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PIONEER BANK, LIMITED, *In the matter of.* CHANIRAM, *In re.*

by the Act and the Rules on the presentation of petitions for winding up do not seem to my mind to be as clear as they ought to be, and I, therefore, take the opportunity of pointing out that, in my opinion, there is nothing in the Act or Rules which deprives the Court of the discretion which it has in every other case, so that the Court may, if it thinks fit, refuse to admit a petition, or, as an alternative course, give the company concerned notice that a petition has been presented, so that it may take proceedings to restrain the petitioner from proceeding with his petition.

In this case the company has not pressed for costs against the petitioner, as I am told such an order would be valueless to them, the petitioner not being a man of any means, and therefore it has consented to the petition being dismissed without costs; otherwise, I should have made the petitioner pay its costs.

Attorneys for the Bank: *Messrs. Matubhai Jamietram & Madan.*

Attorneys for the petitioner: *Messrs. Patel & Ezekiel.*

H. S. C.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

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July 7.

JOSHI LAXMIRAM LALLUBHAI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* MEHTA BALASHANKAR VENIRAM (ORIGINAL DEFENDANT), RESPONDENT.*

Limitation Act (XV of 1877), Schedule II, Article 179—Limitation Act (IX of 1908), Schedule I, Article 182—Civil Procedure Code (Act XIV of 1882), sections 351 and 357—Decree on mortgage—Application for execution—Mortgagor's petition for declaration of insolvency—Opposition by mortgagee judgment-creditor—Step-in-aid of execution—Limitation.

An application by mortgagee judgment-creditor in execution of his decree, opposing the insolvency proceeding of the mortgagor judgment-debtor, is a

* Second Appeal No. 929 of 1913.

step-in-aid of execution under Article 179, Schedule II of the Limitation Act (XV of 1877), and Article 182, Schedule I of the Limitation Act (IX of 1908).

SECOND appeal against the decision of E. Clements, District Judge of Ahmedabad, reversing the order of M. I. Kadri, Subordinate Judge of Umreth, in an execution proceeding.

The facts were as under :—

The plaintiffs obtained a decree on a mortgage against the defendant. The decree was dated 19th September 1903. On the 8th August 1905 the plaintiff judgment-creditors applied for the execution of the decree under darkhast No. 427 of 1905 and prayed only for the attachment and sale of the mortgaged house. No further relief was claimed in the darkhast. On the 6th January 1906 the defendant judgment-debtor applied to be declared an insolvent. The application for insolvency was opposed by the judgment-creditors. Under the proceedings in execution of the judgment-creditors' aforesaid darkhast the judgment-debtor's house was sold on the 26th June 1906. On the 29th September 1906 the first Court declared the judgment-debtor insolvent and the judgment-creditors preferred an appeal. Subsequently the first Court struck off the said darkhast for execution on the 7th December 1906 on two grounds, namely, that (1) it had been satisfied and (2) the judgment-debtor was adjudicated an insolvent. On the 6th December 1910 the judgment-creditors' appeal against the order of the first Court declaring the judgment-debtor to be an insolvent succeeded and, thereupon, they, on the 18th October 1911, presented a fresh darkhast, No. 462 of 1911, for the execution of their decree and prayed for the arrest of the judgment-debtor.

The judgment-debtor contended that the darkhast was time-barred.

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The Subordinate Judge overruled the judgment-debtor's contention. He found that the judgment-creditors were entitled to have the period between the 6th January 1906 and the 6th December 1910 during which the judgment-debtor's application for insolvency was pending excluded from being counted towards limitation. Therefore, following the ruling in *Chintaman Damodar Agashe* v. *Balshastri*[1] he held that the darkhast was in time.

The judgment-debtor having appealed, the District Judge found that the darkhast was not in time. He, therefore, reversed the order and dismissed the darkhast observing :—

> The case relied upon by the lower Court for treating darkhast 462 as a renewal of the proceedings of 1906, *Chintaman Damodar* v. *Balshastri* (I. L. R. 16 Bom. 294) is distinguishable, as here the Original Darkhast did not ask for the arrest of the judgment-debtor, or for anything else beyond the sale of the house. The judgment-creditor knowing of the insolvency proceedings ought to have presented a darkhast for all his remedies. I see no equities in the case sufficient to lead the Court to strain the meaning of the judicial decisions on this point of limitation.

The plaintiff judgment-creditors preferred a second appeal.

H. V. Divatia for the appellants (plaintiff judgment-creditors) :—Our second darkhast for execution, though presented more than three years after the first, was within three years from the termination of the judgment-debtor's insolvency proceedings and those proceedings operated in law as an injunction.

When a person is declared insolvent, though not discharged, he cannot be arrested in execution of a decree because the decree-holder cannot execute his decree *pari passu* with the insolvency proceedings: section

(1) (1891) 16 Bom. 294.

357 of the Civil Procedure Code of 1882, *Panangupalli Seetharamaya* v. *Nanduri Ramachendrudu*[1], *Gauri Datt* v. *Shankar Lal*[2].

In connection with the first darkhast, the reason given by the Court for striking it off was the declaration of the judgment-debtor's insolvency. So the order of the Court had the effect of staying proceedings under section 15 of the Limitation Act of 1877.

Where there is a temporary bar to the execution of a decree, the application made after the bar is removed is not barred by limitation: *Rudra Narain Guria* v. *Pachu Maity*[3].

Manubhai Nanabhai for the respondent (defendant judgment-debtor):—The new Limitation Act, 1908, came into force on the 1st January 1909. The darkhast having been time-barred on the 8th August 1908 could not be revived by the new Act: sections 6 (*a*), (*c*) and 8 of the General Clauses Act. Section 15 of the Limitation Act of 1877 applied only to suits and not to applications for execution.

Assuming that the new Limitation Act of 1908 applies, *institution* of the application was never restrained. Moreover, the order adjudicating the judgment-debtor to be an insolvent existed only for one year and six months and the exclusion of the said period could not bring the case within limitation.

Insolvency proceedings do not *per se* operate as an injunction. An order under section 351 of the Code of 1882 does not purport to discharge the judgment-debtor so as to bar his arrest.

Divatia in reply:—The liberal construction put by the Madras High Court in *Panangupalli Seetharamaya* v. *Nanduri Ramachendrudu*[1] may be adopted.

(1) (1904) 28 Mad. 152. (2) (1892) 14 All. 358.
(3) (1896) 23 Cal. 437.

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Even though section 15 of the new Limitation Act of 1908 be held inapplicable, the present case may be viewed from another standpoint. Our opposition to the judgment-debtor's insolvency should be regarded as a step-in-aid of execution of our decree under Article 179 of the old Limitation Act of 1877, corresponding with Article 182 of the new Limitation Act of 1908. It was necessary for us to apply to the "proper Court" to have the judgment-debtor's insolvency set aside before we could apply for his arrest.

BEAMAN, J. :—The facts in this case are somewhat unusual. There was an ordinary mortgage decree of the year 1903. The mortgagee applied for execution in due course on the 8th of August 1905. In January 1906 the mortgagor applied under the old Code of Civil Procedure to be declared an insolvent. In his application of August 1905 the mortgagee asked that the property might be sold, but did not seek any further relief against the mortgagor. Accordingly in June 1906 the property was sold under this darkhast. In September of the same year the Court declared the mortgagor an insolvent, although under section 351 it did not discharge him. In December of the same year the Court struck off the darkhast of August the 8th, 1905, for two reasons: (1) that it had been satisfied, (2) that the judgment-debtor was now an adjudicated insolvent. The mortgagee appeared from the first in the insolvency proceedings as the sole opposing creditor.

We might find some difficulty, more, speaking for myself, I think a verbal than a real difficulty in bringing such appearance within the meaning of the words "application to take some step-in-aid of execution" under Article 179 (old), now Article 182 of the Schedule to the Limitation Act. But as the result of those proceedings was against him, the creditor, appellant here, appealed to the District Court and

succeeded. We think that it is not putting too great a strain upon ordinary language to say that an appeal in such circumstances fairly falls within the meaning of the words: "an application to take a step-in-aid of execution." It is clear that as long as the insolvency proceedings went in favour of the debtor, the creditor could not have presented any application in ordinary course for the further execution of his decree with the least hope of success. Two at least of the High Courts in India had already put so liberal a construction upon the insolvency provisions of the old Civil Procedure Code that an executing creditor must have foreseen that no application for the execution of the decree either by sale of property or arrest of the person of the judgment-debtor could have the least chance of success so long as the judgment-debtor had been declared an insolvent under section 351, even although he had not been actually discharged within the meaning of section 357. So that we think that in view of the Court's finding that this judgment-debtor was an insolvent early in 1906, the present appellant had no other course open to him than in the first instance to get this bar to the further execution of his decree removed, and the only way in which he could hope to obtain that result would be by first opposing the insolvency petition in the first Court, and if he failed there, by appealing to higher authority. This he did, and although it is unnecessary to trace the subsequent tedious proceedings, it is sufficient to say that his last appeal could not have been made earlier than January 1909, that is to say, well within three years of his present darkhast.

Adopting that view, it is unnecessary to enter into any of the other nice and difficult questions which have been raised and adequately argued in the course of this appeal. We do not seek to lay down any general principle upon any of those questions, but we desire to

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confine our judgment to the rather unusual facts before us, and we think that we do no violence to the meaning of Article 179 (old), now Article 182, by holding that the present darkhast is within three years of the last application made by the judgment-creditor to a Court to take some step-in-aid of the execution of his decree. For these reasons we think that the appeal ought to be allowed and the judgment of the Court below reversed. We direct, therefore, that the darkhast be restored and that execution do proceed upon it according to law. We think that this appeal must be allowed with all costs.

Appeal allowed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

1914.

July 8.

MANJUNATH SUBRAYABHAT (ORIGINAL PLAINTIFF), APPELLANT, *v.* SHANKAR MANJAYA (ORIGINAL DEFENDANT), RESPONDENT.*

Vritti *inalienable—Alienation in special cases under special conditions—Local usage and custom.*

As a general rule *vrittis* are inalienable. They may be alienated in special cases and under special conditions provided that such alienations can be supported by local usage and custom.

Rajaram v. *Ganesh*(1), referred to.

SECOND appeal against the decision of C. V. Vernon, District Judge of Kanara, reversing the decree of V. V. Bapat, Subordinate Judge of Honavar.

The plaintiff sued in the year 1908 to recover from the defendant Rs. 49-15-11 alleged to be due to him on account of his purchase of a ¾ share of a *vritti* consisting of cash allowance.

* Second Appeal No. 574 of 1912.

(1) (1898) 23 Bom. 131.