

1895.

MUNOHERJI
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v.
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thing for the younger members of a family to deposit money belonging to them with the older members. That, I think, was really what took place in the present case. The money remained with the defendant as a deposit, and no part of it has since been withdrawn from him. On all these grounds, I am of opinion that we should hold this money to be a 'deposit.' If the circumstances here do not make it a deposit within the meaning of the word as used in the Limitation Act, it is difficult to understand what a deposit can be.

Appeal dismissed.

Attorneys for the appellant:—Messrs. *Bicknell, Mervánji and Motilál.*

Attorney for the respondent:—Mr. *M. M. Saklátwálla.*

INSOLVENT JURISDICTION.

Before Mr. Justice Parsons and Mr. Justice Starling.

IN THE MATTER OF HORMARJI ARDESHIR HORMARJI, AN
INSOLVENT.

1895.

August 30.

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

In August, 1892, the insolvent was found guilty of various offences under sections 50 and 51 of the Indian Insolvent Act (11 and 12 Vic., c. 21) and was sentenced to imprisonment for three months, his discharge being also postponed for a further period of twelve months. In December, 1894, on his application for final discharge under section 60 of the Act, the Official Assignee applied that before the order of discharge was made, judgment should be entered up against him under section 86 for the amount of his debts. The Commissioner of the Insolvent Court in the exercise of the discretion given to him by the Act ordered judgment to be entered up accordingly. On appeal by the insolvent,

Held, reversing the order, that under the circumstances of the case the discretion of the Commissioner had been improperly exercised, and that the order to enter up judgment against the insolvent should be discharged.

APPEAL from an order made by Farran, J.⁽¹⁾

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 Insolvent Act (Stat. 11 and 12 Vic., c. 21)

(1) See *supra*, p. 297.

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 Act. The case is reported at I. L. R., 17 Bom., 313.

In December, 1894, the insolvent applied for his discharge under section 60 of the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21). On that occasion the Official Assignee intervened, and applied under section 86 of the Act to enter up judgment against the insolvent for the amount of his debts, which were over 30 lakhs. The Court made the order, and directed that judgment should be sustained up. From that order the insolvent now appealed, on the ground that the discretion given to the Court by section 86 had not been properly exercised, and that the insolvent had been already sufficiently punished by imprisonment.

The debts and liabilities proved against the insolvent amounted to Rs. 46,66,205, and his total assets realised Rs. 11,92,666, out of which dividends amounting to 23 per cent. had been declared.

Scott for the appellant.

Macpherson (Acting Advocate General) and *Inverarity* for the respondents.

The following authorities were cited:—*In re Clagett's estate*⁽¹⁾; *Re Goud*⁽²⁾; *Re Lloyd*⁽³⁾; *Re Jones*⁽⁴⁾; *Re Shackleton*⁽⁵⁾; *In re Manuel Grant Costello*⁽⁶⁾; *In re English*⁽⁷⁾; *In re Richards*⁽⁸⁾; *In re Bullen*⁽⁹⁾; *Ex parte Salaman*⁽¹⁰⁾; Stat. 46 and 47 Vic., c. 52, sec. 28, sub-sec. 6; Stat. 7 Geo. IV, c. 57, sec. 57.

STARLING, J.:—The appellant in this case having applied for his personal discharge was opposed by the respondents, and the Commissioner after hearing all the evidence in the case found that he had concealed a sum of Rs. 17,000 and also had been guilty of reckless trading. For the first offence, the Commissioner sentenced the appellant to three months' imprisonment on the criminal side of the jail, and for the second, ordered that he should

(1) 20 Ch. D., 637, at p. 650.

(2) 63 L. T. N. S., 292.

(3) 62 L. T. N. S., 366 at p. 367.

(4) 62 L. T. N. S., 370.

(5) 61 L. T. (N. S.), 648.

(6) 8 Beng. L. Rep., Appx., 57.

(7) 7 Cal. L. R., 378.

(8) 9 L. T. N. S., 398.

(9) 5 Morr. B. C., 243.

(10) 14 Q. B. D., 936.

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not get his personal discharge until he had been in jail on the civil side for the term of six months at the suit of each of the two-opposing creditors. The appellant served his period of three months, and was in jail for eight months at the suit of his creditors, when he was released on medical certificate.

On the 6th December, 1893, he obtained a rule *nisi* for his discharge in the nature of a certificate which was returnable in twelve months. That rule came on for hearing on the 5th December, 1894, when Mr. Macpherson on behalf of the opposing creditors argued that the proper notices to creditors in England had not been given, but the Commissioner overruled that contention and the appellant obtained his discharge in the nature of a certificate. At the same time, on the motion of Mr. Macpherson, the Court made an order that judgment should be entered up against the insolvent under section 86 of the Insolvent Act, for the full amount of the schedule debts due.

The point argued in appeal was whether the Commissioner had properly exercised his discretion in passing the above order. The Acting Advocate General contended that judgment ought to be entered up almost as a matter of course, and relied upon the course of procedure under the old Insolvent Acts in England. Under Stat. 7 Geo. IV, c. 57, a person must have been in prison in execution of some process for the payment of money. He could then petition the Court for the Relief of Insolvents, executing at the same time an assignment to the provisional assignee of all the property he was then possessed of. Then came the hearing, after which the petitioner had to execute a warrant of attorney authorizing judgment to be entered up against him, and on that he could be adjudicated an insolvent and be released from jail, freed from all liability in his person for his debts, but his property was never discharged from liability. It is true that section 57 of the Act just referred to is almost identical with section 86 of the Indian Insolvency Act, but it must be borne in mind that in England while a trader could get a final discharge from his debts, a non-trader who had become involved in debt could never get one, and the Indian Insolvent Act provides that both traders and non-traders may get a discharge in the nature of a certificate.

We are of opinion, therefore, that the provisions of, and the practice under, the English Insolvency Act which only culminated in a discharge from prison, are no certain guide to the Court in this matter. In the English Bankruptcy Acts there was no provision for entering up judgment until that of 1883 was passed, in which it appeared as section 28, sub-section 6.

In making the order in the present case, the learned Commissioner did so on the ground that the insolvency was brought about by reckless trading. That question had been gone into on the previous hearing, and the insolvent's personal discharge had been deferred for twelve months on account of it. On his application for his final discharge the opposing creditors could have again opposed him on the same ground, and the Court could have suspended his getting the advantage of a further indulgence if it had thought that he was not entitled to get a full discharge at once. Entering up judgment is, however, quite a different matter. Its effect is to send a man into the world with a certificate that he is entirely free from all the liabilities he had incurred up to the date of the petition, whether actually included in the schedule or not, provided they could have been proved, but at the same time there is a judgment entered up against him which is probably unknown to the world, by which all that he makes from time to time over and above what is necessary for the maintenance of himself and family and the carrying on of his business is liable to be swept away, possibly to his utter ruin. Suppose a man who, after starting afresh, has been very successful, and has put by some 20,000 rupees. The Court possibly might order that to be handed over to the Official Assignee on his application for execution of the judgment already entered up. A year or two afterwards bad times come, prices go down, and the man is in straits. If he had the Rs. 20,000 by him he might weather the storm, but not having it, he has to succumb.

The question as to the circumstances under which judgment should be entered up against a bankrupt or insolvent have been discussed in England under the Act of 1883, and a general rule of practice has been established there which should, we think,

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be followed by the Court here. In the case of *Re Bullen*⁽¹⁾ Lindley, L. J., at p. 247 says: "There is no evidence at all that the man will ever have any after-acquired property, and under those circumstances I think *prima facie* one ought not to tie up a man by such adjustment as that under section 28, subsection 6. It would give rise to great difficulties and possibly litigation." This case was cited to the Court in *Re Shackleton*⁽²⁾ and Cave, J., in delivering judgment, said: "Unless it finds a man in possession of income, derived by his earnings or otherwise, which is more than sufficient to keep his family in the enjoyment of the ordinary necessaries of life according to their station, or unless he is likely to succeed to considerable property, it is not a wise thing to grant the order subject to conditions as to after-acquired property. The Court must see that they do not by prescribing conditions of that kind, do away with a great motive in men to exert themselves in their business. If you impose a burden that prevents a man from looking forward to better his position, he will not make an effort to do so." Again in *Re Goud*⁽³⁾, Cave, J., says, after referring to the case of *Re Bullen*: "Now I have in cases before me acted upon that principle, and I expressed in a recent case of *Re Jones*⁽⁴⁾ which went up to the Court of Appeal and was there affirmed, and I think we must sitting here take it as now being established that, "*prima facie*" you ought not to make an order of this kind upon a debtor unless you show that he has got some expectation of coming into property in the future which, but for an order of this kind, he would be able to enjoy without paying his debt."

In the present case there was no suggestion that the appellant was likely to come into any property in the future. On the contrary the Official Assignee in his affidavit of the 18th December, 1883, said that there is no probability of anything more being realised, and the whole argument in the Insolvent Court proceeded upon his infraction of insolvency law before he had filed his petition: consequently we are of opinion that the order

(1) Morrell's B. C., 243.

(2) 61 L. T. N. S., 648.

(3) 63 L. T. N. S., 292.

(4) 62 L. T. N. S., 370.

to enter up judgment ought not to have been made, and must now be discharged except as to costs, but as the case was argued in the Insolvent Court on different grounds from what it has been here, each party will bear their own costs.

Order discharged.

Attorneys for the appellant:—Messrs. *Ohalk, Walker and Smetham.*

Attorneys for the respondents:—Messrs. *Craigie, Lynch and Owen.*

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ORIGINAL CIVIL.

Before Mr. Justice Parsons and Mr. Justice Starling.

DAGREE (ORIGINAL DEFENDANT,) APPELLANT, v. PACOTTI SAN JAO
(ORIGINAL PLAINTIFF), RESPONDENT.*

1895.

August 30.

Native Christian—Koli caste of fishermen—Converts to Christianity from Hinduism—Succession Act (X of 1865), Secs. 2 and 331—Inheritance—Custom—Evidence of custom of inheritance—Practice—Koli caste.

The Indian Succession Act (X of 1865) and the rules of inheritance prescribed by it, apply to Hindus who have become Christians; and evidence to show that they and the community to which they belong have retained the Hindu custom of inheritance, is inadmissible.

APPEAL from Farran, J.

The plaintiff (respondent) was the husband of one Dumu, who died in October, 1891, leaving him by her will all her moveable and immoveable property. He alleged that she was entitled to a house which she inherited from her maternal grandfather (Dhurma) and to two-thirds of a house and certain moveable property left by her father (Dáma Budia), who died in December, 1890.

The defendant Dagree was the widow of Dáma Budia and the step-mother of Dumu. She had taken possession of all the property in question, and claimed, by the custom of the community, to have a life-interest in it.

The plaintiff contended that the property had devolved upon his wife Dumu under the rules of inheritance laid down in the Indian Succession Act (X of 1865), by which the community was governed, and he, therefore, brought this suit to recover it.

* Suit No. 268 of 1892.