

1880
JULY 15.
ORIGINAL
CIVIL.
4 B. 482.

from s. 14. That section relates, no doubt, to separate causes of action; but the combination which is allowed to bring other foreign causes within the jurisdiction is denied in the case of land. The object seems to be to confine suits to land strictly to the Courts having jurisdiction over the land, or, at least over part of the land sought. The suit for movable property is not allowed to attach to itself a suit for immovable property, as by leave of the Court another suit for moveable property may in that way be drawn within another than the local jurisdiction. Should a mixed cause—involving a claim to both kinds of property, one within and one without the jurisdiction—be one obviously proper for trial in the High Court the suit in the Mofussil Court may be withdrawn under s. 13 of the Letters Patent, and tried here. The cause of action being single, no objection could arise to a consolidation of the two suits upon the words of s. 14.

I do not think, therefore, that the present is a case in which leave to sue in this Court could properly be given. But it was in fact not asked for. I am told that I ought to infer it from leave having been granted to the plaintiff to sue as a pauper, but such leave does not by any means necessarily imply that this particular question was judicially considered. The leave of the Court ought to have been as distinctly sought and obtained for the purpose of joining the different elements of the cause of action in a single suit in this Court as for the purpose of suing in *forma pauperis*. As it is, I must dismiss the suit as to the immoveable property outside the original civil jurisdiction of this Court, for want of jurisdiction.

Attorneys for the plaintiff.—Messrs. *Balkrishna and Bhagwandas*.

Attorneys for the defendant.—Messrs. *Nanu and Hormusji*.

4 B. 489.

[489] INSOLVENCY.

Before Mr. Justice Marriott.

IN THE MATTER OF THUCKER BHAGVANDAS HARJIVAN,
(Insolvent); MURARJI GOKULDAS (Creditor).
[18th August, 1880.]

Indian Insolvent Act (Stat. 11 & 12 Vic., c. 21), s. 9 — Order of adjudication—Lying in prison for twenty-one days—Period within which petition for adjudication to be presented—Construction—Effect in an Act of the words "It shall be lawful"—Review—Jurisdiction.

The Indian Insolvent Act (11 and 12 Vic., 21) the ninth section of which empowers a creditor of any person, who shall lie in prison for debt for a period of twenty-one days, to petition the Court to adjudge such person an insolvent, prescribes no limits to the time within which such petition must be presented. It may be presented by the creditor at any time subsequently to the imprisonment.

The effect of the words "It shall be lawful" in s. 9 of the Indian Insolvent Act are imperative, and do not give the Court a discretion, in the exercise of which it may refuse an order of adjudication applied for under that section.

The Court for the relief of insolvent debtors at Bombay has jurisdiction to review its own orders.

[R., 11 Bom. L.R. 1032 (1039) = 4 Ind. Cas. 126.]

THIS was an application by the insolvent, under s. 9 of the Indian Insolvent Act (11 and 12 Vic., c. 21), for the revocation of an order,

dated 29th July 1880, whereby the Court had adjudged him to have committed an act of insolvency.

The insolvent had been arrested in execution of a decree obtained against him by certain creditors (Messrs. Bomanji and Ardesir Hormusji) in the Court of Small Causes at Bombay. He was detained in prison for six months, and obtained his release in October 1879. On the 29th July 1880, Murarji Gokuldas applied for and obtained the above order of adjudication under the ninth section of the Indian Insolvent Act, on the ground that the insolvent had lain in prison for debt for a period of twenty-one days. The insolvent now applied to have the order revoked.

Lang, for the insolvent.—We contend that no order of adjudication can be made, under the ninth section of the Act, in respect of an imprisonment which has expired long before the date of the petition for such adjudication. No case has been decided upon the point; but the wording of the section shows that such a petition can be presented only while the person, against whom it is directed, is actually in prison. The words in the ninth section—"It shall be lawful for the Court to adjudicate, &c."—give the Court a [490] discretion, and in this case the order should be refused, considering the length of time that has elapsed.

Counsel referred to Stat. 6, Geo. IV, c. 16, s. 5; English Bankruptcy Act 1849; 12 and 13 Vic., c. 106, s. 88; *Wallace v. Blackwell* (1); Stat. 5 and 6 Vic., c. 122, s. 7.

Telang, for the petitioning creditor, referred to *Higgins v. Mc Adam* (2), *Moser v. Newman* (3), *Calcott v. Freeman* (4).

JUDGMENT.

MARRIOTT, J.—This is an application, by the petition of the above-named insolvent, praying that an order of this Court of the 29th day of July last, whereby the above-named insolvent was adjudicated to have committed an act of insolvency, may be revoked.

The adjudication was made upon the petition of Mr. Murorji Gokuldas, an alleged creditor of the insolvent. That petition alleged that the insolvent was a trader within the Bankrupt Law, and that on the 11th December 1878, a decree was passed against the insolvent by the Court of Small Causes in an action brought by Messrs. Bomanji and Ardesir Hormusji Wadia for Rs. 1, 071-13 and that (and this is the act of insolvency alleged) the insolvent "remained in jail for about six months under execution of the said decree."

The petition further alleged that the petitioner was a creditor of the insolvent, inasmuch as he is the assignee of a decree passed by the High Court on the 30th March 1875, against the insolvent in suit No. 128 of 1875, and wherein Vurjivandas Madhavdas and others were plaintiffs and the insolvent was defendant, for Rs. 45, 383-4 for debt and interest and costs of the suit, when taxed as usual, and further simple interest until judgment, which judgment-debt remains unsatisfied.

The insolvent's petition does not deny that he is a trader, and the fourth paragraph states that the insolvent "was discharged from jail in October, 1879, after having been detained for six months at the instance of his judgment-creditors, Bomanji and Ardesir Hormusji," and it contains certain allegations of fact tending to show that there was not a good petitioning creditor's debt, and that the petition for adjudication was not *bona fide*.

(1) 3 Drew. 538.

(2) 3 Y. & Jer. 1.

(3) 6 Bing. 556.

(4) 2 T. R. 59.

1880
AUG. 18.

INSOL-
VENCY.

4 B. 489.

Upon this state of facts it was argued for the insolvent that the Court had no jurisdiction under s. 9 of the Indian [491] Insolvent Act (11 and 12 Vic., c. 21), to make the order of adjudication, inasmuch as the insolvent had been discharged from custody prior to the date of the petition and adjudication.

Now, s. 9 enacts "that if any person, who, &c., would be deemed a trader, liable to become bankrupt having been arrested or committed to prison for debt.....shall upon any sucharrest or commitment for debt.....lie in prison twenty-one days.....it shall be lawful for any person being a creditor.....to present a petition to the Court of the presidency within which such person shall have been so imprisoned..... whereupon.....it shall be lawful for the Court to adjudge that such person has committed an act of insolvency."

Under this section, in order to entitle a creditor to petition, two conditions, and two only, are requisite, provided that the person be a trader viz:—first, that he be arrested or committed to prison for debt, and, second, that upon such arrest or commitment he 'do lie in prison' for twenty-one days; and it appears to me that the moment a debtor who has been so arrested or committed, has lain in prison for twenty-one days, an act of insolvency has been completed which entitles a creditor to petition, and empowers the Court, upon such petition, to adjudicate. This construction is in accordance with the construction placed upon the old English Bankruptcy Acts. Under the statutes 1 Jac. I, c. 15—15 Jac. I, c. 19, and 6 George IV, c. 16 the act of bankruptcy was held to be complete by the lying in prison for the specific periods in these statutes mentioned: *Wallace v. Blackwell* (1).

There appears to me to be nothing in the language of the section of the Indian Act which either expressly or impliedly makes it requisite that the debtor should be in prison at the time of presenting the petition or at the time of the adjudication. Indeed, I think the grammatical construction of the section leads to the contrary conclusion, for the sentence which empowers a creditor "to present a petition to the Court..... of the Presidency within which such person shall have been so imprisoned," seems to contemplate the presentation of a petition after a person has been discharged.

[492] I do not think any assistance in construing s. 9 is to be obtained from s. 8. That section relates to non-traders; but the decision of Couch, C. J., in the case of *In re Rayhobak Ramchandra* (2) certainly shows that he considered a non-trader also liable to be adjudicated an insolvent after he had ceased to be in custody.

Again, the Indian Insolvent Act places no limit to the period within which a creditor may petition. In this the Indian Act follows the provisions of the English Bankruptcy Acts of James I and 6 George IV. A limit to the period within which a petition for adjudication could be prescribed in England, was first introduced in Stat. 5 and 6 Vic., c. 122, by the seventh section of which it was enacted "that no person shall be liable to become bankrupt by reason of any act of bankruptcy committed more than twelve months prior to the issuing of the fiat in bankruptcy against him." The Indian Insolvency Act was passed subsequently to this statute; but the Legislature did not deem it advisable to fix any limit within which the petition for adjudication should be presented. Upon the construction of the Act, therefore, it seems that, once an act of insolvency,

(1) 3 Drew 538.

(2) 6 B. H. C. R. O. C. J. 86.

of the description of those mentioned in s. 9, has been committed, it is open to every creditor of the insolvent, at any subsequent period of time, to present a petition for adjudication.

It may be urged that this may be a great hardship on an insolvent; that, however, is a matter for the consideration of the Legislature, and not for a Court of law.

The fact that the Act fixes no limit to the period within which the petition for adjudication must be presented, is an argument against the suggestion that such a petition must be presented while the insolvent is in gaol.

It was urged that, as the Act fixes no limit within which the petition for adjudication is to be presented, it is but reasonable to conclude that the Legislature, by enacting that "it shall be lawful for the Court to adjudge that such person has committed an act of insolvency," intended to give the Court a discretion to adjudicate, or not, according to the circumstances of each particular case. I think these words do not give the Court any such [493] discretion; but that, inasmuch as they confer on the Court authority to do a judicial act in a certain case, they make it imperative on the Court to exercise that authority when the cases arise, and the exercise of that authority is duly applied for. The words "it shall be lawful" in an Act of Parliament have often been the subject of judicial construction, and very fully so in the recent case of *Julius v. The Bishop of Oxford*(1). For a summary of the decisions, and a concise statement of the true construction of those words, I would especially refer to Lord Penzance's judgment, pp. 231 and 232. I am, therefore, of opinion that the petitioning creditor had a right to petition, and that the Court had jurisdiction to make the order of adjudication, notwithstanding that the insolvent had been discharged from gaol at the date of the petition and adjudication, and notwithstanding that the act of insolvency was committed more than twelve months prior thereto; and I further think that s. 9 confers no discretion on the Court, but that it is imperative.

Having heard evidence as to the circumstances under which the petitioning creditor's debt was alleged to have arisen, His Lordship revoked the orders of adjudication with costs.

25th August. Hon. F. L. Latham (Acting Advocate-General) and Telang appeared on behalf of the petitioning creditor, and moved for a review of the above order of revocation made on the 18th August. They contended that the practice and procedure of the Courts of Insolvency in India were the same as those of the Bankruptcy Courts in England, except where expressly varied by the Indian Insolvent Act. Although by s. 70 of the English Bankruptcy Act of 1869 (32 and 33 Vic., c. 71), the Courts in England were given a power of review, yet they had exercised this power long before any such express enactment was passed. The Courts in India had, therefore, a similar power: *Ex parte Roffey* (2), *Ex parte Atherton*(3); and see Lee on Bankruptcy (ed. 1871), p. 352.

Lang, for the insolvent, contended that the Court had no power of review, and that the only course open to the petitioning creditor was by way of appeal.

[494] His Lordship, however, held that the Court had jurisdiction to review its own orders, and cancelled the order of the 18th day of August, by which the order of adjudication had been revoked.

Attorney for the insolvent.—Mr. H. W. Payne.

Attorney for the petitioning creditor.—Mr. C. Tyābji.

(1) L.R. 5 App. Cases 214. (2) 19 Ves. 468. (3) L. R. 3 Ch. 143.