

valuable consideration to a person who thereupon sues upon the security, it cannot be urged that though the right to enforce the security in the hands of the creditor may be barred by limitation, the assignee may proceed to enforce it if he brings his suit within 12 years from the date of assignment. The right to enforce the security in his own name arises on the date of assignment, but the limitation which has already commenced to run will not cease to operate just because the creditor has assigned the security to another. A subrogee, whose position is that of an equitable assignee, cannot be better. He can enforce the security in the right of the creditor and therefore subject to the law of limitation that would affect the creditor.

My answer therefore is in the negative.

BY THE COURT:—The answer to the question referred to by the Bench is in the affirmative.

APPELLATE CIVIL

Before Mr. Justice Collister and Mr. Justice Bajpai

WALI MUHAMMAD AND OTHERS (OPPOSITE PARTIES) v.
HINGAN LAL (APPLICANT)*

1935
October, 23

Provincial Insolvency Act (V of 1920), sections 5, 75—Creditor's petition for adjudication dismissed—Death of debtor pending creditor's appeal in district court—Order of district court that case should proceed against debtor's legal representatives—Whether appeal lies—Revision—Civil Procedure Code, sections 4, 115.

A creditor's petition for adjudication of a debtor as an insolvent was dismissed, and the creditor appealed to the District Judge. During the pendency of the appeal the debtor died, and the District Judge ordered, under section 17 of the Provincial Insolvency Act, that the proceedings should continue against the legal representatives of the deceased debtor. Against this order the legal representatives filed an appeal in the High Court:

*Second Appeal No. 6 of 1933, from an order of I. B. Mundle, District Judge of Saharanpur, dated the 25th of February, 1933.

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*Ganga Nath,
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Held, that a clear distinction was drawn between a "decision" and an "order" by section 75(1) of the Provincial Insolvency Act, and as by the second proviso an appeal was allowed only against a decision of the district court, the present appeal, which was only against an interlocutory order passed in the course of the appeal pending in the district court, did not lie.

Held, further, that the order could not be interfered with in the exercise of revisional jurisdiction. The powers conferred by the first proviso to section 75(1) would be exercisable if the order had been an order made by the court below in an appeal decided by it, but no appeal had yet been decided by the court below. Nor were the powers conferred by section 115 of the Civil Procedure Code exercisable; for, the powers given to High Courts by section 5(2) of the Provincial Insolvency Act were expressly subject to the provisions of that Act, and as that Act specifically provided by section 75 for appeals and revisions in a particular manner, any action taken under section 115 of the Civil Procedure Code would be in contravention of the provisions of that Act. Further, according to section 4 of the Civil Procedure Code, inasmuch as the Provincial Insolvency Act was a special law its provisions could not, in the absence of any specific provision to the contrary, be affected in any way by the Civil Procedure Code.

Mr. *Shiva Prasad Sinha*, for the appellants.

Mr. *G. S. Pathak*, for the respondent.

COLLISTER and BAJPAI, JJ.:—The facts of this case might be briefly stated. One Lala Hingan Lal, a creditor, applied for the adjudication of Wazir Ali as an insolvent in the court of the Subordinate Judge of Saharanpur who had insolvency jurisdiction. The application of the creditor was dismissed. He filed an appeal in the court of the District Judge and during the pendency of the appeal Wazir Ali died. An application was made by the creditor for bringing the heirs of Wazir Ali on the record and the learned District Judge observed that section 17 of the Provincial Insolvency Act applied and that the appeal would not abate. He directed that the case would proceed against the legal representatives of the deceased respondent. A second appeal has been preferred against this order by the legal representatives of Wazir Ali.

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A preliminary objection has been taken on behalf of the respondent that no second appeal lies, and when it was pointed out that the High Court has very extensive powers in revision it was submitted that a revision also did not lie. In order to consider the merits of the preliminary objection we have got to interpret section 75 of the Provincial Insolvency Act. The first clause provides that the debtor, any creditor, the receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction by a court subordinate to a district court may appeal to the district court, and the order of the district court upon such appeal shall be final. It is said that the policy of the legislature is that an *order* of the district court upon the appeal would be final, and under the second proviso an appeal can be preferred only against the *decision* of the district court. There is a clear distinction between a decision and an order, as is apparent from a reading of sub-clause (1). So far as the appeal is concerned, the contention is that the district court in the present case has not arrived at any decision but has only passed an interlocutory order impleading the legal representatives of the deceased respondent and therefore no second appeal lies. We are of the opinion that there is considerable force in this contention and it is not possible for us to entertain the present proceedings as an appeal.

It was then submitted by learned counsel for the appellants that we should interfere with the order of the court below in our revisional jurisdiction. The first proviso to section 75, clause (1) says that the High Court, for the purpose of satisfying itself that an order made in any appeal decided by the district court was according to law, may call for the case and pass such order with respect thereto as it thinks fit. Before we can call for the case and pass appropriate orders we must be satisfied that the order complained of is an order made by the court below *in any appeal decided by it*. The objection of counsel for the respondent is that the appeal has not

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so far been decided by the district court and as such it is not possible for us to interfere with the order of the court below. Here again the objection of the respondent seems to be well founded.

On behalf of the appellants reliance was placed on the case of *Abdul Razah v. Basiruddin Ahmed* (1). Their Lordships observed that where an appeal has been preferred against an order refusing the appellant's application to be declared an insolvent, the High Court has power in the exercise of its inherent jurisdiction as a court of appeal to make an *ad interim* order for the protection of the appellant and for the appointment of a receiver of his assets during the pendency of the appeal. We think that this case has no application inasmuch as there is no question here of the inherent power of the High Court to pass suitable orders in any miscellaneous proceeding that might come before the High Court in connection with the appeal pending before it. The next case that was brought to our notice was the case of *Nagindas Bhukhandas v. Ghelabhai Gulabdas* (2). The learned Judges of the Bombay High Court held that on an appeal from a sentence of imprisonment under section 43 of the Provincial Insolvency Act the High Court has power, under order XLI, rule 5 of the Civil Procedure Code read with clause (2) of section 47 of the Provincial Insolvency Act, to suspend the sentence until the appeal is disposed of. Here also there was an appeal pending in the High Court and an application was made for the suspension of a sentence passed by the court below and it was held that the provisions of the Civil Procedure Code might be invoked in order to afford protection. The case which is really in point is the case of *Gangadhar v. Shridhar* (3). The learned Additional Judicial Commissioner of Nagpur observed as follows: "The Provincial Insolvency Act V of 1920 was in force when the present application was made and I must consider that

(1) (1910) 14 C.W.N., 586.

(2) (1910) 56 Indian Cases, 449.

(3) (1920) 61 Indian Cases, 589.

the application was made under the first proviso to section 75 (1) of that Act. But the order of the district court does not dispose of the appeal and consequently the proviso to section 75(1) has no application. But as no order has been passed by the district court *upon the appeal* the provision in section 75(1) that such an order would be final has likewise no application. The powers given to High Courts by section 5(2) of Act V of 1920 are subject to the provisions of that Act, but there is no provision which states that an interlocutory order is final. The High Court has power to set aside an interlocutory order passed in a civil suit. It has therefore power to set aside the order which I am asked to revise." We agree that in terms there is nothing in section 75, clause (1), which would make the order complained of final because it is not an order passed upon an appeal, but at the same time we, with respect, differ from the view of the Nagpur court that we could interfere with the present order under the Code of Civil Procedure. The provision on which reliance is placed is contained in section 5 of the Provincial Insolvency Act. That section says that subject to the provisions of this Act High Courts and district courts, in regard to proceedings under this Act in courts subordinate to them, shall have the same powers and shall follow the same procedure as they respectively have and follow in regard to civil suits. It is said that we could interfere with the order of the court below under section 115 of the Civil Procedure Code. The answer to that is that the High Court has power to act under the Code of Civil Procedure only subject to the provisions of this Act. Where therefore the Insolvency Act specifically provides for appeals and revisions in a particular manner, any action taken by us under the Code of Civil Procedure will not be subject to the provisions of the Insolvency Act but will be in contravention of those provisions. Reference was made by learned counsel for the respondent to section 4 of the

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Code of Civil Procedure, which says that in the absence of any specific provision to the contrary nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force. The Provincial Insolvency Act is a special law and in the absence of any specific provision to the contrary the Code of Civil Procedure cannot limit or otherwise affect the provisions of the Insolvency Act. We are, therefore, of the opinion that it is not possible to interfere with the order of the court below under any provision of the Code of Civil Procedure when a distinct procedure is prescribed in the Provincial Insolvency Act.

At one stage it was argued on behalf of the appellants that the order of the court below could be interfered with in appeal inasmuch as the order is a decision of the district court. We cannot agree with this contention because a distinction has been drawn by the Act between a decision and an order. The word "decision" has an element of finality so far as a particular court is concerned and an interlocutory order of a court cannot be said to be a decision of that court.

For the reasons given above we sustain the preliminary objection and dismiss this appeal with costs.

REVISIONAL CRIMINAL

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

EMPEROR v. MOHRU LAL*

1935
November, 4

Criminal Procedure Code, sections 179, 181—Jurisdiction—Place of trial—Criminal misappropriation—Indian Penal Code, section 405—Agent of Cawnpore firm sent to sell goods in Bengal and to remit the money to Cawnpore—Agent absconding and failing to remit the money—No evidence to show where the money was actually misappropriated.

*Criminal Reference No. 478 of 1935.