proved and the point now argued did not arise. It cannot therefore be regarded as an authority supporting the respondent.

In the appeal, the parties will bear their own costs.

The memorandum of objections will be dismissed with costs.

In the Courts below, the parties will give and take proportionate costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice Curgenven.

GHOUSE KHAN (APPELLANT), PETITIONER,

v.

BALA SUBBA ROWTHER (RESPONDENT), RESPONDENT.*

1927, April 12.

Provincial Insolvency Act (V of 1920), sec. 28 (2)—Previous leave to file suit against insolvent, necessary.

Under section 28 (2) of the Provincial Insolvency Act (V of 1920), leave to institute any suit or other legal proceeding against a person adjudged insolvent must be obtained before such institution and cannot be granted afterwards. *In re Dwarkadas Tejbandas*, (1916) I.L.R., 40 Bom., 235, followed.

APPEAL against the order of R. A. JENKINS, District Judge of Coimbatore, in I.A. No. 53 of 1925 in I.P. No. 15 of 1921.

The facts are given in the judgment.

K. N. Rajagopala Sastri for appellant.

S. T. Srinivasagopalachari for respondent.

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* Appeal against Order No. 133 of 1925.

GHOUSE KHAN v. BALA SUBBA ROWTHER.

ODGERS, J.

JUDGMENT.

ODGERS, J.—This is an appeal against the order of the learned District Judge of Coimbatore dismissing the appellant's petition under section 28 (2) of the Provincial Insolvency Act wherein the appellant asked for leave to prosecute his suit, O.S. No. 43 of 1924, on the file of the Sub-Court, Bellary. It appears that on the 30th July 1921, one Balasubba Rowther, the respondent in the petition to the District Judge of Coimbatore, was adjudicated insolvent. On the 9th June 1924 a suit was instituted in the Bellary Sub-Court on a promissory note which had been executed on the 14th May 1921 by the insolvent to a third party and which in March 1924 was transferred to the appellant here. The plaintiff in the suit is said to have only become aware of the insolvency of Balasubba Rowther when the latter filed his written statement. He has therefore applied to the Coimbatore Court, which is the Insolvency Court, for leave to prosecute the suit, which as stated was refused on the ground that leave is a condition precedent to the institution of proceedings. The relevant provisions of the Provincial Insolvency Act are section 28 (2) and the words

> "No creditor . . . shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose".

"The Court" in this sub-section is clearly the Court in which the insolvency proceedings take place. Section 29 enacts that

> "*any* Court in which a suit or other proceeding is pending against a debtor shall, on proof that an order of adjudication has been made under this Act, either stay the proceeding or allow it to continue on such terms as the Court may impose."

It would therefore seem that the proper remedy of the appellant here would have been to apply to the Bellary Court for leave to continue his suit against the insolvent, whereas he has applied to the Insolvency Court in Coimbatore for leave to prosecute the suit. The corresponding provisions in the English Act are sections 7 and 9 which contain practically the same provisions. So the short question is whether the learned District Judge was right in holding that the words in section 28 (2)

> "or commence any suit or other legal proceeding except with the leave of the Court"

are to be construed as constituting a condition precedent.

We have been referred to two English cases which were urged on DAVAR, J., of the Bombay High Court in *In re Dwarkadas Tejbhandas*(1), where the learned Judge sitting alone decided under section 17 of the Presidency Towns Insolvency Act, where the words are identical, that leave is a condition precedent and cannot be granted after the suit is filed. The learned Judge went into the question at some length and held that the words of the section are clear and explicit and leave no room for any other construction. The first of these English cases is *In re Wanzer, Limited*(2). There the Company had taken premises in Glasgow and the landlord had proceeded by the Scotch method of sequestration for the purpose of realizing his rent. The landlord's hypothec was in Scotch Law held to afford a security to him on the goods on the premises, and in spite of the order for winding up that was made, leave was given to proceed with the sequestration unless sufficient security was given by the tenant for the rent. This is

(1) (1916) I.L.R., 40 Bom., 235.

(2) [1891] 1 Ch., 305.

GHOUSE KHAN v. BALA SUBBA ROWTHER.

ODGERS, J.

a proceeding under the Companies' Act, and it appears to establish that the proceeding at Scotch Law is such that the landlord is in the nature of a secured creditor. According to NORTH, J., he is in a position analogous to that of a debenture-holder. If that is so, he is no doubt at least partially outside the provisions of the law relating to Companies' winding up. I do not think it can, as DAVAR, J., held, be in any way taken as a precedent in the present case. The other English case is *Rendall* v. *Blair*(1) a case under the Charitable Trusts Act, 1853. The managers of a charity school purported to dismiss the plaintiff who was the master of the school. The question raised by the action was whether the managers had been properly appointed. The words of the section, which was considered by the Court of Appeal, section 17 of 16 and 17 Vict., C. 137, ran:

> "Before any suit, petition or other proceeding . . . for obtaining any relief, order or direction concerning or relating to any charity, or the estate funds, property or income thereof, shall be commenced, presented or taken, by any person whomsoever, there shall be transmitted by such person to the said board, notice in writing of such proposed suit, petition or proceeding. . . and the said board . . . may, by an order or certificate . . . authorize or direct any suit, petition or other proceeding to be commenced, presented or taken with respect to such charity."

KAY, J., thought that the suit ought not to have been begun without the leave of the Charity Commissioners. The Court of Appeal by a majority held that the action was not such as required the consent of the Charity Commissioners, but the whole Court held that even if the consent of the Charity Commissioners were necessary it was not necessary to obtain it before commencement of the action. COTTON, L.J., admits in his judgment that consent ought to have been applied

(1) (1890) 45 Ch.D., 139.

for before the action is begun but observes that the statute does not say that, if the consent is not obtained the action must be dismissed and cannot be proceeded with till that consent is obtained. In the course of the decision, the learned Lord Justice held that consent may be obtained after the petition or after the action has been commenced. The learned Lord JUSTICE thought that the sanction of the Charity Commissioners was necessary. BOWEN, L.J., thought it was not. As it was, the present action was one solely to enforce a common law right and the consent of the Commissioners was only to be obtained where the administration of the trust was sought. The learned Judge agreed that though it was not necessary to decide it, the proper course would not be to dismiss the action altogether but to allow it to stand over to see if the consent of the Commissioners could be obtained. He thought the language is not such as would be used if it were intended that some preliminary step should be taken before the action is maintainable at all and that the absence of the consent of the Commissioners is only a bar to the Courts dealing with the action, not a bar to the original institution of the suit. This is where I venture to think the difference in language emerges, and the language of section 28 (2) of the Provincial Insolvency Act is intended to be a bar to the original institution of the suit. In my opinion, therefore, neither of the two English cases which are on different statutes from the one we have to consider really touches the point. Beyond the decision in *In re Dwarkadas Tejbhandas* (1), there is the observation of SADASIVA AYYAR, J., in *Ammakutty* v. *Manavikraman*(2). The question before the learned Judge was whether a suit instituted against the

(1) (1916) I.L.R., 40 Bom., 235. (2) (1920) I.L.R., 43 Mad., 793.

GHOUSE KHAN v. BALA SUBBA ROWTHER.

ODGERS, J.

Receiver appointed by a Court without obtaining the previous sanction of the latter affected the jurisdiction of the Court. It was held that the condition did not affect the jurisdiction but was one imposed to enforce due respect towards Courts of Justice and could be effectively cured by obtaining sanction during the course of litigation.

The learned Judge in the course of his judgment said.

"This sanction is not a condition imposed by statutory law like the sanction mentioned in section 92, Civil Procedure Code or section 17 of the Presidency Towns Insolvency Act."

That of course is only a passing opinion, but in the absence of much clearer authority it is an opinion to be taken into consideration. The curious part about this case is that on the 18th August 1925 the adjudication in insolvency was annulled and the annulment was confirmed by the High Court in May 1926 and in April 1925 the suit in the Bellary Court was dismissed on the ground that it was not maintainable under section 28 (2) although the learned Judge allowed the plaintiff liberty to apply for restoration under section 151, Civil Procedure Code as soon as sanction was granted either by the High Court on appeal or by the District Judge of Coimbatore on a remand of the matter to him. It is now of course too late for the appellant to begin a new suit on the promissory note and he is, therefore, forced to come to us to say that leave ought to have been given to him to prosecute his suit of 1924. For the reasons stated I think that the words in section 28 (2) of the Provincial Insolvency Act constitute a condition precedent and that leave must be obtained before the institution of the suit. I would therefore, follow the ruling in *In re Dwarkadas Tejbhandas*(1) and dismiss the Civil Miscellaneous Appeal with costs.

(1) (1916) I.L.R., 40 Bom., 235.

CURGENVEN, J.—I agree that under section 28 (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.

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.