"the most prominent point against him." This finding is based solely on evidence that the petitioner is reputed to possess a revolver. There is no witness who has ever seen him with a revolver or who has any other grounds than information for believing that he has one. It is purely hearsay and since it does not relate to a fact which can be proved by evidence of general repute it is entirely inadmissible.

1924

SAN DUN v. KING-EMPEROR.

CARR, J.

ORIGINAL CIVIL.

Before Mr. Justice Lentaigne.

ROWE & CO., LTD.
v.
TAN THEAN TAIK.*

1924

Sep. 3.

Presidency-Towns Insolvency Act (III of 1909), section 17—Suit filed without leave of Court against an insolvent, who was refused his discharge—Application for such suit to be stayed pending the obtaining of such leave whether tenable.

Held, that the refusal of his discharge to an insolvent did not determine the insolvency proceedings and that the bar against the commencement of a suit against him after the adjudication order continued to operate in spite of the refusal of his discharge.

Held, also, that a suit filed after such refusal without the leave of the Court being barred at the commencement, the Court should not order a stay of the proceedings pending the obtaining of the leave but should reject the plaint under Order 2, Rule 11 of the Code of Civil Procedure.

In re Dwarkadas Tejbandas, 40 Bom. 235 ; *Jenn Muchi* v. *Budhiram Muchi*, 32 Cal., 339 ; *V. M. Assan Mahomed Sahib* v. *M. E. Rahim Sahib*, 43 Mad. 579, —*referred to.*

Patel—for the Plaintiff.

Gregory—for the Defendant.

LENTAIGNE, J.—In this case the plaintiff sues the defendant for Rs. 3,407-10-0 as the balance due in respect of goods supplied to the defendant on credit to the value of Rs. 4,681-15-0 in the months of

* Civil Regular No. 326 of 1924.

1924

ROWE & CO. v. TAN THEAN TAIK.

LENTAIGNE, J.

January, June, July and October 1922 after allowing credit for Rs. 1,274-5-0 paid to account. In his Written Statement the defendant admits each and every allegation in the plaint, but alleges that he was adjudicated an insolvent on the 20th December 1922 and that his discharge was refused on the 11th June 1924. He then pleads that the plaintiff should in the first instance have applied for leave to sue the defendant before filing the suit; and that as the plaintiff had failed to apply for such leave, the suit should be dismissed with costs.

The case came on for hearing on the 22nd August 1924 and I framed the single issue:—Having regard to the fact that the defendant was adjudicated an insolvent, was the leave of the Court necessary under section 17 of Presidency-Towns Insolvency Act, before the institution of the suit?

The suit was instituted on the 16th June 1924, five days after the defendant had been refused his discharge in the Insolvency Court; and it is contended on behalf of the plaintiffs that this fact has freed the plaintiff from the necessity of obtaining the leave of the Insolvency Court under section 17 of the Presidency-Towns Insolvency Act, 1909. The material provisions of that section are as follows: "On making an order of adjudication, the property of the insolvent, wherever situate, shall vest in the Official Assignee, and become divisible among his creditors and *thereafter*, except as directed by this Act, 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

1924

ROWE & CO. v. TAN THEAN TAIK.

LENTAIGNE, J.

impose." It is unnecessary to set out the proviso which saves the rights of secured creditors.

It is urged on behalf of the plaintiff that the restriction imposed by this section on the commencement of any suit or other legal proceeding is governed and limited by the words "during the pendency of the insolvency proceedings" and that after the refusal of the discharge, the insolvency proceedings were no longer pending for the purposes of this section. I think that both of these contentions are open to question.

As regards the first contention, I think that if the section is construed in its plain literal meaning, the words "during the pendency of the insolvency proceeding," being placed after the word "shall" and in immediate conjunction with the words "have any remedy against the property of the insolvent," appear to be limited in operation to that provision and do not appear to govern the subsequent provision beginning with the words "or shall" and relating to the commencing of a suit. However it may be that the words in question can be treated as also impliedly governing the subsequent provision; but even on such supposition the operation and meaning must be similar to the operation of the words in their primary application in the case of the remedies against the property of the insolvent which I will discuss below.

I find that the double use of the word "shall" was not discussed and that the provision as to the commencement of a suit was treated as governed by the words "during the pendency of the insolvency proceeding" in the judgment of the Bombay High Court in the case of *In re Dwarkadas Tejbandas* (1); but

(1) (1916) 40 Bom., 235.

1924

ROWE & CO. v. TAN THEAN TAIK.

LENTAIGNE, J.

the question as to when insolvency proceedings ceased to be pending was not discussed in that case, and the point really decided was that a plaint filed without the previous leave of the Insolvency Court, even if filed within the period of limitation for such suit, could not be given restrospective effect as a suit commenced within the period of limitation by an order of the Insolvency Court granting such leave if made after the suit had become barred by limitation, and on that ground the Insolvency Judge refused the leave.

As regards the second contention that the insolvency proceedings are no longer pending after the refusal of the discharge, I think that the Court cannot ignore the fact that the primary operation of the words "during the pendency of the insolvency proceedings" is to govern a provision barring the existence or continuance of remedies on the part of a creditor against the property of the insolvent. One of the main objects of every adjudication of an insolvent is to make his estate divisible amongst the creditors, and it must often occur that valuable assets are still in the hands of the Official Assignee and in process of realization for that purpose at the date when the insolvent applies for his final discharge. That being so, it appears to be inconceivable that the Legislature could have intended that any individual unsecured creditor could have the uncontrolled right to attach and in execution realize any moneys or property of the insolvent in the possession of the Official Assignee; or that he should have the uncontrolled right to enforce such remedies against property still remaining in the possession of the insolvent or in the possession of any other person in trust for the insolvent, having regard to the fact that all such property is expressly declared by the

section to vest in the Official Assignee. On a consideration of this aspect of the question I can see no reason why the actions of the Official Assignee in realizing the estate and completing the realization and paying dividends, if any, and for that purpose obtaining the sanction and directions of the Insolvency Court should not be regarded as part of the insolvency proceedings even when such actions and proceedings continue after the refusal of the final discharge of the insolvent. For these reasons, I think that I would not be justified in adopting a construction limiting the operation of the provision to the period prior to the order of the Insolvency Court granting or refusing the discharge of the insolvent. I think it more probable that the reference to the pendency of the insolvency proceedings was inserted in the provision in order to emphasise the legal effect of a possible annulment of an adjudication. Such operation of the words may appear to be redundant; but whatever may be the proper construction of the words in this provision, I think that the Court is not justified in adopting any construction which overlooks the primary operation as a limitation of the period during which the remedies of an individual creditor against the property of an insolvent are barred; and I am satisfied that in such operation the provision cannot be construed as necessarily determined by the refusal of the discharge. If then the refusal of the discharge is not necessarily a determination of the insolvency proceedings, the bar against the commencement of a suit after the adjudication order would continue to operate, and I must hold that the plaintiff would not thereafter be entitled to commence a suit for a debt like that claimed in this case which was provable in insolvency, without the leave of the Insolvency Court.

1924

ROWE & CO. v. TAN THEAN TAIK.

LENTAIGNE, J.

The suit now before me will not become barred under the law of limitation for some time to come and it is still possible for the plaintiff to obtain the leave of the Insolvency Court within the period of limitation, and on such leave being given to legally commence a like suit. It is therefore desirable that no order should be passed in this case which would have the effect of creating confusion by raising unnecessary legal questions on the institution of a proper suit after obtaining the requisite leave. The questions which will arise in that event will possibly be analogous to the questions arising under the proviso to section 17 of the Provincial Small Cause Courts Act, 1887, as discussed in the cases of *Jeun Muchi* v. *Budhiram Muchi* (2) and *V. M. Assan Mohamed Sahib* v. *M. E. Rahim Sahib* (3), but I do not think that I would be justified in merely passing an order staying proceedings, because the section of the Insolvency Act expressly bars the *commencement* of this proceeding as a suit, and I must, therefore, hold that this proceeding has not been properly commenced.

Mr. Patel for the plaintiff has now applied that permission be granted to him to withdraw the suit with liberty to institute a fresh suit for the same claim and on the same cause of action under Order 23, Rule 1; and on the hypothetical assumption that this proceeding could be regarded as a suit I have no doubt that the plaintiff must fail by reason of a formal defect within that rule, and I therefore grant the plaintiff such permission to withdraw with liberty to bring a fresh suit, subject to payment of the costs which I award below to defendant.

I have some doubt, however, as to whether a proceeding which the legislature has expressly prohibited

(2) (1905) 32 Cal., 339. (3) (1920) 43 Mad., 579.

1924

ROWE & CO. v. TAN THEAN TAIK.

LENTAIGNE, J.

the plaintiff from commencing can technically be described as a suit. If the plaint had specifically alleged that the defendant was an undischarged insolvent, and that the suit related to a debt provable in the insolvency, I think that it would have been the duty of the Court to reject the plaint under Order II, Rule 11, as a suit barred by the provisions of the Insolvency law.

As the plaintiff has been granted permission to withdraw, I think that it will be sufficient if I pass an order rejecting the plaint. I direct that the plaintiff shall pay the defendant a fee of five gold mohurs as the condition of the withdrawal.

APPELLATE CIVIL.

Before Sir Sydney Robinson, Kt., Chief Justice, and Mr. Justice Bagnley.

1924

Aug. 11.

MA HTAY
v.
U THA HLINE.*

Gift of immoveable property—Transfer of Property Act (IV of 1882), section 123, equitable relief from—Buddhist Law—Partition on re-marriage of father—Suit for declaratory decree—Fraudulent suit—Discretion of Court—Specific Relief Act (I of 1877), section 42.

Where immoveable property was transferred with possession orally as a gift and the donor had allowed the donees in possession to deal with it as their absolute property such as mortgaging it, re-mortgaging it and purchasing other properties with the proceeds of the mortgages, *held* that the donor should not be allowed to take advantage of the provisions of the Transfer of Property Act, as to permit him to do so would be to permit the Act to be used to perpetrate a fraud.

Held also, that on the re-marriage of a Burmese Buddhist father, it is open to him to satisfy the claims of his children by the first marriage at once and to effect a partition of his properties so that the children of the first marriage may have no claim to inherit on his death.

---

* Civil First Appeal No. 166 of 1923 against the judgment and decree of the District Court of Hanthawaddy passed in its Civil Regular Suit No. 49 of 1922.