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strong; there is no evidence on the defendant's side at all to be compared with it for certainty or credibility. I must believe him fully as to the facts on which he has given evidence. It is quite clear that there was no shoring used in the trench. No two witnesses for the defendant agree as to the extent of the shoring they allege was there. Moreover, if there had been shoring, it would have been known what was done with it when the trench was so hurriedly filled up. Not much reliance can be placed on witnesses, who, we find, see shoring which never existed, and who do not see a trench 12 feet long by 2 feet deep, which the contractor of the work, Kesow himself, a witness called by the defendant, says that he excavated. If the witnesses would [313] not see this trench, it is hardly surprising that they would not see the much deeper trench that evidently was there.

It is unnecessary to say more or discuss the evidence at any greater detail. I have purposely not gone into the expert evidence, the evidence, that is, of persons who examined the premises after the mischief had been done and the plaintiffs' house demolished, for, as I said before, it is, in my opinion, almost useless. It is no assistance to be told in one breath that a crack might be caused in one way, and in another breath that it might also be caused in two or three other ways. No doubt such injuries as this house had sustained might have been caused in other ways than by the disturbance of the trench, but they could have been caused by it; and on the evidence it is clear that, in point of fact, they were caused by it, and by nothing else.

I find the issues 2, 3 and 4 accordingly. The amount of damages claimed has hardly been disputed, and is proved in the case. I pass a decree for the plaintiffs for Rs. 3,812-7-0 and costs.

Attorneys for the plaintiffs:—Messrs. *Payne, Gilbert and Sayani.*

Attorneys for the defendant:—Messrs. *Crawford, Burder, Buckland and Bayley.*

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### INSOLVENT JURISDICTION.

*Before Mr. Justice Farran.*

IN THE MATTER OF HORMARJI ARDESIR HORMARJI,  
AN INSOLVENT. [13th, 20th, 26th, 27th and 28th July and  
4th, 5th and 6th August, 1892.]

*Insolvency—Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21), ss. 50 and 51—Conduct of insolvent amounting to offences within those sections—Conduct of insolvent considered with reference to the following charges filed against him by opposing creditors, viz., reckless speculation; contracting debts without reasonable expectation of paying them; misconduct in contracting debts; concealment of property; obtaining forbearance by false representations; contracting debts by false pretences; undue preference.*

The insolvent had for many years carried on business in Bombay as a merchant. His firm (Messrs. B. and A. Hormarji) had been established in 1830 by his uncle and father. On the death of the latter in 1882 the insolvent was left the sole surviving partner, and from that time until his failure he carried on the business [314] alone. The failure took place in April, 1891, and on the 1st May 1891 he was adjudicated an insolvent. His liabilities were stated to be Rs. 47,98,591, his good assets Rs. 5,13,908 and his doubtful assets Rs. 60,014. His discharge was opposed by six banks in Bombay with which he had had dealings. The grounds of opposition were as follows:—

(1) Reckless speculation; (2) contracting debts without any reasonable expectation, at the time when the same was contracted, of paying the same; (3) gross

misconduct in contracting debts; (4) concealment of property; (5) obtaining forbearance from the opposing creditors by making false representations to them (6) contracting debts by means of false pretences; (7) fraudulently and with intent of diminishing the sum to be divided among his creditors, or of giving an undue preference to creditors, having discharged a debt due by the insolvent.

It appeared that down to the end of 1889 there was nothing in the dealings of the firm to which objection could be taken. In the first half of the year 1890 he must have sustained heavy loss, as his mercantile assets over liabilities which on 31st December 1889 were Rs. 5,50,794, were on the 30th June 1890 reduced to Rs. 2,29,612. The charges, however, against the insolvent were based upon his conduct subsequently to the latter date. On that day (30th June 1890) the insolvent nominally possessed 4 lakhs of rupees, the saleable value of which was about 2½ lakhs. With his finances in this state the insolvent speculated in exchange, and in six months (*viz.*, before the 31st December 1890), he had lost his 4 lakhs of nominal capital and 19 or 23 lakhs of rupees besides. The Court *held*,

(1) As to the first ground of opposition, that the insolvent was guilty of rash and reckless speculation. This, however, was not an offence within the meaning of s. 51 of the Indian Insolvent Act (11 and 12 Vic., c. 21). When the insolvent entered into the contracts which had resulted in the loss he had a fair capital, and though his speculations were excessive in the amount he had a fairly reasonable expectation that there would not be such a fall in exchange as would more than absorb his assets.

(2) As to the second and third grounds of opposition, that they were proved in respect of the insolvent's transaction subsequently to December 1890, and that the insolvent was guilty of gross misconduct in contracting debts having no reasonable or probable expectation, at the time when they were contracted, of paying them, and that his conduct fell within the purview of s. 51 of the Indian Insolvent Act. In December 1890 the insolvent was bankrupt to the extent (at all events) of over 16 lakhs, and had on hand large forward contracts which then showed a further probable loss. In that position he entered into further large speculative sales of exchange. He had then no assets with which to meet any loss.

(3) As to the fourth ground of opposition, that it was proved.

(4) As to the fifth ground of opposition, that it was not established. On 18th April 1891 the insolvent called a meeting of creditors and laid a not very candid or truthful statement of his affairs before them. Nothing was then arranged and the meeting was adjourned for a week, in order that a committee should examine the insolvent's position, &c. It was understood and arranged that in the meantime no steps should be taken against the insolvent, and that he should keep [315] his affairs in *statu quo*. The insolvent, however, swore that he understood he was to make no large payments, but that he was to keep the firm going. During that week the insolvent paid Rs. 3,193 due on a bill to one of the banks, and Rs. 472 on redraft account, a few insignificant current expenses and Rs. 1,000 to his solicitors, who were preparing a trust-deed to be carried before the creditors. The Court was of opinion that the conduct of the insolvent in making these payments did not amount to the offence charged in the fifth ground of opposition, *viz.*, obtaining forbearance from the opposing creditors by making false representations to them.

(5) As to the sixth ground, that it was not established. On the 14th March the insolvent in answers to enquiries had assured the manager of the Chartered Bank that his firm was quite sound and solvent, it being then to his knowledge hopelessly insolvent. On that day the manager accepted the insolvent's bills for £20,000 for which security was given and subsequently the insolvent sold one of his own bills for £10,000 to the bank. This, however, was in pursuance of a previous contract. The evidence of the manager showed that it was because of this contract, and not because of the false representation of the insolvent, that he purchased the draft for £10,000. The Court was of opinion that the transaction did not come within s. 50.

(6) As to seventh ground (undue preference), that it was not proved. On the 16th April 1891, the day but one before the insolvent held a meeting of his creditors, he sent £5,000 to Messrs. Elliott & Sons in England. That firm had accepted bills of the insolvent which he was bound to take up, but the earliest did not fall due until the 20th May, 1891. His practice had been to remit money a day or two before bills became due. The Court was of opinion that the

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transaction was not an undue preference within s. 50. It was no doubt a voluntary payment, but it was not shown to be a fraudulent discharge of a debt within the section. A mere voluntary payment of a debt is not within the purview of the section. Such a payment must be fraudulent and must be made with the intent of diminishing the sum to be divided amongst creditors, or of giving an undue preference to any of the creditors. From the mere fact of a voluntary payment, fraud of a penal nature cannot be inferred. Here nothing more was proved than a voluntary payment by a man in insolvent circumstances. The insolvent knew he was in difficulties, but was of so sanguine a nature that he believed he could surmount them, and so £5,000 were sent rather with a view to keep up his English connection than with the fraudulent intent of giving an undue preference. Where an undue preference is made penal the Court must be satisfied that the guilty intention necessary to constitute the offence existed in the mind of the insolvent, and ought not to assume it unless the circumstances point to no other probable conclusion.

The release by an insolvent of a debt due to him without receiving payment would undoubtedly fall within the scope of s. 50 of the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21).

THE insolvent for many years carried on business as a merchant in Bombay under the firm of Messrs. B. and A. Hormarji & Co. [316] He was adjudicated an insolvent on the 1st May 1891. His liabilities were stated to be Rs. 47,98,591, his good assets to be Rs. 5,13,903, and his doubtful assets to be Rs. 60,014.

His discharge was opposed by the Chartered Mercantile Bank, the Chartered Bank of India, Australia and China, the National Bank of India, the Hongkong and Shanghai Bank, the Agra Bank, and the New Oriental Bank.

The grounds of opposition filed were as follows :—

- (1) Reckless speculation.
- (2) Contracting debts without any reasonable expectation, at the time when the same was contracted, of paying the same.
- (3) Gross misconduct in contracting debts.
- (4) Concealment of property.
- (5) Obtaining forbearance from the opposing creditors by making false representations to them.

The above grounds of opposition were common to all the opposing creditors. The Chartered Bank also filed a separate ground of opposition, viz.—

- (6) Contracting debts by means of false pretences.

After the cross-examination of the insolvent, leave was given to file a further ground of opposition, viz.—

- (7) Fraudulently and with intent of diminishing the sum to be divided among his creditors, or of giving an undue preference to creditors, having discharged a debt due by the insolvent.

He now applied for his discharge under s. 47 of the Indian Insolvent Act, Stat. 11 and 12 Vic., c. 21.

*Inverarity and Scott*, for the opposing creditors :—They cited as to the first three grounds of opposition, *Ex parte Heyn* (1) ; *Ex parte Johnson* (2) ; *Ex parte Dornford* (3) ; *Ex parte Rufford* (4) ; *Ex parte White* (5) ; *Ex parte Salaman* (6). As to undue preference, *Nunes v. Carter* (7) ; *Brown v. Kempton* (8) ; *Rusi v. Cooper* (9) ; *Butcher v. Stead* (10) ;

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| (1) L.R. 2 Ch. 650.                       | (2) 4 DeG. & Sm. 25.            | (3) 4 DeG. & Sm. 29.      |
| (4) 2 DeG. M. & G. 234.                   | (5) 14 Q. B. D. 600.            | (6) 14 Q. B. D. 936.      |
| (7) L. R. 1 P. C. 348, per Lord Westbury. |                                 | (8) 19 L. J. (C. P.) 169. |
| (9) 2 Cowp. 629 (634).                    | (10) L.R. 7 Eng. & Ir. Ap. 839. |                           |

[317] *In re Skegg* (1); *Ex parte Griffith* (2); *Ex parte Hill* (3); *Singleton v. Butler* (4); *Wilson v. Balfour* (5). As to false pretences, *Reg v. Welman* (6); *Reg v. Willot* (7). Reference was also made to ss. 50 and 24 of the Indian Insolvent Act; Stat. 11 and 12 Vic., c. 21, corresponding to ss. 48 and 32 of Stat. 7, Geo. III, c. 57. Also to Stat. 1 and 2 Will. IV, c. 56; English Bankruptcy Act, 1849; Stat. 12 and 13 Vic., c. 106, s. 256; Stat. 24 and 25 Vic., c. 154, s. 221; Stat. 32 and 33 Vic., c. 71, s. 13.

*Lang* (Acting Advocate-General), *Jardine and Russell*, for the insolvent:—They cited *Morgan v. Brundrett* (8); *Ex parte Downman* (9); *Miller v. Sheo Pershad* (10); *Ex parte Jenkins* (11); *Runnett v. Vinayak Pandurang* (12). They referred to Stat. 12 and 13 Vic., c. 106; Stat. 6 Geo. IV, c. 16, s. 73.

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## JUDGMENT.

FARRAN, J.—Hormarji Ardesir was adjudicated an insolvent on the 1st May, 1891. The debts and liabilities of the insolvent, as stated in his schedule, amount to Rs. 47,98,591-13-7, against which he was possessed of assets amounting to Rs. 12 or 14 lakhs according to the value to be properly placed upon them. They have realised Rs. 11,86,826-8-4. There may possibly be sums still recoverable from certain insolvent estates, and from the firm of Matheson & Co., of London, but substantially the above are the figures which I have to take into account in dealing with this matter.

The insolvent now seeks for his personal discharge under s. 47 of the Indian Insolvent Act, 11 and 12 Vic., c. 21. His discharge is opposed by the following banks, who are his creditors for the following sums:—The Chartered Mercantile Bank, Rs. 4,05,430-10-1; the Hongkong and Shanghai Bank, Rs. 9,92,403-11-6; the National Bank, Rs. 8,65,622-14-10; the Agra Bank, Rs. 12,42,774-0-11; the Chartered Bank, Rs. 2,16,336-1-8; and the New Oriental Bank, Rs. 3,38,123-4-5. These sums aggregate Rs. 38,60,690-11-5. The remaining creditors are creditors [318] for, comparatively speaking, small sums, from Rs. 5,000 downwards, except Mulchand, who is a creditor for Rs. 11,327-1-5, for brokerage; Kushalchand, who is a creditor for Rs. 14,818-7, in respect of a draft, sold against pearls, of which account sales were not received when the schedule was made up; Premchand Roychand who is a creditor for Rs. 14,754-6-9, for his share in the Coorla Mill commission, which he had not received; and the Comptoir de Paris, who are creditors for Rs. 17,250-12-2; and also excepting John Elliott & Sons, of London, who are creditors for Rs. 3,33,120-12-11; and Matheson & Co. of London, who are entered in the schedule as creditors for Rs. 2,58,195-9-5 but on the other side are entered as debtors in Rs. 4,91,187-8-9. These accounts of Matheson & Co. are not as yet adjusted, and the balance may be in favour of the insolvent. If this is so, the total debts of the insolvent will be reduced by about Rs. 2,58,195-9-5, which would bring them to Rs. 45,40,396-4-2. The above figures have not been proved before me, but they are taken from the schedule, and may be assumed, for the purpose of this enquiry, to be correct. It may therefore be taken, that the principal creditors of the insolvent, with the exception of John Elliott & Sons, of London, are all opposing his discharge.

(1) 25 Q. B. D. 505.

(2) 23 Ch. D. 69.

(3) 23 Ch. D. 695.

(4) 2 Bos. &amp; P. 283.

(5) 2 Campbell, 579.

(6) 6 Cox. Cr. Ca. 153.

(7) 12 Cox. Cr. Ca. 68.

(8) 5 B. &amp; Ad. 289.

(9) 32 L.J., (Bankruptcy), 49.

(10) 10 I.A. 93.

(11) 39 W. Rep. 430.

(12) 9 B.H.C.R. 27.

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The grounds of opposition filed were—(1) Reckless speculation; (2) contracting debts without having any reasonable or probable expectation, at the time when the same were contracted, of paying the same; (3) gross misconduct in contracting debts, in that his whole debts so greatly exceeded his means of providing for the payment that during the time when the same were in course of being contracted (reference being had to his actual and expected property) as to show gross misconduct in contracting the same; (4) concealment of property; (5) obtaining forbearance from the opposing creditors by making false representations to them. These grounds of opposition are common to all the opposing creditors. The Chartered Bank has filed a ground on its own behalf in addition to the above, which it also relies on (6) contracting debts by means of false pretences.

At the close of the cross-examination of the insolvent, counsel for the Chartered Mercantile Bank applied for leave to add [319] several other grounds of opposition. All of the facts relied upon in support of these were known to the opposing creditors when they filed the above grounds, or were within their means of knowledge. I refused to allow this to be done in the greater number of cases; as, for reasons which I then gave, I considered that the insolvent might have been prejudiced in his defence by not having had them put forward and relied upon at an earlier stage of the case, and as I thought that the power given to the Court by Rule 20 should be exercised with great caution. I allowed a ground of opposition resting on an admitted payment of a sum of £5,000 to John Elliott & Co. by the insolvent on the eve of his insolvency to be added, as the facts relating to it were within the actual knowledge of the insolvent, and of no one else. It is now added as ground (7), *viz.*, fraudulently, with intent of diminishing the sum to be divided among his creditors, or of giving an undue preference to creditors, having discharged a debt due from the insolvent.

The first ground of opposition is not within the words of s. 50 or 51, of the Insolvent Act,—that is to say, it is not specifically stated as a ground for putting the provisions of either of these two sections in force. I have no doubt but that, if it were proved, I should be justified on account of it in adjourning the insolvent's discharge under s. 47 of the Act. It has been so ruled in *Re Gopal Chunder Seal* (1), but I consider that unless the facts bring the case within the second and third heads of opposition I have no jurisdiction to treat it as an offence under s. 51. It clearly does not fall within the purview of s. 50.

The insolvent at the time of his adjudication was the sole owner of the firm of B. & A. Hormarji. The firm had been established in 1830 by the uncle and father of the insolvent. On the death of the latter in 1882 the insolvent was left as the sole surviving partner, and continued so until his failure. There is no evidence as to what the capital of the firm was when the insolvent became the sole owner of it, but since the adjudication, balance sheets have been prepared at the expense of the estate, [320] and under the supervision of the insolvent, which purport to show the position of the firm at the close of 1886 and subsequent years. These balance-sheets have been compiled from the accounts in the ledgers of the firm. Their accuracy was not disputed before me, save in two particulars which are these:—

(1) Towards the close of each year it was not uncommon for the firm to draw and sell bills of exchange on London constituents, and, receiving the proceeds, to place them to the credit of the firm with some

(1) 2 Boulnois 119.

of its bankers. The sums thus received by the insolvent's firm were received for the purpose of being remitted to London to meet the bills thus drawn which had to be met by the firm, and being thus credited in the books appear as part of the assets of the firm. Against that asset the liability to meet the bill should of course appear as a debit of the firm. It was, however, the practice not to enter that debit in the accounts of the year about to close. The practice was to enter that debit at the beginning of the following year, when the proceeds of the bill were remitted by wire or otherwise to London to meet the bill. The moneys, when drawn from the bankers for this purpose and remitted, were credited to the banking accounts and debited to the constituent on whom the bill was drawn, and the bill drawn was at the same time placed to his credit. The accounts then became correct in the following year. This practice, it was said, was adopted in order to enable the constituents' accounts to be balanced to the end of the year, so that it might exactly tally with the account of the London constituents as balanced in London to the end of the year. There was nothing improper in this way of keeping the books; but whenever it occurred, the balance-sheets, made up from the ledgers, failed to show the true position of the firm by the amount of bills drawn on London and sold and not entered in the balance-sheets as a liability, though the proceed of such bills appears in them as an asset. I shall hereafter, for the sake of brevity, refer to such bills as "suspense bills."

(2) The other particular in which the balance-sheets are objected to is that the assets of the firm are said to be overvalued in them. This objection is principally urged against the valuation of the Coorla shares of the insolvent. The value of [321] the assets is put down in the balance-sheets as it is shown in the ledgers. The original cost price is entered there. In this respect the opposing creditors ask the Court, I think, to adopt too strict a view. When a merchant is about to embark upon a large speculation he is bound to consider his position in order to ascertain whether, if it results in loss, his assets will suffice to meet the probable loss. In estimating his assets for this purpose, he is of course under an obligation not to fraudulently or dishonestly overvalue them, but, on the other hand, he is not bound to subject each item to a strict scrutiny. A sanguine man will estimate the value of his assets at a higher figure than a more desponding or perhaps a more cautious man will do. In judging of a man's conduct by after events, I think that the Court should acquit him of moral or commercial impropriety if he estimates his assets honestly at the figure which he at the time of entering into the speculation believed that they were worth. The balance-sheet for 1886 shows an excess of assets over liabilities of Rs. 5,08,928; that of 1887 shows an excess of Rs. 6,04,226; that of 1888 shows an excess of Rs. 5,93,933; that of 1889 shows an excess of Rs. 5,50,794; and that of the first six months of 1890, ending June 30th, shows an excess of Rs. 2,29,612. These balances are made up after the drawings of the insolvent for each year (whatever they may have amounted to) had been entered in the books. The Homarji house property is not included amongst the assets.

The insolvent states that during this period, ending 30th June, 1890, he was doing a safe and profitable business which brought him in an income of about one lakh of rupees per annum. The business was partly commercial, partly financial, but the latter portion of it was the more important. It is necessary to consider its nature and extent. The transactions were carried on with Hamborough & Co., Matheson & Co.,

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the Chartered Mercantile Bank in London, the National Bank of India in London, and on a small scale with Elliott & Co. They were complicated. I will describe the nature of them with Hamborough & Co. The insolvent used to draw bills on Hamborough & Co., usually at four months' usance. These he *sold* in Bombay. With the proceeds he *purchased* bills drawn at six months' usance. [322] Thus his transactions were more or less simultaneous. The six months' bills he remitted to Hamborough & Co. with directions to discount them, and with the proceeds to take up the four months' bills. The profit on the transaction consisted in a nice calculation of the London discount rate as compared with the cost in Bombay of the six months' bills. To enable him to make this calculation he received daily a telegram giving the London rates. Sometimes the bills drawn on Hamborough & Co. were demand bills, which he sold, and with the proceeds purchased six months' bills. By wire he advised Hamborough & Co. to discount the six months' bills to arrive, and thus secured the rate. The profit was made in the same way as in the case of the four months' bills. Sometimes he drew demand bills on Hamborough & Co., sold them in Bombay, used the proceeds until the demand drafts were about to fall due, and then remitted the proceeds of the demand drafts or their equivalent by wire to meet the demand drafts. The profit in this case was that acquired by the use of the money in Bombay.

With Matheson & Co. the process was different. He drew on them at four months' and sold the bills in Bombay, remitted the proceeds by wire (telegraphic transfers) on demand bills to Matheson & Co. In London, Messrs. Matheson & Co. allowed him interest on the proceeds received from the telegraphic transfers on demand bills at 5 per cent. until the four months' bills became due, and then met the four months' bills with such proceeds. The transactions with the Banks were similar, and there were subsidiary arrangements which it is not necessary to detail. The financial business with Messrs. Elliott & Sons was comparatively small in amount. The insolvent stated that he needed to sell and buy bills to meet the requirements of this class of his business to the extent of about a million pounds sterling per annum. As about three sets were drawn during the year, there would be about £300,000 to £400,000 current at a time. It will readily be seen that a very small rate of profit in discount on such large sums would bring in considerable income. The amounts I have given are only rough estimates. It would appear from the cross-examination of the insolvent that the figures are probably understated. The statement of [323] the mode of business is not intended either to be strictly accurate.

With reference to this financial business it is to be observed:— (1) That it rested solely on credit and could not be carried on unless the parties to it were in high repute as to their solvency in the commercial world. (2) That, resting as it did upon credit it required little, if any, capital of the insolvent to be embarked in it, and enabled him to keep all, or almost all, his capital invested in shares and Government notes upon which he received dividends and interest, and it also enabled him to finance the Coorla Mills, of which he was the agent. (3) That as long as it was carried on through perfectly solvent houses, there was little, if any, risk of loss. As the transactions were embarked in on a calculation based upon actual discount rates and the actual state of the money market, it was not in its nature speculative. The element of speculation entered into it when forward contracts in exchange were made in order to obtain

favourable rates for the bills, which the insolvent proposed to draw for his financial undertakings. The houses with which the insolvent did business were houses, it is admitted, of first-class repute. The evidence before me does not enable me to determine with exactness whether those *a priori* conclusions were borne out by corresponding results, except that the insolvent stated that it was so. There were no profit and loss accounts for each year put in evidence, and the balance-sheets, on account of the suspense bills not appearing in them, and the drawings of the insolvent for each year not being shown, are only approximate guides. The small variation in them down to 31st December, 1889, however, lends confirmation to the insolvent's statement. The fair inferences to be drawn from them, coupled with the evidence of the insolvent, is that the capital of the firm did not materially alter in amount down to that date, and that he drew out for expenditure, in one form or other, all the profits of the firm, and possibly a little more.

In addition to the above financial business, the firm did ordinary commercial business, taking consignments of produce, pearls, &c., for sale in England on account of Native shippers, [324] and selling goods consigned to the firm here from abroad. There is no evidence as to the extent of this business. It seems to have been of the ordinary character, and conducted with prudence. To carry it on would require the sale of bills against produce in Bombay to a considerable extent.

Down to the close of the year 1889 there is nothing, therefore, shown against the insolvent to which exception can be successfully taken. In the first half of 1890 the insolvent must have met with heavy losses. His mercantile assets above liabilities, which on the 31st December, 1889, stood at Rs. 5,50,794 were reduced on the 30th June, 1890, to Rs. 2,29,612. This period has not been examined into, and the cause, therefore, of the loss has not been shown. The charges against the insolvent are based upon his conduct subsequently to the latter date. It becomes, therefore, necessary to consider his exact position on the 30th June, 1890, as it appears from the balance-sheet (Ex. No. 6).

(After stating the figures His Lordship continued).—Adding this to his mercantile capital, the insolvent's estate upon the most favourable estimate showed a balance in his favour of 4 lakhs on the 30th June, 1890. It was, however, in a very embarrassed position. Except in the Oriental Bank, the accounts in all the other Banks were largely overdrawn, to the extent of more than Rs. 5,30,000 on, I presume, the security of his available property. However, he nominally possessed 4 lakhs. Its saleable value was about  $2\frac{1}{2}$  lakhs.

With his finances in this state the insolvent began (or rather continued, for he began his operations earlier in the year) to speculate in exchange, or, as he expressed it, "to work for a rise in exchange." The silver market, which governs exchange, was then in a very excited state. "Working for a rise in exchange" was, in effect, the same as making large purchases of silver deliverable to him at forward dates. On account of the great number of exchange transactions which the firm necessarily had to enter into for the purpose of its financial business, it is very difficult to separate these speculative transactions in exchange from the rest of the business. The two, in fact, were worked, the one with the other. This difficulty is increased by the insolvent not [325] having handed over any register of his forward contracts to the Official Assignee. It would be possible to ascertain the particulars and amount of the forward contracts from the lists of sales and purchases made out by the different Banks, but

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the process would be a laborious one. From fear of falling into error I have refrained from it. A less accurate estimate is sufficient for the purposes of this judgment. In 1890, the insolvent sold bills to the extent of £4,071,800, and bought in the same year bills amounting to £2,681,400. The latter figure does not include some bills which he purchased from Messrs. Ralli Brothers and Messrs. Volkart Brothers. The deduction of a million pounds from each side on account of the insolvent's financial business leaves his speculative business as sales, £3,071,800; and purchases, £1,681,400; the latter figure being liable to increase on account of purchases from Messrs. Ralli Brothers and Messrs. Volkart Brothers. These speculative transactions were, therefore, entered into on an enormous scale. Unfortunately, I cannot divide the figures between the early and the latter half of the year 1890. The insolvent's account shows a total loss in exchange between 30th June, 1890, and his failure in 1891 of Rs. 37,50,725. In the statement he made out for his creditors in April, 1891, he roughly divided his losses into periods, putting the net losses, which meant his realized losses, from the 1st of July to the 11th of November, 1890, at Rs. 16,49,951-7-3 and from the latter date to the 31st December, 1890, at Rs. 2,34,802-3-0. This statement makes the total losses in exchange to be Rs. 32,54,836-11-9 only, which is too small. The above figures are, therefore, probably under-estimated. The statement, however, was made out for the insolvent himself, and he admits the figures to be correct as far as they go. The balance-sheet made out down to 31st December, 1890, make the insolvent's mercantile assets to be less than his liabilities by Rs. 6,11,669; or, when the Hormarji house is taken into calculation, by Rs. 4,11,669. This balance-sheet is, however, wholly incorrect, in not including "suspense bills" to the extent, as estimated by the insolvent, of £170,000.

On the 31st December, 1890, therefore, the insolvent's liabilities must have exceeded his assets by considerably more than [326] Rs. 20,00,000. The loss on speculation by this mode of computation amounted to at least 23 lakhs of rupees between July 1st and December 31st. Whether this figure is taken on the insolvent's statement, the result is, that the insolvent, starting with a nominal capital of 4 lakhs, had in these enormous speculations lost it, and some 19 or 23 lakhs of rupees besides, before the 31st December. Within the limits of his means the insolvent was at liberty to speculate if he pleased, but this speculation is, in my judgment, far in excess of the amount which his capital, as it stood in July, 1890, justified him in entering into. The result is the same if the final account is considered. Starting in July, 1890, with a nominal capital of 4 lakhs, he has lost before May, 1891, at least Rs. 37,00,000.

This, in my judgment, amounts to speculation both rash and reckless. That, however, as I have said, is not, in terms, an offence under s. 51 of the Indian Insolvent Act. What I have to determine under that section is, whether the insolvent's debts, or any of them, were contracted without his having any reasonable or probable expectation at the time when he contracted them of paying the same or whether his whole debts so greatly exceeded his means of providing for the payment thereof during the time when the same were in the course of being contracted (reference being had to his actual and expected property) as to show gross misconduct in contracting the same. Now as to the contracts, which culminated in the loss of Rs. 16 lakhs or more in November, 1890, I do not think I shall be justified in holding that they were entered into.

without reasonable or probable expectation of fulfilling them in paying the losses which might result from their breach. When the insolvent entered into them he had a fair capital; though the rise in the silver market had been rapid and considerable, there was not, according to the advice under which the insolvent acted, any apparent reason why there should be any rapid or considerable fall, and appearances pointed only to ordinary fluctuations of the market and a probable rise. The insolvent, therefore, though his forward contracts in the beginning of the second half of 1890 were excessive in amount, had a fairly reasonable expectation that there would not be a fall in exchange, or, at all events, such a fall as would more than absorb his assets.

[327] The position in November and December, 1890, had, however, changed. The insolvent was then bankrupt to the extent of 16 to 20 or 23 lakhs. It is not very material which figure is adopted, and, moreover, had on hand forward contracts to a large extent, which then showed a further probable loss. In this position he entered into further large speculative sales of exchange. I cannot give the exact figures without an elaborate examination of the returns made by the Bank, but the bills sold by the insolvent in 1891, before his failure in April, amounted to £1,365,700, while those purchased by him were £1,847,900. A considerable number of the latter were cross purchases to close previous sale transactions. Deducting one-third of a million sterling from the figures on the other side, for financial bills sold and purchased, we find that he sold about £1,000,000 when absolutely and irretrievably insolvent. In so far as these transactions consisted of bills sold under forward contracts, the action of the insolvent was simply gambling with the moneys of the Banks. From an examination of the list of sales of bills made out by the Banks, I have satisfied myself that the £1,000,000 of bills sold included a large amount of forward sale; the insolvent indeed himself admits it. This gambling with the creditors' moneys had been going on at least as far back as the 11th November, 1890. It would perhaps be incorrect to say that the insolvent when he contracted fresh liabilities after 11th November, 1890, had no probable or reasonable expectations of being able to pay them, for by keeping up appearances and selling more bills he might have expected to be able to satisfy these particular liabilities by incurring fresh ones, but I cannot entertain any doubt, but that the liabilities incurred in respect of forward contracts after the 11th November, 1890, were, when they ripened into debts, such as to indicate gross misconduct in contracting the same. The assets with which he could hope to meet them were a huge minus quantity.

I am, therefore, of opinion that the third ground of opposition is established, and that the insolvent's conduct falls within the purview of s. 51 of the Act. It is argued by the Advocate-General that the conduct of the Banks in entering into these forward contracts with the insolvent was such that they are not [328] now entitled to oppose his discharge upon the above ground. I do not yield to that argument. No doubt the Board of the Chartered Bank thought that he was speculating. The Home Board advised their Bombay agent of this at the end of 1890, and several times again in 1891, and the agent entered into few fresh unsecured transactions with him after that. In January it was proposed that all the Banks should make up a statement, so as to ascertain the extent of Hormarji's dealings, but nothing came of it. The managers at the beginning of 1891, or quite at the end of 1890, called the broker Mr. Weber's attention to the magnitude of the insolvent's operations. I think that at this time they certainly suspected that Mr. Hormarji was

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speculating. It would, however, have been a strong measure to have refused his forward bills at that time. It is the business of the Banks to sell their own bills, forward as well as ready, and to cover themselves by buying the forward or ready bills of merchants. When this is done there is no speculation. It is difficult for Banks to inquire, in the case of merchants offering to sell their forward bills, whether they are speculative sales or not.

I think that I should not be justified in deciding that Banks forfeit the protection which the provisions of s. 51 afford them, because they do not refuse the forward bills of a finance house like Hormarji's, which they believed to be solvent, on the suspicion that they are speculative in character. As to the position and strength of the house, the magnitude of its operations for so many years, and the boastful way in which Hormarji was accustomed to speak of his firm no doubt misled them. At the same time the extreme facilities which the Banks afforded the insolvent in carrying on his speculations must have been a great temptation to him to continue them. I shall take this into account when dealing with the insolvent's conduct.

The fifth ground of opposition, that of obtaining forbearance fraudulently and by means of false pretences, I do not consider to be established. On the 18th of April, 1891, the insolvent called a meeting of the Bank managers, and laid a not very candid or truthful statement of his affairs before them. Nothing was [329] then arranged, and the meeting was adjourned for a week, but a committee of inspection on behalf of the Banks was appointed to examine the insolvent's position, and that the insolvent should lay some definite proposal before the Banks. It was understood at the meeting and expressed that the Banks in the interval should take no steps against Hormarji, and that he should keep his affairs in *statu quo*. Hormarji says that he understood that he was to make no large payments, but was to keep the firm going. During the week Hormarji made a payment of Rs. 3,193-15-3, due on a bill, to one of the Banks, and a sum of Rs. 472-6-1 on re-draft account, a few insignificant current expenses, and Rs. 1,000 to his solicitors. The payment of Rs. 3,193-15-3 to one of the Banks shows that it was not intended that no payments whatever were to be made. The payment of Rs. 1,000 to the solicitors, who were preparing a trust-deed to be laid before the creditors, does not seem to me, in spirit, to be a breach of the somewhat indefinite understanding which the opposing creditors rely on. I fail, however, to see how the making of this payment subsequently to the meeting can be said to be an obtaining of the forbearance which was granted at the meeting fraudulently or by means of false pretences. It is not shown that Hormarji at the time of the meeting intended to make this payment.

The next matter to be considered is the ground of opposition relied on by the Chartered Bank, that the insolvent contracted a debt to them by means of false pretences. The facts may be briefly stated. On the 14th of March the Manager, Mr. Stiven, received a telegram from his head office to the effect that it was rumoured in London that the firm of B. & A. Hormarji were in difficulties, and asking him to report. Mr. Stiven sent for Hormarji and made inquiries in reference to the truth of the rumours mentioned in the telegram. It is unnecessary to go into the details of the interview. The result was that Hormarji led Mr. Stiven to believe that though his firm had met with losses, they were such as the firm was well able to bear, and that the firm was quite sound and solvent. It was at this time absolutely and hopelessly insolvent to

the knowledge of Hormarji, though he may have entertained the [330] insane delusion that by a rise in the silver market and by further speculations he would be able to retrieve his position.

That his representation as to his position was a false representation or false pretence is clear enough. It is, however, necessary to bring the case under s. 51 that the debt should be contracted by false pretences. On that day Mr. Stiven accepted the bills of Mr. Hormarji himself for £20,000 in lieu of a Bank telegraphic transfer which Hormarji had contracted to give him. Mr. Stiven, however, would not do this without security. Security was given and the bills were eventually accepted in London and paid. After this there was one or perhaps two small new unsecured transactions in bills, but the bills were paid. On the 16th April the insolvent sold one of his own bills on Messrs. Matheson & Co., for £10,000 to the Bank. This was in pursuance of a contract, dated the 16th July, 1890, by which the Chartered Bank had contracted to purchase a Bank telegraphic transfer, or a demand draft, on Messrs. Matheson & Co., or Messrs. Hamborough & Co., for £10,000, deliverable between 30th March and 30th April, 1891. Under that contract Hormarji was entitled to deliver his own demand bill. The evidence of Mr. Stiven goes to show that it was because he had made this contract that he purchased Hormarji's £10,000 draft, and not because of the false pretence which Hormarji had made to him on the 14th March, though, no doubt, if he had known Hormarji's real position, he would not have taken his demand draft without security. Stiven would, no doubt, have equally taken it, if he had not received a telegram on the 14th March, and had had no conversation with Hormarji as to his affairs.

Under these circumstances, I think it would be a straining of the law to hold that the debt which arose from the dishonour of the bill for £10,000 was contracted by false pretences. I must, therefore, hold that the sixth ground of opposition is not established.

I now turn to the more serious charges, the fourth and seventh, framed under s. 50 of the Act. On the 16th April, the day but one before Hormarji met his creditors, he despatched some time after 2 P.M., a draft of £5,000 to Messrs. Elliott & Sons. [331] That firm had accepted bills of Hormarji's which he was bound to take up, but the earliest did not fall due until the 20th May. His former practice had been to remit moneys to take up such bills a day or two before they became due, but in a few instances he had remitted a week, and a fortnight before the bills were payable. In those cases Messrs. Elliott & Co., on receipt of the money, placed it with a discount house, and credited Hormarji with the interest received. The £5,000 were sent by a telegraphic transfer of the Oriental Bank, which was paid for by a cheque on the Bank of Bombay, where the insolvent had a cash credit on the security of Government paper. There was no financial benefit to be gained by sending this money, and I entertain no doubt that it was sent to lessen the insolvent's liability to Messrs. Elliott & Sons. It was undoubtedly voluntary. The question is whether it is a fraudulent discharge of a debt within the meaning of s. 50 of the Act. I do not think that it is proved that it was. Under s. 24 of the Act, any voluntary payment made by a man when in insolvent circumstances within two months of his insolvency is deemed fraudulent and void against the assignees of the insolvent, and can be set aside on that ground. This is a section dealing with civil rights. Section 50 is a highly penal section; and in it the word "fraudulent" must have its

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ordinary meaning assigned to it. The offence of fraudulently discharging a debt is placed among such offences as concealing property, wilfully altering books, and other similar offences of a heinous nature, and the penalty which can be inflicted for it is two years' imprisonment on the criminal side of the jail. It is by no means clear what the section does mean. Releasing a debt due to the insolvent without receiving payment would undoubtedly fall within its scope. A mere voluntary payment of a debt is, I think, equally clearly not within its purview. It must be fraudulent and may be made "with the intent of diminishing the sum to be divided amongst creditors, or of giving an undue preference to any of the creditors." From the mere fact of voluntary payment I do not think you can infer fraud of a penal nature. I was myself for some time strongly inclined to limit the fraudulent discharge of a debt to the case where an insolvent releases a debt due to himself without consideration, but am now disposed [332] to think that it is of wider import. The intent to give an undue preference to a creditor occasions the difficulty. That can only be done, I think, by paying or securing him. I doubt if the words can be given effect to (as suggested by Mr. Lang) by concealing a debt due from the insolvent with intent of preserving it always for the creditor, notwithstanding the insolvency proceedings. However that may be, I think nothing more is proved here than a voluntary payment by a man in insolvent circumstances. When it was made, I think that Hormarji had not the idea of the Insolvent Court before his mind. He knew that he was in difficulties, but such is the sanguine nature of the man, that I feel pretty confident that he thought his financial and commercial business was of so valuable a nature, and that his commission from the Coorla Mills was so valuable an asset, that his creditors would certainly, on terms, allow him to carry on the one, and continue to receive the other, and accept payment of their debt by instalments, and that his only doubt was whether he could not continue to carry on his business without calling his creditors together, a doubt which his consultation with Mr. Craigie on the evening of the 16th April at once dispelled. If the insolvent entertained these views, I do not think that I can hold that he sent the £5,000 to Messrs. Elliott & Sons fraudulently with intent to diminish the sum to be divided amongst his creditors, or to give an undue preference to Messrs. Elliott & sons. I should rather say it was done with a view of keeping up his English connection and to prevent Messrs. Elliott & Sons refusing to do business with him any longer. I do not believe the insolvent when he says that he did as a piece of skilful financing. In that point of view it was detrimental. The cases cited by Mr. Inverarity are all, with one exception, decided (under a wholly different statute) cases arising out of the civil liability of a creditor voluntarily preferring to restore the payment which he has received. I do not say that they are not useful as guides; but when the conduct of the insolvent in giving a fraudulent preference is made penal, the Court must be satisfied that the guilty intention necessary to constitute the offence existed in the mind of the insolvent, and ought not to assume it, unless the circumstances point to no other probable, I will not say possible, conclusion.

[333] The last charge against the insolvent is of a painful nature. It has caused me much anxiety. The circumstances connected with it are these:—(His Lordship then discussed the evidence and continued:—) I do not, however, think, as suggested by counsel, that the insolvent formed a deliberate design in November, 1891, of setting aside the return commission as a fund for emergencies, or as a provision against insolvency.

I am rather inclined to credit his statement that he looked upon the return brokerage as something outside his business, a fund to which his business creditors had no claim, and that when he found himself in the possession of a considerable portion of it, when he was adjudicated an insolvent, the temptation to retain it unnoticed was too strong to be resisted, and that his moral courage was not sufficient to enable him to admit his error when the Official Assignee asked him for an explanation. The sum is too small to support the suggestion of the counsel for the opposing creditors, and it has probably been all spent before now. I must, however, record my finding that the fourth ground of opposition is proved.

For the reasons expressed through my judgment, I feel that a comparatively light punishment will be sufficient to meet the ends of justice in this case. The insolvent, whose discharge has already been suspended for more than a year, will suffer imprisonment, under s. 50, for three months, and will after that be entitled to his discharge when he has been in custody at the suit of the opposing creditors, under s. 51 of the Act, for twelve months; in all his discharge will thus be postponed for fifteen months from this day. The question whether judgment should be entered up against the insolvent under s. 86 can be decided when the insolvent comes up for his discharge.

On the application of counsel the costs of the opposing creditors together with the costs of the adjudication were ordered to be paid out of the estate.

Attorneys for the insolvent: Messrs. *Chalk, Walker and Smetham.*

Attorneys for the opposing creditors: Messrs. *Craigie, Lynch and Owen.*

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### [334] INSOLVENT JURISDICTION.

*Before Mr. Justice Bayley (Acting Chief Justice) and Mr. Justice Candy.*

IN THE MATTER OF HORMARJI ARDESIR HORMARJI,  
AN INSOLVENT. [29th and 31st August, 1892.]

*Insolvency—Insolvent convicted and sentenced to imprisonment under s. 50 of the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21)—Appeal by insolvent under s. 73—Bail—No power in High Court to admit insolvent to bail, pending appeal.*

An insolvent was convicted by the Insolvent Court of an offence under s. 50 of the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21) and sentenced to imprisonment. Under s. 73 of the Act he appealed against the decision and sentence of the Insolvent Court, and applied to be admitted to bail, pending the hearing of his appeal.

*Held*, refusing the application, that the High Court had no power to admit him to bail.

APPLICATION to admit to bail.

On the 24th August the insolvent was sentenced (1) by Farran, J., (sitting as Commissioner in Insolvency) to suffer imprisonment for three months under s. 50 of the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21). From this decision and sentence the insolvent lodged an appeal under s. 73 of the Act. He was in custody, and he now applied to the appellate Court to be released on bail, pending the hearing and determination of his appeal.

(1) See *supra* 17 B. 313 (333).