

CRIMINAL REVISION.

Before Mukerji and S. K. Ghose J.J.

AKSHAYCHAND BEGWANI.

1934

Feb. 20.

v.

EMPEROR.*

*Insolvency—Provincial Insolvency Act (V of 1920), s. 22, Scope of—Charge,
what it should be.*

The first part of section 22 of the Provincial Insolvency Act was never intended to be applicable to the case of an order made on a creditor's petition. The second part of the section, however, applies to both classes of cases, namely, orders made on the creditor's as well as on the debtor's petitions and to all stages of the proceedings that follow the order admitting the petition, leaving it to the court or the receiver to make the requisition at the appropriate stage, and not only up to the order of adjudication.

Ex parte Moir. In re Moir (1) referred to.

The elements of the offences contemplated by clauses (a) and (b) of section 69 of the Provincial Insolvency Act are not the same and conviction under clause (b) on a charge under clause (a) may prejudice the accused.

CRIMINAL REVISION.

The material facts appear from the judgment.

Santoshkumar Basu (with him *Parimal Mukherji*) for the petitioner. The order of the District Judge was without jurisdiction, because he purported to make the order under section 22 of the Provincial Insolvency Act, which was not applicable to the case. Firstly, because the petition for adjudication was made by the creditor and section 22 had no application to such case. Secondly, because the section had no application when an order for adjudication had already been made. On the first ground, it may be noted that the debtor cannot possibly be aware of the admission of the creditor's

*Criminal Revision, No. 1037 of 1933, against the order of H. Ahmad, Additional Sessions Judge of Mymensingh, dated Sep. 18, 1933, confirming the order of P. C. Majumdar, Deputy Magistrate of Jamalpur, dated April 10, 1934.

1934

*Akshaychand
Begwani
v.
Emperor.*

petition until notices under section 19 (3) have been served on him. The debtor cannot be under any obligation to assist in the distribution of his property unless he is adjudged insolvent. The debtor is also not bound to assist the creditor in establishing his right to an order. On the second ground, section 28(1) may be referred to. It specifically enacts the duties of the debtor after adjudication, whereas section 22 is in that part of the Act which deals with the procedure before adjudication. See sections 13 to 26. It is also apparent from the fact that the word "debtor" is used in section 22 as well as in these last sections, whereas the word "insolvent" is used in sections relating to the procedure after adjudication. In any case, account books can be asked to be produced only under the first part of section 22, which has no application after adjudication.

The charge framed against the petitioner is misleading and embarrassing. This had led the appellate court to find that the petitioner was guilty under section 69 (b) as well as section 69 (a). The petitioner could not be convicted under the former section without a proper charge.

[The evidence was then discussed in detail.]

Debendranarayan Bhattacharjya (with him *Shyamaprasanna Deb*) for the Crown. Section 22 of the Provincial Insolvency Act, by its terms, applies to both classes of cases on petitions by debtors as well as by creditors. The second part undoubtedly applied to both classes; there is no reason why the first part should not. The position of the section affords no indication. Sections 19 to 21 and 23 and 24 deal with both classes. The question of notice also does not raise any difficulty. The duties cast under the first part of section 22 arise only after service of notice under section 19 (2) in cases of petition by debtors and under section 19 (3) in cases of petitions by creditors. Again, whatever may be said as to the first part of section 22, the second part undoubtedly applies after an order of adjudication.

The words "at any time thereafter" are sufficiently wide. This part undoubtedly authorises the court to direct the production of account books. It is covered by the words "generally do all such acts and things, *etc.*" See *Ex parte Moir*. In re *Moir* (1). Again, the use of the word "debtor" in section 22 is no indication. This word and the word "insolvent" have been used indiscriminately. See section 30.

1934
 Akshaychand
 Begwani
 v.
 Emperor.

With regard to the alleged defect in the charge, although some unnecessary details have been introduced, it is neither misleading nor embarrassing. The appellate court, no doubt, held that the petitioner was also guilty under section 69 (b), but it upheld the conviction under section 69 (a).

[The evidence was then discussed.]

MUKERJI J. The petitioner, Akshaychand Begwani, and his partner were adjudged insolvents by the District Judge on the 26th September, 1931, on the application of a creditor, and their properties vested in a receiver appointed by him. On the 21st March, 1932, they were ordered by the learned judge to file the books of account of their businesses at Sherpur and Jhinaigati, but they failed to do so. On the 25th April, 1932, the learned judge examined the petitioner and, on the next day, laid a complaint for his prosecution under section 69 (a) of the Provincial Insolvency Act. On this complaint, the petitioner was tried by a Deputy Magistrate, who convicted him and sentenced him to undergo rigorous imprisonment for 2 months. He preferred an appeal, which was heard and dismissed by the Additional Sessions Judge, who held that the petitioner was liable not only under clause (a) but also under clause (b) of section 69 of the said Act.

The charge on which the petitioner was tried was in these words :

That you, on or about the 26th day of September, 1931, were adjudged an insolvent in the court of the District Judge of Mymensingh, and were

1934

*Akshaychand
Begwani*
v.
Emperor.
Mukerji J.

subsequently directed to produce your account books relating to the firm Akshaychand Prithiraj at Sherpur Town and Jhinaigati, P. S. Sherpur, but you concealed those account books at Sherpur Town and Jhinaigati, and wilfully failed to perform the duties imposed upon you by section 22 of the Provincial Insolvency Act, 1920, *viz.*, production of the books of account of the said firm between 26th September, 1931 and 25th April, 1932, and thereby committed an offence punishable under section 69(a) of the Provincial Insolvency Act, at Sherpur, Jhinaigati and Mymensingh and within my cognizance.

And I hereby direct that you be tried on the said charge.

The first contention urged on behalf of the petitioner is that he never failed to perform any duties cast upon him by section 22 of the Act. This argument is based upon two propositions: first, that section 22 does not apply to a creditor's petition; and second, that it refers to a stage antecedent and not subsequent to an order of adjudication. The section, in my opinion, is badly worded. It is divisible into two parts; the first part saying that the debtor shall, on the making of an order admitting the petition, produce all books of account; and the second part saying that the debtor shall, at any time thereafter, *etc., etc.*, and shall do all such acts and things in relation to his property as may be required by the court or the receiver or as may be prescribed. The whole of the section, in its two parts, purports to enumerate the duties of a debtor. The first part of the section relates to one particular stage, namely "on the making of an order admitting the "petition", and the second part; to all subsequent stages as the words "at any time thereafter" plainly indicate. From the words "order admitting the petition"—the same words having been used in some of the previous sections indiscriminately and without meaning any difference between an order made on a creditor's petition and an order made on a debtor's petition,—the obvious interpretation of the same words as used in section 22 would be to give it an application in respect of both classes of orders. But I am firmly of opinion that the legislature could never have intended to make the first part of the section applicable to a case when an order has been made on a creditor's petition. To put such an interpretation would be to make the provision

unworkable, for a debtor would hardly have knowledge of his creditor's petition being admitted until he is served with notice of the order admitting it and yet his duty would arise on such order being made. Besides, such a procedure would mean that the debtor would be under an obligation to assist his creditor merely because the latter has succeeded in getting his petition admitted, and before he has established any right to have an inspection of his debtor's books of accounts. My opinion, therefore, is that though, owing to the bad drafting of the section, the first part of the section may seem to apply to both classes of orders, it was never intended to be applicable to the case of an order made on a creditor's petition. But I think the second part of the section applies to both classes of cases and to all stages of the proceedings that follow the order admitting the petition, leaving it to the court or the receiver to make the requisition at the appropriate stage. There can be no question that the order that was made by the District Judge was made after the order of adjudication and so made at a proper stage. The use of the word "debtor" and not the word "insolvent", does not, in my opinion, suggest that the section was meant to be operative only up to the order of adjudication. The expression "generally do all such acts and things in relation to his property as may be required by the court" is sufficiently wide to include the production of account books in respect of the business. See *Ex parte Moir*. In re *Moir* (1).

The second contention urged on behalf of the petitioner is that the charge was of an embarrassing nature. With this contention I do not agree. I think it may have said less, but what more it has said in excess of what was necessary was clearly for the petitioner's benefit and for that the petitioner can hardly complain. As a branch of this contention, it has been urged that, on a charge framed under section 69 (a), the court cannot convict an accused under section 69 (b), as the judgment of the Additional

1934

Akshaychand
Begwani

v.

*Emperor.**Mukerji J.*

(1) (1882) 21 Ch. D. 61, 66.

1934

*Akshaychand
Begwani*
v.
Emperor.
Mukerji J.

Sessions Judge indicates he was prepared to do. In my opinion, this contention is sound; the elements of the offences contemplated by the two clauses are not the same, and so there may be prejudice to the accused if such a procedure is adopted.

On the aforesaid two contentions then my view is that the petitioner, in the present case, could only be convicted under section 69 (a), for failure to comply with the order of the court to produce the account books and thereby failing to perform this duty which is cast upon him by the second part of section 22. This leads us to consider the third contention of the petitioner, which relates to the merits of his defence.

To deal with this contention one has to bear in mind the word "wilfully" used in section 69, clause (a). To fulfil the requirements of this word, it will have to be proved that the account books required to be produced were in the possession or power of the petitioner to produce. We have read the whole of the evidence on the record with care and have examined the bearing of the litigations that preceded the proceedings. We feel no hesitation in holding that the aforesaid element which the prosecution has to establish has not been proved. One of the important persons whose absence from the witness-box must affect the case for the prosecution is Dia Mull, who, in our opinion, should have been examined by them. The case has left in our minds an impression that the two parties are trying to get the better of each other through the medium of the insolvency court, and in our opinion it is a matter of grave doubt as to which of the rival cases put forward by them is really true.

We, accordingly, make the rule absolute and set aside the conviction of and the sentence passed on the petitioner and order that he be discharged from bail.

S. K. GHOSE J. I agree.

Rule absolute.