bear to the entirety of the mortgaged properties valued as on the date of the mortgage. MAHALAKSHMI v. SOMARAJU.

The appeal is allowed and the case will be sent back to the lower Court to give effect to the above directions and pass a preliminary decree for sale for the amount ascertained as above. The plaintiff and the seventh defendant will pay and receive proportionate costs both here and in the Court below.

G.R.

APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice Krishnaswami Ayyangar.

KALYANASUNDARAM PILLAI (JUDGMENT-DEBTOR—DEFENDANT), APPELLANT, 1938, October 6.

v.

VAITHILINGA VANNIAR (DECREE-HOLDER—SECOND PLAINTIFF), RESPONDENT.*

Provincial Insolvency Act (V of 1920), sec. 78 (2)—Period of pendency of insolvency—Exclusion of, in computing period of twelve years fixed by sec. 48 of Code of Civil Procedure (Act V of 1908)—Sec. 48, Civil Procedure Code, sec. 78 (2), Provincial Insolvency Act, and art. 182 of Limitation Act (IX of 1908)—Scope and effect of.

The judgment-debtor in a suit in which a decree was passed on 29th August 1917 was adjudicated an insolvent on 21st December 1923. The adjudication was annulled on 19th August 1929. On 18th April 1935 the decree-holder filed a petition for the execution of the decree. It was the last of four execution applications filed after the period of twelve years from the date of the decree, each of them being within time

* Appeal Against Order No. 482 of 1937.

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so far as article 182 of the Limitation Act was concerned. The petition of 18th April 1935 having been filed more than seventeen years and seven months after the date of the decree would be barred under section 48 of the Code of Civil Procedure unless the period during which the insolvency was pending could be excluded in computing the period of twelve years limited by that section. The question was whether by reason of section 78 (2) of the Provincial Insolvency Act the period during which the insolvency was pending had to be excluded in computing the period of twelve years fixed by section 48 of the Civil Procedure Code.

Held that the language of section 78 (2) of the Provincial Insolvency Act was comprehensive enough to affect and control the computation of the period of time limited by section 48 of the Code of Civil Procedure, that the period during which the insolvency was pending must therefore be excluded in computing the period of twelve years fixed by section 48 of the Code of Civil Procedure and that the execution petition of 18th April 1935 was in time.

If the law fixes a period of time after which a suit or other proceeding is not to be entertained by the Court, the period so limited is etymologically a period of limitation. It is in this sense that this expression has been used in section 78 (2) of the Provincial Insolvency Act. The period of twelve years limited by section 48 of the Civil Procedure Code is a "period of limitation" within section 78 (2) of the Provincial Insolvency Act. The applicability of that section is not confined to the period of limitation fixed by the Limitation Act only, but extends to other statutes which similarly enact periods of limitation in the sense explained.

Where it was also contended that the benefit of section 78 (2) of the Provincial Insolvency Act was exhausted as soon as it was once made use of and that if in respect of the first of the execution applications after the twelve years' period that section was applied and an exclusion of time was obtained for that application, no more exclusion was available for the second or any of the later applications, so much so that the later applications, though within the extended period sanctioned by section 78 (2) and though within the limit of time fixed by article 182 of the Limitation Act, must be held to be barred,

held further that the contention was based on a confusion of the respective functions of section 48, Civil Procedure Code, and section 78 (2) of the Provincial Insolvency Act and was unsustainable.

The true scope and effect of the provisions explained.

APPEAL against the order of the District Court of East Tanjore at Negapatam, dated 28th August 1937 and made in Execution Petition No. 9 of 1936 in Original Suit No. 282 of 1917, District Munsif's Court, Tanjore.

V. Ramaswami Ayyar for *K. Rajah Ayyar* for appellant.

R. Sundaralingam for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by KRISHNASWAMI AYYANGAR J.—This appeal is directed against an order of the District Judge, East Tanjore, on an execution petition filed more than twelve years after the decree. He has entertained the petition and allowed execution to proceed, overruling the judgment-debtor's contention that it was barred by section 48 of the Civil Procedure Code. The judgment-debtor has appealed, and on his behalf the same contention has been repeated before us.

The decree was passed on 29th August 1917. The execution petition which is said to be barred was filed on 18th April 1935 more than seventeen years and seven months after the date of the decree. *Prima facie*, the execution petition would seem to be barred under section 48 of the Civil Procedure Code unless it could successfully be urged that a sufficient period could be excluded in computing the period of twelve years limited by the section. That, in fact, was the contention which has been accepted by the learned Judge. It would appear that the judgment-debtor

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was adjudicated an insolvent on 21st December 1923, and it was not until 19th August 1929 that the adjudication was annulled. During this period when the insolvency was pending, the decree-holder could not prosecute the petition except with the leave of the Court, or obtain any remedy on it. Acting on section 78 (2) of the Provincial Insolvency Act, the learned Judge excluded the period during which the insolvency was pending and held that the execution petition was in time. The learned Judge thus arrived at a conclusion which is in our opinion not only just in itself, but in perfect consonance with the law

Section 78 (2) says :

" Where an order of adjudication has been annulled under this Act, in computing the period of limitation prescribed for any suit or application for the execution of a decree [other than a suit or application in respect of which the leave of the Court was obtained under sub-section (2) of section 28], which might have been brought or made but for the making of an order of adjudication under this Act, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded."

The terms of the section are, we think, clear and definite and direct the exclusion of the time during which the insolvency was pending. This section, it may be remembered, was newly introduced into the Act of 1920 in order to mitigate the rigour of the restriction contained in section 16 (2) of the old Act corresponding to the present section 28 (2). Under the law as it stood before, it was held, in spite of this restrictive clause, that time ran, as once it began to run no subsequent disability or inability could stop it [*Sidhraj Bhojraj* v. *Alli Haji*(1)] in view of section 9 of the Limitation Act. We must be satisfied, if we are to accede to the appellant's contention, that

(1) (1922) I.L.R. 47 Bom. 244.

the legislative effort made in section 78 (2) to remove a patent hardship has failed of the very purpose for which it seems to have been made. Far from being so satisfied, we are satisfied the other way, that the effort has succeeded.

We have heard a good deal about what is and what is not a period of limitation. The argument is that section 48 of the Civil Procedure Code does not enact a rule of limitation; the period of twelve years fixed by it is not a "period of limitation" within section 78 (2) of the Provincial Insolvency Act; and its computation is therefore not governed by the exclusory provision of the latter section. We are quite unable to understand why the period of twelve years limited by section 48 of the Civil Procedure Code is not to be regarded as a period of limitation. It is undoubtedly so treated by the express language of article 181, column 1, of the Limitation Act which refers to "applications for which no period of limitation is provided elsewhere in this Schedule or by section 48 of the Civil Procedure Code, 1908", and also by column 1 of article 182 which speaks of the "execution of a decree or order of any Civil Court not provided for by article 183 or by section 48 of the Code of Civil Procedure, 1908". An attempt, and we think it a futile one, was made to distinguish between what was called the positive provision contained in section 3 of the Limitation Act which, it was conceded, is strictly a rule of limitation, and the negative language adopted in section 48, which, it was boldly asserted, is not a rule of limitation at all but merely a rule of procedure. While we see a difference in the manner of expression, we are quite unconvinced that that difference is calculated to mark or emphasize a distinction of substance or

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principle. It is not so much the form as the effect that matters. Both enactments in essence direct the Court to dismiss a suit or an application presented after the period prescribed, and why such a period is not properly described as a period of limitation passes our comprehension. If the law fixes a period of time after which a suit or other proceeding is not to be entertained by the Court, the period so limited is etymologically a period of limitation. It is in this sense, we think, that this expression has been used in section 78 (2) of the Act, and it follows that the time during which the insolvency was pending must be excluded in computing the period of limitation by whatever statute that period might have been fixed. The language is quite general, and refers to the period of limitation prescribed for any suit or application, and we are unable to find anything in the section which can support the argument that its applicability is confined to the period of limitation fixed by the Limitation Act only, and does not extend to other statutes which similarly enact periods of limitation in the sense explained.

It has been said that section 48 enacts a rule of procedure and not a period of limitation ; *Jurawan Pasi* v. *Mahabir Dhar Dube*(1), *per* JWALA PRASAD J. in *Mahanth Krishna Dayal Gir* v. *Musst. Sakina Bibi*(2) and *Subbarayan* v. *Natarajan*(3). Indeed it may be truly said of all rules of limitation that they belong to the domain of adjectival, rather than that of substantive law. But it appears to us that this is in practice a profitless distinction at any rate for the present purpose ; for it cannot be gainsaid that rules of limitation not only regulate the remedy but very often affect the

(1) (1918) I.L.R. 40 All. 198, 203. (2) (1916) 20 C.W.N. 952, 956.
(3) (1922) I.L.R. 45 Mad 785, 792.

substance of the right itself. A division of rules of law into substantive and adjectival law is an interesting study for students of jurisprudence, but it is likely to mislead if one's entire attention is centered on the label by itself. Nor are we wholly satisfied about the necessity or the correctness of classifying rules of limitation as falling under the two heads, viz., strict rules, and loose or secondary ones ; *per* RAMESAM J. in *Subbarayan* v. *Natarajan*(1), the view expressed wherein has coloured the decision in *Ganeshi Lal* v. *Imtiaz Ali*(2) and is also noticeable in *Mohammad Abdul Karim* v. *Nawaz Singh*(3). On this point, we prefer to follow with respect the more logical, and to our mind the more convincing, view taken in *Shiam Karan* v. *The Collector of Benares*(4) where the learned Judges considered the effect of paragraph 11(3) of the Third Schedule of the Civil Procedure Code on the twelve years' rule contained in section 48. They held :

"There are two descriptions of limitation provided for applications for execution. One is that prescribed by the Indian Limitation Act, and the other is that provided in section 48 of the Code of Civil Procedure. Section 48 forbids the granting of an application after the expiry of twelve years from the date of the decree except in the cases specified in the section. This provision lays down a limitation to the right of the decree-holder to execute his decree as much as the Limitation Act prescribes different periods of limitation for repeated applications for execution. It seems to us that in clause (3) of paragraph 11 the words 'periods of limitation' are intended to apply to both kinds of restrictions placed upon the right of the decree-holder to take out execution of his decree, and in this sense that clause would be applicable to a case to which section 48 applies."

At page 124, however, occur observations which, if we may say so with respect, appear to have been made

(1) (1922) I.L.R. 45 Mad. 785, 796.
(2) (1931) 8 O.W.N. 642.
(3) (1910) 13 O.C. 303.
(4) (1919) I.L.R. 42 All. 118.

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under the influence of an earlier decision of the same High Court in *Jurawan Pasi* v. *Mahabir Dhar Dube*(1) and which have been elaborated by RAMESAM J. in the case already cited. It was observed :

"No doubt, in a strict sense, section 48 does not prescribe a period of limitation, but in a general sense it imposes a 'limitation' on the right of the decree-holder to apply for execution after the expiry of twelve years from the date of the decree. In that general sense, although by section 48 'a period of limitation' strictly so called is not prescribed, the twelve years rule in effect lays down the period of limitation applicable to an application for execution."

As we have said it is unnecessary, with all respect, to subscribe to a distinction which strikes us as too artificial in character especially when, as we think, it is not founded on any rational basis, not warranted by the statutory language, and not necessary for advancing the argument.

Whether the periods of limitation enacted in the Second Schedule of the Limitation Act are controlled in their application by the provisions of the sections of that Act only, or by other enactments, and *vice versa*, must always remain a matter of judicial interpretation. The observations of the learned Judges who decided the cases cited above must of course be understood with reference to the context in which they were made. Reference was made in particular to the following observation of SPENCER J. in *Subbarayan* v. *Natarajan*(2) :

"I am aware that article 181 of the schedule speaks of section 48, Civil Procedure Code, as providing 'a period of limitation'. But section 48 has nothing to do with the periods of limitation prescribed in the schedule to the Limitation Act, and has no connection with the process of computation of time according to the nature of the cause of action in particular suits. For, as may be seen by its position in the

(1) (1918) I.L.R. 40 All. 198. (2) (1922) I.L.R. 45 Mad. 785, 792.

Code of Civil Procedure in the part that is headed 'execution', it enacts a rule of procedure for all executing Courts. The effect of that rule is to put an absolute term of twelve years on the right of decree-holders to apply to execute their decrees. *See* the observations of JWALA PRASAD J. in *Mahanth Krishna Dayal Gir* v. *Musst. Sakina Bibi*(1). The only exceptions to the absolute term fixed by the section are those mentioned in proviso 2 to the section itself."

It was mainly on the strength of the last sentence above extracted that it was urged that section 78 (2) of the Insolvency Act should not be interpreted so as to control section 48 of the Civil Procedure Code, for to do so would be, it was urged, to introduce a further exception to that already contained in the section itself. We do not think that the learned Judge intended to lay down any such absolute proposition, and indeed he was not called upon to do it by anything in the facts then before him. He was examining a much more circumscribed proposition, viz., whether in computing the period of twelve years, it was permissible to exclude, under section 15 of the Limitation Act, the period of time during which the decree had been stayed by an order of Court. Both the learned Judges held that the section was inapplicable, as on its true construction the word "prescribed" found in it meant "prescribed in the Schedule to the Act", though these latter words do not occur in it. No wider rule could have been in the learned Judge's mind especially in view of the fact that he refers to *Shiam Karan* v. *The Collector of Benares*(2) without expressing any dissent in spite of its recognising an exception outside section 48, Civil Procedure Code. As regards the question whether this section enacts a mere rule of procedure, we have explained what, in our opinion, should be the correct approach.

(1) (1916) 20 C.W.N. 952. (2) (1919) I.L.R. 42 All. 118.

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The very point we are now called upon to decide came up before the Chief Court of Oudh in a case reported as *Dhan Dei, Musammat* v. *Kashmiri Bank, Ltd., Fyzabad*(1) and it was there held that section 48 of the Code is controlled by section 78 (2) of the Provincial Insolvency Act. We are clearly of opinion that the language of the latter section is comprehensive enough to affect and control the computation of the period of time limited, whether by section 48, Civil Procedure Code, the Limitation Act or any other statute. It seems to us that the Legislature deliberately stopped short of referring in section 78 (2) to any statute or statutes in particular in order to prevent the generality of the purpose being in any manner limited to a particular statute or statutes. Otherwise, as we have said, injustice and hardship are bound to result.

There remains a minor point which was also taken by the appellant's Advocate. In this case there were four execution applications after the period of twelve years, the last of which was filed on 18th April 1935 as already mentioned. Each one was within time so far as article 182 is concerned. The argument on behalf of the appellant was, if we followed it aright, that if in respect of the first of the applications after the twelve years' period, section 78 (2) is applied and an exclusion of time is obtained for that application, no more exclusion is available for the second or any of the later applications. In other words, the benefit of the section is exhausted as soon as it is once made use of, so much so that the later applications, though within the extended period sanctioned by section 78 (2) and though within the limit of time fixed by article 182, must be held to be barred. We are of opinion that this

(1) (1931) I.L.R. 7 Luck. 397.

contention is based on a confusion of the respective functions of section 48, Civil Procedure Code, and section 78 (2) of the Provincial Insolvency Act. Though section 78 (2) is applicable to the periods limited by both section 48, Civil Procedure Code, and article 182, each of these two periods runs independently of the other. In the former case, the period of twelve years is extended by the addition of a further period equivalent to that during which the insolvency was pending. The ultimate point of time within which applications are to be made is thus determined. Within the enlarged time so obtained, it is open to the decree-holder to make any number of applications each one of which again has to be tested by reference to article 182. The two statutory provisions function independently of each other though, in deciding whether a given application is in time, regard must be had to both. It is only if it satisfies the conditions of both provisions that an application can be said to be in time. This being their true scope and effect, we must repel this contention as well.

In the result, this appeal fails and is dismissed with costs.

A.S.V.