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and Administration Act, though the testator can only deal with one-third of the property and the remaining two-thirds passes to his heirs, whatever the terms of the will may be. They say (p. 128):

“ Thus the executor, when he has realised the estate, is a bare trustee for the heirs as to two-thirds, and an active trustee as to one-third for the purposes of the will ”.

The words “ when he has realised the estate ” clearly show that their Lordships did not take a different view as to the power of the executor to sell in order to realise the estate.

I agree, therefore, in the answers and the order proposed by my learned brother.

Solicitors for the appellants: Messrs. *Captain & Vaidya*.

Solicitors for the respondents: Messrs. *Ardeshir, Hormusji, Dinshaw & Co.*

*Appeal allowed.*

G. G. N.

### SMALL CAUSE COURT REFERENCE.

*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.*

SIDHRAJ BHOJRAJ AND OTHERS, PLAINTIFFS v. ALLI HAJI, DEFENDANT\*.

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April 10.

*Indian Limitation Act (IX of 1908), sections 14, 15—Presidency Towns Insolvency Act (III of 1909), section 17—Insolvency of debtor—Annulment of adjudication order—Suit by creditor after annulment of adjudication order—Whether creditor can claim exclusion of the period of insolvency proceedings—Practice.*

Where, after a debt has become due and payable and time has begun to run against the creditor, the debtor is adjudicated insolvent but his petition is subsequently dismissed and the adjudication order cancelled, the time during

\* Small Cause Court Reference in Suit No. 1289/13804 of 1921.

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which insolvency proceedings were pending cannot be deducted in computing the period of limitation for a suit instituted by the creditor against the debtor to recover his debt.

Section 17 of the Presidency Towns Insolvency Act, 1909, does not create an absolute bar to the creditor's right to institute a suit so as to enable the creditor to claim a deduction of the time during which the insolvency was pending.

*Ramaswami Pillai v. Govindasami Naicker*<sup>(1)</sup>, followed.

Per SHAR J.:—The mere fact of an adjudication order having been made does not necessarily mean that there is an injunction or order staying the institution of a suit within the meaning of section 15 of the Indian Limitation Act, though the effect of the order of adjudication read with section 17 of the Presidency Towns Insolvency Act is to prevent a creditor from commencing any suit against his debtor without the leave of the Court.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act, 1882, and Order XLVI, Rule 1, of the Code of Civil Procedure, 1908, by S. F. Billimoria, Third Judge, Small Cause Courts, Bombay.

The plaintiffs, Sidhraj Bhojraj and Poonsey Ghella-bhai, trading as Shrimat Appasaheb Sidhraj & Co. sued to recover Rs. 1,312 being balance due with interest on account of sugar sold and delivered to the defendant, Alli Haji, from 16th March 1916 to 31st October 1917.

The plaint was presented on 11th July 1921 and the suit instituted on 12th July 1921.

To save his claim from the Statute of Limitation the plaintiff relied upon the fact that the defendant was adjudicated insolvent on 7th January 1919 by the High Court and the adjudication order was cancelled and the petition dismissed on 5th October 1920. He contended that in computing the period of limitation

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the time during which the defendant's petition in insolvency in the High Court of Bombay was pending should be deducted. It was argued on plaintiff's behalf that section 17 of the Presidency Towns Insolvency Act was a statutory bar against the institution of suit by a creditor and that, therefore, under section 15 of the Limitation Act the period during which the bar continued should be deducted from computation.

The claim was admitted by the defendant, and the only plea was limitation.

The Judges of the Small Cause Courts, Bombay, had always held that the time during which the debtor's petition in insolvency was pending should be deducted from the computation of the period of limitation. In July 1918, the Full Court had given its opinion to that effect.

Since then, the High Court of Madras had, in November 1918, ruled in *Ramaswami Pillai v. Govindasami Naicker*<sup>(1)</sup> that the time during which insolvency was pending should not be deducted in computing the period of limitation for a suit brought after the proceedings in insolvency had terminated.

The trial Judge felt considerable doubt as to the soundness of the view hitherto held by the Small Cause Courts, Bombay. He, however, delivered a judgment contingent on the opinion of the High Court. The defendant applied to the Full Court which was of opinion that in view of *Bower v. Chetwynd* [1914] 2 Ch. 68, a case should be stated for the opinion of the High Court on the point.

Accordingly, the two questions set out in the judgment of His Lordship the Chief Justice were referred to the High Court by the trial Judge.

The reference was considered by the High Court.

<sup>(1)</sup> (1918) 42 Mad. 319.

No appearance for either party.

MACLEOD, C. J.:—This is a reference by the Third Judge of the Court of Small Causes.

The following questions have been referred :—

(1) Where, after a debt has become due and payable and time has begun to run against the creditor, the debtor is adjudicated insolvent and his petition is subsequently dismissed and the adjudication order cancelled, if the creditor institutes a suit thereafter against the debtor to recover the debt, is the time during which insolvency proceedings were pending to be deducted in computing the period of limitation ?

(2) Is section 17 of the Presidency Towns Insolvency Act a bar absolute to the creditor's right to institute a suit so as to enable creditor to claim a deduction of the time during which the insolvency was pending, in computing period of limitation in any suit brought by the creditor after the insolvency proceedings are quashed ?

Judgment in the case was delivered by the Third Judge contingent on the opinion of the High Court under section 69 (2) of the Presidency Small Cause Courts Act. But in spite of that the defendant applied to the Full Court. This would seem to be irregular as there was no decree or order against which an appeal would lie. Though the appeal was heard by the Full Court and both Judges were of opinion that a case should be stated, still the reference comes before us as on a case stated by the Third Judge alone.

We have not had the advantage of hearing the parties or their advocates.

We think both the questions should be answered in the negative.

When once time has begun to run against a plaintiff for the institution of a suit which he is competent to file, it will continue to run unless stopped by some provision of the Limitation Act. In this case the plaint was presented on the 11th July 1921. The suit was to recover the balance due on account of sugar sold and delivered to the defendant from the 16th

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March 1916 to the 31st October 1917. To save the bar of limitation the plaintiff relied upon the fact that the defendant was adjudicated insolvent on the 7th January 1919 by an order of the High Court which was annulled on the 5th October 1920.

The plaintiff contends that the period during which the adjudication order was in force should be excluded under section 15 of the Indian Limitation Act. That section says that where the institution of a suit has been stayed by an injunction or order, the time of continuance of the injunction or order, the day on which it was issued or made and the day on which it was withdrawn shall be excluded in computing the period of limitation prescribed for the suit. The plaintiff would then have to show that the institution of his suit was stayed by an injunction or order, or that it could be said that the institution of his suit was stayed by virtue of the provisions of section 17 of the Presidency Towns Insolvency Act. That section says that on 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 or on such terms as the Court may impose. It cannot, therefore, be said that when an adjudication order is made there is any injunction or order against the institution of a suit by a creditor. Before a creditor can institute a suit he must comply with the formality prescribed by the section, and it is only when leave is refused that it can be said that there is an injunction or order staying the institution of the suit. In *Ramaswami Pillai v. Govindasami Naicker*<sup>(1)</sup> the same question arose and

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it was decided that the period during which insolvency proceedings were pending could not be excluded. I think a certain amount of confusion of thought is due to the fact that with regard to the proof of debts in insolvency the date of the adjudication order determines a creditor's right to prove (section 46 of the Presidency Towns Insolvency Act), but a creditor has always to face the risk that the order may be annulled when made on a creditor's petition on the ground that no act of insolvency has been committed and for want of prosecution when made on the debtor's petition. The creditor, therefore, should see that his debt is acknowledged in the schedule, for even if his proof is admitted by the Official Assignee his claim may be barred if the adjudication order is annulled. Cases of real hardship must be very rare, for if a creditor allows the greater part of the time prescribed for instituting his suit to pass by, he has only himself to thank if the time expires pending insolvency proceedings. In this case it would appear that from the 7th January 1919 until the 5th October 1920 the plaintiff did nothing to protect himself either by getting an acknowledgment of his claim from the debtor or by asking for leave to put a suit on the file. The only excuse he may have had was that there had been previous decisions of the Small Cause Court to the effect that the period during which insolvency proceedings were pending could be excluded from the period of limitation.

SHAH, J.:—We have not been assisted with any argument in this case: and the questions referred to us are not altogether free from difficulty.

On the whole I do not think that there is sufficient ground for not accepting the view taken by the Madras High Court in *Ramaswami Pillai v. Govindasami Naicker*<sup>(1)</sup>. It may work hardship in some

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cases. But in the absence of any order of the Insolvency Court refusing leave to commence the suit, it is difficult to hold that the provisions of section 15 of the Indian Limitation Act can apply. The mere fact of an adjudication order having been made does not necessarily mean that there is an injunction or order staying the institution of a suit within the meaning of section 15 of the Indian Limitation Act, though the effect of the order of adjudication read with section 17 of the Presidency Towns Insolvency Act is to prevent a creditor from commencing any suit against his debtor without the leave of the Court.

I do not consider it necessary to refer to the English decisions bearing on this point as I do not think that the difficulty of interpreting the provisions in the Indian Acts on the point is removed thereby. In spite of the possible hardship in some cases, I think that on the whole the view of the Madras High Court is right.

I, therefore, agree that the questions should be answered as proposed by my Lord the Chief Justice.

*Answers accordingly.*

G. G. N.

## ORIGINAL CIVIL.

*Before Mr. Justice Marten.*

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May 1.

*In re* ARBITRATION BETWEEN JAMES MACKINTOSH & Co. AND THE SCINDIA STEAM NAVIGATION Co., LTD., AND ANOTHER\*.

*Arbitration without intervention of Court—Commission to examine witnesses—Jurisdiction to issue commission—Indian Arbitration Act (IX of 1899)—Civil Procedure Code (Act V of 1908), section 75 and Order XXVI, Rules 1 and 4—Practice.*

Where parties agree to refer their disputes to arbitration without the intervention of the Court, no suit having been brought in respect of those disputes,

\* Arbitration Case No. 18 of 1922.