cases that a consent order could not be varied or set aside in the same suit by an application and that an independent suit was necessary.

I am, therefore, of opinion that the Court has jurisdiction to set aside an order made by consent which is not in the nature of a final order or judgment but which is merely an interlocutory order in the suit provided proper grounds are made out.

I shall, therefore, hear the parties now on the merits of this application. The suit will be placed on tomorrow's board after testamentary suits.

Attorneys for applicants: Messrs. *Payne & Co.*

Attorneys for Defendant No. 13: Messrs. *Sahiar & Co.*

Order accordingly.

B. K. D.

ORIGINAL CIVIL.

Before Mr. Justice Blackwell.

IN RE EBRAHIM AHMED.*

1929 *July* 16.

Solicitor—Costs—Lien—Insolvency—Debtor's attorneys—Costs awarded against petitioning creditor—Subsequent insolvency of debtor—Petitioning creditor's right to set-off costs payable by him against debt due to him—Priority of solicitor's lien on costs payable to debtor over petitioning creditor's claim.

Where the petitioning creditors failed in their petition to adjudicate the debtor an insolvent and were ordered to pay costs to the debtor they, on the subsequent adjudication of the debtor, are not entitled to set-off the amount of those costs against the amount payable by the debtor to them, so as to defeat the lien of the debtor's attorneys in respect of the costs awarded to the debtor.

Ex parte Cleland: In re Davies,[1] followed.

CHAMBER Summons for a declaration of attorney's lien for costs.

On May 23, 1928, certain petitioning creditors presented a petition to have Ebrahim Ahmed Verawalwala adjudicated an insolvent. The debtor engaged

*Insolvency Case No. 560 of 1929.

[1] (1867) L. R. 2 Ch. 808.

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IN RE EBRAHIM AHMED

the services of Messrs. Dorab & Co. as attorneys to oppose the said application. On June 19, 1928, the said petition was dismissed with costs. The said costs were taxed at Rs. 413-8-8 and the allocatur was served on the petitioning creditors who refused to pay the said amount.

The debtor was adjudicated an insolvent on another petition on July 30, 1928.

The debtor had not paid anything to his attorneys in respect of their costs. In the subsequent insolvency proceedings the petitioning creditors claimed to set-off the amount payable by them to the debtor for his costs against the debt due to them. The debtor's attorneys claimed a lien for the said costs and on the refusal of the petitioning creditors to recognise their said claim, they took out a Chamber summons for a declaration as to their lien and their priority over the petitioning creditors' right of set-off.

Forbes, in support of the Summons.

K. M. Munshi, for the petitioning creditors.

BLACKWELL, J. :—This was a summons taken out by the applicants Messrs. Dorab and Company, asking for a declaration that they have a lien for their costs on the amount of costs awarded to one Ebrahim Ahmed, a debtor, as against the petitioning creditors payable under a certain order dated June 19, 1928, made by the learned Commissioner in Insolvency and taxed at Rs. 413-8-8, and for a declaration that by reason of that lien the petitioning creditors were bound to pay that sum to the applicants above-named. The summons in question was adjourned by me into Court for argument.

The facts relied on by the applicants are set out in an affidavit dated April 9, 1929, made by Dorab Rustomji Chothia, who is the sole proprietor of the applicants'

firm. Shortly stated, the facts are that a petition was presented against the debtor by the petitioning creditors, and on June 5, 1928, the debtor engaged the applicants to act for him. On June 19, 1928, the petition was ordered by the learned Commissioner in Insolvency to be dismissed with costs to be paid by the petitioning creditors to the debtor. Subsequently that bill of costs was taxed at the sum of Rs. 413-8-8, the allocatur was served on the petitioning creditors' attorneys on March 23, 1929, and they have declined to pay. In the meantime the debtor had on July 30, 1928, been adjudicated insolvent on another petition.

On the matter coming before me Mr. Munshi who appeared for the petitioning creditors was good enough to refer me to the decision of the appeal Court in *Tyabji Dayabhai & Co.* v. *Jetha Devji & Co.*,[1] in which the law applicable in India to a solicitor's lien was discussed at length. Having regard to that decision Mr. Munshi informed me that the only point which he felt to be now open to him for argument was the question whether the lien here claimed by the attorneys can prevail over a claim to a set-off by the petitioning creditors against that solicitors' lien. Mr. Munshi stated that that alleged right to set-off arose in this way. The petitioning creditors had obtained a decree against the debtor. The amount of that decree had not been paid, and on that decree they presented their petition for an adjudication order against the debtor. The question for determination, according to Mr. Munshi, therefore, was whether the petitioning creditors having been ordered in the insolvency proceedings to pay costs to the debtor were entitled to claim a set-off in respect of the sum payable by the debtor to them under the decree so as to defeat the lien claimed on this summons by the debtor's attorneys.

[1] (1927) 29 Bom. L. R. 1196 ; 51 Bom. 855.

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IN RE EBRAHIM AHMED

Blackwell J.

Mr. Munshi was then good enough to refer me to a case, *Ex parte Cleland: In re Davies*,[1] and with the candour which he always shows to the Court in presenting his cases informed me that if it should be my opinion that that decision was applicable to the facts of this case, he did not feel himself in a position to argue the matter further.

Upon that Mr. Forbes who appeared in support of the summons referred me to Cordery on Solicitors, 3rd edition, p. 376. There the learned author of that work says as follows :—

"But a set-off will not be allowed, to the prejudice of the solicitor's lien, where the costs are incurred in independent proceedings. Thus, costs ordered to be paid by a petitioning creditor to a debtor, where an adjudication in bankruptcy was set aside, were not set off to the prejudice of the solicitor's lien against the debt due to the petitioning creditor."

In support of that proposition, the case which Mr. Munshi had been good enough to refer me to, is cited. It appears from that case that an adjudication in bankruptcy had been obtained by D against C. That adjudication was subsequently set aside and D was ordered to pay C his costs. Later, D executed an assignment to trustees for his creditors in the form of schedule D to the English Bankruptcy Act, 1861. The costs in question were subsequently taxed. At the date of the deed, C owed D a sum exceeding the amount of the taxed costs which D had been ordered to pay to C. It was held that C's solicitor was entitled to a lien on the costs ordered to be paid to C by D, and therefore the debt due from C to D could not be set off against them. In the course of his judgment, Lord Justice Cairns said this (p. 812) :—

"The debt or claim, therefore, for costs, is not the debt or claim of *Cleland* alone, it is in the view of a Court of equity, and upon the principles of a Court of equity, a debt or claim which has been assigned or encumbered, and the

[1] (1867) L. R. 2 Ch. 808.

persons entitled to it now are not *Cleland* alone, but *Cleland* and his solicitor, the claim of the solicitor being paramount to that of *Cleland*. That consideration, in my opinion, renders it impossible that the costs can be set-off against the debt. It would be impossible, as I have already stated, that there could be such a set-off out of bankruptcy, and still clearer is it that there could be no such set-off in bankruptcy."

Later, in his judgment at page 813, Lord Justice Cairns said :—

"The costs, though recoverable in the name of *Cleland*, and though ordered to be paid to *Cleland* by name, are paid to him, not for his own benefit, for he could not take the money and spend it; but are to be paid to him subject to the lien of his solicitor, and are, therefore, to be held by him, either in whole or in part, as a trustee for his solicitor. In my opinion, therefore, there was no set-off which could be asserted under this deed, or at the time of the execution of the deed."

In my opinion, the law with regard to set-off as against a solicitor's claim for a lien as thus laid down in England is applicable to India. The costs ordered to be paid by the petitioning creditors to the debtor would, if paid to him, be received and held by him as a trustee to the extent of his attorneys' claim for their costs. That being so, I am clearly of opinion that no set-off is permissible by the petitioning creditors against the money ordered to be paid at any rate to the extent of the lien for costs of the applicants. It follows, therefore, that this summons must be made absolute.

On the question of costs, Mr. Munshi submitted to me that inasmuch as this appeared to be a matter of first impression in India, it would be reasonable that there should be no order as to costs. Mr. Forbes strenuously opposed this submission, and contended that an order for costs should be made in his favour. On the whole, I am of opinion that, this being a matter of first impression, which was expressly adjourned into Court for argument, the fair order will be that there should, in the circumstances, be no order as to costs. That, accordingly, will be the order made.