REVISIONAL CIVIL

Before Bhandari, C.J.

THE NEW CITIZEN BANK OF INDIA, LTD. Delhi,—*Petitioner.*

versus

MESSRS. K. B. BURNEL AND CO.,—*Respondent.*

Civil Revision No. 67-D of 1953

1953

Nov. 2nd.

Civil Procedure Code (V of 1908) Order 34—Whether applies to mortgage of movables—Provincial Insolvency Act (III of 1920)—Section 28 (6)—Secured Creditor realizing his security before the order of discharge—Balance of the debt due not proved in insolvency—Whether entitled to a personal decree against the discharged insolvent.

K.B.B. & Co., took loan from N. C. Bank on security of goods. The company was declared insolvent on the 17th June 1947. On the 30th August 1948 suit by Bank for recovery of Rs. 392-12-0 and on 10th March 1949 obtained ex *parte* decree and later realized the security. The Bank declined to make an application to the Official Receiver under section 28 (8) of the Provincial Insolvency Act or inform him that it wanted to rank as one of the creditors of the Company. On 14th December 1951 company obtained discharge. The Bank made an application for execution of the decree on the 25th June 1952. The executing court dismissed the application as debt was not proved in insolvency. Bank moved the High Court in revision.

Held, that the provisions of Order 34 must be confined to mortgages of immovable property and have no application to mortgages of movables.

Held also, that where a creditor holding a mortgage decree against the insolvent, realises his security before the order of discharge is passed, but does not value his security and prove the balance personally due from the insolvent, the order of discharge releases the insolvent from personal liability under the mortgage as it is a debt provable under the Act and the creditor cannot subsequently claim a personal decree for the balance against the insolvent.

Co-operative Hindustan Bank, Ltd., v. *Surendra Nath* (*1*), distinguished, and *The Official Assignee of Bombay* v. *Messrs. Chimniram-Motilal* (2), followed.

(1) A.I.R. 1932 Cal. 524
(2) I.L.R. 57 Bom. 346

Petition under section 25 of Act IX of 1887 (Provincial Small Cause Courts Act) for the revision of the order of Shri Y. L. Taneja, Judge Small Cause Court, Delhi, dated the 6th December, 1953, accepting the petition of the judgment debtor and holding that the present debt has been discharged by the insolvency of the judgment debtor.

SURAJ BHAN, for Petitioner.
BUDI DEVA GUPTA, for Respodent.

JUDGMENT

Bhandari, C.J. BHANDARI, C. J. Two questions arise for decision in the present case, namely, (1) whether the provisions of Order XXXIV of the Code of Civil Procedure apply to movable property and (2) whether the provisions of section 28(6) of the Provincial Insolvency Act empower a secured creditor to execute a decree against the personal property of an insolvent after the order of discharge has been passed.

The facts of the case are simple and not in dispute. Messrs. K. B. Burnel and Company obtained a loan from the New Citizen Bank of India Limited by depositing certain pieces of serge by way of security. On the 17th June 1947 the Company was declared an insolvent. On the 30th August 1948 the Bank brought a suit against the Company for the recovery of a sum of Rs. 392-12-0 and on the 10th March 1949 an *ex parte* decree was granted in favour of the Bank. About a year later the serge belonging to the Company was sold for a paltry sum of Rs. 7-3-0 but in view of the provisions of section 28 (6) of the Provincial Insolvency Act, it declined to make an application to the Official Receiver or to inform him that it wanted to rank as one of the creditors of the Company. The Company was discharged on the 14th December 1951. On the 25th June 1952 the Bank submitted an application under Order XXI of the Code of Civil Procedure for the execution of the decree. The executing Court held that it was the duty of the Bank, after the serge had been sold, to apply to the Official Receiver for the recovery of the

balance and that as no such application was made and as the debt owing by the Company to the Bank was not proved before the discharge of the company, it was not open to the Bank to claim preferential treatment. In view of these findings the Court dismissed the application filed by the Bank. The Bank has come to this Court in revision and the question for this Court is whether the Court below has come to a correct determination in point of law.

The first point for consideration is whether the provisions of Order XXXIV of the Code of Civil Procedure apply to movable property. In *Co-operative Hindusthan Bank, Ltd.* v. *Surendra Nath Dev*, (1), a Division Bench of the Calcutta High Court held that the rules of Order XXXIV, based as they are on well settled rules of equity, apply not only to suits for mortgages on immovable property but also to suits on mortgages of movable property. This observation, however, appears to me to be obiter and has been made without a careful consideration of the relevant facts. The correct principle appears to have been enunciated in *The Official Assignee of Bombay* v. *Messrs. Chimniram Motilal* (2), where the learned Judges after a careful consideration of the history of that Order and the fact that the Chapter is headed "Suits relating to mortgages of immovable property", held that the operation of Order XXXIV must be confined to mortgages of immovable property.

The second and perhaps the more important of the two questions is whether the provisions of section 28 (6) of the Provincial Insolvency Act exempt a secured creditor from liability to prove his debts against the insolvent debtor. Two different sets of views have been expressed on this point. In *Sunder Lal* v. *L. Benarsi Dass* (3), a Division Bench of the Allahabad High Court held that section 47 of the Provincial Insolvency

(1) A.I.R. 1932 Cal. 524
(2) I.L.R. 57 Bom. 346
(3) A.I.R. 1939 All. 401

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Act permits a secured creditor to come under the Act if he chooses, but as the provision is optional he is entitled to remain apart from the insolvency proceedings and rely entirely on his decree and execution proceedings. It was accordingly held that an order of discharge does not release the insolvent from liability to proceedings under Order XXXIV, rule 6, being taken against him. This view appears to have been endorsed in *Khupchand-Nathmal Marwadi* v. *Rajeshwar Shankar Deshpande* (1).

The other High Courts, however, appear to have expressed a contrary opinion. In *Haveli Shah* v. *Mst. Hussaini Jan*, (2), a Division Bench of the Lahore High Court held that where a creditor holding a mortgage decree against the insolvent, realises his security before the order of discharge is passed, but does not value his security and prove the balance personally due from the insolvent, the order of discharge releases the insolvent from personal liability under the mortgage as it is a debt provable under the Act and the creditor cannot subsequently claim a personal decree for the balance against the insolvent. This view was approved in *Chokkalinga Mudali* v. *Manickka Mudali*, (1) the head-note of which is in the following terms :—

> "By reason of the provisions of section 47, the debt of a secured creditor is not provable until he has realised his security or has abandoned it or valued it. Until one of these events has happened, there is no debt provable in the insolvency proceedings. Thus, the real position is that a secured creditor may prove in the insolvency proceedings, but his right is a contingent one and until the contingency happens he is

(1) A.I.R. 1940 Nag. 252
(2) A.I.R. 1938 Lah. 217
(3) A.I.R. 1942 Mad. 273

outside the Act. If the secured creditor has not during the insolvency proceedings realised his security, or surrendered or valued it, section 44 (2) cannot affect him, because no portion of the debt due to him has become provable and the section only applies to debts which are provable in the insolvency. Therefore, he is entitled to a personal decree against the insolvent under Order XXXIV, Rule 6, Civil Procedure Code, after the insolvent's unconditional discharge if the security has not been realised before the discharge of the insolvent. If it has and there is a deficiency the balance of the debt constitutes a debt provable in insolvency and section 44 (2) will operate to cancel it."

After a careful consideration of these authorities, I am clearly of the opinion that the view expressed by the High Courts at Lahore and at Madras must be preferred to the view expressed by the High Courts of Allahabad and Nagpur.

The history of the present litigation makes it quite clear that on the 10th March 1950 when the Bank sold the serge belonging to the insolvent for a sum of Rs. 49-5-0, the Bank knew that it was a creditor of the insolvent for the balance due from him and it was, therefore, clearly the duty of the Bank to make an application to the Official Receiver for being included in the list of creditors. The Bank omitted to make an appropriate application and the executing Court was, therefore, justified in dismissing the application made by it under Order XXI. The order of the Court below must, therefore, be affirmed and the petition must be dismissed. There will be no order as to costs.