

## REVISIONAL CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava

FIRM GANGA DIN GUR PRASAD (DEFENDANT-APPLICANT)

v. THAKUR JAGMOHAN SINGH

(PLAINTIFF-OPPOSITE PARTY)\*

1935  
December, 9

*Provincial Insolvency Act (V of 1920), section 28(2)—Suit to recover money from firm adjudged insolvent—Leave of Court not obtained—Suit, whether barred.*

A suit for the recovery of a sum from a firm adjudged insolvent is barred by the provisions of section 28(2), Provincial Insolvency Act, where no leave of the Court is obtained for its commencement by the plaintiff. *Fida Husain v. The Collector of Shahjahanpur* (1), dissented from. *Firm Panna Lal Tasaduq Husain v. Firm Hira Nand Jiwan Ram* (2), and *Ponnusami Chettiar v. Kaliaperumal* (3), relied on.

Mr. K. N. Tandon, for the applicant.

Mr. Har Narain Dass, for the opposite party.

SRIVASTAVA, J.:—This is an application under section 25 of the Provincial Small Cause Courts Act for revision of the decree dated the 26th of January, 1935, of the learned Munsif of Sitapur in the exercise of his Small Cause Court jurisdiction.

The defendant firm carried on a cloth business and the plaintiff was one of its customers. The plaintiff from time to time used to deposit money with the defendant firm for making the said purchases. His case was that the defendant firm closed its doors in Phagun Sambat 1989 and that a sum of Rs.118-14-9 was due to the plaintiff in respect of the money deposited by him as stated above. The suit was resisted on several grounds. The lower Court found that a sum of Rs.76-3 was due to the plaintiff from the defendant firm at the time when it was adjudged insolvent. It further held that the suit was maintainable even though the

\*Section 25 Application No. 27 of 1935, against the decree of Babu Hiran Kumar Ghoshal, Munsif, Sitapur, dated the 26th of January, 1934.

(1) (1914) 17 O.C., 267.

(2) (1928) A.I.R., Lah., 28.

(3) (1929) A.I.R., Mad., 480.

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leave of the Court was not obtained as required by section 28(2) of the Provincial Insolvency Act. It was also of opinion that the suit was within time. As a result of these findings the lower Court decreed the plaintiff's suit for Rs.76-3 with proportionate costs.

The main contention urged on behalf of the defendant applicant is that the suit was not maintainable inasmuch as the leave of the Court required by section 28 of the Provincial Insolvency Act had not been obtained. I am of opinion that the contention must succeed. Admittedly the defendant firm was adjudicated insolvent on the 4th of December, 1931. The present suit was filed on the 9th of January, 1934, without the leave of the Court having been obtained to the institution of the suit. It is also not disputed that no order of discharge has yet been passed. Section 28(2) runs as follows:

“On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court on such terms as the Court may impose.”

The question therefore is whether the plaintiff can be regarded as a “creditor to whom the insolvent is indebted in respect of any debt provable under this Act”. Section 34 of the Act defines “debts provable under the Act”. With certain exceptions laid down in sub-section (1) “debts provable under the Act” include “all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent, or to which he may become subject before his discharge by reason of any obligation incurred before

the date of such adjudication". The language of this sub-section is very wide and comprehensive. The sum in dispute was deposited with the defendant firm before the date of the adjudication. There can be no doubt that when the defendant firm was adjudged an insolvent it was under a liability to the plaintiff for payment of this sum. I have therefore no hesitation in holding that the amount claimed in this suit was a "debt provable under the Act" within the meaning of section 34 of the Provincial Insolvency Act. This being so, the plaintiff was forbidden by the provisions of section 28(2) of the Provincial Insolvency Act from instituting the present suit except with the leave of the Court.

The learned counsel for the opposite party has relied on the decision of the late Court of the Judicial Commissioner of Oudh in *Fida Husain v. The Collector of Shahjahanpur* (1). It was held in this case that the prohibition contained in section 16, sub-section (2) of the Provincial Insolvency Act (III of 1907) which corresponds to section 28(2) of the present Insolvency Act (V of 1920) is aimed at creditors to whom notice of the insolvency proceedings has been given and does not affect persons having claims against the insolvent to whom no notice whatever of the insolvent's application has been delivered. With all respect to the learned Judge who decided this case I find myself unable to agree with his decision. There is nothing in the provisions of section 28(2) making its application dependent on notice of the insolvent's application being given to the plaintiff. Moreover section 19(2) provides that notice of an application for insolvency shall be given to creditors in such manner as may be prescribed. Rule 5 of the rules made by this Court under the Provincial Insolvency Act provides that the notice of an order fixing the date of the hearing of the petition under section 19(2) shall be by advertisements in such newspaper or newspapers, official or otherwise, as the Court may

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direct. Such a publication should in my opinion be presumed to be notice to all the creditors. The learned Judicial Commissioner in the above-mentioned case observed as follows:

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“Again the scope of the Act may be inferred from the terms of section 45 which lays down the effect of an order of discharge. According to section 45, sub-section 2 an order of discharge releases the insolvent from all debts entered in the schedule. The language of this sub-section is important for it is quite clear that the intention is only to afford protection to the debtor in respect of debts which have found a place in the schedule. It is not laid down that the order of discharge releases the insolvent from all debts which are provable under the Act as is the case in Bankruptcy Law in England.”

This reasoning is no longer applicable because in section 44(2) of the present Act which corresponds to section 45(2) of the old Act the words “all debts provable under this Act” have been substituted for the words “all debts entered in the schedule”. The effect of this is to bring the law in a line with the Bankruptcy Law in England and to extend the protection to the debtor in respect of all debts which are provable under the Act. I am supported in the view which I have taken by the decision of the Lahore High Court in *Firm Panna Lal Tassaduq Husain v. Firm Hira Nand Jiwan Ram* (1) and by the decision of the Madras High Court in *Ponnusami Chettiar v. Kaliaperumal Naicker* (2). In the last mentioned case WALLACE, J. remarked as follows:

“No doubt, as was recognized, this may work hardship in certain cases, for example, where the plaintiff is ignorant of the insolvency proceedings altogether. But after all, the Gazette notification of insolvency is presumed to be notice to all the creditors and they cannot be heard to plead want of notice or ignorance. On

(1) (1928) A.I.R., Lah., 28.

(2) (1929) A.I.R., Mad., 480.

the other hand unless this strict reading of the section is adopted there will be great embarrassment both to the insolvent and the Insolvency Court. All the creditors could file suits without leave and maintain that the Court should keep these pending until the insolvency proceedings had come to an end on the ground that the initial bar would then be removed. That would be practically overriding section 28. The insolvent is entitled to the protection of the Court against the commencement of any such suit."

I am therefore of opinion that no leave of the Court having been obtained for commencement of the present suit by the plaintiff, it was barred by the provisions of section 28(2) of the Provincial Insolvency Act. In this view of the matter it is not necessary for me to deal with the other arguments advanced on behalf of the applicant on the question of limitation and non-joinder of parties.

The result therefore is that I allow the application, set aside the order of the lower Court and dismiss the plaintiff's suit with costs.

*Application allowed.*

## FULL BENCH

*Before Sir C. M. King, Knight, Chief Judge, Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice Ziaul Hasan*

MUSAMMAT RAHIMAN AND OTHERS (DEFENDANTS-APPELLANTS) v. MUSAMMAT BAQRIDAN, PLAINTIFF AND ANOTHER (DEFENDANTS-RESPONDENTS)\*

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*Mahomedan Law—Hanafi Law—Waqf—Declaration of waqf, if sufficient to complete waqf—Delivery of possession, whether necessary—Waqif first mutawalli—Question as to change in character of possession, if arises—Waqf of property under usufructuary mortgage, validity of—Mutawalli, powers of—Change in terms or personnel of mutawallis, if possible after*

\*Second Civil Appeal No. 315 of 1933, against the decree of Pandit Shyam Manohar Nath Shargha, District Judge of Gonda, dated the 13th of October, 1933, upholding the decree of Babu Har Charan Dayal, Subordinate Judge of Bahraich, dated the 19th of December, 1932.

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