APPELLATE CIVIL.

Before Nasim Ali and Sen JJ.

MURADAN SARDAR

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL.*

1938

Nov. 18 ; *Dec.* 8.

Insolvency—Limitation—Insolvency petition—Conditions precedent—Act of insolvency—Provincial Insolvency Act (V of 1920), s. 6, cl. (g); s. 9, sub.-s. (1), cl. (c); s. 19—Indian Limitation Act (IX of 1908), s. 5.

The period of three months mentioned in s. 9, sub-s. (*1*), cl. (c), of the Provincial Insolvency Act, within which the creditor is entitled to present a petition for insolvency, is a condition precedent and not a period of limitation.

Chenchuramana v. *Arunachalam* (1) followed.

Section 5 of the Indian Limitation Act, which relates to the extension of the period of limitation, has no application whatsoever to s. 9, sub-s. (*1*), cl. (c) of the Provincial Insolvency Act.

Mere service of notice on the creditor under s. 19, sub-s. (*2*) of the Provincial Insolvency Act, informing the creditor of the date for the hearing of the debtor's petition for insolvency, is not an act of insolvency amounting to a notice that the debtor has suspended payment of his debts as provided in s. 6, cl. (*g*) of the Act.

Per SEN J. The provisions of the Provincial Insolvency Act must be strictly construed.

APPEAL FROM ORIGINAL ORDER preferred by the debtor adjudged as an insolvent on the application of the creditor.

The material facts of the case appear sufficiently from the judgment.

Narendra Nath Chaudhury for the appellant. My first contention is that the High Court in remanding the case did not decide the question of limitation. On the other hand, it directed the District Judge to proceed with the case according to the provisions

*Appeal from Original Order, No. 644 of 1936, against the order of T. H. Ellis, District Judge of 24-*Parganás*, dated Aug. 25, 1936.

(1) (1935) I. L. R. 58 Mad. 794.

1938

Muradan Sardar v. *Secretary of State for India in Council.*

of the Provincial Insolvency Act. Therefore, the learned District Judge is wrong in not allowing my client to raise the question of limitation. My second contention is as follows :—

The appellant-debtor presented a petition for insolvency on May 29, 1934. This petition was dismissed on September 7, 1934. On October 6, 1934, the respondent-creditor presented another petition for adjudging debtor-appellant as an insolvent. The present appeal arises out of this petition. In this petition of October 6, 1934, the alleged act of insolvency committed by the appellant was stated to be the filing of insolvency petition by the appellant-debtor on May 29, 1934. This alleged act of insolvency on May 29, 1934, occurred more than three months before the presentation of the petition on October 6, 1934. Therefore, the creditor-respondent's petition filed on October 6, 1934, was not maintainable under s. 9, sub-s. (*1*), cl. (*c*) of the Provincial Insolvency Act, which says that the act of insolvency alleged in the petition must occur within three months before the presentation of the petition.

The Senior Government Pleader, *Sarat Chandra Basak*, and *the Asst. Government Pleader*, *Ramaprasad Mookerjee*, for the respondent. I invite your Lordship's attention to s. 78 of the Provincial Insolvency Act. This section says that s. 5 of the Indian Limitation Act applied to "applications" under the Provincial Insolvency Act. My client, the respondent, was not aware of the appellant-debtor's insolvency petition till July 23, 1934, when notice under s. 19, sub-s. (*2*) of the Act fixing the date for the hearing of debtor's petition for insolvency was served on the respondent. An application was filed by the respondent under s. 5 of the Indian Limitation Act for the extension of the period of three months' time as required by s. 9, sub-s. (*1*), cl. (*c*) of the Provincial Insolvency Act. I submit that the respondent has made out a sufficient cause under s. 5 of the Indian Limitation Act. Therefore, the respondent's petition for adjudicating the appellant

as an insolvent which was presented on October 6, 1934, is within three months from the respondent's knowledge on July 23, 1934. This is a complete answer to the appellant's contention based on s. 9, sub-s. (*1*), cl. (*c*) of the Provincial Insolvency Act. It is true that s. 78 of the Act uses the word "appli-"cation" and s. 9 of the Act uses the word "petition". This does not make any difference as these words mean the same thing and have been interchangeably used in the Act itself. I submit also that service of notice on July 23, 1934, under s. 19, sub-s. (*2*) of the Provincial Insolvency Act amounts to a fresh act of insolvency by which the appellant-debtor suspended the payment of his debts. I refer your Lordships to s. 6, cl. (*f*) of the Act.

Again the debtor's petition for insolvency was presented on May 29, 1934. This petition was not dismissed till September 7, 1934. Therefore, till September 7, 1934, there was no necessity for presentation of the petition for insolvency by the respondent-creditor. The debtor by suddenly getting his petition for insolvency dismissed on September 7, 1934, cannot use the said dismissal to the detriment of the creditor's petition for insolvency presented on October 6, 1934. From all these it is clear that no objection under s. 9, sub-s. (*1*), cl. (*c*) can avail against the respondent.

Narendra Nath Chaudhury in reply. The first argument on behalf of the respondent proceeds upon the basis that the period of three months mentioned in s. 9, sub-s. (*1*), cl. (*c*) of the Act is a period of limitation and, therefore, s. 5 of the Indian Limitation Act applies. The entire basis of this argument is wrong because s. 9, sub-s. (*1*), cl. (*c*) does not provide a period of limitation, but only lays down a condition precedent to the petition for insolvency. Section 9, sub-s. (*1*), cls. (*a*) and (*b*) also support this view. I rely on the case of *Chenchuramana* v. *Arunachalam* (1). The marginal note to s. 9 of the Act also points

(1) (1935) I. L. R. 58 Mad. 794.

1938

Muradan Sardar v. *Secretary of State for India in Council.*

to the same view. Section 78 of the Act relied on by the respondent uses the word "applications", but s. 9 of the Act uses the word "petition". This shows that s. 78 of the Act cannot refer to s. 9 of the Act. If this is correct, as I submit it is, then s. 78 of the Provincial Insolvency Act which makes s. 5 of the Indian Limitation Act applicable to "applications" under the Provincial Insolvency Act does not apply to s. 9 of the Provincial Insolvency Act, which uses the word "petition" and not the word "applications". It has been said on behalf of the respondent that this is a distinction without any difference. I submit that there is a real difference between "petition" and "application". Petition is filed not in relation to a pending cause whereas "application" is filed in relation to a pending cause. I submit also that the other argument on behalf of the respondent is equally erroneous. Notice of the Court by the Court relating to the date of hearing of the insolvency case as provided in s. 19, sub-s. (*2*) of the Act can by no stretch of imagination amount to a notice by the debtor suspending payment of his debts under s. 6, cl. (*f*) of the Act.

NASIM ALI J. This is an appeal against the order of the District Judge of 24-*Parganâs*, dated August 25, 1936, adjudicating the appellant an insolvent under the provisions of the Provincial Insolvency Act on the petition of the Secretary of State for India in Council, the respondent in the present appeal. The acts of the insolvency alleged to have been committed by the appellant, so far as they are material for the purposes of the present appeal, are: (1) that the appellant himself applied to be adjudged an insolvent in the Fourth Court of the Subordinate Judge at Alipore on May 29, 1934, and (2) that notice of this petition for insolvency was served on the respondent on July 23, 1934.

The application by the respondent for adjudicating the appellant an insolvent was filed on October 6, 1934. It is, therefore, clear that the first act of

1938

Muradan Sardar v. *Secretary of State for India in Council.*

Nasim Ali J.

insolvency was committed by the appellant beyond three months from the date of the presentation of the petition by the respondent. The learned District Judge did not discuss this question, as he was of opinion that this Court decided this matter in favour of the respondent, when the case came up on appeal to this Court at a previous stage. We have gone through the judgment of this Court in that appeal. It is clear from that judgment that this Court did not come to any decision on this matter. This Court simply allowed the respondent to amend his application for adjudicating the appellant an insolvent.

The learned Senior Government Pleader contended that, under the provisions of s. 78 of the Provincial Insolvency Act, the respondent is entitled to an extension of time for presenting his petition in view of the provision of s. 9, sub-s. (*1*) (*c*) of the Provincial Insolvency Act read with the provisions of s. 5 of the Indian Limitation Act. Section 9, sub-s. (*1*) provides :—

> A creditor shall not be entitled to present his insolvency petition against a debtor unless—
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> (*a*) the debt owing by the debtor to the creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to such creditors, amounts to five hundred rupees : and
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> (*b*) the debt is a liquidated sum payable either immediately or at some certain future time ; and
>
> (*c*) the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition.

The contention of the Senior Government Pleader is that the period of three months from the date when the act of insolvency is committed is the period within which the petitioning creditor is entitled to present his application and as s. 5 of the Limitation Act applies to such a petition by virtue of s. 78 of the Provincial Insolvency Act, the respondent is within time, as he had no notice of the application for insolvency before July 23, 1934.

The point for determination, therefore, is whether this period of three months is a period of limitation to which the provisions of the Limitation Act are

1938

Muradan Sardar v. *Secretary of State for India in Council.*

Nasim Ali J.

attracted or it is a period within which the particular act of insolvency, on which the petitioning creditor wants to found his petition, must be committed in order that it may be availed of as a ground for making an application for adjudication. In other words, the question is whether, after three months have expired from the date when an act of insolvency is committed, that act still continues to be an act of insolvency in order to enable the petitioning creditor to take advantage of it. Clauses (*a*) and (*b*) of s. 9, sub-s. (*1*) evidently lay down the conditions precedent to the filing of an application by the petitioning creditor. Clause (*c*), therefore, must be also taken as laying down the third condition which must be fulfilled before the petitioning creditor can present an application. The marginal note to s. 9 states :—"Conditions on which creditor may peti-"tion".

The side-note although it forms no part of the section is of some assistance, inasmuch as it shows the drift of the section.

.....per Collins M. R. in the case of *Bushell* v. *Hammond* (1).

I am clearly of opinion that cls. (*a*), (*b*) and (*c*) of s. 9 lay down the three conditions on which a petitioning creditor is entitled to found his petition. The period of three months, mentioned in cl. (*c*), does not refer to the presentation of the petition, but it refers to the act of insolvency on which the petition is to be grounded. Section 6 of the Act lays down what are the acts of insolvency within the meaning of the Act. That section, however, must be read subject to cl. (*c*) of s. 9. In other words, the acts of insolvency must occur within three months before the presentation of the petition. Section 7 of the Act gives right to the petitioning creditor to file an application for insolvency, but that right is subject to the conditions specified in this Act and these conditions have been laid down in s. 9. If the object

(1) [1904] 2 K. B. 563.

1938

Muradan Sardar v. *Secretary of State for India in Council.*

Nasim Ali J.

of the legislature was to provide any period of limitation within which the application is to be presented, they would have said so in s. 7. In my opinion, there is no period of limitation prescribed in the Provincial Insolvency Act within which the petitioning creditor is to present his application. The question of the applicability of s. 78 of the Act read with s. 5 of the Limitation Act does not, therefore, arise in this case. This view finds support from the Full Bench decision of the Madras High Court in the case of *Chenchuramana* v. *Arunachalam* (1).

The next contention of the Senior Government Pleader is that as the notice of the insolvency application was served on the respondent within three months from the date of the presentation of the petition, the appellant ought to be adjudged insolvent, inasmuch as the service of that notice is an act of insolvency within the meaning of the Act. His argument is that by serving this notice of the filing of the insolvency case, the appellant must be taken to have given notice of the suspension of payment of his debts to his creditors. It may be mentioned here that this is not the specific case made by the respondent in his petition for insolvency. It is true that in cl. (*b*) of para. 4 of the amended petition the fact of the service of the notice of the insolvency case started by the appellant is mentioned, but in cl. (*c*) of the said para. it is definitely stated by the filing of the said insolvency case and proceeding with the case on several dates of hearing, the appellant gave notice of the suspension of payment of his debts to his creditors. It is, therefore, clear that the filing of the petition for insolvency and not the service of the notice of this application is stated to be the appellant's notice of suspension of payment of debts. Further, cl. (*g*) of s. 6 lays down that the debtor must give notice that he has suspended payment. The mere service of notice by the insolvency Court informing the creditor of the date on which the insolvency petition is to be

(1) (1935) I. L. R. 58 Mad. 794.

1938

Muradan Sardar v. *Secretary of State for India in Council.*

Nasim Ali J.

heard cannot amount to giving notice by the debtor to his creditors that he has suspended payment. The respondent cannot, therefore, be heard to say that the service on him of the notice of the date of the hearing of the insolvency petition by the insolvency Court amounted to a notice of suspension of payment of debts. The grounds on which the respondent founded his application are not, therefore, sustainable in law. In fact the conditions precedent not having been fulfilled, the petition of the respondent for adjudging the appellant as insolvent must be dismissed.

The result, therefore, is that this appeal is allowed, the order of the District Judge adjudging the appellant insolvent is set aside. The petition of the respondent for adjudging the appellant insolvent is dismissed.

The appellant will get his costs in this appeal. The hearing fee is assessed at two gold *mohurs*.

SEN J. I agree. I wish to add a few words as this appeal raises a question regarding the interpretation of s. 9 of the Provincial Insolvency Act, which, as far as I am aware, has not been considered by this Court before.

The facts which give rise to this appeal are as follows:—

On May 29, 1934, the appellant applied to be adjudicated insolvent in the Court of the Subordinate Judge, 24-*Parganâs*. On July 23, 1934, notice of the date of the hearing of the application was served on the Secretary of State for India in Council, who was one of the creditors. On September 7, 1934, this application for adjudication was dismissed. Thereafter, on October 6, 1934, the Secretary of State for India in Council applied that the appellant should be adjudicated insolvent. The learned District Judge dismissed the application on various grounds, one of them being that the application was not within time. Against this order of dismissal,

1938

Muradan Sardar
v.
Secretary of State for India in Council.

Sen J.

there was an appeal to this Court and this Court remanded the case for re-hearing to the District Judge, with certain directions, whereby the Secretary of State was permitted to amend his application for adjudication. Then the case was heard by the learned District Judge. The appellant raised the question that the petition for adjudication had been filed more than three months after the alleged act of insolvency. The learned District Judge refused to hear this plea on the ground that this Court had already decided that the application was within time. Thereafter he adjudicated the appellant insolvent. Against this order the present appeal has been filed.

On behalf of the appellant it is contended that the learned District Judge was in error in holding that the question whether the petition had been made in time had already been decided by this Court. I have seen the order of remand by this Court. It is clear, therefrom, that this question was left open and it should therefore have been entertained by the learned District Judge.

The sole point for decision before us is whether this petition has been filed within three months of the alleged act of insolvency. In this Court, two acts of insolvency are relied upon by the respondent. The first act is the presentation of the petition for insolvency by the appellant on May 29, 1934, and the second act relied upon is the service of notice of the hearing of this petition upon the Secretary of State for India in Council on July 23, 1934. I shall take up for consideration first whether service of this notice would amount to an act of insolvency within the meaning of s. 6 of the Provincial Insolvency Act.

The learned Senior Government Pleader contends that the service of this notice amounts to the debtor giving notice to his creditors that he had suspended payment or that he was about to suspend payment of his debts. In other words, he contends that it

1938

Muradan Sardar v. *Secretary of State for India in Council.*

Sen J.

amounts to the act of insolvency defined in s. 6, sub-s. (*g*) of the Provincial Insolvency Act. In my opinion, this contention of the learned Government Pleader is not correct. This notice was not served by the debtor at all and it is not a notice saying that the debtor had suspended payment. The notice which was served upon the Government on July 23, 1934, is before us. It is not accompanied by the petition for adjudication. It is merely a notice to the Government stating that the insolvency petition will be considered on a certain date. It is a notice which is contemplated in s. 19, sub-s. (*2*) of the Provincial Insolvency Act. Section 19, sub-s. (*1*) says :—

> Where an insolvency petition is admitted, the Court shall make an order fixing a date for hearing the petition,

and s. 19, sub-s. (*2*) says :—

> Notice of the order under sub-s. (*1*) shall be given to creditors in such manner as may be prescribed.

This notice, therefore, is a notice of the date of the hearing and I do not think that it would be proper for us to read words into the notice and to construe it to mean a notice by a debtor to his creditors that he has suspended payment.

There remains the other act of insolvency, namely, the filing of the insolvency petition. Clearly that act was committed more than three months before the filing of the present petition by the Secretary of State for India in Council. The learned Senior Government Pleader invokes the aid of s. 5 of the Indian Limitation Act; he says that the respondent did not know of the filing of the insolvency petition until July 23, 1934, and points out that this application has been brought within three months of the date of knowledge. In my opinion, s. 5 of the Limitation Act has nothing whatsoever to do with this question. Section 9 of the Provincial Insolvency Act lays down the conditions under which a creditor may file a petition for the adjudication of a debtor.

The conditions laid down are three. First, the debt owing by the debtor to the creditor must amount to at least five hundred rupees. Secondly, the debt must be a liquidated sum payable either immediately or at some certain future time; and thirdly, the act of insolvency on which the petition is grounded must have occurred within three months of the presentation of the petition. It is the last clause which is the subject-matter of controversy before us. The learned Senior Government Pleader contends that this clause lays down the period of limitation within which a petition for insolvency should be filed and he argues that if that is so, the provisions of s. 5 would be attracted by virtue of the provisions of s. 78 of the Provincial Insolvency Act. As I read s. 9, I do not think that it lays down the period of limitation within which a creditor should bring his petition for adjudication. It merely lays down the conditions precedent which must coexist before a creditor may petition for the adjudication of a debtor. One of those conditions is that the act of insolvency must have occurred within three months of the presentation of the petition. If the legislature intended to lay down a period of limitation, it could have done so in express terms by saying that the petition should be presented within a certain time. This the legislature has not done. The provisions of this Act must be construed strictly, inasmuch as the status of the subject is sought to be affected thereby. The ordinary construction of cl. (*c*) of s. 9, sub-s. (*1*) would be that a person is not entitled to institute a petition for adjudicating a debtor insolvent unless he established *inter alia* that the act of insolvency took place within three months before the presentation of the petition for adjudication. This view is supported by the decision of the Full Bench of the Madras High Court in the case of *Chenchuramana* v. *Arunachalam* (1). His Lordship the Chief Justice in considering s. 9(*1*)(*c*), makes the following observation :—

> On the other hand, I am of the view that s. 9(*1*)(*c*) is a condition precedent to the filing of the petition, that is to say, the petitioning creditor must,

(1) (1935) I. L. R. 58 Mad. 794, 798.

1938

Muradan Sardar v. *Secretary of State for India in Council.*

Sen J.

on the day when he presents his petition, have in view some act of insolvency which the debtor has committed within the preceding three months. He has to see on that date, and on that only, what acts of insolvency are available to him; and he cannot make use of any act of insolvency which has been committed outside the period of three months.

An act of insolvency by itself does not entitle a creditor to apply for the adjudication of his debtor. There must be certain other conditions present and those conditions are laid down in s. 9. One of those conditions is that the act of insolvency relied upon must be one which had been committed within three months of the petition for insolvency. In the present case, there was no such act of insolvency. The petition was, therefore, incompetent.

For the reasons stated above I agree with the order passed by my learned brother.

Appeal allowed.

N. C. C.