

## APPELLATE CIVIL—FULL BENCH.

*Before Mr. Horace Owen Compton Beasley, Chief Justice,  
Mr. Justice Krishnan Pandalai and Mr. Justice  
Cargenven.*

1929,  
November 12.

PALANI GOUNDAN (ALIENEE-PETITIONER), PETITIONER,

v.

THE OFFICIAL RECEIVER OF COIMBATORE  
(RESPONDENT), RESPONDENT.\*

*Ss. 5, 27 (2), 43 (1) of the Provincial Insolvency Act (V of 1920)  
—Sec. 148, Civil Procedure Code (V of 1908)—No applica-  
tion in time for discharge of insolvent—Annulment of  
adjudication, when mandatory—Power of Court to extend  
time for application.*

Under section 27 (2) of the Provincial Insolvency Act, the Court can extend the time for an application for discharging an adjudicated insolvent. Hence the words "the period specified" in section 43 (1) of the Act, mean the period either originally fixed or subsequently extended from time to time. Though if a debtor does not apply for discharge within "the period specified," the Court is bound to annul the adjudication and section 43 (1) is in this sense mandatory, yet if no express order of annulment is passed, as it should be passed, an annulment does not *ipso facto* take place. Until such an express order is made, any one can apply for extension of time for discharge and the Court can, by virtue of sections 5 and 27 (2) of the Act and section 148, Civil Procedure Code, extend the period, whether the application for it is made before or after "the period specified;" *Chinnappa Reddy v. Thomasu Reddy*, (1927) I.L.R., 51 Mad., 839, overruled; *Gopal Ram v. Magni Ram*, (1927) I.L.R., 7 Pat., 375, followed. *Bhadri Narain v. Sheo Koer*, (1889) I.L.R., 17 Calc., 512 (P.C.), applied.

PETITIONS under section 75 of Act V of 1920 praying the High Court to revise the orders of the District

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\* Civil Revision Petitions Nos. 1349 and 1350 of 1928.

Court of Coimbatore, in C.M.A. Nos. 69 and 68 of 1928 preferred against the orders of the Court of the Subordinate Judge of Coimbatore, made respectively in I.A. Nos. 223 and 298 of 1928 in I.P. No. 1 of 1923, on the file of the District Court of Coimbatore.

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These petitions coming on for hearing, the Court (RAMESAM and JACKSON, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

The decision relied on by the District Judge while making some observations in favour of the respondent ultimately proceeds on the ground that the proceeding before the learned Judges was a Revision Petition and the learned Judges thought that it was a ground good enough for rejecting the petition. The contention of the respondent is supported by the decisions of the Calcutta, Patna, Lahore and Rangoon High Courts; *Abraham v. Sookias*(1), *Gopal Ram v. Magni Ram*(2), *Iakhi v. Molar*(3), and *K. K. S. A. R. A. Chetty v. Mg. Myat Tha* (4). The opposite view was taken in this Court by two learned Judges in *Chinnappa Reddy v. Thomasu Reddy*(5). It is unnecessary to refer to other decisions in this Court. One matter is clear. As observed by CHATTERJEA and PANTON, JJ., section 43 of the Act does not operate as an automatic annulment on the failure of the debtor to apply for a discharge. On this point, there is an authority which says that the adjudication shall stand cancelled on the debtor's default. The only question that arises is—whether the Court can extend the time before the order of annulment is passed, though after the expiry of the time originally fixed under section 27. We refer the following question for the decision of a Full Bench:—

Whether a Court has jurisdiction to extend the time originally fixed under section 27 for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under section 43, either under section 5 of the Insolvency Act taken with section 148, Civil Procedure Code, or under section 27 (4) of the Act itself, or otherwise?

(1) (1923) I.L.R., 51 Cal., 337.

(2) (1927) I.L.R., 7 Pat., 375.

(3) (1925) 86 I.C., 115.

(4) (1927) A.I.R. (Rang.), 136.

(5) (1927) I.L.R., 51 Mad., 839.

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## ON THIS REFERENCE—.

*S. Venugopalachari* for petitioner.—After the expiry of time fixed for applying for discharge not only the Court is bound to annul the adjudication, but the adjudication itself stands annulled *ipso facto*; and no express order annulling the adjudication is necessary for section 43 (1) to operate. No application for extension can be made after the expiry of the time; otherwise, section 148, Civil Procedure Code, would be unnecessary. Wherever the legislature requires an order to be made expressly or an application to be made by a party to create a certain effect, it has so enacted. Section 43 (1) has been held to be mandatory by almost all the decisions of this Court; *per* WALLER, J., in *Arunagiri Mudaliar v. Kandasami Mudaliar*(1), *Chinnappa Reddy v. Thomas Reddy*(2), *Venugopalachariar v. Chunnial Sowcar*(3), *per* REILLY, J. in *Jethaji Peraji Firm v. Krishnayya*(4); though under the English Bankruptcy Act an application for extension can be made after the time fixed, *In re Lord Thurlow*(5). The latest decisions of other High Courts are against me.

*N. S. Srinivasa Ayyar* and *G. Jagadisa Ayyar* for respondent.—It is true that if the debtor does not apply for discharge, the Court is bound to annul the adjudication under section 43 (1); the section is mandatory only in this sense, but it does not follow that there is an automatic annulment then; the Court has to pass an express order of annulment. This is implied in section 37 (2) of the Act. “Period fixed” in section 43 (1) means “period fixed either originally or as extended from time to time;” see *per* VENKATASUBBA RAO, J. in *Jethaji Peraji Firm v. Krishnayya*(4), *Gopal Ram v. Magni Ram*(6), *Abraham v. Sookias*(7) and *Muharaj Hari Ram v. Sri Krishna Ram*(8). Extension can be applied for even after expiry of time. See sections 5, 27 (2) of the Act and section 148, Civil Procedure Code; *Bhadri Narain v. Sheo Koer*(9).

## OPINION.

BEASLEY,  
C.J.

BEASLEY, C.J.—The question referred to us is “Whether a Court has jurisdiction to extend the time

(1) (1923) 19 L.W., 418.

(3) (1926) I.L.R., 49 Mad., 935.

(5) [1895] 1 Q.B., 724.

(7) (1923) I.L.R., 51 Cal., 337.

(2) (1927) I.L.R., 51 Mad., 839.

(4) (1929) I.L.R., 52 Mad., 648.

(6) (1927) I.L.R., 7 Pat., 375.

(8) (1926) I.L.R., 49 All., 201.

(9) (1889) I.L.R., 17 Cal., 512 (P.C.).

originally fixed under section 27 of Provincial Insolvency Act for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under section 43, either under section 5 of the Insolvency Act taken with section 148, Civil Procedure Code, or under section 27 (2) of the Act itself, or otherwise." This reference is made necessary because of the view taken by Courts other than the Madras High Court in opposition to the balance of opinion in the Madras High Court.

The facts are that the insolvency petition was presented on the 5th January 1923 and on this petition there was an order of adjudication on the 31st January 1924 and one year's time was granted to the insolvent to apply for his discharge. This time was further extended and the finally extended period expired on the 30th June 1927. No further applications for extension of time were made and nothing was done in the insolvency until in 1928 an alienee applied for the annulment of the adjudication. Notice was ordered to the insolvent to show cause against the annulment of the adjudication and then a creditor filed an application to extend the time for the application for discharge.

We have now to consider whether the Court has any jurisdiction to extend the time for an application for discharge having regard to the fact that the time specified by the Court expired on the 30th June 1927 and the application for an extension of time was only made in 1928. The first section to be considered is section 43 (1) of the Provincial Insolvency Act, which reads,

"If the debtor does not appear on the day fixed for hearing his application for discharge or on 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."

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WALLER, J., in *Arunagiri Mudaliyar v. Kandaswami Mudaliyar* (1), held that the Judge had no option under section 43 but to annul the adjudication and that he had no power under section 27 to extend the period after it had expired. His reason for so holding is that section 43 is in his view absolutely peremptory in its terms and that the only course open to a Court, on default of the insolvent to apply for his discharge, is to annul the adjudication, and that being so, no application for extension of the period can lie after it has expired. In the same case, KRISHNAN, J., took the contrary view. In *Chinnappa Reddy v. Thomasu Reddy* (2), KUMARASWAMI SASTRI and WALLACE, JJ., agreed with WALLER, J.'s view in a judgment which reviewed most of the decided cases upon this point and they held that the word "shall" in its ordinary signification is mandatory and saw no reason why that word in section 43 should not receive its ordinary interpretation. PHILLIPS and MADHAVAN NAIR, JJ., followed WALLER, J.'s opinion in *Arunagiri Mudaliyar v. Kandaswami Mudaliyar* (1), in *Venugopalachariar v. Chinnulal Sowcar* (3). VENKATASUBBA RAO and REILLY, JJ., considered this question in *Jethaji Peraji Firm v. Krishnayya* (4). VENKATASUBBA RAO, J., in the first place, observes that the adjudication does not get automatically annulled under section 43 (1) on the expiry of the original period. Next he holds that section 27 (2) of the Provincial Insolvency Act, whilst saying that the Court may extend the time, does not say in express terms that it may be extended either before or after the expiration of the period originally fixed, and in his view, section 148, Civil Procedure Code, clearly allows the Court to enlarge the time, irrespective of the fact that the application is made either before or after

(1) (1923) 19 L.W., 418.

(2) (1927) I.L.R., 51 Mad., 839.

(3) (1926) I.L.R., 49 Mad., 935.

(4) (1929) I.L.R., 52 Mad., 648.

the expiry of the period originally specified, and for this, *Bhadri Narain v. Sheo Koer*(1) is direct authority. He holds, therefore, that it is open to the Insolvency Court under section 27 (2) of the Provincial Insolvency Act to extend the time on a proper application to that effect made at any time before the adjudication is annulled under section 43 (1). REILLY, J., is inclined to the view that the words " shall be annulled " in section 43 of the Act are mandatory. In the view of the majority of the Judges of this High Court who have considered this question, the answer to the question referred to us would be in the negative.

But other High Courts, namely, Calcutta, Patna and Lahore, have taken the opposite view. This question was very carefully dealt with by a Full Bench of the Patna High Court in *Gopal Ram v. Magni Ram*(2) holding that the Court has power under section 27 (2) of the Provincial Insolvency Act to extend the time originally fixed by it for the insolvent to make an application for discharge, in spite of the fact that the time originally fixed by it may have expired and no application for discharge was made by that time, and that the power so conferred by section 27 (2) can only be curtailed or withdrawn when the Court's power to deal with the question of adjudication has come to an end by reason of its having passed the final order annulling the order of adjudication. It also held that the annulment of adjudication does not, under section 43 (1) of the Act, come into operation without an express order of the Court to that effect. All the decisions were carefully considered in the judgment of JWALA PRASAD, J. On page 381, he says :

" The interpretation sought to be placed upon section 43 of the Act by Mr. Shambhu Saran could only be accepted if the

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(1) (1889) I.L.R., 17 Cal., 512.

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Court was not required to pass an order of annulment after the failure of the insolvent to make an application within the period specified by the Court. The annulment of adjudication would not *ipso facto* come into operation without an express order of the Court to that effect under section 43 of the Act. This is clear from the section itself and it gains support from clause (2) of section 37 which says 'Notice of every order annulling an adjudication shall be published in the Local Official Gazette and in such other manner as may be prescribed,' so that an order annulling an adjudication has to be passed by the Court and so long as that order is not passed, the question, as observed above, remains pending before the Court in spite of the expiry of the period fixed by the Court for the insolvent to make an application for his discharge."

It was strongly contended before us that this view of the Patna High Court is wrong and that directly the time has expired for the application for the discharge and the debtor has made default in making such an application, the order of adjudication is *ipso facto* annulled. But this contention quite overlooks section 37 (2) of the Act to which JWALA PRASAD, J., referred. That, in terms, refers to the order annulling the adjudication. It seems clear that no adjudication can be annulled without an order. If the annulment were automatic on the expiry of the period prescribed by section 27 (1), the order annulling the adjudication specified in section 37 (2) would be quite unnecessary. In *Abraham v. Sookias*(1), CHATTERJEA and PANTON, JJ., took the same view as was taken afterwards in the case in 7 Patna, namely, that the Court has power to extend the time even after the expiry of the period originally fixed and that furthermore the annulment of the adjudication is not automatic. On the latter point, *Maharaj Hari Ram v. Sri Krishan Ram*(2) is in agreement with 7 Patna and 51 Calcutta.

(1) (1923) I.L.R., 51 Calc., 337.

(2) (1926) I.L.R., 49 All., 201.

In my opinion, the view taken by the Calcutta, Patna and the Allahabad High Courts is the correct one. I think that too much importance has been given in the decided cases in this Court to the question of whether the word "shall" in section 43 (1) of the Act is to be used in a mandatory sense or not. No doubt it is mandatory and gives the Court no option but to order an annulment of the adjudication, but that does not necessarily imply that the Court cannot grant an extension of time before passing such an order. In my view, all that is intended by that section is that if no one applies for an extension of time or no extension of time is given, the Court must then annul the adjudication. Section 27 (2) of the Act cannot be lost sight of. That gives the Court power to extend the time within which the debtor shall apply, for his discharge and section 43 (1) only compels the Court to annul the order of adjudication, if the debtor does not apply for an order of discharge within the period specified by the Court and, in my view, section 27 (2) applies as much to cases beyond the extended period as to those within it, so long as the application is made before any order of annulment is made by the Court and the words "within the period specified by the Court" in section 43 (1) mean the period extended by the Court from time to time beyond the original period and up to the date of annulment.

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I also agree with VENKATASUBBA RAO, J., in *Jethaji Yeraji Firm v. Krishnayya*(1) that section 148 of the Civil Procedure Code allows the Court to enlarge the time irrespective of the fact that the application is made after the expiry of the time originally fixed or afterwards extended.

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(1) (1929) I.L.R., 52 Mad., 648.



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CURGENVEN,  
J.

For the above reasons, I would answer the question referred to us in the affirmative.

KRISHNAN PANDALAI, J.—I agree.

CURGENVEN, J.—I also agree. The question is not, in my view, whether the terms of section 43 (1) of the Act are mandatory. Granting that the Court is obliged to annul an adjudication if the debtor does not apply for an order of discharge “within the period specified by the Court,” it remains to be decided how that expression is to be construed. Sub-section (1) of section 27 requires the Court, on making an order of adjudication, to “specify in such order the period within which the debtor shall apply for his discharge.” Sub-section (2) empowers the Court to extend such period. “The period specified by the Court” will clearly comprise not only the period originally specified under sub-section (1), but any extension granted under sub-section (2). Then the only further question is whether such extension may be sanctioned even after the original period, together with any extension already ordered, has expired. Section 5 of the Act attracts the provisions of the Code of Civil Procedure, and among them the power, conferred by section 148 of the Code, to grant an extension of time, even though the period originally fixed may have expired. It is scarcely necessary to go further than this; but if it were, the Privy Council judgment in *Badri Narain v. Sheo Koer*(1) would support the view that power to enlarge a period after its expiry is implicit in such a provision as section 27 (2). That case was decided under the old Code, which contained nothing corresponding to section 148, and the point for decision was as to a Court’s power retrospectively to enlarge the period for furnishing

security under section 549 (now Order XLI, rule 10).  
The section contained the direction

“If such security be not furnished within such time as the Court orders, the Court shall reject the appeal.”

Purely upon a construction of the section, their Lordships say that

“the application to the Court to enlarge the time for giving security may be made either before or after the expiration of the time within which the security has been ordered to be furnished, and the Court may thereupon enlarge the time according to any necessity which may arise where it is just and proper that they should do so.”

I can discover no reason for construing section 43 (1) of the Provincial Insolvency Act in any different manner.

N.R.

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## APPELLATE CIVIL.

*Before Mr. Justice Kumaraswami Sastri and  
Mr. Justice Pakenham Walsh.*

RAJAH SOMASEKHARA ROYAL AND TWO OTHERS  
(DEFENDANTS 4, 6 AND 2), APPELLANTS,

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December 5.

v.

RAJAH SUGUTOOR IMMADI MAHADEVA ROYAL YES-  
WANTHA BAHADUR AND TWO OTHERS (PLAINTIFF AND  
DEFENDANTS 3 AND 5), RESPONDENTS.\*

*Lingayats—Custom of adoption of a married man—Lingayats of  
North Kanara, not governed by Mayukha Law of adoption.*

Under the Hindu Law obtaining in the Madras Presidency, the adoption of a married man is invalid; this rule applies also to Lingayats, who are only a sect of Hindus, in the absence of a custom to the contrary.

As the district of North Kanara formed part of the Madras Presidency till 1861 and was then transferred to the Bombay

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\* Appeal No. 354 of 1926.