LAHORE HIGH COURT

Bhai Jai Kishen Singh

Vs

Bank of Northern India

(Harries, C.J., Mahajan and Abdur Rahman, JJ.)

04.02.1944

JUDGMENT

Abdur Rahman, J.

1. The question that we have been invited to answer in this reference is whether the period spent by a creditor in prosecuting a petition for his debtor's adjudication as an insolvent can be excluded under Section 14, Limitation Act, in computing the limitation prescribed for an execution application when the petition for insolvency was dismissed on the ground that the act of insolvency alleged to have been committed by his debtor did not fall within Section 6, Provincial Insolvency Act?

2. The facts which have given rise to the above question may be briefly stated. The Peoples Bank of Northern India (in liquidation) made an application for execution against Bhai Jai Kishan Singh on 1st May 1941. When called upon to show cause, the judgment-debtor objected to its execution on the ground of limitation. It has been found by the execution Court that the last application for execution was dismissed on 8th May 1937. In order to bring the application within limitation, the period spent in prosecution of a petition for the debtor's adjudication (made on behalf of the bank) between 29th April 1940 when it was made, and 80th April 1941 when it was dismissed, was asked to be excluded. This petition, it may be observed here, was dismissed on the ground that the transfer of some colony land which was the only act of insolvency alleged by the bank could not be regarded to be an act of insolvency under the Provincial Insolvency Act. Relying on the decision by a Division Bench of this Court in *Lorind Chand v. Bahadur Khan*[1] the Subordinate Judge of Lyallpur upheld the decree-holder's contention. The execution application was accordingly held to be within time. The judgment-debtor appealed. Not being satisfied with the correctness of the decision in *Lorind Chand v. Bahadur Khan A.I.R. 1935 Lah. 736(supra)*, a learned Single Judge of this Court referred the question for decision to a Division Bench which in its turn referred it to a Full Bench.

3. Learned Counsel for the appellant contends that the period spent in prosecuting the insolvency

petition could not have been excluded under Section 14, Limitation Act, in computing the period of limitation for the execution application prescribed by Article 182 of that Act firstly, as the proceeding in the insolvency Court was not founded upon the same cause of action; and, secondly, as the insolvency Court had dismissed

[1] A.I.R. 1935 Lah. 736

the petition, not because it was unable to entertain it "from defect of jurisdiction or other cause of a like nature," but because the respondent bank had been unable to establish its allegation that the 6 appellant had committed any act of insolvency within the meaning of Section 6, Provincial Insolvency Act. In support of his contention, reliance was placed on the decisions in *Manek Lal Mansukh Bhai v. Suraypur Mills Co. Ltd*[2] *Rajabapayya v. Basavayya*[3] *Maharaj Sai v. Kedarnath*[4]*,* and *Abbas Ali Khan v. Yusaf Ali Khan A.I.R. 1927 Lah. 186.*

4. Learned Counsel for the respondent, on the other hand, contends that, although different in form the petition for the appellant's adjudication as an insolvent by the bank was in substance an application for the recovery of money and that the bank's real cause of action in either case was the failure of the debtor to pay his debt to the bank. He further urges that the words "or other cause of a like nature" in Section 14, Limitation Act, must be liberally construed and that, if so construed, his client would be held entitled to exclude the period spent in prosecuting the insolvency petition. In addition to the Lahore decision in *Lorind Chand v. Bahadur Khan A.I.R. 1935 Lah. 736*, he further relies on a decision by a learned Single Judge of the Madras High Court in ***Vaithilinga Naidu v. Naarayanaswami Naidu A.I.R. 1943 Mad. 457***. Having been called upon to compute the period of limitation prescribed for an application for execution, I find that Section 14(1) of the Act is not in terms applicable. To such a case, however, the provisions contained in Sub-section (2) of that section would apply. But the words of that Sub-section are different from the words used in Sub-section (1). In order to fall within the ambit of Sub-section (2), the applicant must be found to have been prosecuting a civil proceeding for the same relief as asked for in the subsequent application as distinguished from the prior civil proceeding having been, as mentioned in Sub-section (1), "founded upon the same cause of action." In either case, however, the Court in which the prior civil proceeding was prosecuted must be found to have been unable to entertain it "from defect of jurisdiction or other cause of a like nature." I shall advert to the second condition in due course if I find it necessary to do so; but it is not in my view possible to hold that the relief claimed by the bank in the petition for insolvency was the same which is now asked for in its application for execution. While a debtor can be adjudged an insolvent if he is found to have committed an act of insolvency, the execution Court can, on the application of the decree-holder, only order the decree to be executed in one of the modes stated in Section 51, Civil Procedure Code Since adjudging an insolvent is not one of the recognised modes of execution, it would follow that the creditor cannot, when applying for the execution of his decree, ask for his debtor's adjudication by the execution Court. Nor is the execution Court competent to grant it. Indeed, the respondent's application for execution does not ask for that relief and the application for execution cannot, therefore, be held to have been for the same relief as the petition for the appellant's adjudication.

5. It was, however, contended by learned Counsel for the respondent that in so far as the bank desired nothing more but to realise its money and the petition for the debtor's adjudication was made with that object only, the relief contained in either of the petitions must be held in substance though not in form to be the same. In deciding

[2] A.I.R. 1928 Bom. 252 [4] AIR 1933 Nag 130

[3] A.I.R. 1942 Mad. 713

Vaithilinga Naidu v. Naarayanaswami Naidu[5] King, J. has taken this view. But with very great deference to him, IAm unable to agree with the reasons which appealed to the learned Judge in coming to the conclusion that the application for execution against the debtor was for the same relief as a petition for his adjudication. It may be that a decree-holder applying for execution of his decree and a creditor asking for his debtor to be adjudged an insolvent have the realisation of their dues at heart, but the reliefs asked for by them are wholly different although it may be that in favourable circumstances the debts due to them may be fully satisfied by either process. This would not, however, show that the relief asked for by either of them were the same. The jurisdiction invoked by the creditor and exercised by the two Courts was different: the nature of proceedings in the two Courts was different: the parties in the two proceedings were different: and above all the object of the two proceedings and the legal effect of granting the prayers contained in these applications were also different.

6. The Insolvency Courts in this country owe their existence to a special statute and the jurisdiction exercised by them is of a special kind not possessed by ordinary Courts of the land. The proceedings in insolvency are proceedings in rem while proceedings in execution are proceedings in personam. The creditor cannot withdraw the petition presented by him for his debtor's adjudication without the leave of the Court and the Court can substitute another creditor as petitioner if the creditor who had originally made the petition does not proceed with due diligence. Notice of the petition for insolvency when admitted has to be given to all the creditors. This is wholly unlike proceedings between two private parties. Two of the main purposes of a proceeding in insolvency are (a) the realization and equitable distribution of a debtor's property amongst his creditors and (b) his protection not only from arrest but from being harassed by his creditors separately. The insolvency Court undertakes the task of administration of the insolvent's estate and passes an order of discharge after the realization of all his available assets and distribution of the same amongst his creditors. These objects are wholly opposed to what a decree-holder desires to procure in the execution of his decree. He wants his own debt to be realized in preference to the debts due to other creditors and his attempt, therefore, is to steal a march over others and to get his debt satisfied before others. He would be in fact trying for an unequal distribution if his debtor's assets happen to be insufficient. Similarly, instead of making any attempt to protect his debtor he wishes to take every step which he is authorized to take including the attachment of his property and arrest of his person. In the end, an order of a debtor's adjudication causes more or less a civil death and the whole of his property with all his debts and liabilities come to vest in the receiver with the result that all his creditors have no right to sue or take other legal proceedings against him in ordinary Courts. None of these consequences ensue

on a suit being decreed or on a decree being executed by a creditor.

7. It is true that a creditor does not by taking insolvency proceedings confine himself to the adjudication of the appellant as insolvent and continues to pursue the matter, as observed by King, J., "in the hope and with the purpose that at some time a dividend would be paid to him from the insolvent's estate." But does, a decree-holder ask in his application for execution for merely a dividend? He asks for payment of the whole of

[5] A.I.R. 1943 Mad. 457

the debt due to him and would not mind depriving all the other creditors if he could. Even when he applies for rateable distribution, he cannot attack the validity of the decree or decrees held by others. All he can do is to see whether the conditions mentioned in Section 73, Civil Procedure Code, are complied with. This is not so in insolvency proceedings. Persons alleging themselves to be creditors of the insolvent have to prove their debts (Section 33) and an insolvency Court can go behind judgments of civil Courts and see for itself whether the debt alleged to ' be due-by the insolvent was due in fact. This is because the rights of bona fide creditors have to be safeguarded, and the insolvent's assets have to be distributed only amongst those to whom the debts are really found to be due. If we bear in mind that both the reliefs can be simultaneosly claimed by a creditor in certain circumstances, that is to say, he can ask for the attachment or arrest of the judgment-debtor in execution of his decree and can at the same time ask for his adjudication in the insolvency Court, it would be clear that the reliefs in the two applications are, different and cannot be regarded to be one for purposes of Sub-section (2) of Section 14, Limitation Act.

8. Nor is it possible for me to accept the contention that the causes of action for an insolvency petition or for a suit to recover money or for an execution of decree for money are one and the same. If by the expression 'cause of action' we mean all the bundle of facts and circumstances which a party must establish before he can ask the Court to grant the relief which he claims, it is clear that a mere failure of a defendant or a judgment-debtor to pay the debt cannot furnish a creditor with a complete cause of action for taking his debtor to an insolvency Court and to get him adjudged an insolvent. He must in addition prove that his debtor was unable to pay his debts and that he had committed an act of insolvency as defined in Section 6, Provincial Insolvency Act. These two facts form a part of a creditor's cause of action which he must establish before he can hope to succeed before an insolvency Court. It was not necessary for him to prove these facts before an ordinary civil Court either before obtaining his decree or before executing it. The causes of action for an insolvency petition cannot therefore be regarded to be the same as in the suit or execution. I must for that reason differ with very great deference, from Tek Chand, J. in *Lorind Chand v. Bahadur Khan*[6]

9. In any case, conceding for the sake of argument, but without admitting, that my conclusions as to the reliefs and the causes of action in a petition for insolvency and in an application for execution not being the same are incorrect, I have no manner of doubt that the dismissal of the

insolvency petition on the ground that the act of insolvency alleged to have been committed by the debtor was not an act of insolvency' within the meaning of Section 6, Provincial Insolvency Act, cannot possibly be held as a result of the Court's inability to entertain the petition for "defect of jurisdiction or other cause of a like nature" used in Sub-section (1) and (2) of Section 14, Limitation Act.

10. If a creditor alleges that his debtor had committed certain acts which were sufficient to get him adjudged an insolvent, the failure to establish those acts as acts of insolvency and the consequent dismissal of the petition cannot be by any stretch of language imputed to the inability of the Court to entertain the petition for want of

[6] A.I.R. 1935 Lah. 736

jurisdiction or other cause of a like nature. The Court had in fact jurisdiction to adjudge or not to adjudge the debtor an insolvent and in refusing the petition for his insolvency either on the ground that the act alleged to have been committed was not an act of insolvency or because the creditor has failed to establish the act of insolvency alleged to have been committed by his debtor, it exercised as much of the jurisdiction vested in it by law as it would have exercised in holding to the contrary and granting it. Take for instance that a petition for a debtor's adjudication is made on the ground that he had with intent to defeat or delay his creditors departed from his dwelling house or usual place of business or that he had excluded himself so as to deprive his creditors of the means of communicating with himbut the creditor when called upon to prove these facts failed so to do and his application was consequently dismissed by a Court of competent jurisdiction, could it be reasonably contended that the petition was dismissed for lack of jurisdiction or for other cause of a like nature? I do not think so. Similarly, a petition for insolvency cannot be deemed to have failed for these reasons if the act alleged by a creditor to have been committed by his debtor is, although found to have been committed, not found on a careful examination by a Court to be an act of insolvency within the meaning of Section 6, Provincial Insolvency Act. It may be that the creditor will be held to have misconceived his remedy in such a e case but the dismissal of the petition cannot anyhow be attributed to the absence of jurisdiction or to a cause of like nature. In the same way, if a suit for damages for libel were dismissed merely on the ground that the article in a newspaper complained by the plaintiff was not libelous, the suit could not be held to have failed for want of jurisdiction in the Court or for other cause of a like nature. It would be held to have been disposed of on its merits after the Court had examined the language of the article and found that it could not have been legitimately taken exception to and did not contain any libel.

11. In the illustrations given by me the proceedings and the suit were found to have failed not because they were infructuous on account of defect of jurisdiction or other cause of a like nature but because the allegations by the petitioner were not established in illus. 1 and although proved to have been made in illus. 2 and 3, they were not on an examination by the Court found to be sufficient to entitle the petitioner in the second case and the plaintiff in the third for a verdict in their favour. Section 14, Limitation Act, could have no application as failure on the part of the

petitioner or the plaintiff to get the reliefs which they asked Q for was not attributable to anything connected either with the" jurisdiction of the Court or with some other defect which is like that of jurisdiction. The words "or other cause of a like nature," however liberally construed, must be read so as to convey something ejusdem generis or analogous with the preceding words relating to the defect of jurisdiction. If these words are read along with the expression "is unable to entertain," they would denote that the defect must be of such a character as to make it impossible for a Court to entertain the suit or application either in its inception or at all events as I to prevent it from deciding it on its merits. It is not quite easy or perhaps possible to give an exhaustive list of defects that these words may be taken to cover. But if they are such as have got to be decided before the merits of the case can be gone into and if they do not necessitate an examination of the merits of a case, they may, in my opinion, fall within the purview of these words. If, on the other hand, the Court has got to go into the merits before a case can be dismissed, the defect will not in my judgment come within the ambit of these words. Decided cases may, however, be taken as illustrations of such a defect. Section 14, Limitation Act, has been applied if a suit had failed because it was brought without proper leave, *Subbarum v. Yagana*[6] *Laliteshwar Singh v. Rameshwar Singh*[7] and *Ramdeo Dass v. Ganesh Narain*[8] or if it failed because no notice under Section 80, Civil P. C, had been given, *Manganmal v. Farnandez*[9] or where it failed for non-production of the Collector's certificate required by Section 6, Pensions Act, *Putali Mehati v. Tulja*[10] These go to show that although the Court had jurisdiction to decide them, it was unable to entertain them on account of a technical defect and it was not possible for the Court to proceed and consider them on their merits. If a plaintiff or a petitioner failed to establish a cause of action in himself, no deduction of time could be allowed under Section 14 of the Act: *Hurro Proshad Roy v. Gopal Das Dutt*[11] *Jema v. Ahmad Ali Khan*[12] and *Commercial Bank of India v. Allavoodeen Sahib*[13] It would seem to follow that if a plaint or a petition does not disclose a cause of action, they will have to be rejected but the time spent in their prosecution cannot be excluded under Section 14, Limitation Act.

12. The fact of the matter is that if on the facts the relief asked for by a plaintiff or a petitioner is found by the Courts to have been misconceived either because it is not warranted by the facts mentioned by them or because the facts stated in the plaint or the petition do not disclose a good and complete cause of action and the plaint or petition are consequently dismissed or rejected, the provisions contained in Section 14, Limitation Act, could not be of any help: *Murugesa Mudaliar v. Jattaram Davy*[14] *Dwarkanath Chakravarti v. Atal Chandra Chakravarti*[15] *Abbas Ali Khan v. Yusaf Ali Khan*[16] *Hari v. Krishnaji*[17], and *Rajabapayya v. Basavayya*[18] Coming to the decision in *Lorind Chand v. Bahadur Khan*[19] again, IAm sorry I do not share the views expressed by Tek Chand, J. that the proceedings' in the insolvency Court had failed in that case for defect of a nature like that of jurisdiction. The petition for insolvency was dismissed as the alleged acts of insolvency were found to have been vague and indefinite and could not be brought within the purview of Section 6, Provincial Insolvency Act., It was conceded by the learned Judge that the appellant in that case appeared to have gone to the insolvency Court on the mistaken advice that the conduct imputed to the defendant amounted in law to an act of insolvency.

13. The petition was rejected not because the Court was unable to entertain it for want of jurisdiction or for any other defect analogous to 'that of jurisdiction but because the petition was not found to disclose facts which would have brought the petition within the scope of Section 6, Provincial Insolvency Act. Could it be legitimately contended that the Court was not competent in that case to grant leave ' to amend the petition so as to make the alleged acts of insolvency clear and definite and then to grant or reject it on its merits? Had the Court granted leave to amend, it could only have been if the petition had been entertained by the Court. If the petitioner had, in that case, gone to the insolvency Court to have his debtor adjudged an insolvent, it was his primary duty to allege facts which would have entitled him to ask for that relief. If he failed to

[6](96) 19 Mad. 90 [8](08) 35 Cal. 924 [10](78-79) 3 Bom. 223
[7](07) 34 Cal. 619 [9](11) 5 S.L.R. 181 [11](77-78) 3 Cal. 817
[12](90) 12 All. 207 [14](1900) 23 Mad. 621 [16] A.I.R. 1927 Lah. 186
[13](1900) 23 Mad. 583 [15] A.I.R. 1919 Cal. 381 [17] A.I.R. 1928 Bom. 323
[18] A.I.R. 1942 Mad. 713
[19] A.I.R. 1935 Lah. 736

allege them even, he must be regarded to have failed to disclose a good or a complete cause of action but that is neither a defect of jurisdiction nor a defect of a nature analogous to that of jurisdiction which would give him a right to exclude the period spent in pursuing that matter. The application may have been liable to be dismissed or rejected but it cannot be said in my opinion that the Court was unable to entertain it from defect of jurisdiction or other cause of a like nature.

14. In the present case the Court had after going through the merits arrived at the conclusion that the transfer by the judgment-debtor-appellant could not be regarded as an act of insolvency. In doing so the Court could not have helped going into the merits of the case to some extent. The Court entertained the petition for insolvency, went through the allegations made on behalf of the bank and came to the conclusion that, although true, they did not constitute an act of insolvency within the meaning of Section 6, Provincial Insolvency Act. It cannot be said in such a case that the Court was unable to entertain the application for defect of jurisdiction or other cause of a like nature. The time spent in prosecuting such an application could not therefore be excluded and the application for execution must accordingly be held to be barred by limitation.

15. For the above reasons, my answer to the question formulated in the beginning is in the negative. As the whole of the case was referred to a Division Bench and by the Division Bench to a Full Bench, I must, for the above reasons, hold the application for execution to be barred by time and allow the appeal. The appellant will be entitled to have his costs in this Court and in the execution Court.

Harries, C.J.

16. I agree.

Mahajan, J.

17. I agree and wish to add that, before a person can claim the benefit of the provisions of Section 14(2), Limitation Act, in computing the period of limitation prescribed for an execution application on the ground that he was prosecuting with due diligence another civil proceeding, e.g., an application for the adjudication of the judgment-debtor as an insolvent, he must make out that the reliefs claimed in both of them were identical. Under the statutory provisions governing the two proceedings the identity of reliefs in the two civil matters is not possible. An insolvency Court cannot give the reliefs that in law can be asked for in an execution application and vice versa an executing Court cannot adjudicate a debtor an insolvent; on the other hand, it has to stay its hands as and when an insolvency petition presented by the debtor is admitted. It is not the motive of the creditor in instituting the two proceedings or the fact that they are both means to an end which is the same in both cases, that attracts the provisions of Section 14(2) to a case, but it is only the identity of relief in both the proceedings that is essential to get the benefit of the section. In my view, the only proper course for the decree-holder to adopt in such cases is to make his execution application within the time prescribed by law and get it stayed till the disposal of the insolvency petition, but if he does not take this course he cannot save his limitation by recourse to Section 14, Limitation Act. Another hurdle in the way of the creditor decree-holder in such cases is that the insolvency application when dismissed on the ground that the facts alleged therein do not amount to an act of insolvency does not fail for defect of jurisdiction or other cause of a like nature. The dismissal is one on the merits and the order passed on it under Section 25 disposes it of after a trial. In such a case there is no failure on the part of the Court to entertain it, on the other hand, after entertaining it, the Court dismisses it as it cannot succeed in law. Presentation of an in fructucus application for insolvency therefore in no case helps the decree-holder in enlarging the limitation prescribed for an execution application.

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