a discharge. But these are merely expectations as pointed out in the English cases which may or may not be realized. They do not give any legal right to the insolvent to interfere in the realization of his property which is entirely left to the Official Assignee. The reasoning to the contrary in the judgment of OLDFIELD, J., in *Sivasubrahmania* v. *Theethiappa*(1) cannot be supported. That case itself was however one of an appeal by the insolvent against an order admitting proof of a creditor to which he had objected. The question whether the insolvent is a person aggrieved in such circumstances does not arise in the present case and I express no opinion on the point. I would answer the reference by saying that the ruling in *Sakhawat Ali* v. *Radha Mohan*(2) should be followed and that no appeal lies in the present case, and I agree in dismissing the appeal.

N.R.

ORIGINAL CIVIL.

Before Sir Murray Coutts Trotter, Chief Justice, Mr. Justice Krishnan and Mr. Justice Beasley.

In re A. V. P. M. R. M. MURUGAPPA CHETTIAR.

1925, 28 September

Income-tax—Sec. 10 of Indian Income-tax Act (XI of 1922)—Profits—Money remitted to headquarters in British India by foreign branch—Presumption.

Money remitted to the headquarters of a firm in British India from a branch situated in a foreign country is presumed to be profits and not capital and is assessable to income-tax as profits unless the assessee proves the contrary; *Scottish Provident Institution* v. *Allan*, [1903] A.C., 129, followed.

(1) (1924) I.L.R., 47 Mad., 120. (2) (1918) I.L.R., 41 All., 243.

In re MURUGAPPA CHETTIAR.

Application under section 45 of the Specific Relief Act I of 1877 and section 66 of the Income-tax Act XI of 1922 for an order requiring the Commissioner of Income-tax to refer to the High Court the question of law arising in the matter of assessing the petitioner to income-tax.

The facts are given in the judgment.

M. Subbaraya Ayyar for assessee.—The foreign remittance is not taxable; for it was not profits, but was appropriated by the assessee to capital. The Commissioner is wrong in holding that there is a conclusive presumption that a remittance from a branch in a foreign country to the headquarters can represent only profits. Accounts between the branch and the head-quarters for the year in question were not settled and the profits were not ascertained. These facts are borne out by the accounts themselves.

M. Patanjali Sastri for the Commissioner.—It is a question of fact whether this sum represents capital or profits in the circumstances of this case. The Commissioner did not hold that any conclusive presumption arose but only held that as the assessee did not tender any proof, but had mixed up his accounts of capital and profits, a presumption arose that the remittance represented only profits. The onus of proving the contrary is on the assessee and a wrong appropriation to evade tax is not binding on the Crown; *Scottish Provident Institution* v. *Allan*(1), *C. W. Schulze* v. *S. W. Bensted*(2).

M. Subbaraya Ayyar in reply.—The former of the cases quoted related to a case unquestionably of profits.

JUDGMENT.

The difficulty in this case has entirely arisen owing to the ambiguity in the language used by the Commissioner in passing his order on the petition. The second paragraph of his order was on the face of it capable of the construction that he had held in the circumstances of this case that where any sum of money passed from a foreign business to the headquarters of the firm in British India it must be regarded as profits and that no

(1) [1903] A.C., 129. (2) (1922) 8 Tax Cases, 259.

evidence was admissible to show that in fact it was something else. We are satisfied that the Commissioner did not mean to say that, but merely meant to say that he thought that where money was remitted from abroad to the headquarters in British India, the natural inference would be that such remittances came out of profits rather than capital until the contrary was shown by the assessee. The claim here was that a large portion of the amount remitted from Seranda to Karaikudi was a re-payment of capital lent long years before or at any rate was profits outside the three years' limit which would not under the law be assessable in British India. The Commissioner heard this contention and was not satisfied that the assessee had made out his case and he was entitled to take that view. That the *onus* of proof rested upon the assessee appears to be amply borne out by the case of *Scottish Provident Institution* v. *Allan*(1). That was a case of a Scottish Insurance Company, with branches in Australia, and in dealing with the question whether remittances from Australia to the head office in Scotland were assessable to income-tax, Lord HALSBURY uses the following language :—

"The next question is whether or not, though earned abroad, the profits have been brought to this country. Here is a large sum sent back. Putting these two items together, they must include and obviously do include a large amount of profits. It is for the company to show, if the fact be so, that that remittance ought to be subject to a certain amount of deduction, because a good deal of it was repayment of that which was, in truth, capital and not profit at all."

The presumption that the Commissioner made in this case, viz., that *prima facie* all remittances were to be regarded as profits and that the burden of proof was cast upon the assessee to show the contrary, seems to be amply warranted by the authority of that case. As the

(1) [1903] A.C., 129.

In re MURUGAPPA CHETTIAR.

Commissioner did not misdirect himself the only questions in the case that remain are purely questions of fact and so long as he has approached them without any misconception in his mind as to how they should be dealt with, his findings are conclusive.

The application will be dismissed with costs, Rs. 150.

N.R.

APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., *Chief Justice*, *Mr. Justice Krishnan and Mr. Justice Beasley.*

1925, October 28.

A. VENKATA GURUNATHA RAMA SESHAYYA (PLAINTIFF), APPELLANT,

v.

SRI TRIPURASUNDARI COTTON PRESS, BEZWADA (2nd DEFENDANT), RESPONDENT. *

Indian Limitation Act (IX of 1908), arts. 62, 115, 116 and 120—Suit for dividend declared by a registered company—Art. 120, applicable.

A suit by a share-holder against a company for recovery of a dividend is governed by article 120 of the Indian Limitation Act and not by article 62 or 115 or 116 of the Act. *Ripon Press and Sugar Mill Co., Ltd.* v. *Nama Venkatarama Chetty.* (1919) I.L.R., 42 Mad., 33 overruled.

APPEAL under clause 15 of the Letters Patent against the judgment of Mr. Justice WALLACE in S. A. No. 593 of 1921 preferred against the decree of the Court of the Subordinate Judge of Bezwada in A. S. No. 22 of 1920 preferred against the decree of the Court of the District Munsif of Bezwada in O.S. No. 112 of 1917.

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* Letters Patent Appeal No. 35 of 1924.