ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Heaton.

1916.

January 24.

MAHOMED HAJI ESSACK ELIAS (APPELLANT AND PLAINTIFF) *v.* ABDUL RAHIMAN BIN SHAIKH ABDUL AZIZ EL. EBRAHIM AND ANOTHER (RESPONDENTS AND DEFENDANTS).*

The Presidency Towns Insolvency Act (III of 1909), section 18 (3)—Suit on a promissory note against an adjudged insolvent—Proceedings against an insolvent may be stayed, although not pending at the time of the order of adjudication—Proceedings against an insolvent stayed, although leave to sue was obtained under section 17—Discretion of the trial Court in staying proceedings not to be interfered with, where interference would involve abuse of judicial proceedings.

The wording of section 18 (3) of the Presidency Towns Insolvency Act III of 1909 is wide enough to justify a stay of proceedings in an action which was not pending at the time of the order of adjudication.

Section 10 of the English Bankruptcy Act, and *Brownscombe* v. *Fair*,[1] referred to.

ON the 27th August 1913, the firm of Sobhagchand Naginchand and Company, the 2nd defendant, executed a promissory note in favour of one Abdul Rahiman bin Abdul Aziz Ebrahim, the 1st defendant, promising to pay to the 1st defendant or order sixty-two days after date the sum of Rs. 50,000 for value received. The 1st defendant endorsed the said promissory note to the plaintiff for good consideration and the plaintiff was the holder in due course thereof.

The 1st defendant was adjudged insolvent on the 27th October 1913, and the 2nd defendant's firm was also adjudged insolvent on the 1st November 1913, the amount of the said promissory note remaining unpaid and due to the plaintiff.

On the 8th April 1915, the 1st defendant's petition for discharge was refused. The 1st defendant was however granted a protection order for one year on

* Appeal No. 56 of 1915.

[1] (1887) 58 L. T. 85.

the 16th April 1915. The protection order was, on appeal by the opposing creditor, set aside by the appellate Court on the 16th August 1916 : see *Mahomed Haji Essack* v. *Shaik Abdool Rahiman*.[1]

The plaintiff filed the present suit on the promissory note against the defendants on the 28th May 1915. Leave to file the suit was obtained under section 17 of the Presidency Towns Insolvency Act, 1909, on the 2nd June 1915.

On the 6th July 1915, the suit came on for hearing when counsel for the 1st defendant appeared and stated that the claim was admitted and the sole object in filing the suit was to strengthen the plaintiff's position as an appellant against the order made on the application for the insolvent's discharge. MACLEOD J. thereupon stayed the proceedings in the suit until further orders, his Lordship observing that he would have refused leave in the first instance, had the plaintiff's real object in asking for leave been disclosed.

After the decision of the appellate Court on the 16th August 1916, setting aside the protection order in favour of the 1st defendant, the plaintiff applied on the 30th September 1916 for the removal of the stay order. MACLEOD J. refused to remove the stay order. His Lordship dismissing the application remarked as follows : "I see no reason why I should remove the stay order. If I did, the only result would be that I should pass a decree for the plaintiff and stay execution against the 1st defendant, otherwise the decree in the hands of the plaintiff would be an instrument for extorting money."

The plaintiff appealed.

Bahadurji with *Inverarity*, for the appellant.

Desai, for the respondents.

[1] (1915) 40 Bom. 461.

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SCOTT, C. J. :—There are two questions in this case. The first is whether the learned Judge in making the stay order which is under appeal acted without jurisdiction. It was contended that section 18 (3) was the only section which could apply and that only applied where a suit had been instituted before the adjudication order was made. We have, however, been referred to the observations of the Division Court in England in *Brownscombe* v. *Fair*,[1] expressing the opinion that the corresponding words of section 10 of the English Bankruptcy Act which are practically identical with those of section 18 (3) of the Presidency Towns Insolvency Act, were wide enough to justify a stay of proceedings in an action which was not pending at the time of the order of adjudication.

The only other question is whether the learned Judge was wrong in exercising his discretion in the way he did to stay proceedings. The insolvent, it is true, has been guilty of many acts which incurred the severe reprobation of the Judges both in the Insolvency Court and in the Court of Appeal, and for that reason it was held by the Court of Appeal that he should not be protected after having his discharge refused against such actions as his creditors might be in a position to take against him. The only effective appellant in the appeal was the judgment-creditor who was added during the pendency of the appeal. It is said there is one other judgment-creditor and the result of the appeal would be that, at all events, with regard to those judgment creditors in the opinion of the Appeal Court they should be at liberty to enforce their rights against the insolvent's person. But that is not equivalent to saying that every one of the other fifty-four creditors should, as a matter of course, be allowed at this late stage to institute proceedings in respect of debts admitted in

[1] (1887) 58 L. T. 85.

the schedule and partially satisfied by dividends declared in insolvency in order that each of them may be in a position to harass the insolvent by proceedings for arrest. At this stage we are not concerned with the question whether or not each of the Judges of this Bench would have made the same order as Mr. Justice Macleod in the case of this particular creditor, but we are concerned with the question whether his exercise of his discretion ought to be interfered with, and we are of opinion that there is no good reason for interference. If we were to interfere upon such materials as are before us such interference would or might logically lead to consequences which would involve an abuse of judicial proceedings.

We, therefore, dismiss the appeal with costs.

Solicitors for appellant : Messrs. *Little & Co.*

Solicitors for respondents : Messrs. *Payne & Co.*

Appeal dismissed.

G. G. N.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Shah.

LAXMIPATIRAO SHRINIWAS DESHPANDE (ORIGINAL DEFENDANT No. 1), APPELLANT *v.* VENKATESH TRIMAL DESHPANDE AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 2 TO 13), RESPONDENTS.*

1916.

July 21.

Hindu Law—Adoption—Dvyamushyayana *adoption—Presumption.*

In every case of a *nitya dvyamushyayana* form of adoption, there must be an agreement to that effect : such an agreement must be proved by the person setting up the *dvyamushyayana* adoption, like any other question of fact, as much in the case of the adoption of an only son of a brother as in any other case of such an adoption.

* Second Appeal No. 339 of 1911.