

APPELLATE CIVIL.

Before Nasim Ali and R. C. Mitter JJ.

1936.

Nov. 12.

CHARU CHANDRA MAHURI

v.

RAMESH CHANDRA SEAL.*

Insolvency—Limitation for execution proceedings—“Annulment,” if include setting aside an order or rejection of application for adjudication by appellate Court—Provincial Insolvency Act (V of 1920), s. 78, cl. (2).

The words “annulled under this Act” in s. 78, cl. (2) of the Provincial Insolvency Act include all orders cancelling or setting aside an adjudication or rejecting an application for adjudication passed by an appellate Court on appeal or revision under s. 75 of the Act, and are not limited to annulments under ss. 35, 36, 37, 39 and 43 of the Act.

The decree-holder, on whose application the judgment-debtor was adjudicated an insolvent, on his application being rejected by the High Court on appeal, is entitled under s. 78, cl. (2) of the Provincial Insolvency Act to have the period from the date of the order of adjudication by the lower Court to the date of the said order of the High Court excluded in computing the period of limitation for an application for execution of a decree.

Amar Singh v. Imperial Bank of India, Jullundur (1) followed.

APPEAL FROM APPELLATE ORDER by the decree-holder.

The facts of the case and the arguments in the appeal are sufficiently stated in the judgment.

Narendra Kumar Das and *Durgesh Prasad Das* for the appellant.

Radha Binode Rakshit for the respondents.

The judgment of the Court was as follows:—

This is a decree-holder's appeal in an execution case. The judgment-debtors objected to the execution on the ground that it was barred by limitation.

*Appeal from Appellate Order, No. 395 of 1935, against the order of E. S. Simpson, District Judge of Chittagong, dated Feb. 28, 1935, reversing the order of Amulya Gopal Ray, Second Subordinate Judge of Chittagong, dated Dec. 13, 1933.

This objection was overruled by the learned Sub-Judge. On appeal by the judgment-debtors to the lower appellate Court the learned District Judge has given effect to this objection and has dismissed the decree-holder's application for execution as barred by limitation. Hence this Second Appeal.

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It appears that the last execution case against the judgment-debtors was disposed of on September 3, 1929. On January 10, 1931, the judgment-debtors were adjudged insolvents by the insolvency Court at the instance of the appellant. They thereupon appealed to this Court against the order of adjudication. On July 5, 1933, this Court set aside the order of adjudication so far as it affected two of them. On October 24, 1933, that is, after the expiry of three years from the date of the disposal of the last execution case, the present application for execution was filed. It is not disputed that if the decree-holder is entitled to deduct the period from January 10, 1931, to July 5, 1933, from the date of disposal of the last execution case to the date of the filing of the present application, under the provisions of s. 78, cl. (2) of the Provincial Insolvency Act, his application for execution will be in time. The point for determination, therefore, is whether the provisions of the said section are attracted to the facts of the present case.

Section 78, cl. (2) of the Act is in these terms :—

Where an order of adjudication has been annulled under this Act, in computing the period of limitation prescribed for any suit or application for the execution of a decree [other than a suit or an application in respect of which the leave of the Court was obtained under sub-s. (2) of s. 28 which might have been brought or made but for the making of an order of adjudication under this Act], the period from the date of the order of adjudication to the date of the order of annulment shall be excluded.

The contention of the learned advocate for the respondent is that the expression "annulled under "this Act" means "annulled under ss. 35, 36, 39 and "43 of the Act" and that it does not contemplate the

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setting aside of an order of adjudication by the High Court on appeal from the order of adjudication under s. 75 of the Act. The word "annul" has not been defined in the Act. It means to render void in law (See Short Oxford Dictionary, 1933 Edition). It is, however, contended by the learned advocate for the respondents that annulment presupposes a valid order of adjudication and that where there is no valid order of adjudication, the question of annulment cannot arise. In other words, the contention is that, if the order of adjudication was valid at the time when it was made but it is not set aside subsequently on certain grounds which came into existence after the order of adjudication, it is a case of annulment, but if the order of adjudication was bad at its inception and was illegal and the application for adjudication is dismissed by the Court of appeal, it is not a case of annulment within the meaning of s. 78, cl. (2) of the Act. The obvious answer to this contention is that s. 35 contemplates also annulment of the order of adjudication on the ground that a debtor ought not to have been adjudged insolvent and that the order of adjudication is invalid at its inception.

It is next urged by the learned advocate for the respondents that the word "annul" is coupled with the words "under the Act" and consequently "annulment under the Act" must refer to the provisions for annulment of the order of adjudication contained under the head "Annulment of order of adjudication" in the Act. Section 43 which also empowers a Court to annul the order of adjudication does not come under this head. The expression "under the Act" means "by virtue of the power conferred by the Act". The Act gives right of appeal to the High Court against the order of adjudication. If the High Court sets aside the order of adjudication by virtue of the power conferred on it under the provisions of the Act, it certainly does so under the Act. So long as the order of adjudication

remains in force, a creditor cannot proceed in execution without the leave of the Court. We do not see any difference in principle between the setting aside of the order of adjudication in appeal against an order of adjudication and the annulment of the order of adjudication under ss. 35, 36, 39 and 43 of the Act, so far as limitation is concerned. The disability of the creditor during the period from the date of the order of adjudication to the date when the order is rendered void in law is the same in both cases. We are, therefore, of opinion that the expression "annulled under the Act" means "rendered void in law either by the Court of first instance or by the Court of appeal by virtue of the powers conferred by the Act."

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The appellant is, therefore, entitled to the benefit of s. 78, cl. (2) of the Provincial Insolvency Act and his application for execution is not barred by limitation. This view is supported by the decision of the Lahore High Court in the case of *Amar Singh v. Imperial Bank of India, Jullundur* (1).

The result, therefore, is that this appeal is allowed, the order of the learned District Judge is set aside and that of the learned Subordinate Judge is restored with costs throughout—hearing fee two gold mohurs.

Appeal allowed.

A. A.