

APPELLATE CIVIL.

Before Mr. Justice Mya Bu, and Mr. Justice Mackney.

1939

Dec. 5.

U TUN MYAING AND ANOTHER

v.

MA SHIN.*

Insolvency—Presentation of petition for adjudication—Suit commenced after petition but before adjudication—Leave of Insolvency Court unnecessary—Procedure—Provincial Insolvency Act, ss. 28 (2) & (7), 29, 55.

Section 28 (2) of the Provincial Insolvency Act does not bar any suit or other legal proceeding commenced by the creditor of the insolvent without the leave of the Court after the presentation of the petition on which the order of adjudication is made, and before the order of adjudication is passed. The word "thereafter" refers to the making of the order of adjudication and not to the vesting of the property of the insolvent in the Court or in a receiver by virtue of sub-section (7).

E Maung for the appellants.

No appearance for the respondents.

MYA BU, J.—This case raises a question of law of some importance upon which there is a complete dearth of reported judicial pronouncement. The question has arisen in the following way: On the 14th February 1939 a petition was filed by a creditor of Ma Shin to have Ma Shin adjudged an insolvent. The Insolvency Court passed its order adjudicating Ma Shin on the 29th April. On that day before the order of adjudication was passed the appellants U Tun Myaing and Daw Nu filed a suit against Ma Shin and another praying that the defendants might be compelled to effect registration of a certain deed. Subsequently, objection was taken on behalf of the defendants to the maintainability of the suit on the ground that Ma Shin having been adjudicated an insolvent the suit which was commenced after the filing

* Civil First Appeal No. 77 of 1939 from the judgment of the Assistant District Court of Prome in Civil Regular Suit No. 4-P of 1939.

of the petition in insolvency without the leave of the Insolvency Court was incompetent. This objection was upheld by the trial Court which has accordingly rejected the plaint. In arriving at its decision the trial Court relied on the provisions of section 28, sub-sections (2) and (7) of the Provincial Insolvency Act. Sub-section (2) runs as follows :

“ On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceedings, except with the leave of the Court and on such terms as the Court may impose.”

Sub-section (7) provides :

“ An order of adjudication shall relate back to and take effect from the date of the presentation of the petition on which it is made.”

The learned Assistant District Judge came to the conclusion that on account of the doctrine of relation back enacted in sub-section (7), the order of adjudication related back to the date of the presentation of the petition for adjudication and consequently the adjudication having been made the suit instituted after the date of the filing of the petition without the leave of the Court was rendered incompetent by the second part of sub-section (2), although it was filed before the actual making of the order of adjudication.

The question that falls for determination in this appeal therefore is whether the second part of sub-section (2) operates from the filing of the petition in insolvency or only from the actual making of the order of adjudication. Under the first part of sub-section (2)

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of section 28 and in the absence of the doctrine of relation back enacted in sub-section (7), the vesting of the property of the insolvent in the Court or in a receiver would commence only on the making of an order of adjudication, while under the second part, omitting the words "and thereafter" for the moment, it would not be possible for any creditor to whom the insolvent is indebted to have any remedy against the property of the insolvent or commence any suit or other legal proceeding except with the leave of the Court during the pendency of the insolvency proceeding which commences from the presentation of the insolvency petition. If the object of the Legislature is merely to render the restraint placed on a creditor under the second part of sub-section (2) effective as from the presentation of the petition in insolvency, the enactment of sub-section (7) would be quite superfluous. On the other hand, if the first part of sub-section (2) be not qualified by the provisions of sub-section (7), the property of the insolvent vesting in the Court or a receiver would be only such property as the insolvent owns upon the making of the order of adjudication. If the Legislature desired vesting of the property of the insolvent in the Court or a receiver as from the filing of the petition in insolvency, then the enactment of sub-section (7) becomes a *sine qua non*. This view of the matter leads me to the conclusion that the words "and thereafter" refer to the making of the order of adjudication and not to the vesting of the property of the insolvent in the Court or in a receiver by virtue of sub-section (7) and were deliberately inserted to make the restraint placed on a creditor under the second part of sub-section (2) effective as from the making of the order of adjudication.

There are other practical considerations which to my mind reinforce this view. It is quite conceivable

that after the presentation of a petition in insolvency a suit or a proceeding may be commenced and may even be finally disposed of before the making of the order of adjudication. What is to happen to the result of such a proceeding if a decree has been passed in favour of the plaintiff? Is the question of the validity of the institution of such a proceeding or of such a decree to be kept in suspense until an order of adjudication is actually made or actually refused? Are the creditors or other persons having claims against the insolvent, when they see that a petition in insolvency is pending against their debtor, to postpone the institution of a suit or other proceeding until the order of adjudication is actually made or are they to go to the Insolvency Court and apply for leave of that Court in mere anticipation of an order of adjudication being subsequently made before they know whether it was going to be made or not? Protection to *bona fide* transactions afforded by section 55 extends only to transactions affecting the insolvent's proprietary or pecuniary interests, without which protection the first part of sub-section (2) of section 28, read with the doctrine of relation back in sub-section (7), would have operated undue hardship to those who enter into such transactions *bona fide*. If a person having a claim against the insolvent commences a suit or other proceeding to enforce that claim without knowing the pendency of the petition in insolvency but before the making of the order of adjudication, he is not granted any protection by section 55. These circumstances show that the second part of sub-section (2) of section 28 is not affected by the doctrine of relation back in sub-section (7) and the words "and thereafter" refer to the words "on the making of an order of adjudication" in the opening clause of sub-section (2). In the result I am of the opinion that a suit or legal

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proceeding commenced by a creditor of an insolvent before the making of the order of adjudication whether before the presentation of the petition in insolvency or thereafter is not invalid or incompetent even if such suit or proceeding were instituted without the leave of the Insolvency Court. What the Court should do in such suit or proceeding is to act in accordance with section 29, if and when an order of adjudication is made by the Insolvency Court.

For these reasons the order of rejection of the plaint in this case is erroneous. This appeal is allowed, the order under appeal is set aside and the case will be remanded to the trial Court which will proceed with it in accordance with law having regard to the provisions of section 29 of the Provincial Insolvency Act. The appellants' costs of this appeal shall be costs in the cause.

MACKNEY, J.—I agree that sub-clause (2) of section 28 of the Insolvency Act does not ban any suit or any other legal proceeding commenced by the creditor of the insolvent without the leave of the Court after the presentation of the petition on which the order of adjudication is made, and before the order of adjudication is passed.

Doubtless there is an ambiguity in the word "thereafter" as used in this sub-clause. It may mean "after the making of the order of adjudication and after the calling into existence of the vestiture of the property of the insolvent", or it may mean "after the date from which the order of adjudication takes effect and after the property has become vested in the Court." It appears to me that the former meaning is the more natural to be attached to the word, for here there is an explicit reference to the *making* of the order of adjudication. As my learned brother has pointed out, many

undesirable difficulties would be created if we adopt the alternative interpretation. To my mind it would be rather unreasonable to outlaw the commencing of a suit which had already been commenced before the ban was promulgated.

The natural interpretation of section 29 of the Act confirms me in this view.

The wording of this section does not suggest that it applies only to suits pending which were instituted before the filing of the petition. Before the making of an order of adjudication proof thereof could not be furnished, but nevertheless the suit might have been instituted after the petition had been filed. It appears to me that section 29 naturally refers to such suits—among others—which in particular have been instituted after the presentation of the petition but before the order of adjudication.

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