

a seditious publication. That being so I am not prepared to go anywhere near the length of presuming that the accused had any knowledge whatever that the book which was being printed at his press was a seditious publication. Finding myself unable to make that presumption, it seems to me that I am bound to agree with the conclusion that he must be acquitted of the charge on which he has been tried.

*Conviction set aside.*

R. R.

1910.  
 EMPEROR  
 SHANKAR  
 SHRIRISHNA  
 DEV.

## CRIMINAL REVISION.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

EMPEROR v. MULSHANKAR HARINAND BHAT.\*

1910.  
 August 11.

*Presidency Towns Insolvency (Act III of 1909), sections 17, 103 and 104—Adjudged insolvent—Criminal proceedings against the insolvent—Penal Code (Act XLV of 1860), section 421—Sanction of Insolvency Court not obtained—Jurisdiction of Magistrate—"Suit or other legal proceeding," interpretation of.*

A person in insolvent circumstances applied to the Insolvent Debtors Court at Bombay for relief under the provisions of the Presidency Towns Insolvency Act, 1909; and was adjudicated an insolvent. Ten days later, a creditor of the insolvent, without having obtained any sanction from the Insolvent Debtors Court, filed a complaint against the insolvent in the Presidency Magistrate's Court for an offence punishable under section 421 of the Indian Penal Code, 1860. It was contended that the Magistrate had no jurisdiction to entertain the complaint.

*Held*, that the Magistrate's jurisdiction to try the insolvent for an offence under section 421 of the Indian Penal Code, 1860, was not taken away by any thing contained in the Presidency Towns Insolvency Act, 1909.

The expression "or other legal proceeding" in section 17 of the Presidency Towns Insolvency Act, 1909, coming after the word "suit", a word of more limited application, must be construed on the principle of *ejusdem generis*. It, therefore, includes only proceedings of a civil nature.

THIS was an application for revision of an order passed by Chunilal H. Setalval, Acting Third Presidency Magistrate of Bombay.

\* Criminal Application for Revision No. 177 of 1910.

1910.  
 EMPEROR  
 v.  
 MULSHANKAR  
 HARBHAND  
 BHAT.

The accused No. 1 Mulshankar was the proprietor of a theatrical company called the "Kathiawad Natak Mandali," which was in embarrassed circumstances.

The paraphernalia of the company, consisting of scenes, sceneries, dresses, &c., was first pledged to two merchants at Ahmedabad on the 3rd September 1909 for Rs. 7,500. On the 5th April 1910, the accused No. 1 executed an assignment of the paraphernalia of the company for Rs. 10,000, to one Chhotalal Mulchand (accused No. 2). Out of the sum so obtained, accused No. 1 paid Rs. 7,950 to the Ahmedabad merchants; and the remaining Rs. 2,050 were spent in paying off the arrears of salary of some of the actors and servants of the company.

Owing to the pressing demands of his other creditors, the accused No. 1 filed his petition in the Court for the Relief of Insolvent Debtors at Bombay on the 19th April 1910; and he was adjudged an insolvent the same day.

On the 29th April 1910, one Ambalal Nathaji, a creditor of accused No. 1, presented a complaint in the Court of the Acting Third Presidency Magistrate of Bombay, against accused No. 1 for an offence punishable under section 421 of the Indian Penal Code, and against Chhotalal and his brother (accused Nos. 2 and 3) for offences punishable under sections 421 and 119 of the Code.

The accused contended before the Magistrate that he had no jurisdiction to entertain the complaint, as the complainant had not obtained leave of the Insolvency Court under section 17 of the Presidency Towns Insolvency Act, 1909.

The Magistrate took up the preliminary question as to jurisdiction first, and held that he had jurisdiction to hear the case.

The accused applied to the High Court under its criminal revisional jurisdiction.

*F. S. Talyarkhan*, instructed by Messrs. *Ardeshir, Horvasji, Dinslaw & Co.*, for accused No. 1.

The new Insolvency Act enables the Insolvency Court to go into questions which are identical with those which can be gone into in a complaint under section 421 of the Indian Penal Code,

1860. The Act leaves the complete control over the insolvent in the hands of the Insolvency Court. It defines the offence (section 103), and provides for the procedure and punishment (section 104).

If proceedings can be taken both under the Act and the Indian Penal Code an insolvent is liable to two prosecutions about the same subject-matter and at almost the same time.

Lastly, when an act is made punishable by two Acts, one general and the other special, the sentence should be passed under the latter: see *Kuloda Prosad Majumdar v. The Emperor*<sup>(1)</sup>; *Lee v. Dangar, Grant & Co.*<sup>(2)</sup>

*Velinkar*, instructed by Messrs. *Ardeshir, Hoimasji, Dinshaw & Co.*, for accused Nos. 2 and 3.

The general rule of *ejusdem generis* is subject to this reservation that if the words that follow a word of limited sense are intended to be used in a wider sense, then that sense must be assigned to them. The words "or other legal proceedings" in section 17 of the Presidency Towns Insolvency Act, 1909, are so used and they include criminal proceedings.

If this were not so, then it would be open to any creditor of an insolvent to go to a Criminal Court and by adopting criminal proceedings against the latter to extort payment from him. It would thus leave an engine of oppression in the creditor's hands.

*Binning*, with *B. J. Dhondi* and *D. G. Dalvi*, for the complainant.

The words "or other legal proceedings" in section 17 of the Presidency Towns Insolvency Act, 1909, following the word "suit" refer only to civil proceedings. This becomes clear when they are contrasted with the words "or other proceedings" in section 18 of the Act. The former section was enacted to settle doubts that had arisen regarding the interpretation of section 49 of the old Act: see *Hookamchand v. Nowroji*<sup>(3)</sup>.

(1) (1906) 11 C. W. N. 103.

(2) (1892) 2 Q. B. 397.

(3) (1907) 10 Bom. L. R. 345.

1910.

EMPEROR  
v.  
MULSHANKAR  
HARINAND  
BIHAR.

The Act makes a clear distinction between offences under sections 421, 424 of the Indian Penal Code and section 103 of the Act: see section 79, clause (2), and section 39. The terms of section 103 are not the same as those of section 421; and there is difference even as to punishments.

It is a principle of law that the general law is not avoided unless there is an express repeal of it under the special Act. See Maxwell (3rd Edn.), pp. 469, 255, 256, 113; *Chandi Pershad v. Abdur Rahman*<sup>(1)</sup>; *Proceedings of the High Court, dated 22nd February 1876*<sup>(2)</sup>; and *The Queen v. Ramchandrapa*<sup>(3)</sup>.

*Talyarkhan*, in reply.

The offence under section 421 of the Indian Penal Code is the same as that under section 103 of the Insolvency Act; and it would be undesirable to punish a man twice over for the same offence.

*Velinkar*, in reply, referred to *In re Meghraj Gangabux*<sup>(4)</sup>.

CHANDAVARKAR, J.:—The three petitioners are being prosecuted on the complaint of a creditor of the first petitioner in the Court of the Third Presidency Magistrate, Bombay, the charge against the first petitioner being an offence under section 421 of the Indian Penal Code and the charge against the other two being abetment thereof. The first petitioner was adjudged insolvent under the Presidency Towns Insolvency Act (III of 1909) ten days prior to the institution of the complaint. It was urged for them before the learned Magistrate by way of preliminary objection to the complaint that his jurisdiction to try them for an offence under section 421 of the Indian Penal Code was excluded by the provisions of the Presidency Towns Insolvency Act and that the only Court which was competent to entertain a complaint of the offence was this Court exercising insolvency jurisdiction under the Act. The preliminary objection having been overruled by the Magistrate, the petitioners ask this Court to quash his order and proceedings in the exercise of its revisional jurisdiction.

(1) (1894) 22 Cal. 131.

(2) (1876) 1 Mad. 55.

(3) (1883) 6 Mad. 249.

(4) (1910) See *ante* p. 47.

1910.

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 EMPEROR  
 v.  
 MULSHANKAR  
 HARINAND  
 BHAT.

First it is contended that the Magistrate's jurisdiction is excluded because no leave of the Insolvency Court under section 17 of the Presidency Towns Insolvency Act has been obtained for the institution of the criminal proceedings in the Magistrate's Court. That section provides that "on the making of an order of adjudication . . . no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt, or shall commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose." By the complaint filed in the Magistrate's Court the creditor here concerned is not asking for "any remedy against the property" of the first petitioner. Nor is the criminal proceeding initiated in that Court a suit. But it is urged that it falls within the more general expression "or other legal proceedings". That general expression, coming after "suit", a word of more limited application, must, in my opinion, be construed on the principle of *ejusdem generis*. It was said that such construction was opposed to the general scheme of the Act, which is to give complete control to the Insolvency Court over matters, both civil and criminal, affecting the property and the person of an adjudged insolvent. Where the Act creates an offence it is the Insolvency Court which has jurisdiction as to it; and as to offences under the Penal Code, the ordinary jurisdiction of the Criminal Courts cannot be held to be excluded unless expressly or by necessary implication the Act repeals the Code for the purposes of those offences.

The question, therefore, is whether there is anything in the Act which repeals section 421 of the Indian Penal Code. We have at the outset section 39 of the Act which directs that "the Court shall refuse the discharge in all cases where the insolvent has committed any offence under this Act, or under sections 421 to 424 of the Indian Penal Code." Then section 79 of the Act makes it the duty of the Official Assignee "to investigate the conduct of the insolvent and to report to the Court upon any application for discharge, stating whether there is reason to

1910.

EMPEROR  
v.  
MULSHANKAR  
HARINAND  
BHAT.

believe that the insolvent has committed any act which constitutes an offence under this Act or under sections 421 to 424 of the Indian Penal Code in connection with his insolvency” and “to take such part and give such assistance in relation to the prosecution of any fraudulent insolvent as the Court may direct or as may be prescribed.” This language is consistent only with the preservation of the jurisdiction of the ordinary Criminal Courts as to the offences under sections 421 to 424 of the Indian Penal Code. These sections, so far from being repealed, are recognised by the Act as being operative and the prosecution of the insolvent for the offences created by them is distinctly contemplated by the Act.

The only section of the Act which is relied upon as in effect repealing section 421 of the Indian Penal Code and substituting therefor, a new offence, created by the Act and made triable only by the Insolvency Court, is section 103. But that section does not substantially interfere with section 421 of the Code. As its essential ingredients show, it is more or less a new offence, created by the Act in addition to the offence under the Code.

What are the ingredients of the offence under section 421 of the Penal Code as contrasted with those of the offence under section 103, clause (b), sub-clause (ii) of the Presidency Towns Insolvency Act, with which we are here concerned? First, the act complained of must, under section 421, have been done “dishonestly or fraudulently,” whereas the offence to fall within section 103 of the Act requires only the element of fraud and dispenses with that of dishonesty. It is true that at least one element, that of dishonesty, is common to both; and it may be conceded that there are also some common elements in both as to the act itself, constituting the offence. For instance, the act contemplated in section 421 of the Code consists in (1) the removal of the property or (2) its concealment, or (3) its delivery to any person, or (4) its transfer or the causing of its transfer to any person, without adequate consideration. The offence under section 103 of the Act brings in a few of these elements, namely, removal, concealment, and transfer. But it must be a transfer of a limited kind, it has to be by way of charge or mortgage only.

Then again, under section 421 of the Code the transfer must be "without adequate consideration", but that element is absent in section 103, according to which it is immaterial whether the transfer by way of charge or mortgage is supported or not by adequate consideration.

1910.

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EMPEROR  
 v.  
 MCLSHANKAR  
 HARINAND  
 BHAT.

These differences between the two sections are intensified when we come to the question of intention as an essential element of the offence constituted by each of the sections. The intention required by section 421 of the Code is that the act must be done to prevent or with knowledge that it is likely to prevent the distribution of property according to law among the creditors of the offender or the creditors of any other person, whereas the intention in section 103 of the Act is not the distribution but either the diminution of the sum to be divided among the insolvent's creditors or the giving of an undue preference to any of the said creditors. Distribution need not necessarily have the effect of diminution in all cases; and there may be undue preference, which does not necessarily interfere with the distribution.

So also as to the penalty provided by either section. The punishment for an offence under section 421 of the Code is two years' imprisonment of either description, or fine, or both; that under section 103 is only two years' imprisonment.

It may be that in some cases the facts proved may bring about elements common to both the sections; but that is not enough to create repugnancy between them. The repugnancy or contrariety must be substantial and must clearly arise out of the general features of the two sections. "Every affirmative statute is a repeal of a precedent affirmative statute, where its matter necessarily implies a negative; but only so far as it is clearly and indisputably contradictory and contrary to the former Act in the very matter; and the repugnancy such, that the two acts cannot be reconciled." (Dwarris on Statutes; 2nd Edition, pages 530 and 531.) As was said by Grove, J, in *Hill v. Hill*<sup>(1)</sup>: "It is common learning that one statute may be impliedly repealed by a subsequent statute necessarily

(1) (1876) L. R. 1 Ex. D. 411,

1910.

EMPEROR  
v.  
MULSHANKAR  
HARINAND  
BHAT.

inconsistent with it; but then the inconsistency must be so great that they cannot both be to their full extent obeyed. I do not think that in considering a question of this kind we ought to hold that a mere accidental inconsistency between two statutes amounts to a total repeal of the earlier; such a doctrine might be pushed to a mischievous extent."

On the ground, therefore, that the offence under section 421 of the Indian Penal Code is substantially different from the offence under section 103 of the Presidency Towns Insolvency Act, I am of opinion that the Magistrate's jurisdiction to try an adjudged insolvent for the former offence is not taken away by the latter Act.

The rule must, therefore, be discharged.

HEATON, J.:—A creditor instituted against a debtor a prosecution under section 421, Indian Penal Code, after an order of adjudication had been made under Act III of 1909 in respect of the debtor. The leave of the Insolvency Court was not obtained to institute those criminal proceedings. The question is whether the Magistrate has jurisdiction to proceed until the leave of the Insolvency Court is obtained. The argument that he has not is founded on the terms of section 17 of the Act. That section runs as follows:—

"On the making of an order of adjudication, the property of the insolvent wherever situate shall vest in the Official Assignee and shall become divisible among his creditors, and thereafter, except as directed by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt or shall commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose:

Provided that this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed."

It seems to me that by "other legal proceeding" is meant broadly other proceeding of a civil nature connected with the insolvent's estate. This is to be inferred from the words of the section as a whole; from what is quite plainly its main intention



which is the vesting of the insolvent's property in the Official Assignee and its protection against Court process; and from the position of the section in the general scheme of the Act. I think the expression does not include criminal proceedings.

It was argued that the Act intended the Insolvency Court to have control not only over the insolvent's estate but in respect of all matters arising out of his conduct in so far as it could be brought in question in relation to the insolvency. There is much force in this argument; but had the intention of the legislature been to prohibit a Magistrate from taking cognizance of a complaint of an offence under the Indian Penal Code against an insolvent, it would have given clear expression to that intention; and this it has not done.

It was also argued that section 103 of the Insolvency Act by defining and making punishable offences akin to those defined by section 421 of the Indian Penal Code has repealed the latter section in the case of matters coming within the scope of the Insolvency Act. Sections 39 and 79, however, make it quite clear that it is not so: for both those sections expressly contemplate as separate matters an offence under section 421 of the Indian Penal Code in the case of an insolvent and an offence under the Insolvency Act.

Lastly, it was urged that if a prosecution was allowed without leave of the Insolvency Court an insolvent could be prosecuted twice over for the same offence; once before a Magistrate under the Indian Penal Code and again under section 104 of the Insolvency Act. This imaginary terror makes as little impression on me, as I conceive it did on the mind of the legislature which enacted the Insolvency Act.

For these reasons I am of opinion that the Magistrate was right in deciding that he could proceed with the complaint.

*Rule discharged.*

R. R.

1910.

EMPEROR  
 v.  
 MULSHANKAR  
 HARINAND  
 BHAT.