Bombay High Court
Shivkumar Bachu Sharma vs Bai Khatizabai And Ors. on 21 August, 1957
Equivalent citations: AIR 1958 Bom 253, (1957) 59 BOMLR 1224, ILR 1958 Bom 360
Author: S Desai
Bench: Tendolkar, S Desai
JUDGMENT S.T. Desai, J.

1. This appeal raises an interesting question of some importance and nicely relating to the construction of Section 9(A) of the Presidency Towns Insolvency Act. The few facts necessary for the disposal of this appeal are these. In a suit for ejectment filed against the appellant by the respondents a consent decree was obtained in the Court of Small Causes at Bombay and by that decree the appellant agreed to pay a sum of Rs. 8,800/-, another sum of Rs. 930/- for costs of the suit and a further sum of Rs. 325/- for additional costs. The decree was passed on 16th December, 1953. Two sums of Rs. 1000/- each were paid by the appellant to the respondents on 8th February 1953 and 30th April, 1953 respectively. No payment having been made thereafter by the appellant the respondents applied to the Court for issuance of an Insolvency Notice and the Insolvency Notice was issued by the Court on 21-10-1956 and was served on the appellant on 9th November 1956. On 8th January, 1957 the appellant took out the notice of motion out of which arises this appeal and the notice of motion was for setting aside the insolvency notice. On 8th March 1957 a further ground was allowed to be added to the notice of motion. Various contentions appear to have been raised before the learned Judge. The learned Judge has dismissed the notice of motion. It is not clear on what ground the notice of motion was dismissed because in this case we do not have the benefit of any judgment by the learned Judge. We may immediately observe that the point which has been really pressed before us in this appeal and which has impressed us does not appear to have been urged before the learned Judge.

2. A number of contentions have been urged before us by Mr. K.K. Desai, learned Counsel appearing for the appellant. It is not necessary for us to examine all of them in view of the fact that on a construction of Section 9(A) of the Presidency Towns Insolvency Act, we are in favour of the appellant. The contention arises in this way. The consent decree is entirely silent on the question of payment of any interest on the decretal amount. In the insolvency notice taken out by the respondents, they no doubt gave credit for the two sums of Rs. 1000/- each paid to them but they added Rs. 350/- as interest on the amount that was due to them under the consent decree, and what is more they also claimed future interest. The principal contention of Mr. Desai before us has been that by adding this amount of Rs. 850/- as interest and claiming further interest, there was such non-compliance with the requirements of the provisions relating to an Insolvency Notice that the insolvency notice has become wholly invalid.

3. Now, Sub-section (1) of Section 9(A) requires, and it is a peremptory requirement, that the insolvency notice shall be in the prescribed form and the form requires that the amount due under the decree must be specified in the notice. Therefore, if the amount is not correctly specified the notice would be bad and that has been the view taken by this Court in numerous cases. But the first part of Sub-section (2) lays down as follows :

"Such notice shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due, unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such misstatement....."

Now, on a proper construction of this subsection, we are of opinion that it deals only with cases where the amount stated in the notice as the amount due exceeds the amount actually due merely by reason of a misstatement and not otherwise. The short argument is that the appellant's case cannot fall in the first part of this sub-section, because this is not a case of a mere misstatement and since the first part of the sub-section can have no application, there was no obligation on the part of the appellant to give the notice to the creditor visualised by the sub-section. The argument has proceeded that the requirement about the notice to the creditor could be the only impediment in the way of the appellant in challenging the insolvency notice and that impediment not being there, the insolvency notice remained invalidated and the notice of motion should, therefore, have been allowed by the learned Judge. It is urged that the respondents were bound strictly to comply with the form of the insolvency notice and the insolvency notice being in accordance with the terms of the consent decree, it became invalid. Reliance has been placed in that context on Sub-section (1) of Section 9(A). As to Sub-section (2) of the section, it is said that it was obviously intended to deal with cases where an insolvency notice may become invalidated by reason simply of the fact that the sum specified in the notice had not been correctly stated through some clerical error or through some mis-calculation or such other innocent cause. It was said that there was no basis whatever in the decree for any claim for interest or future interest. There is, in our opinion, substance in this argument.

4. On behalf of the respondents it is argued by Mr. Sorabji, learned Counsel appearing for them, that the present insolvency notice was protected by the provision laid down in Sub-section (2) of Section 9(A). The argument is that the notice did not become invalid and was not hit by the misstatement relating to interest. Considerable stress is laid on the words "shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due." It is said that the protection given by Sub-section (2) of Section 9(A) applies to every case where the amount specified exceeds the amount actually due, which would be a result of any misstatement as to the amount. The argument ran that the expression 'misstatement' applies not merely to a misstatement which may be the result of any clerical error or mis-calculation or due to any innocent cause but to every case of misstatement whether deliberate or otherwise. The crux of the argument is that there is no warrant whatever for giving any restricted connotation to the expression misstatement' in Sub-section (2).

5. It is a well established canon of construction that a provision like the one before us must be strictly interpreted. It is now firmly established that a bankruptcy notice is not a good notice if it is not in accordance with the terms of the decree, but is on the decree as modified in some manner. That, in our opinion, is precisely what has happened in the case before us. There was no basis whatever for the respondents making any claim for interest. Learned Counsel appearing for the respondents has frankly conceded that there is nothing in the consent decree which could have induced the respondents to believe that they were entitled to interest. The way we read Sub-section

(2) is that it applies only to those cases of mistake about the amount to be specified which were the result of any error in giving credit for part payments made, or any clerical or arithmetical error or any other misstatement proceeding from an innocent cause of a like nature. It may be from ignorance of fact, forgetfulness or inadvertence. At times it does happen that the amount is not correctly stated in the insolvency notice due to any such cause. But apart from that we do not see why an insolvency notice should be regarded as valid when the amount specified thereunder is obviously one not granted by the decree. You cannot claim in the insolvency notice something which was not awarded by the decree and then expect to avoid the consequences of the notice becoming invalidated simply by saying that after all it was a misstatement. You cannot make an unjustified claim and take shelter under the expression 'mis-statement'. The expression 'mis-statement' is not of such wide import as would include mis-statement arising from any cause; it is certainly not every false statement deliberate or otherwise that is comprehended. In our opinion, the amount specified in the insolvency notice before us was not merely in excess of the amount actually due but it was a claim for an amount not warranted by the decree. There was no foundation whatever for any such amount of interest being specified and claimed in the insolvency notice and it is not possible for us to dismiss that unwarranted and false claim for interest by merely regarding it as a mis-statement which prevents an insolvency notice from becoming invalid by operation of Sub-section (2) of Section 9(A). In our judgment, the expression 'mis-statement' must be restricted to cases of mistake as broadly indicated by us. It has to be read in a reasonable manner and in a manner which would be consistent with the scope and object of the provision under consideration. The sub-section cannot be read in such a manner as would enable any false claim which bas no basis in the decree being made in the insolvency notice. For all these reasons we have reached the conclusion that the insolvency notice was invalid.

6. It was finally urged on behalf of the respondents that even if we are inclined to take the view that the insolvency notice was invalid, the learned Judge was in error when he condoned the delay which admittedly was there in the matter of taking out of the notice of motion for setting aside the insolvency notice and that the notice of motion should have been dismissed on that ground alone. We agree that it is open to the respondent to support the judgment on any ground whatever whether the point on which that ground is sought to be raised was decided in his favour or against him by the learned Judge. It is not disputable that there was delay. In his affidavit in support the appellant stated that he had left Bombay on or about 23rd November, 1956 and expected to return to Bombay in the first week of December. He was obliged to go out of Bombay on some urgent work find could not keep up to his scheduled programme of returning to Bombay from his native place in time duo to his illness. All that the respondents stated in their affidavit in reply was that they did not admit the facts pleaded by the appellant in support of his plea for condonation of delay. The learned Judge was satisfied with the statements made in the affidavit of the appellant in support of his plea for delay being excused. It is true that the relevant part of the affidavit does not give all the requisite particulars that one normally expects in any such application for condonation of delay. But it is there stated that the appellant had gone out of Bombay and that he had urgent work out of Bombay and that he had fallen ill when he was at his native place. The correctness of those facts not having been challenged in the affidavit in reply, the learned Judge was certainly entitled to draw the requisite inference which obviously he must have drawn when he excused the delay. And after all it was a matter of discretion with the learned Judge and the discretion having been exercised it is not

for us to say what view we might have taken of the facts in the affidavit in support. Therefore, in our opinion, we would not be justified in interfering with the discretion exercised by the learned Judge on this part of the case.

7. The result is that the appeal succeeds and will be allowed. Since we are making an order setting aside the Insolvency Notice, there will be a declaration that no act of insolvency was committed by the appellant as stated in the insolvency notice in question. We have already stated and we may repeat in fairness to the learned Judge that the point in the precise form was not urged before him and it is only on that point that the appeal succeeds. The fair order for costs will be that both the parties to the appeal should bear their own costs. The order for costs made by the learned Judge will be vacated.

8. Liberty to the appellant to withdraw the sum of Rs. 500/- deposited in Court.

9. Appeal allowed.