APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

1921, January 26.

BOLISETTI MAMAYYA, FIFTH RESPONDENT, APPELLANT,

v.

KOLLA KOTTAYYA, KOMMURRI RAMAYYA RICE MILL COMPANY, PETITIONERS, RESPONDENTS.*

Provincial Insolvency Act (III of 1907), ss. 4, 5 and 47—Civil Procedure Code (Act V of 1908), O. I, r. 3—Single petition by creditor to adjudicate debtors as insolvents—Debtors, members of a joint Hindu family—Joint debt—Joint acts of insolvency—Single petition against joint debtors, whether maintainable—Multifariousness in suits—Test of.

The members of a joint Hindu family can be adjudicated insolvents on a single petition by a creditor, if they are liable on a joint debt and have been guilty of a joint act or acts of insolvency.

The test is whether, if the application were treated as a suit, the suit would be bad for multifariousness, that is, for misjoinder of different causes of action against different defendants; if no such objection can be successfully advanced, a single application for adjudication is maintainable.

Sarada Prasad Ukil v. *Ram Sukh Chandra*, (1905) 2 C.L.J., 318, dissented from.

APPEAL against the order of F. A. COLERIDGE, the District Judge of Guntūr, in I.P. No. 59 of 1918.

The material facts are set out in the judgment.

P. Narayanamurti for appellant.

B. Somayya, A. Satyanarayana and *K. Kamanna* for respondents.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—These two appeals have arisen out of an order of the District Judge, Guntūr, adjudicating a father and two of his sons styled respondents Nos. 1, 2 and 3 as insolvents. The petitioner in insolvency was a creditor of the father and may also be treated as the creditor of his three sons (respondents Nos. 2, 3 and 4) for the purpose of these appeals. He applied for adjudicating the father and his major sons the

* Appeal against Order No. 96 of 1920.

second and the third respondents as insolvents and did not pray that the minor fourth respondent should also be made an insolvent. He alleged in his petition vaguely "that the respondents" transferred their immoveable properties under six documents, Exhibits A to F, September and November 1918 to their relations and friends either nominally without consideration or with a view to fradulently prefer the alienees who were their relations and friends and that therefore the "respondents" have committed acts of insolvency within the meaning of clauses (b) and (c) of section 4 of the Provincial Insolvency Act (III of 1907.) As he prayed only for respondents 1 to 3 to be adjudicated insolvents I shall take it that the above allegations against "respondents" refer to respondents 1 to 3 alone and that respondents 1 to 3 alone are alleged to have transferred their immoveable properties and thus committed acts of insolvency. The learned District Judge adjudicated the first three respondents to be insolvents accordingly. Appeal No. 96 is preferred by the fifth respondent who is one of the three alienees mentioned in the application. Respondents No. 3 and 4 are the two appell ants in the other Appeal No. 138. It is admitted by the learned vakil for respondents 3 and 4 (in the lower Court) who are the appellants in 138, that the inclusion of the fourth respondent as one of the appellants in that appeal was a mistake as he was not adjudicated an insolvent by the District Court and (as I have said before) even the applying creditor did not pray for the fourth respondent also being adjudicated an insolvent.

Section 5 of the Provincial Insolvency Act provides that an "Insolvency petition may be presented either by a creditor or by the debtor." Next section 6 makes a distinction between the circumstances which entitles a debtor to present an application and the circumstances which entitle a creditor to make an application. Clause (3) of section 6 details the conditions which enable the debtor to present the Insolvency petition, and clause (4) the condition similarly entitling the creditor. Further, between the contents of the petitions respectively presented by a debtor or a creditor a distinction is made in section 11, clauses (1) and (2). After the presentation of the petition the Court is directed to fix a date for hearing the petition and on the date fixed for the hearing of the petition or on an adjourned date the

MAMAYYA v. K. R. RICE MILL CO.

SADASIVA AYYAR, J.

Court is directed to require "proof" (that is, I take it from the person presenting the petition whether debtor or creditor) that three requisites have been complied with, requisite (*a*) being that the creditor or the debtor, as the case may be, is entitled to present the petition, and requisite (*c*) being that the debtor has committed the act of insolvency alleged against him. I take it that the requisite (*c*) refers only to the petition by a creditor and not to the petition by the debtor, for so far as the debtor is concerned, it has been held that the presentation of the petition itself by a debtor is an act of insolvency on his part and hence there is no meaning in requiring proof of requisite (*c*) in the case of an application made by the debtor himself.

The two reasons given by the District Judge for adjudicating three of the debtors as insolvents are (1) that the first respondent himself filed an independent petition to be declared an insolvent and (2) that he admitted he had alienated properties under six documents within three months before the date of the petition. I take it that the reference to the period of three months before the date of the petition was made having in mind the provision of section 6, clause (4) (*c*), which says that the act of insolvency on which the petition is grounded must have occurred within three months before the presentation of the petition.

Now an act of insolvency is defined in section 4. Two of the acts which fall under that definition are (1) a transfer of the property of the debtor with intent to defeat or delay his creditors (clause *b*) and (2) a transfer which would be void as a fraudulent preference if he were adjudged an insolvent (clause *c*). Section 37 (1) of the Act provides that a transfer by a person unable to pay his debts in favour of a creditor with a view of giving that creditor a preference over other creditors shall, if the petition on which he is adjudged an insolvent is presented within three months after the date of the transfer, be deemed fraudulent and void (that is, that such a transfer would be a fraudulent preference and an act of insolvency, reading section 37 with section 4). The District Judge therefore must have intended that all or some of these six alienations were fraudulent preferences or that at least one of them was intended as a fraudulent preference. He does not however expressly say so. He has not also clearly

indicated whether he considers all the six alienations to be fraudulent preferences or only a less number, and if so which of them.

As I stated in the beginning, the allegation in the petition seems to be that all the respondents Nos. 1 to 3 committed joint acts of insolvency. It is, however, clear on a perusal of Exhibits A to F that it is only the first respondent that executed these transfers, and assuming that all, or some of them are fraudulent preferences, or at least one of them is such, there is no proof found among the records to establish that respondents Nos. 2 and 3 were guilty of any act or acts of insolvency. The second respondent has not appealed but as the fifth respondent has appealed against the entire order of the District Judge, I would modify the Lower Court's order by dismissing the application of the petitioning creditor so far as the second and third respondents in the lower Court are concerned.

Then, we have the case of the first respondent in the lower Court to consider. He, again, has not appealed but the fifth respondent who is an alienee of some of his properties has attacked the first respondent's adjudications on several grounds and he is entitled to contest the matter. His contentions may be stated mostly in his own words thus:

"(1) The learned District Judge should have given opportunity to the fifth respondent to adduce evidence in support of the alienations in his favour."

"(2) There is no finding that the first respondent committed an act of insolvency."

(I take it that he means that there is no proof that there was a fraudulent preference in favour of the fifth respondent or either of the other two alienees.)

"(3) The lower Court failed to see that a joint application against a number of persons who are members of a joint Hindu family to declare them insolvents is not maintainable and a declaration cannot be asked for in one petition against several joint debtors."

I shall take the last point first. On general principles of the law governing procedure, I do not see why a single application should not be filed against the members of a joint Hindu family by a petitioning creditor if those members have been guilty of a joint act or joint acts of fraudulent preference. Section 47 of the Provincial Insolvency Act directs the Court to follow the

MAMAYYA v. K. R. RICE MILL CO.

SADASIVA AYYAR, J.

same procedure in insolvency matters as is followed in civil suits. Now, a suit can be maintained by a plaintiff against several defendants where the facts constituting the cause of action are one and the same against all the defendants (see rules in Order 1 of the Civil Procedure Code). Mr. Narayanamurti, however, relied on two Calcutta decisions, *Sarada Prasad Ukil* v. *Ram Sukh Chandra*(1) and *Kali* v. *Hari*(2), in support of his contention.

Kali v. *Hari*(2) merely follows what the learned Judges who decided that case considered to be the principle of *Sarada Prasad Ukil* v. *Ram Sukh Chandra*(1) though they admit that the latter case was decided under Chapter XX of the Code of Civil Procedure and not under the Provincial Insolvency Act. Turning to *Sarada Prasad Ukil* v. *Ram Sukh Chandra*(1), Mr. Justice MUKERJEE, who delivered the judgment of the Bench in that case, merely points out several inconveniences which would arise in many cases from entertaining a single application directed against several persons to adjudicate them insolvents and the inconveniences of holding a single trial on such a petition. But I think the learned Judge (with all respect) ignores that there would be grave inconveniences also in many cases in holding separate trials where the debt due to the petitioning creditor is a joint debt of all the persons sought to be adjudicated insolvents and where the latter have been guilty of a joint act or joint acts of insolvency. The fact that section 8 of the Insolvency Act provides for consolidation on the ground of convenience even in cases where distinct petitions are obligatory shows that the argument on the ground of inconvenience should not be given too much weight. As I stated, the test is whether if the application was treated as a suit, that suit would be bad for multifariousness, that is, for misjoinder of different causes of action against different defendants. If no such objection can be successfully advanced a single application is, in my opinion, maintainable in that case. Of course, we should confine ourselves to the allegations in the petition to find out whether the objection of multifariousness is sustainable. In the present case, on the allegations in the creditor's petition as it stands, the objection of multifariousness cannot be sustained. That ground of appeal is therefore rejected.

---

(1) (1905) 2 C.L.J., 318. (2) (1920) 31 C.L.J., 206.

Now, as regards the two other contentions the learned District Judge, as pointed out already, might have distinctly stated whether he considers all of these alienations as fraudulent preferences or whether he considers only one or a few of them as such, and if so, which of them. No doubt it lies upon the petitioning creditor to prove that there was at least one alienation which was made with the object, on the part of the insolvent, to give a fraudulent preference. As pointed out by my learned brother in *The Official Assignee, Madras* v. *T. B. Mehta & Sons*(1), it is not sufficient to prove that the transfer had the effect of giving preference to a creditor; it must be proved further that there was the view or intention to give that creditor a preference. Such a proof was sought to be given by the petitioning-creditor in this case by examining the first respondent as his witness. That first respondent admits that all the three alienees were his relations and that they have been preferred to other creditors. Without deciding that all the six alienations were meant as fraudulent preferences I am satisfied that there is sufficient material for a finding that at least one of these was a fraudulent preference made with a view to prefer the alienee under it, and so I see no reason to interfere with the order of the District Judge adjudicating the first respondent as an insolvent.

As regards the contention that the appellant was not given sufficient opportunity to prove that the first respondent was not guilty of any fraudulent preference, I do not think that he has established that he was so denied such an opportunity by the lower Court.

As regards the provision of the English Act quoted in the Calcutta cases, already referred to, I wish to add a few observations. That provision corresponds to Order 30, rule 1 of the Code of Civil Procedure, which says:

"any two or more persons claiming or being liable as partners and carrying on business in British India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were at the time of the

(1) (1919) I.L.R., 42 Mad., 510.

MAMAYYA v. K. R. RICE MILL CO.

SADASIVA AYYAR, J.

accruing of the cause of action partners in such firm, to be furnished and verified in such manner as the Court may direct."

It was never considered that the existence of this provision, enabling a person to sue a firm in the firm's name, had any effect upon the right of the plaintiff who has a joint cause of action against several persons not constituting a trading firm to bring a single suit against them. That being so, I cannot see how that provision has any relevancy in the consideration of the question whether a single petition is permissible by a creditor against two or more joint debtors guilty of a joint act of insolvency.

In the result the order so far as it adjudicates the first respondent an insolvent is confirmed but it is set aside as regards the adjudication of respondents 2 and 3.

NAPIER, J.

NAPIER, J.—I agree. I only wish to add a few words on one point out of deference to the learned Judges of the High Court of Calcutta who decided *Kali* v. *Hari*(1). The point taken by the appellant is that a joint application will not lie against more than one person, even on an allegation of joint liability and joint acts of insolvency. The contention certainly receives support from the judgment above referred to; but for the reasons given by my learned brother I am unable to agree with it. The learned Judges say:

> "There is no doubt provision in the English Bankruptcy Act that any two or more persons being partners or any person carrying on business under a partnership name may take proceedings or be proceeded against under this act in the name of the firm,"

and I gather that the learned Judges are of opinion that if it was not for that provision, it would not be possible to take any proceedings against two persons who are held to be jointly liable as partners. With the greatest deference I do not think that the section says anything of the sort. What the section says is that any two or more persons being partners may be proceeded against in the name of the firm, that is to say, the section presumes that a suit or proceedings may be taken against them in the name of the firm itself as is done in a suit against members of a partnership. There is no definite provision saying that proceedings might be taken against such persons

(1) (1920) 31 C.L.J., 206.

jointly and I have no doubt that it was never considered necessary to make any such specific provision. The judgment in that case, as my learned brother pointed out, was founded on a previous judgment under the Code of Civil Procedure and I see no reason why it should be necessary to import into this Act anything arising out of the Code of Civil Procedure, even if such a contention could be justified on the true construction of the Code.

As for inconvenience, it seems to me that that question is practically resolved by the provision which says that where a creditor has actually applied in separate petitions against persons jointly liable the Court has power to consolidate the proceedings for the convenience of all parties. I quite agree that there must be a cause of action which is joint to all the persons who are sought to be adjudicated and that it would not be sufficient to allege that persons were joint debtors but had committed separate acts of insolvency, but where the debt and the acts of insolvency are joint, I have no doubt that a petition will lie against persons alleged to be jointly liable to the creditor.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Ramesam.

UMMATHU (PLAINTIFF), APPELLANT,

v.

PATHUMMA AND OTHERS (DEFENDANTS NOS. 1 TO 4), RESPONDENTS.*

1921, February 21.

Limitation Act (Indian) (IX of 1908), ss. 4 and 14—Suit for dower—Period of Limitation expiring during Christmas holidays—Suit filed in a Subordinate Judge's Court, on its Small Cause side on the re-opening day—Plaint, returned for want of jurisdiction on the Small Cause side—Plaint presented as an Original Suit in the same Court on its regular side—Limitation, bar of.

Where the period limited for the institution of a suit for dower expired on a day when the Court was closed for the Christmas holidays, and the suit was instituted on the re-opening day as a Small Cause suit in the Court of a Subordinate Judge on its Small Cause side and on the plaint being returned after some days for want of jurisdiction it was filed on the next day in the

* Second Appeal No. 1105 of 1920.