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a preliminary one made by bye-laws under section 8 of the Act. We need not, therefore, enter on the other points raised. The applicant is duly qualified and has satisfied the requirements of the bye-laws of the University as to his appearance at the Previous Examination, and the University were under statutory obligation to examine him when he presented himself for it. We, therefore, make the rule absolute with costs.

Rule absolute.

Attorneys for the Petitioner :—Messrs. *Thakoredas, Dharamsi and Cama.*

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

INSOLVENCY JURISDICTION.

Before Mr. Justice Russell.

1898.
December 21.

DAYABHAI SARUPCHAND, Insolvent; SORABJI BYRAMJI COLAH, opposing Creditor.

Insolvency—Order of personal discharge—Finality of order—Indian Insolvent Act (Stat. 11 and 12 Vict., cap. 21), Secs. 47, 56—Practice—Procedure.

An order under section 47 of the Indian Insolvent Act (Stat. 11 and 12 Vict., cap. 21) for the final discharge of an insolvent once granted cannot be set aside except upon the grounds specified in section 56 of that Act. The only course open to an opposing creditor is to appeal against the order under section 73.

Rule obtained by the opposing creditor to have an order made under section 47 of the Indian Insolvent Act (Stat. 11 and 12 Vict., cap. 21), for the personal discharge of the insolvent revoked or set aside.

The insolvent had filed his petition and schedule on 12th January, 1898. In pursuance of Rule 14 (see Rules and Orders, Bombay) he gave notice of his intention to apply to the Court for an *interim* order of protection under section 13 of the Insolvent Act. Thereupon the opposing creditor filed grounds of opposition to such order, and appeared by counsel on the 4th May, 1898, to oppose the granting of the order. The Court, however, in spite of his opposition granted a protection order to the in-

solvent for three months. On the 3rd August, 1898, the insolvent applied for an extension of the *interim* order, which, notwithstanding the opposition of the opposing creditor, was granted for a further period of two months.

In September, 1898, the insolvent served notices (under Rule 12) upon his creditors, and the 5th October, 1898, was appointed for the hearing of his petition. In the notices the creditors were called upon to file their grounds of opposition (if any) three clear days before the day so fixed for the hearing of the petition. (See Rule 18.)

On the 5th October, 1898, the case came on for the first hearing, and on that day, according to the practice, the insolvent obtained a rule *nisi* for his personal discharge under section 47 of the Insolvent Act, which was made returnable a fortnight later, *viz.*, on the 19th October. At the same time (*viz.*, 5th October) he obtained a further extension of his *interim* protection order for one month.

On the 19th October, 1898, the case came on again, and there being no opposition, and no grounds of opposition having been filed under Rule 18, the insolvent obtained his personal discharge under section 47 of the Act.

On the 16th November, 1898, the opposing creditor took out a rule calling upon the insolvent to show cause "why the matter of his petition should not be re-heard or reviewed, or why the order made in the matter on the 19th October, 1898 (whereby it was (*inter alia*) ordered that the said insolvent should be declared entitled to the benefit of the Act passed for the benefit of insolvent debtors in India) should not be revoked or set aside."

In the affidavit filed in support of the rule, the opposing creditor stated that he was in Court on the 5th October, 1898, when the insolvent's case was called on, but that, hearing that an extension of the protection order was granted for one month, he "left the Court under the impression that the hearing of the insolvent's petition would take place a month thereafter." The affidavit then proceeded as follows:—

"8. On reading the newspapers on the 20th instant, I was exceedingly surprised to learn that on the 19th instant the petition of the insolvent was heard and that he was discharged.

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"9. I say that I intended to oppose the discharge of the insolvent and that it is my intention to do so if I am permitted.

"10. I filed my grounds of opposition to the discharge of the insolvent and my affidavit of claim so far back as the 3rd day of May, 1898, and I was informed that by reason of my having filed such grounds of opposition the petition of the insolvent was liable to be placed in the opposed list and, therefore, was not likely to be called on for hearing for some months, and such my belief was strengthened when on the 5th day of October, 1898, I attended the Court, the insolvent himself applied for an extension of the protection order, although, according to the terms of the notice served upon me, that day, *viz.*, the 5th day of October, 1898, was fixed by the Court for the hearing of the insolvent's petition.

"11. I, therefore, pray that the order for the discharge of the said insolvent may be annulled, and that his petition may be again set down for hearing, and that I may be permitted to oppose his discharge."

The rule now came on for hearing.

Mankar, for the insolvent, showed cause:—The order of discharge once made cannot be set aside, unless upon some of the grounds mentioned in section 56 of the Act. None of these grounds are shown in the opposing creditor's affidavit. The Court has, therefore, no power to re-hear the matter. There has been no fraud or misconduct of any kind on the part of the insolvent in obtaining his discharge, nor is it alleged. The failure of the opposing creditor to appear on the day of hearing through accident or mistake is not sufficient cause under the section to justify the Court in reviewing its order—*In re Golam Hoosen* decided by Bayley, J., on 10th February, 1892 (not reported); *In re Jacob Auron* decided by Farran, J., on 16th January, 1895 (not reported); and *In re Shalom Balkoji Tagaokar* decided by Strachey, J., on 18th November, 1896.

Inverarity for the opposing creditor in support of the rule:—I don't apply for a review under section 56. That section does not refer to a case like this. We ask to have the order of discharge set aside. The Court has power over its own order independently of that section. The order was passed under circumstances which make it an injustice to the opposing creditor. He was misled by what took place in Court on the 5th October and understood that the matter would not come on again for a month. It is only reasonable that the Court should set aside the order of discharge.

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RUSSELL, J.:—The facts of this case I find from the records are as follows:—The insolvent filed his petition on the 12th January, 1898. He obtained an *interim* order on the 4th May, 1898, for three months notwithstanding that notice and grounds of opposition to the *interim* order were filed by the abovenamed opposing creditor on the 3rd May, 1898, and gone into. On the 3rd August, 1898, the said *interim* order was extended for two months, although the said opposing creditor again appeared and opposed.

Notices for discharge were issued by the insolvent and duly served upon the opposing creditor, among other creditors, on the 15th August, 1898, fixing the 5th October, 1898, for the first hearing. Such notices contain the usual clause:—"If you wish to oppose the discharge of the said insolvent, you must give notice thereof to me, *i. e.*, the Clerk of the Court, in accordance with Rule 18." As no such notice was ever received from any of his sixty-nine creditors, the insolvent on the 5th October, 1898, obtained his usual rule *nisi*, and on the 19th October, 1898, he obtained his personal discharge under section 47 in the ordinary course unopposed.

The opposing creditor took out a rule calling upon the insolvent to show cause why the order for his discharge should not be set aside, to which Mr. Mankar showed cause on the 21st instant, and the matter was argued by him and Mr. Inverarity before me. I am of opinion that the rule must be discharged upon the ground that I have no power to set aside the order for discharge. Section 56 of the Insolvent Act provides as follows:—(His Lordship read the section and continued.) It has been argued before me that the word "review" there does not include setting aside an order. I am of opinion that this argument is not well founded. The section distinctly provides for the finality of orders of discharge, and I apprehend that the word "review" means "take again into consideration with a view of further dealing with the order." It seems to me that it is only when the Court can take into consideration the order with the view of further dealing with it upon the grounds mentioned in the section, that the Court can rehear the matter and then annul the original order. The circumstances of this case do not bring it within the purview of

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section 56 and consequently the only course open to the opposing creditor is to appeal under section 73 from the order granting the discharge. See *Re Blackwell* (1).

I would add that I have referred to two other cases: one *In re Jacob Aaron* (2), where an application was made to set aside an order of discharge upon the ground that it had been granted owing to the Insolvent Court sitting unexpectedly, and the opposing creditor consequently not appearing. That application was refused. A similar application was made in No. 376 of 1895 in which the order of discharge had been granted in consequence of the opposing creditor's counsel being accidentally not present in Court. That application was also refused. The present case is stronger, because the opposing creditor took no notice of the express notice given to him by the Clerk of the Insolvent Court in accordance with the practice in that behalf. Having regard to that practice I do not think the mere filing of the grounds of opposition is a sufficient compliance with Rule 18. I cannot but regret this result, and discharge the rule without costs, which was the course adopted in the cases I have referred to.

(1) (1872) 9 Bom. H. C. Rep., 319. (2) No. 147 of 1894, unreported.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Chief Justice (Acting), and Mr. Justice Ranade.

1898.
October 3.

KUSAJI (ORIGINAL APPLICANT), APPELLANT, *v.* VINAYAK R. PARABHU (ORIGINAL OPPONENT), RESPONDENT.*

Surety—Limitation Act (XV of 1877), Sch. II, Art. 179, Expl. 1—Liability of surety in execution—Application for execution against a surety when a step in aid of execution against a principal—Mode of enforcing payment against a surety—Practice—Procedure.

Vinayak Ramchandra was awarded the sum of Rs. 4,951-13-11 by the District Judge as compensation for land taken up by the Collector under the Land Acquisition Act, 1870. The money was ordered to be paid over to him on his giving security for its refund in case the appellate Court so ordered. Damodar Viziarangam thereupon became his surety and executed a bond binding himself to pay into Court the said sum of Rs. 4,951-13-11, if ordered by the Court. On the

* Appeal, No. 45 of 1898.