PEDDA JEEYANGARLAVARU v. KRISHNAMACHARLU. — MADHAVAN NAYAR, J.

that case it was held that the decision of the High Court upon a case stated and referred to it by the Chief Revenue authority under section 51 of the Income-tax Act was merely advisory and not judicial. In these circumstances, it is difficult to hold that by the pronouncement referred to, their Lordships of the Privy Council have overruled the long current of authorities in this and in other courts bearing on the question; at any rate, until the doubt is removed by a clearer pronouncement, the contention that the decisions referred to have been overruled cannot be accepted. A similar conclusion was reached by another Bench of this Court in L.P.A. No. 240 of 1925. For these reasons the preliminary objection raised by the respondent must be overruled.

On the merits, I agree with my learned brother that the decision of the learned Judge should be reversed with costs here and on the Civil Miscellaneous Petition.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice Madhavan Nayar.

1926, August 20.

S. K. VENKATARAMA AIYAR (RESPONDENT), APPELLANT,

v.

A. BURAN SHERIFF AND ANOTHER (PETITIONERS 1 AND 2), RESPONDENTS.*

Sec. 9, Provincial Insolvency Act (V of 1920), cls. (a) and (b)—Petitioning creditor's right to present insolvency petition if entitled to Rs. 500, on date of presenting petition—"Some certain future time," meaning of—Sec. 25, giving discretion to Court.

According to clause (*a*) of section 9 of the Provincial Insolvency Act (V of 1920), it is sufficient if the petitioning

* Appeal against Order No. 306 of 1925.

creditor is entitled to a debt of Rupees Five Hundred on the date of presenting the insolvency petition; it is not necessary that he should be entitled to that amount on the date of adjudication also. It is immaterial that by the latter date the amount gets reduced as the result of an appeal or counter-suit by the debtor. Adjudicating a debtor on a creditor's petition is discretionary under section 25 of the Act.

APPEAL against the order of J. C. STODART, District Judge of South Arcot, in Insolvency Petition No. 20 of 1923.

The facts are given in the judgment.

M. S. Venkatarama Ayyar (with *E.R. Rajagopalachariyar* and *R. Srinivasa Ayyar*) for appellant.—Clause (*a*) of section 9 of the Provincial Insolvency Act really requires that the debt of Rs. 500 must be due not only on the date of presentation of the petition but also on the date of adjudication. Hence if as the result of an appeal or a counter-suit by the debtor this amount gets reduced or is made not payable at the time of adjudication but is made to be contingent upon some other event, such as the decision on appeal, there is no right to present the petition; for the appellate decree relates back to the date of the original decree; see *Rangaswami Kavundan* v. *Alagayammman*(1). Moreover, as the Appellate Court ordered that the amount due to the judgment-creditor should be paid only after the passing of the decree of the Appellate Court, the amount is not payable at "some certain future time" within the meaning of clause (*b*) of section 9. "Certain" means "specified;" see *Rangasami Mudaliyar* v. *Srinivasa Mudaliyar*(2), *Juggomohun Ghose* v. *Manickchund* and *Kaisreechund*(3), *Page* v. *Newman* (4), which are decisions on the same words under the Interest Act. Further under section 25 of the Act it is discretionary with the Court to adjudge a debtor as an insolvent on a creditor's petition. In the circumstances of this case the lower Court should have exercised the discretion and refused the adjudication.

K. S. Venkatarama Ayyar for respondents.—All that section 9 requires is that the debt of Rs. 500, must be due on the date of presentation of the petition and not on the date

(1) (1915) 2 L.W., 169. (2) (1910) 8 M.L.T., 405.
(3) (1859) 7 M.I.A., 263. (4) (1829) 9 Barn & Cress., 378; 109 E.R., 140.

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of adjudication also. The effect of adjudication is to relate back to the date of presentation; see section 28, clause(7) *Kalianji* v. *The Bank of Madras*(1). Section 13 (2) and section 34 (2) relate not only to debts existing on the date of presentation of the petition but also to contingent debts on that date. The decisions quoted relate to Interest Act where the wording is different from that in the Provincial Insolvency Act. In the former Act the words are "at a certain time;" in the latter Act they are "at some certainfuture time;" hence the decisions under the Interest Act will not apply. Even under the Interest Act, it has been held in the decisions quoted, that the Act will be satisfied if the time could be made certain though not specified. Here the appellate decree does not affect the case. That appellate decree itself is now under appeal to this Court and it may be displaced. Hence that is an uncertain test. Provisions of the Civil Procedure Code have been made applicable to proceedings in insolvency; hence as in suits, only events existing in the date of plaint or petition are alone to be looked to to ascertain the maintainability of a plaint or petition and not subsequent events. Moreover, as the debtor had alienated all his properties, there was no other remedy open to the decree-holder but to present this petition and thereafter to get the fraudulent transfers annulled. The lower Court was not asked to exercise the discretion under section 25 of the Act and no special reasons were assigned in that Court or have been assigned in this Court for the exercise of that discretion in appellant's favour.

M. S. Venkatarama Ayyar replied.

JUDGMENT.

ODGERS, J.

This is an appeal against the order of the District Judge of South Arcot adjudicating the appellant an insolvent. The facts prior to this adjudication are a little complicated, and the arguments founded thereon have taken some time to hear. The petitioning creditors filed two suits against the debtor, O.S. No. 548 of 1922, for gunny bags and O.S. No. 583 of 1922, for some amounts due in a partnership business. There was, moreover, a

(1) (1916) I.L.R., 39 Mad., 698.

suit O.S. No. 580 of 1922 by the insolvent against these creditors for accounts due on an alleged partnership between him and them. This suit on the 7th of November 1922 was dismissed and the other suits by the creditors were decreed. In May 1923 the insolvent made some alienations of his properties and deposited the amount due in O.S. No. 548 into Court and the Court sale was set aside. On the 23rd May 1923 a petition for adjudication was filed in the District Munsif's Court. In the meantime appeals had been filed in O.S. No. 583 and O.S. No. 580. On the 13th August 1923 creditors petitioned the District Court to adjudicate the appellant an insolvent, and on the 1st December 1923 a stay of the petition was obtained pending the disposal of the appeals. On the 14th April 1924 the appeal in O.S. No. 548 was allowed and the stay was dismissed. The appellant was therefore in a position to ask for restitution of about Rs. 585 which he paid out in order to set aside the Court sale. In O.S. No. 580, the appellant's suit, he obtained a preliminary decree for accounts and in O.S. No. 583, an amount of Rs. 1,059 was decreed against him (the appellant) but it was only to become payable on the passing of the final decree in O.S. No. 580 of 1922. This O.S. No. 580 has been to second appeal when it was decided against the appellant and is now awaiting final appeal under the Letters Patent. On the 17th September 1924 the petition for adjudication was considered and the petitioners were held to be creditors and entitled to present the petition and two months afterwards the adjudication took place. The learned Judge has held that the petitioner has complied with the conditions precedent set out in section 9 of the Act to enable him to present the insolvency petition. It is admitted that the large bulk of the debt alleged to be due to the creditors is the amount due under the

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decree in O.S. No. 583 of 1922, viz., Rs. 1,059 odd, the time for payment of which was postponed till the final decree was passed in O.S. No. 580 of 1922. The learned Judge held that the postponement had not the effect of divesting the petitioners' character as creditors and that they were creditors when the petition was filed and they are still creditors.

It is contended that it is not sufficient that these petitioners should be creditors at the time the petition was filed, but they must be creditors at the time the order of adjudication is passed. We do not find any provision to that effect in the Act although there is a note by Mr. Williams in his book that this obtains in the corresponding provision in the Bankruptcy Act. The question seems to me to be whether a creditor has fulfilled the three conditions precedent set out in paragraph 9 at the time he filed the insolvency petition, viz. (to put it shortly) a debt of Rs. 500, a liquidated sum payable either immediately or at some certain future time, and an act of insolvency. With regard to the last requirement no question has arisen in this case. Certain acts of insolvency, namely, alienations of property have been *prima facie* found by the Judge to exist, and the adjudication is founded upon those, but as before stated, the objection before us is that the petitioning creditors were not clothed with the proper authority as required by the Act before filing the petition in the two other respects. We had a great deal of discussion as to whether this decree debt of Rs. 1,059 made payable on the passing of the final decree in O.S. No. 580 is a liquidated sum payable at some certain future time and some decisions were quoted before us, *Rengasami Mudaliar* v. *Srinivasa Mudaliar*(1),

(1) (1910) 8 M.L.T., 405.

Juggomohun Ghose v. *Manickchend* and *Kaisreechund*(1), and *Page* v. *Newman*(2) to the effect that it must be some definite ascertained debt. Those decisions as pointed out by the learned vakil for the respondents all relate to the Interest Act where the words are "certain time" and there has been some discussion as to whether "some certain future time" is something different from "a certain time." Speaking for myself I am rather inclined to think that the expression "some certain future time" means any time in the future which is capable of being ascertained. But I do not propose to decide in this present proceeding what the exact meaning of "some certain future time" in section 9 (*b*) means. The question then comes down to this, whether the aggregate amount of debts due to the creditors amounted to Rs. 500 at the date of the filing of the petition. That that is the crucial date is, I think, fairly clear on principle because the words in section 9 are that the creditors shall not be entitled to present an insolvency petition unless the three conditions set out are fulfilled and further we find that section 13 (2) sets out the particulars that are to be contained in every insolvency petition presented by a creditor or creditors and in (*b*) "the amount and particulars of his or their pecuniary claim or claims against such debtor." That seems to refer to the date of the insolvency petition. There is no doubt that at the date of the insolvency petition the appellant was indebted to the respondents in a sum of at least Rs. 1,059. But it is contended that the order made on appeal, namely, that this amount should not be payable until the amount of the final decree in O.S. No. 580 is ascertained has the effect of referring back the date of the appellate decree to that of the original

(1) (1859) 7 M.I.A., 263.
(2) (1829) 9 Barn. and Cress., 378; 109 E.R., 140.

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decree and that therefore we do not know whether Rs. 1,059 or nothing or less or more will in fact be found due to the petitioning creditors. That argument of course cuts both ways, because it has to be remembered that O.S. No. 580 is under Letters Patent Appeal and if it is to be held that an appeal is simply a continuation of all the previous proceedings then O.S. No. 580 is still going on. Then there is a further question as to the costs payable to the appellant. It was stated to us that two sums of Rs. 204 and Rs. 245 were due to the insolvent from the creditors which together with a sum of Rs. 585 due to him (as stated above) in restitution would amount to some thing over Rs. 1,000. The question is whether a Court is to go into this kind of thing when it examines whether or not petitioning creditor has qualified himself, to present his petition. I think not. I think that the fact that the appellant admittedly owed Rs. 1,059 at the date of the petition is sufficient to qualify the petitioning creditors. The only other point raised was that under section 25 the Court should have held that there were circumstances which rendered it improper to adjudicate this man an insolvent.

There seems to have been some talk of a stay; hence this proviso in the decree as to the payment of Rs. 1,059 which has caused this trouble. But the provisions of section 25 are discretionary and there is no evidence that the learned District Judge was asked to exercise this discretion under the section and I do not think it can be said that under those circumstances he ought to have exercised, nor am I prepared to do so on appeal. There may be good grounds why it is better in the interests of both parties that this man should be adjudicated an insolvent, I do not know. But it seems to me that to exercise a discretion under section 25 in appeal and to

hold that there is other sufficient cause why no order should be made would be to ask us to do a thing that we ought not to do especially in the circumstances of this case. VENKATA-RAMA AIYAR v. BURAN SHERIFF. ODGERS, J.

As to the costs one set has been paid into the Official Receiver's hands and the other set is under stay. It therefore cannot be said that this whole amount is due or can be immediately set off against Rs. 1,059.

I think therefore this civil miscellaneous appeal must fail and be dismissed with costs.

MADHAVAN NAYAR, J.—I agree and have nothing to add. MADHAVAN NAYAR, J.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Sundaram Chetti.

KANNAN (7TH RESPONDENT), APPELLANT, 1926, September 14.

v.

AVVULLA HAJI (PETITIONER), RESPONDENT.*

Limitation Act (IX of 1908), art. 182 (5)—Application for delivery by decree-holder-purchaser, whether a step in aid.

An application by a decree-holder-purchaser for delivery of property purchased by him in execution, is a step in aid of execution within article 182, clause (5) of the Limitation Act (IX of 1908). *Lakshmanan Chettiyar* v. *Kannammal*, (1901) I.L.R., 24 Mad., 185, followed.

In order that an application by the decree-holder should serve as a step in aid, it is not necessary that it should be made in a pending execution application. *Kunhi* v. *Seshagiri*, (1882) I.L.R., 5 Mad., 141, followed. In these matters the principle of *stare decisis* is applicable.

* Appeal against Appellate Order No. 142 of 1924.