

APPELLATE CIVIL.

Before Tek Chand and Monroe JJ.

AMAR SINGH (DEFENDANT) Appellant

versus

IMPERIAL BANK OF INDIA, JULLUNDUR
(PLAINTIFF) Respondent.

Civil Appeal No. 1251 of 1931.

*Provincial Insolvency Act, V of 1920, section 78 (2) :
Limitation—suit against defendant whose adjudication has
been ‘set aside’ on appeal—exclusion of intervening period
—‘Annulled’—meaning of.*

The order adjudicating the defendant-debtor insolvent in 1926 was ‘set aside’ in 1928 on appeal to the High Court, the case being remanded with direction to proceed with the application in accordance with law. The Lower Court then refused the application (in April 1930), a decision which was upheld on appeal on 30th July, 1930. The present plaintiff pleaded that in computing limitation for his suit, instituted subsequently, the intervening period between the date of adjudication and the date of annulment should be excluded under section 78 (2) of the Provincial Insolvency Act.

Held, that as there was a valid order of adjudication in the present case, which was set aside or ‘annulled’ on appeal, section 78 (2) of the Provincial Insolvency Act was applicable, and the period between the order of adjudication and the order of annulment must be excluded.

The word ‘annulled’ in section 78 (2) is not limited to annulment under section 35 *et seq.* of the Act, but applies to annulment by whatever means.

Baily v. Johnson (1), relied upon.

Baliram v. Supadosa (2), distinguished.

(1) (1872) L. R. 7 Ex. 263.

(2) 1931 A. I. R. (Nag.) 109.

First appeal from the decree of S. S. Sardar Hukam Singh, Subordinate Judge, 1st Class, Jullundur, dated 30th March, 1931, ordering that defendants 1 and 2 do pay to the plaintiff the sum of Rs. 37,411-4-11.

1932

AMAR SINGH
v.
IMPERIAL BANK
OF INDIA.

BADRI DAS and SHIV CHARAN DAS, for Appellant.

A. MAHID and N. S. GAUBA, for Respondent.

MONROE J.—The first of these appeals, No. 1251 of 1931, arises out of a suit to recover the sum of Rs. 37,411-4-11 due to the Imperial Bank of India, on a cash credit account. The only issue with which we are now concerned is whether the suit was brought within time, the Subordinate Judge holding it to be within time has given a decree for the amount claimed. The second appeal No. 1334 of 1931, arises out of a like claim against the appellant by the Punjab National Bank, Limited, for a sum of Rs. 1,683-4-4. In the first instance the Subordinate Judge decreed this claim also, but on appeal to the District Judge this decision was reversed on the ground that the suit was not within time. From the decision in the first case the defendant, and from the decision in the second the Punjab National Bank, Limited, have appealed to this Court.

MONROE J.

The defendant debtor was adjudicated insolvent on the 17th December, 1926, and the debts were proved before the Official Receiver on the 28th January, 1927. The adjudication order was set aside on the 29th October, 1928, on appeal to this Court, when Mr. Justice Jai Lal made an order in the following terms:—“The order of adjudication is hereby set aside and the case remitted to the District Judge with direction to proceed with the application in accord-

1932

AMAR SINGH

v.

IMPERIAL BANK
OF INDIA.

MONROE J.

ance with law." On the 30th April, 1930, the District Judge refused the application and an appeal from his order was dismissed on the 30th July, 1930.

It is admitted that if the period between the dates of the declaration of insolvency and the dismissal of the application can be omitted in computation of the period of limitation, the suits are within time. The plaintiffs rely on section 78 (2) of the Provincial Insolvency Act and alternatively on section 14 of the Limitation Act in support of their contention, that in computing the time, the period mentioned must be omitted. Section 78 (2) of the Provincial Insolvency Act provides that where an order of adjudication has been annulled under the Act, in computing the period of limitation prescribed for a suit which might have been brought but for the making of the order of adjudication, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded. Counsel for the defendant have argued that in the section the word "annulled" is used in a special sense, being coupled with the words "under this Act," and that an order can be said to be "annulled under the Act" only when a valid order has been made and it has been annulled under one of the express provisions of the Act as, *e.g.* section 35. They drew our attention to the fact that a portion of the Act commencing from section 35 is given a sub-title "Annulment of adjudication" and contended that the meaning of the word "annulled" in section 78 is controlled by its narrow meaning in the portion of the Act under the sub-title.

In support of this argument the learned counsel has cited *Baliram v. Supadosa* (1), the grounds for

the decision in which were that "no order adjudicating the defendant an insolvent was legally passed but that the application of the plaintiff creditor was dismissed under section 25 (1) of the Provincial Insolvency Act, and, therefore, that there could be no order of annulment passed in the case under section 35 of the Act." The facts of the case cited and of the present case are similar and the passage from the judgment which I have cited seems to justify the contention that that case is an authority for the proposition that where an adjudication is not annulled under section 35 of the Act, section 78 (2) has no operation. The decision in *Baliram v. Supadosa* (1), has as its basis the finding that no order was legally passed. Where, as in the present case, we find that an order has been made in the matter by a Court of competent jurisdiction, although that order has afterwards been set aside on appeal, we cannot say that the order was made illegally: and the fact that the Judge erred either in his findings of law or fact does not affect its validity—if an appeal had not been lodged in time or for some reason had not proceeded, the order would have stood good for all time. I have, therefore, no doubt that we are now concerned with a valid order which has been annulled, though the annulment was effected by an order of this Court on an appeal in which the words "set aside" and not the word "annulled" was used. The only case in which the meaning of the word "annulled" appears to have been considered is *Baily v. Johnson* (2), where the same point was raised on section 81 of the Bankruptcy Act, 1869. In that case Field Q. C. for the plaintiff argued that section 81 which provided that the pro-

1932

AMAR SINGH

v.

IMPERIAL BANK
OF INDIA.

MONROE J.

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1932

AMAR SINGH
v.
IMPERIAL BANK
OF INDIA.
MONROE J.

perty of the debtor should revert to him upon annulment of the adjudication did not relate to a case where the order of adjudication was discharged on appeal but was confined to cases under sections 28 and 84, the only other sections in the Act where the word "annul" is used: the leading judgment of a Court consisting of Cockburn C. J., Blackburn, Keating, Mellor, Lush, Brett and Grove JJ., was delivered by Cockburn C. J., who said "It is quite clear that section 81 of the statute applies to the case of a bankruptcy being annulled by whatever means and is not limited in the manner suggested in the argument."

The only material distinction in the wording of the English and Indian Statutes is to be found in the addition of the words "under this Act" in the latter. When the High Court annulled the order of adjudication in the present case, it can have acted only under the Act, it is, indeed, by virtue of the provisions of the Act, and the Act alone, that an appeal can be taken to the High Court. I see no reason whatever for treating the words "under the Act" as equivalent of "under section 35 of this Act." I may add that on general grounds it is difficult to see why a distinction should be drawn between the effect of the annulment of an order under section 35 and the effect of the discharge of an order by a Court of appeal: in both cases, while the order remains operative, rights of action are affected in the same way, and the results on limitation of suits should be the same. I have no doubt that section 78 (2) of the Provincial Insolvency Act operates on the claims now before us so as to bring them within the period of limitation. Taking this view, I find it unnecessary to consider whether section 14 of the Limitation Act also produces the same result.

I would, therefore, dismiss appeal No. 1251 of 1931, with costs, and allow appeal No. 1334 of 1931, and give the plaintiffs a decree for Rs. 1,638-4-4 with interest at 6 per cent. from the 4th October, 1930, the date of the institution of the suit till payment, together with costs in all Courts.

TEK CHAND J.—I agree with the order proposed by my learned brother.

N. F. E.

1932
 AMAR SINGH
 v.
 IMPERIAL BANK
 OF INDIA.
 MONROE J.

TEK CHAND J.

Appeal dismissed.

APPELLATE CIVIL.

Before Tek Chand and Monroe JJ.

MUHAMMAD YUSUF AND OTHERS (DEFENDANTS)

Appellants

versus

MUHAMMAD SADIQ AND OTHERS (PLAINTIFFS)

Respondents.

Civil Appeal No. 2224 of 1927.

Muhammadan Law—Waqf—property dedicated to be sold and sale-proceeds to be used for construction of a robot for pilgrims in Mecca—validity of—Civil Procedure Code, Act V of 1908, section 92: Suit under—competency of.

In 1897 in the course of arbitration proceedings for partition of the Estate of a deceased Mussalman, *M.I.*; at the request, and with the agreement, of the heirs in whom the property had vested on his death, the arbitrator had declared in express terms that the property in question was dedicated for the purpose of constructing a *robot* in Mecca for the benefit of pilgrims, and that *M.*, the younger brother of the deceased, was to be appointed *Mutwalli*, and either himself remain the *Mutwalli*, or appoint some other person as such with the consent of the other heirs. *M.* entered into possession of the plots in 1897, but took no steps to sell them or otherwise administer the trust during his life-time. After his death in

1933
 Feb. 1.