

VENKATA-  
RAMAYYA  
v.  
PULLAYYA.

so, applying *Petherpermal Chetty v. Muniandy Servai*(1), the first defendant was entitled to set up that defence and to succeed in the suit. It follows, therefore, that this second appeal must be dismissed with costs.

A.S.V.

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### APPELLATE CIVIL—FULL BENCH.

*Before Sir Owen Beasley, Kt., Chief Justice, Mr. Justice King and Mr. Justice Gentle.*

G. V. MUTHUSWAMI CHETTY, APPELLANT,

v.

THE OFFICIAL ASSIGNEE OF MADRAS AS THE  
ASSIGNEE OF THE ESTATE AND EFFECTS OF S. A.  
ANANTHANARAYANA CHETTY, RESPONDENT.\*

*Presidency-towns Insolvency Act (III of 1909), ss. 7 and 36—Application under sec. 7—Suit for purposes of sec. 3 of Indian Limitation Act (IX of 1908), if—Mortgage with possession by insolvent set aside on application by Official Assignee under sec. 55 of Presidency-towns Insolvency Act—Subsequent application under ss. 7 and 36 of that Act by Official Assignee for recovery of mesne profits from mortgagee—Period for which such profits recoverable—Art. 109 of Indian Limitation Act—Applicability of.*

A person, who had usufructually mortgaged his property in April 1923, was adjudicated insolvent in February 1925. On an application made by the Official Assignee in March 1931 under section 55 of the Presidency-towns Insolvency Act, the mortgage deed was set aside by an order passed in February 1932. In December 1934 the Official Assignee made a further application under sections 7 and 36 of the said Act to call

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(1) (1908) I.L.R. 35 Cal. 551 (P.C.).

\* Original Side Appeal No. 2 of 1936.

upon the mortgagee to account for the rents and profits which he had received from the mortgaged property.

*Held* that the mortgagee was liable for mesne profits only for the period of three years immediately preceding the Official Assignee's application.

*Re Mansell; Ex parte Norton*, (1892) 66 L.T. 245, followed.

An application under section 7 of the Presidency-towns Insolvency Act is equivalent to a suit and equivalent to a suit for the purposes of section 3 of the Indian Limitation Act which applies the articles of the Act to all suits.

In claiming by the application to recover the rents and profits in question the Official Assignee was claiming as representing the insolvent's estate, and was not putting forward any claim hostile to the insolvent.

*Jagannath Prasad v. The U.P. Flour and Oil Mills Company, Limited*, (1916) I.L.R. 38 All. 347, distinguished.

APPEAL from the order of MOCKETT J. dated 2nd December 1935 and made in the exercise of the insolvency jurisdiction of the High Court in Application No. 438 of 1934 in Insolvency Petition No. 71 of 1925 (in the matter of S. A. Ananthanarayana Chetty, an insolvent).

*S. Panchapugesu Sastri* (with him, *P. S. Ramaswami Ayyangar*) for appellant. The Presidency-towns Insolvency Act is not, as regards limitation, a self-contained Act. The provisions as to limitation contained in that Act and relied upon by MOCKETT J. refer to cases where the Official Assignee claims under a right higher than that of the insolvent. They are inapplicable to cases where the Assignee claims in right of the insolvent and there is no provision in the Act as regards limitation applicable to such cases. *Re Mansell; Ex parte Norton*(1) was a case of rents and profits. As to the practice in England, see *Williams on Bankruptcy*, 14th edition, page 414. Applications like the one in the present case are of the nature of complaints and the rules of limitation applicable to suits apply to such applications.

MUTHUSWAMI  
v.  
OFFICIAL  
ASSIGNEE,  
MADRAS.

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(1) (1892) 66 L.T. 245.

MUTHUSWAMI  
v.  
OFFICIAL  
ASSIGNEE,  
MADRAS.

The decision of the Privy Council in the case of *Hansraj Gupta v. Official Liquidators of Dehra Dun, etc., Company*(1) may be relied upon for the position that the application cannot be regarded as a suit, but their Lordships themselves hold that the defence of limitation will be open on such applications (see page 1078). Whether the Indian Limitation Act in terms applies to the notice of motion in the present case or not and whether the notice of motion can or cannot be regarded as a plaint, as the section conferring jurisdiction on the Insolvency Court does not create a new right, the defence of limitation is, on the authority of *Hansraj Gupta v. Official Liquidators of Dehra Dun, etc., Company*(1), open on such an application. The right sought to be enforced by the application in the present case is not one created by the Act. Where the Official Assignee could in a suit get only rents or mesne profits for three years, he could not, by an application under section 7, get more. Even if the application is not a plaint and the proceeding started by it is not a suit, the discretionary power under section 7 will be exercised in favour of the Official Assignee only subject to the defence of limitation. Section 7 is only a transfer of jurisdiction from the ordinary Court to the Insolvency Court and the power conferred upon the Insolvency Court by the section is a discretionary power. On the principle of the ruling in *Hansraj Gupta v. Official Liquidators of Dehra Dun, etc., Company*(1), the Court will say that it will exercise the discretionary power only subject to the defence of limitation. *Official Assignee, Madras v. Narasimha Mudaliar*(2) does not deal with the question of limitation but lays down that the power under section 7 is a discretionary power. [*Kancherla Krishna Rao, In re*(3) and Mulla's Law of Insolvency, page 50, referred to.]

*A. C. Sampath Ayyangar* for respondent.—If the Indian Limitation Act applies to the case at all, the article applicable would be article 120. Article 109 cannot apply because the insolvent himself cannot get mesne profits, he himself having transferred the property. In such a case, the Official Assignee does not sue in right of the insolvent because the insolvent himself has no right to sue. By the

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(1) (1932) I.L.R. 54 All. 1067 (P.C.). (2) (1929) I.L.R. 52 Mad. 717 (F.B.).  
(3) (1927) I.L.R. 51 Mad. 540 (F.B.).

avoidance of the transfer the Official Assignee gets a fresh right. Section 51 of the Presidency-towns Insolvency Act gives a fresh title to the Official Assignee and, if it is held that he has the same period of limitation for a suit for mesne profits as the insolvent, the Assignee might be barred long before his right accrues. When the Assignee does not impugn the transfer by the insolvent and sues for a relief which the insolvent himself could have claimed, then it may be that the same period of limitation will apply to a suit by the Assignee as to one by the insolvent. If in the present case, the Official Assignee, admitting the usufructuary mortgage, had sued for redemption of the same, he might have had the same period of limitation. Where, however, the Official Assignee avoids a transfer by the insolvent and sues for rents and profits from the transferee, the suit is for a relief which the insolvent himself could not have claimed and is in virtue of a new right created in the Assignee by reason of the avoidance of the transfer. Cases where a new right is created are excepted in *Hansraj Gupta v. Official Liquidators of Dehra Dun, etc., Company*(1); see page 1078. The Official Assignee gets the right by virtue of the Act. [*Jagannath Prasad v. The U.P. Flour and Oil Mills Company, Limited*(2), *In the matter of the Dehra Dun—Mussoorie Electric Tramway Company, Limited*(3) and *Vaidiswara Ayyar v. Siva Subramania Mudaliar*(4), referred to.]

*S. Panchapagesa Sastri* replied.

*Cur. adv. vult.*

The JUDGMENT of the Court was delivered by KING J.—Part of the property of one S. A. Ananthanarayana Chetty consisted of two stables in Madura. These stables were usufructuarily mortgaged by him to his son-in-law on 11th April 1923. On 11th February 1925, S. A. Ananthanarayana Chetty was adjudicated insolvent. In March 1931, the Official Assignee applied under section 55 of the Presidency-towns Insolvency Act to have the mortgage deed set aside and an order was

MUTHUSWAMI  
v.  
OFFICIAL  
ASSIGNEE,  
MADRAS.

KING J.

(1) (1932) I.L.R. 54 All. 1067 (P.C.).

(3) (1927) I.L.R. 50 All. 476.

(2) (1916) I.L.R. 38 All. 347.

(4) (1907) I.L.R. 31 Mad. 66.

MUTHUSWAMI  
 v.  
 OFFICIAL  
 ASSIGNEE,  
 MADRAS.  
 KING J.

duly passed in his favour in February 1932. Having thus had the mortgage deed annulled, the Official Assignee made a further application under sections 7 and 36 of the Act in December 1934 to call upon the mortgagee to account for the rents and profits which he had received from the mortgaged property. Our learned brother, MOCKETT J., who heard this application has held, under section 7, that the mortgagee is liable to account for the whole of the rents and profits which he has received since the mortgage was effected. Against this order the mortgagee appeals, contending in his memorandum of appeal that he is not liable to account at all.

At the hearing of the appeal this extreme contention was abandoned, and the only argument advanced was that the appellant was liable for mesne profits only for the period of three years immediately preceding the Official Assignee's application, i.e., from December 1931. This argument, we think, is a sound one and must prevail.

The authority upon which this argument was based is an English decision, *Re Mansell ; Ex parte Norton*(1). In that case, a trustee in bankruptcy applied under section 72 of the Bankruptcy Act of 1869 to recover certain rents from one Norton more than six years after Norton should have paid them. Norton pleaded the Statute of Limitations and it was held by all the three learned Judges (Lord Esher M.R., Fry L.J. and Lopes L.J.) that this plea was a good one, the reason being that the application was equivalent to an

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(1) (1892) 66 L.T. 245.

action. The exact words of Lord Esher M.R. <sup>MUTHUSWAMI</sup>  
are :

“ A motion in bankruptcy such as this is equivalent to an action.”

v.  
OFFICIAL  
ASSIGNEE,  
MADRAS.

KING J.

And what FRY L.J. says is this :

“ It is plain that, when the Legislature by section 72 of the Bankruptcy Act gave power to the Court of Bankruptcy to decide all questions, whether of law or fact, arising in any case of bankruptcy, that transference of jurisdiction was not intended to alter the liabilities and rights of persons proceeding in the Court of Bankruptcy. This case therefore is just the same as if the trustee were suing in an ordinary Court of law . . . .”

Now this decision was duly brought to the notice of MOCKETT J. but he held that it afforded him no assistance, and that, “ as the law of limitation in India is contained within the four walls of an Act, unless it is possible to place a particular proceeding within one of the articles of that Act, the Act does not apply”. With respect we are unable to see why the decision should not be followed in the present case. Section 7 of the Presidency-towns Insolvency Act is admittedly the equivalent in India of section 72 of the Bankruptcy Act in England. We are therefore, we think, justified in holding that an application under section 7 is equivalent to a suit and equivalent to a suit for the purposes of section 3 of the Limitation Act which applies the articles of the Act to all suits. After all, as has been pointed out in the Full Bench ruling in *Official Assignee, Madras v. Narasimha Mudaliar*(1), a claim for money under section 7 against a stranger to the insolvency is only an alternative to a suit, and an alternative which the Insolvency Court should

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(1) (1929) I.L.R. 52 Mad. 717 (F.B.).

MUTHUSWAMI

2.  
OFFICIAL  
ASSIGNEE,  
MADRAS.

KING J.

not permit except in simple cases capable of easy and speedy proof (*see* page 731). It would indeed be an anomaly, if the Insolvency Court by granting this permission should automatically confer upon the Official Assignee power to claim debts which would be irrecoverable by suit.

We need not, however, pursue this particular point any further as Mr. Sampath Ayyangar, who appeared for the Official Assignee before us, abandoned any contention that the Limitation Act did not apply merely because this was a proceeding in insolvency. He attempted instead to distinguish *Re Mansell*; *Ex parte Norton*(1) from the present case on the ground that the Official Assignee did not here represent the insolvent at all but was applying on the strength of a right higher than any the insolvent would have had. In arguing so Mr. Sampath Ayyangar appeared to be obsessed by the fact that, as a preliminary to the present application, the Official Assignee had had to have the mortgage transaction set aside and that the former application was one which the insolvent himself could never have made. No doubt that is so, but the two applications must nevertheless be very clearly distinguished. When the mortgage has been set aside, what is the result? It surely is that, in spite of the mortgage, the ownership of the mortgaged property and the right to receive its rents and profits have in law remained throughout part of the insolvent's estate. When the insolvent's estate became vested in the Official Assignee by reason of the insolvency, the right to receive these rents and profits must be deemed to have vested in him. It is to us clear,

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(1) (1892) 66 L.T. 245.

beyond all argument, that in claiming by this application to recover these rents and profits the Official Assignee is claiming as representing the insolvent's estate, and is not putting forward any claim hostile to the insolvent. We consider accordingly that Mr. Sampath Ayyangar's argument on this point provides no sound reason to induce us not to follow *Re Mansell*; *Ex parte Norton*(1).

MUTHUSWAMI  
v.  
OFFICIAL  
ASSIGNEE,  
MADRAS.  
KING J.

Only a brief final reference is necessary to a ruling reported as *Jagannath Prasad v. The U.P. Flour and Oil Mills Company, Limited*(2) to which our attention has been drawn by Mr. Sampath Ayyangar. That decision shows that in certain circumstances a liquidator can recover from the shareholders of a company in liquidation unpaid calls the right to which would be barred by limitation if the company itself were to file a suit to recover them. But this is no true analogy to the present case. The decision in *Jagannath Prasad v. The U.P. Flour and Oil Mills Company, Limited*(2) turned upon the interpretation of specific provisions in the Companies Act which defined the shareholders' liabilities. There are no such provisions in the Presidency-towns Insolvency Act which can be used against the appellant. And it is further made clear in *Jagannath Prasad v. The U.P. Flour and Oil Mills Company, Limited*(2) that, but for these specific provisions, the liquidator would have had no higher right to resist the bar of limitation than the company itself. In the present case, as we have already pointed out, the Official Assignee makes

(1) (1892) 66 L.T. 245.

(2) (1916) I.L.R. 38 All. 347.



MUTHUSWAMI  
v.  
OFFICIAL  
ASSIGNEE,  
MADRAS.

his application as representing the insolvent's estate and in that capacity only.

In the result then this appeal must be allowed in part with costs throughout and the appellant's liability to account be reduced to the period of three years immediately preceding the Official Assignee's application.

A.S.V.

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## APPELLATE CIVIL.

*Before Mr. Justice Venkatasubba Rao and Mr. Justice Cornish.*

MEGRAJ ISWARADAS (PETITIONER), APPELLANT,

v.

THE CORPORATION OF MADRAS (RESPONDENT),  
RESPONDENT.\*

1936,  
April 9.

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*Code of Civil Procedure (Act V of 1908), sec. 63—Applicability—Decrees of same Court against same defendant but in favour of different persons—Transmission for execution of, to Courts of different grades—Sale in execution held earlier by Court of inferior grade and purchase by holder of the decree executed by that Court—Applicability of sec. 63 to case of—Order to be made in such a case—Sec. 63 exception to rule in sec. 73, if.*

Decrees were passed by the High Court on its Original Side, some in favour of the respondent and one in favour of the appellant. The decrees in favour of the respondent were sent to the Sub-Court, Chingleput, for execution; that in favour of the appellant to the District Court, Chingleput. In pursuance of the respondent's decrees, the properties were attached by the Sub-Court in January 1932 and the sale was held on 28th September 1932. The respondent obtained leave to bid and was allowed to set off the purchase price against the decree amount which exceeded the amount of his bid. In the

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\* Appeal Against Order No. 256 of 1934 and Civil Revision Petition No. 898 of 1933.