

APPELLATE CIVIL.*Before Jenkins C.J. and Mullick J.*

CHATRAPAT SINGH DUGAR

1913

v.

March 11.

KHARAG SINGH LACHMIRAM.*

Appeal to Privy Council—Application for leave to appeal—Whether appeal to Privy Council lies in cases under the Provincial Insolvency Act—Right of appeal to Privy Council, on what it rests—Letters Patent (of 1865), cl. 39—Civil Procedure Code (Act V of 1908), ss. 109, 110, and O. XLV, r. 3—Provincial Insolvency Act (III of 1907), ss. 46, 47.

The right of appeal from the High Court to the Privy Council rests on cl. 39 of the Letters Patent (of 1865) read with ss. 109 and 110 and O. XLV, r. 3 of the Civil Procedure Code.

The Provincial Insolvency Act does not interfere with any right of appeal to the Privy Council that may otherwise exist.

Bombay Burmah Trading Corporation, Ltd. v. Doralji Cursetji Shroff (1) referred to.

Where an application for insolvency was dismissed under s. 15 of the Provincial Insolvency Act and an appeal was also dismissed in the High Court under O. XLI, r. 11 :—

Held, that an appeal to the Privy Council was competent if the matter was appealable in other ways.

APPLICATION for leave to appeal to His Majesty in Council by Chatrapat Singh, a petitioner for insolvency.

On the 21st May 1909, one Chatrapat Singh Dugar filed an application for insolvency in the Court of the District Judge of Murshidabad under section 5 of the Provincial Insolvency Act. Various creditors

* Application for leave to appeal to His Majesty in Council, No. 23 of 1912.

(1) (1908) I. L. R. 27 Bom. 415.

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appeared to contest the matter. They contended, *inter alia*, that the application was not *bona fide* and fit to be dismissed, as it was really meant to keep in abeyance the process of the Court in other matters. It was submitted on behalf of the petitioner that the question whether he had or had not committed acts of bad faith was to be determined by the Court, not at this preliminary stage, but at the final stage when application would be made for an order of discharge, and it was further submitted that the requirements of section 6 of the Provincial Insolvency Act having been fulfilled, the order of adjudication should be passed under section 16 of the said Act. The District Judge, however, overruled the contention of the petitioner and dismissed the application under section 15 of the Insolvency Act, holding that the application was an abuse of the process of the Court. No evidence was adduced on behalf of any party before the District Judge. Thereupon, the petitioner preferred an appeal to the High Court, and at the hearing under O. XLI, r. 11 of the Civil Procedure Code it was urged among other grounds that the District Judge of Murshidabad had erred in law in determining at the preliminary stage whether any act of bad faith had been committed and in dismissing the application under section 15 of the Provincial Insolvency Act, and that an order for adjudication under section 16 of the Act should have been passed instead. The appeal was dismissed. The petitioner then preferred an application for a review of the order passed under O. XLI, r. 11. The application for review was rejected. Thereupon, the petitioner filed this application for leave to appeal to His Majesty in Council.

Dr. Rashbehary Ghose (with him *Babu Hemendra Nath Sen*), for the appellant. The only sections that

are necessary to be considered are sections 6, 15, 16, 44(i) and 47 of the Provincial Insolvency Act. The question whether an applicant is guilty of bad faith can be considered only at the time of discharge: *Sheikh Samiruddin v. Srimati Kadumoyi D si* (1), *Uday Chand Maiti v. Ram Kumar Khara* (2), *Kali Kumar Das v. Gopi Krishna Ray* (3), *Girwar-dhari v. Jai Narain* (4) and *Jeer Chetti v. Ranga-sawmi Chetti* (5). As to what is abuse of Court's process, see *Ex parte Painter* (6). Where does the question of abuse of Court's process come in at this stage? The Court must declare if the conditions mentioned in section 6 are complied with. The question is concluded by authority, if authority were needed, for the Act is clear. The reference to Woodroffe J.'s judgment in an insolvency matter in the Original Side of this Court in which my client was concerned was irrelevant. As to whether an appeal to the Privy Council is competent at this stage, I submit an appeal lies under the Civil Procedure Code or clause 39 of the Letters Patent. The Rangoon Land Acquisition Case, *Rangoon Botatouny Company, Ltd. v. The Collector, Rangoon* (7), is clearly distinguishable. Under the Land Acquisition Act only one appeal is allowed.

[JENKINS C.J. That Act is distinguishable.]

The point is fully discussed in *The Special Officer, Salsette Building Sites v. Dasabhai Bezanji Motiwala* (8). In *Bombay Burmah Trading Corporation, Ltd. v. Dorabji Cursetji Shroff* (9) the application was under the Code, I think. If you see the arguments of

(1) (1910) 15 C. W. N. 244.

(2) (1910) 15 C. W. N. 213.

(3) (1911) 15 C. W. N. 990.

(4) (1910) I. L. R. 32 All. 645.

(5) (1911) 22 Mad. L. J. 52.

(6) (1894) [1895] 1 Q. B. 85.

(7) (1912) I. L. R. 40 Calc. 21 ;

L. R. 39 I. A. 197.

(8) (1913) 17 C. W. N. 421.

(9) (1903) I. L. R. 27 Bom. 415.

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Mr. Branson and Mr. Lowndes in the last mentioned case, you will find the point fully discussed.

It would be a very serious thing if no appeal lay under the Provincial Insolvency Act. Then no appeal would lie under the Bengal Tenancy Act, Probate and Administration Act, and Companies Act.

See *In the Matter of the Petition of Feda Hossein* (1). Before 1874 concurrent findings of fact did not of itself debar appeal to His Majesty. In this case Mr. Kennedy contended that the section taking away the right of appeal in such cases was *ultra vires*.

Here all that can be said is that the powers of the High Court under the Letters Patent are wider, and that they are not inconsistent with the Code. The case of *Hurrish Chunder Chowdhry v. Kalisunderi Debi* (2) discusses a question similar to the present one.

[JENKINS C.J. The difficulty is that in the Insolvency Act only certain sections are made applicable to the Code.]

See Provincial Insolvency Act, s. 47.

Babu Ramchandra Majumdar (with him *Babu Saratkumar Mitra* and *Babu Harihar Prasad Sing*), for the respondents. The Code has no application to this case—particularly that portion of the Code which deals with the Privy Council: see sections 46 and 47 of the Provincial Insolvency Act. The appeal to the High Court is contemplated by clause (2) of section 46. As soon as that is done, the force of the section is exhausted. Save and except section 46, there is no provision for High Court interfering. Under section 47 only a limited application of the Code is allowed. When an appeal is preferred, the procedure is to be as laid down in the Code. The force of the Insolvency

(1) (1876) I. L. R. I Calc. 431.

(2) (1882) I. L. R. 9 Calc. 482 ;

L. R. 10 I. A. 4.

Act continues only so long a case is pending in the lower Court, and the force of the Code so long the appeal is pending in the High Court. Section 141 of the Code is not applicable and cannot be imported to section 46 of the Insolvency Act.

In *Rangoon Botatoung Company, Ltd. v. The Collector, Rangoon* (1), it was held that no appeal lay.

[JENKINS C.J. But an award is not order or decree under the Code or Letters Patent.]

But the Privy Council did not proceed on that line. They said the Code was not applicable.

Whether any authority but the Privy Council can give the right to appeal to His Majesty is a wide question. In this case section 47 of the Provincial Insolvency Act would have been useless, if an appeal to the Privy Council were competent.

[JENKINS C.J. But how can you distinguish *Bombay Burmah Trading Corporation, Ltd. v. Dorabji Cursetji Shroff* (2) ?]

But in the Companies Act there is no provision that the Code is applicable only to certain sections of that Act. Mookerjee J. in *Uday Chand Maiti v. Ram Kumar Khara* (3) says that most of the provisions of the Provincial Insolvency Act are largely drawn from English law: see Halsbury's Laws of England, Vol II, p. 467, as to the powers of a Court to decline making an order on a petition for insolvency when it finds it to be an abuse of the process of Court.

The appellant here evidently did not attack the findings of fact.

Dr. Ghose, in reply, on the question of abuse of Court's process, referred to sections 6, 15 and 17 of the Provincial Insolvency Act, and submitted that he was informed by his junior that in the hearing

(1) (1912) I. L. R. 40 Calc. 21 ;

L. R. 39 I. A. 197.

(2) (1903) I. L. R. 27 Bom. 415.

(3) (1910) 15 C. W. N. 213.

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under O. XLI, r. 11, the Judges were asked to consider the merits of the case, but declined.

JENKINS C.J. This is an application for leave to appeal to His Majesty in Council.

The applicant presented a petition under the Provincial Insolvency Act praying to be adjudged an insolvent, but his petition was dismissed. From this order of dismissal an appeal was preferred to the High Court, but his appeal was dismissed under O. XLI, r. 11. There was an application for review, but that was refused, and it is in these circumstances that the present application has been made for leave to appeal to His Majesty in Council.

The first point we have to consider is whether an appeal lies.

The right of appeal from the High Court to the Privy Council rests on clause 39 of the Letters Patent, and this is elaborated in the Code of Civil Procedure. Section 109 of the Code provides that "subject to such rules as may, from time to time, be made by His Majesty in Council regarding appeals from the Courts of British India, and to the provisions hereinafter contained, an appeal shall lie to His Majesty in Council—(a) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction; (b) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction; and (c) from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council."

Section 110 deals with cases mentioned in clauses (a) and (b) of section 109, and provides that in those cases the amount or value of the subject-matter must be as therein stated, and, where the decree or final

order affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law.

The procedure as laid down in O. XLV, r. 3 of that order provides that "every petition shall state the grounds of appeal and pray for a certificate either that, as regards amount or value and nature, the case fulfils the requirements of section 110, or that it is otherwise a fit one for appeal to His Majesty in Council."

In the present case we are told that the assets are expected to be five lakhs or so, and the creditors represent an indebtedness very much in excess of that. This is accepted on both sides as substantially representing the actual state of affairs.

It is said that we have no power to grant leave, because no provision for appeal to Privy Council is contained in the Insolvency Act, and it is urged that sections 46 and 47 of that Act, if anything, negative this right of appeal. But I do not so read the Insolvency Act. In my opinion, by that Act there was no intention to interfere with any right of appeal to the Privy Council that might otherwise exist, and this is a case which comes clearly within the provisions of the Letters Patent and of section 109 of the Code. The only question is whether this is a case which can properly be certified to be a fit one for appeal to His Majesty in Council: *The Bombay Burmah Trading Corporation, Ltd. v. Dorabji Cursetji Shroff* (1). It has been suggested before us on the part of the respondents that there has been an abuse of the process of the Court, and the learned Judge of the District Court so held. But there is no express decision by the High Court to that effect, because the appeal was dismissed under O. XLI, r. 11, and where

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this is done the evidence is not considered but merely the judgment under appeal. More than that, we are assured by the learned pleader who appears for the applicant and who sought to have the appeal to the High Court admitted, that this is what actually occurred in this case. Therefore, it cannot be said that there is any concurrent finding that there was an abuse of the process of the Court.

Moreover, I think this is a case where a substantial question of law arises as to whether it was within the competence of the District Judge to dismiss the application as he did, having regard to the provisions of section 15 of the Provincial Insolvency Act. In my opinion, therefore, this is a case which comes within section 109 (c) of the Code of Civil Procedure, and we ought therefore to certify that this case is a fit one for appeal to His Majesty in Council under section 109(c).

Let a certificate be issued accordingly.

MULLICK J. concurred.

S. M.

Certificate granted.