## APPELLATE CIVIL—FULL BENCH.

*Before Sir Owen Beasley* Kt., *Chief Justice,*
*Mr. Justice Ramesam and Mr. Justice Cornish.*

1931, December 14.

FATMA BI BY HER DULY AUTHORIZED AGENT JAINULABDEEN SAHIB (SECOND RESPONDENT), APPELLANT,

*v.*

NAGOORKHAN AND ANOTHER (APPLICANT AND FIRST RESPONDENT), RESPONDENTS.*

*Presidency-towns Insolvency Act (III of* 1909), *sec.* 46 (3)—*Barred debt—Right to sue on same subsisting on date of adjudication—Proof of—Indian Limitation Act (IX of* 1908), *sec.* 4.

A barred debt is provable in insolvency, under section 46 (3) of the Presidency-towns Insolvency Act, where the right to sue on the debt subsisted on the date of the order of adjudication, by reason of the provisions of section 4 of the Indian Limitation Act.

APPEAL against the judgment of WALLER J. passed in the exercise of Insolvency Jurisdiction of the High Court in Application No. 73 of 1931 in Insolvency Petition No. 441 of 1928.

*A. Ramachandra Ayyar* for appellant.—Though the claim on the promissory note was barred on 20th October 1928, since the 20th and the 21st October were holidays, a suit could have been filed on the 22nd. The debtors were adjudicated on the 22nd. The properties vested in the Official Assignee and no suit could have been filed except with the leave of Court. Section 4 of the Indian Limitation Act should be read along with sections 17 and 46 of the Presidency-towns Insolvency Act. Under the circumstances the filing of a suit will be an expensive formality. The debt could be proved in Insolvency. In *In re Hepburn. Ex parte Smith*(1) it was held that, for purposes of finding out

* Original Side Appeal No. 37 of 1931.
(1) (1884) 14 Q.B.D. 394, 400.

if a debt could be proved, the Court should see if the remedy by action subsists. See also *Ex parte Lancaster Banking Corporation. In re Westby*(1); *In re General Rolling Stock Company, Joint Stock Discount Company's Claim*(2); and *Ex parte Dewdney*(3).

*K. Krishnaswami Ayyangar* and *V. Varadaraja Mudaliyar* for first respondent.—Section 4 of the Indian Limitation Act is an enabling section. Only a right of suit is given. No other method of claim is open under the section. It is only by filing a suit on the 22nd that the debt could have been made subsisting. In *In re General Rolling Stock Company, Joint Stock Discount Company's Claim*(2), there was no consideration of any section analogous to section 4 of the Indian Limitation Act. It has been distinguished in *Ramaswami Pillai* v. *Govindasami Naicker*(4). Unless the debt is subsisting, it cannot be proved; *Sivasubramania* v. *Theethiappa*(5). See also *Debendra Nath Roy* v. *Kartic Prasad Das*(6).

Second respondent was unrepresented.

## JUDGMENT.

BEASLEY C.J.—This is an appeal from a judgment of WALLER J. sitting in Insolvency. The Official Assignee allowed the claim of the appellant here which was in respect of a debt alleged to be due to her on a promissory note by the insolvent. A creditor preferred an appeal from the order of the Official Assignee to WALLER J., and he allowed the appeal. BEASLEY C.J.

The facts can be briefly stated. The insolvent owed the appellant money on a promissory note. The last payment was a payment of interest on the 20th October 1925. No further payment was made by the insolvent and the debt would have become and did become barred by limitation on the 20th October 1928. Up to that time the appellant had taken no steps to enforce her claim

(1) (1879) 10 Ch. D. 776, 784. (2) (1872) 7 Ch. App. 646, 650.
(3) (1809) 15 Ves. Jun. 479; 33 E.R. 838, 842.
(4) (1918) I.L.R. 42 Mad. 319. (5) (1923) I.L.R. 47 Mad. 120.
(6) (1928) I.L.R. 55 Calc. 1210.

FATMA BI v. NAGOOR-KHAN.

BEASLEY C.J.

against the insolvent on the promissory note. The 20th of October, which was a Saturday, was a public holiday and the High Court was closed. The next day, the 21st, was a Sunday and the Court was closed that day also. On the 22nd October the appellant could have filed a suit against the insolvent upon the promissory note and enforced her claim because, by reason of the provisions of section 4 of the Limitation Act, the insolvent could not successfully set up as bar to the suit the Limitation Act. Section 4 of the Limitation Act is as follows:—

> "Where the period of limitation prescribed for any suit, appeal or application, expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court re-opens."

However, on the morning of the 22nd October 1928, the insolvent was adjudicated an insolvent, and it is admitted that no steps were taken thereafter with regard to this claim by the appellant until she preferred her claim in the insolvency. WALLER J. held that, as the claim on the promissory note was barred on the 20th October and as the appellant had not filed a suit on the 22nd October, the first available day after that, her claim was one which could not be proved in the insolvency and accordingly allowed the appeal.

What we have got to consider here is, what effect an adjudication in Insolvency has upon section 4 of the Limitation Act. It is argued by the respondent here that it has no effect at all, and that the appellant's claim was barred by limitation on October 20th, and she did not avail herself of the time given her for enforcing her claim against the insolvent on October 22nd. On behalf of the appellant it is argued that, when the adjudication took place on the 22nd October, no further steps could reasonably be taken by the appellant, and that her claim was one to be dealt with in the

insolvency. What has got to be considered is the meaning of section 46 (3) of the Presidency-towns Insolvency Act. That states that all debts to which the debtor is subject when he is adjudged an insolvent shall be deemed to be debts provable in Insolvency. It is argued on behalf of the appellant that on the 22nd October this was a debt to which the debtor was subject and that, being so, it was provable in Insolvency. It seems to me that, at any rate, throughout the 22nd October this was a debt to which the debtor was subject, and the question as to whether or not it was provable cannot depend upon the action taken thereafter by the creditor. It is argued for the respondent that it was a conditional debt only, conditional on the appellant filing a suit against the debtor. In my view, on that date the appellant had an enforceable claim against the debtor and the debtor had a debt which could be enforced against him. We have now got to consider whether it was necessary, the adjudication having supervened, for the creditor to file a suit. After the adjudication of a debtor all his property by reason of section 17 of the Presidency-towns Insolvency Act vests in the Official Assignee and no one can bring any suit to enforce any right against the property without the leave of the Court. It is argued here that, notwithstanding this vesting of the insolvent's property in the Official Assignee, the appellant should have come to Court on the 22nd October after the adjudication of the insolvent and applied for leave to file a suit. That would have meant of course that he would have had to pay court-fee on his plaint and that if, on an examination of his claim, it appeared to the Official Assignee that the claim was a good one, the filing of the suit would have been entirely unnecessary and would have cast upon the estate of the insolvent the burden of

FATMA BI v. NAGOOR-KHAN. — BEASLEY C.J.

paying the costs of that plaint. A position somewhat similar, though the facts were slightly different, arose in *In re General Rolling Stock Company, Joint Stock Discount Company's Claim*(1). In that case, which was a company winding-up case, it is true that it appears that the debt was not barred at the time of the making of the winding-up order but became time-barred during the pendency of the liquidation. It was held there that the creditor had a good claim. On page 649 JAMES L.J. says:

> "After a winding-up order has been made, no action is to be brought by a creditor except by the special leave of the Court, . . ."

Here, after an adjudication no suit can be filed by a creditor against a debtor without the leave of the Court. Then he proceeds:

> "And it cannot have been the intention of the Legislature that special leave to bring an action should be given merely in order to get rid of the Statute of Limitations."

Here the obvious effect of filing a suit on the 22nd October would have been to deprive the debtor of his plea that the suit was barred by limitation. That seems to me to be the same thing as filing a suit for the purpose of getting rid of the Limitation Act; nor does it seem to me to make any difference at all that, in that case, there was at the time of the winding-up order a debt which was not barred by limitation. Here was an enforceable debt; before it could be enforced the adjudication happened, and it seems to me to be quite an unreasonable thing to force a creditor under such circumstances to apply for the leave of the Court to file a suit. Supposing the Court refused leave, then, although the Limitation Act gave the creditor the right to file a suit and enforce his claim on that day, that

(1) (1872) 7 Ch. App. 646.

right would be taken away by the action of the Court. Another case to which reference can usefully be made is *Ex parte Lancaster Banking Corporation. In re Westby*(1). There BACON C.J. says:

"When a bankruptcy ensues, there is an end to the operation of that statute, with reference to debtor and creditor. The debtor's rights are established and the creditor's rights are established in the bankruptcy, and the *Statute of Limitations* has no application at all to such a case, or to the principles by which it is governed."

It is perfectly clear that, but for the intervention of the insolvency here, if the creditor did not file the suit on October 22nd she could not enforce her claim. What I have said here must not be taken as meaning that section 4 of the Limitation Act extends the period of limitation. It does not; it merely gives an extended time to a creditor in which to enforce his claim under certain circumstances. For these reasons, the appeal must be allowed with costs (throughout) on the Original Side scale.

RAMESAM J.—I agree.

CORNISH J.—I agree.

G.R.

(1) (1879) 10 Ch. D. 776.