APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

1935
Mar. 27.

THE BURMA DAIRY CO.
v.
D. R. DESAI.*

Insolvency—Application for discharge—Criminal proceedings against insolvent—Complaint when to be made—Chances of successful prosecution—Public interest—Preliminary inquiry—Notice to insolvent—Presidency-Towns Insolvency Act (IV of 1909), s. 104.

It is not necessary, and in many cases undesirable, that the Court should order that a complaint be made under s. 104 of the Presidency-Towns Insolvency Act at the hearing of an application for discharge.

J.M. Lucas v. *Official Assignee of Bengal*, 24 C.W.N. 418—*referred to.*

Different considerations apply when the Court is called upon to decide whether, and if so upon what terms, an insolvent should be granted his discharge, and whether the Court should exercise the powers which it possesses under s. 104. In considering whether a complaint should be made under s. 104 the Court has not only to take into account the probability of the criminal proceedings being successful or the reverse, but also must determine upon a consideration of the case as a whole whether it is desirable in the public interest that an example should be made of an insolvent whose conduct has been so bad that criminal proceedings ought to be taken against him as a deterrent against the same or similar offences being committed by other insolvents.

The Court can proceed under s. 104 with or without a preliminary inquiry being made, but it is often of great importance to the insolvent that he should have an opportunity of explaining to the Court why criminal proceedings should not be initiated against him.

Jewraj v. *Dayal Chand*, I.L.R. 55 Cal. 783—*referred to.*

K. C. Sanyal for the appellants. At the time of the hearing of an application for the discharge of an insolvent the Court is only concerned with whether the discharge should or should not be granted. The Court is not concerned at that stage with the question whether, on the facts disclosed, the insolvent has committed any offence under s. 104 of the Presidency-Towns Insolvency Act ; although, of course, the Court

* Civil Misc. Appeal No. 134 of 1934 from the order of this Court on the Final Side in Insolvency Case No. 82 of 1930.

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may, if it chooses, pass orders under that section. As to the proper time of moving the Court under s. 104, see *Lucas* v. *Official Assignee, Bengal* (1).

Dadachanji for the respondent. The appellants had filed a long list of objections to the application for discharge by the insolvent, and therein they had specifically prayed for an enquiry into the conduct of the insolvent, and the offences committed by him under s. 103 of the Act. Applications to take criminal action against an insolvent are usually made and heard at the time of hearing his application for discharge. The learned Judge in insolvency was justified in characterizing the appellants' application as an appeal from the order of Sen J. It would have been an application for review if it had been heard by Sen J.

It is the usual practice, and only fair to the insolvent, that the Court should give him notice before taking action under s. 104 of the Act.

PAGE, C.J.—This appeal must be allowed.

An application for his discharge from insolvency was filed by the respondent, and objections to his discharge were presented on behalf of the petitioning creditors, who are the appellants. In due course the application was heard by Sen J. sitting in insolvency, and the discharge of the respondent was refused.

Now, in the objections to the respondent's discharge which were filed on behalf of the appellants, the appellants *inter alia* prayed that

" (*b*) an enquiry may be held into the conduct of the insolvent, especially with regard to the offences committed by him under section 103 of the Act ;

(1) 24 C.W.N. 418.

(*c*) a complaint may be lodged against the insolvent to stand his trial in a criminal court as sanctioned by law and for such purpose all necessary orders and directions may be passed."

The prayers (*b*) and (*c*) were not referred to in the order of Sen J. refusing the respondent's application for discharge. Further, we are informed that, except that the learned advocate for the appellants read the document containing his objections, no reference was made to this subject at the hearing of the application for the discharge of the respondent.

On the 4th July, after Sen J. had passed the order refusing the respondent his discharge, the learned advocate for the appellants prepared the petition out of which the present appeal arises, praying :

"(*a*) that an enquiry may be held under the provisions of section 104 of the Presidency-Towns Insolvency Act into the conduct of the insolvent for having committed offences cognizable under section 104 of the said Act ;

(*b*) that pending the said enquiry the bond executed by the insolvent for his due appearance may not be cancelled ; and

(*c*) that for such purpose all necessary orders and directions may be passed."

On the same day an affidavit in support of the application was sworn by the agent and attorney of the appellants. Mr. K. C. Sanyal, the learned advocate for the appellants, has informed the Court that he endeavoured on that day to obtain an opportunity of presenting this application to Sen J., because he was apprehensive that the respondent might abscond. He was unable, however, to see Sen J. on the 4th July. On the following morning, however, Sen J. directed him to file the application, and to take steps that due notice thereof should be served upon the respondent. On the 9th of July the present

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application was filed, and the Deputy Registrar ordered notice thereof to be served upon the respondent, and fixed the 17th July as the date of hearing. On that day Mr. Dadachanji, the learned advocate for the respondent, applied for an adjournment of the hearing of the application, and his application was granted by Sen J. The application was eventually heard by Braund J., who was then the learned Judge appointed to take insolvency matters. On the 9th of August 1934 Braund J. dismissed the application upon the ground that

> "it amounts, in my opinion, to nothing short of an appeal from the exercise of the discretion of the Court by Mr Justice Sen in making no order for an enquiry under section 104. It is, in my judgment, implicit in the learned Judge's judgment that he is not disposed to set in motion the powers of the Court under that section."

Against this order of Braund J. the present appeal has been presented. With all respect to Braund J. we find ourselves unable to construe the meaning and effect of the order passed by Sen J. on the 4th July 1934 in the way that found favour with the learned Judge in insolvency. It appears to me to be plain that Sen J. in passing orders on the application of the respondent for his discharge did not, and did not affect to, consider or determine the question whether the Court should take action against the insolvent under section 104 of the Presidency-Towns Insolvency Act. We are informed that after hearing the petition of the respondent, the report of the Official Assignee, and the objections filed on behalf of the appellants Sen J. took the view that it was manifest that the respondent must be refused his discharge; the learned Judge observing that "there is no doubt that in this case almost every grou

for refusing the discharge of an insolvent enumerated in section 39 of the Presidency-Towns Insolvency Act exists." In the course of his order the learned Judge stated that :

"After hearing the advocate for the petitioning creditor I was satisfied that this was a case in which the insolvent's discharge must be refused, and therefore called upon the insolvent's advocate at least to satisfy me as regards the alleged sale of the Tamwe Stores to one Gazi Shah in June 1929 . . . He admitted also that this is not a case in which he could ask the Court to give his client an unconditional order for discharge. In the circumstances I did not desire to hear him any further, nor did he ask that he be allowed to address the Court on other features of the case."

Sen J. then proceeded to discuss certain other aspects of the case, and after referring again to the transaction in connection with the sale of the Tamwe Stores stated

"in my opinion this transaction shows that in June 1929 this insolvent was making away with the available assets of the firm and was not at all concerned about payment to the creditors of the firm. In the present state of the case I am not prepared to say this transaction was fraudulent, but it is certainly highly suspicious, and the conduct of the insolvent in this transaction certainly entitles him to no consideration as regards the granting of his personal discharge or the imposing of conditions on such discharge."

I am inclined to think that the words "in the present state of the case" should read "at the present stage of the case", and that the words as they now stand are found in the order is probably due to some fault in transcribing what the learned Judge said. This, I think, must be so because the learned Judge in the preceding sentence had pointed out that the transaction in connection with the Tamwe Stores "shows that the insolvent was

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making away with the available assets of the firm." As I apprehend his judgment what was in the learned Judge's mind was that for the purpose of disposing of the application for discharge it was unnecessary to do more than to point out that the transaction in connection with the Tamwe Stores plainly disentitled the insolvent to any consideration as regards the granting of his personal discharge or the imposing of conditions on such discharge. Sen J. then proceeded to refer to the admitted fact that the insolvent had transferred promissory notes of the face value of Rs. 26,000 to various creditors, and concluded his order by stating

> "I am satisfied from all the facts appearing in this case that the insolvent has made out no case whatever for the imposing of terms for his discharge, and that in the circumstances the only order that can be passed is to refuse his discharge."

Now, it is common ground that Sen J. did not in fact make any reference in his order to the prayer in the appellants' objections that the Court should take action under section 104, and having regard to what took place at the hearing before him I cannot persuade myself that Sen J. either applied his mind to that matter or affected to consider or determine it. The subsequent events also support this view, because, if Sen J. had been under the impression that he had already determined that proceedings should not be taken against the insolvent under section 104, he would not have acted in the manner in which he did when Mr. Sanyal on behalf of the appellants made the application under consideration to him on the 5th of July, nor would the learned Judge, in my opinion, on the 7th of July have granted the application of

Mr. Dadachanji on behalf of the respondent for an adjournment of the hearing of the application. Further, if Sen J. had purported to dispose of the prayer raised by the respondent in his objection relating to section 104 one would have expected that the learned advocate for the respondent would have applied to the learned Judge in insolvency on appeal from the order of the Deputy Registrar when the present application was filed, and it was ordered that notice should be issued to the respondent. That, however, was not done. It appears that the insolvent, so far from urging that the application of the appellants did not lie, applied to Sen J. that the hearing of the application should be adjourned. With all respect to the learned Judge in insolvency I am of opinion that at the hearing of the application for the insolvent's discharge Sen J. neither heard nor determined nor purported to hear or determine the question whether the Court should exercise the powers with which it was vested under section 104. Having regard to certain observations in the judgment of Braund J. it is, I think, desirable that we should point out that it is open to the Court at any stage of the proceedings after the adjudication order has been passed, and even after discharge, to exercise the discretion with which it is vested under section 104. But, as pointed out by Jenkins C.J. in *J. M. Lucas* v. *Official Assignee of Bengal* (1)

"though no invariable rule can be laid down it is ordinarily undesirable to institute criminal proceedings until the determination of civil proceedings in which the same issues are involved. It is too well known to need elaboration that criminal proceedings lend themselves to the unscrupulous

(1) 24 C.W.N. 418 at p. 424.

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application of improper pressure with a view to influencing the course of the civil proceedings : and beyond that there is the mischief illustrated by this case of criminal proceedings being instituted with an imperfect appreciation of the facts where they have not been ascertained in the more searching investigation of a Civil Court."

I am further of opinion that it is not necessary, and in many cases that it would be undesirable, that the Court should order that a complaint be made under section 104 at the hearing of an application for discharge. Different considerations arise when the Court is called upon to decide whether and if so upon what terms an insolvent should be granted his discharge, and whether the Court should exercise the powers which it possesses under section 104. In considering whether a complaint should be made under section 104 the Court has not only to take into account the probability of the criminal proceedings being successful or the reverse, but also must determine upon a consideration of the case as a whole whether it is desirable in the public interest that an example should be made of an insolvent whose conduct has been so bad that criminal proceedings ought to be taken against him, as a deterrent against the same or similar offences being committed by other insolvents. Of course, in any case the Judge is at liberty to proceed under section 104 with or without a preliminary enquiry being made, and in this connection reference may usefully be made to the observations of Suhrawardy and Graham JJ. in *Jewraj Khariwal* v. *Dayal Chand Jahury* (1). Further, I respectfully agree with Braund J. that "an application under section 104 is not one in which the insolvent

(1) (1927) I.L.R. 55 Cal. 783.

against whom proceedings are proposed is entitled to take part, unless invited to do so by the Court", but with due deference I do not agree with the learned Judge in thinking that where an insolvent is not heard on an application under section 104 " the insolvent is not thereby prejudiced in any way, because in the event of proceedings by way of prosecution being instituted he has, of course, ample opportunity of appearing and defending himself in those proceedings when launched."

It depends on the circumstances ; and, in my opinion, it may often be of great importance to the insolvent that he should have an opportunity of explaining to the Court the reasons why he contends that the Court should not proceed to the extreme limit of making a complaint under section 104 against him in a Criminal Court.

In the present case notice of the application was given—and in my opinion rightly given—to the respondent.

Now, the learned Judge in insolvency has dismissed the present application upon the ground that it was not open to him to hear or determine it on the merits. For the reasons that we have stated the appeal will be allowed, the order from which the appeal is brought set aside, and the proceedings returned to the learned Judge sitting in insolvency for the application to be heard and determined on the merits according to law.

MYA BU, J.—I agree.