CIVIL REVISION.

Before Nasim Ali and Rau J.J.

1939

Nov. 27, 28; *Dec.* 6.

MADAN LAL JHUN JHUN WALLA

v.

REZA ALI KHAN.*

Insolvency proceedings—*Ruling Chief served with notice as creditor without consent of the Crown representative—Immunities of such Chief—Jurisdiction of Court—Validity of adjudication—Right of appeal—Code of Civil Procedure (Act V of 1908), s. 86—Provincial Insolvency Act (V of 1920), ss. 5, 12, 18, 19(2), 75.*

Per curiam. An adjudication order made by the Insolvency Court on notice to a Ruling Chief, who was the creditor and was made a party on the application of the debtor without the consent of the Crown representative, is valid.

The rule relating to the immunity of a Ruling Chief from being sued as embodied in s. 86 of the Code of Civil Procedure is not a rule of procedure as contemplated by s. 141 of the Code.

A party has a right of appeal under s. 75 of the Provincial Insolvency Act against a decision of the Insolvency Court on an issue of jurisdiction even though he does not appeal against the final order of adjudication.

Harman v. *Official Receiver* (1) referred to and relied on.

Per NASIM ALI J. Section 86 of the Code of Civil Procedure in terms applies only to suits which commence with a plaint. The provisions of ss. 12 and 18 of the Provincial Insolvency Act do not convert an insolvency petition into a plaint.

By virtue of s. 5 of the Provincial Insolvency Act read with s. 141 of the Code of Civil Procedure all the provisions of the Code relating to suits are not attracted to insolvency proceedings.

Per RAU J. It may well be that there are proceedings other than ordinary suits to which the provisions of s. 86 of the Code ought to be applied, *e.g.*, divorce proceedings which are commenced by a petition.

Statham v. *Statham* (2) referred to.

But insolvency proceedings in which a Ruling Chief is a creditor are distinguishable. In such proceedings it cannot be said that the Chief himself is directly subjected to any form of legal process. There is no breach

*Civil Revision, No. 1079 of 1939, against the order of H. G. S. Bivar, District Judge of Burdwan, dated June 29, 1939, reversing the order of Jyoti Prasad Banerji, Subordinate Judge of Asansol, dated April 25, 1937.

(1) [1934] A. C. 245. (2) [1912] P. 92.

of his immunity when a right, which, if it were alive, could only be exercised by the Ruling Chief himself invoking the jurisdiction of the Courts and thereby submitting to that jurisdiction, is asked to be exercised now by proving the debt before the Insolvency Court.

CIVIL RULE obtained by the insolvent under s. 115 of the Code of Civil Procedure.

The facts of the case are sufficiently stated in the judgments and the arguments in the judgment of Rau J.

Bankim Chandra Mookherjee and *Mukti Pada Chatterjee* for the petitioner.

S. M. Bose and *Panna Lal Chatterjee* for the opposite party.

Cur adv. vult.

NASIM ALI J. On September 1, 1938, the petitioner, hereinafter referred to as the debtor, filed a petition in the Court of the Subordinate Judge of Asansol for being adjudicated insolvent under the provisions of the Provincial Insolvency Act. In this petition the opposite party, who is a Ruling Chief, hereinafter referred to as the creditor, was stated to be his only creditor to whom he was indebted to the extent of Rs. 90,102-2-10, on account of a decree for rents and taxes in respect of certain houses in the town of Calcutta obtained by the opposite party against him on the Original Side of this Court in Suit No. 1632 of 1932. Notice of this insolvency petition was given to the creditor in the manner prescribed by rules made under the Provincial Insolvency Act. On November 14, 1938, the creditor appeared and applied for time to file his objections. This application was allowed and the creditor was given time till December 5, 1938, to file his objections. The creditor, however, did not do this on that date and the case was adjourned thrice in order to enable him to file his objections. On January 24, 1939, the creditor filed his objection stating *inter alia*, that

1939

Madan Lal Jhun Jhun Walla
v.
Reza Ali Khan.

Nasim Ali J.

the Court has no jurisdiction to try the proceeding and that he was not made a party in the proper way. The advocate for the creditor on that date asked the Subordinate Judge to try the issue of jurisdiction first. The Subordinate Judge, thereupon, fixed February 7, 1939, for the hearing of this matter. On this last mentioned date, he heard the parties and on February 9, came to the conclusion that the insolvency petition could not proceed, as it was filed without the consent of the Governor-General in Council under s. 86(*l*) of the Code of Civil Procedure. On March 7, 1939, the debtor applied for review of this decision. Notice of this application was given to the creditor. On April 25, 1939, the learned Subordinate Judge came to the conclusion that the insolvency petition was maintainable without the previous consent of the Governor-General in Council and adjourned the case to May 22, 1939, for hearing on the merits. On May 22, 1939, the Subordinate Judge found that the debts of the debtor exceeded Rs. 500 and that he was unable to pay his debts. He, accordingly, made the usual order of adjudication. On May 24, 1939, the creditor appealed to the District Judge of Burdwan against the decision of the Subordinate Judge dated April 25, 1939. He, however, did not appeal against the order of adjudication made on May 22, 1939. On June 29, 1939, the District Judge allowed the appeal and dismissed the insolvency proceedings, as he was of opinion that s. 86 of the Code was a bar, in view of the fact that the previous consent of the Crown representative was not taken. On July 14, 1939, the debtor obtained the present Rule for revision of this order by this Court under s. 115 of the Code.

The reasons given by the learned District Judge in support of his decision are:—

(a) The insolvency petition is to be taken as a plaint in view of the provisions of ss. 18, 19(*2*) and 5 of the Provincial Insolvency Act:

and (b) The prayer of the debtor for being adjudicated an insolvent amounts to a declaration that the debtor was unable to pay his debts and that they would be extinguished after the declaration of such dividends as the receiver declared.

Section 86 of the Civil Procedure Code, so far as it is relevant for the purpose of the present Rule, as amended by the Government of India (Adaptation of Indian Laws) Order, 1937, is in these terms:—

"Any such Prince" (Sovereign Prince) "or Chief" (Ruling Chief) "and any ambassador or envoy of a foreign State, may, in the case of the Ruling Chief of an Indian State with the consent of the Crown Representative, certified by the signature of the Political Secretary, and in any other case with the consent of the Central Government, certified by the signature of a Secretary to that Government, but not without such consent, be sued in any competent Court."

This section in terms applies only to suits. The expression "suit" has not been defined in the Code. By s. 26 of the Civil Procedure Code, every suit is to be instituted by the presentation of a plaint or in such other manner as may be prescribed. Excepting the presentation of a plaint, no other mode of instituting suits has yet been prescribed. A proceeding that does not commence with a plaint is, therefore, not a suit. An insolvency proceeding is started not by the presentation of a plaint but by the presentation of a petition. By s. 12 of the Provincial Insolvency Act, every insolvency petition is to be in writing and is to be signed and verified in the manner prescribed by the Civil Procedure Code, 1908, for signing and verifying plaints. Section 18 of this Act provides that the procedure laid down in the Code of Civil Procedure, 1908, with respect to the admission of plaints, shall, so far as it is applicable, be followed in the case of insolvency petitions. These provisions, in my opinion, do not convert an insolvency petition into a plaint. They simply make some specific provisions in the Code relating to plaints applicable to insolvency petitions.

1939

Madan Lal Jhun Jhun Walla
v.
Reza Ali Khan.

Nasim Ali J.

Section 19(2) of the Provincial Insolvency Act simply speaks of a notice of an order to the creditor and not of a summons on the defendant.

By s. 5 of the Insolvency Act, the insolvency Court, subject to the provisions of that Act, is given the same powers and is required to follow the same procedure as it has and follows in the exercise of Original Civil Jurisdiction.

Section 141 of the Code lays down that the procedure provided in the Civil Procedure Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

If, by the combined operation of these two last mentioned sections all the provisions of the Code relating to suits are to be attracted to insolvency proceedings, the provisions of the Insolvency Act, making certain specific provisions of the Code applicable to insolvency proceedings, would be wholly redundant. The Insolvency Act authorises the insolvency Court to give notice of the date of the hearing of the insolvency petition to all creditors and debtors, irrespective of the question whether they are Sovereign Princes or Ruling Chiefs. The rule relating to the protection of Sovereign Princes and Ruling Chiefs from being sued as embodied in s. 86 of the Civil Procedure Code is not, in my opinion, a rule of procedure as contemplated by section 141 of the Code.

I, accordingly, make the Rule absolute and set aside the order of the District Judge dated June 20, 1939.

The petitioner is entitled to his costs. Hearing fee three gold mohurs.

Rau J. The petitioner, who has obtained this Rule, was adjudged an insolvent by the Subordinate Judge of Asansol on May 22, 1939, upon his own petition, the sole creditor mentioned in the petition

1939

Madan Lal Jhun Jhun Walla
v.
Reza Ali Khan.

Rau J.

being the opposite party, who is the Ruler of the State of Rampur. Before passing the final order of adjudication, the Subordinate Judge decided a preliminary point relating to jurisdiction. At first, on February 9, 1939, he appears to have taken the view that the petition could not proceed without a certificate under s. 86 of the Code of Civil Procedure, since the Ruler of Rampur was a Sovereign Prince or Ruling Chief within the meaning of that section. Later, on April 25, 1939, the Subordinate Judge reviewed this decision and held that the petition could proceed without any certificate. He, accordingly, proceeded with the hearing of the petition and, as already stated, on May 22, 1939, made the order of adjudication. Two days later, *i.e.*, on May 24, 1939, the Ruler preferred an appeal to the District Judge of Burdwan against the Subordinate Judge's order of April 25, 1939, on the point of jurisdiction. The District Judge allowed the appeal, holding that, in the absence of a certificate under s. 86 of the Code of Civil Procedure, the Subordinate Judge had no jurisdiction. It is against this order of the District Judge that the present Rule is directed.

A preliminary point, which the advocate for the petitioner has taken, may first be disposed of. It will be seen that there has been no appeal against the order of adjudication itself; the Ruler of Rampur appealed only against the Subordinate Judge's decision on the point of jurisdiction, although, at the time the appeal was preferred, the order of adjudication had already been made. The limitation for appeal against the order of adjudication has already expired and, accordingly, it is contended by the advocate for the petitioner that the order of adjudication has already become final and that, in the circumstances, the decision of the Subordinate Judge on the preliminary issue of jurisdiction must necessarily stand. Counsel for the Ruler contends, on the other hand, that under s. 75(*1*) of the Provincial Insolvency Act (V of 1920) he has a right, as a person

1939

Madan Lal Jhun Jhun Walla v. *Reza Ali Khan.*

Rau J.

aggrieved by the decision on the point of jurisdiction, to appeal against that decision and was under no obligation to appeal only against the final order of adjudication. He argues that if he succeeds in his contention that the proceedings were without jurisdiction, the order of adjudication must necessarily become a nullity.

I think this contention is correct. The relevant portion of s. 75(*1*) of the Act provides that any creditor aggrieved by a decision come to in the exercise of insolvency jurisdiction by a Court subordinate to a District Court may appeal to the District Court. Now, whatever may be the position under this section in regard to interlocutory decision in general, it seems to me that in regard to a decision on so fundamental an issue as that of jurisdiction it does confer a right of appeal. Speaking generally and not with reference to this particular case, there is no reason why a party should be compelled to wait for the proceedings to terminate in a final order if he can show at an early stage that they are without jurisdiction and thereby put an immediate end to them. In this particular case it so happens that the Subordinate Judge had made the order of adjudication two days before the creditor appealed to the District Judge on the question of jurisdiction, but if the right to appeal on the question of jurisdiction exists, as I have endeavoured to show that it does exist, the fact that the final order had already been made does not take it away.

In a recent case before the House of Lords, *Harman* v. *Official Receiver* (1), it appears to have been unanimously held that if an order was without jurisdiction, and, therefore, a complete nullity, the appellate Court had no jurisdiction to deal with it. In view of this pronouncement, an appellant who seeks to attack an order on the ground of want of

(1) [1934] A. C. 245.

jurisdiction may well prefer, whenever possible, not to attack the order itself, but rather to attack the antecedent decision on the question of jurisdiction. In the present case, such a course is made possible by the language of s. 75(*1*).

I now pass on to the other questions raised. The main question for consideration is whether s. 86 of the Code of Civil Procedure operates as a bar to the insolvency proceedings initiated by the petitioner's petition. Section 86 of the Code, so far as it is relevant for our present purposes, provides that any Ruling Chief of an Indian State may with the consent of the Crown Representative, but not without such consent, be sued in any competent Court. The word used in the section is "sued". In the present case there has been no "suit" strictly so called, but it is contended on behalf of the Ruler that s. 141 of the Code makes the same rule applicable to proceedings other than suits and, therefore, to insolvency proceedings. This section states that the procedure provided in the Code in regard to suits shall be followed, *as far as it can be made applicable*, in all proceedings in any Court of Civil jurisdiction. I shall assume for the moment that directly by virtue of its own terms or indirectly by virtue of s. 5(*1*) of the Provincial Insolvency Act, s. 141 of the Code governs insolvency proceedings. The question nevertheless arises whether the provisions of s. 86, which, as already stated, apply in terms only to suits, can properly be made applicable to insolvency proceedings of the kind with which the present Rule is concerned.

To answer this question, it is necessary to consider the *raison d' etre* of s. 86 of the Code. That section is obviously a statutory adaptation to Indian conditions of certain well-known conventions of international law. The exact nature of these conventions has been authoritatively described in a

1939

Madan Lal Jhun Jhun Walla v. *Reza Ali Khan.*

Rau J.

recent case before the Privy Council, *Chung Chi Cheung* v. *The King* (1). That case was concerned with the immunities of foreign ships, but their Lordships have incidentally discussed the whole doctrine of ex-territoriality. The view which they have accepted is that, in accordance with the conventions of international law, the territorial sovereign of every State grants to foreign sovereigns certain immunities. Some of them are well settled; others are uncertain. When the local Court is faced with a case where such immunities come into question, it has to decide whether, in the particular case, the immunity exists or not. One of the immunities regarded as well settled is that the foreign sovereign himself and his property are not to be subjected to legal process by the Courts of the territorial sovereign.

The immunity in regard to property referred to in the foregoing summary has to be understood in the light of the House of Lords' decision in *Compania Naviera Vascongado* v. *Steamship Cristina* (2). It would appear from the observations made in that case that the immunity in respect of property, so far as it can be regarded as well settled, is only in respect of the public property of the foreign State and does not extend to property not dedicated to public uses. (See, in particular, Lord Maugham's observations at pp. 519, 520). Property in this context would seem to include debts due to the State: *Duff Development Company, Limited* v. *Government of Kelantan* (3), where a garnishee order attaching a debt due to the Government of Kelantan from the Crown Agents for the Colonies was set aside by the Court of Appeal.

These are the general principles which have to be borne in mind in considering how far the provisions of s. 86 of the Code of Civil Procedure can be made

(1) [1939] A. C. 160. (2) [1938] A. C. 485, 519, 529.
(3) [1924] A. C. 797, 799.

1939

Madan Lal Jhun Jhun Walla v. *Reza Ali Khan.*

Rau J.

applicable to proceedings other than suits. Once it is held that they are properly applicable, no question of waiver by the foreign soveriegn or other person entitled to the immunity can arise under the Indian law; for, according to the Privy Council decision in *Gaekwar Baroda State Railway* v. *Hafiz Habib-ul-Haq* (1). the immunity arising under s. 86 of the Code is not waivable.

Now it may well be that there are proceedings other than ordinary suits to which the provisions of s. 86 of the Code ought to be applied; *e.g.*, divorce proceedings in which it is sought to make a Ruling Chief a co-respondent, as in *Statham* v. *Statham* (2). Indeed, divorce proceedings, though commenced by a "petition" and not by a "plaint", are often referred to as suits, though not ordinary suits. (Compare ss. 45-49 of Indian Divorce Act, 1869). But our attention has not been called to any case where it has been held that the immunity of a foreign sovereign extends to bar insolvency proceedings initiated by a petitioning debtor, merely on the ground that the foreign sovereign is amongst the creditors.

One of the rules enunciated by Dicey in his Conflict of Laws is that the Court has, on a bankruptcy petition presented by a debtor alleging that the debtor is unable to pay his debts, jurisdiction to adjudge the debtor bankrupt. The rule is deliberately stated without any qualification and amongst the illustrations to the rule is mentioned a hypothetical case where an Englishman domiciled in England incurs debts in France and presents in England a petition alleging that he is unable to pay his debts. In such a case, it is said, the Court has jurisdiction to adjudge the debtor a bankrupt. In other words, the fact that the creditor is outside the jurisdiction of the insolvency Court is not regarded

(1) I. L. R. [1938] All. 601; L. R. 65 I. A. 182.

(2) [1912] P. 92.

1939

Madan Lal Jhun Jhun Walla v. *Reza Ali Khan.*

Rau J.

as a bar to an adjudication order. It appears to follow by analogy that an order of adjudication is not incompetent merely because one of the creditors is a foreign sovereign not amenable to the jurisdiction of the Court. It may be observed that Dicey rests his illustration to the rule upon ss. 3 and 6 of the English Bankruptcy Act, sections which are closely analogous to s. 7 of the Provincial Insolvency Act in India, so that the statutory position in this regard in both countries is substantially the same. In such proceedings it cannot be said that the sovereign himself is directly subjected to any form of legal process. It is true that notice of the hearing of the petition is given to him, vide s. 19(2) of the Provincial Insolvency Act, so that if he wishes to intervene, he can do so and appear at the hearing. If he does not wish to intervene, he is under no obligation to do so and the hearing proceeds. The mere issue of a notice of this kind can hardly be described as legal process. In the case *Boger* v. *Boger* (1), which was decided at a time when it was considered that a foreign co-respondent, resident and domiciled abroad, was not subject to the jurisdiction of the divorce Court (unless he consented), the Court nevertheless directed that notice of the proceedings should be given to him so that he might come in if he so desired. The implication is that the mere giving of a notice or intimation is not the same thing as exercising jurisdiction or subjecting to legal process.

It does not appear from the materials before us that the debt involved in the present insolvency proceedings was the public property of the State of Rampur. All that appears is that the debt was due upon a compromise decree in a suit for rent and taxes in respect of certain premises in Calcutta leased out by the Ruler of Rampur to the debtor. It is true that in the Privy Council case of the *Advocate General of Bombay* v. *Amerchund*, it was held that

(1) [1908] P. 300.

no distinction could be drawn between the public and the private property of an absolute Sovereign like the Peshwa. See the footnotes at pp. 329, 330 of *Elphinstone* v. *Heerachund Bedreechund* (1). But this view appears to have been modified in a subsequent Privy Council case, *Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (2), where it was said that it was very probable that such a distinction existed, the private property of the Ruler going to his heirs under his personal law and the public property to the succeeding Ruler.

It may, however, be argued that though neither the Ruler nor any public property of his State is directly subjected to legal process in these insolvency proceedings, nevertheless there is an indirect attack upon his personal immunity, inasmuch as their effect is that (a) upon the order of adjudication, all the creditors are required to tender proof of their respective debts and (b) upon the order of discharge, the insolvent is released from all debts provable under the insolvency law, subject to certain exceptions which are not relevant here. (See ss. 33 and 44 of the Provincial Insolvency Act). The necessary result, in a case where a foreign sovereign is amongst the creditors, is indirectly to subject him to legal process on pain of the debt being extinguished. The Court in fact says to the creditor, "You "must appear and prove your debt or else lose it". The effect of such a proceeding, it may be said, on the analogy of the observations in *The Parlement Belge* (3), is to call upon the foreign sovereign either to sacrifice his property or his independence; and to place him in that position is virtually a breach of his personal immunity from jurisdiction.

Such an argument, however, if accepted would have the result of extending the foreign sovereign's immunity not only to the public property of the

(1) (1830) 1 Knapp. 316 ; 12 E. R. 340. (2) (1859) 7 M. I. A. 476.
(3) (1880) 5 P. D. 197, 219.

1939

Madan Lal Jhun Jhun Walla v. *Reza Ali Khan.*

Rau J.

State but to all his property—an extension for which, as I have already stated, there is no sufficient warrant in authority. Moreover, the argument appears to lose sight of the fact that the so-called sacrifice demanded in insolvency proceedings is not of the debt itself but rather of the right to recover it by action after the insolvent is discharged. This is a right which if it were alive could only be exercised by the creditor himself invoking the jurisdiction of the Courts and thereby submitting to that jurisdiction. Therefore in calling upon a foreign sovereign to prove his debt in an insolvency proceeding, the Court in effect says to him "If you wish to "invoke the jurisdiction of the Courts at all, do so "now and prove your debt. You will not be able to "invoke that jurisdiction after the debtor has been "discharged". There is, therefore, no "sacrifice of "independence" demanded.

The case is akin to the class of cases where a Court, being called upon to distribute a fund in which a foreign sovereign or State may have an interest thinks it expedient and proper, in order to a due distribution of the fund, to make that sovereign or State a party. Such a procedure is not regarded as a breach of the sovereign's immunity. *Duke of Brunswick* v. *King of Hanover* (1). Proceedings for the winding up of a company in which a foreign Government is interested furnish another analogy. Such proceedings are not considered a breach of immunity. In re *Russian Bank for Foreign Trade* (2).

For these reasons I am of opinion that the provisions of s. 86 of the Code cannot be made applicable within the meaning of s. 141 of the Code to insolvency proceedings merely by reason of the fact that a sovereign Prince or Ruling Chief is one of the creditors. The next question that arises is as to the

(1) (1844) 6 Beav. 1 (39); 49 E. R. 724 (739). (2) [1933] 1 Ch. 745, 769.

effect of s. 5(*1*) of the Provincial Insolvency Act, which provides that the Court in regard to proceedings under the Act shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction. It is argued on behalf of the Ruler in this case that since in a suit against the Ruler the Court has no power to proceed in the absence of the certificate mentioned in section 86 of the Code, the Court's powers in insolvency proceedings are similarly limited. But as has just been pointed out, the Court's powers in the exercise of original civil jurisdiction are not always subject to s. 86 of the Code; they are so subject in the case of suits, by the terms of s. 86 itself; but not in the case of proceedings other than suits, unless the provisions of s. 86 can be made applicable thereto. It has already been pointed out that the provisions of s. 86 of the Code cannot properly be made applicable to insolvency proceedings initiated by a petitioning debtor. This argument also, therefore, fails and the Rule must accordingly be made absolute with costs.

Rule absolute.

A. A.