## MISCELLANEOUS CIVIL

*Before Mr. Justice R. L. Yorke*

MESSRS. SAGARMAL HANOMAN PRASAD THROUGH SAGARMAL (APPELLANT) *v.* ABDUL RAHMAN AND ANOTHER (RESPONDENTS)* 1938 *February*, 1

*Provincial Insolvency Act (V of 1920), sections 16 and 75(3)—Petitioning creditor coming to arrangement with the debtor and withdrawing his application—Creditor who became so subsequent to act of insolvency but prior to application for adjudication, if entitled to substitution under section 16—Application for substitution rejected—Appeal against order—Leave not taken under section 75(3)—Admission of appeal, if tantamount to leave.*

The mere absence of an application for leave under section 75(3) Provincial Insolvency Act is no bar to the maintainability of an appeal. Where the appeal has been admitted and there is a substantial point for consideration, the admission of the appeal is tantamount to the grant of leave contemplated by section 75(3) Provincial Insolvency Act.

Where a petitioning creditor who is a representative of the whole body of creditors, comes to an arrangement with the debtor and seeks not to prosecute his application any further it cannot possibly be said that he is still proceeding with due diligence. On the contrary it shows failure to proceed with due diligence in the highest degree. Section 16 Provincial Insolvency Act does apply in such a case, and it is a case where an order of substitution should be made. Even a creditor who became a creditor subsequent to the act of insolvency but prior to the date of the application for adjudication is entitled to put in an application under section 16 of the Act for substitution of his name as petitioning creditor.

Mr. *H. D. Chandra* for the appellant.

Mr. *Naim Ullah* for the respondents.

YORKE, J.:—Messrs. Sagarmal Hanoman Prasad through Sagarmal appeal from an order of the District Judge of Fyzabad in an insolvency case refusing to make an order of substitution under section 16 of the Provincial Insolvency Act.

The appeal arises out of the following facts.

*Miscellaneous Appeal No. 61 of 1936, against the order of Munshi Humayun Mirza, District Judge of Fyzabad, dated the 20th of May, 1936.

1937

MESSRS. SAGARMAL HANOMAN PRASAD THROUGH SAGARMAL v. ABDUL RAHMAN

*Yorke, J.*

On the 10th of August, 1935, one of the two respondents Abdul Rahman executed a deed of gift of the whole of his estate in favour of his wife. On the 13th of August, 1935, the other respondent Tabarak Ullah similarly executed a deed of gift of the whole of his estate in favour of his wife. On the 9th of November, 1935, Damodar Dass made an application for the adjudication of these two persons as insolvents, alleging as acts of insolvency these two transfers. The present appellant was included in the array of creditors in these proceedings in respect of a debt amounting to Rs.800, the date of which was the 14th of October, 1935, subsequent, of course, to the transfers made by the debtors, but prior to the date of the application. On the 16th of January, 1936, the present appellant, coming to know that there was a probability of the proceedings being dropped by Damodar Dass because of a settlement between him and the debtors, put in an application under section 16 of the Act for substitution of his name as petitioning creditor. On the following day a compromise was put in whereby Damodar Das withdrew his application or sought to withdraw it alleging that a settlement had been arrived at between him and the debtors.

The learned District Judge permitted Damodar Dass to withdraw his application, and rejected the application of Sagarmal to be substituted for Damodar Das for reasons which are given by him in his judgment. He says that the principal acts of insolvency alleged by Damodar Dass could not be acts of insolvency which might be relied upon by Sagarmal as they were of dates previous to even Sagarmal's own debt. He went on to say that the general ground of debtors concealing themselves would be available to Sagarmal, and Sagarmal might make a fresh application against the debtors to get them adjudged as insolvents. It is against this order rejecting the application for substitution that the present appeal has been filed.

1937

MESSRS. NAGARMAL HANOMAN PRASAD THROUGH NAGARMAL v. ABDUL RAHMAN

*Yorke, J.*

A preliminary objection is raised on behalf of the respondents debtors that the appeal as framed is incompetent because no leave has been taken under sub-section (3) of section 75 of the Act either from the District Court or from this Court. It is pointed out that Sagarmal has never applied for permission to either Court and has not even mentioned the matter of permission in his grounds of appeal to this Court. It is further urged that permission should not be given because section 16 only gives a discretion, and in the present case that discretion has been exercised in a judicial manner. The discretion further, it is said, did not deprive the creditor of the right to file a fresh application against the debtors and there would be no question of any bar of limitation in view of the new section 78 of the Act. On behalf of the appellant it is urged that the most modern view on this subject is that the admission of an appeal is tantamount to the grant of leave contemplated by section 75(3), and I need hardly refer to the rulings which have been quoted as they are all mentioned in Ghosh's Commentary on the Provincial Insolvency Act (9th Edition, 1933, page 591). It is obvious from what is said in the rulings, much of which has been reproduced in the Commentary, that the absence of application for leave is no bar and that the only real question in such a case is whether there is a substantial point for consideration. In the present case both conditions are present. First the appeal has already been admitted by a learned Judge of this Court and secondly there is clearly a substantial point for consideration. I find no force therefore in the preliminary objection.

Coming now to the merits of the appeal, the question is first whether the present circumstances do or do not induce the application of section 16, and secondly whether in the present case the lower court had made a proper exercise of the judicial direction given to it by that section. Learned Counsel for the respondents

1927

MESSRS. SAGARMAL HANOMAN PRASAD THROUGH SAGARMAL v. ABDUL RAHMAN

*Yorke, J.*

contends that this is not a case in which it can be said that the petitioner is not proceeding with due diligence on his petition. It seems to me on the contrary that there can be no stronger case than the present one, and that where a petitioning creditor, who is a representative of the whole body of creditors, comes to an arrangement with the debtor and seeks not to prosecute his application any further, it cannot possibly be said that he is still proceeding with due diligence. On the contrary there seems to be a failure to proceed with due diligence in the highest degree. I am therefore clearly of opinion that section 16 does apply in such a case, and that in the ordinary way it is a case where an order of substitution should be made.

The second consideration here is that there is an allegation of fraud. It may or may not turn out to be well-founded, but *prima facie* it does look as if there was something not entirely above board about the proceedings of the debtors in the present case. It is not clear how after the transfers by the debtors of the whole of their estate to their wives, they could have been in a position to make an arrangement for payments to the petitioning creditors. The main point urged on behalf of the respondents is that in view of section 78, the appellant will not be in any way injured by the order of the learned District Judge, it being contended that no question of limitation can possibly arise. It is very easy to say that at this state, but there can be no doubt that if the appellant is left to file a fresh application for the adjudication of the respondents, he will be met with every plea available to them, and the ultimate result of that litigation cannot be foreseen at this state. It seems to me therefore that it is a case where the law provides for substitution and the conditions precedent are clearly present. The District Judge would have made a more proper use of his discretion, had he ordered substitution under the provisions of section 16 of the Act.

1937

MESSRS. SAGARMAL HANOMAN PRASAD THROUGH SAGARMAL v. ABDUL RAHMAN

On this view of the case I allow this appeal, set aside the order of the learned District Judge and direct him to substitute the appellant for the petitioning creditor, Damodar Dass, and to proceed with the application according to law. The appellant will get his costs of this appeal.

*Appeal allowed.*

## FULL BENCH

*Before Mr. Justice G. H. Thomas Acting Chief Judge, Mr. Justice Ziaul Hasan and Mr. Justice A. H. deB. Hamilton*

1938

*February* 21

BABU KUNDAN LAL (DEFENDANT-APPELLANT) *v.* HAJI SHEIKH FAQIR BAKHSH (PLAINTIFF-RESPONDENT)*

*Transfer of Property Act (IV of* 1882), *as amended by Act* (XX *of* 1929), *section* 92—*Section* 92 *as amended, whether has retrospective effect—Section* 63, *Transfer of Property Act as amended—Sections not mentioned in section* 63, *whether have retrospective effect—Interpretation of statutes—Retrospective effect of acts—General rule about provisions of an Act having retrospective effect.*

(*Per Full Bench*)—The provisions of the amended section 92 of the Transfer of Property Act have retrospective effect except in regard to acts done before the 1st of April, 1930, in any proceeding pending in any court on that date. *Janki* v. *Kanhaiya Lal* (1), overruled. *Hira Singh* v. *Jai Singh* (2), followed. *Ko Po Kun* v. *C. A. M. A. L. Firm* (3), *Bank of Chettinad, Ltd.* v. *Ma Ba Lo* (4), *Kanji and Moolji Brothers* v. *T. Shunmugan Pillai* (5), *Gauri Shankar* v. *Gopal Das* (6), *Jagdeo Sahu* v. *Mahabir Prasad* (7), *Cooverjee H. Plumber* v. *Vasant Theosophical Co-operative Housing Society, Ltd.* (8), *Young* v. *Adams* (9), referred to.

(*Per* THOMAS, A. C .J.)—The general rule of law is that an Act has no retrospective effect unless it is so specifically provided

*Second Civil Appeal No. 194 of 1935, against the decree of Mr. Sheo Gopal Mathur, 1st Additional Judge, Small Cause Court, Lucknow and Additional Civil Judge, Lucknow, dated the 9th of April, 1935, reversing the decree of Mr. Akhtar Ahsan, Munsif, South, Lucknow, dated the 9th of August, 1934.

(1) (1935) O.W.N., 1238.
(2) (1937) I.L.R., All., 880(F.B.).
(3) (1932) I.L.R., 10 Rang., 465.
(4) (1935) I.L.R., 14 Rang., 494.
(5) (1932) A.I.R., Mad., 734.
(6) (1934) A.I.R., All., 701.
(7) (1933) I.L.R., 13 Pat., 111.
(8) (1935) Bom., 91
(9) (1898) A C., 469.