

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

1930.

Nov. 25, 26.

HIT NARAYAN SINGH

c.

BRIJ NANDAN SINGH.*

Execution—judgment-debtor adjudicated insolvent before decree—Provincial Insolvency Act, 1920 (Act V of 1920), sections 28(2) and 31—application for execution, whether “commencement of legal proceeding”—section 28(2)—disability, whether imposed on decree-holder—limitation, when begins to run—leave to proceed against the person of the judgment-debtor granted under section 28(2)—application for execution within 3 years from the date of order granting leave, whether in time—want of protection order under section 31, whether affects the disability imposed by section 28(2).

B was adjudicated an insolvent on the 29th of January, 1926. A decree for money was however obtained against him by H on the 26th May, 1926. A receiver was appointed who took charge of all the properties of the insolvent.

The decretal debt of H was one of the debts proved in the court of insolvency. On the 28th May, 1929, H applied for leave to proceed against the person of the judgment-debtor under section 28, clause (2), of the Provincial Insolvency Act, 1920, and on the same day the leave was granted. Accordingly on the 5th June, 1929, H applied for execution by arrest of the judgment-debtor who contended that the application was barred by limitation.

Section 28(2), Provincial Insolvency Act, 1920, lays down :

“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 proveable under this

* Appeal from Appellate Order no. 98 of 1930, from a decision of M. Najabat Hussain, District Judge of Shahabad, dated the 6th March, 1930, confirming an order of Babu Saudagar Singh, Subordinate Judge of Shahabad, dated the 12th September, 1929.

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."

Held, (i) that the application for execution was the commencement of a legal proceeding and it came within the mischief of the second part of section 28(2), which imposed a disability on the decree-holder from taking any step in execution;

(ii) that limitation did not begin to run until the 5th of June, 1929, when, leave to proceed against the person of the judgment-debtor having been granted, the disability ceased to exist and that, therefore, the application for execution was within time.

Held, further, that the fact that no protection order had been made under section 31 of the Provincial Insolvency Act, 1920, did not affect the disability imposed by section 28(2) of the Act, as the latter section entitled the decree-holder to apply for execution by arrest of the judgment-debtor only if he obtained leave of the court to do so.

Maharaj Hari Ram v. Sri Krishna Ram(1), dissented from.

Shcosaran Ram v. Basudeo Prasad Sahu(2), distinguished.

Per Macpherson, J.—An application in execution by arrest of judgment-debtor is the commencement of a legal proceeding under section 28(2) of the Provincial Insolvency Act; and limitation against the decree-holder in the present case began to run from the date when the leave of the Insolvency Court for such commencement was granted.

Appeal by the decree-holder.

The facts of the case material to this report are stated in the judgment of Kulwant Sahay, J.

S. M. Mullick and *S. N. Bose*, for the appellant.

Rai T. N. Sahai, for the respondent.

KULWANT SAHAY, J.—The question involved in this appeal is whether the appellant's application for execution of a money decree was barred by limitation. The decree was passed on the 26th May, 1926. The

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

(2) (1918) 47 Ind. Cas. 798.

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application for execution was made on the 5th June 1929. On the face of it, therefore, the application was barred.

It is, however, contended that on account of certain proceedings in insolvency the period of limitation did not begin to run from the date of the decree. The judgment-debtor was adjudicated an insolvent and the adjudication order was made on the 29th January, 1926. A receiver was appointed who took charge of all the properties of the insolvent. The decretal debt of the appellants was one of the debts proved in the Court of insolvency. The appellant applied in the Court of insolvency for leave to proceed against the person of the judgment-debtor under section 28, sub-section (2), of the Provincial Insolvency Act (Act V of 1920). This application was made on the 28th May, 1929, and leave was granted on the same day and the application for execution by arrest and imprisonment of the judgment-debtor was made on 5th June. It is contended that the period of limitation began to run from this date, that is, the 28th May, 1929, and that, therefore, the application for execution made on the 5th June, 1929, was within the period of limitation.

Both the Courts below have held that the appellant was not entitled to compute the period of limitation from the 28th May, 1928, and they have held that the application was barred by limitation. Section 28 of the Provincial Insolvency Act of 1920 in sub-section (2), provides that 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 provided in the Act and that thereafter no creditor to whom the insolvent is indebted in respect of any debt provable under the 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.

It is contended on behalf of the appellant that a disability was imposed upon him by the concluding portion of sub-section (2) of section 28 which debar a creditor from commencing any suit or other legal proceeding, except with the leave of the Court. An application for execution of a decree is certainly the commencement of a legal proceeding; and, therefore, an application for execution comes within the mischief of the second part of sub-section (2) of section 28. If that is so, then the period from the making of the adjudication order up to the termination of the insolvency proceedings has to be excluded in computing the period of limitation except in cases where leave of the Court is obtained. It is admitted in this case that the insolvency proceedings are still pending.

It is contended on behalf of the respondent that it was open to the decree-holder to apply for execution by arrest of the judgment-debtor inasmuch as no order had been made by the Court under section 31 of the Act. It is true that a protection order has not been made. If an order had been made then such an order would debar the decree-holder from making any application at all to proceed against the person of the judgment-debtor. The fact that no protection order has been made under section 31, does not affect the disability imposed by section 28(2) as the latter section entitles the decree-holder to apply for execution by arrest of the judgment-debtor only if he obtains leave of the Court to do so.

It is next contended that the bar as regards the commencement of any suit or other legal proceeding must refer to a suit or proceeding against the property of the insolvent which is dealt with in the first part of section 28, sub-section (2). In my opinion there is no justification for such an interpretation. The first part deals with remedies against the property of the insolvent and the second part deals with all remedies including the remedy against the

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person of the insolvent. Section 16(2) of the old Act (Act III of 1907) imposed a disability not only as against the property but also against the person of the insolvent, and the Act of 1920 has made the alteration that the disability as against the person of the insolvent may be removed by obtaining leave of the Court.

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The learned District Judge has relied on the decision of this Court in *Sheosaran Ram v. Basudeo Prasad Sahu*(1). That was a case in which a decree for money was executed and the judgment-debtor was arrested. After his arrest an adjudication order was made in insolvency under the Presidency-Towns Insolvency Act (Act III of 1909). After the making of the adjudication order the judgment-debtor was released on production of the order. A fresh application for execution was made after the annulment of the adjudication, and it was held that this fresh application was barred by limitation. The grounds given were two-fold: first, that time had already begun to run before the disability was imposed upon the decree-holder, and the subsequent disability did not stop the time running against the decree-holder. This apparently refers to the fact that the decree had been passed and in fact application for execution of decree had been made before the order of adjudication had been made in that case and time for execution of the decree had begun to run before the disability imposed by the adjudication order had come into existence. In the present case the decree was passed after the adjudication order had been made and, therefore, time did not begin to run as against the decree-holder from the date of the decree as there was a disability existing from before in taking out execution of the decree. Another reason given by the learned Judges in *Sheosaran Ram's*(1) case was with reference to section 25 of the Presidency-Towns Insolvency Act, which corresponds with section 31 of the Provincial Insolvency Act of 1920.

(1) (1918) 47 Ind. Cas. 798.

Their Lordships observed : "Section 25 expressly provides that any insolvent who shall have submitted his schedule as aforesaid may apply to the Court for protection, and the Court may on such application, make an order for the protection of the insolvent from arrest or detention. There is also a provision in that section that no such order shall operate to prejudice the right of any creditor in the event of such order being revoked or the adjudication annulled". The learned Judges did not consider the provisions of section 17 in connection with this question. Section 17 of the Presidency-Towns Insolvency Act corresponds with section 28 of the Provincial Insolvency Act of 1920, by which the disability has been imposed upon creditors in commencing any legal proceedings without the leave of the Court. Having regard to the facts in *Sheo Saran Ram's*(¹) case and to the observations made therein, it is clear that that decision has no application to the facts of the present case.

Reliance was also placed upon the decision of the Allahabad High Court in *Maharaj Hari Ram v. Sri Krishan Ram*(²). There also the concluding portion of sub-section (2) of section 28 of the Provincial Insolvency Act was not considered at all. All that the learned Judges say in that case is : "In section 28 of the Provincial Insolvency Act the effect of an order of adjudication is described and protection from arrest in execution of a decree is not provided. If it had been the intention of the Legislature to protect insolvents, the provisions of section 31, which permit an insolvent to apply to the Insolvency Court for a protection order, would have been superfluous". To my mind, with very great respect to the learned Judges, the reason does not appear to be sound. Section 31 empowers the Court to make a protection order, after the making of which no proceeding can be taken against an insolvent. Section 28 contemplates cases before a protection order is made and in

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that case it is open to a creditor to apply to the Insolvency Court for leave to proceed against the person of the insolvent.

Having regard to the express terms of sub-section (2) of section 28 of the Provincial Insolvency Act, I am of opinion that the decree-holder was under a disability from taking any step in execution of his decree until leave had been obtained and as the application for execution was made within the period of limitation from the order granting leave, the present application for execution is not barred by limitation.

The appeal is, therefore, allowed, and the order of the Court below is set aside. The execution will proceed in due course of law.

The appellant is entitled to his costs.

MACPHERSON, J.—I agree. The case of *Sheo-saran Ram v. Basudeo Prasad Sahu*(1) is distinguishable on the facts. An application in execution by arrest of judgment-debtor is, in my opinion, the commencement of a legal proceeding under section 28(2) of the Provincial Insolvency Act and limitation began to run against the appellant from the date when the leave of the Insolvency Court for such commencement was granted.

Appeal allowed.

LETTERS PATENT.

Before Terrell, C. J. and Khaja Mohamad Noor, J.

RAGHUBANS LAL

v.

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Letters Patent of the Patna High Court—clause 10 as it stood before amendment in 1929—decision of a judge passed

* Letters Patent Appeal no. 85 of 1928, from a decision of the Hon'ble Mr. Justice R. L. Ross, dated the 1st August, 1928, setting aside the order of M. Amir Hamza, Subordinate Judge of Gaya, dated the 23rd December, 1927.

(1) (1918) 47 Ind. Cas. 798,

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