It was first of all argued before us that this document amounted to a mortgage. We are clearly of opinion that it is not a mortgage within the meaning of the Transfer of Property Act; and indeed this point was not seriously pressed.

MAL v. MISSER v. SIDH BINAIK UPADHYA.

The learned pleader for the appellant then contended that, if this document does not amount to a mortgage, it is a charge under s. 100 of the Transfer of Property Act. We are of opinion that it is not a charge. When the Legislature speaks of a charge under s. 100 it speaks of something which operates as a charge upon land immediately as it is executed. This document seems to us, not to create a charge at the time of its execution, but to operate only as a charge upon the land in question upon the non-payment of the principal money in 1289. All that it does is to create the possibility of a charge ultimately arising on the land. That is not a charge under s. 100 of the Transfer of Property Act.

We think that the case has been rightly decided by the lower Appellate Court, and accordingly dismiss the appeal with costs.

H. T. H. *Appeal dismissed.*

Before Mr. Justice Tottenham and Mr. Justice Norris.

IN THE MATTER OF THE PETITION OF JOWALLA NATH.

JOWALLA NATH (JUDGMENT-DEBTOR) *v.* PARBATTY BIBI AND OTHERS (DECREE-HOLDERS).*

1887 *June* 20.

Insolvent judgment-debtor—Civil Procedure Code (Act XIV of 1882), s. 351, Chap. XX.

A Court cannot refuse the application of a judgment-debtor seeking to be declared an insolvent under the provisions of Chap. XX of the Civil Procedure Code unless it finds affirmatively that the applicant has brought himself within clauses (*a*), (*b*), (*c*) or (*d*) of s. 351 of the Code; and the fact that his schedule assets exceed his liabilities does not disentitle him to such relief.

A judgment-debtor applied to be declared an insolvent under the provisions of Chap. XX of the Code of Civil Procedure. The District Judge refused the application on the ground that the assets were admittedly in excess of the liabilities, and that he had made no effort for a period of two years to realise his property for the benefit of his creditors.

Appeal from Order No. 94 of 1887, against the order of T. M. Kirkwood, Esq., Judge of Patna, dated the 28th of March, 1887.

Held, that the District Judge was bound to grant the application as the applicant had not brought himself with clauses (*a*), (*b*), (*c*) or (*d*) of s. 351 in which cases alone he had a right to refuse the application.

THIS was an appeal by a judgment-debtor against an order by the District Judge of Patna refusing to declare him an insolvent under the provisions of Chap. XX of the Civil Procedure Code.

The judgment-debtor had made a previous application in 1885 to be declared an insolvent, but on his application being opposed by some of his creditors it was withdrawn. His present application was made on the 26th January, 1887, and the 28th March was fixed by the Court of first instance for the hearing under s. 350 of the Code. At the hearing on that date he was opposed by some of his creditors, and the lower Court dismissed his application. The material part of the judgment of the lower Court, which began by setting out a list of the petitioner's debts and assets, and showing that the latter exceeded the former by about Rs. 1,000, was as follows:—

"On the application itself as it stands I think there is no case for insolvency. The assets are, even on the showing of the applicant, Rs. 1,000 in excess of the liabilities. Then it is urged that this is not all cash in hand, the judgment-debtor cannot realise it at once, and meanwhile it will be hard on him if he has to go to jail. To that I can only reply that, though there was an effort to be declared insolvent on his property being attached just two years ago, which was opposed by these same decree-holders, and was then withdrawn, it is not alleged that in the interim any effort has been made to realise the amount due and pay off the debts by sale of the property or by realisation of bond and khatta debts. As the applicant has not availed himself of this long period of grace allowed by the creditors in order to take any steps towards liquidating their claims, I see no reason whatever to suppose that, if he is enlarged for another two years, he will take any steps in that direction.

"He says, 'Oh, I am quite ready to hand over to my creditors all my claims and let them realise what they can out of them,' but it has been his bounden duty himself all this time to realise

them on behalf of his creditors, and he has made no effort in this direction.

"I do not think the case is one in which the applicant should be treated as an insolvent.

"No doubt s. 356 provides for realisation of an amount which in some cases exceeds the claims of the creditors; but I think the case of a man who has, during the two years that his creditors have let him alone, made no effort to effect realisations is not a man to whom any favor should be shown. It cannot be said that circumstances have been too much for him and that he is unfortunate; it can only be said that he has exhibited a culpable lethargy in taking no steps towards getting in his dues in order to satisfy the claims against him, and that the creditors are not acting harshly to him in now seeing, as a final effort, what a term in jail will effect towards making his duty manifest to him.

"I reject the application with costs."

The judgment-debtor now appealed to the High Court against that order.

Mr. *Abul Hossain* and Baboo *Saligram Singh* for the appellant.

Mr. *C. Gregory* and Baboo *Jogendra Chandra Ghose* for the respondents.

Mr. *Abul Hossain* (for appellant).—The Judge was bound to declare the applicant an insolvent. He did nothing to bring himself within clauses (*a*), (*b*), (*c*) or (*d*) of s. 351 of the Civil Procedure Code. *Salimat Ali* v. *Minahan* (1) supports my contention. The fact that assets are in excess of the liabilities does not disentitle the applicant from seeking the protection of the Court, and s. 356 of the Code expressly provides for such cases.

Mr. *C. Gregory* (for the respondents).—The application on the face of it shows that the petitioner is not an insolvent. The creditors allowed him two years' time, but he took no steps to realise the property which is mentioned in his schedule. He was guilty of laches, and has forfeited the right to be declared an insolvent, and does not deserve any indulgence being shown him.

(1) I. L. R., 4 All., 337.

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on to such a claim one of a disputable character did not go to show that the suit was not a *bonâ fide* one.

Held, that there is no authority for saying that the principles applied in England to the granting of writs *ne exeat regno* should be applied in this country; and that the Court can only look to the provisions of the Code of Civil Procedure; that when a person comes on business to this country in which he has no property or domicile, and enters into a contract with a person to do work in connection with that business and which must be done before he leaves the country, and it is known he intends to leave as soon as the work is completed, there is an implied understanding, if the work was done on his credit, that it should be paid for before he leaves.

Held, also, that the case fell within the provisions of s. 477 of the Code, and that the defendant should furnish security for his appearance while the suit was pending within a week in terms of s. 479, such security to be for the amount of the claim.

THIS was an application under s. 471 of the Code of Civil Procedure that security should be taken for the appearance of defendant to answer any decree that might be passed against him in the suit.

The plaintiffs were the owners of the Hooghly Dock and the defendant the master of a barque called "Roanoke," and the claim in the suit was for work done to the vessel in the nature of repairs and for dock hire. The plaintiffs alleged that between the 23rd May and 11th June, 1887, they at the request of the defendant executed certain works and repairs at rates and prices agreed on, the total value of which amounted to the sum of Rs. 5,796-14-3; and they stated that the works and repairs so executed were reasonably worth that amount; that for the purpose of executing such repairs the vessel was taken into their dock, and whilst she was there it became necessary to fill the dock to let another vessel called the "Star of Erin" in, and again to empty it; that the defendant had alleged that in the course of such operation his vessel had been strained and otherwise injured, but that such allegations were erroneous, but that for the purpose of surveys and otherwise they had at the request of the defendant executed certain other works of the value of Rs. 1,182-11-9, and they claimed to be entitled to recover that sum.

The plaintiffs further claimed the sum of Rs. 2,250 on account of dock hire at Rs. 250 a day for the use of the dock from the 12th to the 20th of June, the barque having been kept in the dock

for that period after reasonable notice had been given to the defendants to remove her.

They also claimed Rs. 256 survey fees rendered necessary owing to the allegations as to the injuries caused to the vessel by letting the "Star of Erin" into the dock, and a sum of Rs. 334-5-9 for repairs executed subsequent to the 16th of June at the request of the defendant.

The whole claim amounted to Rs. 9,728-9-9, for which the plaint was filed on the 25th June, 1887, and on the same day a rule was obtained calling on the defendant to show cause within 24 hours after the service thereof on him why he should not furnish security to the extent of that sum for his appearance to answer any decree that might be passed in the suit.

The rule was granted on a petition of the plaintiffs and an affidavit of James Mori, the manager of the plaintiffs' dock, which set out fully the facts in connection with the plaintiffs' claim, and also stated that the defendant had no permanent residence in British India; that he had come to Calcutta in command of the "Roanoke" and was about to leave again in charge of her on a voyage to Natal; and that there was no certainty as to when he would return or if he would ever return to India. It was further alleged that the vessel was under a charter for Natal and had been on demurrage since the 14th, and had already loaded a portion of her cargo and could complete her loading and proceed to sea in a very short time.

The defendant disputed the claim of the plaintiffs and opposed the order asked for. He disputed the rates charged for the work and repairs, denied having agreed to them, and said that they were exorbitant and that the work charged for had been done in a very slovenly, unworkmanlike manner and was altogether unseaworthy; that it was grossly overcharged for, and even that charged for had not been completed, and some of the items had never been done at all, and some of the articles charged for never supplied. He further denied that he was indebted to the plaintiffs at all on the ground that, if a proper sum was charged for the work actually done, it would be found that his claim for demurrage exceeded that amount. He stated that he had at the time objected to the admission of the "Star of Erin" to the dock as his vessel was not in a fit state to be floated, and he

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alleged that in consequence of the plaintiffs insisting on admitting that vessel and doing so they had caused considerable damage to the "Roanoke" by straining her and breaking away some deck houses and portions of the rail. He claimed the sum of Rs. 2,750 as demurrage from the 12th to the 22nd June, alleging that owing to the "Star of Erin" being admitted to the dock his vessel could not be removed before the latter date, and that sum, together with surveyor's fees and the amount claimed by him for damages, towage, etc., brought up the amount he claimed from the plaintiffs to Rs. 3,556-7.

In his affidavit he stated that he never had, nor had he then, any intention whatever of removing the said vessel from the jurisdiction of the Court with the intention to obstruct or delay the execution of any decree which might be passed against him, and that the owners of the vessel were wealthy people in London and Rotterdam, and that any sum that might be required for the repairs or necessary expenses of the vessel could be obtained by him in three days.

Mr. *Pugh* and Mr. *T. A. Apcar* showed cause against the rule on behalf of the defendant.

Mr. *Hill* in support for the plaintiffs.

Mr. *Pugh*.—The case of *Harrison* v. *Dickson* (1) lays down the rules observed by the late Supreme Court in matters of this kind and the principle upon which the Court will exercise its discretion in making such an order as that asked for. In England there was the writ of *ne exeat regno*, and also the proceeding at common law by which a person was held to bail, but there must be a debt due and the amount must be ascertained (Seton on Decrees, Vol. I, Part II, p. 316, and the cases there cited). There is no doubt that the Court has a discretion to grant or refuse this application, and this is not a case, having regard to the nature of the claim and the case set up by the defendant, in which such discretion should be exercised. The defendant is not the proper person to be sued—*Mackinnon, Mackenzie & Co.* v. *Lang, Moir & Co* (2). That the plaintiff could have sued the owners,

(1) 1 Boulnois, 33. (2) I. L. R., 5 Bom., 584.

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and that service on the captain as agent would have been sufficient is shown by the decision in *Blackwell* v. *Jones* (1).

The real question here is, should the discretion of the Court be exercised. The word used in the section is "may," and the plaintiffs will have to contend that it should be read as "must." The leading case on the subject is *Julius* v. *Lord Bishop of Oxford* (2), and "may" as used here should be read as being permissive only.

Mr. *Apcar* on the same side.—The Court should not exercise its discretion in the case as the suit is clearly not a *bonâ fide* one, as shown by the claim for Rs. 2,250 for dock hire, the vessel being kept in dock by the plaintiffs letting the "Star of Erin" in behind her and preventing her getting out. In England the application would not be granted on a stated and unsettled account which is contested—*Flack* v. *Holm* (3). The Court can only grant this application if the defendant fail to show cause against it, and what constitutes good cause is laid down in *Spence's Hotel Company*, v. *Anderson* (4).

Mr. *Hill* for the plaintiffs in support of the rule.—Masters of ships form an exception to the general rule as to the liability of agents for contracts entered into on behalf of the owners (Kay, Vol. 2, p. 1148). *Spence's Hotel Company* v. *Anderson* (4) does not show that the plaintiffs in this case are not entitled to the order they asked for. See also *Agra & Masterman's Bank* v. *Minto* (5). The learned Counsel then proceeded to contend that the Court here was bound to follow the provisions of the Code of Civil Procedure and that the English cases had no application, when he was stopped by the Court. He then went into the facts of the case, and contended that the suit was a *bonâ fide* one, and referred to the cases cited at p. 561 of Broughton's Civil Procedure Code (Act X of 1877).

The Court took time to consider and subsequently delivered the following judgment:—

MACPHERSON, J.—This is an application under s. 477 of the

(1) 7 Bom., O. C., 144.
(2) L. R., 5 App. Ca., 214.
(3) 1 J. and W., 405.
(4) 1 Ind. Jur. N. S., 294.
(5) 1 Ind. Jur. N. S., 265.

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Civil Procedure Code to take security for the defendant's appearance to answer any decree that may be passed against him in the suit. The plaintiffs are the proprietors of the Hooghly Dock, and the defendant is the master of the "Roanoke" described as a barque of 400 tons. The claim amounting to Rs. 9,728 is principally for work done to the vessel while in the plaintiffs' dock, but it includes a charge of Rs. 2,250 for dock hire.

The defendant has no domicile in this country; he came to Calcutta in charge of the vessel, and there is no answer to the allegation that he intends to leave as soon as he possibly can, his vessel being under charter for Natal, and that there is no certainty as to whether he will ever return. There is clearly, therefore, reasonable probability that the plaintiffs will be obstructed or delayed in the execution of any decree that may be obtained. The defendant shows cause against the rule which issued, the contentions being that under the Contract Act he is not personally liable and that the suit is not a *bonâ fide* suit. The plaint sets out that the defendant, the master of the barque in question, entered into the contract for repairs, and that the repairs were done at his instance and under his instructions.

There is no denial of this allegation in the affidavits filed. The defendant does not say that he contracted as agent only, or that the name of his principal was disclosed, or that it was understood that the plaintiffs were to look to his principals and not to him for payment. The affidavit merely declares that the owners of the barque are gentlemen of wealth carrying on business in England and Rotterdam and well able to meet any decree that may be passed. There is not in the affidavits a single circumstance to indicate that the plaintiffs in entering into this contract were dealing with the defendant as an agent, and that they were looking not to him but to some one else for payment, and it is highly improbable that they would do so as regards persons living out of the jurisdiction whose names they had never heard, and of whose existence, so far as appears, they were ignorant. The mere fact that the defendant was the master of the barque (there is nothing to show that he is not also a part owner), and that the plaintiffs might have ascertained who the owners were, does not

rebut the presumption arising under s. 230 of the Contract Act, and I must, on the materials now before me, hold that this section applies and that the defendant is personally liable.

The remaining question is as to the suit being a *bonâ fide* one, for, if the defendant can show that the suit is not *bonâ fide*, that would be good cause.

It is admitted that the vessel was in the plaintiffs' dock from the 21st May to the 22nd June, and that certain repairs were done.

The claim may be divided into two parts—as to work done up to the 10th June or under agreements entered into before that date, and work done subsequently, including charges for dock hire. The plaintiffs' claim for the former amounts to Rs. 5,706, and the accounts filed with the defendant's affidavits show that he objects to items aggregating Rs. 2,399 for work not done or overcharged.

The parties are at issue as to whether the work was done at rates agreed to beforehand or not, and I need only say as to this that the defendant's affidavits do not directly meet the plaintiffs' allegation on this point. If all the objected items were allowed there would still remain a balance in the plaintiffs' favor of Rs. 3,400. It is said no doubt that the work was bad and would not pass a survey, but this is a matter on which I cannot on the materials before me express an opinion, though I may observe that in the correspondence which passed before suit nothing was said of bad work.

The remaining part of the claim is of a more disputable character ; the defendant not only denies his liability altogether, but counterclaims for a sum of Rs. 3,556 for demurrage and expenses on account of his vessel being improperly detained in the plaintiffs' dock.

The questions which will have to be determined are, therefore, whether the vessel remained in dock under circumstances which would entitle the plaintiffs to dock hire or the defendant to demurrage, and whether the work subsequently done was done by the plaintiffs in consequence of injuries arising from their own neglect. I am not going to express any opinion on the merits of these

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questions. I have only to see whether, looking to the case as a whole, it is a *bonâ fide* case, or whether it is a case of a speculative character, and brought with a view to harass or annoy the defendant, or to take advantage of his position and induce him to come to terms which, perhaps, he otherwise would not do. The mere fact that the claim is disputed does not deprive it of the character of *bona fides*, and if the claim were confined to the Rs. 5,729 I should have made this order without hesitation, because it is beyond doubt that the claim to that extent is an honest claim and based on a substantial foundation. As I have said, even if all the items objected to were disallowed and struck out of the plaintiffs' claim, there would still remain a balance in the plaintiffs' favor, unless the defendant could establish the set-off relied on, or show that the work done was so bad as to be almost worthless. The fact that a person adds on to a claim of that description a claim of a disputable character does not, in my opinion, go to show that the whole claim is not brought in good faith and, in the plaintiffs' estimation, with some prospect of success. If they had any claim at all as regards the latter sums they were bound by law to include it in the present suit or to abandon it altogether. I cannot, therefore, say that the claim is not a *bonâ fide* one.

It has been urged also that the Court in dealing with this section should apply the principle applicable in England to suits of *ne exeat regno*. There is no authority for this, and it seems to me that the contention is not consistent with the words of the section. I think if a person comes on business to this country, in which he has no domicile or property, and enters into a contract with a person to do work in connection with that business, and which must be done before he leaves the country, and it is known that he intends to leave as soon as the work is completed, there is an implied understanding, assuming that the work was done on his credit, that it shall be settled or paid for before he leaves the country. It seems to me, therefore, that the case is one that falls under s. 477, and I must make an order that the defendant must furnish security for his appearance while the suit is