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IN THE MATTER OF MAUNG YA BA, DECEASED.

PAGE, C.J.

employed in a hand-dug well, and as the deceased workman was so employed we feel ourselves at liberty to express an opinion upon that question. We hold that a workman employed in a hand-dug well may fall within the ambit of clause 12 of Schedule II, but whether he is employed in connection with the operations therein referred to or any of them is a question of fact which has to be determined by the proper authority, and not by this Court. We answer the question submitted in this sense.

DAS, J.—I agree.

DUNKLEY, J.—I agree.

APPELLATE CIVIL.

Before Mr. Justice Cunliffe and Mr. Justice Mya Bu.

MAUNG GYI *v.* A.L.K.P. CHETTYAR FIRM.*

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May 16.

Insolvency—Dismissal of petition of adjudicating creditor—Provincial Insolvency Act (V of 1920), s. 16—Application by another creditor for substitution.

Where a petition for the adjudication of a debtor filed by a creditor has been dismissed by the Court another creditor cannot apply under s. 16 of the Provincial Insolvency Act to be substituted in place of the original creditor. This section applies where the proceedings are pending, and not where they have terminated by the dismissal of the petition.

Hormasji for the appellant.

Aiyar for the respondent.

CUNLIFFE and MYA BU, JJ.—This appeal must be allowed.

The learned Judge of the District Court at Hanthawaddy was sitting in insolvency. He was

* Civil Misc. Appeal No. 229 of 1932 from the order of the District Court of Hanthawaddy in Insolvency Case No. 50 of 1932.

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MAUNG GYI v. A.L.K.P. CHETTYAR FIRM.

considering the petition of a Chettyar firm for the adjudication of a Burmese couple who, it was alleged, had transferred their property to one Amina Bibi for a consideration of Rs. 10,000. The Chettyars contended that this transaction was for the purpose of defeating and delaying the insolvents' creditors. It was, however, subsequently intimated to the Court that the petitioning creditors and the insolvents had come to an agreement with regard to this matter, and on this intimation the petition was dismissed by the Court. No other creditor seems to have been given notice of the application based on the settlement which resulted in the dismissal of the petition.

Some months later another Chettyar firm applied to the learned Judge to be substituted for the original petitioning creditors. They relied on a further so-called fraudulent transaction. The learned Judge decided that he could accede to this application. It is quite clear from his judgment that he consented to do so by virtue of the interpretation he put upon the provisions of s. 16 of the Provincial Insolvency Act. It was argued before him that, the original petition having been dismissed, the second petitioning Chettyar creditors had no *locus standi*. Nevertheless, he declined to accept this contention because he was of the opinion "that where a settlement has been come to between the insolvent and the petitioning creditor the Court may substitute as petitioner a creditor whose debt is not disputed by the insolvent." It appeared to him to be immaterial that the petition had been dismissed prior to the application on the part of the creditors who wished to be substituted.

The question, therefore, before us is whether the learned Judge was acting rightly under this section. We are clearly of opinion that he was not.

S. 16 is in these terms:

"Where the petitioner does not proceed with due diligence on the petition, the Court may substitute as petitioner any other creditor to whom the debtor may be indebted in the amount required by this Act in the case of a petitioning creditor."

The language of the section seems to us to contemplate a petition that is alive and is not dead—a petition that is proceeding and has not been dismissed—otherwise the words "where the petitioner does not proceed with due diligence" would, in our view, be meaningless. A person cannot proceed with due diligence in any proceedings that have come to an end and although, as far as we can see, there is no direct case law on this point, we are of the opinion that the meaning of the section is quite clear. The only course open to the respondents to this appeal is to launch a fresh petition. The learned Judge, no doubt, was trying to act in the interests of justice. With his practical mind he was endeavouring to take a short cut. But having regard to the fact that he was relying specifically upon s. 16 we consider that the action he took was not justified. Accordingly we allow this appeal with costs three gold mohurs.