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HARRIES, J.:—I agree with the judgment delivered by the CHIEF JUSTICE and have nothing further to add.

BY THE COURT:—

1. The answer to the first question is in the affirmative.

2. The answer to the first part is in the affirmative, and that to the second part is in the negative.

3(a). The answer to the first part is in the negative, and that to the second part is in the affirmative.

3(b). Both remedies are open to the minor.

4. The answer is in the affirmative.

5. The decision of the court that made the reference to arbitration overruling the objection and passing a decree in accordance with the award cannot be challenged by an appeal or by an application in revision, for at most that amounts to an error of law. But the order made by the court, where it has acted illegally or with material irregularity in the exercise of its jurisdiction, can be challenged by way of revision, though not by way of appeal, whether the illegality or irregularity was committed before the reference to arbitration or after the receipt of the award.

APPELLATE CIVIL

*Before Sir Shah Muhammad Sulaiman, Chief Justice,
 and Mr. Justice Niamat-ullah*

SARJU PRASAD BHAGWATI PRASAD (PLAINTIFF) v.
 RAJENDRA PRASAD AND OTHERS (DEFENDANTS)*

*Presidency Towns Insolvency Act (III of 1909), sections 17, 18.—
 Suit instituted after order of adjudication, without leave of
 court—Maintainability—Whether leave, if subsequently
 granted, can cure the defect—Limitation—Subsequent annul-
 ment of order of adjudication, whether removes the defect.*

A suit commenced without the leave of the insolvency court, in contravention of the provisions of section 17 of the Presidency Towns Insolvency Act, is not maintainable.

*First Appeal No. 172 of 1933, from a decree of Raj Rajeshwar Sahai, Additional Subordinate Judge of Ballia, dated the 2nd of December, 1932.

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Even if leave were obtained subsequently it would not cure the defect where such leave was granted after the period of limitation for the suit had expired. If leave were obtained subsequently, but before limitation had expired, the suit might be allowed to be continued inasmuch as it might be considered to have been commenced on the date on which the leave was granted.

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Although, after the dismissal of the suit and the pendency of the appeal, the insolvency court annulled the order of adjudication on the ground that the insolvent had failed to apply for a discharge, the suit could not be treated as a fresh suit instituted on the date on which the annulment order was passed, and therefore not requiring leave of the court.

Section 18 of the Presidency Towns Insolvency Act is applicable to cases where the suit or other legal proceeding is already pending when the proceedings in insolvency are started and is therefore not subject to the prohibition contained in section 17. So, where the suit is instituted without the leave of the insolvency court, after proceedings in insolvency have commenced, clause (3) of section 18 can not be invoked for the purpose of allowing the suit to continue.

Mr. K. Verma, Dr. K. N. Malaviya and Mr. G. S. Pathak, for the appellant.

Messrs. Krishn Bahadur and Shambhu Prasad, for the respondents.

SULAIMAN, C.J., and NIAMAT-ULLAH, J.:—This is a plaintiff's appeal arising out of a suit for recovery of a sum of money on a cause of action which is alleged to have arisen on the 13th of October, 1929. The suit was instituted on the 23rd of February, 1932, against the defendants who are alleged to be the proprietors of a firm Madho Ram Rajendra Prasad, carrying on business at Calcutta. Before the suit had been filed, this firm had been adjudicated an insolvent by the Calcutta High Court on the 17th of April, 1929; but before the institution of the suit no leave for commencing this proceeding was obtained by the plaintiff. The court below, on the 2nd of December, 1932, dismissed the suit holding that for want of leave the suit was not maintainable. During the pendency of the appeal in this Court, it now appears that the adjudication

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of insolvency was annulled by the Calcutta High Court on the 14th of February, 1933, on the ground that the insolvent had not applied for discharge within a certain time. The annulment was not of the entire proceedings from the outset.

The question for consideration is whether there was a fatal defect in the suit. The contention urged on behalf of the plaintiff appellant is that the defect of want of leave as required by section 17 of the Presidency Towns Insolvency Act can be cured by a leave subsequently taken. It is therefore urged that inasmuch as the insolvency has been annulled and it is no longer necessary to obtain leave, the defect has been cured automatically. The learned advocate for the appellant has relied on several cases of the Bombay and Madras High Courts where it has been held that the courts have power to stay proceedings even where the suit was filed after the adjudication. But in some of these cases it is not clear whether on the date when the order was passed limitation had or had not expired, nor is it clear that the question whether the suit was not maintainable was expressly raised or decided.

Again, reliance has been placed on a number of English cases where courts have ordered stay of proceedings after an adjudication order. But there too there was no clear decision as to whether the suit itself was maintainable without any leave. The case strongly relied on by Mr. Pathak is *In re Wanzer, Limited* (1). In that case there was no question of limitation involved, as the suit had been brought promptly. Furthermore, it was the landlord who was suing for rent, and the learned Judge held that he was somewhat in the position of a secured creditor.

On the other hand, there are three cases where it has been definitely held that a leave obtained subsequently would not cure the defect: See *Firm Panna Lal v.*

(1) [1891] 1 Ch., 305.

Firm Hira Nand (1), *Ponnusami Chettiar v. Kaliaperumal Naicker* (2) and *Maya Ookeda v. Kuwerji Kurpal* (3).

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It seems to us that it is necessary to examine the provisions of the Presidency Towns Insolvency Act itself. Section 17 is very specific and lays down that after the making of an order of adjudication "no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt or shall commence any suit or other legal proceeding except with the leave of the court and on such terms as the court may impose." The section as it stands prevents even the commencement of a suit or proceeding when the leave of the insolvency court has not been obtained. *Prima facie* it implies that if a suit has been commenced in contravention of the provisions of the section, then it should not be maintainable because the requirement of the section has not been complied with. Even if leave is obtained subsequently, it would not be sufficient to cure the initial defect, namely that the suit was commenced without such leave. Of course, if limitation has not expired and leave is obtained subsequently, then the suit may be allowed to be continued inasmuch as it may be considered to have been commenced on the date on which leave was granted.

In the case of *People's Industrial Bank v. Ram Chandra Shukla* (4) a Bench of this Court, of which one of us was a member, had to consider the applicability of section 171 of the Indian Companies Act which had a similar language. In that case limitation had not expired and leave was obtained after the commencement of the proceeding. The Bench accordingly held that the defect was cured and that the suit should be

(1) A.L.R., 1928 Lah., 28.

(2) A.L.R., 1929 Mad., 450.

(3) A.L.R., 1932 Bom., 338.

(4) (1929) I.L.R., 52 All., 430.

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considered to be continued properly. That case is no authority for the proposition that even if limitation had expired and leave was obtained subsequently, it would have retrospective effect so as to get over the defect caused by the language of section 17.

It is contended on behalf of the appellant that the provisions of section 18 show that the suit filed without the leave of the court is not fatally defective, and it is contended that courts have been given power under sub-section (3) of that section either to stay the proceedings or to allow them to continue on such terms as they may think just. It would follow therefore that in spite of the fact that a suit has been filed without the leave of the court, the court has power to allow the suit to continue on any terms that it may consider just.

In a case arising under the Provincial Insolvency Act, where the marginal note to section 29 is "Stay of pending proceeding", but the language of section 29 is identical with that in sub-section (3) of section 18, the Lahore High Court has held that section 29 applies to proceedings which are pending at the time of the adjudication and not to proceedings which are started thereafter: See *Firm Panna Lal v. Firm Hira Nand* (1). The marginal heading of section 18 of the Presidency Towns Insolvency Act is merely "Stay of proceeding"; but apparently the intention is the same under both the Acts. If section 18 were interpreted as being applicable to proceedings which are pending at the time of the adjudication, then there would be no anomaly or conflict between section 17 and section 18; otherwise the result would be that the insolvency court may under section 17 grant leave for the continuance of a suit on certain terms, while the court in which the suit is pending may under section 18(3) either stay the proceeding altogether or allow it to be continued on some other terms. Such a conflict would create an anomaly, which could not have been contemplated by the legislature. On the

(1) A.I.R., 1928 Lah., 28.

other hand, if section 17 applies to proceedings started after the adjudication, whereas section 18 applies to proceedings which are already pending at the time, then there can be no conflict between the two sections.

Under section 18(1) of the Presidency Towns Insolvency Act the insolvency court can order stay of any suit pending before any Judge of that court or in any other court subject to the superintendence of that court. The latter court would of course be bound by the order passed by the superior court and would not be authorised to pass an order under sub-section (3) contrary to any such order. Similarly under the Provincial Insolvency Act there would be no difficulty because under section 28(2) the insolvency court would grant leave on any terms it may impose for the institution of new suits, whereas under section 29 the court in which a suit already instituted is pending may either stay the proceedings or allow it to continue on such terms as it may impose. This interpretation, therefore, would avoid any conflict and therefore seems to be the proper interpretation to be put on these two sections.

There is no authority of this Court either way, and we are therefore free to put any interpretation on these two sections which we consider proper and fair. We accordingly hold that under section 17 creditors are prevented from commencing any suit or legal proceeding against their debtor after an order of adjudication has been made, and that during the pendency of the insolvency proceedings they have no remedy whatsoever against the property of the insolvent in respect of the debt, except approaching the insolvency court and getting themselves declared as scheduled creditors. If any suit or proceeding is commenced without such leave, then such suit or proceeding is altogether void, and leave obtained subsequently would not cure the defect where leave is granted after the period of limitation has expired. We, therefore, hold that section 18 would be applicable to cases where the suit or proceeding is

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already pending and the case therefore does not come under the prohibition contained in section 17.

Applying these principles to the facts of the case before us, we find that the suit was filed without the leave of the insolvency court and was therefore bad under the provisions of section 17. Leave was not obtained up to the time when the period of limitation had expired. The suit, therefore, is not maintainable and cannot be decreed. It is true that the adjudication appears to have been annulled subsequently, after which it may not now be necessary for the creditor to obtain any leave for instituting a suit; but we cannot treat this present suit as a fresh suit instituted on the date when the annulment order was passed. The remedy, if any, of the plaintiff is to file a fresh suit and then possibly claim the benefit of section 14 of the Limitation Act on account of the pendency of the present litigation, which fails for want of leave of the insolvency court.

We accordingly dismiss the appeal with costs.

FULL BENCH

*Before Sir Shah Muhammad Sulaiman, Chief Justice,
Mr. Justice Thom and Mr. Justice Beunet*

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NUGENT (APPLICANT) *v.* NUGENT (OPPOSITE-PARTY)*
*Civil Procedure Code, section 60—Army Act, 1881 (44 and 45
Vict. cap. 58), sections 136, 138, 144, 145—Indian Army Act
(VIII of 1911), section 120—Attachment of pay in execution
of decree for alimony—European Military Assistant Surgeon,
second class—Warrant officer—"Deduction" of pay—"Public
officer"—Civil Procedure Code, section 4(1)—Special law
when affected by the Code.*

The pay of a European Military Assistant Surgeon, second class, of the Indian Medical department, who is a warrant officer and not a commissioned officer, is not liable to attachment in execution of an order for alimony and maintenance passed by a civil court.

*Application in Matrimonial Suit No. 3 of 1934.