MISCELLANEOUS CIVIL

Before Mr. Justice A. H. deB. Hamilton and Mr. Justice R. L. Yorke

1940 May 8

BHAIYA UDAI PRATAP SINGH AND OTHERS (DEBTORS-APPELLANTS) v. DWARKA PRASAD AND OTHERS (CREDITORS-RESPONDENTS)*

Civil Procedure Code (Act V of 1908), order 22, rule 4—Encumbered Estates Act proceedings—Appeal by applicant under Encumbered Estates Act making all creditors respondents—Death of some respondents—No substitution of representatives within prescribed time—Abatement of appeal, whether as a whole or against deceased creditors only.

Where during the pendency of an appeal by the applicant under the Encumbered Estates Act some of the creditor-respondents die and no application is made for substitution of their legal representatives within the period provided by law, the appeal abates as a whole.

Gokaran Singh v. *Brij Bhukan Singh and others* (1), referred to.

Mr. *Thakur Prasad*, for the appellants.

Messrs. *R. B. Lal, Har Govind Dayal Srivastava* and *Murli Manohar Lal*, for the respondents.

HAMILTON and YORKE, JJ.:—This is an appeal by a number of persons, who are applicants under the Encumbered Estates Act, from the judgment of the Special Judge, first class, Bahraich who has dismissed the whole application on the view that the original application made to the Collector on the 13th December, 1935, did not comply with the provisions of section 4 of the Act, and was therefore liable to be dismissed under proviso (*a*) to sub-section (1) of section 4 of the Act.

In the appeal the whole body of creditors were named as respondents. During the pendency of the appeal two of the creditor-respondents died and no application was made for substitution of their legal representatives

*Miscellaneous Appeal No. 69 of 1937, against the decree of Mr. Shiva Charan, Special Judge, First Class of Bahraich, dated the 24th July, 1937.

(1) (1939) I.L.R., All., 892.

within the period of 90 days provided by law. In consequence the appeal so far as it affects those two creditors has abated, and the first question for consideration on this appeal is what is the effect of the abatement of the appeal as against two of the creditor-respondents. On behalf of the appellants it is not disputed that the effect must be that the appeal has abated against those two respondents, but it is contended that the appeal can proceed as against the other creditor-respondents. The necessary result, would, of course, be that if this appeal should succeed and the order of the learned Special Judge be set aside (as indeed it would probably have to be in view of certain other decisions of this Court) the proceedings would continue under the Act in respect of some creditors, but could not proceed against other creditors. Those other creditors, however, would be unable to take any fresh steps in regard to their debts (assuming even that no bar of limitation should come into play) by reason of the provisions of section 7 of the Encumbered Estates Act. Section 7(1)(*b*) provides that "no fresh suit or other proceedings other than an appeal, review or revision against a decree or order, or a process for ejectment for arrears of rent shall, except as hereinafter provided, be instituted in any civil or revenue court in the United Provinces in respect of any debts incurred before the passing of the said order." Thus whereas the effect of dismissing the appeal as having abated as a whole would be that the proceedings under the Encumbered Estates Act have come to an end entirely and those creditors would not be debarred by section 7 from pursuing any remedies still open to them against the applicant debtor, the effect of allowing the appeal of the applicants against those respondents against whom the appeal has not abated would be to preclude the former group from obtaining any remedy in regard to the debts which stand in their favour.

Hamilton and Yorke, JJ.

Another difficulty might also arise namely that apart from section 7, these creditor claimants would pre-

1940

BHAIYA UDAI PRATAP SINGH AND OTHERS v. DWARKA PRASAD AND OTHERS

sumably also come within the mischief of section 13 of the Act which provides that all claims not made within the time and in the manner required by the Act shall be deemed for all purposes and on all occasions to have been duly discharged. These same creditors therefore, unless on the restoration of the proceedings they elected and were able to proceed with their former claims or to file fresh claims, would be out of court for ever.

Hamilton and Yorke, JJ.

It appears to us that the position of the parties under this Act is full of anomalies. The clear intention of the Act is the relief of encumbered estates from all the debts outstanding against them. In the first instance, as has been held by the High Court at Allahabad in *Gokaran Singh* v. *Brij Bhukan Singh and others* (1), the landlord applicant under the Encumbered Estates Act is clearly in the position of a plaintiff. It is he who moves the court to obtain relief in respect of his debts On the other hand after the issue of notices under section 9 it is the creditors who have to put in statements of claim which are of the nature of plaints. The proceedings in respect of each claim of a creditor or all the combined claims of each creditor can be regarded as separate suits, and the result of those suits is that the Special Judge gives, under section 14 of the Act, a simple money decree for the amount due to the claimant. It is difficult to see how in a case of a simple claim for money made by a creditor in proceedings before a Special Judge the creditor in whose favour a decree is to be made can be regarded as the defendant. With great respect to the learned Judges who decided *Gokaran Singh's case* (1), we are inclined to think that although there are difficulties in the opposite view, there are also difficulties in the view which they have taken and one of those difficulties is exemplified by the order which they ultimately passed. They were prepared to hold that the suit of the applicant as against the creditor had abated, but on the application of the creditor's legal

(1) (1939) I.L.R., All., 892.

representatives themselves, they allowed substitution to be made of those legal representatives. It is fairly clear why the legal representatives of the creditor were anxious for substitution to be made. They saw that they would be faced with difficulties arising out of sections 7 and 13 of the Act. Had the learned Judges taken their view to its logical conclusions and refused entirely to allow substitution, the result would have been not an injury to the applicant (in fact the applicant himself was anxious to allow the abatement to continue) but an injury to the legal representatives of the creditor who would apparently have had no remedy left to them, by which they could realize the amount of their debt

One general principle of this Act, as it appears to us, is that the applicant cannot be allowed by his default to injure the interests of the creditors. Gokaran Singh in the case in question clearly thought that by refusing to apply for substitution, he would get rid of the debt of the deceased creditor, but by allowing the application of the legal representatives the court declined to allow the applicant to benefit by his own default. The same intention appears from section 50 of the Act which provides that—

> "If a landlord with regard to whom a notice has been published under section 9 dies before a declaration has been made in respect of him under section 44,
>
> (*a*) the proceedings under this Act shall be continued as nearly as may be possible in all respects as if the landlord was still living."

Similarly whereas a landlord applicant could, in the early days of this Act, have succeeded sometimes in getting rid of a debt by omitting it in his written statement under section 8 and by the creditors not coming to know of the application and therefore failing to put in a claim under the provisions of sections 9 and 10 of the Act within the time prescribed, the Act has now been modified so as to allow claims to be made at a later stage.

1940

BHAIYA UDAI PRATAP SINGH AND OTHERS v. DWARKA PRASAD AND OTHERS

Hamilton and Yorke, JJ.

if the creditor can show good cause for so doing. We may therefore infer that the general intention of the Act is that the landlord applicant should not in any case be allowed to profit at the expense of his creditors by any laches on his own part. This principle is, we think, applicable in the present case also. If despite the abatement of this appeal against two of the appellants, we were to allow this present appeal to go forward, the result might be that the legal representatives of those creditors who have died during the pendency of the appeal would be deprived of all remedy against their debtor.

One other possibility which has to be considered is whether this appeal could not be allowed to proceed even in the face of no substitution having been made for deceased creditors on the ground that the other creditors are, as it were, representatives of the whole body of creditors. We do not think that in a matter of objection to the maintainability of the application as a whole any one creditor could be held to be representative of the others. Each creditor is entitled to raise his own objections, though possibly an objection raised by one may succeed to the benefit of all.

Putting the case shortly it appears to us that this appeal must abate as a whole, because if the appeal were to be allowed as things now stand, the result would be that the application would have to proceed *ab initio* as against some and not as against other creditors. This would be in contravention of the whole intention of the Act, and secondly the effect of it would be that those very creditors against whom the appeal has abated would be debarred from all remedy by the provisions of the Act itself.

We are therefore constrained to hold that this appeal has abated as a whole and we dismiss it accordingly.

Appeal dismissed.