respondent's further costs, and that the petitioner give security for the same, or at his option pay the same into Court.

1894.

MAYHEW v. MAYHEW.

Costs to be costs in the cause.

Attorneys for petitioner:—Messrs. *Brown and Moir.*

Attorneys for respondent:—Messrs. *Turner and Hemming.*

INSOLVENT JURISDICTION.

Before Mr. Justice Farran.

IN THE MATTER OF HORMARJI ARDESIR HORMARJI, AN INSOLVENT.

1894.

December 5.

Insolvency—Indian Insolvent Act (Stat. 11 and 12 Vict., C. 21), Sec. 86(1)—Entering up judgment against insolvent—Final discharge.

Under section 86 of the Insolvent Act (Stat. 11 and 12 Vict., c. 21) the Court has a discretion to grant or refuse an application to enter up judgment against an insolvent for the amount of his debts. In exercising this discretion the Court must be guided by the circumstances of the insolvency.

APPLICATION for discharge under section 60 of the Insolvent Act (Stat. 11 and 12 Vict., c. 21).

(1) Section 86 of the Indian Insolvent Act (Stat. 11 and 12 Vict., c. 21):—

"86. Provided always, and be it enacted, that in all cases where any Insolvent shall not have obtained his discharge in the nature of a certificate as aforesaid under this Act, the said Court for the Relief of Insolvent Debtors may, if in the circumstances of the case it shall think fit, before making such order for such discharge, direct a judgment to be entered up against such Insolvent in the Supreme Court of the Presidency within which such Court for the Relief of Insolvent Debtors shall be situate in the name of the Assignee or Assignees, or of such Official Assignee as the Court shall think fit, for the amount of the debts or demands stated in the schedule of such Insolvent as due or claimed, and of such as shall be established in the said Court against the said Insolvent's estate, or so much thereof as shall appear at the time of such order to be due, which said order shall be filed in the said Court for the Relief of Insolvent Debtors in India; and the production of such order, or of a copy of such order, under the seal of the said Court, of which order, copy and seal no proof shall be requisite other than the production of such order or copy, shall be sufficient authority to the proper officer for entering up the said judgment; and then in every such case, and notwithstanding the provisions hereinbefore contained, if at any tims it shall appear to the satisfaction of the said Court that such Insolvent is of ability to pay such debts or demands, or any part thereof, or that he is dead, leaving assets for such purpose, and that under the circumstances the same is reasonable and proper, the said Court may, if it shall think fit, order execution to be taken out upon such judgment against the property of such Insolvent, whether the

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The insolvent had filed his petition on the 1st May, 1891. In August, 1892, at the hearing of his application for discharge under section 47 of the Act he was found guilty of reckless speculation and other offences, and was sentenced to a term of imprisonment under sections 50 and 51 of the Insolvent Act (Stat. 11 and 12 Vict., c. 21). The case is reported in I. L. R., 17 Bom., 313.

Lang (Advocate General) for the insolvent now applied for his discharge under section 60 of the Act.

Macpherson for the Official Assignee[1]:—On behalf of the Official Assignee, who is put in motion by some of the opposing creditors, I apply, before the order of discharge is made, that judgment be entered up against the insolvent under section 86 of the Insolvent Act for the amount of his debts.

This application, it is understood, will be opposed on behalf of the insolvent. Undoubtedly the Court has, under the section, a discretion to grant or refuse the application; but hitherto the practice has been to make the order as a matter of course, and this is certainly not the instance in which the practice should be altered. This is not a vindictive application by the creditors. Their losses have been enormous. The insolvent was found guilty, at the hearing, of concealing property. To that property they are certainly entitled, and judgment should be entered up for it. But there is no provision for entering up judgment for

same may or may not be by law vested in his Assignee or Assignees, for such sum of money as under all the circumstances of the case the said Court shall order, such sum to be distributed rateably amongst the creditors of such Insolvent according to the mode hereinbefore directed in the case of a dividend; and such further proceedings may be had upon such judgment as the Court may from time to time order until the said debts or demands shall be fully paid and satisfied, and no *scire facias* shall be necessary to revive or execute such judgment on account of any lapse of time or change of parties, or otherwise, but execution shall at all times issue thereon by virtue of the order of such Court for the Relief of Insolvent Debtors from time to time: Provided always, that in case any application against any such Insolvent for the purpose aforesaid shall appear to the Court vexatious or oppressive, it shall be lawful for the said Court not only to refuse to make any order on such application, but also to dismiss the same, with such costs against the party making the same as to the said Court shall appear reasonable."

(1) The Official Assignee represented the opposing creditors.

less than the full amount of the scheduled debts, and, therefore, judgment must go for the whole. It must be remembered that even with judgment for this large amount against him the insolvent is fully protected, for section 86 does not allow such judgment to be executed without application to the Court, and the Court, before ordering it, must be satisfied that execution is reasonable and proper. In ordering execution the Court would adopt the English practice as stated by Jessel, M. R., in *In re Clagett's* Estate[1], and see also *In re Pain*[2]. Counsel also referred to *In re Coorlawalla*[3]; *In the matter of Cándás Narrondas*[4]; and Statute 1 and 2 Vict., c. 110, sec. 87.

Lang, for the insolvent, *contra*:—To grant this application would be to inflict a further punishment upon an insolvent already sufficiently punished. The English Act (Stat. 1 and 2 Vict., c. 110, sec. 87) which has been cited as corresponding to our Indian Act only applied to non-traders who were insolvents, and not bankrupts. Under the Bankrupt Acts which applied to traders, after acquired property was always protected. To enter up judgment against the insolvent would be to punish him a second time. He should only be punished once—*In re Marks*[5]; *In re Huggins*[6].

Macpherson in reply:—Until the Indian Act is repealed it is that Act which is to be enforced, and not the English Act. But, if the English Act were in force here, the insolvent would be much more severely dealt with than he can be under the Indian Act; *e.g.* see section 31 of the Bankruptcy Act of 1883. Further, section 28 of that Act seems to give the English Court the same power as is given by section 86 of the Indian Act. The result of this application is only to compel an insolvent to do that which (if he is an honest man) he would do of his own accord.

FARRAN, J.:—I am glad that the order which I am about to make is one which, if I am wrong in making it, may be corrected by the Court of appeal. As far as I am aware, this is the first time that an application of this kind has come before the Court. The practice hitherto has been to enter up judgment against the

(1) 20 Ch. D. 637 at p. 650.
(2) L. R. 3 Ch., 639.
(3) 9 Bom. H. C. Rep., 14 at p. 17.
(4) I. L. R., 11 Bom., 138, at p. 148.
(5) L. R., 1 Ch., 334.
(6) 22 Q. B. D., 277.

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insolvent as a matter of course in every case. That is a practice which does not appear to be in accordance with the Act, for the 86th section, under which it is done, directs the Court before making the order to exercise its discretion as to whether the order shall be made or not. A practice which precludes the exercise of that discretion is erroneous. It does not appear how it originated, but it has probably arisen from a misreading of rule 42 of the rules of this Court.

The Court, however, has now to exercise its discretion in this case, and the question is by what circumstances it ought to be guided in deciding whether to grant or to refuse an application of this kind. On the best consideration I can give to the matter I cannot but think that those circumstances must be found in the conduct of the insolvent previously to his insolvency. The Court must ask, what occasioned his insolvency? Was it his own misconduct? Was there recklessness or fraud in carrying on his business, or is it clear that the insolvency has been caused by unexpected misfortune, or by circumstances which he could not foresee or which were beyond his control? It is, I think, such considerations as these which must guide the Court in exercising its discretion under section 86 of the Act.

Applying this test to the present case I am obliged to say that, in my opinion, the insolvency of Hormarji was not in any way due to unexpected misfortune, but was the result of recklessness and want of ordinary foresight and care in the conduct of his business. Being of this opinion I must grant this application. I do so with regret, for it is obvious that the insolvent must begin life again at great disadvantage. If I am wrong, the matter can be taken to appeal.

Order to enter up judgment.

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

Attorneys for Official Assignee:—Messrs. *Craigie, Lynch and Owen.*