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 ESSOO
 BHAYAJI
 v.
 THE S. S.
 "SĀVITRI."

In civile est, nisi tota lege perspecta, una aliqua particula ejus proposita, judicare vel respondere. Such a survey is always indispensable even when the words are the plainest, for the true meaning of any passage is that which best harmonises with the subject and with every other passage of the statute—Maxwell on Statutes, p. 35; *Smith v. Bell* ⁽¹⁾.

There is no difference between causing injury to a ship and causing injury to a carriage, or any other kind of moveable property. A suit to recover compensation for damages caused by a collision is an action of tort founded upon the negligence of the defendant or his servants in the management of his vessel—*The European* ⁽²⁾. I decide the issue before me in favour of the defendants.

Attorneys for the plaintiff:—Messrs. *Little, Smith, Frere and Nicholson*.

Attorneys for the defendant:—Messrs. *Chalk and Walker*.

(1) 10 M. & W., 378.

(2) 10 Prob. Div., 99.

INSOLVENCY JURISDICTION.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice West.

IN THE MATTER OF CA'NDA'S NA'RRONDA'S, INSOLVENT.

C. A. TURNER, OFFICIAL ASSIGNEE, APPELLANT, v. PURSHOTAM MUNGALDA'S NATHUBHOY AND OTHERS, RESPONDENTS.

Insolvency—Judgment entered up under Section 86 of Indian Insolvent Act (Stat. 11 and 12 Vic., Cap. 21)—Execution of such judgment—Limitation—Limitation Act XV of 1877, Sch. II, Arts. 178, 179 and 180.

C. was adjudicated an insolvent in October, 1866, and on the 19th August, 1868, judgment was entered up against him under section 86 of the Indian Insolvent Act (Stat. 11 and 12 Vic., cap. 21) for Rs. 16,40,648. In 1886 it was ascertained by the Official Assignee that certain property belonging to the insolvent's estate was available for the creditors of the estate, and on his application an order for execution against the said property was made on the 5th April, 1886, by the Insolvent Court under section 86 of the Insolvent Act. It was contended that execution was barred by limitation.

Held, that execution on the judgment was not barred.

Per SARGENT, C. J.:—The policy of the Indian Insolvent Act is that the future property of the insolvent should be liable for his debts. That intention would be

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to a great extent defeated, if judgment entered up by the order of the Insolvent Court under section 86, which is the machinery provided for effecting that object, could only be executed within a limited time. Limitation Acts should not be deemed applicable to judgments entered up under section 86, unless their language clearly requires it. A judgment entered up under section 86 of the Insolvent Act, although a judgment of the High Court, is not a judgment entered up in the exercise of the ordinary original civil jurisdiction, nor could the right to enforce the judgment be lawfully released by any person, and, therefore, article 180 of the Limitation Act did not apply.

Per West, J.:—Formerly in England as well as in India the policy of the Insolvent Acts was to make the insolvent perpetually responsible. In England, however, by Statute 32 and 33 Vic., cap. 83, bankruptcy was substituted for insolvency, and all pending cases of insolvency were ordered to be closed within prescribed periods. In construing that statute it has been declared that after the given time the insolvent was free from all responsibility, and that after his death his estate was free also. Thus the lien on an insolvent debtor's whole future property has disappeared from English law; but this has been effected by direct legislation. In India there has been no legislation with regard to judgments of the Insolvent Court, but it has been decided that such a judgment is to be deemed a decree of the High Court, and executed as such. It must, therefore, be subject to the same rules as other decrees of the High Court in the absence of any special exception. Article 180 of the Limitation Act is, therefore, applicable to such a judgment. The Insolvent Act did not contemplate its being entered up otherwise than as a judgment of the Supreme Court, and, as such, it ranked as a judgment of a chartered Court in the exercise of the ordinary original civil jurisdiction. The same description may be applied to it now; and hence the execution is limited, as in the case of other judgments and decrees of the High Court. The principle of perpetual liability to execution can no longer be deemed a principle. The English law has discarded it; the Indian law has made all judgments subject to limitation, and amongst them judgments of the Insolvent Court. Article 180, therefore, applies. But the right to enforce the judgment in the present case did not accrue to the Official Assignee until the order of the Insolvent Court to take out execution was made. That order was not made until April, 1886, and, therefore, the right to execution, which arose on the date of that order, was not barred by article 180 of the Limitation Act XV of 1877.

APPEAL from a judgment of Scott, J., dated 5th July, 1886.

The respondents in this case were the representatives of the insolvent, Cándás Nárrondás, deceased. The appellant was the Official Assignee.

The said Cándás Nárrondás was adjudicated an insolvent on the 15th October, 1866, and on the same day a vesting order was made by the Insolvent Court vesting his estate and effects in the Official Assignee.

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On the 19th August, 1868, judgment was entered up in the name of the Official Assignee against the insolvent under section 86⁽¹⁾ of the Indian Insolvent Act (Stat. 11 and 12 Vic., cap. 21) for the sum of Rs. 16,40,648.

In 1886 it was ascertained by the Official Assignee that certain property belonging to the insolvent's estate, but alleged to have been settled in trust under an indenture dated 16th December,

(1) "86. Provided always, and be it enacted, that in all cases where any insolvent shall not have obtained his discharge in the nature of a certificate as aforesaid under this Act, the said Court for the relief of insolvent debtors may, if in the circumstances of the case it shall think fit, before making such order for such discharge, direct a judgment to be entered up against such insolvent in the Supreme Court of the Presidency within which such Court for the relief of insolvent-debtors shall be situate in the name of the assignee or assignees, or of such Official Assignee as the Court shall think fit, for the amount of the debts or demands stated in the schedule of such insolvent as due or claimed, and of such as shall be established in the said Court against the said insolvent's estate, or so much thereof as shall appear at the time of such order to be due, which said order shall be filed in the said Court for the relief of insolvent debtors in India; and the production of such order, or of a copy of such order under the seal of the said Court, of which order, copy, and seal no proof shall be requisite other than the production of such order or copy, shall be sufficient authority to the proper officer for entering up the said judgment; and then and in every such case, and notwithstanding the provisions hereinbefore contained, if at any time it shall appear to the satisfaction of the said Court that such insolvent is of ability to pay such debts or demands, or any part thereof, or that he is dead, leaving assets for such purpose, and that under the circumstances the same is reasonable and proper, the said Court may, if it shall think fit, order execution to be taken out upon such judgment against the property of such insolvent, whether the same may or may not be by law vested in his assignee or assignees, for such sum of money as under all the circumstances of the case the said Court shall order, such sum to be distributed rateably amongst the creditors of such insolvent according to the mode hereinbefore directed in the case of a dividend, and such further proceedings may be had upon such judgment as the Court may from time to time order, until the said debts or demands shall be fully paid and satisfied, and no *scire facias* shall be necessary to revive or to execute such judgment on account of any lapse of time or change of parties, or otherwise, but execution shall at all times issue thereon by virtue of the order of the said Court for the relief of insolvent debtors from time to time; provided always, that in case any application against any such insolvent for the purpose aforesaid shall appear to the Court to be vexatious or oppressive, it shall be lawful for the said Court not only to refuse to make any order on such application, but also to dismiss the same, with such costs against the party making the same as to the said Court shall appear reasonable."

1863, was available for the creditors of the estate; and on his application an order for execution against the said property was made on the 5th April, 1866, by the Insolvent Court under section 86 of the Indian Insolvent Act.

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Under the ruling of the High Court in the case of *In re Bhagwandás Hurjivan* ⁽¹⁾ it was necessary to proceed under the provisions of the Civil Procedure Code (Act XIV of 1882), and notice under section 248 of the Code was accordingly served upon the respondents, requiring them to show cause before the Judge in chambers why the judgment entered up against the said insolvent, dated the 19th August, 1868, should not be executed against them.

The case came before Scott, J., in chambers, and after argument his Lordship dismissed the application for execution, being of opinion that it was barred by limitation.

His Lordship delivered the following judgment:—

SCOTT, J.:—This application arises under section 86 of the Indian Insolvency Act ⁽²⁾. It is there provided that the Insolvency Court may direct a judgment to be entered up in the Supreme Court (which must now be read the High Court) in the name of the assignee for the amount of the debts found due by the insolvent; and, further, if at any time the Insolvent Court is satisfied that the insolvent is able to pay such debts, the said Court may order execution to be taken out against the property of the insolvent, and such further proceedings may be had from time to time as the Court may order, until the debts shall be paid; and no *scire facias* shall be necessary to revive or to execute such judgment on account of any lapse of time or change of parties or otherwise, but execution shall at all times issue thereon by virtue of the order of the Insolvent Court.

In the present case, judgment was entered up against the insolvent, Cándás Nárrondás, on the 19th August, 1868, by the Insolvent Court under the above section. On the 17th March, 1886, a warrant of attachment was issued, and on the 5th April, 1886,

(1) I. L. R., 8 Bom., 511.

(2) See note, *supra*, p. 140.

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execution was ordered to be taken out upon the judgment entered up against certain moveable and immoveable property settled in trust by the insolvent by an indenture of 1863. It has been recently decided in this Court that such execution must be conducted in accordance with the rules concerning execution laid down in Chapter XIX of the present Civil Procedure Code—*In re Bhagwándás Hurjivan*⁽¹⁾. The senior Judge who presided in that case, Bayley, J., states the law very concisely in the following terms:—"The Insolvent Court made the order. That order was taken to the Prothonotary of the High Court, who thereupon entered up judgment, and the subsequent proceedings in enforcing that judgment are to be taken under the provisions of the Civil Procedure Code." Section 227 of the Civil Procedure Code, therefore, applies, and the judgment must be executed as if it had been made by the Court in the exercise of its original civil jurisdiction.

The question next arises, whether under the provisions of the Civil Procedure Code and the Limitation Act, which is a law relating to procedure, and must be read with the Civil Procedure Code, the execution is not barred by lapse of time. Eighteen years have elapsed between the judgment entered up and the order for execution. But twelve years is the period fixed within which a judgment may be enforced if it is a judgment within the meaning of section 180 of the second schedule of the present Limitation Act, and by section 179 three years is fixed for the execution of a decree of any Civil Court not provided for by section 180. This same period was given by the Act for the limitation of suits in force at the time this judgment was entered up in the Supreme Court. (See Limitation Act XIV of 1859, secs. 19, 20.) It may also be added that the principle of limitation was fully recognised before any Act of Limitation was passed in India. The Privy Council has held that the English law of limitation applied in India—*Kadir Bukhsh Khan v. Mussumatain Fussehoon Nissa*⁽²⁾, and in a subsequent case about the same time—*Her Highness Ruckmáboye v. Lulloobhoy Mottichund*⁽³⁾—their Lordships extended the application of that law to Hindus

(1) I. L. R., 8 Bom., 511, at p. 520.

(2) Moore's Ind. Ap., at p. 431.

(3) 5 Moore's Ind. Ap., 234.

and Mahomedans as well as to Europeans in civil actions in the Supreme Court. We may take it, therefore, that the general policy of limitation was applicable in India at the date of the Insolvency Act.

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But it was argued that all limitation of time was expressly excluded by the terms of section 86 of the Insolvency Act. The words relied upon are, "and no *scire facias* shall be necessary to revive or to execute such judgment on account of any lapse of time, but execution shall at all times issue thereon by virtue of the order of the Insolvent Court." These words, in my opinion, were intended to give a special value to the special publicity of the entering up by the order of the Court, but were not intended to exclude the vested right of every debtor to the privileges of limitation. The fair interpretation of the passage of the section relied upon, in my opinion, is as follows:—The words "no *scire facias* shall be necessary to revive or to execute such judgment on account of any lapse or time," only dispense with the formalities in the nature of a writ of *scire facias*, ordinarily required as a preliminary to the execution of a judgment not executed within a year of its date. The other words relied upon, *viz.*, "execution shall at all times issue," must, in the absence of any specific exclusion of the general law of limitation, be read subject to the operation of that general law. It is a well-known principle that Acts must be construed so as not to affect any vested rights, unless those rights are excluded in express terms; or, to put the same principle in other words, the Legislature must not be taken to intend any alteration in the law beyond what it explicitly declares in express terms or by unmistakable implication. General words, such as these in question, must, if possible, be read as bearing on the immediate object of the Act, and not as altering the general policy of the law. The scope and object of this section was to keep alive the ordinary legal liability of the debtor to his previously accrued debts, not to deprive him of any vested right, such as that of limitation, or to cast upon him any extraordinary or new liability such as that of a perpetual liability. To hold otherwise would be to repeal by a side wind, so to speak, a general principle of law. I must,

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therefore, hold that section 86 of the Insolvent Act does not exclude the operation of the law of limitation.

The next question is, what law must be applied. There is no doubt that a law of prescription or limitation is a law of procedure having reference only to the law of the *forum*. (See *Her Highness Ruckmáboye v. Lulloobhoy Mottichund*⁽¹⁾; *Story's Conflict of Laws*, sec. 579.) It acts, *ex post facto*, upon the contract only in case of a suit being brought; and the law of the Court where the suit is brought—in this case the High Court—is applied. This claim is, therefore, barred by time, and it is not necessary to discuss the other points of the case. The cost of the application, so far as Mr. Latham's and Mr. Lang's clients are concerned, must be borne by the applicant. The costs of the trustees must come out of the estate.

The Official Assignee appealed.

Inverarity for the appellant.

Macpherson and *Lang* for the respondents.

Inverarity:—I contend that the application for execution is not barred. The Limitation Act XV of 1877 does not apply to proceedings under section 86 of the Insolvent Act. There is no clause expressly referring to it. If any clause does apply, it must be either clause 178 or 180. Clause 179 clearly does not apply. A judgment entered up by order of the Insolvent Court in the High Court is not a decree or order within the meaning of that clause. As to clause 178, see *Bái Mánekbái v. Mánekji Kávasji*⁽²⁾. See *Cook's Insolvent Debtor's Practice*, Preface, page 11, and see page 120. If any clause applies, it would appear to be clause 180, and under it the applicant is not barred; for the time does not run from the date of the decree, but from the date of a present right to enforce it. The Official Assignee cannot act without obtaining the sanction of the Court. Limitation can only run from the date of his obtaining that sanction. It was then, *viz.*, on the 5th April, 1886, that he obtained a "present right." In the case of *In re Bhagwandas*⁽³⁾ it was

(1) 5 Moore's Ind. Ap. at p. 234.

(2) I. L. R., 7 Bom., 213.

(3) I. L. R., 8 Bom., 511; see pp. 524-5.

held that the judgment, in a case like this, remains suspended until the condition provided by section 86 of the Insolvent Act is fulfilled. Further, the Official Assignee is a person capable of releasing that right, and so the case may come within clause 180.

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But we go further, and contend that the Limitation Act does not apply at all to proceedings under section 86 of the Insolvent Act. That section is not repealed by the Limitation Act. To do that, express words would be required. A statute cannot be repealed by implication by the Indian Legislature: see Indian Councils Act (Stat. 24 and 25 Vic., cap. 67), sec. 22.

Section 86 of the Insolvent Act is taken from the English statute. The policy of the Insolvent Act is different from that of the Bankruptcy Acts. Its policy is to give protection to the person, but the property of the insolvent remains liable. [Counsel referred to Stat. 53 Geo. III, c. 102, sec. 14; 54 Geo. III, c. 23, sec. 14; 1 Geo. IV, c. 119, sec. 25, which last is substantially the same as section 86 of the Indian Insolvent Act; Stat. 7 Geo. IV, c. 57, sec. 57; 1 and 2 Vic., c. 110, sec. 87; Cooke's Insolvency Practice, page 121; *Barton v. Tattersall*⁽¹⁾; *Ex parte Pain*⁽²⁾].

The Judge in chambers, in such a case as this, has no power to go behind the order of the Insolvent Court. He is then merely a ministerial officer to set in motion the machinery provided by the Civil Procedure Code. Here the Insolvent Court has ordered execution to issue. The Judge in chambers has ordered that it shall not issue. Reference was also made to *Kalyánbhái Dipchand v. Ghanashámlál Jadunáthji*⁽³⁾; *Raghubans Gir v. Sheosaran Gir*⁽⁴⁾; *Basant Lal v. Batul Bibi*⁽⁵⁾; *In re Clagett's Estate*⁽⁶⁾; and Stat. 32 and 33 Vic., cap. 83; and *Byrne v. Byrne*⁽⁷⁾.

Macpherson for the respondents:—The judgment against the insolvent when entered up under section 86 of the Insolvent

(1) 1 Russ. & M., 257.

(4) I. L. R., 5 All., 243.

(2) L. R., 3 Ch. Ap., 639.

(5) I. L. R., 6 All., 23.

(3) I. L. R., 5 Bom., 29.

(6) L. R., 20 Ch. Div., 637.

(7) 2 Dr. & War., 71, 74.

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Act becomes a judgment of the High Court—*In re. Bhagwanda's Hurjivan*⁽¹⁾; and it then comes under clause 180 of the Limitation Act XV of 1877. Section 86 only provides that no application shall be required to revive the judgment, but it does not say that no limitation shall apply. There is nothing in the section to exclude limitation. At the time of its enactment there was no limitation. But now there is a law of limitation, and all judgments of the High Court (of which this is one) are subject to it. There is nothing to distinguish this from any other judgment of the High Court. The law of limitation is a law of procedure, and affects all applications made after it comes into force—Maxwell on Statutes, p. 271; Chitty on Contracts, p. 741. It has been argued that section 86 excludes limitation in all cases; but the real meaning of the section is that no *scire facias* should be necessary, as it had been previously: see old Supreme Court Rules, No. 125. Instead of a *scire facias*, the Civil Procedure Code substitutes the notice under section 248. On the day that judgment was entered up in the High Court, the Official Assignee had a present right to enforce it. He might have applied to the Insolvent Court for an order for execution. Such an application is a step in enforcing the judgment; and so the time runs against him from that time under clause 180. No doubt, section 86 is not repealed by the Limitation Act; but the latter and more recent Act of Limitation imposes a period of limitation where none existed before. Section 6 of the Limitation Act applies only to cases where a particular period of limitation is laid down by some law.

December 10. SARGENT, C. J.:—The question in this appeal arises out of the insolvency of Cándás Nárrondás, who was adjudged an insolvent on the 15th October, 1866. Judgment was entered up against the insolvent on the 19th August, 1868, under section 86 of the Indian Insolvency Act, for Rs. 16,40,648. Application for leave to execute the judgment was made in April, 1886, which was granted by the Judge of the Insolvent Court on the 5th April, 1886. Application for execution was then made on the 13th April, 1886, to the Prothonotary, who took the objection

(1) I. L. R., 8 Bom., 511.

that it was barred by the Limitation Act, and the Judge in chambers has held the objection to be well founded.

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At the time the Insolvent Act was passed, which was in 1848, there was no statutory bar by lapse of time to the execution of a judgment of the Supreme Courts of India; but it was a rule of those Courts, following the practice of the Common Law Courts of England, that, after the expiration of a year from the date of the judgment, execution could not issue until a writ of *scire facias* had been taken out and served on the judgment-debtor. It was to obviate the necessity of this proceeding as a preliminary to execution, and to leave it entirely in the discretion of the Insolvent Court in every case whether execution should issue on the judgment, that it was provided by section 86 that no *scire facias* should be necessary to revive or execute such judgment on account of any lapse of time or change of parties or otherwise, but that execution should at all times issue thereon by virtue of the order of the said Court for the relief of insolvent debtors from time to time. However, by subsequent legislation, commencing with section 20 of Act XIV of 1859, the period within which judgments of any Court established by Royal Charter can be enforced, has been limited; and it has been contended that either by article 178 or article 180 of the schedule II to the present Limitation Act XV of 1877, the judgment entered up by order of the Insolvent Court on the 19th August, 1868, is now barred.

It was contended by Mr. Inverarity that any limitation of the time, within which the judgment could be executed, would virtually be repealing section 86 of the Insolvent Act; and that, although by Stat. 24 and 25 Vic, c. 67, sec. 22, the Governor-General in Council can repeal English Acts prior to Indian Council Acts, it must be by express words and not by implication. There are no restrictive words to that effect to be found in the Councils Act (Stat. 24 and 25 Vic.); and I presume the question whether an Act of the Governor-General in Council has, and to what extent, repealed an Act of the English Parliament prior to the Councils Act, must depend upon the same rules of construction as an application in ordinary cases.

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Now, the Indian Insolvent Act was framed on the same lines as the English Insolvency Acts, commencing with 53 Geo. III, c. 1 and 2, down to the passing of the Bankruptcy Act of 1861, which abolished the distinction between insolvency and bankruptcy, the principle of which Acts, although varying the modes of giving effect to it, has always been held to be that the future property of the insolvent should be liable for his debts. I need only refer to the remarks of the Master of the Rolls in *Barton v. Tattersall*⁽¹⁾, where it was held that the debts of the insolvent could be proved in a suit for the administration of the estate, and of Lord Hatherley in *Ex parte Pain*⁽²⁾, where the latter, discussing the effect of sections 87 and 88 of Stat. 1 and 2 Vic., cap. 110, the former of which is similar in its practical effect to section 86 of the Indian Act, by providing that the insolvent before his discharge must give a warrant of attorney to enable the provisional assignee to obtain execution against his future property for the benefit of his creditors, says: "The insolvent cannot obtain his discharge, except upon the condition of his making over all his future property of every kind for the benefit of creditors." Such being the policy of the Indian Insolvent Act, it is plain that it would be to a great extent defeated if judgment entered up by the order of the Insolvent Court under section 86, and which is the machinery provided for effecting that object, could only be executed within a limited time; the spirit, therefore, of the well-established rule of construction of Acts, that *generalia specialibus non derogant*, requires that the Limitation Acts should not be deemed applicable to judgments entered up under section 86, unless their language clearly requires it.

Such is not the case, in my opinion; with the language of the two clauses of the Act of 1877, which have been relied on as constituting a bar to the judgment in question. Article 180 relates to an application to enforce a judgment, decree or order of any Court established by Royal Charter, in the exercise of its ordinary original civil jurisdiction. Now, a judgment entered up under section 86 is doubtless a judgment of a Court

(1) 1 Russ. & M., 257.

(2) L. R., 3 Ch. App., 639.

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established by Royal Charter, but it is not a judgment entered up in exercise of its ordinary civil jurisdiction, but under section 86 of the Insolvent Act, the jurisdiction under which formed no part of the ordinary civil jurisdiction. Again, the period of limitation fixed for such judgments, namely, twelve years from the time a present right to enforce the judgment accrues to some person capable of releasing the right, is quite inapplicable to judgments which could only be enforced by order of the Insolvent Court, and could not be released by any person, which must clearly mean lawfully released. As to section 178, it is to be remarked that a fresh right to execute the judgment is constantly accruing under section 86 whenever the Insolvent Court orders it.

I am of opinion, therefore, that the judgment in question was not barred, and that the order of the Court below should be discharged, and that execution should issue on the judgment. The respondents must pay the Official Assignee his costs throughout, including the costs of this appeal; but I think the question was properly raised by the trustees, and for the protection of the fund; and that they are, therefore, entitled to recoup themselves any costs they may have incurred, or may hereafter pay to the Official Assignee out of the trust estate.

WEST, J.:—As the decision in *In re Bhagwándás Hurjivan*⁽¹⁾ has determined that a judgment entered up under an order of the Insolvent Court ranks as a judgment or decree of the High Court, we must so regard the judgment in the present instance. The Court, in the case referred to, held that the judgment must be executed, like the one passed by the Court itself, according to the provisions of the Code of Civil Procedure; and whether the judgment is to be deemed one sent to the Court from another Court under the provisions of section 227 of the Code or not, makes no practical difference. In either case the order of the Court for the Relief of Insolvent Debtors would be good for its own purpose; in either case it would not justify the Court in disregarding a bar by limitation coming into existence and operating against execution of the decree subsequently to the High Court's becoming seised of it. It is urged that such a bar has come into existence; that the decree cannot be

(1) I. L. R., 8 Bom., 511.

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other than a decree of the High Court, and is subject, as such, to limitation.

Under the English law in force when the Indian Insolvent Act (Stat. 11 and 12 Vic., cap. 22), was passed, and from which that statute was largely copied, the insolvent, as a condition of obtaining his discharge, had to execute a warrant of attorney to confess judgment in favour of the assignee. This evidence duly recorded became a speciality against which limitation did not run under the Act of James I. Execution could, therefore, be had after any time. The need for a *scire facias* was removed by the insolvency statutes; but at the same time a discretion was accorded to the Commissioners in Insolvency of granting, refusing, or limiting the execution sought at any time against the after-acquired property of the insolvent. Subject to this qualification, the confession of judgment would come into operation whenever property worth seizing came into the insolvent's possession until the whole amount of the scheduled debts was discharged. The English Statute 1 and 2 Vic., cap. 110, sec. 88, further provided that the insolvent might be forced to transfer stock which the assignee could not get at under the judgment entered up, and it was under this provision that the case of *Ex parte Pain*⁽¹⁾ arose. The general principle was that all property that should become the insolvent's should be available for the satisfaction of his creditors, and this was carried out in the case of *Barton v. Tattersall*⁽²⁾ and those which followed it, to the extent of allowing a creditor, who was also assignee, to obtain satisfaction in an administration suit without seeking execution of the judgment.

The Indian Act replaces the process of a confession of judgment by a direct order of the Insolvency Court. It enables the same Court to order that execution be taken out of the judgment entered up in the Supreme Court and "against the property of the insolvent, whether the same may or may not be by law vested in his assignee." This last provision is meant, apparently, as a substitute for the one in the English statute

(1) L. R., 3 Ch. App., 639.

(2) 1 Russ. & M., 257.

under which the case of *Ex parte Pain*⁽¹⁾ was disposed of.

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The perpetual responsibility of an insolvent debtor ceased in time to be part of the policy of English legislation. By the Statute 32 and 33 Vic., cap. 83, bankruptcy was substituted for insolvency, and all pending cases of insolvency were to be closed within prescribed periods. The meaning of this last provision is discussed in *In re Clagett's Estate; Fordham v. Clagett*⁽²⁾.

Effect was in this case given to a rather ambiguous provision by construing it in the light of the obvious policy of the Act, and declaring that after the given time the insolvent was free from all responsibility under the proceedings in insolvency, and, consequently, that after his death his estate was free also. The lien on an insolvent debtor's whole future property has thus disappeared from the English law; but the Legislature expressed, as well as it could, in direct terms its purpose of making a radical change.

In India it would seem as if the Insolvency Act had almost escaped the notice of the Legislature in dealing with cognate subjects. The judgment of the older law is replaced by the judgment and decree of the Code of Civil Procedure. The execution of a decree has ceased to be a merely ministerial act and a matter of course; a Judge must be applied to, and be satisfied that execution is rightly sought. As, then, the judgment entered up by order of the Insolvent Court is to be deemed a decree of the High Court itself, it is plain that the former state of things with regard to it has necessarily changed. This is recognized when on the order of the Insolvent Court to take out execution the assignee applies to a Judge as for execution of a decree under the Code of Civil Procedure. It seems, then, that the decree must be subject to the same rules generally as other decrees of the High Court in the absence of any special exception. There was much perhaps to be said for a distinction between the judgments entered up under the order of the Insolvent Court and ordinary decrees under the Code; but once included in the same category they must needs be subject to the same rules.

(1) L. R., 3 Ch. App., 639.

(2) L. R., 20 Ch. Div., 637.

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Article 180 of Schedule II of the Limitation Act XV of 1877, therefore, is, I think, applicable to the judgment in the present case. The Insolvency Act did not contemplate its being entered up otherwise than as a judgment of the Supreme Court. It ranked then as a judgment of a Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction. The same description may be applied to it now, and hence the execution is limited, as in the case of other judgments and decrees of the High Court. The principle of perpetual liability to execution can no longer be deemed a principle. The English law has discarded it, as we have seen; the Indian law has made all judgments subject to limitation, and amongst them those of the Insolvent Court. Mr. Inverarity sought to make out that the endless responsibility was a proper price paid for protection from imprisonment. It was rather an inducement to give up property. The moral obligation to satisfy an ordinary decree is the same as in the case of one that combines many claims; and there is no reason why the policy of applying limitation to the one should not extend to the other. An insolvency law for the District Courts is provided within the Civil Procedure Code itself; but he who profits by it is not, therefore, deprived of the benefit of the limitation against decrees enacted on grounds of public policy.

A real difficulty, however, arises from the peculiar wording of article 180 of Schedule II of the Limitation Act. I cannot see that a present right "to enforce the judgment. . . . accrues to any person," in a case such as the present, until the Insolvent Court's order is made to take out execution. The action of the Commissioner is not merely formal. He exercises a discretion in allowing execution or not: and that discretion has not been annulled by the change in the procedure that follows on his order. An application must be made to him; and he must consider the facts; and until he has given his order based on them, no right can have accrued to any one to apply to the High Court for execution. If the condition were merely one within the power of the Official Assignee to satisfy, he could not be allowed, by purposely failing to satisfy it, to postpone obtaining

the order for an indefinite time; non-fulfilment would, in such a case, be turned against him who was the cause of it. But here the condition is the Commissioner's conviction, that the proved state of facts is one in which execution may properly be ordered. The order in this case was made last April, and there was nothing in the Limitation Act to prevent that order from being applied for. The right to execution, which arose on the date of the order, was not affected by article 180, when effect was sought for it a few days afterwards, and, therefore, I think the decision of the Court below must be reversed.

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Order reversed.

Attorneys for the appellant:—Messrs. *Ardesir, Hormusji and Dinshá.*

Attorneys for the respondents:—Messrs. *Little, Smith, Frere and Nicholson.*

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánabhái Haridás.

VISHNU SAKHA'RA'M NÁGARKAR AND ANOTHER, (ORIGINAL APPLICANTS), APPELLANTS, *v.* KRISHNARA'O MALHA'R, DECEASED, BY HIS SONS AND HEIRS, A'NANDRA'O AND OTHERS, (ORIGINAL OPONENTS), RESPONDENTS.*

1886.

July 29.

Decree—Execution of a decree of the Agent for Sardárs—Rights of transferee of a decree—Civil Procedure Code (Act XIV of 1882), Secs. 2, 232, 649—Jurisdiction—Waiver—Acquiescence.

A. in 1839 obtained a decree against B., a *sardár* in the Court of the Agent for Sardárs. The decree was executed in the Agent's Court until B.'s death in 1868. B.'s status as a *sardár* under the exclusive jurisdiction of the Agent, did not descend to his sons, and the decree was transferred to the Court of the First Class Subordinate Judge at Ahmednagar for execution. Various objections were taken to the execution of the decree by that Court, but none on the ground that the Agent's decree could not be executed by a mere transfer to an ordinary Civil Court. The case went up twice to the High Court, under whose orders the execution was for several years continued in favour of A.'s representatives against the estate of B.'s sons. In 1885, one of A.'s representatives assigned his interest under the decree to C. and D. Thereupon the transferees C. and D. applied to the First Class Subordinate Judge at Ahmednagar to have their names substituted in the place of the transferor in the execution proceedings.

* Miscellaneous Appeal, No. 2 of 1886.