

## APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Sadasiva Ayyar.

MUNGULURI SIVARAMAYYA (COUNTER-PETITIONER AND CREDITOR NO. 10), APPELLANT,

1915.  
July 20,  
21 and 28.

v.

SINGUAMAHANTI BHUJANGA RAO AND ANOTHER—  
(PETITIONER AND CREDITOR NO. 11), RESPONDENTS.\*

*Provincial Insolvency Act (III of 1907), sec. 46, cl. 3—Appeal out of time—Deduction of time for obtaining copy, if permissible—Delay, if excusable—General provisions of Limitation Act, if applicable—Limitation Act (IX of 1908), ss. 5, 12 and 29—Conversion of appeal into Civil Revision Petition, when permissible—Order without notice to Official Receiver, illegal.*

An appeal under section 46, clause 3 of the Provincial Insolvency Act, which was preferred to the High Court beyond the period of time fixed therein, is barred by limitation as the time requisite for obtaining a copy of the order appealed against cannot be deducted under that Act or under sections 12 (2) and 29 of the Limitation Act.

*Quære.*—Whether the Court can excuse the delay under section 5 of the Indian Limitation Act (IX of 1908).

Case law on the subject considered.

The High Court is competent to convert such an appeal into a Civil Revision Petition under section 15 of the Charter Act, and to set aside the order, where the lower Court passed the order in favour of a creditor of an insolvent without notice to the Official Receiver.

*Abdulla v. Salaru* (1886) I.L.R., 18 All., 4, followed.

APPEAL against the order of J. J. COTTON, the District Judge of Gōdāvari at Rajahmundry, in Insolvency Application No. 551 of 1913, in Insolvency Petition No. 8 of 1909.

The facts of the case appear from the judgment of OLDFIELD, J.

*B. Narasimha Rao* for the appellant.

*T. Prakasam* for the respondents.

OLDFIELD, J.—The appellant is tenth creditor of a person OLDFIELD, J. who has been adjudicated insolvent by the District Judge of Gōdāvari and besides being an unsecured creditor has according to his counter-affidavit filed in the lower Court a mortgage on part of the property now in question. The petitioner in the lower Court, here respondent, is another creditor who alleged in his

\* Appeal Against Order No. 155 of 1914.

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petition, Insolvency Application No. 551 of 1913 that he held an agreement executed by the insolvent, his son, to transfer the property to him in discharge of his debt, that he had once prayed for execution of a document by the Court or Official Receiver in whom the assets had vested, that receiving no orders he had later asked for leave to sue and that again receiving no orders he finally asked for a direction to the Official Receiver to execute the document. Respondent made the defendant alone a party to his petition and appellant says in his counter-affidavit that he appeared to oppose it after hearing of it merely by chance. The lower Court passed the order under appeal directing the Official Receiver to execute a transfer as prayed. It also in the same order allowed a claim by respondent to two items as his own, and not the insolvent's property.

One defect in this order is that it makes no reference to the important contentions of appellant *inter alia* that the agreement in question could not prevail against his mortgage for want of registration and was unenforceable owing to lapse of time and that the claim to two items which does not appear to have been made in the petition under disposal, had already been negatived by the Court after enquiry. But the proceedings were subject to the more fundamental objection that though the insolvent's assets had vested in the Official Receiver under section 16 (2) (a), Provincial Insolvency Act, the lower Court dealt with them by its order in the absence of that officer and without hearing his objections. We are astonished that this mistake should have been made; and we cannot regard it as rectified by the impleading of the Official Receiver in this Court. The result is that the lower Court has passed an order irregular in a material respect and of no legal effect since the person directly concerned has had no opportunity to oppose it.

It is however argued that no interference with this result is possible, because this appeal is out of time inasmuch as section 46 (4), Provincial Insolvency Act, contains nothing authorizing an appellant to deduct time spent in obtaining copies from the period of limitation it fixes and, the Provincial Insolvency Act being a special law within the purview of section 29 (1) (b) of the Limitation Act, section 12 (2) of the enactment is also inapplicable; and it is further contended that section 5 of the Limitation Act is inapplicable for similar reasons and that we

therefore cannot take the course which my learned brother proposes and excuse the delay. On the first point I should follow *Abu Backer Sahib v. Secretary of State for India*(1) in preference to *Dropadi v. Hera Lal*(2) holding that valid ground for distinguishing between cases under the Madras Forest Act and the Provincial Insolvency Act has not been shown and decide that the appeal is out of time. On the second point I should not be prepared to dissent from my learned brother's proposal to give weight to the circumstances of the case and the novelty of this objection and excuse the delay if it were clear that it could legally be excused and if the matter were *res integra*, I should be inclined to the view taken in *Nija butoolla v. Wazir Ali*(3) *Forest Act Reference*(4) and *Seshama v. Sankara*(5) that the general provisions of the Limitation Act including section 5 are applicable inasmuch as they do not alter or affect any period of limitation within the meaning of section 29 (1) (b). Later decisions however of this Court—*Veeramma v. Abbiah*(6) and *Appa Rau Sanayi Aswa Rau v. Krishnamurti*(7)—are to the contrary effect, and it would be necessary either to follow them or refer the matter to a Full Bench for authoritative decision.

My learned brother however agrees with me that in the exceptional circumstances of this case an alternative course is open to us which we propose to take—to treat the appeal as a revision petition and deal with it as such under section 15 of the Charter Act. Those exceptional circumstances consist in the clear illegality of the lower Court's action, the fact that its order may if acted on prejudice the creditors as a body, though it cannot really bind them or the Official Receiver who represents them. There is the further circumstance that, if interference is delayed, respondent might alienate the property and irreparable loss might result. *Abdulla v. Salaru*(8) is a precedent for interference with an appealable decision. In these circumstances we revise the lower Court's order by setting it aside and directing that the petition before it be reheard, after the Official Receiver has been made a party and be disposed of with reference to all of his and appellant's contentions. There

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(1) (1911) I.L.R., 34 Mad., 505.

(3) (1882) I.L.R., 8 Calc., 910.

(5) (1886) I.L.R., 12 Mad., 1 at p. 5.

(7) (1897) I.L.R., 20 Mad., 249.

(2) (1912) I.L.R., 34 All., 496.

(4) (1887) I.L.R., 10 Mad., 211.

(6) (1895) I.L.R., 18 Mad., 99.

(8) (1896) I.L.R., 18 All., 4.

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will be no order as to costs in this Court. Costs to date in the lower Court will be provided for in the order it eventually passes.

SADASIVA AYYAR, J.—I entirely agree that the District Judge's order has to be set aside for the reasons given by my learned brother, so I concur in the order passed by him under section 15 of the Charter Act.

On the question whether section 5 of the Limitation Act gives this Court the power to excuse the delay in the presentation of this appeal, I agree with the decisions in *Nija butoolla v. Wazir Ali*(1), *Forest Act Reference*(2) and *Seshama v. Sanakaru*(3) which answer that question in the affirmative. *Veeramma v. Abbiah*(4) was not concerned with the power of the Court to excuse delay under section 5 but with the provisions of section 7 of the old Limitation Act (present section 6) the application of which provisions would have 'affected' and 'altered' the period of limitation provided by a special statute by excluding the interval during which the plaintiff was under disability and thus by lengthening the period. The decision in *Appa Rau Sanayi Aswa Rau v. Krishnamurti*(5) no doubt interprets the reasoning in *Veeramma v. Abbiah*(4) as involving the conclusion that section 5 of the Limitation Act is also inapplicable to a case governed by a special statute. With the greatest respect I feel inclined to doubt if the reasoning of all the three Judges who decided *Veeramma v. Abbiah*(4) really leads to that conclusion though some of the observations in the judgment of one of the learned Judge's (SHEPHERD, J.) might so point. I respectfully dissent from the decision in *Appa Rau Sanayi Aswa Rau v. Krishnamurti*(5), the learned Judges who decided that case themselves conceding that the argument urged before them in favour of the applicability of section 5 appeared "to have considerable force."

K.R.

(1) (1882) I.L.R., 8 Cal., 910.

(2) (1887) I.L.R., 10 Mad., 211.

(3) (1889) I.L.R., 12 Mad., 1 at p. 5.

(4) (1895) I.L.R., 18 Mad., 99.

(5) (1897) I.L.R., 20 Mad., 249.