1937

JAMIL-UN-NISSA v. MUHAMMAD ZIA

Jai Gobind Tewari (1), pointed out that even though it be found that the land built on has been in the exclusive possession of the person erecting the building, a mandatory injunction should be granted where the erection is of recent date and has been objected to from the beginning, the principle to be applied being whether the erection of the building is in keeping with the method of exclusive possession hitherto enjoyed by the co-owner. This case was approved of by another learned Judge of this Court in *Makhan Lal* v. *Sujan* (2). We therefore think that the defendants are not entitled to put up constructions of a permanent character on this land without the consent of the other co-sharers. The result therefore is that the suit of Muhammad Zia is dismissed against the defendants with costs in all courts. The claim of the other co-sharers for joint possession against the defendants is dismissed, but the claim for an injunction restraining the defendants from building any constructions of a permanent character on this land and for the demolition of the permanent constructions already put on the land is decreed. These co-sharers will bear their own costs and not be called upon to pay the costs of the defendants in their suit.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Bennet

1937 *February*, 19

PIARE LAL (OPPOSITE PARTY) *v.* MUHAMMAD SALAMATULLAH KHAN AND OTHERS (APPLICANTS)*

Provincial Insolvency Act (V of 1920), sections 17, 75—Civil Procedure Code, order XXII, rules 1, 3—Insolvent's appeal from order of adjudication—Death of insolvent pending appeal—Abatement—Heirs can continue appeal—Right survives—Maxim, Actio personalis moritur cum persona—*Provincial Insolvency Act, section 6(g)—Act of insolvency.*

*First Appeal No. 248 of 1934, from an order of M. B. Ahmad, District Judge of Shahjahanpur, dated the 26th of November, 1934.

(1) A.I.R., 1927 All., 709. (2) [1933] A.L.J., 510.

A debtor was adjudicated an insolvent upon a creditor's petition. He appealed against the order of adjudication but died pending the appeal. His heirs applied to be brought on the record in order to continue the appeal:

Held, that the right to contest the order of adjudication was not a purely personal right of the insolvent so that the appeal would abate on his death; the right survived in favour of his heirs, and they were entitled to be brought on the record and to continue the appeal.

The question of adjudication of a person as insolvent is not a matter purely personal to him which has no connection with his property. When a creditor applies for the adjudication of his debtor his principal aim is to realise his debts out of the assets of the debtor, which is not a matter concerning the person of the insolvent only. The maxim, *actio personalis moritur cum persona,* has not been applied and can not be applied to insolvency proceedings. Section 17 of the Provincial Insolvency Act also shows that the death of the debtor does not cause the proceedings to abate and the proceedings are continued. Again, section 75 of the Act expressly allows a right of appeal not only to the debtor but to every other person aggrieved by the decision. The order of adjudication was appealed against by the insolvent himself, and on his death his heirs wished to continue the appeal and to show that the order was incorrect; to hold that the appeal had abated would be to deprive them of their right to challenge the correctness of the order.

Where a debtor wrote to a creditor: "Be it known to you that your dunning me over and over for your money is entirely useless. I am now so much indebted that I can not pay off my debts. You do what you like:" it was *held* that this amounted to an act of insolvency within the meaning of section 6(*g*) of the Provincial Insolvency Act.

Dr. *N. P. Asthana,* for the appellant.

Mr. *L. N. Gupta,* for the respondents.

SULAIMAN, C.J., and BENNET, J.:—A preliminary objection is taken to the hearing of this appeal that this appeal has abated. The respondents had applied for the adjudication of Piare Lal as insolvent. The court adjudicated him an insolvent and Piare Lal appealed to this Court. During the pendency of the appeal Piare Lal died and his heirs have been brought on the record.

1937

PIARE LAL v. MUHAMMAD SALAMAT-ULLAH KHAN

It is contended on behalf of the respondents that the right to contest the order of adjudication was a personal right vested in Piare Lal, and that on his death the appeal abated.

The learned counsel for the respondents relies strongly on three cases of the Lahore High Court which no doubt to a certain extent support his contention. In *Hardhian Singh* v. *Sham Sundar* (1) it was held by a Division Bench of the Punjab Chief Court that under the provisions of the then Code of Civil Procedure an order made under section 351 was purely personal and on the death of an insolvent no one represented him for the purpose of maintaining an appeal against an order declaring him insolvent. No English cases were considered and the opinion was expressed simply on the general view that the right was a personal one and that no one could represent the insolvent after his death.

This case appears to have been followed by Sir SHADI LAL, C.J., and ZAFAR ALI, J., in *Narain Singh* v. *Gurbakhsh Singh* (2). The learned CHIEF JUSTICE following the ruling in *Hardhian Singh's* case (1) held that an appeal preferred against the adjudication of an insolvent abates on his death, as the right to sue does not survive within the meaning of order XXII, rule 4 of the Code of Civil Procedure. This case was of course followed by a learned single Judge of the Lahore High Court in *Attar Chand* v. *Mohammad Mobin* (3), where it was remarked that once the application of the creditors for adjudication had been dismissed, the debtor was wholly absolved from all manner of liability under the Insolvency Act, and on his death the liability did not survive so as to entitle the creditors to resurrect the case against his representatives.

On the other hand the Madras High Court in two cases has expressed a somewhat contrary opinion. In *Venkatarama Aiyar* v. *Official Receiver* (4) it was held that an application by a debtor for adjudicating himself

(1) Punj. Rec. 1888, p. 177.
(2) (1927) I.L.R., 9 Lah., 306.
(3) (1931) 135 Indian Cases, 196.
(4) (1927) I.L.R., 51 Mad., 344.

as an insolvent, filed while he was alive, could be continued and adjudication made even after his death; and in *Ramathai Anni* v. *Kanniappa Mudaliar* (1) it was held that section 17 of the Provincial Insolvency Act applies to the case of a debtor dying before the order of adjudication, whether the petition for adjudication was presented by the debtor or by a creditor, and an order of adjudication can be passed on the petition after the debtor's death. It may also be mentioned that in that case the insolvent had died in the trial court and his widow had been brought on the record as his legal representative and the creditor's petition was heard on the merits after overruling the widow's objection to be made a party. The appeal was also preferred by the widow and entertained by the Madras High Court, without any objection having been apparently raised on behalf of the respondent that she had no right to continue the matter.

It seems to us that the Madras view is in perfect consonance with the principles of English law. Section 17 of the Provincial Insolvency Act provides: "If a debtor by or against whom an insolvency petition has been presented dies, the proceedings in the matter shall, unless the court otherwise orders, be continued so far as may be necessary for the realisation and distribution of the property of the debtor."

The language of this section is almost similar to that of section 108 of the English Bankruptcy Act of 1883. In the case of *In re Walker* (2) it was held that where a debtor dies after a bankruptcy petition is presented, but before adjudication, the court should under section 108 of the Act adjudicate him a bankrupt and the order of adjudication should be gazetted and advertised in the ordinary way. It was never considered that the right was a purely personal right and the matter should abate on the death of the debtor. The case where the death took place even before the notice was served on the

(1) (1928) I.L.R., 51 Mad., 495. (2) (1886) 54 L.T., 682.

1937

PIARE LAL v. MUHAMMAD SALAMAT-ULLAH KHAN

debtor was, however, considered different because there was no provision for ordering substituted service in the case where the debtor was actually dead; see *In re Easy: Ex parte Hill and Hymans* (1). In *In re Hardy: Hardy* v. *Farmer* (2) the rule laid down in *Ex parte Sharp* (3), that where a debtor dies the proceedings in the matter shall unless the court otherwise directs be continued as if he was alive, was accepted. It was, however, remarked that the old section 108 could not be read as applying to a bankruptcy petition which had been dismissed, neither could it be applied to a case where the petition had been presented by a creditor but there had been no service during the debtor's lifetime. It was held that the construction put upon that section was a general one and there was no reasonable ground to say that the provisions of that section would not justify a continuance of the proceeding.

It seems to us that it is not correct to say that the question of adjudication is a purely personal matter which had no connection with the property of the deceased. When a creditor applies for the adjudication of his debtor, his principal aim is to realise his debts out of the assets of the deceased, which is not a matter concerning the person of the insolvent only. Similarly where a debtor applies to be adjudicated insolvent he intends to have his estate administered and debts paid up and the surplus if any restored to him and himself discharged from all further liability. Even in such a case it cannot be said that the matter is a purely personal one of the insolvent. The general rule of the common law of tort, *actio personalis moritur cum persona,* namely that the personal action dies with the person and in such a case death puts an end to the right of action, has not been applied and cannot be applied to bankruptcy proceedings. A creditor may be seriously prejudiced if it were to be held that the proceedings terminate automatically on the death of the debtor. He

(1) (1887) 19 Q.B.D., 538. (2) [1896] 1 Ch., 904.
(3) 34 W.R., 550.

might have applied for the adjudication shortly before the expiry of the period of limitation for his suit, expecting that he would recover his debts through the insolvency court, and the debtor might die after the expiry of the period of limitation. If the application is to abate automatically, the creditor would be left without any remedy. Again where an adjudication order has been passed, if the right to continue the proceeding does not survive, the result would be that the heirs of the debtor would be deprived of their remedy to challenge the order by way of appeal and to take other objections which might have been open to the debtor. We do not think that there is anything in the Provincial Insolvency Act which would justify the view that the death of the debtor or insolvent brings about a complete abatement of the proceeding and there is no right surviving to the heirs of the deceased.

Section 75 of the Provincial Insolvency Act expressly allows a right of appeal not only to the debtor but to every other person aggrieved by the decision. In the present case the order of adjudication had been appealed against by the insolvent himself, and on his death his heirs wish to continue the appeal and to challenge the propriety of the order on the ground that the order should not have been made. If we were to hold that the appeal has abated, the result would be that the heirs would be deprived of the right to challenge the order of adjudication. We find no justification for the view that this is the necessary consequence of the death of the debtor. With great respect we are unable to agree with the view expressed by the Lahore High Court.

We accordingly overrule the objection.

We now proceed to consider the merits of the appeal. The appeal is based on two grounds, that the debtor appellant has not committed an act of insolvency and that the debtor is able to pay his debts. The petitioning creditors were four in number and they held three decrees, one of 1928 amounting now to Rs.20,000, one of 1932 amounting to over Rs.4,000, and one of 1927

1937

PIARE LAL v. MUHAMMAD SALAMAT-ULLAH KHAN

amounting to Rs.2,000. The estate of Piare Lal, the alleged insolvent, is now in the hands of a receiver in a partition suit. It is true that for a certain period that estate was paying sufficient income for an allowance of Rs.1,200 per month to be paid to Piare Lal by the receiver, but owing to agricultural depression the income from the estate has declined and the learned District Judge is doubtful as to whether if all the property is sold it will be possible for the debts to be paid. In any case it is quite clear that at present there is no prospect of the debts being paid and the decrees are all lying outstanding and apparently nothing has been paid on these decrees. We are satisfied therefore that it has not been shown by the debtor that he will be able to pay his debts, under section 25 of the Insolvency Act.

Now as regards the alleged acts of insolvency the petition set out that a notice had been given by a registered post card to applicant No. 2 on the 4th September, 1933, that it was not possible for Piare Lal to pay his debts and that he was not going to pay it. The actual terms of this notice were that there were so many debts that he was not able to make payment and it was useless for the creditor addressed to continue to make demands and that he might do whatever he liked in the matter ("Be it known to you that your dunning me over and over for your money is entirely useless. I am now so much indebted that I cannot pay off my debts. You do what you like. But do not please worry me.") Argument was then made that the post card would not amount to an act of insolvency within the meaning of section 6(*g*). Section 6(*g*) requires: "if he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts". In *Crook* v. *Morley* (1) there was a case where a debtor sent to his creditors a letter saying: "Being unable to meet my engagements as they fall due, I invite your attendance at a certain place when I will submit a statement of my position for

(1) [1891] A C., 316.

your consideration and decision." That was held by the House of Lords to amount to an act of insolvency. We consider that the post card was almost parallel to that notice and therefore we consider that this post card did amount to an act of insolvency.

For these reasons we dismiss this appeal with costs.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Bajpai

LACHHMAN (DEFENDANT) *v.* LAL RATNAKAR SINGH (PLAINTIFF)*

1937
February, 25

Limitation Act (IX of 1908), article 32—Landlord and tenant—Abadi land—Sahan darwaza—*Tenant building on open land outside his house—Licensee—Suit for demolition and perpetual injunction—Limitation.*

A tenant, who has been using a piece of open land in front of his house in the village *abadi* as a sitting place and for the purpose of tying his cattle thereon, is, in the absence of proof that the land had been granted to him for building purpose or for any particular or specific purpose, nothing more than a licensee and has no right to build on that land. A suit by the zamindar against him for demolition and perpetual injunction is not governed by article 32 of the Limitation Act, but by article 120 or 144.

Article 32 of the Limitation Act is not applicable to a case where there is a mere license revocable at any time, as distinct from a legal right to remain in possession for a specific purpose. It is applicable to those cases only in which the injury complained of is the perverted user of the property by the defendant, who has the right to use it for a specific purpose, and the plaintiff seeks merely to get rid of the perversion. It has no application where the defendant's act really amounts to an ouster of the plaintiff from the property, and what the plaintiff seeks is not simply to get rid of a perverted user but substantially a greater relief, that of assertion of the plaintiff's title and prevention of his ouster by the defendant.

Mr. *Ambika Prasad*, for the appellant.

Mr. *N. Upadhiya*, for the respondent.

SULAIMAN, C.J., and BAJPAI, J.:—This is a Letters Patent appeal arising out of a suit brought by the

*Appeal No. 103 of 1934, under section 10 of the Letters Patent.