

I have come to the conclusion, on the whole of the evidence, that the defendant's version is the true one, and that the plaintiff cannot recover against the defendant as the hirer of his boats.

It was said, however, for the plaintiff that, even on the defendant's own account of the facts, he was entitled to account and discovery. *Prima facie*, no doubt, a principal is entitled to such relief against his agent. But I think it clear that the plaintiff cannot have such relief in this suit as at present framed. I cannot give him relief for which he has not asked, on the ground of a state of facts the contrary of that which he has asserted.

It was said, however, that the plaintiff might be allowed to amend his plaint to meet this view of the case. I think, however, when the parties have come to trial to determine which of two stories is true, it would be a dangerous precedent to allow the plaintiff to amend, by abandoning his own story and adopting that of the defendant, and asking relief on that footing. The question whether on that footing the plaintiff is entitled to relief, is one to which in such case the defendant's attention has not been called, and as to which he has had no opportunity of answering. Nor would much have been gained by amending, for it could only have been on the terms of the plaintiff's paying all the costs of the suit.

Suit dismissed with costs.

Attorney for the plaintiff: Baboo Nobin Chunder Bural.

Attorney for the defendant: Baboo Gonesh Chunder Chunder.

INSOLVENCY.

Before Mr. Justice Broughton.

IN RE HURRUCK CHUND GOLICHA.

Insolvency Adjudication—Gomashta—Trader beyond Jurisdiction carrying on business by a Gomashta within Jurisdiction—Practice—Affidavit, time for filing—Stat. 11 and 12 Vict., c. 21, s. 9.

A trader, residing out of the jurisdiction of the High Court, but carrying on business at Calcutta by a gomashta, can be adjudicated an insolvent under 9 of 11 and 12 Vict., c. 21, if his gomashta stops payment and closes and

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leaves his usual place of business, or does any act which, if done by the trader himself, would have rendered him liable to be adjudicated an insolvent.

An affidavit, intended to be used to oppose or show cause against a motion or petition, is filed in time, if filed, on or before the sitting of the Court, on the day that cause is in fact shown, although not filed before the sitting of the Court on the day for which notice was given.

ON the 22nd of March 1880, one Hurruck Chund, carrying on business at Calcutta, under the name of Hurruck Chund Okhoyram, was adjudicated an insolvent under s. 9 of the Indian Insolvent Act, 11 and 12 Vict., c. 21.

The adjudication was made upon the petition of a creditor, Misree Lall, who stated:—

1st. That Hurruck Chund was a trader in Calcutta.

2nd. That, on the 28th of February 1880, Hurruck Chund had departed from the jurisdiction, with intent to defeat and delay his creditors, and with like intent departed from his usual place of business.

3rd. That Hurruck Chund was indebted to the applicant.

4th. That Hurruck Chund had closed his place of business, and stopped all payments.

The order of adjudication was served on Nilkant Khan, the gomashtha of Hurruck Chund, on the 15th of April 1880.

On the 17th of May 1880, Misree Lall obtained an order directing the insolvent Hurruck Chund, and his gomashtha Nilkant Khan, to attend personally before the Court on the 15th June 1880, and so on from day to day, for the purpose of being examined touching the estate and effects of the insolvent.

On the 20th of May 1880, notice was served on the attorney the adjudicating-creditor, that, on the 25th May, an application would be made on behalf of Hurruck Chund Golicha, who was assumed to be the same person as the Hurruck Chund who had been adjudicated an insolvent, to revoke the order of the 22nd March, and the adjudication thereon. On the same day a petition, verified by Hurruck Chund Golicha, and several affidavits in support of it, were filed, which, if true, proved conclusive that Hurruck Chund Golicha had, for more than a year before the 28th of February 1880, been residing at Azimgunge, near Moorshedabad, and was there on the 28th of February 1880, an

could not therefore have on that day departed from Calcutta with any intent whatever.

On the 25th of May 1880, but whether after or before the sitting of the Court did not appear, an affidavit was filed on behalf of the adjudicating-creditor, in which the deponents affirmed, that, on the 28th of February 1880, they had attended at the place of business of the firm of Hurruck Chund Okhoyram, to demand payment of sums due to their employers, and that they had been informed by Nilkant Khan, the gomashita of the firm, that the business had failed and was closed; that his *malik*, or principal, had absconded, and that the creditors of the firm could not, therefore, be paid.

Owing to the time of the Court being occupied by other business, the application to revoke the adjudication did not come on to be heard till the 1st of June 1880.

Mr. *Jackson* for the insolvent.

Mr. *Piffard* for the adjudicating-creditors.

Mr. *Kennedy* watched the case on behalf of the Official Assignee.

Mr. *Jackson* for the insolvent urged; that the adjudication had been obtained upon an affidavit which alleged only one fact upon which the adjudication could have been legally grounded, the fact, namely, that the insolvent had, on the 28th of February 1880, departed from the jurisdiction with intent to defeat and delay his creditors, and that that fact was distinctly negatived and disproved by the verified petition and affidavits filed on behalf of his client. As to the affidavit in reply, which he understood Mr. *Piffard* intended to attempt to make use of, he submitted that the Court could not look at it, as it was not shown to have been filed before the sitting of the Court on the day on which notice had been given that the application to set aside the adjudication would be made. He also contended that the affidavit could not now be used, inasmuch as it contained grounds in opposition to the petition to revoke the adjudication of which notice had been served upon his client.

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Mr. Piffard.—This application to set aside the adjudication is too late. It is true that the Indian Act does not, like the English one, specify any particular limit of time within which an application to set aside an adjudication must be made, but it must be made *within a reasonable time*. In England, an application to set aside an adjudication must be made within twenty-one days. In the present case, notice that such an application is to be made is first given on the 20th of May, only two days less than two months after the order of adjudication, and a month and five days after service of it upon the insolvent. This is not the case of a prosperous and honest trader, who, by mistake, or fraud, or malice, has been, unjustly and without evidence, and notwithstanding that he is really perfectly solvent, adjudicated an insolvent, and who comes into Court directly he hears that proceedings have been taken and an order made prejudicial and destructive to his credit. P does not deny that he had, on the 28th of February, a trading business in Calcutta, which has been closed from that day, and all payments stopped. He does not deny that he is an insolvent or *allege that he is able and willing to pay his just debts*. P relies simply on the fact that the adjudicating-creditor was mistaken in saying that he, Hurruck Chund, or Hurruck Chund Golicha, had been personally present at Calcutta till the 28th February, and had, on that day, left the jurisdiction for the purpose of defeating or delaying his creditors; and it is not without significance that the insolvent apparently treated the order and the proceedings with indifference until he and his *gomashta* were ordered to attend in Court and be examined as to his estate and effects, and that three days after the making of this order notice is first served of this application. If no new case in reply had been made, or if the affidavits in reply were inadmissible, the application should be dismissed with costs: but I submit the affidavits in reply are admissible under rule 476 in Mr. Belchambers's book, and that, under rule 478, no notice was necessary. The affidavit in reply was filed in this Court on the 25th of May, whether before or after the sitting of the Court is immaterial, as it has now been filed in the Court seven days before this, the day on which the application is in fact made and

cause shown against it. That affidavit shows an act of bankruptcy committed at Calcutta by the gomashtha, by and through whom the insolvent carried on his Calcutta business. *Qui facit per alium facit per se.* Carrying on business within the jurisdiction by a gomashtha makes his principal subject to the jurisdiction of a Civil Court, and must equally make him subject to the jurisdiction of the Insolvent Court. As a matter of fact, a principal is so frequently in this country a person who, except enjoying its profits, has no concern with and takes no active part in the management of the business carried on in his name, that the legitimate operation of the law of insolvency would be defeated; and it would become impossible to obtain an adjudication against any native firm, unless an act of bankruptcy committed by a gomashtha were treated as the act of his principal, unless and until the latter shows that he had neither authorized, nor ratified, the act, and that he was not in fact in insolvent circumstances.

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The judgment of the Court was delivered by

BROUGHTON, J. (who, after shortly stating the facts, continued):—On these facts, without reference to an affidavit in answer, filed a week ago by the petitioning creditor, and I think properly available to him in this inquiry, two questions have arisen: *first*, a question of construction; and *secondly*, a question of practice.

The first question is, whether a trader, who trades by a gomashtha, can be adjudicated an insolvent, if the gomashtha commits an act of insolvency. If he cannot, there must be numerous cases in which native traders in this city cannot be adjudicated insolvent at all, for nothing is more common than for a trader living in the mofussil, and scarcely ever visiting Calcutta, to leave an extensive business in the hands of his gomashtha, who has the fullest authority, and who carries on the whole business on his behalf.

There are two ways in which a man may become insolvent. He may petition himself, under s. 5, or a creditor may petition under ss. 8 or 9.

Under s. 5, the petitioning insolvent must “reside within the

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jurisdiction," but it has been held more than once, and very recently held, that residence within the meaning of this section may mean carrying on business in Calcutta, although at the time not actually dwelling within the limits of Calcutta: *In re Tariney Churn Goho* (1) and *In re Howard Brothers* (2), both cases decided by Pontifex, J. There are several cases to the same effect cited in Millett and Clarke's *Insolvency in India*, p. 13, from the records of the office of the Official Assignee.

If the 5th section can bear this construction, a similar construction can be put on the words "depart from the limits of the jurisdiction" and "depart from his usual place of business within the jurisdiction." It requires, indeed, no departure from the literal meaning of the words to hold, that when a trader has established a business through a gomashtha, he departs from the place of his business, if his gomashtha departs, and if he does not come himself or send some one else to carry on the business. If, as in this case, the gomashtha shuts up the place of business and stops payment, he does in fact depart from his usual place of business, for the usual place of business is inside his house where the business is carried on, and not outside his house with the door locked behind his back; and when he shuts the place up and stops payment, he departs from his usual place of business with intent to defeat or delay his creditors.

It has been held that a trader non-resident whose gomashtha acts in this way may be adjudicated an insolvent: *In re Cullumjee Monjee* (3), a case decided by Sir C. Jackson, J., in 1858.

There it was alleged that the gomashtha had departed from the usual place of business, and the principal was adjudicated an insolvent, unless the gomashtha should, within eight days from the service of the order upon him, show good cause to the contrary.

I think, therefore, that the petition upon which the adjudication has been made is true when the words are construed as they have already been construed. The trader was present by the gomashtha, and by his gomashtha he absented himself.

It appears to me, therefore, that the question of practice need not be determined, that question being, whether, supposing the

(1) 11 B. L. R., App., 26.

(2) 11 B. L. R., 254.

(3) *Coryton*, 8.

adjudication to have been on a defective petition, it ought to have been set aside, when, on further evidence, it appears that the trader has made himself liable to be adjudicated an insolvent.

But I think that such further evidence can be taken into consideration on an application to set aside the adjudication.

In the present case the further facts appear upon the petition of the insolvent, the affidavit filed in support of it, and the affidavit in reply.

Mr. Jackson argues that the affidavit in reply cannot be used, because it was not sworn until after the Court sat to dispose of the case last week, when the case should have come on to be heard. But it was filed on that occasion, and it has now been filed for a week. This is all that is required by the rules of practice: rules 476 and 498, Belchambers's, p. 212. The insolvent had an opportunity of seeing the affidavit in answer if he desired to do so.

I think, therefore, that this petition must be dismissed, and that the adjudicating-creditor may add his cost of opposing it to his debt, and that the costs of the Official Assignee ought to be paid out of the estate.

Petition dismissed.

Attorney for the Petitioner: Baboo Womesh Chunder Benerjee.

Attorney for the adjudicating-creditor and the Official Assignee: Baboo Kali Nath Mitter.

APPELLATE CIVIL.

Before Mr. Justice Romesh Chunder Mitter and Mr. Justice Tottenham.

KRISHTO LALL GHOSE (DEFENDANT) v. BONOMALEE ROY AND ANOTHER (PLAINTIFFS).*

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July 24.

Evidence—Admissibility of Document requiring Registration—Divisible Transaction.

When a transaction is indivisible, and the registration of the document evidencing it is, by law, compulsory, the document will not be admissible in

* Appeal from Appellate Decree, No. 157 of 1879, against the decree of Baboo Nobin Chunder Gangooly, Subordinate Judge of Zilla Beerbhoom, dated the 21st of December 1878, affirming the decree of Baboo Purno Chunder Shome, Sudder Munsif of that District, dated the 15th of August 1878.