not treat them as representatives of the appellant's interest, because he impleaded him, as well as his brothers. In view of the fact that the appeal fails otherwise, we have not thought it necessary to decide this rather nice point.

SETHURAJAN v. GURUSWAMI.

A.S.V.

APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice, and Mr. Justice Venkataramana Rao.

DAVOOD MOHIDEEN ROWTHER, PETITIONER,

v.

SAHABDEEN SAHIB, RESPONDENT.*

1937, February 11.

Provincial Insolvency Act (V of 1920), ss. 28 and 29—Suit by creditor against debtor after adjudication of latter as an insolvent in respect of a debt provable in insolvency—Maintainability of—Condition precedent to—Leave of Insolvency Court, if—Suit instituted without such leave—Power of Court in which suit instituted to grant leave to continue it.

After a debtor is adjudged an insolvent, a suit filed by his creditor for the recovery of a debt provable in insolvency without the leave of the Insolvency Court is not maintainable and the Court in which the suit is instituted cannot give leave to continue it.

When section 29 of the Provincial Insolvency Act speaks of a suit pending, it refers to a suit already begun but not finished when the order of adjudication is made. Under section 28 of the Act leave of the Court is a condition precedent to the right of action, the want of it is a defect fatal to the suit and subsequent leave cannot validate it.

Case-law reviewed.

---

* Civil Revision Petitions Nos. 1295 of 1935 and 1167 of 1936.

DAVOOD MOHIDEEN v. SAHABDEEN.

PETITIONS under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge of Tanjore in Small Cause Suit No. 219 of 1934 and the order of the Court of the Subordinate Judge of Tanjore dated 13th July 1936 and made in Execution Application No. 217 of 1936 in Small Cause Suit No. 219 of 1934.

The above petitions originally came on for hearing before VENKATARAMANA RAO J. who made the following

ORDER OF REFERENCE TO A BENCH:—

This case (Civil Revision Petition No. 1295 of 1935) raises a question of some importance relating to the construction of section 29 of the Provincial Insolvency Act. A few facts may be necessary for the appreciation of the exact point involved in the case. On 11th March 1924 the defendant in this case executed an usufructuary mortgage in favour of one Haidersa Rowther. On the said date the property was subject to a simple mortgage. The simple mortgagee sued to enforce the security, obtained a decree, and, in execution thereof, purchased the property and dispossessed Haidersa on 25th July 1928. In the meantime the mortgagor applied to the Insolvency Court for adjudicating him an insolvent and the order of adjudication was passed on 8th August 1928. The insolvency has not terminated as the insolvent has not obtained his final discharge. It appears that Haidersa was adjudicated an insolvent and the Official Receiver sold all the outstandings due to the estate of Haidersa, and at the auction sale the plaintiff in this suit purchased the claim of Haidersa against the defendant in pursuance of the usufructuary mortgage executed in his favour. That claim was to recover money due under the mortgage under section 68 of the Transfer of Property Act by reason of the dispossession on 25th July 1928. The plaintiff instituted this suit on 18th April 1934 to recover the money due under the mortgage by reason of his purchase. He did not obtain leave of the Insolvency Court as required by section 28 (2) of the Act. The defendant did not plead the

bar of section 28 (2) in his original written statement but later filed an additional written statement raising this plea. In answer to this the plaintiff filed an application under section 29 for leave to continue the proceedings, and leave was granted. The question, therefore, is whether it is open to the Court to grant such leave under section 29. Under section 28 (2), on the making of an order of adjudication, except as provided by the Act, no creditor to whom the insolvent is indebted in respect of any debt provable under the Act shall commence any suit or other legal proceedings except with the leave of the Court and on such terms as the Court may impose. The section in my opinion imposes a condition precedent to the right of action. It has been construed to be so by a Bench of this Court in *Ghouse Khan* v. *Bala Subba Rowther*(1) and it has also been held that it is not open to the Insolvency Court to grant leave subsequently and cure the initial defect. WALLACE J. observes in *Ponnusami* v. *Kalaperumal*(2) that the absence of leave is not only a bar to the original institution of the suit, but that a suit commenced without leave cannot be continued by obtaining leave at any subsequent stage thereto. But in *Ghouse Khan* v. *Bala Subba Rowther*(1) ODGERS J. made an observation to the following effect, that even where a suit has been instituted without the leave of the Insolvency Court it would be open to the plaintiff to apply to the Court before which the suit was instituted for leave and that such leave could be granted. It was on the strength of that observation that the learned Judge in this case allowed the plaintiff to continue the suit. Taking sections 28 and 29 together it seems to me that section 29 contemplates proceedings pending on the date of the adjudication and not suits instituted subsequent to the order of adjudication. Else it seems to me that the condition precedent imposed by section 28 (2) will become nugatory. But a different view seems to have been taken in Bombay on the corresponding section, 18 (3), of the Presidency-towns Insolvency Act where the language is similar. In *Mahomed Haji Essack* v. *Abdul Rahiman*(3) the learned Judges say that even though leave has not been obtained under section 17 of the Presidency-towns Insolvency Act it is open to the Court before which a suit is instituted to grant leave, and pending the suit

(1) (1927) I.L.R. 51 Mad. 833. (2) A.I.R. 1929 Mad. 480.
(3) (1916) I.L.R. 41 Bom. 312.

DAVOOD MOHIDEEN v. SAHABDEEN.

the proceedings under section 18 (3) of the Presidency-towns Insolvency Act may be stayed. In doing so SCOTT C.J. purported to follow the decision of the English Court reported as *Brownscombe* v. *Fair*(1). That case was decided on the construction of sections 9 and 10 of the English Bankruptcy Act, 46 and 47 Vic. c. 52. In section 9 we find a clause corresponding to section 28 (2) of the Provincial Insolvency Act whereby a creditor cannot commence an action without the leave of the Insolvency Court. The language of section 10 of the said English Bankruptcy Act is similar to section 29 of the Indian Act. It says that any Court in which proceedings are pending against a debtor may on proof that a bankruptcy petition has been presented by or against the debtor either stay the proceedings or allow them to continue on such terms as it may think just. In that case, the Master and the learned Judge before whom the original case came up allowed the suit to be continued. On appeal, WILLS J. stayed the action. In doing so he made the following observation:

"The intention of the Legislature in the Bankruptcy Act was, that on the bankruptcy of a man no more litigation between the bankrupt and his creditors should be permitted except in special circumstances, such as where a case was at the time of the bankruptcy ripe for trial in which the amount of the proof against the bankrupt's estate would not be seriously affected. But there must be such circumstance; in the present case there is nothing exceptional. Mr. Rose Innes says that the jurisdiction of the Court is limited to actions commenced before the bankruptcy proceedings are initiated; but I do not think so, for the words are perfectly general."

These observations seem to indicate that even though leave has not been obtained in the first instance it is open to the Court before which the suit is pending to stay the action or continue it. As the provisions of the Indian law are more or less based upon the English Bankruptcy Act, the decision of WILLS J. is of some importance in the construction of the Indian Act. But I must say that the Lahore High Court has taken a different view, namely, the view which I have already indicated that taking sections 28 and 29 together what is contemplated is proceedings pending on the date of the adjudication and not proceedings instituted after the order of

(1) (1887) 58 L.T. 85.

adjudication. It is therefore desirable that this matter should be considered by a Bench as the question is one of frequent occurrence. I therefore refer this matter to a Bench.

ON THE REFERENCE :

T. R. Srinivasan for petitioner.

S. K. Ahmed Meeran for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by VENKATARAMANA RAO J.—The facts sufficient for the disposal of this revision petition are fully stated in the order of reference and it is unnecessary to repeat them. On those facts the question arises whether, after a person is adjudged an insolvent, a suit filed by a creditor for the recovery of a debt provable in insolvency without the leave of the Insolvency Court is maintainable and can the Court in which the suit is instituted give leave to continue it ? The sections of the Provincial Insolvency Act relevant to this question are sections 28 and 29. Section 28, clause 2, runs thus :

" On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act 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 proceedings except with the leave of the Court and on such terms as the Court may impose. "

Section 29 runs thus :

" 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 against him under this Act, either stay the proceeding, or allow it to continue on such terms as such Court may impose. "

DAVOOD MOHIDEEN v. SAHABDEEN.

VENKATA-RAMANA RAO J.

Unhampered by authority, reading both sections together and giving the words their plain and natural meaning, the following propositions are clearly deducible :

(i) Section 28 (2) is mandatory and, after an order of adjudication is made, no suit or other proceeding can be instituted against the insolvent or his property without the leave of the Insolvency Court and such leave is a condition precedent to the right of action ; and

(ii) where any suit or other proceeding is pending on the date of the adjudication in any Civil Court, such Court on being apprised of the order of adjudication can in its discretion either stay the suit or proceeding or give leave to continue the same.

It will be seen that section 27, which deals with the power of Insolvency Courts to make an order of adjudication, is the first of the sections enacted under the heading " Order of adjudication ". The succeeding sections deal with the legal consequences which follow from the order of adjudication. Thus the point of time in relation to which both sections 28 and 29 speak is the date of the order of adjudication. Section 28 deals with proceedings not pending on the date of the order of adjudication and section 29 deals with proceedings then pending. The term " pending " literally means " begun but not yet carried out or finished ". Therefore when section 29 speaks of a suit pending, it refers to a suit already begun but not finished when the order of adjudication is made; see *Subramanyam* v. *Narasimham*(1).

(1) (1928) 56 M.L.J. 489, 492 and 493.

In the view that under section 28 leave of the Court is a condition precedent to the right of action, no other interpretation of section 29 is possible. If leave is a condition precedent, the want of it is a defect fatal to the suit and subsequent leave cannot validate it. If it be held that leave can be given under section 29 to continue a suit commenced without the leave of the Insolvency Court, it would be rendering section 28 nugatory. To illustrate, suppose a District Court before which proceedings in insolvency are pending refuses to grant leave to a creditor to institute a suit against an insolvent ; after such refusal the creditor files a suit in the District Munsif's Court and it can grant leave to continue the suit ; this means the District Munsif will be sitting as it were in judgment against the order of the District Judge, a state of affairs which could never have been in the contemplation of the Legislature in enacting the Provincial Insolvency Act, whatever may be the English Law or the law of insolvency which governs the presidency-towns with which we shall presently deal.

An argument based on hardship to the creditor resulting from this interpretation was addressed to us relying on certain decisions. [Vide *Subramanyam* v. *Narasimham*(1) and *Bhimaji* v. *Chunilal Jhaverchand* (2)]. It is this : a creditor for no fault of his in ignorance of the adjudication files a suit ; it would be unjust to dismiss the suit for want of leave and it may be at the time of dismissal his claim may be barred and he will be practically remediless. When the words

(1) (1928) 56 M.L.J. 489. (2) (1931) I.L.R. 57 Bom. 623.

DAVOOD MOHIDEEN v. SAHABDEEN.

VENKATA-RAMANA RAO J.

of the statute are plain, a Court of law cannot refuse to give them their natural meaning because of a possibility of hardship or injustice; moreover, as pointed out by WALLACE J. in *Ponnusami* v. *Kalaperumal*(1), there is really no such hardship. As observed by him at page 481:

> "The gazette notification of insolvency is presumed to be notice to all the creditors and they cannot be heard to plead want of notice or ignorance. On the other hand, unless this strict reading of the section is adopted there will be great embarrassment both to the insolvent and the Insolvency Court."

There is preponderance of Indian authority in support of the view we are taking. In *Ghouse Khan* v. *Bala Subba Rowther*(2) ODGERS and CURGENVEN JJ. held that leave of the Insolvency Court is a condition precedent to the institution of a suit and failure to obtain such leave is a defect which cannot be cured and leave subsequent to the institution of the suit cannot be given. They followed the decision in *In re Dwarkadas Tejbhandas*(3) given on an analogous provision in the Presidency-towns Insolvency Act (section 17). In *Ponnusami* v. *Kalaperumal*(1) WALLACE J. held that even subsequent annulment of insolvency would not cure the initial defect. It must be noticed that WALLACE J. was inclined to take a different view in cases of the creditor's ignorance of the insolvency. [See *Subramanyam* v. *Narasimham*(4)]. In *Maya Ookeda* v. *Kuverji*(5) BLACKWELL J., following *In re Dwarkadas Tejbhandas*(3), dismissed a suit instituted without such leave. [See also *Panna Lal-Tassaduq*

(1) A.I.R. 1929 Mad. 480. (2) (1927) I.L.R. 51 Mad. 833.
(3) (1915) I.L.R. 40 Bom. 235 (4) (1928) 56 M.L.J. 489.
(5) (1931) 34 Bom. L.R. 649.

Hussain v. *Hira Nand-Jiwan Ram*(1) and *Rowe & Co.* v. *Tan Thean Taik*(2)]. We may point out that in *Ghouse Khan* v. *Bala Subba Rowther*(3), *In re Dwarkadas Tejbhandas*(4) and *Panna Lal-Tassaduq Hussain* v. *Hira Nand-Jiwan Ram*(1) the creditor filed the suit in ignorance of the order of adjudication and yet this circumstance did not affect the decision in those cases.

We shall now deal with the argument in support of the contrary view based mainly on an English decision in *Brownscombe* v. *Fair*(5) and on *Mahomed Haji Essack* v. *Abdul Rahiman*(6) which followed it. It is contended that the words in section 29 are general and wide enough to cover suits instituted before and after the date of the order of adjudication and that such a construction was adopted in construing section 10 (2) of the English Bankruptcy Act of 1883 where the language was similar. Sections 9 and 10 of the English Bankruptcy Act of 1883, so far as they are relevant for the present discussion, are in these terms:

Section 9 (1):—" On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court and on such terms as the Court may impose."

Section 10 (2):—" The Court may at any time after the presentation of a bankruptcy petition stay any action, execution or other legal process against the property or person of the

(1) (1927) I.L.R. 8 Lah. 593.
(2) (1924) I.L.R. 2 Ran. 643.
(3) (1927) I.L.R. 51 Mad. 833.
(4) (1915) I.L.R. 40 Bom. 235
(5) (1887) 58 L.T. 85.
(6) (1916) I.L.R. 41 Bom. 312.

DAVOOD MOHIDEEN v. SAHABDEEN.

VENKATA-RAMANA RAO J.

debtor, and any Court in which proceedings are pending against a debtor, may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings, or allow them to continue on such terms as it may think just."

It does not appear from the report of *Brownscombe* v. *Fair*(1) whether the order was passed under the first portion of section 10 (2) or under the latter portion thereof. But from the arguments of Mr. Read and Mr. Rose Innes it may be taken that the order was made under the latter portion of section 10 (2) which is similar in language to section 29 of the Provincial Insolvency Act and section 18 (3) of the Presidency-towns Insolvency Act. The following observations of WILLS J. in that case do lend countenance to the argument at the Bar:

"Mr. Rose Innes says that the jurisdiction of the Court is limited to actions commenced before the bankruptcy proceedings are initiated but I do not think so, for the words are perfectly general."

With due respect, we may point out that the plain language of the section does not warrant this interpretation. Section 9 deals with proceedings not pending on the date of the receiving order and section 10 with proceedings so pending. That this is the correct view seems to be borne out by the observations of STIRLING J. in *In re Berry. Duffield* v. *Williams*(2):

"Section 9 prohibits the 'commencing' of actions or proceedings, except with the leave of the Court; and I agree with the opinion expressed by NORTH J. in *In re Wray* (*A Solicitor*)(3) that it has no reference to proceedings actually pending against the debtor at the date of the receiving order. Such receiving proceedings are dealt with by section 10, sub-section 1

(1) (1887) 58 L.T. 85. (2) [1896] I. Ch. 939, 946.
(3) (1887) 36 Ch. D. 138, 143.

of which applies to the interval between the presentation of a bankruptcy petition and the making of a receiving order; while sub-section 2 applies to any time after the presentation of a bankruptcy petition. The scheme appears to be that actions and other proceedings are to go on against the debtors unless either the Court of Bankruptcy or the Court in which the proceedings are pending sees fit to interfere in the exercise of the discretion vested in it."

It may be noted that in Halsbury's Laws of England, Vol. II, at page 63, *Brownscombe* v. *Fair*(1) is cited as an authority for the proposition that actions which are commenced after the receiving order without the leave of the Court may be stayed but in the footnote it is added: "They are stayed under the Bankruptcy Act, 1883, section 9." (See also Vol. II, Hailsham's Edition, page 90.) Similarly in William's Bankruptcy Practice (14th Edition, 1932) at page 70 the same case is given as an authority for the said proposition under section 7 of the English Bankruptcy Act, 1914, corresponding to section 9 of the Act of 1883 which is the same as section 28 of the Provincial Insolvency Act and section 17 of the Presidency-towns Insolvency Act. Thus it will be seen that *Brownscombe* v. *Fair*(1) is not treated as an authority for the exercise of such a power under section 10 (2). It is therefore not safe to construe section 29 in the light of the decision in *Brownscombe* v. *Fair*(1). The decision in *Mahomed Haji Essack* v. *Abdul Rahiman*(2) is a decision under section 18, clause 3, of the Presidency-towns Insolvency Act and sections 17 and 18 are a reproduction of sections 9 and 10 of the English Bankruptcy Act, 1883. SCOTT C.J.

(1) (1887) 58 L.T. 85. (2) (1916) I.L.R. 41 Bom. 312.

DAVOOD MOHIDEEN v. SAHABDEEN.

VENKATA-RAMANA RAO J.

follows *Brownscombe* v. *Fair*(1) without any discussion and the decision cannot be relied on as an authority on section 29 of the Provincial Insolvency Act. Two other cases of the Bombay High Court were cited, namely, the decision of FAWCETT J. in *Bheraji Samrathji* v. *Vasantrao*(2) and the decision of TYABJI J. in *Bhimaji* v. *Chunilal Jhaverchand*(3). Both the learned Judges followed *Mahomed Haji Essack* v. *Abdul Rahiman*(4), but FAWCETT J. observed that, if the matter were *res integra*, a different view might be open and he referred to *Panna Lal-Tassaduq Hussain* v. *Hira Nand-Jiwan Ram*(5) in support of that view. The decision in *Subramanyam* v. *Narasimham*(6) is distinguishable. There, the question was whether a decree passed in a suit instituted without leave in the absence of any objection being taken on that score is a nullity. It is unnecessary to deal with the correctness of that decision, but we must express our dissent from the observations contained in the judgment in regard to the interpretation of sections 28 and 29 of the Provincial Insolvency Act in so far as they purport to be based on the theory of ignorance of the creditor of the proceedings in insolvency. TIRUVENKATACHARI J. in that case observes that the word "commenced" must be construed as "knowingly commenced". WALLACE J. seems inclined to this view though he says that having regard to the preponderance of authority he would not dissent from the view he took in *Ponnusami* v. *Kalaperumal*(7). It

(1) (1887) 58 L.T. 85.
(2) (1928) 31 Bom. L.R. 981.
(3) (1931) I.L.R. 57 Bom. 623.
(4) (1916) I.L.R. 41 Bom. 312.
(5) (1927) I.L.R. 8 Lah. 593.
(6) (1928) 56 M.L.J. 489
(7) A.I.R. 1929 Mad. 480.

seems to us that there is no warrant for importing into the section words which are not there. In *Ghouse Khan* v. *Bala Subba Rowther*(1) there is no doubt an observation of ODGERS J. at page 839 to the effect that leave may be obtained under section 29 though the suit might have been instituted without the leave of the Insolvency Court but it is an *obiter dictum* which was not necessary for the case. Further the observation is irreconcilable with the view taken by him in regard to section 28 of the Act that want of leave is fatal to the suit.

We are therefore of opinion on a proper construction of sections 28 and 29 of the Provincial Insolvency Act that leave of the Insolvency Court not having been obtained prior to its institution, the present suit is not maintainable and the learned Subordinate Judge had no power to grant leave to continue the suit. We therefore reverse the decision of the lower Court and dismiss the suit but in the circumstances we direct each party to bear his own costs.

[The judgment in Civil Revision Petition No. 1167 of 1936 is omitted as not being necessary for the purpose of this report.]

A.S.V.

(1) (1927) I.L.R. 51 Mad. 833.