

THE INDIAN LAW REPORTS. [VOL. XXVII.
INSOLVENCY JURISDICTION.

1903.
Feb. 13 and
20, and
March 6.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

IN RE VALLABHDAS JAIRAM, KHIMJI JAIRAM AND BHANJI
JAIRAM, INSOLVENTS.*

Insolvent Act (Stat. 11 & 12 Vict., c. 21), sections 47 and 50—Offence under section 50 a criminal offence—Charge, &c., must be framed to sustain conviction and sentence—opposing creditor—Grounds of opposition should be stated in clear terms—Practice—Procedure.

Insolvents were found guilty under section 50 of the Indian Insolvent Act of wilfully preventing or purposely withholding the production of certain papers relating to their affairs and sentenced to three months' imprisonment.

Held, that the proceedings, so far as they resulted in imprisonment, amounted to a criminal case.

Held, further, (following *Ex parte Van Sandau*⁽¹⁾) that "in all criminal cases it is necessary that there should be a charge, a finding and a conviction, as a foundation for the sentence": and that as there was no charge, the order for imprisonment was wrongly made.

Section 47 of the Insolvent Act provides the machinery by which the grounds of opposition to a debtor's discharge may be inquired into and precisely defined before the hearing.

APPEAL against the finding and order of Russell, J., Commissioner of the Insolvent Debtors' Court, dated 4th February, 1903, who sentenced two of the insolvents to imprisonment.

Prior to their insolvency, the three insolvents, who were brothers, resided and carried on business as cloth merchants in Bombay, under the firm of Vallabhdas Jairam. Their native place was Bet in the Baroda territory, where a fourth brother, viz., Dhanji Jairam, resided and carried on a separate business of money-lending.

The three insolvents having filed their petition in October, 1901, one of their creditors (Naranji Parmanand) filed the following grounds of opposition to their discharge :

1. That the insolvents have concealed their books of account.
2. That the insolvents have made fraudulent and false entries in such books as they have produced.
3. That the insolvents have kept false books of account.

* Appeal No. 1261 ; Insolvency No. 341 of 1901.

(1) (1844) 1 Phillips 445, 457.

4. That the insolvents have contracted debts fraudulently and by means of false pretences.

5. That the insolvents have concealed their property.

6. That the insolvents have recklessly traded beyond their means and their debts so greatly exceed their means of providing for the payment thereof during the time when the same were in the course of being contracted, reference being had to their actual and expected property, as to show gross misconduct on the part of the insolvents contracting the same.

7. That the insolvents have fraudulently, and with the intent of diminishing the sum to be divided amongst their creditors, made away with and concealed their property.

8. That the insolvents have fraudulently and with the intention of defeating their creditors sent away large sums of money out of British India.

9. That the schedule of the insolvents is false and fictitious.

Other opposing creditors, viz., the Trustees of the Khambalia Sanskrit Pathashala, filed grounds of opposition as follows :

1. That the insolvents have fraudulently and with intent to conceal the state of their affairs purposely withheld the production of their books of account relating to their affairs as are subject to investigation under the Insolvent Act.

2. That the insolvents have fraudulently with the intent to conceal the state of their affairs kept and caused to be kept false books and made false entries in and withheld entries from their books of account.

3. That the insolvents have fraudulently with intent of decreasing the sum to be divided among their creditors made away with and concealed part of their property.

4. That the insolvents have contracted debts fraudulently and by means of false pretences and without having any reasonable or probable expectation at the time when contracted of paying the same.

5. That the insolvents' whole debts so greatly exceeded their means of providing for the payment thereof during the time when the same were in the course of being contracted, reference being had to their actual and expected property, as to show gross misconduct in contracting the same.

6. This schedule of the insolvents is false and fictitious.

The insolvents' petition came for hearing before the Commissioner on the 21st January, 1903, and following days. From the cross-examination of the insolvents it appeared that they had had for fifteen years an account with their brother Dhanji at Bet; that they had advanced to him large sums of money from time to time and was entered in their schedule as a debtor for Rs. 98,000. It appeared that many letters had passed between the insolvents and Dhanji. Counsel for the opposing creditors called for these letters, but they were not forthcoming. In his

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cross-examination Vallabhdas said that he received many letters from Dhanji, but did not know where they were; that he had deposited his "whole file of letters" with the Official Assignee, and that many of Dhanji's letters were in the Official Assignee's office.

He further stated that neither he nor his brothers had any books or papers besides those lodged with the Official Assignee.

On the 4th February, 1903, the Commissioner granted Khimji Jairam his discharge save as to certain specified debts, but as to the other two insolvents, viz., Vallabhdas Jairam and Bhanji Jairam, he found that they had "fraudulently and with intent to conceal the state of their affairs and to defeat the objects of the Act wilfully prevented and purposely withheld the production of letters written to them by their brother Dhanji Jairam relating to their affairs under investigation," and under section 50 of the Indian Insolvents Act (Stat. 11 & 12 Vict., c. 21) he sentenced them to imprisonment for three months for this offence.

The insolvents appealed on the following grounds:

(a) That the learned Commissioner was wholly in error in holding that your petitioners had committed any of the offences mentioned in section 50 of the Act for the Relief of Insolvent Debtors in India.

(b) That His Lordship's finding that your petitioners had suppressed letters from their brother Dhanji was not justified by any evidence given before the Court, and it was never attempted to be proved that any such letters were in existence.

(c) That no specific charge was made against your petitioners in the grounds of opposition filed in this matter, nor was any charge made in the course of the hearing.

(d) That the charge of concealing Dhanji's letters was never made till after the first petitioner's re-examination was nearly concluded and at the end of the case.

(e) That although allegations and suggestions were made that Your Lordship's petitioners had concealed property, no evidence whatever was given to establish such allegation.

(f) That His Lordship's order was wholly against the weight of evidence recorded in the case and was not justified by the evidence, oral and documentary, given before the Court.

(g) On the evidence before the Court your petitioners submit that they were entitled to their discharge.

(h) That the order of imprisonment for three months is opposed to justice, equity and good conscience.

Inverarity for appellants (insolvents):—The appellants have been convicted under section 50 of the Insolvent Act (Stat. 11 & 12 Vict., c. 21) for having suppressed letters received from their brother Dhanji. The conviction is illegal, because (1) the appellants were not charged with that offence, and (2) there was no evidence that they had committed it.

The first question that arises is whether the offences, for which by section 50 the Court is authorised to punish an insolvent, are criminal offences to the trial of which the principles of the criminal law are applicable. We submit they are. As to the nature of these offences, see Stat. 6 Geo. IV, c. 16, section 112; Stat. 12 & 13 Vict., c. 106, section 251; Bankruptcy Act, 1861, Stat. 24 & 25 Vict., c. 134, section 221, sub. cl. 6; 32 & 33 Vict., c. 62, section 11, cl. 8, and section 19; 46 & 47 Vict., c. 52, section 165; *In re Rash Behari Roy* ⁽¹⁾; *Yeo Swee Choon v. The Chartered Bank of India, &c.* ⁽²⁾

Then, if the offence for which the insolvents have been punished is a criminal offence, a specific charge of that offence is necessary: *In re Pollard* ⁽³⁾; *In re Thompson* ⁽⁴⁾; *Kashinath v. Daji Govind*. ⁽⁵⁾ The procedure prescribed by section 19 of Stat. 32 & 33 Vict., c. 62, ought to be followed in cases dealt with under section 50 of the Indian Insolvent Act. In the present case there was no charge framed at all. The first six grounds of opposition are not under section 50 of the Act. Grounds 7 and 8 are under that section, but are not specific and do not allude to the letters in respect of which the insolvents have been found guilty. It is clear from the evidence given that the insolvents were not aware that they were being tried for suppressing these letters or for any criminal offence. The evidence is that all letters from Dhanji were deposited with the Official Assignee. There is no finding as to intent: *Queen v. Ingham*. ⁽⁶⁾ We submit that the conviction is wrong—that the insolvents ought to be at once discharged from jail under section 73 of the Insolvent Act. I ask for the costs of this appeal.

Robertson and Jardine for opposing creditors *contra*.

(1) (1889) 17 Cal. 209.

(4) (1870) 14 Cal. W. R. 257, 259.

(2) (1892) 19 Cal. 605.

(5) (1870) 7 Bom. H. C. Rep. 102 (A.C.)

(3) (1863) L. R. 2 P. C. 106.

(6) (1859) 29 L. J. (M. C.) 18.

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[JENKINS, C.J.:—We think that the insolvents should be discharged from jail.]

The order for discharge from imprisonment having been made, the Court proceeded to hear the appeal with reference to the insolvents' right to discharge under section 47 of the Insolvent Act. At the conclusion of the arguments the Court reserved judgment, which was delivered on the 6th March, 1903.

JENKINS, C.J.:—Vallabhdas Jairam and Bhanji Jairam, the appellants in Appeal No. 1261, and their brother, Khimji Jairam, having sought the benefit of the Act passed for the relief of Insolvent Debtors in India, their application for discharge was opposed, and on the 4th of February, 1903, an order was passed by the Commissioner in the following terms :

For as much as it appears to this Honourable Court that the said insolvents Vallabhdas Jairam Thackar and Bhanji Jairam Thackar have fraudulently, with the intent to conceal the state of their affairs and to defeat the objects of this Act, wilfully prevented and purposely withheld the production of letters written to them by their brother Dhanji Jairam, relating to such of their affairs as are subject to investigation under the Act, whereby they have brought themselves within the meaning of section 50 of Act 11 & 12 Vict., c. 21, this Honourable Court doth order and adjudge that the said insolvents Vallabhdas Jairam Thackar and Bhanji Jairam Thackar be forthwith taken into custody of the Jailor of His Majesty's Common Jail of Bombay on its criminal side to suffer simple imprisonment by virtue of a warrant under the seal of this Honourable Court and that they be there detained accordingly, and this Honourable Court doth further order and adjudge that the said insolvents Vallabhdas Jairam Thackar and Bhanji Jairam Thackar shall be discharged from the said custody so soon as the said insolvents Vallabhdas Jairam Thackar and Bhanji Jairam Thackar shall have been in custody on the criminal side of the said jail for a period of three calendar months, to be computed from the date of this order.

It was at the same time declared that Khimji Jairam was entitled to the benefit of the Act and to protection from arrest.

From this order of the Commissioner two appeals have been presented, the first by Vallabhdas Jairam and Bhanji Jairam, who contend that no offence has been committed, that the order for imprisonment was wrong, and that they were entitled to their discharge ; and the second by Naranji Parmanand, one of the opposing creditors, who contends that Khimji Jairam should not have had his discharge, and that the insolvents have made away with and concealed portions of their property.

We have already reversed so much of the order as directed the imprisonment of Vallabhdas and Bhanji, but we deferred delivering judgment until the arguments on the whole case had been completed. The ground on which the imprisonment was directed was, according to the order as finally drawn up, that the appellants had, fraudulently and with intent to conceal the state of their affairs and to defeat the objects of the Act, wilfully prevented and purposely withheld the production of letters written to them by their brother Dhanji Jairam, and that thereby they had brought themselves within the operation of section 50 of the Indian Insolvent Act.

Now, it is clear that the proceedings, so far as they resulted in imprisonment, amounted to a criminal case, and "in all criminal cases it is necessary that there should be a charge, a finding and a conviction, as a foundation for the sentence. Everything should be strictly and accurately pursued; and if in any one of these three points a substantial defect should appear, it would be a ground for reversing the proceeding" (see *Ex parte Van Sandau*⁽¹⁾). Similarly in the case of *In re Pollard*,⁽²⁾ it is said that no person should be punished for contempt of Court, which is a criminal offence, unless the specific offence charged against him be distinctly stated and an opportunity of answering it given to him.

In this case there was no charge: no question as to the letters was put to Bhanji or even to Vallabhdas until late in his examination (even then not in a pointed form) and there is no evidence to support the charge. Vallabhdas, when he was questioned on the matter, said, "I do not know where the other letters from Dhanji are if they are not in the Official Assignee's office." No search, however, was made there by the opposing creditors, though the Commissioner seems to have suggested it.

It is to be regretted that this suggestion was disregarded, for had a search been made, it would have been ascertained that among the insolvents' papers there were letters from their brother Dhanji.

It appears to me, then, that the conditions indicated in section 50 were not established, and that the order for imprisonment was

(1) (1844) 1 Phillips 445, 457.

(2) (1868) L.R. 2 P. C. 106 at p. 120.

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wrongly made. This brings me to the question whether the appellants, Vallabhdas and Bhanji, are entitled to their personal discharge. Their brother Khimji has been discharged, and it does not appear that apart from the charge of suppression the Commissioner would have withheld from Vallabhdas and Bhanji the relief he granted to Khimji.

Before us their discharge has been opposed by Naranji Parmanand, who is represented by Mr. Jardine, and by Naranji Narsey and others, who have appeared by Mr. Robertson. Naranji Parmanand has based his opposition substantially on the third and fourth grounds mentioned in his petition of appeal. Naranji Narsey and those who co-operated with him have also stated grounds of opposition, but at the hearing they were not urged before us. I therefore propose to limit myself to the case sought to be made by Naranji Parmanand.

But, before proceeding to deal with the matter, I desire to comment on the inconvenient procedure which has been adopted. The grounds of opposition urged by the several opposing creditors are framed in the most general terms, and, as far as one can judge, without any serious attempt to ascertain what the real facts were. I recognise there often must be difficulties in the way of opposing creditors placing a clear case before the Court at the outset, but section 47 of the Act provides a machinery by which these difficulties can be effectually overcome. It may not always be necessary to make a reference as contemplated by that section; but, at any rate, it would be a convenient practice to grant such reasonable adjournments in the first instance as would enable the creditors to look into the insolvents' affairs, to ask for and receive from the insolvents such explanation as may be deemed necessary, and to re-state their grounds of opposition with more precision and definition. Unless some such procedure be adopted, the inevitable result is a roving and aimless examination in Court, occupying much time and leading to little practical result. The present case furnishes an apt illustration of what I have said, for even before us on appeal the opposing creditors were unable to bring forward any but the vaguest suggestions.

Now the first head of objection to the discharge of the insolvents has been the imputation that they fraudulently, with

intent to diminish the assets to be divided among their creditors, made away with and concealed the sum of Rs. 98,001-15-3 appearing in their schedule as a debt due by Dhanji Jairam to the insolvents' firm. Dhanji Jairam is a brother of the insolvents and, when the facts are examined, we find that this sum of Rs. 98,001-15-3 is a balance representing the results of trading for a period of thirteen years or so, and is in part made up of interest. It appears to me to be a misuse of the language to apply to such a position the expression that the sum of Rs. 98,001-15-3 had been made away with, or concealed. It is shown as an item in the insolvents' books and is disclosed in the insolvents' schedule.

But then it is said that the insolvents have been guilty of concealment because the sum is represented as their separate property, whereas it belonged jointly to them with their brother Dhanji. Even if the hypothesis on which this argument is based were correct, I still fail to see that there has been any making away or concealment; for, in describing it as their separate property and not their joint property, the insolvents represent that their creditors are entitled to the whole and not only to a fraction of the sum; and at the same time it is only by so regarding it that they can claim interest in respect of it. To argue that the securities held by Dhanji for this sum should have been disclosed, assumes, not only that such securities exist, but also that the insolvents were not (as they declared) separate from their brother. This in my opinion has not been made out, and accordingly I am of opinion that the ground of opposition so far as it relates to the sum of Rs. 98,001-15-3 has not been established.

The next ground of opposition is that a sum of Rs. 9,724-11-6 appearing as a cash balance at the end of Samvat 1956 according to the books of the insolvents' firm is unaccounted for. At first sight this appears a formidable objection; but the explanations which have been given before us satisfy me that it is only the appearances that are against the insolvents. No doubt one expects to find a correspondence between the cash box and the cash balance shown in the books; but an examination shows that the cash balance appearing in the books did not exactly

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represent the state of the cash box and I am satisfied on the evidence before us that the discrepancy must be ascribed to mistaken postings, and that this discrepancy has existed for a long time past and from a time when the insolvents were doing a prosperous business. By far the greater part of the discrepancy has been already explained and I think it very likely that a further examination of the books would complete the explanation. But be this as it may, the discrepancy does not justify the conclusion for which the opposing creditors contend and this ground of opposition has not been made out.

It only remains now to deal with the objection that the insolvents have fraudulently and with intent to diminish the assets to be divided among their creditors concealed their share as members of a joint and undivided Hindu family in the Oil Mill described in their schedule as the Ranchordas Dhanji Oil Mill. Now it will be perceived that this ground of objection is based on the assumption that the insolvents and their brother Dhanji were joint. I have already indicated my opinion as to the failure to establish this point in relation to the item of Rs. 98,001-15-3, and equally, in relation to the oil mill, I consider that the proof falls short of what is requisite to establish the insolvents' joint interest in the oil mill. [His Lordship then considered the evidence.]

The result is that in my opinion the opposing creditors have failed to make good their charge as to the mill.

This disposes of the first of the two appeals.

On the second nothing has been urged beyond that with which I have already dealt.

The case will now go back to the Commissioner that he may deal with it in the ordinary course. But the insolvents must have their costs of both appeals.

Appeal allowed.

Attorneys for the insolvents—*Messrs. Tyabji, Dayabhai & Co.*

Attorneys for the opposing creditors—*Messrs. Matubhai, Jannietram and Madon; Messrs. Payne, Gilbert, Sugani and Moos.*