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out of three villages, seven years' arrears, due previously to the filing of the plaint, were awarded with interest by the Lower Courts. The High Court varied that decree so far as it granted interest, which it refused to allow, Couch, C.J., saying that "there is no law which enabled the Lower Courts to award interest" in such a case.

Damages for mesne profits are not a debt or sum payable at a certain time, nor has any demand, in writing, of payment of mesne profits been proved to have been made: this case, therefore, does not come within Act XXXII. of 1839 (*l*).

We have arrived without doubt at the conclusion that interest was improperly awarded in the Courts below—by the Subordinate Judge at 6 per cent., and by the Assistant Judge at 9 per cent. We hold that interest at any rate whatever cannot be allowed in such an action as the present, brought, as it is, to recover mesne profits and interest only.

[APPELLATE CIVIL JURISDICTION.]

Feb. 19.

Miscellaneous Special Appeal No. 30 of 1871.

YENKOBÁ BÁLSHET KÁSÁR.....*Appellant.*

RAMBHÁJI valad ARJUN.....*Respondent.*

Jurisdiction—Decree for sale of mortgaged property out of jurisdiction—Civ. Proc. Code, Sec. 5.

A suit for the recovery of a mortgage debt by the sale of the mortgaged property is not a suit for land within the meaning of Sec. 5 of the Code of Civil Procedure.

A may decree the sale of mortgaged immoveable property though situate beyond its jurisdiction.

THIS was a miscellaneous special appeal from an order of A. C. Watt, Acting Judge of Khandesh, confirming an order of the Subordinate Judge of Amalnair, refusing to execute a decree.

(*l*) See *Harpér* v. *Williams* 4 Q. B. 219; 12 L. J. Q. B. 227

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Yenkobá B. Kásar v. Rambhájí valad Árjun.

The plaintiff brought a suit in the Court of the Subordinate Judge at Erandol upon a mortgage bond for Rs. 1,000, which amount, with interest and costs, he sought to recover from the defendant personally, and, in default of payment by the defendant, by a sale of the mortgaged property. The property mortgaged was situated within the jurisdiction of the Subordinate Judge of Amalnair. The Erandol Subordinate Judge decreed that the plaintiff should recover from the defendant Rs. 1,738-13-7, and that if the defendant did not pay that amount, the plaintiff should realize the same by the sale of the mortgaged property. On an application for execution of this decree coming on before the Amalnair Subordinate Judge, he was of opinion that the Erandol Subordinate Judge had no jurisdiction to order a sale of immoveable property not situated within the limits of his jurisdiction. In appeal, Mr. Watt was of the same opinion. He, therefore confirmed the order refusing execution.

The special appeal was heard by GIBBS and MELVILL, JJ.

V. N. Mandlik, for the special appellant:-This is not a suit for immoveable property. All the cases bearing upon this subject are cited in the 4th edition of Broughton's Commentaries on the Code of Civil Procedure, under Section 5 and support my contention.

Pandurang Balibhadra, for the special respondent.

PER CURIAM:—We think that this is not a suit for land within the meaning of Section 5 of Act VIII. of 1859. Comparing that section with Sections 223 and 224 of the Code, we think that a suit for land is a suit which asks for delivery of the land to the plaintiff. We may observe that the Court of Chancery, though it has no power directly to affect property situate out of the bounds of its jurisdiction, and will not therefore try the validity of a will of land in the Colonies though made in England: *Pike* v. *Hoare* (*a*) nor entertain a bill of partition: *Archer* v. *Preston* (*b*), yet will order the sale of an estate in the Colonies, in order to realize a sum of money charged upon it: *Gascoigne* v.

(*a*) 2 Eden 182. (*b*) 1. Eq. Abr. 139.

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Yenkoba' B. Ka'sa'r v. Rambha'ji valad Arjun.

Douglas (c) and *Noel* v. *Robinson* (d). We reverse the orders of the Courts below, and direct that the Subordinate Judge of Amalnair dispose of the application for execution according to law with reference to this judgment.

Order accordingly.

[INSOLVENT DEBTORS' COURT.]

In re N. D. COORLAWALLA.

Feb. 21.

Indian Insolvent Act, Secs. 47, 50, *and* 60—*Personal discharge under Sec.* 47—*Subsequent inquiry under Sec.* 60—*Evidence—Imprisonment of Insolvent under Sec.* 50.

An insolvent, whose personal discharge has been opposed under Sec. 47 of the Indian Insolvent Act, can be again opposed by the same creditor, and on the same grounds, when he applies for an absolute discharge under Sec. 60.

The order made on the hearing of the petition under Sec. 47 of the Act can be used as evidence against the insolvent when applying for his discharge under Sec. 60, provided that such order clearly states the offences established against the insolvent.

An insolvent by being punished under Sec. 50 of the Act does not thereby cease to be liable in respect of such offences when he applies for his discharge under the 60th Section.

The discharge under Sec. 60 of an insolvent who has already obtained his discharge under Sec. 47 is not as of course, but will depend upon the general conduct of the insolvent both before and subsequent to his obtaining his discharge under Sec. 47.

THE facts of this case appear fully in the judgment of the Court.

The petition of the Insolvent came on for hearing before Gibbs, J., on the 20th of December 1871 and the 10th of January 1872.

Marriott, for the opposing creditors.

The Insolvent in person.

Cur. adv. vult.

(c) Dick. 431. (d) 1 Ver. 90, 453, 460.

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21st February 1872, GIBBS, J. :-The Insolvent in this case obtained an order for his discharge under Section 47 of the Insolvent Debtors' Act on the 23rd July 1869 from the present Chief Justice, then sitting as Commissioner in this Court such order directing that he (the Insolvent) should, under Section 50, previously undergo two years' imprisonment. The orders as follows: "Forasmuch as it appears to this Honourable Court that the said Insolvent, Navorji Dhanjibhái Coorlawalla, has (1) fraudulently, with intent of diminishing the sum to be divided among the creditors, made away with and concealed a sum of ruppees fifty thousand; and (2) fraudulently, with intent to conceal the state of his affairs, and to defeat the objects of the said Act, purposely withheld the production of a certain Guzerathi account book and certain receipts, respectively, relating to his affairs, subject to investigation under the said Act; and (3) wilfully altered and falsified a certain other book of account, namely, an English account book, containing a register of boatloads of sand and *murum*, whereby he has brought himself within the meaning of the fiftieth section of the Act, this Court doth adjudge that the said Insolvent, Navroji Dhanjibhái Coorlawalla, be forthwith taken into the custody of the gaoler of the Common Gaol of Bombay by virtue of a warrant under the seal of this Honourable Court, and that the said Insolvent shall be discharged from custody and entitled to the benefit of the said Act * * * so soon as the said Insolvent, Navroji Dhanjibhái Coorlawalla, shall have been in custoby on the criminal said of the said gaol for the period of twenty-four calendar months, to be computed from the date of the order." It appears that after being in prison for about ten months he was released by order of the Governor in Council on the ground of ill-heald death. He now applies for a discharge in the nature of a certificate under Section 60 of the Act. This application is opposed, and Counsel having been heard for the oposing creditor, and also the Insolvent, I adjourned the case for consideration. The questions raised were, whether (1) an insolvent, who had been opposed at the time he applied for his personal discharge under Section 47, could e bopposed by the same creditor no the same grounds on his

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application for a discharge in the nature of a certificate under Section 60; (2) if he could, then whether the Court could enter the decision of the Commissioner, sitting to adjudge the discharge under Section 47, as evidence against the Insolvent under Section 60, or whether fresh proceedings should not be taken: and (3) whether, having been punished for the offences of which he was found guilty in the inquiry under Section 47 he could still be held liable for the same offences when the question was for a discharge under Section 60.

As regards the nature of the two orders under Sections 47 and 60, respectively, I see no ground for altering the opinion I expressed in the case of *Pestanji and Edalji Kaka* (*a*), to the effect that the benefits derivable from the latter order were so great as to justify the Court, when deciding on the application, in considering the entire facts connected with the Insolvent's trading both before and since his insolvency, and I therefor on this ground, as well as on a review of the peocedure under the old Bankruptcy law in England, consider that the creditors have a right to oppose the granting of this greater boon equally as to the former and smaller benefit under Section 47 and on the same grounds.

On the second question raised, I had doubts when the case was argued, which required me to take time to consider. The case *in re Phillips* (*b*), as shortly noticed in Shelford's Practice, led me at first to consider that a fresh inquiry might be necessary; but upon reading the full report of the case and further considering the law as then in force at home, and the terms of the Insolvent Act for India, I have come to the determination that I may rightly use the order of the Chief Justice as proof of what was found proved against the Insolvent. If the formal order had been too vague to shew this, I think I must that have taken evidence *de novo*; but on this latter point I do not bind myself to any decision, as there is no need for my so doing—the order on record by

(*a*) 8 Bom. H. C. Rep. O. C. J. 37. (*b*) 20 Law Times, 15.

the Chief Justice being quite full and distinct as to the charges established against the Insolvent.

On the third point, I must also record my decision against the Insovent. The wording of the Act to my mind, clearly gives me equal power in dealing with an application under Section 60 as under Section 47; the words of the former section are, that the Court has power to make the rule absolute *i.e*, to grant the order, or "to dismiss such petition, or to adjourn the further hearing thereof, or to make such order thereon as shall be just; and further, the Court can in granting it, limit its operation as to its effect on after-acquired property." Now, surely it could never have been the intention of the Legislature to mean that if an insolvent had been punished for fraudulent practices, he might, after undergoing the punishment awarded, come and, as a right, demand his discharge under Section 60. It is quite true that the object of the insolvent Act here, as the Bankruptcy Act at home, is to enable traders to start fair again; but, as I stated more fully in the case of the *Kaka Brothers*, above alluded to, it could not be intended to allow persons guilty of practices and acts opposed to honest dealings to have as fair a start again as an honest, through unfortunate, trader. The classification of certificates under the provisions of the former Bankruptcy Law at home has not been introduced into the Indian Act, but the 60th section gives the Court ample means to deal with such cases as the present; and I have now, therefore, to consider what my duty is with regard to the Insolvent. Should he be allowed a discharge at all; or, if allowed one, on what terms? I find from the recorded decision of Sir M. Westropp, that the Insolvent was considered by him to have been guilty of the following offences:—(1) Making away with and concealing Rs. 50,000; (2) with holding receipt books and papers; (3) altering and falsifying an account book. From inquiry, I learn that since this order the Insolvent has not been near the Official Assignee: he did not appeal against the Commissioner's decision, but he has not attempted to put matters in a train for the benefit of his creditors: the schedule filed with the

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present petition is simply a copy of that originally filed, and which was held to be faulty and fraudulent. I mention this particularly, as insolvents here seem to think they will get their discharge under Section 60 as a matter of course; and that, after they have received their personal discharge under Section 47, they have nothing more to do than apply for the further benefits of the Act, that they may leave the Official Assignee to do what he likes and what he can without further assistance from them—a course very opposite to what the Act requires, both in its spirits and its letter. I consider that, in deciding this application, I must follow the English cases. By the 5 & 6 Vic., c. 122, s. 23, which was the law in England similar to our present Act here, it was enacted that any bankrupt who shall be guilty of concealing, altering, or falsifying any of his books or papers, with the intent to defraud his creditors, or with the intent to defeat the objects of the Bankruptcy law, or who shall have concealed any of his property, was not to be entitled to a certificate. The Insolvent has been found guilty of concealing, altering, and falsifying his accounts, and also of concealing some of his property: it is clear, therefore, that he could not have got a certificate under the Bankruptcy Act at home. In the case of *ex parte Knight* (*c*), Lord Justice Turner, in upholding an order refusing a certificate, says: "There is nothing against which the Bankrupt Law points more strongly than falsification of books. I think it would be a highly dangerous thing to relax the law in such cases as this." In *ex parte Dobson in re Strong* (*d*), the same learned Judge observes: This Court has never failed to visit fraud and falsehood with severe penalties"; and Lord Justice Knight Bruce in the same case says: In the present case the bankrupt has been proved to have been guilty of wilful falsehood as to the state of his affairs, to have been guilty of intentional concealment of his goods for the purpose of defeating his creditors and to have committed other offences which the gravity of these to which I have referred makes it needless to mention. If we were to grant this man a certificate, we

(*c*) 26 L. J. Bank. 57 (*d*) 25 L. J. Bank. 17.

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should contradict our whole practice and everything we have hitherto said or done in cases of this description." A certificate is not a matter of right, but of discretion. It is true such must be exercised on judicial principles; but those principles mark the duty of attending to the public interests and the claims of society, and I cannot hide from myself the wholesale fraud of which the insolvent appears to have been guilty. He was justly punished by this Court, but soon escaped its effects on the plea of ill-health. Had he suffered the entire period of imprisonment that my predecessor awarded him, I should have hesitated to give him an order under Sec. 60; but I have now no hesitation in refusing it to him, as I think that his conduct before and since his insolvency is such as to bar his having a claim to start free once more as a merchant of this city. The application is rejected, and the Insolvent must pay the costs of the opposing creditors.

[ORIGINAL CIVIL JURISDICTION.]

Feb. 21.

Suit No. 718 *of* 1870.

THE ADVOCATE GENERAL .....*Plaintiff.*

FATIMA SULTANI BEGAM and another .....*Defendants.*

Muhammadan law—Wakf—*Founder's right to appoint manager*—*Manager chosen from specified class*—Akriba, *meaning of term*—*Wife of founder*

Although, according to Muhammadan law, the founder of a *Wakf* has a right to reserve the management of it to himself or to appoint some one else thereto, yet when he has specified the class from amongst which the manager is to be selected (*e.g.*, from amongst his relations), he cannot afterwards name a person as manager not answering the proper description.

After the death of the founder the right to nominate a manager of the *Wakf* vests in the founder's vakils or executors, or the survivor of them for the time being.