that this statement is conclusive against him on this point, but it would be easy to place too much weight upon this admission. I am not going to suggest what is the weight that should be placed upon it, for, in my opinion, that is a matter for the District Court. But it may well be that all that it means is that, at that moment, the appellant Po Sai, being unable to realize his assets, was unable to pay his

debts ; and in his written objection to the petition of the respondent Bank he definitely stated that the correct valuation of his property was more than twice the amount of the debts which the respondent Bank alleged that he owed. This being the state of the evidence, it was incumbent on the District Court to come to a finding as to whether the petition of the respondent Bank ought not to be dismissed on the ground that the appellants are able to pay their debts, and a finding on this point was essential to the proper decision of the appeal. Consequently, as an application in revision, the present application by the appellants is accepted, and the order of the District Court is set aside, and the appeal is remanded to the District Court for a finding on the point as to whether the applicants are able to pay their debts or not, and for the decision of the appeal in accordance with that finding. The costs of the present application in revision will follow the decision of the District Court, advocate's fee in this Court three gold mohurs.

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