
(1988) 07 BOM CK 0027

In the Bombay High Court

Case No : In Insolvency Petition No. 40 of 1987

Bharat Chandulal Nanavati and Another

APPELLANT

Vs

United Commercial Bank

RESPONDENT

Date of Decision : 11-07-1988

Acts Referred:

Bombay High Court (Original Side) Rules, 1980 — Rule 326

Limitation Act, 1963 — Section 12

Presidency Towns Insolvency Act, 1909 — Section 10, 12, 13, 13(2), 13(4)

Citation : (1988) 3 BomCR 146

Hon'ble Judges : H. Suresh, J

Bench : Single Bench

Advocate : A.C. Shah and R. Milwalla, instructed by Matubhai Jamietram, for the Appellant; S.H. Doctor and R.S. Daruwalla, instructed by Kanga and Co., for the Respondent

Judgement

H. Suresh, J.—Two questions arises in this petition: (a) If a money decree is executable on the day the insolvency petition is presented, but not so at the hearing of the same as being barred by the law of limitation, whether an order of adjudication can be passed u/s 13 of the Presidency Towns Insolvency Act, 1909? and (b) when does the limitation start of the purpose of execution of a money decree, governed by the Rules of the High Court of Judicature at Bombay on the Original Side as they existed prior to May, 1, 1980 ?

2. The relevant facts are on a very narrow campus. The petitioning creditors obtained an ex parte decree in the High Court Suit No. 1313 of 1975, against one Mona Traders Pvt. Ltd., a company, and the present debtors, on March 4, 1976. The decree was sealed on July 12, 1976. As far as the company is concerned, the same is in liquidation. As against the other two judgement -debtors (i.e. the debtors herein), debtor No. 1 owes a sum of Rs. 29,00,000/- and odd and debtor No. 2 owes a sum of Rs. 25,00,000/- and odd, both under the decree to the petitioning creditors. Mr. Doctor, appearing for the petitioning creditors stated that the petitioning creditors' attorney (i.e. the advocates for the plaintiffs in the

said suit) had applied for a certified copy of the decree on March 4, 1976 and thereafter again on March 12, 1976 and there is a third application dated June 20, 1980. Mr. Doctor points out that he can produce the lodging numbers to show that those applications have been in fact lodged and he relies on the record of the High Court. However, the petitioning creditors, the plaintiffs, got a certified copy of the decree on or about June 27, 1980.

3. Thereafter, on an application for execution of the decree made on October 16, 1985, a notice under Order 21 and 22 of the CPC was issued and it appears that the said notice has been made absolute subsequently. It is an admitted position that no further steps, by way of attachment of the properties of the judgment debtors have been taken. However, the decree shows as endorsement dated July 18, 1985, that as against the said company the decree-holders, the plaintiffs, have realised a sum of Rs, 4,785/- by way of selling the moveable properties of the company and the same was received on December 15, 1982 towards the part satisfaction of the decree.

4. Since, the debt has remained outstanding, the petitioning creditors, the plaintiffs, issued an Insolvency Notice No. 47 of 1987 dated April 22, 1987 against the debtors. The said notice was served upon the debtors on April 28, 1987. Under the said insolvency notice, the said debtors were required to pay the amount claimed therein within thirty five days after the service of the said Insolvency Notice upon the said debtors. The debtors have failed to pay the amount claimed under the said insolvency notice. They have also not made any application to have the said insolvency notice set aside. The petitioners state that as the time expired on June 2, 1987 the debtors have committed an Act of insolvency on June 3, 1987. The petition has been declared on August 13, 1987 and the same was presented on August 19, 1987.

5. After the service of the notice of this petition, the matter appeared for hearing on January 19, 1988, before Parekh, J. It appears that the matter was adjourned to March 15, 1988 and thereafter from time to time the matter has been adjourned, till the matter reached for hearing before me on July 8, 1988.

6. An affidavit has been filed on behalf of the debtors. There is no controversy about any of the facts mentioned above. The debtors themselves say that they admit that an ex parte decree was passed on March 4, 1976 and according to them the decree is time barred on March, 3/4, 1988 and according to them there is no debt existing as of today, against the debtors as required under sections 12 and 13 of the Presidency Towns Insolvency Act. There is also a contention that the petition as filed is based on a decree which is secured by hypothecation which is neither given up nor valued and, therefore, the petition should be dismissed with costs. Their main contention is that the decree being not executable on the date of hearing and at the time the order of adjudication has to be passed, the present petition is not maintainable and, therefore, the same should be dismissed. Mr. Shah, appearing for the debtors, has mainly relied on a case decided by Tulzapurkar, J., being the case of Re: Messrs Bhimji Nanji & Co.,

reported in (1967)71 Bom.L.R. 638 in support of this contention.

7. Before I deal with the said case, I must refer to some of the relevant provisions of the Presidency Towns Insolvency Act. Section 9, in so far as it relates to this petition, is as follows:

"Section 9, sub-section (2) :

Without prejudice to the provisions of sub-section (1), a debtor commits an act of insolvency if a creditor, who has obtained a decree or order against him for the payment of money (being a decree or order which has become final and the execution whereof has not been stayed), has served on him a notice (hereafter in this section referred to as the insolvency notice) as provided in sub-section (3) and the debtor does not comply with that notice within the period specified therein :

Provided that where a debtor makes an application under sub-section (5) for setting aside an insolvency notice---

(a) In a case where such application is allowed by the Court, he shall not be deemed to have committed an act of Insolvency under this sub-section ; and

(b) In a case where such application is rejected by the Court, he shall be deemed to have committed an act of insolvency under this sub-section on the date of rejection of the application or the expiry of the period specified in the insolvency notice for its compliance, whichever is later;"...

"Section 9, sub-section (5) :

Any person served with an insolvency notice may, within the period specified therein for its compliance, apply to the Court to set aside the insolvency notice on any of the following grounds, namely :-

(a) that he has a counter-claim or set-off against the creditor which is equal to or is in excess of the amount due under the decree or order and which he could not, under any law for the time being in force, prefer in the suit or proceeding in which the decree or order was passed;

(b) that he is entitled to have the decree or order set aside under any law providing for the relief of indebtedness and that---

(i) he has made an application before the competent authority under such law for the setting aside of the decree or order; or

(ii) the time allowed for the making of such application has not expired;

(c) that the decree or order is not executable under the provisions of any law referred to in Clause (b) on the date of the application."

Therefore, after the service of the insolvency notice, it is for the judgement debtor to make an application for discharge of the notice within the time

prescribed in the notice. It is that notice he has to make out a case as to why the decree is not executable. It is at that stage the Court has to consider whether the decree is not executable for any reason, under any law, including the question of limitation, if any. If the judgement-debtor fails to make any such application or fails to have the said notice set aside, it must necessarily be held the debtor did commit an act of insolvency on the expiry of the period mentioned in the insolvency notice and if the judgement creditor files a petition u/s 10 read with section 12 of the Act, he becomes entitled to an order of adjudication in the ordinary course. In such a case there is no question of such a creditor proving any debt or any Act of insolvency as required u/s 13(2) of the Act, inasmuch as the decree itself is the proof of debt and the failure on the part of the debtor in having the Insolvency Notice set aside, is the proof of the act of the insolvency. There can be no further enquiry u/s 13 of the Act whether the decree is executable or not at the time of hearing of such a petition or at the time of passing an order of adjudication. The question whether a decree is executable or not is relevant in an application made by the debtor to have the insolvency notice set aside. But not so, at the hearing of the petition or at the time passing of an order of adjudication.

8. The scheme of the law of insolvency is such that once an order of adjudication is made, it relates back to the date of commission of an Act of insolvency. In such a case, time ceases to run as from that date. It is at that date the property of the insolvent vests in the Official Assignee. As from the date the Indian Limitation Act has no as and the relationship of debtor and creditor ceases to exist. That why u/s 13(8) of the Act, a creditor having presented a petition on commission of an act of insolvency, has no right to withdraw without the leave of the Court. Since the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition, the petition as from the date of its presentation is for the benefit of the general class of creditors and not for and on behalf of the petitioning creditor alone.

9. Here I may illustrate. Very often a petitioning creditor remains absent and in his place another creditor is substituted. Even where a petitioning creditor is not qualified for any reason, another creditor who but for the petition might well have filed one himself, is permitted to take over. In Mulla's Law of Insolvency, in India, we have reference to a Madras case where an application for substitution was made three months after the date of the act of insolvency and the applicant's debt had by that time been barred by limitation. The application was nevertheless granted and the order for substitution was made even if the debt of the substituted creditor was barred by the law of limitation at the date of substitution provided it was not barred at the date of the presentation of the original petition, see Venkata Hanumantha Rao v. Gangayya AIR 1928 Mad 608 . It appears that the same view has been taken by the Allahabad High Court, see (Bohra) Ganga Nath and Others Vs. Kunwar Zalim Singh and Another . In other words, the principle is this : An order of adjudication is no private relief to a petitioning creditor. If he is entitled to present a petition on the ground of

existing debt and commission of act of insolvency, as on the date of presentation of the petition, there can be no further consideration at the time of hearing of the petition or of passing the order of adjudication that his realisation of the debt is barred by limitation at the point of time, for he gets no relief for himself, the relief being for the general class of creditors.

10. A creditor's petition can be dismissed u/s 13(4) of the Act, which is as follows:

"Section 13, sub-section (4);

The Court shall dismiss the petition---

- (a) if it is not satisfied with the proof of the facts referred to in sub-section (2); or
- (b) if the debtor appears and satisfies the Court that he is able to pay his debts, or that he has not committed an act of insolvency or that for other sufficient cause no order ought to be made."

There is no question of the Court being not satisfied where Insolvency Notice is served and the debtor fails to have the said notice aside. Therefore, if the debtor wants the petition to be dismissed he must satisfy the Court that he is able to pay his debts or that he has not committed an act of insolvency. Of course, the petition can be dismissed "for other sufficient cause" for not making an order of adjudication. The words "for other sufficient cause" must be read ejusdem generis, along with the first two reasons, namely, that the debtor is in a position to pay his debts or that the debtor is in a position to pay his debts or that he has not committed an act of insolvency. It cannot be read to mean that the debtors can deny his liability to pay the debt. That stands concluded on proof of facts u/s 13(4)(a) of the Act. If the debt is proved and act of insolvency is established, it is not open to the debtor to say that he is not liable to pay the debt for any reason, under the heading of "other sufficient cause". Any such construction would at once be hit by the vice of tautology. When limitation is pleaded the debt is not extinguished, only the relief is denied. In a creditor's petition there is no question of granting any relief to an individual petitioner as such.

11. Mr. Shah has strongly relied on Justice Tulzapurkar's judgement in the case of *Re: M/s Bhimji Nanji & Co*, reported in (1967)71 Bom.L.R. 638. That was a case which came to be decided prior to the amendment of the Act in 1978. It does not deal with the special provision now provided for, in the case of a judgement creditor serving an insolvency notice, and the consequential failure on the part of the debtors to have the notice set aside. The facts of the case show that the debtors had borrowed a sum of Rs. 5,000/- from the petitioning creditor on or about February 22, 1962. He alleged two or three acts of insolvency against the debtors. The debtors challenged those allegations. The petition was presented on August 10, 1963. It remained pending till it came to be heard and decided on October 25, 1967. At the date of hearing it was argued that the debt had become barred by the law of limitation as on that date and therefore, no

adjudication order could be passed against the debtors. This appealed to the learned Judge. It was argued that on the date of the presentation of the petition there was a subsisting debt and that it was not necessary that it should continue, to exist at the time of the order of adjudication. This was negatived. What was argued on behalf of the debtors is this :

"According to Mr. Dhanuka the phrase "the Court shall require proof of the debt of the petitioning Creditor" must mean that the Court should require the proof of a subsisting or an existing debt, that is to say, a debt which has not become time barred at such hearing. He contended that it is a serious matter for the Court to pass an adjudication order against any person and before such order involving serious consequences is passed by the Court it is but proper that the Court should require all the proof of the debtor's indebtedness right upto the time the adjudication order is made. He, therefore, urged that not only should the debt, on the basis of which the creditor seeks an adjudication order, be subsisting at the date of hearing, but it should also subsist till the adjudication order is passed by the Court".

This is what the learned Judge said :

"On a proper interpretation of section 13(2) of the Presidency Towns Insolvency Act, I am inclined to uphold the contention of Mr. Dhanuka, for on first principles, I feel, it would be proper for the Court to insist upon proof of the fact that the debt is due and payable by the debtor to the creditor on the date of the hearing of the petition and the Court should further see that the debt subsists right upto to the time of making of the order of adjudication; it would be preposterous to adjudicate a person insolvent even if at the hearing the Court is apprised of the fact that the debt has already become time barred or that the debt has in the meantime got reduced to less than Rs. 500-as for instance when the petition is presented on the basis of a decretal debt of say Rs. 1,000 and by the time the petition comes up for hearing the decree is reduced by the Court of Appeal to less than Rs. 500. I am inclined to take the view that the debt on the basis of which a petition has been presented by the creditor must be subsisting not only at the date of the presentation of the petition but also at the date of hearing as well as the date when the adjudication order is proposed to be passed."

When it was pointed out that the view, taken by the learned Judge could cause great hardship, particularly in cases where without any fault on the part of the petitioning creditor, the hearing of the petition might be delayed due to the exigencies of the Court work, the learned Judge brushed aside the same in a rather exclusive language as follows :

"I don not see any hardship arising to the creditor as suggested by Mr. Shah, for it would be open to the creditor or rather it would be his duty to see that he keeps the debt alive either by means of an acknowledgement or part payment or by filing a suit in respect thereof in a proper Court well within the period of limitation, but to my mind, it is clear that mere pendency of an insolvency

petition without anything more cannot have the limitation prescribed by the Indian Limitation Act."

I cannot understand how a petitioning creditor can expect a contesting debtor to give an acknowledgement or part payment during the pendency of the petition, mainly with a view to keep the debt alive, if ultimately a petitioning creditor has to file a suit during the pendency of the petition, how does the petition survive? Assuming a petition is heard in time but the learned Judge is inclined to pass an order of adjudication, and for some reason or the other does not pass any order or is unable to pass any order before the expiry of the period of limitation, is the petition to be dismissed? While the presentation of a petition is within the volition of a petitioner, how can he thereafter be expected to maintain a lead in the mad rush of several such contending petitioners, all desirous of their petitions being heard and orders made on a lurking fear that each one of them might soon be out of Court, for want of time. And, in the meanwhile, the debtors have only to hope that the petitions are just adjourned on one pretext or the other. To my mind, this is an untenable position. I would rather say that this case should be confined to the facts of that case only, and instead I would accept what the Chief Justice Sir John Beaumont said in the case of Byramji Bomanji Talati Vs. The Official Assignee, . In that case the learned Single Judge before whom the petition was argued, took note of the fact that it would be a serious hardship to a creditor if limitation were allowed to run against him after the commencement of the insolvency but before adjudication. In the appeal, the Division Bench consisting of the Chief Justice Sir John Beaumont and Justice Blackwell said thus :

"the insolvency commences on the commission of the act of insolvency, and at that date the property of the insolvent vests in the Official Assignee, whose duty it is to administer it, and distribute it amongst the creditors who prove their debts. As from that date the Indian Limitation Act has no application, and the relationship of debtor and creditor ceases to exist."

Here I may mention that the facts show that on November 19,1928 there was a loan by the claimant-creditor to the insolvent. On August 18, 1931, the insolvent committed an act of insolvency. On October 14, 1931, the petitioning creditor presented a petition for adjudication. On March 27,1933, an adjudication order was passed. At the date when the act of insolvency was committed the claimant-creditor's claim was in time, but was barred at the date of adjudication. The Division Bench quoted with an approval what the Court of Appeal in England had said as follows:

"The case of *ex parte Ross* was also referred to in this connection with approval by the Curt of appeal in England in *Benzon, in re: Rower v. Chetwynd*.

Channel, J., in delivering the judgement of the Court at p. 75, says this:

"As to the second point, cases were quoted beginning with *ex parte Rose* which show that in the bankruptcy a debt does not become barred by lapse of time if it was not so barred at the commencement of the bankruptcy, and of this three can

be no doubt, but this is only in the bankruptcy."

No doubt that is a dictum only, but it recognizes in clear terms what seems to me the correct principle to apply."

12. In the present case, as on the date of presentation of this petition the debt cannot be said to be barred by the law of limitation. The debtors themselves admit that the limitation would come into operation from March 3/4, 1988. That is of no consequence and, therefore, in my view, the first contention of the debtors cannot survive. Therefore, it must necessarily be held that since they have not made any application for having the insolvency notice set aside, the order of adjudication must follow as a matter of course.

13. I will now deal with the second question posed above. Mr. Doctor, appearing for the petitioning creditors submitted that assuming that the decree was dated March 4, 1976, the decree became enforceable only on July 12, 1976 and if that is so, it cannot be said that the period of twelve years as contemplated under Article 136 of the Limitation Act has expired as of today and, therefore, an order of adjudication can be passed without any hesitation. In this connection, he relied on the Original Side Rule as it existed prior to the amendment which came into force on May 1, 1980. Under the earlier rules, it was necessary that an application for executing shall be accompanied by duly certified copy of the order or by the original and the relevant rule in this behalf is as follows:

"326.: Copy decree to accompany.---In all cases the application shall be accompanied by a duly certified copy of the decree or order, or by the original."

Relying on this rule, Mr. Doctor submitted that the decree becomes enforceable only after the decree was sealed. In support of this contention Mr. Doctor relied on the case of Satyendra Nath Bose Vs. Bibhuti Bhusan Bhar and Others, , wherein the Division Bench of the Calcutta High Court construed similar such rules and come to the conclusion that the production of the certified copy being a mandatory rule, the decree becomes enforceable only on compliance with such a condition. The relevant portion is as follows :

"As we have said the provision relating to the production of a certified copy of the decree is an essential requirement of an application for execution. This is an express Rule. It is not easy to imagine a more precise Rule or a Rule of a more imperative character. Such Rule must, therefore, be in suppression of the corresponding Rule in the Code contained in sub-rule (3) of Rule 11 of Order 21; and if in one case production of a certified copy is a matter of option, and in another a compulsory requirement, we are bound to hold that the express provision in the Original Side Rules requiring production of a certified copy of the decree must prevail over sub-rule (3) of Rule 11 of Order 21 of the Code."

14. Mr. Shah on the other hand submitted that the time taken for getting a certified copy cannot be excluded, having regard to the explanation that is found u/s 12 of the Limitation Act, 1963. In this connection, he also relied upon two or

three cases to say that the time requisite for obtaining a copy of a decree or an order shall not be excluded. Mr. Shah also submitted that the Calcutta case Satyendra Nath Bose Vs. Bibhuti Bhusan Bhar and Others, came to be decided prior to the amendment of the Limitation Act of 1963 and, therefore, it cannot be constructed as laying in the correct Law. In support of his contention Mr. Shah cited the case of Biswapati Dey Vs. Kennsington Stores and Others, and also the case of Chandra Mouli v. K.B.N. Singh, reported in AIR 1976 Pat 208. He also drew my attention to two Supreme Court Cases Chandra Mouli v. K.B.N. Singh AIR 1976 Pat. 208 viz 1 Lala Balmukund (Dead) through Lrs. Vs. Lajwanti and Others, and 2 Udayan Chinubhai Vs. R.C. Bali, . I am afraid. None of these authorities can have any bearing on the question that is before me. The question is as to when can it be said that the decree becomes enforceable for the purpose of execution ? If it could be said that the rule 326 of the Original Side Rules, as it existed then, is a mandatory rule and without which no execution is possible then the time can only begin to run after the decree is so sealed. This has nothing to do with the explanation as contemplated u/s 12 of the Limitation Act, 1963. The explanation was introduced in order to finally put the lid on the controversy with regard to the time requisite for obtaining a certified copy of the decree u/s 12(2) of the Act. The explanation made it clear that any delay in the Office of the Court in drawing up the decree or order before the application for a copy thereof is made, shall not be excluded. That may be relevant for the purpose of obtaining a certified copy of decree. But for the execution of a decree if there is a condition precedent, time cannot run prior thereof. The Calcutta High Court said that the rule was mandatory. I am inclined to agree with the same. Without the production of a certified copy of the decree no execution was possible. Therefore, in the present case, limitation, if any, would start only from the date of sealing the decree i.e. July 12, 1976.

15. Mr. Doctor has drawn my attention to the fact that in the present case, in fact there is no such delay inasmuch as the application was made on March 4, 1976 and another application was made on March 12, 1976 and the decree was ready on July 12, 1976. If that is so, there is no question of any application of the explanation, as contained in section 12 of the Limitation Act.

16. There are only two other contentions which I have to only state as they have been argued.

17. Mr. Doctor said that this application itself can be considered as an application for execution and, therefore, it cannot be said that there is any question of limitation as such. I am not deciding this question, as in my view, prima facie, it is not possible for me to say that this petition itself can be considered as an application for execution of a decree as such, within the meaning of Order 21 of the Code of Civil Procedure.

18. The other contention as advanced by Mr. Shah is to the effect that the petitioners have not given up the security of hypothecation. In my view, that question does not arise. The security was given by the company and not by these

debtors and, therefore, they have no right to raise such a contention.

In the result, I pass the following order:

Petition is made absolute in terms of prayer (a) and also for costs.

Miss Milwalla, for the judgement-debtors, makes an application for stay of the order. I am not inclined to stay the operation of the order as during the pendency of this petition, the debtor's main object was to while away the time hoping that they can conveniently use the judgement given by Tulzapurkar, J., in the case of Messrs. Bhimji Nanji & Co, reported in (1967)71 Bom.L.R. 638, after March 3, 1988, and thereafter avoid their entire liability to pay the amount. This conduct cannot be countenanced at all. Even otherwise public money is involved to the extent of over thirty lacs from these judgement-debtors and not a pie has come so far though more than twelve years have passed since the decree. Neither the Company nor these debtors want to pay any amount. No sympathy, therefore, can be shown to the debtors who have availed of money from public finance institutions, all for private gain. However, with a view to see that no grievance is made with regard to their right of appeal, I only direct that the advertisement may not be done for a period of four weeks from today. Rest of the order stands.