

(1930) 05 CAL CK 0030

Calcutta High Court

Case No: None

Gangabishnu Singha

APPELLANT

Vs

Kahn and Kahn and Co.

RESPONDENT

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**Date of Decision:** May 5, 1930**Acts Referred:**

- Provincial Insolvency Act, 1920 - Section 22, 69, 75

**Citation:** AIR 1931 Cal 508**Hon'ble Judges:** Rankin, C.J; Mukerji, J**Bench:** Full Bench

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### Judgement

Rankin, C.J.

This is an appeal from an order passed by the learned District Judge of Khulna, whereby he directed a complaint to be made against one Gangabishnu Singha for wilfully failing to perform the duty of producing all books imposed upon him by Section 22, Provincial Insolvency Act. The learned District Judge has given leave to appeal to this Court from his decision and it appears to me therefore that there is no difficulty in holding, u/s 75 of the Act, that the appeal is a good appeal apart altogether from the order complained of being shown to be one of those specified in Schedule 1, Provincial Insolvency Act.

2. The position is this: The appellant was the subject of a creditor's petition for insolvency which was presented by one Jaykissen on 12th September 1927. That petition was admitted on the same day. On 24th September there appears to have been an order appointing one Mr. N. N. Ghosh, pleader, interim receiver. The order does not appear to have gone on to state what the receiver had to receive or what the present appellant was to do; but I suppose it meant that Mr. Ghosh was to be the receiver of "all the properties of the appellant. On 8th November, Mr. Sen was appointed receiver in the place of Mr. Ghosh. In December 1927 the debtor filed five books of account and, in February or March 1928, the receiver had made a report on that and notice had gone to all the creditors. The present respondents, Messrs.

Kahn and Kahn, entered appearance and claimed to be creditors of the debtor. On 11th April 1928 the petition of Jaykissen was amended by adding certain further respondents, of whom two were later given up, and, on 5th May 1928, a proportion order was refused to the appellant. On 8th August 1928, the creditor's petition for adjudication came on for hearing and was dismissed.

3. The learned District Judge took the view that Jaykissen had proved no good petitioning creditor's debt. He held that the various acts of bankruptcy alleged were not proved and that the Court had no jurisdiction. Further he was of opinion that the whole proceedings were probably collusive on the part of the present appellant and the man who was posing as an adjudicating creditor, namely Jaykissen. Consequently he very properly put an end to the whole proceedings and the attempt to take proceedings in insolvency came to an end.

4. Thereupon, Messrs. Kahn and Kahn applied to the successor of the learned District Judge, by way of prosecuting the appellant, u/s 69 of the Act, alleging that, at the time when the interim receiver was appointed u/s 22 and the debtor gave up five books of account, he had failed to deposit all his books of account and therefore this being done with the necessary intent, proceedings for prosecution should be started arising out of the insolvency proceedings which had come to an end.

5. The first question which has been elaborately discussed by the learned District Judge is this: whether, after the petition for adjudication had been dismissed and it was known that the alleged debtor was not going to be made insolvent in those proceedings at all, it was possible to take proceedings u/s 69 of the Act. Now, the learned Judge has, in my judgment, come to a wrong conclusion and it is very necessary to distinguish between two entirely different questions. The first question is:

When a man is not going to be adjudicated at all, can steps be taken against him u/s 69?.

6. And the second question is:

When a man has been adjudicated, can steps be taken against him u/s 69, in respect of acts or omissions committed by him during the insolvency proceedings, but prior to the order of adjudication being passed ?

7. In my judgment, the answer to the first question is in the negative and the answer to the second question is in the affirmative. If one compares the corresponding section, namely Section 103, Presidency Towns Insolvency Act, one finds that it runs thus:

Any person adjudged insolvent who fraudulently with the intent to conceal the state of his affairs... has destroyed or otherwise wilfully prevented or purposely withheld the production of any books or has kept or caused to be kept false books,

and so on. On that, a defence has been raised at times that, if these acts were done, but done prior to adjudication, the acts were not hit by the section. In the case of *Joseph Perry v. Official Assignee of Calcutta* [1920] 47 Cal. 254 that contention was raised and negatived. When we come however to the language adopted by the Provincial Insolvency Act, we find thus:

If a debtor whether, before or after the making of an order of adjudication, wilfully fails to perform the duties imposed on him by Section 22 or to deliver up possession, etc.

8. Does that mean that, although there is no order of adjudication and -is never going to be any order of adjudication-- the petition having been entirely dismissed, there being found to be no petitioning creditor's debt, no act of bankruptcy, no jurisdiction on the part of the Court--nevertheless steps can be taken u/s 69? The learned District Judge has said that he has had drawn to his attention some decisions in the Indian Cases series of the Courts of Oudh, Upper Burma, Patna, Allahabad and one of the Calcutta High Court to the effect that, although the petition has been dismissed, prosecution can take place u/s 69. It is quite true that in *Ram Behary Lal v. Jagan Nath* [1917] 19 O.C. 89 it would appear to have been thought by the learned Acting Judicial Commissioner that the existence or nonexistence of an adjudication order made no difference. I entirely fail to satisfy myself that, in any of the other cases, it was ever laid down or meant to be laid down that, in the absence of an order of adjudication, a prosecution could be started u/s 69. It is quite true that after adjudication prosecution can be started u/s 69 for acts or omissions which took place before the order of adjudication. In my judgment the whole reason of the thing is contrary to the view that Section 69 is to be applied to a man who, as far as any formal order of the Court shows, may be perfectly solvent and who may never at any time have been in the smallest pecuniary difficulty. If one looks at the section, one finds that in Clause (a) it is intended to deal with failure to deliver up possession of any part of a man's property which is divisible among his creditors under this Act. It is only after an order of adjudication that the man's property is divisible among his creditors under the Provincial Insolvency Act. By Section 28 (2):

On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided and shall become divisible among the creditors.

9. So this man's property never became divisible among his creditors. Take Clause (b), Section 69:

Fraudulently with intent to conceal the state of his affairs or to defeat the objects of this Act.

10. What is referred to there by the objects of this Act? " The objects of this Act" refers to the intention of the statute that the insolvent's estate should be

ad-ministered in that course of distribution which the law provides for an insolvent's estate. . For example certain public bodies to whom rates are due get them paid preferentially, certain people like servants on small wages get their wages in full, the great majority of unsecured creditors have to come in after that pro rata and there are some claims, e. g., to interest, which may be postponed to ordinary creditors. The gist of the offence u/s 69 is that a man, whose property is required by law to be distributed among his creditors in the statutory manner is doing something to get his property distributed in another manner. All that is meaningless in the absence of an order of adjudication. Again. Clause (c) says:

Fraudulently, with intent to diminish the sum to be divided among his creditors or to give an undue preference to any of his creditors.

11. There is no meaning in that till a man has been adjudicated. Till then a man has got a complete right to prefer any creditor. It is only with reference to an insolvency that these things have any meaning at all and the intention of Section 69 is clear enough--the same intention as is to be found in the English Bankruptcy Act or in the Presidency Towns Insolvency Act. When a man is a bankrupt, he may be made criminally responsible in a special way under the provisions of the bankruptcy law; but it is altogether novel that he should be made liable under this section if, as a matter of fact, there is no adjudication at all. It is no answer at all to say that a man may expect to be adjudicated and may do things with the intent described although he never may in the end be adjudicated. The learned District Judge has made this complaint u/s 70 of the Act. This section was entirely remodelled in 1926 (Act 9 of 1926, Section 11). What are the terms of that section ?

When the Court is satisfied, after such preliminary enquiry, if any, as it thinks necessary, "that there is ground for enquiring into any offence referred to in Section 69 and appearing to have been committed by the insolvent, the Court may, etc.

12. This makes the matter reasonably plain. The present appellant, judging by the view taken by the District Judge who heard the petition, appears to be anything but a meritorious person because, according to the learned Judge, he was in collusion with the petitioning creditor and no doubt that collusion was for the purpose of some fraud or other. But so far as the insolvency law is concerned, it is not yet proved that the debtor owed more than he could pay; it is not proved that he ever committed any act of bankruptcy and the Court has flatly refused to entertain insolvency proceedings against him.

13. In these circumstances, I think that the order made to prosecute the debtor u/s 69, Provincial Insolvency Act, is entirely ultra vires and misconceived. In my judgment, this appeal should be allowed and the order of the learned Judge should be set aside with costs both here and before the learned Judge. The hearing-fee in this Court is assessed at three gold mohurs.

Mukerji, J.

14. I entirely agree.