

1926  
 M. A.  
 MAISTRY  
*v.*  
 ABDUL AZIZ  
 RAHMAN.  
 CHARI, J.

Cause Court failed to get an adjudication on that point in that Court. It is therefore not open to him to come to this Court and ask for an adjudication on the same point. The result of allowing the plaintiff to prove these facts in this case would be merely to enable him to evade a statutory provision.

For these reasons I hold that no decree ought to be passed in favour of the plaintiff, though the defendant in the present suit is *ex-parte* and the summons is alleged to have been tendered and signed by him. The plaintiff's suit is therefore dismissed.

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### APPELLATE CIVIL.

*Before Sir Guy Rutledge, Kt., K.C., Chief Justice, and Mr. Justice Brown,*

1926  
 Dec. 21.

A. K. R. M. M. C. T. FIRM

*v.*

SHAIK JOOMAN AND THE OFFICIAL  
 ASSIGNEE.\*

*Presidency Towns Insolvency Act (III of 1909), sections 39, 103—Charges for offences under section 103 must be clearly laid and proved—Court's power and duty to refuse discharge without charges—Refusal of discharge for presumed suppression of account books or non-keeping of account books.*

*Held*, that for a conviction of an offence under the Insolvency Act, it is necessary to make a charge against an insolvent and prove against him beyond reasonable doubt, but the Court can in a proper case absolutely refuse the discharge of an insolvent notwithstanding the absence of such charge or conviction. Where there is a strong presumption that an insolvent kept and suppressed his account books so as to prevent any investigation in his insolvency of how he disposed of his assets, the only possible order is to refuse his discharge. Where an insolvent has not kept books of account in a large business, it is a gross neglect and not much less culpable, and he ought as a rule to be refused his discharge. A decree in favour of the Official Assignee without security for satisfaction of the decree in such a case is not a proper order.

*N. M. Cowasjee*—for Appellant.

*Kyaw Zan*—for 1st Respondent.

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\* Civil Miscellaneous Appeal No. 132 of 1926.

RUTLEDGE, C.J., AND BROWN, J.—This is an appeal by a creditor from an order of this Court on the Original Side in exercise of its Insolvency Jurisdiction granting the 1st respondent his discharge on his consenting to a decree in favour of the Official Assignee for Rs. 75,000.

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The first ground urged on behalf of the appellant is that as the insolvent had committed an offence under section 103, clauses (a) and (b) of the Act, the Court had no option under section 39 (1) but to refuse his discharge.

It is admitted that respondent has never been charged with any offence under section 103 of the Presidency Towns Insolvency Act, and the Official Assignee in his Report, dated the 29th May 1926, states "I have no reason to believe that the insolvent has committed any act which constitutes an offence under the Presidency Towns Insolvency Act, or under sections 421 to 424 of the Indian Penal Code in connection with his insolvency." While we do not go so far as to say that insolvent must be convicted of an offence under the Insolvency Act or the Indian Penal Code to bring him under the first part of section 39 (1), we are clearly of opinion that such a charge must be made against him and must be proved against him beyond a reasonable doubt; and we do not consider that the adverse finding stated in the order appealed from fulfils these requirements. We are accordingly of opinion that the learned Judge was right in holding that he had a discretion to treat the case under the latter part of section 39 (1); that is to say, to act under clauses (a), (b), (c) or (d). And we also consider that the learned Judge's findings and comments upon the insolvent's conduct are fully justified by the record, especially where he holds that it is incredible that

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the insolvent could have carried on a huge building business without the assistance of books of account. A strong presumption arises that insolvent did keep books of account and suppressed them so as to prevent any investigation in his insolvency of how he disposed of his assets. If he did so, then the only possible order is to refuse his discharge. But, even in the very improbable case that he kept no books of account of his building business, considering the magnitude of the transactions into which he entered, such gross neglect is not much less culpable ; and it would, in our opinion, be a most unfortunate example for all others in a like case of insolvency if a man, who had kept no accounts of transactions running up to about 14 to 15 lakhs of rupees, was treated with great leniency.

It is urged that insolvent is illiterate. This, in our opinion, furnishes no excuse. His illiteracy, in our opinion, renders it all the more necessary that, when he entered into large transactions over a period of years, accurate books of account should be kept of all such transactions. There are, no doubt, certain cases where a decree in favour of the Official Assignee as a condition of discharge may be a very proper order, *e.g.*, where security for the payment of the amount of the decree has been furnished. No such security has been suggested in this case.

Agreeing with the findings and concurring in the observations of the learned Judge with regard to the insolvent's conduct, we consider that the only course open to us is to allow the appeal, reverse the order appealed from, and refuse the insolvent's discharge.