APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Krishnaswami Ayyar.

1909. December 21, 22. 1910. January 19.

CHENGALVARAYA MUDALY (PETITIONER), APPELLANT,

v.

THE OFFICIAL ASSIGNEE OF MADRAS AND AS SUCH THE ASSIGNEE OF THE PROPERTY AND CREDITS OF C. P. NAMBERUMALL CHETTY AND C. P. VEERA-RAGHAVULU CHETTY, ADJUDICATED INSOLVENTS (COUNTER-PETITIONERS), RESPONDENTS.*

Indian Insolvency Act, 11, 12 Vict., cap. 21, *ss.* 39, 40,—*'Mutual credits' relate to date of vesting order—Presidency Small Cause Courts Act, s.* 69—*Money deposited as security under section does not become the property of the decree-holder—Right to set off claims for unliquidated damages.*

Money deposited in Court under section 69 of the Small Cause Courts Act does not become the property of the decree-holder.

Before the date of the vesting order an insolvent had obtained two decrees against a debtor. In the case of one of the decrees, the debtor applied for a reference under section 69 of the Presidency Small Cause Courts Act and the amount deposited by him remained in Court on the date of the vesting order. The High Court declining to express an opinion on the reference, the decree became absolute and the money was paid to the Official Assignee. Before the date of the vesting order the debtor had brought a suit against the insolvent, and a decree was passed therein against the insolvent after the vesting order:

Held, that the debtor was entitled under section 39 of the Insolvency Act to set off against the amount of the two decrees obtained against him the amount due by the insolvent under the decree obtained by the debtor.

The decree in respect of which the deposit was made remained unsatisfied in law on the date of the vesting order and was an item of credit within the meaning of section 39 on such date. The subsequent payment to the Official Asignees did not deprive the debtor of his right of set off.

Per *Krishnaswamy Ayyar, J.*—Claims for unliquidated damages cannot be the subject of set off as mutual credits under section 39 of the Indian Insolvency Act. Such claims are however mutual dealings within section 38 of the English Acts of 1869 and 1883 and can form the subject of set off under section 40 of the Indian Insolvency Act, which makes the provisions of the subsequent English Acts applicable to the proof of claims under the Indian Insolvency Act.

APPEAL against the order of Wallis, J., Insolvency Commissioner, in Petition No. 267 of 1908, dated the 5th day of April 1909, in the

* Original Side Appeal No. 24 of 1909.

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matter of Namberumall Chetty and C. P. Veeraraghavulu Chetty, adjudicated insolvents.

The facts necessary for this report are set out in the judgments.

K. Ramanath Shenai for appellant.

J. R. B. Branson, the Official Assignee, in person.

JUDGMENTS (THE CHIEF JUSTICE).—We have had some difficulty in getting at the facts in this case, but as I understand them and so far as they are material to the question we have to decide, they are these.

In August 1906 the insolvents entered into a contract with the appellant that he was to do certain shipping work for them for two years certain, that he was to receive an advance of Rs. 2,000 for which he was to execute two promissory notes in favour of the insolvents, and that the notes were to be met out of the amounts due to the appellant under his agreement. The advance was received and the notes were executed.

Suits were brought against the appellant on the promissory notes. He set up the agreement of August 1906 by way of defence. Two decrees were obtained against the appellant on the notes in the Small Cause Court, one in Suit No. 11 and the other in Suit No. 12. The appellant asked for a reference under section 69 of the Small Cause Courts Act in Suit No. 11 and paid into Court under section 70 of the Act Rs. 1,060, the amount of the judgment and costs. The High Court declined to express an opinion, and in August 1908 the contingent judgment in Suit No. 11 was made final and there was a final decree against the appellant in Suit No. 12.

On November 30th, 1908, the appellant being the petitioning creditor, the vesting order was made in respect of the estate of the insolvents.

On April 2nd, 1909, *i.e.*, after the vesting order, the money which had been paid into Court by the appellant in Suit No. 11 was paid out to the Official Assignee.

Pending the reference to the High Court in Suit No. 11, and before the adjudication the appellant brought a suit against the insolvents on the agreement of August 1906. He recovered judgment for Rs. 4,000 and odd on February 12th, 1909.

The appellant applied to the Insolvency Commissioner for an order that the sum of Rs. 4,000 and odd for which he had instituted his suit before the vesting order, and for which he had

recovered judgment dated after the vesting order should be set off against the amounts of the two decrees obtained against him on the promissory notes. The learned Commissioner allowed the judgment for Rs. 4,000 to be set off as against the decree in Suit No. 12. He disallowed the set off as regards the decree in Suit No. 11 on the ground that as the Official Assignee had obtained an order for the payment out to him of the amount of his decree and the money had been paid to him and there was nothing to set off. Here, with all respect, I think the learned Commissioner was wrong. For the purpose of section 39 of the Insolvency Act the line is to be drawn at the date of the vesting order. At the date of the vesting order, the insolvents had, no doubt, obtained a final decree in Suit No. 11 against the appellant, but the decree was, at that date, unsatisfied in the same way as the decree in suit No. 12 was unsatisfied, since the money in Court which had been paid in by way of security in suit No. 11 under section 70 of the Small Cause Courts Act was, in my opinion, at the date of the vesting order the appellant's money. For the purposes of the question before us I do not think any distinction can be drawn between the two Small Cause Court decrees.

A point was taken by the Official Assignee that assuming there had been mutual dealings between the appellant and the insolvents within the meaning of section 38 of the English Act of 1883 this was not a case of mutual credit within the meaning of section 39 of the Indian Act. There is nothing in the judgment of the learned Commissioner to show that this contention was raised before him. It is clear that, if it is well founded, there is no right of set off as regards the decree in Suit No. 12. The learned Commissioner has held that there is this right of set off and the Official Assignee has not appealed. In these circumstances I do not feel called upon to discuss the question. I think the appellant is entitled to a set off as against both the Small Cause Court decrees; that the order of the learned Commissioner should be modified accordingly and that the appellant should have his costs here and in the Insolvency Court.

KRISHNASWAMI AYYAR, J.—The petitioning creditor appeals against an order of the learned Commissioner in insolvency in so far as he refused to allow a set off. There were two decrees of the Presidency Small Cause Court obtained against the petitioner.

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The first decree was passed in December 1907 contingent upon the view of the High Court on a question stated by the Chief Judge. The petitioner deposited in Court the amount of the decree and costs under section 70 of the Small Cause Courts Act. The High Court having refused to give any opinion the decree was made absolute on the 3rd August 1908. A decree was passed for a similar sum in another Small Cause Suit against the petitioner on the same date virtually in favour of the insolvents. Upon the application of the petitioner the decree-holders in the Small Cause Suits were adjudicated insolvents and a vesting order was made on the 30th November 1908 The petitioner had on that date a claim against the insolvents for certain sums due to him for work done on behalf of the insolvents, and for damages in respect of alleged breaches of contract by the insolvents. The learned Commissioner has allowed the set off in respect of one of the Small Cause decrees against the claim of the petitioner which since matured into a decree of this Court in Original Suit No. 4 of 1908 on the 12th February 1909. But he has refused to set off the other decree. I am unable to agree with the reasons for this decision. The only difference between the two Small Cause decrees lies in the circumstance that the amount of one decree was in deposit and was paid over to the Official Assignee on the 2nd April 1909, and in the case of the other, execution has still to be taken out. The petitioner gave notice of motion on the 15th of March 1909 and it was during the pendency of his application that the Small Cause Court ordered payment of the money in deposit. We are informed that the order for payment by the Small Cause Court was on the understanding that it was subject to the order of the Commissioner in Insolvency on the notice of motion. There is nothing on the record to support this statement. But there is no doubt that the Small Cause Court was apprised of the application to the Commissioner in Insolvency for the set off. If section 39 of the Insolvency Act applies no distinction can be made between the two Small Cause decrees. The payment by the Small Cause Judge pending the application to the Insolvency Court, would clearly be illegal and the Official Assignee would be liable to refund the amount received by him to be set off against the decree to which the insolvents' estate was liable. It is well settled that the time at which the right of set off is to be determined is the date of the vesting order (see *Eberle's Hotels and*

Restaurant Company v. *Jonas*(1) and also *Palmer* v. *Day & Sons*(2)). In this view it would follow that if the case be one of mutual credit as contemplated by section 39 of the Indian Insolvency Act, the order of the learned Commissioner would be liable to be cancelled. I cannot attach any force to the contention of Mr. Branson that money deposited under section 70 of the Presidency Small Cause Act became the money of the decree-holders—the insolvents—and that, therefore, at the date of the insolvency, there was no money due to the insolvents' estate from the petitioning creditor in respect of one of the Small Cause decrees to be set off against the claim of the petitioning creditor. There is nothing in the language of that section to convert the money paid into Court by the judgment-debtor pending the reference to the High Court into the money of the decree-holder. The judgment-debtor is required to give security as a condition of the reference or to pay the money into Court instead of giving security. The cases to which reference was made by Mr. Ramanath Shenai are authority, if any were needed, (although they were decided on analogous provisions of the law as to payment into Court), for the position that a mere payment into Court by the judgment-debtor under section 70 has not the effect of making the money so paid the property of the decree-holder. See *Mothiar Mira Taragan* v. *Ahmatti Ahmed Pillai*(3), *Dal Singh* v. *Pitam Singh*(4), *Prosunnonath Mookerjee* v. *Binode Ram Sein*(5) and *Fatima Khatoon Chowdrain* v. *Mahomed Jan Chowdry*(6).

A new contention has, however, been raised that the petitioning creditor's claim on the 30th of November 1908 in excess of a sum of Rs. 600 and odd was for unliquidated damages for breaches of contract by the insolvents. An examination of the plaint in Original Suit No. 4 of 1908 on the file of this Court shows that this was so. The question is whether a claim for unliquidated damages falls within the language of section 39 which enables mutual credits to be set off. This provision corresponds to section 38 of the English Bankruptcy Act of 1883, but is more restricted in scope. While section 39 of the Indian Insolvency Act is confined to mutual credits, section 38 of the English Act of 1883 extends the rule of set off to all mutual dealings. It is true that mutual

(1) (1887) 18 Q.B.D., 459 at p. 470.
(2) (1895) 2 Q.B., 618 at p. 622.
(3) (1906) I.L.R., 29 Mad., 232.
(4) (1903) I.L.R., 25 All., 179.
(5) (1870) 13 W.R., 29.
(6) (1868) 12 M.I.A., 65.

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credit is a wider term than mutual debt. See *Rose* v. *Hart*(1). But it is not as wide as mutual dealings. The claim for unliquidated damages by or against the insolvent's estate cannot be set off under the provision as to mutual credits in the Bankruptcy Acts before 1861, *Bell* v. *Corey*(2). Section 153 of the Act of 1861 for the first time provides for the proof in respect of unliquidated damages. This is re-enacted in section 37 of the Bankruptcy Act of 1883. The 171st section of the statute 12 and 13 Victoria, Chapter 106, enabled every debt, or demand provable against the estate of the bankrupt to be set off. Since 1861 the law in England is settled that unliquidated damages due by the estate of the insolvent by reason of a contract or promise are capable of being set off against a debt or demand due to his estate. See *Makeham* v. *Crow*(3). The provision as to mutual dealings was introduced into the statute of 1869 and has been re-enacted in section 38 of the Act of 1883. There is no doubt that unliquidated damages can be set off under this section. Claims for rent and damages for non-completion of buildings, *Booth* v. *Hutchinson*(4), for price of goods and damages for non-delivery, *Peat* v. *Jones*(5), *Mersey Steel and Iron Company* v. *Naylor Benzon & Co.*(6), for price of goods and damages for misrepresentation in the contract, *Jack* v. *Kipping*(7), have been thus set off under the English Act. Although if section 39 as to mutual credits stood alone the set off claimed in this case except as to Rs. 600 and odd would not be allowable, section 40 of the Indian Act makes the provisions "of other statutes hereafter to be passed" as to proof of debts, dues and claims applicable, subject to the like deductions and conditions as in the said statutes are set forth or prescribed. See *In re Vardalaca Charri*(8). Unliquidated damages, therefore, may be proved against the insolvents' estate. *In the matter of Omertololl Daw*(9). And as section 38 of the English Act of 1883 provides that there shall be a set off in respect of the mutual dealings, *i.e.*, that the sum due from the one party shall be set off against any sum due by the other party and the balance of the amount and no more shall be

(1) 2 Sm. L.C., 298.
(2) (1849) 19 L.J.C.P., 103.
(3) (1864) 15 C.B.N.S., 847.
(4) (1872) 15 Eq., 30.
(5) (1881) 8 Q.B.D., 147.
(6) (1884) 9 A.C., 434.
(7) (1882) 9 Q.B.D., 113.
(8) (1877) I.L.R., 2 Mad., 15.
(9) (1874) 13 B.L.R., app., page 2.

claimed or paid on either side, the damages claimed against the insolvents' estate in this case must be subject to this deduction of the amounts due to that estate by the petitioning creditor. I would therefore modify the order of the learned Commissioner and allow the whole set off claimed. The appellant will have his costs here and in the Court below.

THE CHIEF JUSTICE.—I do not dissent from the grounds on which my learned brother bases his judgment, but I prefer to base my judgment on the ground stated by me.

C. Vijiarayavalu Naidu, Attorney, for appellant.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Munro.

KAMBINAYANI JAVVAJI TIMMAJI AMMA GARU AND ANOTHER (PLAINTIFF AND HER LEGAL REPRESENTATIVE), APPELLANTS,

v.

KAMBINAYANI JAVVAJI SUBBARAJU NAYANIVARU AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1909. December 16, 17, 20. 1910. February 1.

Hindu Law—Widow, compromise by—When such compromise tantamount to alienation—Possession when adverse to reversioner.

Where a widow, whose right to property is disputed, enters into a compromise with the disputant by which she merely undertakes to make no further claim to the property, such compromise does not amount to an alienation by the widow and the disputant does not hold the property under any title derived from her.

Sheo Narain Sing v. *Khurgo Koery and Sheo Narain Singh* v. *Bishen Prosad Singh*, [(1882) (10 C.L.R., 337)], dissented from.

Radha Mohan Dhas v. *Ram Das Dey*, [(1869) (3 B.L.R., 362)], referred to.

The possession of the disputant under the above circumstances was adverse to the reversioner.

In considering whether possession is adverse to the reversioner, it must be seen whether it is based on a title derived from the widow as representative of the separate estate or on one which leaves no separate estate to be represented.

APPEAL against the decree of K. C. Manavedan Raja, District Judge of North Arcot, in Original Suit No. 9 of 1903.

The facts of the case are sufficiently stated in the judgment.

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* Appeal No. 113 of 1905.