Equivalent Citation: AIR 1932 Lah 281, (1932) ILR 13 LAH 70, 137Ind. Cas.820

IN THE HIGH COURT OF LAHORE

Decided On: 11.07.1930

Appellants: **Umrao Bibi**
Vs.
Respondent: **Ram Kisen and Ors.**

JUDGMENT

Tek Chand, J.

1. The litigation out of which this appeal has arisen, commenced as far back as 1899 and has had along and chequered career. The central figure in the litigation is one Hamid Shah, a Gardezi Sayed of Multan City. He belonged to one of the leading families of the district and has succeeded to a large Sanded estate. He however ran into debt a part of which was raised on the security of a portion of his immovable property and the rest was unsecured. In course of time the creditors pressed him for payment of their dues, but instead of settling with them, he made several transfers of portions of his property to his wives, daughters and other relations in or about 1899. Eventually one Gela Ram, who had a decree against him for the small sum of Rs. 500 and who had failed to obtain satisfaction by other means, got Hamid Shah arrested by order of the executing Court.

2. Thereupon, on 1st April 1899, Hamid Shah presented in the Court of the District Judge Multan, a petition under Section 344 Civil P.C. (10 of 1882), for adjudication as insolvent. This petition was accompanied by two lists: one marked (A) givinga description of the property which then belonged to him, and the other marked (B) containing the names and particulars of creditors (45 in number) and the amount due to each of them. In this petition he recited the fact of his arrest in execution of Gela Ram's decree, alleged that he was unable to pay his debts, stated that he was prepared to place the property in list (A) at the disposal of the Court for paying off the creditors and asked for an adjudication order. This petition was opposed by some of the creditors who urged that Hamid Shah had lately transferred a large part of his -property to his wives, daughters and friends, with the object of defeating and delaying the creditors, and that the petition had not been made in good faith. After some adjournments, Hamid Shah came to terms with a large majority of his creditors and on 10th November 1899 an application (Ex. P. 25) signed by him and 35 out of the 45 creditors mentioned in list (B) was presented before the District Judge embodying the terms of a "compromise," which had been arrived at between them. A translation of this application is printed at p. 1, Vol. 2 of the paper-book, but on reference to the" original, it was admitted by both counsel that it is not quite accurate. Another translation of this application will be found in the lower Court's judgment at p. 88, Vol. 1, and this has been accepted by both parties as substantially correct. As the decision of the case mainly depends on the interpretation of this document, and reference will have to be made to it frequently in the course of this judgment it is desirable to transcribe it verbatim here:

In the Court of the District Judge, Multan.

3. In re It amid Shah, Judgment-debtor v. Creditors.

In the above noted case the parties having come to terms present this compromise which may he accepted.

I, Sayed Hamid Shah admit that the whole property of which I have filed the list in Court may be regarded as sold on my part.

We, all the creditors, accept the application of Sayed Hamid Shah and agree that he may be declared an insolvent under Section 344, Civil P.C.

The following conditions have been fixed among the creditors with respect to the disposal of the insolvent's property.

Firstly, regarding that property of Sayed Hamid Shah, judgment-debtor, which is already mortgaged with possession, if any one among the whole body of creditors agreed to pay higher (than the mortgage amount) it shall be given to him and the surplus included in the insolvent's money. In case no other creditor agrees to pay higher, the property shall be deemed as sold to the present mortgagees.

Secondly regarding that property, which is entered in the list as Khalis Malkiyat (unencumbered property) the value should be ascertained through local Commissioners and the amounts due to the creditors should also be determined through Commissioners. If any creditor or other person should like to take the property on payment of the price ascertained by the Commissioners it would be given to him and the price will be distributed among the creditors in proportion to the amount due to each as determined by the Commissioners. And if no one among the creditors or other persons is willing to purchase the said property then the Commissioners shall divide it among the creditors in proportion to the amount ascertained to be due to each as proposed above.

Sayed Hamid Shah may be absolutely absolved from every kind of liability to the creditors in future and his whole debt may be considered as squared in lieu of this very property,

4. As stated already the total number of creditors mentioned in list (B), annexed to the petition for insolvency, was 45, and of these 35 had signed the application (Ex. P. 25) on 10th November 1899. It appears that the remaining creditors were at first unwilling to accept the arrange, ment embodied in that document, but after a few weeks their opposition died out and by 30th April 1900 they too signified their assent to it and agreed to its terms. Statements to this effect were made before the District Judge who passed an order accepting Hamid Shah's prayer, and adjudicated him insolvent on 1st May 1900. The usual notifications were published, and in due course the Court appointed a local Commissioner for the purpose of determining the exact amount of the debt due to each creditor and for valuation of his property. It also directed the civil nazir to take possession of the moveable property of the insolvent and to arrange for its sale by public auction.

5. While matters were at this stage Hamid Shah died in August 1900. He had no son, but loft him surviving four widows, three daughters and a brother. Shortly after his death a question arose before the revenue authorities as to the person or persons whose names should be substituted for that of Sayed Hamid Shah in the revenue records. Three of his widows, Mt. Tind Wadi, Allah Wasai and Mughlani Bibi appeared before the Revenue Officer and definitely stated that they laid no claim to his estate, as in his lifetime he had given them sufficient property for their maintenance. They expressed a desire that the lands standing in his name be mutated in favour of his creditors

as our husband has made over the said pro perty to his creditors. Therefore, the same may be given to them.

6. The fourth widow Mt. Umrao Bibi, appellant No. 1, also, did not claim to succeed to the property as heir of Hamid Shah but prayed that a small part of it may be given to her for her maintenance and the rest made over to the creditors. Sayed Eateh Shah (Appellant No. 2), brother of the deceased was also present during these proceedings and the record does not show that he put forward any claim to the estate. On 10th May 1901 the Revenue Officer passed a somewhat unusual order, in which he stressed the point that in view of the proceedings in insolvency a peculiar situation had arisen, and expressed the opinion that in order to complete the record "the entry must be made in the

name of somebody." He ordered therefore that

for the present mutation might be entered in the name of Mt. TJmrao Bibi and that the receiver be informed that this has been done for the time being and that she would be entitled to maintenance only. The property could however be made use of for all purposes.

7. In the meantime, under orders of the insolvency Court the local Naib Tahsil-dars had taken possession of the lands, situate in their respective jurisdictions and after realizing the produce and selling it they began to deposit the proceeds in the Treasury. Nothing much appears to have been done until 1911 when two of the creditors, Milkhi Ram and Munshi Ram (present plaintiffs 54 and 55), applied to the insolvency Judge for payment to them of their dues, out of the amount realized from the estate of the insolvent. To this application Mt. Umrao Bibi and Eateh Shah raised vari, ous objections, inter alia, impugning the validity of the arrangement made by Sayed Hamid Shah with the creditors in 1899. The insolvency Judge, Mirza Zafar AH, in a very brief order dismissed the creditors' application on 10th June 1911. These creditors appealed to the Divisional Judge but their appeal was unsuccessful. They then moved the Chief Court on the revision side (C.R. No. 1663 of 1912). The petition for revision came up before Chevis, J., who heard argumentsat great length, and eventually by agreement of all parties passed an order on 2nd March 1916. As this order has a very important bearing on the questions requiring decision by us it seems necessary to set out its terms in some detail. In this order the learned Judge reviewed the previous history of the litigation, and after summarizing the provisions of the arrangement between Hamid Shall and the creditors as embodied in the document (Ex. P-25) dated 10th November 1899, observed as follows:

At first some creditors did not agree but apparently by 30th April 1900 opposition died out and all creditors then agreed. One would have thought that the insolvency proceedings would then have stayed, as under the agreement the lands passed to the creditors and all Hamid Shah's debts were wiped out. When the debts had vanished how could the man be regarded as insolvent? But the Court on 1st May 1900 passed an order declaring him an insolvent.

8. The learned Judge then referred to the subsequent proceedings in the insolvency Court and wound up his order as follows:

This leaves matters just where they were before. The insolvent has died long ago, property is locked up, and apparently the insolvency proceedings will go on for ever. The insolvency proceedings should, I think, have been dropped on 1st May 1900 and all parties before me agree to this. Until the insolvency proceedings are dropped nobody can take any steps either in Court or out of Court to do anything with the property. As far as I can see, no one of the parties can break away from the insolvency Court and attempt to enforce his rights by a regular suit.

All parties before me agree by their counsel to the following order:

I accept this application for revision and set aside the order of the Divisional Judge and all proceedings in the Divisional Court and in the insolvency Court back to 1st May 1900. I set aside the order of the District Judge, dated 1st May 1900 and instead I pass an order dismissing the application of Hamid Shah to be declared an insolvent.

9. As stated above, all parties had agreed to the order passed by Mr. Ghevis. But it appears that the agreement did not last long. Disputes arose soon among the creditors of Hamid Shah on the one side and his heirs on the other, as to the effect of the order on their respective rights. The creditors claimed that it was a recognition of their rights as owners of the properties mentioned in list (B) by virtue of the arrangement recited in the document of 10th November 1899; while Mt. Umrao Bibi considered herself entitled to these properties as the next heir to Hamid Shah. She set the ball rolling by making an application to the Insolvency Court on 25th April 1916 for a direction to the Commissioners to handover possession of the aforesaid properties-to her, and an

order to the treasury to pay her the cash which had been realized in the course of the insolvency proceedings and had been deposited there. This application was opposed by the creditors' but the Insolvency Judge Misra Jwala Sahai, passed a summary order in favour of Mt. Umrao Bibi on 19th March. 1917. The creditors appealed to the District Judge, but the appeal was unsuccessful. They then preferred a petition for revision to the High Court, questioning the jurisdiction of the Insolvency Judge to pass the order and challenging the finding of the Courts below that the title in the properties had not passed to the creditors. Wilberforce, J., who dealt with this petition, overruled the contention that the order under revision had been passed without jurisdiction,and held that it was not necessary for him to go into the merits of the lower Court's order,

as the facts were most complicated and difficult of decision and could only be determined by a regular suit.

10. Following the well-settled practice to this Court not to interfere on revision when another remedy is open to the aggrieved party, the learned Judge dismissed the petition on 11th February 1919.

11. The creditors were not slow to avail themselves of the remedy by the regular suit and within a fortnight of the High Court order, the present action was commenced by some of them in the Court of the Senior Subordinate Judge, Multanr praying for; (a) a declaration that the lands in question and Rs. 3,500 lying in deposit in the Multan Treasury were owned by them, and the other creditors (defendants 7--50) by virtue of the "compromise," terms whereof had been recited in the application of 10th November 1899, (b) possession as owners of such of these lands as had been handed over by the Insolvency Judge to Mt. Umrao Bibi by its order dated 19th March 1917, and (c) recovery of Rs. 1,300 which Mt. Umrao Bibi had realized from the insolvency Court. In the alternative, the plaintiffs claimed a decree for Rs. 1,36,104-4-6 as the amount clue to them by the estate of Hamid Shah deceased. Several creditors who had not joined in the claim and had been impleaded as defendants in the plaint were, on their application made co-plaintiffs. The suit was resisted by Mt. Umrao Bibi and Mt. Jind Wadi two of Hamid Shah's widows (the other two widows having dio.l in the meantime,) Mt. Swai Bibi, Amirzadi Bibi, ArbabBibi (defendants 3 to 5), his daughters; and Saved Fateh Shah (defendant 6) his brother. These defendants filed lengthy written statements raising numerous pleas which are covered by the following issues framed by the trial Court:

1. Was the registration of the compromise in suit compulsory on defendants?

2. Was the compromise in suit a complete sale or at least an agreement to sell? On plaintiffs.

3. Is the claim for specifics performance barred by reason of any previous orders? On defendants.

4. Did Hamid Shah raise debts for immoral purposes and was he therefore incompetent to transfer the property in suit in payment of such debts? On defendants.

5. Is the compromise in suit valid and enforceable? On plaintiffs.

6. What amounts by way (of?) debts are due to the several plaintiffs from Hamid Shah deceased? On plaintiffs.

7. Is the suit within time? On plaintiffs.

8. To what relief, if any, are plaintiffs entitled? On plaintiffs.

12. The learned Senior Subordinate Judge, in an elaborate judgment has decided in favour of the plaintiffs all these issues, except issues 3 and 6, which did not arise on his findings, and has passed a decree granting the creditors reliefs (a), (b) and (c) mentioned above. From this decree three of the defendants, namely, Mt. Umrao Bibi (widow), Mt. Amirzadi Bibi (daughter) and Sayed Fateh Shah (brother) of Hamid Shah have preferred a first appeal to this Court and on their behalf we have heard at great length. Sir Muhammad Shafi and. Mr. Mehr Chand

Mahajan, while Mr. Badri Das has addressed us for the respondents.

13. At the commencement of the hearing Mr. Badri Das raised a preliminary objection that three of the plaintiffs-respondents (13, 17 and 93) had died during the pendency of this appeal, that their representatives had not been brought on the record within the period of 90 days prescribed in Article 177, Lim. Act, (as amended by Act 11 of 1923), and consequently the appeal had abated against these respondents; It was also urged that having regard to the nature of the claim and the terms of the decree of the lower Court the appeal could not proceed against the other respondents. The affidavits and the extracts from the Death Register, produced before us, prove conclusively that Megh Raj and Ishar Das, plaintiffs, died on 2nd and 17th November 1928, respectively, and applications under Order 22, Rule 4, to substitute their representatives, were not made till 27th March 1929. Similarly Tika Mal alias Tek Chand, son of Kewal Mal, plaintiff-respondent 17, died on 17th March 1924 and an application to bring his representatives on the record was made on 27th August 1925. Moreover in this application Nathu Ram was described as one of the representatives of the deceased, but Nathu Ram had died on 29th October 1923, having predeceased his father by six months and had left his own sons who were among the heirs of Teka Mai. It is thus clear that all the applications were made out of time, and the appeal automatically abated against the deceased respondents.

14. When these facts were brought to light at the hearing an oral prayer was made by the appellant's learned Counsel that the abatement be set aside on the ground that appellant 1 is a pardanashin lady and that it was not possible for her to keep herself informed of the whereabouts of all the respondents in a big city like Multan. This prayer I find myself unable to accept. In the first place, it is to be borne in mind that Mt. Umrao Bibi was not the sole appellant in the case. Her brother-in-law Fateh Shah was a co-appellant and he was admittedly alive at the time when the aforesaid respondents died. No attempt has been made to explain why Fateh Shah could not have made the requisite applications within time. Secondly, it is noteworthy thatJn each of the applications filed by Mt. Umrao Bibi under Order 22, Rule 4, a careful attempt was made to conceal the exact date of the death of the respondents concerned, it being wrongly stated in each case that he had died only two and a half months before, and it was on this false averment that orders were secured from the Judge in Chambers granting the applications subject to all just exceptions. It was not until a few days before the hearing, when the respondents had filed counter-affidavits supported by entries from the Death Register, that it was suggested on behalf of Mt. Umrao Bibi that she could not keep herself informed of the factum of the death of these persons because she was a pardanashin lady. It is obvious that she has not come before the Court with clean hands, and it is difficult to accept as true the explanation now put forward by her. No sufficient cause under Order 22, Rule 9, has been shown; and it must be held that the appeal has abated against Megh Raj, respondent 13, Teka Mal, respondent 17, and Ishar Das, respondent 93.

15. The next point for determination is whether, on the above findings the appeal can proceed against the surviving respondents. The question as to when partial abatement of an appeal results in the total dismissal of the whole appeal, has been lately considered by a Full Bench of this Court in Sant Singh v. Gulab Singh A.I.R. 1928 Lah. 572. In that case the learned Chief Justice observed at p. 13 as follows:

Whether the appeal can, or cannot, proceed in the absence of the legal representative of the deceased respondent must depend upon the nature of each case and it is not possible to formulate a rule of general application. It is obvious that if the action, which has given rise to the appeal, could have been brought without impleading the person who has died, his death affects only the interest, if any, which he had in the litigation, but it cannot prevent the determination of the rest of the claim. This rule does not however solve the problem in every case. The test often adopted in such cases is whether in the event of the appeal being allowed as

against the remaining respondents, there would or would not be two contradictory decrees in the same litigation with respect to the same subject-matter, It is a matter of common sense that the Court should not be called upon to make two inconsistent decrees, about the same property, and in order to avoid conflicting decrees the Court has no alternative, but to dismiss the appeal as a whole. If, on the other hand, the success of the appeal would not lead to such a result, there is no valid reason why the Court should not hear the appeal and adjudicate upon the dispute between the parties who are before it.

16. Another test which has been laid down in the same judgment (p. 21) is that the question whether the appeal will abate in whole or in part depends on whether the interests of the respondents are or are not separatly defined. If they are separate or separable, the appeal will abate only as regards the interest of the deceased. If however this is not the case the proceedings will abate as regards the whole of the joint interest.

17. Applying these tests to the present case I have no hesitation in holding that the appeal must be held to have abated in its entirety. The plaintiffs claimed and have been granted a declaration that the properties in dispute belonged jointly to them and defendants 1-70, according to the terms of the "compromise" recited in the application dated 10th November 1899. They have also been granted possession of these properties. Now the terms of the "compromise" so far as they related to the rights of the creditors inter se provide that every unsecured creditor has the option of purchasing any of the mortgaged property on payment of a sum larger than the mortgage charge subsisting on it, and that in the event of this option being exercised the surplus amount after paying off the mortgagee in question shall (along with the proceeds of the unencumbered properties) be distributed pro rata among the unsecured creditors. If, on the other hand, no unsecured creditor offered to pay for a particular mortgaged property a price over and above the mortgage charge, it shall pass to the mortgagee as full owner in lieu of his debt. This interpretation is accepted as correct by the appellants' learned Counsel, and it is also conceded that the unsecured creditors have not been given as yet the opportunity to exercise this option. It is therefore impossible to determine the amount available for distribution among the creditors, or the proportion in which it is to be divided. The subject-matter of the joint decree passed by the lower Court in favour of the various respondents is therefore not only not separate, but it is at present inseparable and indivisible. This being the real position relating to the rights of the decree holders inter se there can be no doubt that in the event of the appeal being accepted, there would be on the records of the Court two contradictory decrees in respect of the same property; one passed by the lower Court having been left intact in favour of the deceased respondents, and the other of the appellate Court in favour of the appellant in terms directly opposed to it. For these reasons, it is clear that the appeal cannot proceed against any of the respondents and its partial abatement against the deceased respondents must result in its dismissal against all.

18. This finding is sufficient to dispose of the case, but as this litigation has already gone on for more than 30 years, and it is possible that, in lbs event of an appeal being preferred to their Lordships of the Privy Council, a view of the law different from that expressed in the Full Bench decision of this Court may be taken, we have thought it desirable to give our decision on other questions which have been argued before us.

19. On the merits, the main question for determination is the exact nature of the transaction which was effected between Hamid Shah and his creditors in 1899, and to which reference was made in the petition presented by them jointly to the District Judge on 10th November 1899, (Ex p. 25). An examination of this petition clearly shows that it consists of three separate and distinct parts. The opening sentence is very significant and recites the fact of the parties "having come to terms" among themselves. It does not, by itself, purport to convey any property or create or declare any rights but contains a recital of an accomplished fact, the terms whereof are repeated with a view to ask the Court to grant a certain consequential relief in

respect of the proceedings pending before it. The second sentence contains an admission by Hamid Shah of the fact that he had transferred his properties described in List (A) to the creditors whose names had been specified in List (B) and asks the Court to regard it as "sold on my part." In the next sentence the creditors intimate to the Court their acceptance of the application of Hamid Shah and state that they agree to his being declared an insolvent. Then follow the terms of the agreement which had been arrived at between the creditors inter se as to the mole of division among themselves of the properties which had been conveyed to them by Hamid Shah. And finally there is the prayer by the creditors to the Court that Hamid Shah may be absolutely absolved from all liability to them in future and the whole of his indebtedness to them be considered as squared in lieu of the properties already conveyed to them.

20. Now it is clear that the petition (Ex. p. 25) does not record a mere agreement to sell any property in future as seems to have been suggested at one stage before the lower Court. Nor is it a document by which property was conveyed in praesenti by Hamid Shah to the creditors. It is in terms and in essence nothing but a petition to the Court reporting an arrangement which had been arrived at between the signatories out of Court by which certain properties belonging to the debtor Hamid Shah had been conveyed to the creditors mentioned in List B in full satisfaction of the debts due by him to them. This arrangement could however become effective only if the remaining ten creditors also accepted it. These creditors were not agreeable at first, but later on they not only waived their opposition, but expressly agreed to it, some before the 30th April, and the others on that date. The arrangement thus became complete and indefeasible. On that date therefore title in the properties in list (A) passed to the creditors, mentioned in list (B), and Hamid Shah became free from his indebtedness to them.

21. It is no doubt true that the parties to this petition had misconceived the nature of the order which, in consequence of this arrangement, the Court should or could have passed in the proceedings under Section 344, Civil P.C., which were pending before it at the time. They appear to have been under the erroneous impression that under the law the proper order to pass was the adjudication of the quondam debtor Hamid Shah as insolvent and under that misconception they made a prayer to that effect to the Court. The presiding officer of the Court also fell into the same error and proceeded to pass an adjudication order. In my opinion this order did not and could not affect the legal rights which the parties possessed independently of it on the 1st May when, it was passed. In any case, this error was set right by Chevis, J., in 1916 when he definitely set aside all proceedings, "back to 1st May 1900." We must therefore leave out of consideration all that, took place in the insolvency Court between 1st May 1900 and 2nd March 1916 on which date the prayer for the adjudication of Hamid Shah made in the petition of 1st April 1899 was rejected.

22. That the parties to this litigation had also originally put this interpretation on the transaction of 1899 is clear from the fact that on the death of Hamid Shah in. August 1900 none of his heirs claimed to succeed to these properties; three of his widows distinctly stated before the revenue authorities that the deceased had "made over these lands to the creditors' arid they may be given to them" and Mt. Urrirao Bibi put forward a fainthearted claim to be maintained out of the income.

23. The correctness of this view is further strengthened by the fact that the order of Chevis, J., was parsed by agreement of all parties including the appellants. The basis of this order was the finding recorded by the learned Judge that by the arrangement in question the properties "passed to the creditors, and all Hamid Shah's, debts were wiped out." On the finding the learned Judge proceeded to put to himself the question, "When the debts had vanished how could the man be regarded as insolvent?" And answering this question in the only way in which it could be answered, he set aside the order of 1st May 1900 and dismissed the petition of Hamid Shah for adjudication as insolvent. It is necessary to emphasize the fact that the order was passed by consent of the appellants and as it proceeded on the assumption that the creditors had become

owners of the property before 1st May 1900 they cannot be allowed now to turn round and say that the very foundation of that order was erroneous. The matter therefore falls within Section 115, Evidence Act, under which, as well as on general grounds, the appellants must be held estopped from jgoing behind it.

24. At this stage it will be convenient to consider the position of a certain creditor, Jahangirji, to whom reference has been made in the lower Court's judgment and in arguments by the appellant's learned Counsel. The relevant facts are that Jahangirji was not one of the 45 creditors mentioned in List (A) attached to the petition Ex. P-25 and therefore no title had passed to him by the arrange, ment recited in it. On 13th January 1902 however he filed an application in the insolvency Court that his name be included in the list of the creditors, as he held a money decree against Hamid Shah. On this the Court directed notices to issue to the heirs of the deceased. This application does not appear to have been granted and we find from the order dated 27th August 1902 (printed at p. 11, Vol. 2 of the paper-book) that the Court accepted as correct the list of creditors which had been prepared by the local Commissioner. This list is on the record and it does not contain the name of Jahangirji. His failure therefore to signify his assent to the arrangement described in Ex. P-25 before it became effective on 30th April 1899 does not in any way affect its validity. For the foregoing reasons I hold that title in the properties in dispute passed to the 45 creditors before Hamid Shah's death and the appellant's contention to the contrary must fail.

25. On the findings given above it was conceded that the other questions raised in the memorandum of appeal do not arise. Ex. P-25 did not by itself transfer, create or declare any rights in immovable property and it was not necessary to have it registered under Section 17, Registration Act.

26. Similarly the Punjab Alienation of Land Act which came into force in June 1901, and which admittedly has no retrospective effect is clearly inapplicable to the transaction, which, according to the view I have taken had been completed more than a year before.

27. Equally devoid of force is the plea of limitation. It was urged that the sale having been effected in 1900 and the present suit having been brought in 1919 was time barred. The history of the litigation as narrated above shows however that from 1st May 1900 to March 1917, the property was in custodia legis under an erroneous order of the insolvency Court, which had taken upon itself the task of administering it for the benefit of the creditors. It is obvious that during this period the plaintiffs could not possibly have instituted the suit and that it was only after the property had been restored to appellant 1 in 1917 that a cause of action arose to them. In any case, the provisions of Sections 14 and 15, Lim. Act, are clearly applicable. The learned Subordinate Judge has dealt with this aspect of the question at length in his judgment and as I am in agreement with his conclusions as well as his reasoning, I do not think it necessary to repeat what he has said. In my opinion the suit is clearly within time.

28. The other points raised in the memorandum appeal were not argued before us.

29. The appeal fails and I would dismiss it with costs.

Tapp, J.

I concur.