

1935

RUDRA
NARAIN
v.

MAHARAJA
OF KAPUR-
THALA
THROUGH
HIS AGENT
AT BAH-
RAICH

*Srivastava
and Thomas,
JJ.*

we may respectfully say so we entirely agree with this opinion.

For the above reasons we agree with the Courts below that the suit which was brought by the decree-holder under section 61 of the Oudh Rent Act constituted a step in aid of execution under clause 5 of Article 182 of the First Schedule of the Limitation Act and the application for execution made by the decree-holder on the 15th of September, 1933, is therefore within time. The result therefore is that the appeal fails and is dismissed with costs.

Appeal dismissed.

REVISIONAL CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava,
and Mr. Justice Ziaul Hasan*

1935
December, 6

PANDIT SHANKAR LAL (DECREE-HOLDER—APPLICANT) v.
PERCHA RAM (JUDGMENT-DEBTOR—OPPOSITE PARTY)*

Provincial Insolvency Act (V of 1920), section 28(2)—Decree-holder can execute decree by arrest of judgment-debtor after obtaining leave of Insolvency Court.

A decree-holder can execute his decree by arrest of the judgment-debtor after obtaining leave of Insolvency Court and where no such leave is obtained, an order disallowing application for execution is correct. *Case law discussed.*

Mr. G. N. Mukerji, for the applicant.

Mr. K. N. Tandon, for the opposite party.

SRIVASTAVA and ZIAUL HASAN, JJ.:—This is a decree-holder's application under section 25 of the Provincial Small Cause Courts Act against an order of the learned Subordinate Judge of Gonda disallowing the applicant's application for execution of his decree against the judgment-debtor-opposite party by his arrest.

*Section 25 Application No. 7 of 1934, against the decree of Babu Gauri Shankar Varma, Subordinate Judge (acting as Judge, Small Cause Court), Gonda, dated the 7th of October, 1933.

The decree in question was passed in favour of the applicant on the 31st of March, 1931, and was transferred for execution to the Court of the learned Subordinate Judge of Gonda. On the 23rd of November, 1931, the opposite party was adjudged an insolvent. On the 28th of July, 1933, the applicant put in an application in the Court of the Subordinate Judge of Gonda for execution of his decree by arrest of the judgment-debtor. The judgment-debtor raised an objection that as he had been adjudged an insolvent, he could not be arrested in execution of any decree. This objection found favour with the learned Subordinate Judge who disallowed the application for execution on the ground that "section 28(2) of the Provincial Insolvency Act bars the execution application". It is against this order that the present application for revision has been brought.

It appears to us that the learned Subordinate Judge was in error in thinking that section 28(2) of the Provincial Insolvency Act bars an application for arrest of the insolvent judgment-debtor absolutely. That subsection 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."

We agree with the learned Advocate for the applicant that though, under section 16(2)(b) of the old Provincial Insolvency Act of 1907, it was provided that after an order of adjudication no creditor had during the pendency of the insolvency proceedings, in respect of

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any debt provable under the Act, any remedy against the property or person of the insolvent, the omission of the words "or person" from section 28(2) of the present Act shows that a creditor can proceed against the person of the insolvent judgment-debtor. It is also true that in the old Act of 1907 there was no provision like that of section 31 of the present Act for a protection order being granted to the insolvent. This further shows that in enacting the present Act (V of 1920) the Legislature intended to take away the absolute immunity from arrest enjoyed by an insolvent under the old Act. Still it appears to us that under the present Act a judgment creditor can proceed against the person of the insolvent only "with the leave of the Court on such terms as the Court may impose". This is quite clear from the words "or commence any suit or legal proceeding except with the leave of the Court on such terms as the Court may impose". It cannot be denied that an application for execution of a decree by arrest of the judgment-debtor is a "legal proceeding" and this being so the leave of the Court is essential under section 28(2) of the present Act. The learned Advocate for the applicant contends that the words "suit" and "legal proceedings" in the last portion of sub-section 2 of section 28 do not refer to the "debt provable under this Act" but to suits and legal proceedings independently of such a debt. We cannot accede to this contention. Nobody can contend that leave of the insolvency Court is necessary to bring a suit say for damages for malicious prosecution for specific performance of a contract or for similar other reliefs independent of a debt, against a defendant who happens to have been adjudged an insolvent. It seems to us obvious that "suit or other legal proceeding" in section 28(2) of the Insolvency Act means a suit or other legal proceeding for recovery of a debt referred to in that sub-section and this being our interpretation of the words "suit" and "legal proceeding", it is manifest that an application to recover a

judgment-debt by arrest of the judgment-debtor is such a legal proceeding. This view is supported by the authority of various High Courts.

In the case of *Hit Narayan Singh v. Brij Nandan Singh* (1), it was held that an application in execution of a decree by arrest of a judgment-debtor is a commencement of a legal proceeding within section 28(2) of the Insolvency Act. Similarly the Madras High Court held in the case of *Swami Kotayya v. Thunuguntla Venkata Rangarao* (2), that the words "other legal proceeding" include applications in execution with prayer for arrest. The case of *C. A. Easwara Iyer v. K. Govindarajulu Naidu* (3) was under the Presidency Insolvency Act but the provisions of section 17 of that Act are exactly similar to those of section 28 of the Provincial Insolvency Act and in that case the argument that applying for a warrant in execution proceedings is not commencing other legal proceedings within the meaning of the section was repelled by the learned Judges who decided that case. In a similar case in the Lower Burma Chief Court in *Thakurdeen v. J. Dubay* (4) it was held that the words "other legal proceeding" in section 17 of the Presidency Towns Insolvency Act include an application for arrest in execution of a decree and that no such application can be made except with the leave of the Court. The same view was held under the Provincial Insolvency Act in the case of *Partap Singh Pardhan Singh v. Firm Bhai Mewa Singh Jodha Singh* (5) in which it was held that an execution proceeding was a legal proceeding and that no proceedings in execution could be started against an insolvent judgment-debtor unless the judgment-creditor had obtained leave of the insolvency Court to commence such proceedings even when a protection order had been refused.

The learned Advocate for the applicant has also referred us to several cases. One of the them is the case

(1) (1931) Patna, 357.

(2) (1935) Mad., 239.

(3) (1915) I.L.R., 39 Mad., 689.

(4) (1919) 35 I.C., 250.

(5) (1928) Lah., 258.

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of *Maharaj Hari Ram v. Sri Krishan Ram* (1) but all that was held in that case was that in section 28 of the Provincial Insolvency Act, protection from arrest in execution of a decree is not provided. This is no doubt true but the words "except with the leave of the Court" were not considered in this case. The case of *Ali Husain v. Lachhmi Narain Mahajan* (2) only follows that of 49 All., 201.

In the case of *Radhey Shiam v. Hakim Saiyid Mohammad Taqi* (3) decided in the Court of the Judicial Commissioner of Oudh, it was held that under the Act of 1920 a creditor could proceed as if no adjudication had taken place but if by this it was meant that no leave of the Insolvency Court was necessary, we regret we must with due deference to the learned Judge differ from this view.

In the cases of *Haveli Ram v. The Zamindara Bank, Hafizabad* (4) and *Mahomed Roshan Sheikh Ali Kaskar v. Gulam Mohiddin* (5) also no more was held than that under the existing law, an insolvent judgment-debtor is not immune from arrest by the mere fact of his being declared an insolvent. They do not at all support the contention of the learned Advocate for the applicant that a decree-holder can execute his decree by arrest of the insolvent without the leave of the insolvency Court. The former case is further distinguishable by the fact that there execution proceedings had commenced and warrant of arrest issued before the order of adjudication, while in the present case execution proceedings were "commenced" after the order of adjudication.

We are therefore of opinion that the applicant could execute his decree by arrest of the judgment-debtor after obtaining leave of the insolvency Court but as it is admitted that he did not obtain such leave, the order

(1) (1926) I.L.R., 49 All., 201.

(2) (1931) I.L.R., 54 All., 416.

(3) (1922) 72 I.C., 911.

(4) (1929) 117 I.C., 373.

(5) (1928) 118 I.C., 791.

disallowing the application for execution was correct though not on the ground mentioned in that order.

We would therefore dismiss this application but would make no order as to costs.

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Application dismissed.

APPELLATE CIVIL

*Before Sir C. M. King, Knight, Chief Judge and Mr.
Justice E. M. Nanavutty*

BHAGWATI PRASAD AND OTHERS (PLAINTIFFS-APPELLANTS)
v. BADRI PRASAD AND OTHERS (DEFENDANTS-RESPONDENTS)*

1935
December, 6

Vendor and purchaser—Sale of share in a mahal—Possession with purchaser—Suit by third person for possession of part of share decreed—Breach of covenant of title—Suit by purchaser for refund of purchase money or for compensation—Vendee not dispossessed—Suit, if premature—Contract Act (IX of 1872), section 73, Applicability of—Breach of covenant of title—Compensation, when claimable—Transfer of Property Act (IV of 1882), section 55—Sale-deed of land—Term as to refund of money in case of dispossession—Construction of deed—Buyer cannot claim compensation unless dispossessed.

Where a person sells a share in a mahal and makes over its possession to the vendee, but a portion of the share out of it is decreed in favour of another person in another suit and the vendee thereupon sues for refund of half of the purchase money or, alternatively, for damages for breach of contract of sale, such suit is premature as mere passing of the decree cannot be held to constitute a cause of action, and the cause of action does not accrue until the vendee is dispossessed in execution of decree. *Lakhpat Kuar v. Durga Prasad* (1), and *Multanmal Jaya Ram v. Budhumal Keval Chand* (2), distinguished. *Juscurn Boid v. Pirthichand Lal* (3), *Hanuman Kamut v.*

*Second Civil Appeal No. 101 of 1934, against the decree of Pandit Brij Kishen Topa, Subordinate Judge, Malihabad at Lucknow, dated the 15th of December, 1933, upholding the decree of Saiyid Akhtar Ahsan, Munsif, Haveli, Lucknow, dated the 29th of April, 1933.

(1) (1929) I.L.R., 8 Pat., 432.

(2) (1920) I.L.R., 45 Bom., 955.

(3) (1918) L.R., 46 I.A., 52.