(1931) 07 BOM CK 0022

Bombay High Court

Case No: O.C.J. Suit No. 1921 of 1927

Bhimaji Bhibhutmal		APPELLANT
	Vs	
Chunilal Javerchand		RESPONDENT

Date of Decision: July 8, 1931

Acts Referred:

- Provincial Insolvency Act, 1920 - Section 29

Citation: AIR 1932 Bom 344 : (1932) 34 BOMLR 683 : (1933) ILR (Bom) 623

Hon'ble Judges: Tyabji, J

Bench: Single Bench

Judgement

Tyabji, J.
Section 28(2) of the Provincial Insolvency Act, 1920, (which corresponds in its relevant part with the Presidency-towns Insolvency Act, 1909, Section 14) requires leave of the Court to commence suits, It runs :

On the making of an order of adjudication,...no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall daring the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose.

2. If a suit is commenced without the leave of the Court is it imperative on the Court to dismiss the suit ? So it was argued by Mr. Coyajee for the defendant. He contended that the view taken by Mr. Justice Davar in In re Dwarkadas Tejbhandas ILR (1915) Bom. 235 : 17 Bom. L.R. 925. was that once the suit had been brought without leave obtained, no course was open to the Court but to dismiss the suit; and that that decision had been followed in Ghouse Khan v. Bala Subba Rowther ILR (1927) Mad. 833 and Ponnusami v. Kaliaperumal A.I. R. [1929] Mad. 480

3. The decisions on the point refer to several allied questions which it is convenient to distinguish at the start :-

4. First, the question with which I have deal is does failure to obtain leave of the Court u/s 28(2) necessitate that the suit be dismissed ? or has the Court the option of taking some other step, either as a sanction for enforcing obedience to Section 28(2) or otherwise, for giving effect to the intention of the legislature ? Can the suit be merely stayed ?

5. Secondly, power is given to the Court to stay the suit u/s 29 of the Provincial Insolvency Act, 1920, on proof that an adjudication order has been made. That section is as follows:-

Any Court in which a suit or other proceeding is pending against a debtor shall, on proof that an order of adjudication has been made against him tinder this Act, either stay the proceeding; or allow it to continue on such terms as such Court may impose.

6. Does this indicate any priority in time between (a) the commencement of the suit, and (b) the making of the adjudication order ? Does it imply that the powers under s. 29 are to be exercised only if the suit is commenced first and the adjudication order made afterwards ? Section 29 gives powers to the Court (other than the Insolvency Court) in which a suit is pending against the debtor. The powers to the Insolvency Court are contained in Section 28(2). Has the Insolvency Court powers similar to those conferred by Section 29 ?

7. Thirdly, has the Court any power to stay the suit, except on an application by a creditor for leave to commence a suit? or can the power to stay be exercised at other times or on other occasions (a) Suppose leave to sue has once been granted and the suit commenced, can the Court subsequently stay the suit or otherwise exercise any powers u/s 29 or (b) suppose the suit has been instituted without leave, and then an application is made to stay, can the Court then stay or (c) suppose that the suit was instituted before insolvency proceedings were commenced, (so that leave to sue could not have been asked for under the Insolvency Act), is it necessary subsequently when Insolvency proceedings are commenced to obtain leave for proceeding with the suit or may such a suit be proceeded with without leave, though an adjudication order is made while the suit is pending can the Court on the application of another party stay such a pending suit ?

8. The matters mentioned thirdly are really covered by, and are merely new forms of or illustrations of the first two questions.

9. It must not be overlooked that in the majority of cases the plaintiff is not concerned which of the two alternatives-stay or dismissal is adopted against him : see e.g., Bheraji Samrathji v. Vasantrao(1928) 31 Bom. L.R. 981 If the suit is not allowed to proceed, it is (in the majority of cases) as good as dismissed. The

distinction be-comes important in a case, where (as in the present case) the adjudication order is annulled, or where there is a question of limitation or of incurring the costs of a fresh suit merely in order to obtain leave at the institution of the fresh suit. The English cases direct attention to the question whether the debt was provable under the Insolvency Act, or there was some such right in the plaintiif as entitled him to bring the suit and whether he would have been given leave if he had applied for it at the time of commencing the suit.

10. Section 29 of the Provincial Insolvency Act is for the present purposes identical with Section 18(S) of the Presidency-towns Insolvency Act, 1909: and both are similar to Section 10 of the English Bankruptcy Act, 1883 (46 & 47 Vic. c. 52), which is reproduced Sections 8 and 9 of the Bankruptcy Act, 1916 (4 & 5 Geo. V. c. 58).

11. Section 7 of the Bankurptcy Act 1916 corresponding to Section 9 of the Act of 1883, and to Section 28(8) of the Provincial Insolvency Act, provides that on the making of a receiving order "no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with leave of the Court and on such terms as the Court may impose." And u/s 10(2) of the Bankruptcy Act

The Court may at any time after the presentation of a bankruptcy petition stay any action, execution or other legal process against the property or person of the debtor and any Court in which proceedings are pending against the debtor may on proof that a bankruptcy petition has been presented by or against the debtor either stay the proceedings or allow them to continue on such terms as it may think just.

12. Section 171 of the Indian Companies Act (VII of 1913) provides that when a winding up order has been made no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose.

13. With reference to the question secondly mentioned by me above, it may be noted that the section last referred to,-which corresponds to the English Companies (Consolidation) Act 1908, (8 Edw. VII, c. 69), Section 142; and to Section 87 of the Companies Act of 1862,-explicitly applies to (a) continuing proceedings in regard to a suit already commenced before the winding up order, as well as to (b) the commencement of fresh proceedings after the adjudication order: cf. Section 29 of the Provincial Insolvency Act.

14. Section 28(2) of the Provincial Insolvency Act, with which I am primarily concerned, does not lay down what shall be the consequences of not obtaining leave at the time of instituting the suit.

15. It was argued for the plaintiff that those consequences must correspond to the powers to be exercised by the Court when an application for leave is made; that the

consequences arise from a conflict with the powers of the Court; that the consequences must conform to the object with which those powers are initially conferred on the Court; that a 28(2) is complemented by Section 29; that the former must be read in the light of the latter; that if so read it becomes clear that, though the law requires that at the very time when the suit is brought, leave of the Court must be obtained (so that the Court might either order the suit to be stayed or permit it to proceed to terms), yet, by analogy, in case the suit is, by oversight or otherwise, brought without leave obtained, the power of the Court to grant a stay is not taken away, and that that power may be exercised at any time during the pendency of the suit; that, on the other hand, the omission of the plaintiff to apply for leave does not either enhance the powers of the Court or restrict them so as to enable it, or compel it, to dismiss the suit.

16. This latter seems to have been the basis of the manner in which the question was argued before the Court of appeal in Mahomed Haji Essack v. Abdul Rahiman ILR (1916) Bom. 312 : 18 Bom. L.R. 198 In the suit out of which that appeal arose, leave had not been obtained prior to its commencement. Leave was subsequently obtained. Later, an application was made to Macleod J. to stay the suit. Stay was granted, In appeal the argument on behalf of the plaintiff was that Macleod J., having once given leave to proceed with the suit, had no jurisdiction to grant the stay. It does not appear to have been contended on behalf of the insolvent, either before Macleod J. or the Court of appeal, that the suit ought not to be merely stayed, but ought to be dismissed, inasmuch as it had been instituted without obtaining leave, that the Court had no option to do otherwise. Scott C.J., delivering the judgment in the Court of appeal, relied upon Brownscombe v. Fair (1887) 58 L.T.N.S .85 and referred to Section 10 of the English Bankruptcy Act. That section, as I have already said, is in terms practically identical with Section 29 of the Provincial Insolvency Act and s 18(3) of the Presidency towns Insolvency Act, The section of the English Act, the Chief Justice pointed out, was held to be (p. 314) "wide enough to justify a stay of proceedings in an action which was not pending at the time of the order of adjudication." The question was only incidentally argued as to what the Court is empowered to do where a suit has been commenced without obtaining leave in contravention of Section 28(2).

17. The decision in Mahomed Haji Essack''s case, therefore, calls for examination in detail because of the implications in it. The suit out of which it arose was commenced without leave. Leave was given by Macleod J, on a later date, In the Court of appeal, it was, to begin with, assumed (as is indeed beyond dispute) that the Court has power to stay a suit which is instituted when insolvency proceedings are pending, namely, where an order of adjudication is made and then a suit is instituted. As the next step, the question was dealt with, whether the Court can grant a stay in the converse case, viz., if the adjudication is made after the suit is instituted, can the suit be stayed in such a case ? This question was answered in the affirmative.

18. When the question lastly referred to is raised the facts that are assumed to exist imply either (a) that the suit had been commenced without obtaining leave or (b) that leave had been obtained, and the suit is sought to be stayed in spite of it.

19. If the first alternative (a) is adopted, it raises the question with which I am now concerned : Whether a suit commenced without the necessary leave can at all be allowed to proceed. Must it invariably be dismissed, or may it be merely stayed ?

20. If the latter alternative (b) is adopted, the question arises whether the Court having once exercised its powers under s. 28(2), its powers are exhausted, or whether it can exercise them again ? Having once given leave to bring the suit, can it again exercise its powers of staying the suit ?

21. The facts before the Court of appeal in Mahomed Hnji Essack v. Abdul Rahiman fell in a way under both alternatives. This may seem paradoxical. But the facts were these. The suit was instituted on May 28, 1915. Leave was obtained only on June 2, 1915. (So far alternative (a) is indicated). On July 6, 1915, the very Judge who had given leave said that he would have refuged leave if he had known the facts: he did not even then dismiss the suit on the ground that it was initially bad because it was commenced on May 28, 1915, without leave. He merely stayed the suit. The Court of appeal confirmed the stay; though Macleod J.''s orders were vigorously attacked no one argued that leave could not have been granted on June 2 in respect of a suit commenced without leave on May 28. All that was argued was that the power could not be exercised a second time: that leave once granted could not be revoked so as to stay the suit: no distinction was made between the two aspects (a) and (b) in which the question may present itself.

22. Neither in Mahomed v. Abdul Rahim nor in Brownscombe''s case was the point taken that the Court must dismiss an action which has been brought without leave obtained. Macleod J. is reported have similarly given leave u/s 171 of the IndianCompanies Act though the suit had been commenced without leave: In re Dwarkadas Tejbhandas ILR (1915) Bom. 235 : 17 Bom. L.R. 925

23. The facts in Brownscombe''s case were as follows. The plaintiff had commenced the action without leave of the Court. (See Mr. Herbert Reed''s argument for the defendant), The plaintiff had thereafter obtained from the Master and the sitting Judge in chambers leave to proceed with the action. The insolvent appealed to the Divisional Court, He contended that leave ought not to have been given. The Divisional Court discharged the order giving leave It held that there was no special ground why the action should be allowed to proceed and ordered that it should be stayed. It was not argued on behalf of the insolvent either before the Master or the sitting Judge in chambers or before the Divisional Court that inasmuch as leave had not been obtained at the time of commencing the action, it was initially defective; that the defect could not be cured at a later stage; that the only course then open to the Court was to dismiss the action. On the contrary till the matter came to the

Divisional Court the plaintiff succeeded in getting leave to proceed with an action which had been commenced without leave. It was only in the Divisional Court that an order adverse to the plaintiff was made; and the order was for stay, not for dismissal.

24. Similarly, in Blount v. Whitely(1898) 6 Man. Bank Cas. 48 there was no question of leave having been obtained, inasmuch as the plaintiff contended that leave was not necessary. The debtor applied that the action (which had been brought without leave) should be merely stayed u/s 9 of the Bankruptcy Act, 1883. Grantham J, refused even that application. The Court of Appeal does no more than stay the action " in accordance with the provisions of Section 9 of the Bankruptcy Act." Though the head-note and the arguments speak of " a bar to the action," all that is meant, and all the Court does, is to stay the action. It does not dismiss it.

25. The effect of these two cases is thus stated in Halsburys Laws of England Vol. II (first edn., p. 63, second edn., p. 90): " Similar actions which are commenced after the receiving order without leave of the Court may/will be stayed."

26. There is a third case decided in England-In re Warzer, Limited[1891] 1 Ch. 305-which is very much in point. Its applicability is, however, obscured by two facts:-(1) the proceedings, the validity of which was in question, consisted of a Scotch landlord''s petition forsequestration, commenced and prosecuted before the Sheriff''s Courts at Glasgow; (2) the Court was acting not under the Bankruptcy Act, but under the Companies Act 1862 (25 & 26 Vic. c. 89), These two obstacles can, however, be eliminated. The Scotch sequestration proceedings were held by North J, to fall within the meaning of the word sequestration in s. 163 of the Companies Act, 1862, Secondly, that section-section 163-(set out on p. 310 of the report) lays down (among other things) that "when any company is being wound up by the Court or subject to the supervision of the Court, any sequestration after the commencement of the winding up shall be void to all intents,'' Thirdly, Section 87 of the Companies Act, 1862, on which the main decision ultimately depended is for the present purposes (subject to an immaterial distinction with which I shall deal later) identical in terms with the relevant provisions of Section 171 of the Indian Companies Act, 1913, and with Section 28(2) of the Provincial Insolvency Act, 1920, which I have to enforce.

27. These being the statutory provisions, I must advert to a fourth point which strengthens the view that I ultimately take. The landlord commenced a proceeding which Section 163 declares to be " void to all intents." Nevertheless, it has been held in England through a long series of cases commencing in 1864 with In re The Exhall Coal Mining Co. Limited (1864) 4 G. J. & Sm. 377 that Section 163 must be read subject to the provisions of Section 87, with the result that the Court is held to have power to authorise even a sequestration falling under s.163,-a sequestration which is declared to be "void to all intents." This part of the decision is questioned, but nevertheless followed, in 1887, by the Court of Appeal in ln re Lancashire Cotton

Spinning Co.(1887) 35 Ch. D. 656 But this doubt does not cloud the point that I have to decide for this reason. Certain proceedings are by Statute declared to be void to all intents; other proceedings are allowed subject to leave. The Court of Appeal in 1887 merely doubted whether Turner C.J.''s reasoning in 1864 can apply to proceedings which the statute declares shall be void to all intents (per Cotton C.J., p. 661). It was not doubted that Turner C.J.''s reasoning must apply to proceedings which had not been so declared void, but which were merely made subject to leave being obtained. The point that I have to consider refers to a proceeding which is allowed subject to leave and is not declared void, Cotton C.J.''s criticism does not touch Turner C.J.''s reasoning in referace to such proceedings. On the other hand all authorities agree with Turner C. J. unquestioningly so far as points like the present are concerned.

28. Adverting to Wanzer''s case so far only as it is relevant to the facts before me, North J. says on p, 213:-" Therefore it comes to this-that the proceeding is one which is not to be commenced or proceeded with without the sanction of the Court: and the Court has not given any sanction." This proceeding (as appears from the sections I have cited) was exactly analogous, in respect of leave of the Court not having been obtained, to a suit brought without leave under s. 28(2) of the Provincial Insolvency Act, The consequences of such omission ought to have been, if anything, more drastic, because the Statute declared such a proceeding void to all intents, Nevertheless North J, holds that "it must still be open to the landlord to apply to the Court for leave to proceed under the 87th section "; and he directs his attention to the question whether if the application had been made, leave would have been granted, He concludes : " that if the landlord had, before commencing these proceedings, asked for leave to take proceedings by way of sequestration, the Court would have given him leave to do so," He does not dismiss the proceedings. He does not even stay them. His order is that leave be given to proceed upon terms.

29. I must, however, clear up a point to which I alluded when I stated that the section which North J. was considering (viz. Section 87 of the English Companies Act, 1862) was, subject to an immaterial distinction, identical with Section 28(2) of the Provincial Insolvency Act. The distinction is this, Section 87 expressly provides that no suit, action or other proceeding shall be (a) proceeded with, or (b) commenced, except with leave of the Court; whereas Section 28(2) does not contain words " proceeded with or." It may appear at first eight, from the prohibition in Section 87 against proceeding with a suit without leave, that it is implied that with leave obtained after institution, a suit (which was originally instituted without leave) may be proceeded with. In other words it may be considered that Section 87 impliedly provides for proceeding with a suit which is initially defective, the defect being that leave which ought to have been obtained prior to instituting it has not been obtained whereas in Section 28(2) there is no such implication because of the absence of the words " shall be proceeded with." If the two sections are distinguishable on this ground then the decision in Wanzer''a case can be of little

assistance. But the answer to this objection appears if reference is made to the last of the three questions which I have mentioned at the commencement of this judgment, and if the supposition marked (c) and Section 29 of the Provincial Insolvency Act are considered. The provision about proceeding with a suit in Section 87 is intended to provide for a suit which is instituted before bankruptcy proceedings have commenced and for which consequently no leave was needed at the time of its institution. To interpret the section otherwise would give no effect to the prohibition against commening a suit without leave.

30. I have already referred to the fact that Section 142 of the Companies (Consolidation) Act, 1908, and Section 87 of its predpcessor the Companies Act of 1862 are in effect similar to the section I have to consider and to the Indian Companies Act 1913, Section 171. There are numerous decisions in England under the Companies Acts. Yet no case has been pointed out in which the Court has considered itself bound under these sections to dismiss an action because leave was not obtained at its commencement. The Court has merely refused to give leave to proceed. I note one of these cases: Ball v. Old Telargoch Land Mining Company (1876) 3 Ch. D. 749 There a shareholder was ignorant of winding up resolutions having been passed. He commenced-of course without leave-an action against the company and the direct Rs. praying for rescission of the contract to take shares on the ground of misrepresentation and for repayment and indemnity. Leave was given to proceed with the action. Indeed the liquidator who applied for stay was ordered to pay the costs.

31. It seems to me that these cases are very strong confirmation of the view which I should be inclined to take of the wording of a 28 that it does not require the suit to be dismissed, but by implication gives power either to stay the suit or allow it to be proceeded with on terms; that these powers may be exercised at a stage later than the commencement of the suit, should the suit have already been commenced without leave, The powers of the Court are not lost, nor are they enlarged, nor altered, because no leave was obtained. The Court may exercise the powers that the section gives to it at any stage, though ordinarily they would be exercised at the commencement of the suit.

32. The view I have taken is no doubt opposed to that of Davar J. in In re Dwarkadas TejbhandasI.L.R. (1915) Bom. 235 17 Bom. L.R. 925 I am, however, supported by the decision of the Court of appeal in Mahomed Haji Essack v. Abdul Rahim and Fawcett J.''s decision in Bheraji Samrathji v. Vasantrao(1928) 31 Bom. L.R. 981 Davar J. admitted the hardship of the decision hewas giving. The facts before him exemplified it. But he declined to consider the English cases saying that it was futile to invoke the assistance of cases decided under the provisions of other laws of another country. The other laws, as is clear on reading the statutes, are identical in terms with the provisions of the Indian Acts. As to the proper course to be followed in such circumstances I am not without directions from the highest tribunal. In I879

the Judicial Committee held that where a colonial legislature has passed an Act in the same terms as an Imperial Statute and the latter has been authority construed by the Court of Appeal in England, such construction should be adopted by the Courts of the colonies: they must yield to the high authority of the Court of Appeal: Trimble v. Hill (1879) 5 App. Cas. 342 It is true that in a later case their Lordships laid down, what is perhaps not a slight modification, that: "When an appellate Court in a Colony which is regulated by English law differs from an appellate Court in England, it is not right to assume that the Colonial Court is wrong. It is otherwise if the authority in England is that of the House of Lords." This remark refers to an appellete Court in a Colony.

33. The remarks of Wallace J. in Ponusami v. Kaliaperumal AIR (1929) Mad. 480 on which the defendant relies-a case in which, as in the present case, the adjudication order had been annulled-are very emphatic. He said (p 481):-

No doubt, as was recognized, this may work hardship in certain cases, for example, where the plaintiff is ignorant of the insolvency proceedings altogether. But after all, the Gazette notification of insolvency is presumed to be notice to all the creditors and they cannot be heard to plead want of notice Of ignorance On the other hand unless this strict reading of the section is adopted there will be great embarassment both to the insolvent and the Insolvency Court. All the creditors could file suits without leave and maintain that the Court should keep these pending until the insolvency proceedings had come to an end on the ground that the initial bar would then be removed. That would be practically overriding Section 28. The insolvent is entitled to the protection of the Court against the commencement of any such suit...The only suit which can be maintained is a suit which was instituted on leave given before its commencement. The present suit ought to have been dismissed in limine, and the plaintiff cannot claim now that be can continue it merely because the only order which could have been passed in it, namely, one of dismissal was not passed before the insolvency proceedings came to an end. I am, therefore, of opinion that the suit is not maintainable.

34. But, with great respect, there is no reason to apprehend any such desire on the part of the creditors of the insolvent to override s 28, That section is meant to sub serve the intersts of the insolvent''s creditors as a body. Moreover, a 28 refers only to debts provable under the Act, and if any creditor prefers in respect of such debts to follow the coarse suggested by Wallace J,, instead of taking proceedings u/s 33 of the Act, he would find that the insolvent has u/s 44(2) been released from the debt for which a suit has been brought. Had the learned Judge''s attention been drawn to the fact that insolvency proceedings do not always end in a nullification of the adjudcation order, and that the real object of obtaining leave to proceed, viz., that those matters should be allowed to proceed in Court which cannot be dealt with in insolvency proceedings, and had the principles on which leave is granted been brought to his notice, they might perhaps have furnished a reply to some of his

difficulties.

35. Mahomed v. Abdul Rahim bears out the view which seems to me to be consonant with principle as to the object of the provision that leave shall be obtained before commencing proceedings. The object is that some suits should be allowed to be proceeded with, An instance is given in Brownscombe''s case : "such as where a case was at the time of the bankruptcy ripe for trial, in which the amount of the proof against the bankrupt''s estate could not be seriously affected." Again the insolvent may studiously conceal the adjudication order from a creditor, may omit the creditor''s name form his schedule, and may allow him to bring a suit and to examine practically all his witnesses and then rely on the section: Umar Sharif v. Jwala Prasad (1924) 79 I.C. 662 In Mahomed v. Abdul Rahim it was apparently argued that leave to proceed should be given, so that a reprobate insolvent may be harassed by proceedings for arrest. Other instances are furnished by the cases in which leave to proceed has been given in England. These will be found in the commentaries on the Companies Act, 1908, Section 142, and Bankruptcy Act, 1914, Section 9. See, for example, Ex parte Coker: In re Blake (1875) 10 Ch. App. 652 Ex parte Isaacs: In re Baum(1878) 9 Ch. D. 271 and Ex parte Smith (1876) 2 Ch. D. 51 On the other hand, the suit would ordinarily be stayed if it would interfere with the Insolvency Court or other authority in insolvency exercising its powers under s 33 and similar provisions. Moreover, as I have already said, if the suit is stayed until further order Rs. it may for practical purposes stand in the same position as if it had been dismissed.
36. There is no ground in my opinion, for holding that the Court''s discretionary powers u/s 28(2) are taken away if once the suit has been commenced without leave of Court,

37. By the provision that no creditor shall commence & suit without leave of the Court, a creditor is enabled to obtain the directions of the Court before he commences his suit. He may save himself from incurring the futile costs of commencing a suit and then finding that the Court will not allow it to proceed. But for such a provision, Courts might have hesitated to express an anticipatory opinion on the hypothetical question whether if a suit were brought it would be permitted to be proceeded with or stayed. A creditor who fails to take advantage of this provision may inflict on himself costs that might have been spared.

38. In the result, I find that the decisions in England have uniformly adopted the view that the Court is empowered to stay a suit for which leave ought to have been, but has not been, obtained that it has never been suggested in England that the Court is imperatively required to dismiss such a suit. Had the legislature intended another result from its enactments, the practice resulting from erroneous interpretations of the enactments by the Courts in England would no doubt have been rectified by making the intention clearer in later legislation. This has not been done. Apart from the interpretation of the enactments, it has been conceded by the

judges who have conceived themselves to be bound to dismiss such suits, that great hardship results from this view. No reasons based on canons of interpretation are mentioned for inferring from the prohibition against commencing a suit without leave, the necessary dismissal of a suit commenced without leave. No reasons seem to have occured to the counsel or judges in England who have argued or adjudicated upon similar cases. Such a contention seems never to have been put forward or considered in England.

39. Reasons are no doubt given by some Judges in India for deducing that a dismissal of the suit must result from omission to obtain the required leave,-even where the infringement of the enactment is innocent, and is incurred in ignorance of the existence of such insolvency proceedings as are necessary for the section to come into operation. The reasons are in the main that there must be some penalty for disregarding the directions of the legislature, I cannot help remembering a dictum of Bowen L.J. that Courts sit for administering justice and not for enforcing discipline, It is generally considered that breaches of the adjective law, unless they result in infringements of substantive rights, are sufficiently safeguarded by orders as regards costs, But should some case arise of a contumacious disregard of the rules of procedure, it seems to me that even for penalizing such contumacious conduct, staying the suit indefinitely (with orders regarding costs) may be no less effective than dismissing it.

40. On all these grounds, I think, it is best to follow the decisions in England, and to interpret the section as empowering the Court to stay (and not to dismiss) a suit which is commenced without leave of the Court after the making of an adjudication order.

41. In the present case it was admitted that unless I am bound to dismiss the suit for failure to obtain leave it must be allowed to be proceeded with. For the adjudication has in this case been annulled, and there is no other reason why there should be a stay of the suit, On taking into consideration the principles on which the Courts in England have been giving leave to proceed with actions to some of which I have alluded, I have do doubt that this suit must proceed.

42. With regard to costs, the plaintiff'' has failed to follow the procedure laid down in s 28(2). It is not shown that the defendant was in any way guilty of preventing the plaintiff from knowing of the insolvency porceedings. In the absence of any evidence I must assume that he has not taken such care to inform himself of the position as he ought to have taken. The decision in In re Dwarkadas Tejbhandas is directly in favour of the defendant, I feel inclined, therefore, in the present case, to follow the order in In re Wanzer, where the creditor was made to pay the costs, rather than Hall v. Old Talargoch Co., where the costs were thrown on the defendant, or Pacaya Rubber and Produce Company, Limited, In re(1913) 1 Ch. 218 where the costs were made costs in the action The plaintiff will, therefore, pay to the defendant costs incurred by the defendant solely caused by the plaintiff''s default in

obtaining leave. Mr. Vakeel suggests that the plaintiff should be allowed to set off such costs against any costs he may be awarded in the decree, and this will be done.