

## [APPEAL FROM INSOLVENT COURT.]

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Sept. 26.DVA'RKA'DA'S LALUBHAI and another... *Appellants.*GEORGE BLACKWELL..... *Respondent.**Practice—Insolvent Debtor's Court—Discharge of Insolvent—Opposing Creditor taken by surprise—Appeal—Reinstatement of Petition on list—Stat. 11 & 12 Vict., c. 21, Secs. 56 and 73.*

Where an opposing creditor being, without any default on his part, misled as to the time when an Insolvent's petition was to come on for hearing, failed to appear when the petition was called on and the Insolvent obtained his discharge *ex parte*, the Appellate Court, on the ground that the opposing creditor had been taken by surprise, set aside the order of discharge and restored the case to the board.

*Seemle that, under the circumstances, the Commissioner sitting in Insolvency had no jurisdiction to set aside the order of discharge.*

THIS was an appeal from an order made by Gibbs, J., on the 24th of April 1872, when sitting as Commissioner in Insolvency, declaring the Insolvent entitled to his personal discharge under Sec. 47 of the Indian Insolvent Act (Stat. 11 & 12 Vict., ch. 21).

The Insolvent, George Blackwell, filed his petition and schedule on the 15th of December 1871. Two of his creditors, Dvárkádás Lalubhái and Dayábhái Lalubhái, filed joint grounds of opposition to his discharge, and the petition was therefore placed upon the list of opposed petitions. The principal ground of opposition was that the insolvent was not an inhabitant of, and did not reside in, Bombay, and that therefore the Court had no jurisdiction to hear his petition or grant him his discharge. The case was set down for hearing on the 24th April 1872, when, the opposing creditors being called and not appearing either in person or by Counsel, the Insolvent's discharge was granted.

On the same day, *Atkinson*, Serjeant, appeared for the opposing creditors and applied that the matter of the petition might be reheard under Sec. 56 of the Act and stated that the opposing creditors had been taken by surprise; that the insolvent had made a false statement as to his residence, and that, therefore, the Court had jurisdiction under

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Sec. 56 of the Act to recall its order of discharge. The Court, however, considering that Section 56 was not applicable under the circumstances of the case, refused to interfere and dismissed the application.

Thereupon the opposing creditors filed a petition of appeal from the order declaring the insolvent entitled to his discharge, and prayed that the order might be cancelled or that the Appellate Court might make such further or other order in the premises as to it might seem meet. The affidavit, which was filed with the petition of appeal, averred that the hearing of the insolvent's petition had, after being transferred to the list of opposed petitions, been ultimately fixed for the 24th of April 1872; that the opposing creditors had duly instructed Counsel to oppose the discharge of the insolvent; that on the 19th of April the Commissioner had announced his intention of not sitting on the next Court day (the 24th April) until 12 o'clock noon and that the insolvent's petition was third upon the list for that day. The Commissioner, however, sat at 11 A.M. Shortly after that hour the petition was called on and (the opposing creditors not being present) the insolvent was discharged under Sec. 47 of the Act. The appellants submitted that under these circumstances the order of discharge was a surprise upon them and ought to be cancelled.

The appeal was argued before SARGENT, Acting C.J., and BAYLEY, J., on the 26th of September 1872.

*Marriott* (with him *Mayhew*, Acting Advocate General) for the appellants:—As the Court below refused to reinstate this case on the board under the provisions of Section 56 of the Insolvent Act, and as, in fact, the circumstances of the case did not bring it within the purview of that section, the only course open to the opposing creditors was to appeal to this Court under Sec. 73 of the Act from the order granting the Insolvent his discharge. As no evidence has been taken in the case, the provisions of Sec. 72 as to having the evidence taken down by an officer of the Court have no ap-

plication. The case of *Ex parte Johnstone (a)* is on all fours with the present case.

*Latham* for the respondent.

*Marriott* in reply.

PER CURIAM:—The order of the 24th of April must be discharged and the petition of the Insolvent restored to the board. Each party will bear his or their own costs of the appeal.

*Ordered accordingly.*

Attorneys for the appellants: *Shamaji and Thakurdas.*

Attorneys for the respondent: *Thacker and Chalk.*

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[ORIGINAL CIVIL JURISDICTION.]

*Referred Case.*

Oct. 3.

W. NICOL AND COMPANY.....*Plaintiffs.*

J. S. CASTLE.....*Defendant.*

*Bill of Lading—“Weight contents and value unknown”—Action against Master—Assignee of Bill of Lading for value—Construction—Act IX. of 1856, Sec. 3.*

A bill of lading purporting to be for 50 tons of coals and containing a printed clause “weight, contents and value unknown” and similar words written above the signature of the Master, does not amount to an admission by the Master that he has received 50 tons of coal on board.

Upon the true construction of the Bills of Lading Act (IX. of 1856) Sec. 3 a bill of lading in the above form is not, in the hands of a consignee for value, conclusive evidence against the Master of the shipment of 50 tons.

THIS was a case stated for the opinion of the High Court, under the provisions of Sec. 55 of Act IX. of 1850, by N. Spencer, Third Judge of the Bombay Court of Small Causes.

(a) 31 L. J. Bank 63.