

CURGENVEN, J.—I agree that under section 23 (2) of the Provincial Insolvency Act, prior leave must be obtained to institute a suit during the pendency of the insolvency proceedings, and that failure to do so cannot afterwards be cured; and accordingly that this Civil Miscellaneous Appeal should be dismissed with costs.

GHOUSE
KHAN
v.
BALA SUBBA
ROWTHER.
CURGENVEN,
J.

N.R.

APPELLATE CIVIL.

*Before Mr. Justice Kumaraswami Sastri and
Mr. Justice Wallace.*

T. CHINNAPPA REDDI (PETITIONER), APPELLANT,

v.

KOLAKULA THOMASU REDDY (RESPONDENT—
INSOLVENT), RESPONDENT.*

1927
November 1.

Provincial Insolvency Act (V of 1920), ss. 43, 41, 37, 27 and 10—No application by insolvent for discharge within the time specified in the order of adjudication or extended time—Application by a creditor for annulment of adjudication, after time specified in the order of adjudication—Application by Receiver to extend time for discharge—Duty of Court to annul adjudication—Power to extend time after expiry of time specified in the order of adjudication.

Section 43 of the Provincial Insolvency Act, 1920, is mandatory, and the Court has no power to extend the time for an application by the insolvent for his discharge, after the period specified in the order of adjudication for such an application has expired; consequently, after the expiry of the time given in the order of adjudication for an application for discharge, the Court is bound to annul the adjudication, on the application of a creditor.

* Appeal against Order No. 195 of 1927.

CHINNAPPA
REDDY
v.
THOMASU
REDDY.

APPEAL against the order of E. PAKENHAM WALSH,
District Judge of Guntūr, in I.A. No. 256 of 1926 in I.P.
No. 42 of 1923.

The material facts appear from the judgment.

Ch. Raghava Rao for appellant.

A. V. Krishna Rao for respondent.

KUMARA-
SWAMI
SASTRI, J.

The JUDGMENT of the Court was delivered by KUMARASWAMI SASTRI, J.—This appeal arises out of an order passed by the District Judge refusing to annul the adjudication of one Thomasu Reddi and extending the time within which he has to file his application for discharge. Thomasu Reddi was adjudicated insolvent on the 8th of July 1924 and one year's time was fixed as the period within which he should apply for his discharge. He did not apply within that period and the time was extended to the 11th of August 1926. As the insolvent did not apply for his discharge as required by section 43, an application was put in on the 13th of December 1926 by the appellant-creditor to annul the adjudication. The Official Receiver submitted his report on the 22nd of December 1926 stating that some properties were sold on the 30th of June 1925, that a petition was filed in the District Court to set aside the sale and it was dismissed on the 5th of November 1925, and that C.M.A. No. 149 of 1926 was filed in the High Court against the order of the District Judge and further proceedings were stayed. He states that it is regrettable that neither the debtor nor any of the creditors applied for extension of time, that the provisions of section 43 appear to be imperative, that in the absence of any extension of time, the order of adjudication is liable to be annulled and that it is desirable under the circumstances to issue notice to the creditors and hear them before the order of annulment is passed. The District Judge on this report and on the creditor's

petition passed an order refusing to annul the adjudication and extending the time to the 23rd December 1927. Another Creditor (No. 4) applied on the 10th of December 1926, under section 27 clause (2) of the Act, to extend the time to apply for discharge and this petition was dismissed on the ground that the Court had already extended the time on the report of the Official Receiver. So far as the insolvent is concerned he neither applied for an extension of time nor filed any petition or affidavit setting forth the reasons for his not having applied within the time fixed by the Court. The question is whether the learned District Judge was right in extending the time on the report of the Official Receiver.

It is argued for the appellant that the provisions of section 43 are mandatory, that the Court has no power to extend the time after it has elapsed, that even if it has such power, the only person to apply is the insolvent and that in any case the Judge was wrong in acting on the report of the Official Receiver especially as the report gives no reason for the application to extend the time not having been filed earlier.

For the respondent it is contended that section 43 is only directory and not mandatory, that it is open to any creditor or to the Official Receiver to apply for an extension of time even though the time has expired and that in the present case the Judge acted within his powers and in the exercise of sound discretion in extending the time.

The relevant sections of the Provincial Insolvency Act are sections 10, 27, 37, and 41. Section 27 of the Act enacts that the Court shall, on making an order of adjudication, specify in such an order the period within which the debtor shall apply for his discharge and that the Court may, if sufficient cause is shown, extend

CHINNAPPA
REDDY
v.
THOMASU
REDDY.
—
KUMARA-
SWAMI
SASTRI, J.

CHINNAPPA
REDDY
v.
THOMASU
REDDY.
—
KUMARA-
SWAMI
SASTRI, J.

the period within which the debtor shall apply for his discharge. Section 41 enacts that the debtor may, at any time after the order of adjudication and shall, within the period specified by the Court, apply to the Court for an order of discharge, that notice should be given and any objections heard by the Court. Section 43 runs as follows:—

“If the debtor does not appear on the day fixed for hearing his application for discharge or such subsequent day, as the Court may direct, or if the debtor does not apply for an order of discharge within the period specified by the Court, the order of adjudication shall be annulled, and the provisions of section 37 shall apply accordingly”.

Clause (2) gives power to the Court to recommit the debtor to prison if he had been released from custody under the provisions of the Act and states that all processes which were in force against the person of the debtor at the time of such release shall be deemed to be still in force against him as if no order of adjudication had been made. Section 37 states that where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts done by the Court or Receiver shall be valid, but subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the Court may, by order in writing, declare. Section 10, sub-clause (2) provides that a debtor in respect of whom an order of adjudication made under the Act is annulled owing to his failure to apply or to prosecute an application for his discharge, shall not be entitled to present an insolvency petition without the leave of the Court by which the order of adjudication was annulled and it states when such leave ought not to be given.

There has been a conflict of opinion as regards the power of the Court to extend the time after it has expired.

In *Arunagiri Mudaliar v. Kandaswami Mudaliar* (1) an application was made by the insolvent, after the expiry of the period fixed in the order of adjudication, to extend the time. This application was filed after a creditor had applied to annul the adjudication under section 43. WALLER, J., was of opinion that after the expiry of the period prescribed by the order of adjudication for applying for discharge, the Court has no power to extend the period, while KRISHNAN, J., was of opinion that the Court has power under section 27, clause (2). Both the learned Judges, however, agreed that it was not a fit case for granting an extension of time. WALLER, J., observed :

“Objection is taken to the District Judge’s order on two grounds,

(a) That under section 43 he had no option but to annul the adjudication,

(b) That he had no power under section 27 (2) to extend the period after it had expired.

I think that both grounds are good. Section 43 is absolutely peremptory in its terms and I am of opinion that directly the Court was informed of the insolvent’s omission to apply within the time fixed, the only course open to it was to annul the adjudication. That being so, it follows that no application for extension of the period can lie after it has expired. No doubt section 148, Civil Procedure Code, allows extension of this description ; but the Code is applicable only so far as it does not conflict with the provisions of the Provincial Insolvency Act and they are opposed to such an extension”.

The learned Judge thought that the proper order would be to annul the adjudication and leave it to the insolvent under section 10 (2) to apply if he had good cause for his delay. KRISHNAN, J., was of opinion that

CHINNAPPA
REDDY
v.
THOMASU
REDDY.
—
KUMARA-
SWAMI
SASTRI, J.

CHINNAPPA
REDDY
v.
THOMAS
REDDY.
—
KUMARA-
SWAMI
SASTRI, J.

the power given by section 27 (2) is not exhausted by the period fixed in the order of adjudication having expired, that as regards section 43, although it says that the Court shall annul the adjudication, such words have been construed by their Lordships of the Privy Council in *Badri Narain v. Sheo Koer*(1), in dealing with the provisions of the Civil Procedure Code, to be only directory and not mandatory and that section 148 can be invoked in aid of the power to extend the time.

In *Abbireddi v. Venkata Reddi*(2) the question was whether the Court had power to review an order made annulling adjudication on the ground that the insolvent did not apply for his discharge within the time fixed in the order. The petitioners were some of the creditors and they applied for a review of the order. DEVADOSS and WALLACE, JJ., held that section 5 of the Act made the provisions of the Civil Procedure Code applicable and that the Court had power to review its own order. In dealing with *Arunagiri Mudaliar v. Kandaswami Mudaliar*(3) the learned Judges observe :

“ It is not necessary to deal with this case in detail as the point raised here did not arise for decision there. If an expression of opinion is necessary, we would be inclined to hold with KRISHNAN, J., that the Court has power to extend the time for making an application for discharge, provided that the application is made before the order of annulment is made ”.

In *Venugopalachariar v. Chinnulal Sowcar*(4), PHILLIPS and MADHAVAN NAIR, JJ., held that section 43 of the Provincial Insolvency Act is mandatory and that when an order of annulment has been passed under section 43, sub-clause (1), section 10, clause (2) of the Insolvency Act, which provides a special remedy for setting aside the order, renders the provisions of Order IX, Civil Procedure Code, inapplicable. PHILLIPS, J., in

(1) (1890) I.L.R., 17 Cal., 512.

(2) (1926) 51 M.L.J., 80.

(3) (1924) 19 L.W., 418.

(4) (1926) 51 M.L.J., 209.

dealing with section 43 agreed with the view of WALLER, J., in *Arunagiri Mudaliar v. Kandaswami Mudaliar*(1) that section 43 was absolutely peremptory in its terms. In dealing with section 43 the learned Judge observes :

CHINNAPPA
REDDY
v.
THOMAS
REDDY.
—
KUMARA-
SWAMI
SASTRI, J.

“ No provision similar to section 43 was contained in the old Provincial Insolvency Act and it is obviously one of the provisions of the new Act that the debtor shall be obliged to apply for discharge if he wishes to retain the benefits of insolvency so as to put an end to the proceedings in insolvency. Provisions have been enacted in section 43 (1) that if he does not apply for discharge his adjudication shall be annulled, but it allows him in certain cases a further remedy of presenting another petition in insolvency which is the method of giving relief to persons who are prevented by *bona fide* causes from presenting their applications ”.

MADHAVAN NAIR, J., also was of opinion that section 43 is clearly mandatory. There is no conflict between this decision and the earlier decision above referred to. In the former case the application was made by some of the creditors and section 10, clause (2), would not obviously apply and the Court had to fall back on the Civil Procedure Code, which is made applicable under section 5. In the latter case the application was by the debtor, in which case a special remedy is provided by section 10, clause (2). These cases, however, are authority for the view that the Court cannot extend the time after the time fixed in the order has elapsed.

In *Ram Krishna Misra, ex parte*(2) it was held by DAS and ROSS, JJ., that the provisions of section 43 are mandatory and that the Court has no discretion to enlarge the time after the expiry of the period fixed by the Court for an application for an order of discharge.

DAS, J., after pointing out that section 27 was a new provision introduced in the Act for remedying the defect

(1) (1924) 19 L.W., 418.

(2) (1925) I.L.R., 4 Pat., 51.

CHINNAPPA
REDDY
v.
THOMAS
REDDY.
—
KUMARA-
SWAMI
SASTRI, J.

in the existing law under which the conduct of the debtor in many cases never came under the scrutiny of the Insolvency Court and after referring to the terms of section 41, observes :

“It is obvious to my mind that the debtor has complete discretion to apply when he likes provided he applies within the period specified by the Court. The word ‘shall’ in section 41 of the Act imposes in my opinion a duty upon the insolvent the breach of which involves the consequences pointed out in section 43.”

In *Roop Narain v. King & Co.*(1), it was held that where the insolvent fails to apply for an order of discharge within the time prescribed, the Court has no option but to annul the adjudication though it has power under section 37 to protect the creditors by directing that the property shall vest in a person appointed by the Court and not revert in the insolvent.

There are other decisions which take a contrary view though some of them may be distinguished from the present case on the ground that they were cases where the debtor had applied.

In *Abraham v. Sookias*(2) it was held by CHATTERJEA and PANTON, JJ., that the Court has power under section 27, clause (2), of the Provincial Insolvency Act, to extend the time to apply for discharge even though the time originally fixed had expired. The application was an application by the insolvent. The learned Judges point out that the adjudication does not become automatically annulled if no application is made prior to the expiry of the period and observe :

“It is true that section 43 provides that the order of adjudication shall be annulled ; but that seems to indicate that it has to be annulled at the instance of the opposite party or by the Court itself, and does not stand cancelled automatically on the expiry of the period. We think that under section 27,

(1) (1926) A.I.R. (Lah.), 370.

(2) (1924) J.L.R., 51 Cal., 337.

clause (2), the Court has the power to extend the time even after the expiry of the period of the order for discharge.”

In *Lakhi v. Molar*(1) it was held that section 148 of the Civil Procedure Code gives the Court power to extend the time fixed even after it has expired, as there is nothing repugnant in the Insolvency Act to make section 148 inapplicable. In *Faiz Muhammad v. Mayadas*(2), the same view was taken, the learned Judge simply following the decision in *Lakhi v. Molar*(1). In *K. K. S. A. R. A. Chettiar v. Maung Myar Tha*(3), it was held that the Insolvency Court has power to extend the time for making an application for discharge. It appears from the report that an application had been made to extend the time by a creditor before the time had expired. This case does not really touch the question as to how far the Court has power to extend the time after it has expired.

It will be thus seen that there is a conflict of opinion as to the power of the Court to extend the time under section 43. So far as the Madras High Court is concerned the balance of authority is in favour of the view that section 43 is mandatory and that the Court has no power to extend the time after the period specified in the order. We think that this view is the correct view to take, having regard to sections 10, 27, 37, 41 and 43 which we have referred to. As pointed out above, section 43 was not in the old Act but it was subsequently added and the object of the amendment is to fix some period within which matters relating to the adjudication have to be disposed of.

The word “shall” in its ordinary signification is mandatory though there may be considerations which influence the Court in holding that the intention of the

CHINNAPPA
REDDY
v.

THOMAS
REDDY.

KUMARA-
SWAMI
SASTRI, J.

(1) (1925) 86 I.C., 115.

(2) (1927) 100 I.C., 134.

(3) (1927) 100 I.C., 921.

CHINNAPPA
REDDY
v.
THOMAS
REDDY.
—
KUMARA-
SWAMI
SASTRI, J.

legislature was to give a discretion. But in the present case we fail to see any reason why the word "shall" in section 43 should not receive its ordinary interpretation. The object of section 43 is to punish the debtor, if he does not with due diligence, apply for discharge within the time limited. It was considered by the legislature that as civil processes were stayed on adjudication it was necessary to fix some time limit within which the adjudication should either be confirmed or set aside. This is clear from the consequences which follow the annulment of adjudication. The debtor can be re-arrested and sent to jail and the decree satisfied in the ordinary way. The Act also gives the right to the debtor to apply to set aside the order. But he has to show sufficient cause for not applying within the time limited. It is open to the debtor or any of the creditors to apply within the time limited for an extension of time but, where this is not done, section 43 should be allowed to take its course.

Turning to the merits of this case, it seems to us that there is no reason why the time should be extended. As pointed out by us, the time originally fixed was extended once and none of the parties did anything. All that the Official Receiver says is that it is regrettable that nothing was done, but the mere expression of regret cannot amount to a reasonable ground for the provisions of the Act not having been complied with. The fact that there was a sale by the Official Receiver which was challenged by a third party would not be a material consideration as under the provisions of the Act, sales held by the Official Receiver or the Court before the annulment of the adjudication would be valid, and the mere fact that the sale is contested unsuccessfully by somebody is no ground for postponing the proceedings under section 43. In this case no application was made by the debtor nor is there any application

forthcoming setting out the reasons why he did not apply under section 43. We do not see sufficient grounds for holding that the creditor who applied for the annulment of adjudication is not entitled to the remedy which the law gives him. We may also point out that the annulment of adjudication does not necessarily re-vest the property in the debtor as the Court can under section 37 give directions in whom the property should vest pending further orders.

We set aside the order of the District Judge extending the time and direct that he should dispose of the matter before him according to law. As regards costs, we direct that the costs of the appellant in this appeal do come out of the estate of the insolvent.

K.R.

CHINNAPPA
REDDY
v.
THOMAS
REDDY.
—
KUMABA-
SWAMI
SASTRI, J.

APPELLATE CIVIL.

Before Mr. Justice Devadoss.

V. AKKAYYA (PETITIONER),

v.

VANAMA LAKSHAMMA (RESPONDENT).*

1927,
November 21.

Indian Succession Act (XXXIX of 1925), sec. 302—Hindu will—Application by executor, to the High Court, under sec. 302 for directions—Previous suit by testator's widow and legatee in a Sub-Court—Decree in favour of widow against executor to deliver property—Provision for charity in the will, not dealt with by the suit or decree—Application to High Court by executor for directions as to charity—Jurisdiction of High Court—Directions, when given.

Under section 302 of the Indian Succession Act (XXXIX of 1925), the High Court has, on an application made to it under

* Civil Miscellaneous Petition No. 4396 of 1927.