

(1979) 07 BOM CK 0035
In the Bombay High Court
Case No : Petition No. 29 of 1978

Vijay Jethalal Shah

APPELLANT

Vs

Laja Nandlal Raheja and Another

RESPONDENT

Date of Decision : 17-07-1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 22
Presidency Towns Insolvency Act, 1909 — Section 13(2), 9
Succession Act, 1925 — Section 214

Citation : AIR 1980 Bom 76

Hon'ble Judges : Sujata V. Manohar, J

Bench : Single Bench

Advocate : U.J. Makhija and T.S. Patel, for the Appellant; R.S. Daruwala and Maya Sarkar, of Madhukar Munim and Co., for the Respondent

Judgement

1. The Petitioning Creditors are the heirs of one Nandlal Raheja who obtained a decree on admission against the judgment-debtor in the Bombay City Civil Court in Summary Suit No. 8300 of 1973 for Rs. 16,247.02 and for other reliefs mentioned in the decree on admission. This decree was obtained on the 7th of Feb. 1974. The judgment-debtor was the 2nd defendant in the suit. A similar decree was also obtained against defendant No. 3. The suit against the 1st defendant is still pending in the City Civil Court at Bombay. After the passing of the decree, some time in October 1976, Nandlal Raheja, the decree-holder, died. The petitioning creditors who are the heirs of Nandlal have been brought on the record of the suit which is still pending against the 1st defendant on or about the 21st of February 1977. Prior to the death of Nandlal. he had obtained an order under Order 21, Rule 22 of the Civil P. C. for execution of the decree. Notice under Order 21, Rule 22, was made absolute on the 8th of October 1976. Nandlal died thereafter and the petitioning creditors who are his heirs took out an insolvency notice against the judgment-debtor on the 1st of November 1977. No steps were taken by the judgment-debtor to have the insolvency notice dated the 1st of November 1977 set aside. Thereafter, the petitioning creditors filed the

present petition dated the 3rd of March 1978 for an order of adjudication. The judgment-debtor has resisted this petition on the ground that the petitioning creditors, without obtaining representation to the estate of the deceased judgment-creditor, are not entitled to file a petition for an order of adjudication against the judgment-debtor.

2. The act of insolvency on the basis of which the present petition has been filed is non-compliance on the part of the judgment-debtor with the insolvency notice dated the 1st of November 1977. u/s 9, Sub-section (i), of the Presidency Towns Insolvency Act, as amended by Bombay Act 51 of 1948, it is laid down as follows:--

"9. Acts of Insolvency. -- A debtor commits an act of insolvency in each of the following cases, namely:--

(i) if, after a creditor has served an insolvency notice on him under this Act in respect of a decree or an order for the payment of any amount due to such creditor, the execution of which is not stayed, he does not, within the period specified in the notice which shall not be less than one month, either comply with the requirements of the notice or satisfy the Court that he has a counter-claim or set-off which equals or exceeds the decretal amount or the amount ordered to be paid by him and which he could not lawfully set up in the suit or proceeding in which the decree or order was made against him."

The language of Section 9(i) is reproduced in the form of an insolvency notice which is prescribed under the rules and forms of the High Court at Bombay under the Presidency Towns Insolvency Act. In the form of an insolvency notice which is prescribed by these rules, the petitioning creditor is required not merely to set out the decretal amount which he claims, but he has also to state that the execution of such a decree has not been stayed. It is, therefore, necessary to decide whether the claim of the petitioning creditors in the present petition is based on a claim arising out of a decree, execution of which has not been stayed. Without such a claim, no valid insolvency notice can be issued by the petitioning creditors; and there will not be any act of insolvency committed by the judgment-debtor as a result of non-compliance with such an insolvency notice.

3. Section 9(i) is based on the provisions of Section 1, Sub-section (i) (g) of the English Bankruptcy Act, 1914. Although u/s 9(i) the words used are "the execution of which is not stayed", these words have been broadly interpreted by the Bombay High Court to cover all cases where the creditor cannot obtain an immediate execution of the decree. It is not necessary that execution of the decree should have been actually stay-ed under an order of the Court. In Mulla's "The Law of Insolvency in India", 3rd Edition, at p. 100, it is stated as follows :--

"The words "execution of which is not stayed" are not confined to cases where there has been an express stay of execution but cover all cases in which the creditor at the time when the bankruptcy notice is issued, is not in a position to issue execution."

Similarly, in Halsbury's Laws of England, 4th Edition, Vol. 3, para 262, it is stated as follows:--

"262. Circumstances preventing issue of bankruptcy notice. Generally speaking, a stay of execution prevents the issue of a bankruptcy notice. For this purpose execution is considered to be stayed if, at the date of the issue of the notice, the judgment-creditor is not entitled to issue immediate execution of the judgment."

This proposition was upheld and applied by a Division Bench of our High Court in the case of Ganeshnarayan Jagdamba Prasad Vs. Indian Textile Syndicate, It has again been reiterated by our High Court in the case of J.P. Tiwari Vs. Bhimraj Harlalka, , where Chagla, C. J., has observed as follows;--

"It is well settled that if there is any impediment in the way of a judgment-creditor executing the decree or if the decree is not presently executable, no insolvency notice can be founded on such a decree. It is not necessary that execution of the decree should be stayed formally by the Executing Court. Even without any such formal order of stay, if the judgment-creditor is not in a position to satisfy the insolvency Court that he has a right to execute the decree in praesenti, the insolvency notice taken out by the judgment-creditor must fail."

4. In the present case, the heirs of the judgment-creditor cannot execute the decree without obtaining representation to the estate of the deceased creditor. u/s 214 of the Indian Succession Act, it is provided as follows:--

"214. Proof of representative title a condition precedent to recovery through the Courts of debts from debtors of deceased persons. -- (1) No Court shall --

(a) pass a decree against a debtor of a deceased person for payment of his debt to a person claiming on succession to be entitled to the effects of the deceased person or to any part thereof, or

(b) proceed, upon an application of a person to be so entitled, to execute against such a debtor a decree or order for the payment of his debt, except on the production, by the person so claiming, of --

(i) a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased, or

(ii) a certificate granted u/s 31 or Section 32 of the Administrator-General's Act, 1913, and having the debt mentioned, therein, or

(iii) a succession certificate granted under Part X and having the debt specified therein, or

(iv) a certificate granted under the Succession Certificate Act, 1889, or

(v) a certificate granted under Bombay Regulation VIII of 1827, and if granted after the first day of May, 1889, having the debt specified therein.

(2) The word "debt" in Sub-section (1) includes any debt except rent, revenue or

profits payable in respect of land used for agricultural purposes."

Hence, the heirs of the deceased creditor cannot start execution proceedings in respect of a decree obtained by the deceased creditor without obtaining representation to his estate. The petitioning creditors are not, therefore, in a position to execute the decree immediately in view of the provisions of Section 214 of the Indian Succession Act. Mr. Daruwala who appears for the petitioning creditors has urged that an order has been obtained under Order 21, Rule 22, of the Civil P. C. Hence the decree was executable on the date when the insolvency notice was issued. He, therefore, submits that the insolvency notice is valid in law and an act of insolvency can be based on the insolvency notice. This argument proceeds on the assumption that if an order has been obtained under Order 21, Rule 22, then the decree is executable. When, however, execution is sought not by the original decree-holder but by his heirs, they are required to comply with the provisions of Section 214 of the Indian Succession Act also before they can proceed to execute the decree. The heirs of the judgment-creditor cannot, therefore, be heard to say that they were entitled to execute the decree at the time when the insolvency notice was issued. Without obtaining representation to the estate of the deceased decree-holder, they were not in a position to execute the decree at the date of the insolvency notice. Non-compliance with an insolvency notice constitutes an act of insolvency only in cases where the notice is issued in respect of a debt under a decree which can be executed in praesenti. The present insolvency notice does not satisfy this legal requirement. Hence no act of insolvency can be based on such an insolvency notice.

5. Mr. Daruwala has urged that insolvency proceedings are not proceedings in execution. Hence it is not necessary for the heirs of a deceased judgment creditor to obtain representation to his estate before they can proceed with insolvency proceedings. In the case of *Bhurmali Kapurchand and Co. v. Premier Machine Tools Co.*, reported in AIR 1977 Bom 305, Mridul, J. while considering the question whether in the case of a decree which was more than two years old, compliance with the provisions of Order 21, Rule 22, of the CPC was necessary before an insolvency notice could be issued, made certain observations to the effect that insolvency proceedings are an equitable mode of execution of a decree in favour of the judgment creditor. It is not necessary for me to consider whether an insolvency proceeding is an equitable mode of executing a decree or not, though I must say that, prima facie, an insolvency proceeding appears to be far from being a mode of executing a decree because, basically, insolvency proceedings are proceedings by which the property of a debtor is taken for the benefit of all his creditors. These proceedings are not concerned with the realisation of the claims of an individual creditor. One may, therefore, assume for the sake of argument that insolvency proceedings are not proceedings in execution and that the heirs of a petitioning creditor need not obtain representation to his estate before continuing insolvency proceedings. In the present case, however, insolvency proceedings are not sought to be continued by

the heirs of the petitioning creditor, since deceased. This is a case where the heirs of a deceased decree-holder have initiated insolvency proceedings as petitioning creditors by getting an insolvency notice issued on the basis that they have an executable decree in their favour against the judgment-debtor. The right to execute a decree becomes relevant in the present proceedings by virtue of its being claimed by the heirs of the deceased decree-holder. If the very foundation of an insolvency proceeding is based upon a right to recover the amount under an executable decree from the judgment-debtor, then the Court can go into the question whether, in fact, the decree is executable by the petitioning creditors who have taken out an insolvency notice. If for any reason they are not in a position to execute the decree in praesenti, then they cannot get a valid insolvency notice issued against the judgment-debtor. It is true that no Notice of Motion was taken out by the judgment debtor to set aside the insolvency notice on this ground; but this ground can be taken even at the stage when a petition is filed to get the judgment-debtor adjudicated insolvent. u/s 13(2)(b) of the Presidency Towns Insolvency Act, at the hearing of a creditor's petition for an order of adjudication, the Court is bound to require proof not merely of the debt of the petitioning creditor, but also of the act of insolvency, and the Court is entitled to dismiss the petition if it is not satisfied that any act of insolvency was, in fact, committed. The present petition is based on the judgment-debtor's non-compliance with an insolvency notice. The insolvency notice is not valid in law for the reasons which I have already stated. Under the circumstances, the judgment-debtor cannot be said to have committed an act of insolvency.

6. The petition, therefore, fails and is dismissed.

7. Mr. Makhija very fairly does not press for costs. There will, therefore, be no order as to costs.

8. Petition dismissed.