

(2007) 08 CAL CK 0053

In the Calcutta High Court

Case No : Re: C.A.N. No. 9013 of 2005, Arising out of C.P.A.N. No. 371 of 2004
in F.M.A. No. 245 of 2001

Keshab Narayan Banerjee

APPELLANT

Vs

Srijit Dutta Gupta and Others

RESPONDENT

Date of Decision : 28-08-2007

Acts Referred:

Citation : (2007) 4 CHN 996 : 111 CWN 1100

Hon'ble Judges : Maharaj Sinha, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Hirak Mitra and P.P. Banerjee, for the Appellant; Saptangsu Basu and Asish Kr. Gupta, for the Respondent

Judgement

Masud, J.—The point to be decided in this appeal is whether, in the facts and circumstances of the case, the order of adjudication in respect of the estate of the debtors, Srilal Kajaria, Jugalkishore Kajaria, Shyamlal Kajaria and Onkarmal Kajaria, passed by the learned trial Judge on May 13, 1960, is justified in law. The Petitioner Jiwanmal Bhutoria carrying on business under the name and style of "Chandmal Jiwanmal" set out various acts of insolvency in para. 6 of his petition. At the time of hearing of the petition, the petitioning creditor did not proceed with the proof of two of the grounds, the first ground being that the Appellant debtors stopped in Calcutta their business of International Traders with the sole intention of defeating or delaying payment of the dues of the numerous creditors including those of the Petitioner and the second being that the debtors transferred some of their assets to defeat the claims of the creditors. The only ground on which the creditors pressed the order of adjudication may be set out as follows:

1. The debtors have given notice on 20th November, 1959, to your Petitioners of their inability to pay and/or that they had suspended payment of their debts and/or they are about to suspend payment of their debts. A copy of the said letter dated 20th November, 1959, is included in the Annexure A hereto. The said

petition was, however, directed by the learned trial Judge to be tried on evidence and the learned Judge after examining voluminous evidence, oral and documentary, came to the conclusion that the allegations against the debtors are correct and, as such, he made the said order of adjudication against the debtors. Before we examine the contentions of both the parties, the material facts may be briefly stated as follows:

2. The debtors, Srilal Kajaria, Jugalkishore Kajaria, Shyamlal Kajaria and Onkarmal Kajaria, for about nine years prior to the presentation of the petition were alleged to be carrying on business in co-partnership under the name and style of "Joharmal Jugalkishore" at No. 18 Amratola Street, Calcutta, and also at No. 325 Kalba Debi Road, Bombay. The said four partners also were supposed to be carrying on business in co-partnership under the name and style of "Pannalal Kishanlal" at the said places in Calcutta and Bombay. Two of the said debtors, Srilal Kajaria and Jugalkishore Kajaria, also were alleged to be carrying on business in co-partnership under the name and style of International Traders at No. 18 Amratola Street, Calcutta, and also at No. 325 Kalba Debi Road, Bombay. Between May 2, 1958 and June 13, 1958, the petitioning creditor lent and advanced in the said business of "Chandmal Jiwanmal" at Bombay by way of commercial loan diverse sums amounting to a total sum of Rs. 2,88,000 to the two debtors Srilal Kajaria and Jugalkishore Kajaria in their business of International Traders in Bombay. Between May 7, 1958 and May 19, 1959, the same creditor lent and advanced to all the aforesaid four debtors in their said business at "Joharmal Jugalkishore", Bombay, sums amounting to Rs. 46,000. A notice dated November 7, 1959, demanding payment, was alleged to have been sent to the said debtors. The debtors, according to the creditor, within three months before the date of presentation of the petition, gave notice on November 20, 1959, to the petitioning creditor informing their inability to pay the debts. The debtors also in their said notice dated November 20, 1959, were supposed to have stated that the debtors had suspended payments of their debts to other creditors and/or they were about to suspend payment of their debts. It is alleged in the petition that in spite of the repeated demands the debtors wrongfully failed and neglected to pay the said sums of Rs. 3,34,000 or any portion thereof. The said sum advanced were unsecured and no person on behalf of the creditors held any security on the said debtors' estate for the payments of the said sums. The debtors have challenged the genuineness of the said two documents dated November 7, 1959 and November 20, 1959, and have given evidence to the effect that the signature of S.L. Kajaria in the said letter dated November 20, 1959, is forged. According to the debtors, cheques for Rs. 3,34,000 were drawn by the petitioning creditor from time to time on the Bank of India Ltd., Bombay, in favour of "International Traders" and "Joharmal Jugalkishore", and the debtors in their business "Joharmal Jugalkishore" and "International Traders", Bombay, deposited the said cheques in their banks and duly encashed the same. But, according to the debtors, who completely denied their indebtedness, the said sum of Rs. 3,34,000 which the debtors received belonged to the debtors

themselves, and as such, there was no question of repayment of debt owed to the creditor. The creditor's definite case is that owing to the vexatious proceedings against him and the other Bhutorias by the income tax authorities and also the certificate proceedings pending against them, they were keeping large sums of cash money in their till. They had been depositing, in various installments, exact sums of money on the days when the cheques for the respective amounts were being drawn by them on their bank in favour of the debtors. According to them, the debtors were in friendly terms with the Bhutorias and, as such, at their request they accommodated the debtors by lending them the said sum of Rs. 3,34,000 by cheques whenever the debtors required the same. The debtors, that is the Kajarias, on the contrary, made out an entirely different case. According to them, sometime in the last week of April 1958, Bahadur Singh Bhutoria and Sampatlal Bhutoria; on behalf of the petitioning creditor, represented to Srilal Kajaria that the petitioning creditor wanted to show his bankers substantial transaction in their business by reviving his banking account in the Bank of India Ltd., Bombay, to enable the Bhutorias to obtain overdraft facilities for their business in Bombay. Srilal Kajaria agreed to accommodate the Bhutorias by accepting their cheques and simultaneously depositing cash moneys in the banking account of the Bhutorias to cover the said cheques issued by the latter either in favour of International Traders or Joharmal Jugal-kishore. Pursuant to the aforesaid arrangement, whenever cheques were issued by and on behalf of the creditor, Srilal Kajaria or Jugal-kishore Kajaria caused the necessary cash money corresponding to such cheques to be deposited into the banking account of the creditor excepting on one occasion when Kajaria deposited one cheque issued by International Traders for a sum of Rs. 36,000. According to Srilal Kajaria, the said deposits in cash were made by them with moneys either taken from the till of their business or from the banking account of their partnership firms. The learned trial Judge after discussing the oral and documentary evidence adduced in the case disbelieved the story of the debtors and held that the creditor's case was substantially proved and, accordingly, he directed the order of adjudication in respect of the estate of the debtors as stated above.

3. Mr. R.C. Deb, Learned Counsel for the Appellant, has strenuously contended that the entire approach of the learned trial Judge to the evidence before him was erroneous inasmuch as he first made up his mind that the disputed letters dated November 7, 1959 and November 20, 1959, were genuine and then evaluated the other evidence adduced by the debtors on the basis of such conclusion ignoring material pieces of evidence demonstratively showing the improbabilities and the absurdities of the creditor's case. He has substantiated his criticism by referring to certain outstanding fact which may now be examined. In our view, there is great force in Mr. Deb's argument. We are convinced that the oral and documentary evidence and the surrounding circumstances do not justify the answers given by the learned Judge to the issues raised in this appeal. The reasons for such conclusion may now be set out as follows:

A. Admittedly between May 2, 1958 and June 13, 1958, the creditor or his representative in Bombay has drawn cheques to the extent of Rs. 3,34,000 on the Bank of India Ltd. in the name of International Traders and Joharmal Jugalkishore. Out of the said sum of Rs. 3,34,000 a total sum of Rs. 2,88,000 was paid to the debtors, Srilal Kajaria and Jugalkishore Kajaria, in their partnership business of International Traders and Rs. 46,000 to the debtors, Srilal Kajaria, Jugalkishore Kajaria, Shyamlal Kajaria and Onkarmal Kajaria, in their partnership business of Joharmal Jugalkishore. There is also no dispute that all these sums were received by the said debtors in their business of International Traders and Joharmal Jugalkishore. There is nothing to show that the said International Traders and Joharmal Jugalkishore repaid the said amount of Rs. 3,34,000 to the creditor. Thus, prima facie, it can be said that the Appellant owed a debt for the said sum of Rs. 3,34,000 to the creditor. The creditor's case is that in 1958 when loans and advances were made to the debtors, Bahadur Singh and Sampatlal were holding moneys belonging to the creditor in cash in Bombay. According to the Bhutorias, they were afraid that if the moneys were kept in different banks, there would have been attachment of his banking accounts by the income tax authorities who have been pursuing them relentlessly for the arrears of income tax (Bhutoria: Qs. 152-153). In support of the said contention we find a letter dated July 2, 1955, (Ex. II) issued by the Certificate Officer of Burdwan to the creditor that the assessment in the Certificate Case No. 623 Misc. of 1951-52 has been substantially modified by an order of the Appellate Assistant Commissioner, income tax. The original assessment was Rs. 3,33, 527 which was reduced to Rs. 2,79,768-13-0. A large number of notices u/s 46(5A) of the income tax Act, 1922, (Ex. P) addressed to several banks where the creditor had accounts were also tendered to prove that the creditor was genuinely apprehensive of their liquidated assets being forzen by the income tax authorities. Further, on March 29, 1950, it appears that a notice of demand u/s 59 of the income tax Act, 1922, (Ex. II) was issued to the creditor showing that he was assessed at Rs. 5,32,414 for the year 1945-46 and, in fact, on March 31, 1952, a certificate of public demand for Rs. 4,33,527-12-0 for the assessment year 1946-47 (Ex. II) was issued by the Certificate Officer, Burdwan. A statement of Messrs Chandmal Jiwanmal with the Bank of India Ltd., Bombay, (Ex. EE) shows that from April 30, 1958 to June 3, 1958, the position of the creditor's banking account was such that save and except the moneys which were being deposited from time to time covering the cheques drawn in favour of Kajarias there was practically no deposit of money and the bank balance was insignificant. It appears from the oral evidence of Bahadur Singh (Qs. 95 104) that the total income tax liability of the Bhutorias amounted to about Rs. 10,00,000. Subsequently, in 1956 they decided to wind up their business in Bombay. After 1956, excepting one part-time typist, they dispensed with the services of all the employees and that was the position in 1958 also when the alleged loans were supposed to have been given. The learned trial Judge has accepted the creditor's case as to his income tax difficulties and, accordingly, believed his story to the effect that the source of the said sum of Rs. 3,34,000

advanced to the debtors was the cash money lying in the till of the creditor. In our view, the creditor's said explanation of the source of the loan cannot be accepted. It is difficult to believe that a solvent businessman who has dealt with business worth lakhs of rupees should close his business in fear of the income tax authorities. Apart from the creditor's oral evidence, there is nothing to show that in April, May and June 1958, the Petitioner had the means to lend and advance the said sum of Rs. 3,34,000 to the debtors. His oral evidence to the effect that huge sums of money were lying deposited in his iron-safe to avoid the statutory liabilities, cannot and should not be accepted by any Court of law. In fact, the learned trial Judge has repeatedly stated in his judgment that the conduct of the Petitioner in this respect is reprehensible.

B. Admittedly, the pay-in-slips (Ex. 21) with which the moneys covering the loan were deposited were produced from the bank and it is also admitted that they were filled in by the employees of the debtors. The creditor's case is that as Bhutorias closed their business in Bombay and, excepting one typist, they had no employees of their own, they took the services of the employees of the debtors and deposited their own moneys through these pay-in-slips. As the relationship between the parties were friendly, they allowed the employees of the debtors to fill in all the pay-in-slips and also took their help by asking them to accompany them to the bank as their bodyguard. The debtors, on the other hand, made out the case that all the moneys they had received under cheques drawn in their Favour by the Bhutorias were deposited in cash by them from their own till or from bank on the same days when the cheques were issued. As stated earlier, this procedure was followed by the debtors to accommodate the creditor at their own request. Thus, the source of money covering the cheques issued in favour of the debtors, according to the creditor, is the cash money lying with the creditor whereas, according to the debtors, it is the cash money lying with them and also their bank. The pay-in-slips demonstratively falsify the creditor's case that the moneys deposited in the bank belonged to the Bhutorias. A reasonable thing for anybody particularly for businessmen like the Bhutorias should have been to keep some evidence which would show that the moneys belonged to them. It is the usual thing for a man to deposit cash money in his bank through the pay-in-slips filled in by himself or his employees. These material documents (Ex. 21), on the contrary, support the debtors' case that the cash moneys deposited in the creditor's bank belonged to them. The Bhutorias' explanation to these extraordinary facts to the effect that good relationship was continuing between them and the debtors at that time and that as they had no employees of their own they took the help of the debtors' employees, cannot be true in view of the fact that all the pay-in-slips were initialed by Bhutorias. There is no satisfactory explanation why the initials were necessary at all. If the initials were done contemporaneously, why could not the pay-in-slips be filled in by the Bhutorias themselves or their typist-clerk. Further, if the initials were done at the time when the pay-in-slips were filled in, why were they done at all unless there was an element of distrust in the debtors. The initials on the pay-in-slips are not

consistent, with the creditor's case that friendly relationship was there between Bhutorias and Kajarias and, as such, Bhutorias had complete confidence in them. We are convinced that these initials were put in by the creditor at much later stage. In fact, the learned trial Judge came to the same conclusion that these initials in the pay-in-slips were entered subsequently.

C. Assuming that the moneys deposited by the Bhutorias in their bank belonged to them and were duly deposited by them with the help of the debtors' employees by getting the pay-in-slips filled in by them which is the creditor's case, the most natural thing would be for the Bhutorias to keep the counterfoils of the pay-in-slips with them. But it appears that the counterfoils of the pay-in-slips remained in the custody of the debtors as evidence of the deposits of their own money. The Bhutorias' explanation is that the counterfoils were lying in their own custody, but on December 19, 1958, they deposited all the documents concerning their business with the debtors including pay-in-slips and books of account when they removed truck-load of things belonging to their Bombay business to their new business at Belgaon. It was stated that the documents were left with the debtors in Bombay because these books belonging to the creditor would be required for pending sales tax proceedings in Bombay. This is another improbable story which is difficult to believe. There is nothing to show that these counterfoils were demanded in writing by the creditor (Bahadur: Q. 459). Further, there is no reason why a light bundle of a few counterfoils could not be carried to Belgaon by train or brought back from Belgaon by the creditor or his men, when hearing of sales tax proceedings would take place. The fourteen counterfoils could have been left in the custody of their sales tax lawyer in Bombay. The creditor in support of his case referred us to the carbon copy of letter dated December 19, 1958, (Ex. C) and a receipt (Ex. CI) to prove that the documents were in fact left with the debtors in Bombay in their custody on that date. This letter and this receipt, supposed to be hastily written (vide Mukundam: Qs. 118 119) on their way from Bombay to Belgaon, if they are at all genuine, repel the Bhutorias' story that they had complete confidence in the debtors. Further, there are good reasons for the suggestion that this letter and the receipt are concocted documents. The receipt is undated and assuming that the signature is genuine, the receipt portion might have been nicely cut out from some other document where S.L. Kajaria's signature was there and where there was a blank space before such signature. It is quite possible that after cutting out the bottom portion of such document the blank portion before the signature was filled in with the words:

Received a letter from Chandmall Jiwanmall dated 19.12.58 along with account book, Bank voucher, files, etc., as mentioned in the letter.

Thus, the portion of the other document severed from the original piece of paper must have been given the shape of a receipt for the purpose of explaining the missing links of the creditor's case. Further the evidence as to the carbon paper required for preparing carbon copy (Ex. C) and not using the carbon or pencil in

drafting the receipt (Ex. CI) and the story of collecting carbon from a neighbour and the paper from the waste paper box do not seem to be convincing (Mukundam: Q. 133 154). The oral evidence was given by Mukundam and Bahadur on these two documents are useless in view of the fact that they were not present when the documents were supposed to have been delivered to S.L. Kajaria. In fact, the learned trial Judge also agreed at one stage to reject Mukundam's evidence, but he was compelled, as he himself stated, to accept his evidence on this point on account of alleged contradictory suggestions made to Bahadur in cross-examination (Bahadur: Qs. 607, 1565, 1566). It was the definite case of the debtors that Exs. C and CI were not genuine documents and naturally the debtors would not know how they came into existence. The Learned Counsel for the debtors have made two suggestions; one suggestion is that signature itself in the receipt is a forged one; and the other Suggestion is that even assuming that the signature is held to be genuine, the size, appearance and the writings on the alleged receipt show that the portion on which it is written is a portion cut out from another document containing S.L. Kajaria's signature. There was further suggestion that the blank space at the top of that signature was filled in by writings giving it a semblance of a receipt. A signature when properly or skillfully forged looks like the genuine signature and, therefore, an alternative suggestion was made. Even assuming that the suggestion is contradictory that does not lead one to the conclusion that Mukundam's evidence is correct. Further, the extraordinary features of these documents show that they do not contain any list of books and documents deposited with S.L. Kajaria and, thus, the alleged receipt even assuming it to be genuine has no merit or value as receipt. Mukundam could not say why books were made over to S.L. Kajaria (Mukundam: Qs. 95 100). Sampat and Mukundam did not say that any counterfoil of the pay-in-slips which the Kajarias have produced was made over in December 1958. As stated earlier, Bahadur's evidence regarding making over of particular pay-in-slips (Bah Qs. 202 & 459) is also useless as he was not present in Bombay. The letter dated December 19, 1958, alleged to have been written by Sampatlal Bhutoria to Srilal Kajaria which is marked as Ex. C is only a carbon copy in pencil. If the original was handed over to Srilal Kajaria the receipt could have been taken on the back of the carbon copy, but instead a separate undated receipt was produced (Ex. CI) which as a receipt has no value inasmuch as it does not contain the date or even the list of documents. The circumstances under which the said letter was written and the manner in which the alleged receipt was obtained do not by themselves satisfactorily prove the genuineness of these two documents. If the story of the creditor leaving his business books in the custody of the debtors on account of friendly relationship subsisting between them is true, why then it was thought necessary to write a letter to S.L. Kajaria keeping a carbon copy of such letter and also holding a receipt for the same. In our view, the possession of the counterfoils by the Kajarias, their production by the latter and the fact that the blank portions in the counterfoils were filled in by the debtors' employees falsify the creditor's case that the moneys deposited through the pay-in-slips belonged to the creditor. It may be said that the

explanation given by the debtors as to the source of the money covering the cheques issued by Bhutorias to them is equally unsatisfactory inasmuch as the debtors also are supposed to have deposited cash money from their own till. But the fact that the pay-in-slips were filled in by the debtors' employees and the counterfoils were lying in the custody of the debtors do give greater weight to the genuineness of the explanation given by the debtors. In our view, the explanation given by the creditor to explain the source of the money advanced to the debtors must be rejected.

D. The normal and natural thing for every creditor who deals with different kind of business is to maintain books of account. The non-production of any books of account supporting the creditor's case of loan compels us to draw adverse inference against the story of such alleged loan. The explanation offered by the creditor was the same explanation which was given by the creditor in support of the proof of Exs. C and CI. For reasons stated earlier, we have already held that Exs. C and CI are not genuine documents. It is absurd to accept the story that a businessman leaves all his business books in the custody of persons to whom loans to the extent of Rs. 3,34,000 have been given in several installments. Further, the letter dated November 12, 1959, written by Chandmal Jiwanmal to the Bank of India Ltd. (Exs. FF) corroborates the debtors' case that the books of account were not handed over to them and that they were deliberately suppressed by the creditor. The creditor's explanation to this letter is that he got the particulars of the account from his pass books which were lying in Belgaon. But in the absence of the relevant pass books which were not produced by the creditor, this explanation also cannot be accepted. Similarly, we find that there is another document, the letter dated September 15, 1959, (Ex. 8) from Bank of India Ltd. intimating sending of cheques and pay-in-slips "as detailed" by Bhutorias. These details must have been given from the Bhutorias' own books. Thus, if the Bhutorias were in the custody of the books in 1959, the story of keeping those books of account in the custody of S.L. Kajaria cannot be true. Again, the copy of the letter dated September 9, 1959, referred to in the letter dated September 15, 1959, has also not been produced. Further, the extraordinary thing is that there was no demand for return of the books although registered letters passed between the parties in March and April 1959 (Exs. 15, 7, 52, I). Questions were asked to Sampat as to the alleged story of Sampat taking back one file relating to sales tax from the custody of S.L. Kajaria and not taking back other books in January 1959 (Sampat: Q. 237) but no satisfactory explanation was put forward why other important documents were not taken back. There is no letter of demand for repayment of the alleged loan except the disputed notice of demand dated November 7, 1959. The moneys were advanced to the debtors in 1958. Registered letters of demands and the reply thereto passed between the parties in March and April 1959 regarding other business transactions and yet no formal letter was written prior to the disputed letter dated November 7, 1959, demanding repayment of loan.

E. In para. 4 of the creditor's petition, it is stated that between May 2, 1958 and

June 1958, a sum of Rs. 3,34,000 was lent and advanced by way of commercial loan to the debtors. It was also mentioned in the said paragraph that there was an agreement to pay interest at the rate of ten annas per cent per month on all sums advanced. It is usual that ordinarily loan transaction between two businessmen would carry interest, but there is not a single piece of document which shows that there was claim of interest against the debtors. This seems to be a conspicuous departure from the two formal transactions which took place between the parties on December 19, 1957. As the loans were given on different dates, the interests have to be calculated from different dates. Even the alleged notice of demand dated November 7, 1959, does not disclose the creditor's total claim on interest.

F. The financial ability of the creditor to grant a loan for Rs. 3,34,000 to the debtors should also be examined. The source of money and the manner of depositing, as discussed earlier, do not substantiate the creditor's case on loan. The creditor's explanation of keeping a sum of three or four lakhs of rupees in the iron-safe in Bombay is not supported by any documentary evidence. If the contention of the creditor is correct, i.e., if the income tax authorities were maliciously pursuing the creditor, a situation which had caused the Bhutorias even to close their business in Bombay, it would have equally cautious on the part of Bhutorias not to bring out their concealed income out of the iron-safe or to deposit the same through pay-in-slip in their banking account. A money so long as it is kept concealed, the income tax authorities cannot lay their hand on it. The alleged loans were supposed to have been made out of their hidden money and naturally it cannot be capable of any proof unless the source of the secret money is disclosed. If the alleged loan was not given out of their concealed income, it should be capable of proof, but that proof also did not take place. If the story of the creditor giving loan to the debtors by way of accommodation or because of friendly relationship is true the natural thing would have been for the Bhutorias to pay in cash to the Kajarias as and when they wanted and get receipts for the same from the Kajarias.

G. The creditor's definite case is that he decided to wind up his Bombay business in 1958. It was the evidence of Bahadur Singh (Q. 471) that the business was not entirely stopped in 1956. According to him, as there were some prior commitments, the business was kept going (Q. 472). But it is surprising that he has categorically admitted that there is no document to show that any business was being carried on by them after 1956 (Q. 473). He has, further, admitted that there was total stoppage of the Bombay business in January 1958, We have already discussed that the story of stoppage of business in fear of the income tax proceedings is unbelievable. If a person stops his business and there is no document to show that he has moneys deposited in his bank or invested elsewhere the natural conclusion is that he has no fund or no money to spare with. The agreement between the Bhutorias and Kajarias as set out in the letters dated December 19, 1957, (Exs. 11, 17, D) under which Srilal Kajaria was given a profit of 40 % and interest of 6 % on advance to be made by him regarding

Jamgaon mines makes it improbable that the Bhutorias did have such a large sum as claimed by them to have been advanced to the Kajarias. The agreement shows that the Bhutorias were not in a position to pay even Rs. 18,000 which were outstanding. This agreement also supports the debtors' case that Bhutorias were not in a solvent position in December 1957 or early 1958. The agreement, on the contrary, proves that Srilal Kajaria's financial position was much more solvent and dependable than the Bhutoria's. The joint venture referred to in the agreement dated December 19, 1957, was undertaken by the debtors and the creditor and there is no explanation why Bhutorias could not pay Rs. 18,000, if they had three or four lakhs of rupees in their till. There is nothing to show why the Bhutorias would agree to pay 40 % profit and 6 % interest if the Kajarias had no finance. Further, the insolvency notice dated April 16, 1957 (annexure affidavit of Srilal affirmed on January 4, 1960) was served on the creditor by Messrs Devidayal Sales (P.) Ltd. and it appears from the said notice that the creditor was not even in a position to pay Rs. 6,017-14 P. for costs of the suit. Then, again interim order of attachment dated July 25, 1958, against the properties of Jiwanmal Bhutoria lying on the Jamgaon mines obtained by chitti in Belgaon Court was made absolute on August 6, 1957, by the Bombay High Court and the Appeal Court, Bombay, on August 26, 1957, confirmed the same (Ex. 53). The Bank of India Ltd. also closed Bhutorias' account sometime in December 1958. It is true that the Bhutorias wanted: to explain all these facts by referring to the facts that they were in possession of about four lakhs of rupees which were kept by them in their iron-safe to avoid the persecution of the income tax authorities. We have already held that such an explanation is difficult for us to accept. In our opinion, all the aforesaid facts go to show that the Bhutorias have failed to prove their financial ability to make the alleged advances. Bhutorias produced documents (Exs. K, L) to show that large sums of money by way of telegraphic transfers from their business at Burdwan and also by way of hundis, were received by them and this explains the source of money lying in their iron-safe. But the memorandum from the bank showing telegraphic transfers of not very large sums of money relate to a period between 1951 and 1956. Similarly, hundis were all issued in 1953 and 1954; The payments of advance were made all in 1958 and there is no documentary evidence to show that the Bhutorias were solvent in 1958.

H. Apart from the pay-in-slips and the books of account, there were other documents which could have substantiated the payment of loan by the creditor. With reference to the said letter dated September 15, 1959, to the Bank of India Ltd. (Ex. 8) questions were asked to Bahadur Singh as to the source from which he could mention the particulars of cheques in that letter. The natural thing would have been to get those particulars from the books of account. But the books of account, according to Bhutorias, were lying with Kajarias and Bahadur had to admit (Bahadur: Os. 649, 665, 669) that the particulars referred to in those letters were collected from rough notes which contained the details of the cheques. But when he was asked to produce those rough notes Bahadur stated

that they were destroyed. It is expected that when the creditor's own case is that the books of account and pay-in-slips showing the deposit of money in the bank were in the custody of the debtors, he should have at least preserved these documents which were in his possession.

I. Sampat's evidence is that the Bhutorias were in possession of a paper which would show that they were in fact in possession of Rs. 70,000 in cash in their safe. It may be added here that on May 6, 1958, two cheques were issued by Sampat for Rs. 30,000 and Rs. 40,000 on the Bank of India Ltd. in favour of the debtors. The production of this paper would support the Bhutorias' case that the moneys were deposited by them in cash in their bank on the days when the cheques were issued by them in favour of the debtors, But, here again; in answer to Q. 476 Sampat's evidence is that his brother had torn it off and on that he had scolded his brother.

J. On May 14, 1958, two cheques for Rs. 36,000 each were given by the Bhutorias to the debtors. Admittedly, one of the said cheques for Rs. 36,000 was dishonoured. Thus, Bahadur might have money elsewhere but his banking account was in a precarious condition. Bahadur was specifically asked to explain the circumstances why the cheque for Rs. 36,000 was dishonoured. According to him,, Bahadur asked the Kajarias for repayment of the loan before Ram-Navami and the Kajarias gave him a cheque for Rs. 36,000 which was sent to the bank. Thereafter, on the same day Kajarias asked Bhutorias for a loan of Rs. 72,000 by two cheques and the two cheques were given to Kajarias. He tried to explain as to why the Kajarias should ask for loan of Rs. 72,000 immediately after giving a cheque for Rs. 36,000 in alleged repayment of earlier loan by saying that the cheques for Rs. 36,000, given by the Kajarias had already been sent to the bank earlier. Apparently, he was suggesting that if a cheque for Rs. 36,000 had not been sent to the bank earlier they would have needed only Rs. 36,000 and not Rs. 72,000. But this story is falsified by the endorsement on the counterfoils of the pay-in-slip for this cheque, "too late for today's clearance". This endorsement shows that this cheque had not been sent to the bank before issue of the two cheques. Thus, this unexpected endorsement contradicts Bahadur Singh's explanation.

K. The evidence of Bahadur regarding the story of the loan by crossed cheque is also highly improbable. Except the first two cheques all the cheques were signed in blank and were filled in by the Kajarias or their employees and the crossing in most of the cheques were also done by them. Ordinarily, there is no necessity for a ceremony of signing the cheques in the morning and making them over to the Kajarias for being filled in and later making over all pay-in-slips for being filled in by the employees of the Kajarias and going to the bank for putting in moneys taking Kajarias' men as bodyguards. In fact, there is evidence to show that during the absence of Bahadur from Bombay from about May 14, 1958, the cheque book was with Srilal Kajaria and three/four cheques signed in blank were filled in during this period. If the Bhutorias are so careful as to cross the cheque,

there is no sense in leaving the cheque book with Srilal Kajaria. On the contrary, the amount in the said three/four cheques signed in blank could not be written unless Srilal Kajaria was aware of the balance sum in the bank. If the creditor's explanation is correct, i.e., the creditor deposited the said amounts in his banking account, how would Srilal Kajaria know Bhutorias' bank balance when, according to Bhutorias, they did not keep any money in bank. On the other hand, it fits in with the story of the debtors that they used to deposit the amount from their own till and, accordingly, put in the figure. On every occasion Kajarias deposited the specific sum and the cheque for the exact amount drawn by Bhutorias was honored. Once the deposit was made by Kajarias by cheque and as Kajarias' cheque was dishonoured Bhutorias' cheque also stood dishonoured. Further, serial numbers of 78 thousand rupees currency notes of thousand-rupee denomination, alleged to have been deposited in cash by Bhutorias, could be traced by the identical numbers of thousand-rupee currency notes, withdrawn by Kajarias from the banks (vide Sampatlal: Q. 516). The long story of the Bhutorias exchanging thousand-rupee notes belonging to Kajarias with the notes of lesser denomination belonging to the Bhutorias is highly improbable. In fact, by giving such explanation the Bhutorias are admitting that Kajarias are at least solvent enough to be in possession of Rs. 78,000 in thousand-rupee notes. Again some of the pay-in-slips were loose pay-in-slips taken from the bank by the Kajarias' men at the time of deposit and some of these came out of the deposit book of Kajarias (Ex. 50) in respect of their own account with the Bank of India Ltd.

4. It is now convenient to discuss the strongest point in favour of the Bhutorias on the basis of which the learned trial Judge, inter alia, made the order of adjudication. The letter dated June 30, 1958, (Ex. A) and the letter dated November 7, 1959, (Ex. T) and the letter dated November 20, 1959, (Ex. B) were all challenged by the Kajarias as forged documents. If these documents are genuine that would be the end of the debtors' case. Mr. P. P. Ghosh, Learned Counsel for the creditor, very strongly has relied on these documents and has contended that the documents when formally proved and supported by oral evidence are definite proofs of their contents. It is urged that there is no presumption of misconduct and the Court should not ordinarily reject documentary evidence unless the Court is convinced that they are forged documents. Further, he has submitted that in any event the learned trial Judge who had the advantage of hearing the oral evidence and watched their demeanor came to a finding of fact that each one of these documents is genuine and the appeal Court should not interfere with such finding unless the evidence in support of forgery is overwhelmingly decisive. He has cited large number of cases in support of his contention which are as follows: AIR 1930 170 (Privy Council) ; Antonio Dias Caldeira v. Fredorick Augustus Gray AIR 1936 P.C, 154; AIR 1948 108 (Privy Council); Sarju Pershad Vs. Raja Jwaleshwari Pratap Narain Singh and Others, ; Ugar Ahir and Others Vs. The State of Bihar, . The propositions of law laid down in these decisions are not disputed. But, it should

be remembered that the application of these principles would depend upon the facts and circumstances of each particular case. A document may be challenged on many grounds. The signature may be forged ; the despatch and the receipt of the document may be dishonestly procured; the signature may be genuine but may be used in such a way as to give a different complexion to the transaction or to document; the evidence of the person who proves the contents of the document may be an untruthful witness; the internal evidence of documents may be of such a nature that they do not correspond to admitted facts or undisputed events. A very competent forger would forge a signature in such an effective manner that the forged signature would be as good as the genuine one in its appearance; otherwise, the whole object of forging the signature fails. If, of course, there is not the slightest doubt in the mind of a Judge as to the genuineness of the signature, there is no scope for consideration of other surrounding circumstances. The very fact that a document has been written bona fide and that the signature is found to be genuine, the person who challenged such document must have to explain how the document has come into existence at all. But, where the signature has been challenged and disputed and there is a conflict of opinion of the experts on the forged document or where the Judge is not convinced beyond a reasonable doubt as to the genuineness of the signature, the nature, the character, the contents of such documents have got to be examined in the light of surrounding circumstances. If the surrounding circumstances lead to a conclusion of improbability as to the contents of the document, consideration of these circumstances may be, in a proper case, relevant factors in determining the genuineness of the signature. Once a signature in a document is found to be genuine the contents of the document should ordinarily be ascribed to the writer of the document and, if necessary, they may be used against such person. But, in cases where there are evidences both in favour or against the genuineness of the signature, the evaluation of such document as a piece of evidence should be adjudged in the light of the probabilities or the improbabilities of the contents of such document. " In such a case, if the contents of document do not correspond to the surrounding circumstances, the safer course would be to accept the evidence against the genuineness of the signature. An expert forger often eludes and successfully misleads the expert witnesses on a forged document. The evidence of expert witnesses on the genuineness of the document is based upon some analysis and study of the document or the signature in it. The very fact that these experts give their opinion on the basis of their past experience and training, they have certainly great persuasive value. But, it would be erroneous to assume that their opinions are conclusively precise like mathematical or scientific truths. It is a common phenomenon that the experts give their conflicting views on the same impugned document. In the instant case, the learned trial Judge after examining the evidence of the expert witnesses called on behalf of the creditor and the debtors and after examining several signatures of S.L. Kajaria and after careful examination of the document by himself came to the conclusion that the signature in the documents dated June 30, 1958, (Ex. A) and November 20,

1959, (Ex. B) are genuine. At the outset, we were inclined to accept this conclusion of the learned trial Judge, but closer examination of the improbabilities of the contents of the documents in the light of the surrounding circumstances have led us to the opposite conclusion that the signatures in these documents could not be the signatures of S.L. Kajaria. We have already discussed above the improbabilities of the contents of the document and contradictions in the creditor's case. Even the expert witness, Bani Kanta Bhattacharyya, on whose evidence reliance was placed by the learned trial Judge gave a long discourse on slants and dashes and the differences between admitted signatures and the disputed signatures. But, in answer to Q. 48 he has said that if a man is a veteran forger, he might have tree movements in the matter of writing a document. In Q. 5i, he has stated:

Q. 51. If an expert forger imitates a signature then it is not possible, according to you, to detect all cases.

A. That is possible.

Q. 53. Therefore, the greater expert forgery is more difficult for you to make the signature distinct.

A. That is so.

5. The said Bani Kanta, however, definitely expressed his opinion that the disputed signatures in the letters dated June 30, 1958 and November 20, 1959, are the real signatures of S.L. Kajaria. But, as against that the expert witnesses Sridhar Chatterjee and Satish Chandra Chowdhury called on behalf of the debtors are of opinion that the disputed signatures in those two documents are not the signatures of S.L. Kajaria. Both these expert witnesses called on behalf of the creditor and the debtors are persons who are all experienced men on this line and yet they came to conflicting views. We have also thoroughly examined the signatures in those documents with those in the admitted document and also with the signatures which S.L. Kajaria wrote out in a plain piece of paper during his examination. We are not convinced that the signatures in those two documents were those of S.L. Kajaria. Under these circumstances, we have no other alternative but to examine the impartialities of the contents of those two letters and to come to the conclusion whether the creditor's case is true or not. We may now discuss the evidentiary value of the disputed letters on which the creditor relied.

6. The disputed letter dated June 30, 1958, (Ex. A) is a letter supposed to have been written by S.L. Kajaria on behalf of Johar-mal Jugalkishore and International Traders to Chandmal Jiwanmal, the creditor in this petition. In the said letter, S.L. Kajaria, the debtor, is setting out a number of cheques received from the creditor from time to time in the name of International Traders and Johar-mal Jugalkishore. The Learned Counsel on behalf of the creditor has made a comment that the debtors for obvious reason have disputed the signature in this letter because, if they admit the letter, the debt is proved against them.

There is no doubt that this is an important letter, tout the question to be decided is whether this letter was at all written by S.L. Kajaria or not. In our opinion, that apart from the surrounding circumstances which we have already discussed above, it looks highly improbable why the debtors on their own would write to the alleged creditor asking for confirmation of cheques received. Ordinarily, a creditor to get an acknowledgment of the debt writes to the debtor for his own safety. Further, in this letter the creditor has been requested to confirm the statement of account. We do not find any confirmation in writing to that effect. A mere oral statement that the confirmation by writing was done on the duplicate of the letter cannot be accepted in the absence of better evidence. In this connection, Exs. S, 16, 17, 18 and 19 might be examined where specifically it is written that the duplicates and copies were requested to be signed. In Ex. A there is not a whisper about the desirability of confirmation on a duplicate or copy. Even assuming that the letter was written by S.L. Kajaria, the document merely speaks of cheques received. The document might have sup ported the creditor's case of loan, but it is highly improbable that the letter would be written by the debtors on their own. The correctness of the contents of the letter would really depend upon the source of the amounts covering the cheque and on that point we have already held that it is difficult to believe the creditors story of depositing the cash amount from his till on the days the cheques were issued. We are, therefore, of opinion that this letter is not of much assistance to the creditor.

7. The next disputed letter is the copy of letter dated November 7, 1959, (Ex. T) written by the creditor to the debtors. The letter was dispatched by registered post from premises No. 29 Sir Hariram Goenka Street, Calcutta, to Srilal Kajaria at 325 Kalba Debi Road, Bombay. This is a document which, according to the debtors, was not received by Srilal Kajaria at all. According to the debtors, the alleged postal acknowledgment by S.L. Kajaria (Ex. U) has been fraudulently utilised by the creditor in respect of one of the two enclosures of another letter (Ex. V) which was previously sent by the creditor to the debtors. According to the debtors, on November 7, 1959, a letter was written by Chandmal Jiwanmal (India) Ltd. to the debtors by registered post in respect of their joint venture in the manganese mines. That letter reads as to have contained two enclosures, but, in fact only one enclosure was first sent and then the other enclosure was separately sent by? registered post on November 7, 1959, to the debtors and the acknowledgment receipt which the creditor has produced to show that the debtors had received the letter of demand dated November 7, 1959, could possibly be the receipt of the letter which contained the second enclosure. The debtors' explanation is not improbable. But, in any event, we are of opinion^ that the creditor has not been able to prove that the letter dated November 7, 1959, was duly served on the debtors or was actually received by them. The person who is said to have posted the letter dated November 7, 1959, has not been called. Even the story regarding preparation and despatch is improbable and contradictory (Sampat: Q. 90; Mukundam: Q. 200-207). According to

Sampat, four copies of letters were sup-posed to have been addressed to two firms and four persons. One letter was supposed to have been sent under registered post from Calcutta and other letters from Burdwan under certificate of posting. If all the four Kajarias are the debtors, it is extra-ordinary why notice of demand should be sent to only one person from Calcutta although four copies were made and this decision was supposed to have been deliberately made when Jiwanmal Bhutoria was said to have overruled Sampat and asked him to send other letters by certificate of posting only. If the registration of three letters could not be sent because it was Saturday, as stated by Sampat (Q. 90), how was it possible to send them by certificate of posting ? There would have been no harm if three notices of demand were sent by registered post of the debtors other than Srilal Kajaria on Monday following. In his evidence, Sampat (Qs. 85, 86) speaks of a letter addressed to six persons, but Ex. T is, in fact, addressed to four persons only. There is no evidence of this alleged letter which was addressed to six persons. Sampat says that there were only four copies which were sent under certificate of posting from Burdwan. He also said that the letter of demand was put in the envelope by Mukundam (Sampat: Q. 114), but Mukundam said nothing about it. The contents of the letter also, in the absence of any document supporting them, cannot be correct. The letter refers to "statement enclosed". There is no evidence that the statement was enclosed. There is no reason why in Ex. T a true copy of the statement should not be attached. The letter refers to telephonic conversation with Jugal who is supposed to have expressed the debtors' inability to pay the dues. The letter also refers to enquiries that Kajarias' business position was not satisfactory. What is the source of that enquiry we could not trace. On the contrary, in his petition the creditor mentioned the name of one Paramsukhlal Agarwalla who was supposed to have told Jiwanmal that the debtors were intending to transfer their properties to defeat the claim of the creditor. Paramsukhlal Agarwalla was never called. On the contrary, there is evidence that this Paramsukhlal Agarwalla never existed. The information?s which the creditor received from the enquiries in the business circle at Calcutta about the debtors' financial condition would be in the nature of hearsay evidence and are of little value. In this letter they also referred to a letter dated October 24, 1959, which was written by the creditor in Marwari language from Burdwan. There is no evidence apart from the oral deposition that the letter in Marwari language was written from Burdwan. The letter also refers to the question of their claim on interest which claim was not supported by any document prior to this disputed letter. Different amounts were paid on different dates and how the creditor has calculated the interest and what the total interest would amount to were nowhere to be found. The acknowledgment receipt (Ex. S) was produced by the creditor to prove the receipt of the demand notice dated November 7, 1959, by somebody on behalf of S.L. Kajaria. The Learned Counsel for the creditor has strongly relied on the acknowledgment receipt (Ex. S) in support of his case, because not only this acknowledgment receipt proves that it was sent by registered letter but also that the letter was replied to subsequently by the debtors on November 20, 1959, admitting the debt. But, it should be

remembered that this document Ex. S merely shows a registered envelope was sent. The explanation offered by the debtors as to the existence of the postal receipt is not unreasonable. The evidence shows that there was an unusual coincidence that another letter was sent the same day by Sampatlal as director for "Chandmal Jiwan-mal (India) Ltd." to Srilal Kajaria (Ex. V). This letter also happens to be a registered letter. But, in the letter (Ex. V) two enclosures were mentioned, but, in fact, only one enclosure might have been included. Another registered letter containing the other enclosure might have been sent to Srilal Kajaria and this second enclosure might have been sent by them deliberately in the name of Chandmal Jiwanmal and the envelope and the sender's name might have been used to prove that the registered letter contained the other document, that is, the demand notice dated November 7, 1959. According to Srilal Kajaria, the registered letters were posted with a well-conceived plan (Srilal: Os. 445-460). The explanation seems to us acceptable because we find that although since March and April 1959 there was silence on the part of the creditor to demand payment of the money from the debtors, the notice of demand was sent on a day when Chandmal Jiwanmal (India) Ltd., their private limited company, found it necessary to write to Srilal Kajaria in connection with the contract No. 45/57 with the State Trading Corpn. India Ltd. The second extra-ordinary thing is that there is no cross-examination on this point that Ex. 22 came separately. The certificates of posting (Ex. LL) are not documents on which strong reliance could be placed as proof of the despatch of the said notice of demand. Jugalkishore Kajaria also denied receipt of the letter of November 7, 1959, but he was not cross-examined on this point. It was commented by Mr. Ghosh on behalf of the creditor that Shyamlal and Onkarmal did not come to deny the receipt of the said letter. But it should be remembered that despatch of the letters was not formally proved. Further, this demand notice is not consistent with the conduct of the Bhutorias prior to November 7, 1959, and the surrounding circumstances. There were demand letters by registered post and replies thereto in March and April 1959, followed by complete silence. In fact, careful preparations of commencing insolvency proceedings by the Bhutorias were being made long before this letter. The Bombay office of the Bank of India Ltd. was being asked by the Bhutorias to get the particulars of the cheques drawn in favour of the debtors as early as September 9, 1959 (vide Ex. 8). There is also evidence to show that the pay-in-slips in connection with the deposit of the cash money by the Bhutorias were being initialed by them much later than the dates on which the moneys were deposited. This finding as to the forging of the initials was made by the learned trial Judge himself against the creditor. Strictly speaking, the letter of demand is also not factually correct inasmuch as Shyamlal and Onkarmal, who happened to be two of the addresses, were not partners of International Traders and, as such, they do not owe Rs. 3,34,000 to the Bhutorias as the letter of demand mentions it.

8. The last disputed letter is the letter dated November 20, 1959, (Ex. B) supposed to have been written by S.L. Kajaria for Joharmal Jugalkishore and

International Traders to Jiwanmal Bhutoria, Johuri Bazar, Burdwan. This letter seems to be the strongest document which demolishes the debtors' case inasmuch as the debtors have not only accepted the debt but admitted the act of insolvency by stopping payment to all creditors. A short point has been taken by Mr. Deb on behalf of the debtors that assuming the letter 4ft be true, the admission by one of the debtors cannot be construed as the admission of insolvency by the other three debtors. He has not argued the point but he has left the question open. In our opinion, there are good reasons why this letter dated November 20, 1959, cannot be relied upon by us. The learned trial Judge was not convinced of the conflicting nature of the evidence of the experts on this point, although he made an observation that if he was to prefer one opinion, he would rather accept the evidence of Bani Kanta. He, however, examined the admitted signature and the signature of S.L. Kajaria in this document and on the basis of similarity of the signatures came to the conclusion that the signature is a genuine one. As stated earlier, it is not safe to adjudge the genuineness of the signature on the basis of the visual similarity unless the contents of the document are reasonably probable and based upon objective facts. In our opinion, the contents of this letter are inconsistent with the facts revealed in the case. On March 26, 1959, there was a registered demand letter by Chandmal Jiwanmal (India) Ltd. asking for accounts and threatening legal proceedings and also a registered reply on April 2, 1959, by Srilal Kajaria with warning that any legal proceeding would be defended (Exs. 7, 52 and I). Such strained relation between the parties does not fit in with the friendly tone in this disputed letter. Further, there was no question of any friendly relationship existing between the parties as the careful preparation for insolvency proceeding by the Bhutorias at least from September 9, 1959, (Exs. 8, 27) was started. Thus, the debtors' conduct is not consistent with what is written in this letter. Even the internal evidence of this letter would also show that this letter is a forgery. The letter contains such formal expressions that the admission of insolvency may be easily spelt out. The difficult financial position, stoppage of payment to all creditors and admission of debt, all are mentioned in this letter. The letter mentions about friendly relations which did not exist since March 1959. It is also stated that Kajarias made "repeated requests" to Bhutorias for not proceeding for payment. We have no evidence as to the circumstances how and when such requests were made by Kajarias. Even assuming Mr. Ghosh's contention to be correct, that is, the four addressees of the letter dated November 7, 1959, in substance referred to the liabilities of all the four partners irrespective of the fact that two of them were not partners of International Traders, it is unbelievable that Srilal Kajaria could have made this mistake by writing the following:

Srilal Kajaria and three other partners of International Traders and Joharmal Jugalkishore.

This is another reason why the letter dated November 7, 1959, (Ex. T) could not be a genuine letter. The letter dated November 20, 1959, (Ex. B) is supposed to be the reply of the notice of demand dated November 7, 1959. If the letter dated

November 7, 1959, has not been actually dispatched, there was no occasion for writing the reply dated November 20, 1959.- Even, according to the cause title in the petition, Shyamlal and Onkarmal were not the partners of International Traders. According to Srilal, he, Jugalkishore and Nagarmal Tulsan were partners of International Traders and he, Jugalkishore, Shyamlal, Onkarmal and Kamala Debi were partners of Joharmal Jugalkishore. Further, the statement in the letter?

we are really in bad days and have no other option but to stop payments to all creditors, is also false inasmuch as the business of the debtors continued as usual and large payments continued to be made to banks and others by the debtors. Jugalkishore has stated that he is in a position to pay even Rs. 10 lakhs in 1960 (Qs. 237-238). There was no stoppage of payment to the creditors as the banking accounts would disclose. The trust receipt facilities with the State Bank of India as disclosed in the bank's letter dated November 21, 1959, (Ex. 57) does not corroborate Kajarias' admission of insolvent condition as set out in the letter dated November 20, 1959. Exhibits 31(a), 32 33. 33(b), 33(c), 33(d), 33(e), 34, 35, 36, 37 and 38 show that large payments were being made by the debtors to their banks in the usual course of their business. There was also evidence to show that the new branch of their business at Madras and rice mill in Champa, M.P., were started towards the end of October, 1959. (Vid Jug Qs. 30 35) It may be added here that the counsel for the creditor gave up the creditor's case of stoppage o? business of International Traders as made in para. 6(b) of the petition at the time of framing the issues and also he did not proceed with the case in para. 6(c) of the petition at the time of the argument. Then, again, Srilal was supposed to have signed on behalf of Joharmal Jugalkishore and International Trader. But the notice of demand dated November 7, 1959, (Ex. T) to which the reply was alleged to have been made in this letter was not addressed to Joharmal Jugalkishore and/or International Traders. There is no explanation why this letter alleged to be the debtors' admission to their liability was addressed to Jiwanmal Bhutoria, Johuri Bazar, Burdwan, although the demand notice to which it is stated to be the reply purports to have been written by Chandmal Jiwanmal of 29 Hiram Goenka Street, Calcutta. This letter is supposed to be the unregistered letter although it is meant to be reply to a registered letter. We do not agree with the learned trial Judge that the burden of proof as to the genuineness of this letter has been discharged by the creditor, prima facie, the onus is undoubtedly on the creditor, but there are sufficient materials which compel us to hold that the creditor's evidence as to the genuineness of the document has been rebutted. We are also not convinced that the contents of the letter dated November 20, 1959, are natural in the surrounding circumstances. The learned trial Judge has stated at p. 979 of the paper book that the payments from time to time to different banks with which the Respondents (Kajarias) had cash credit or overdraft accounts to have the stocks and securities released for purposes of business stand, in my opinion, on the facts of this case, on a different footing altogether.

The very fact that the payments were in fact made repels the creditor's case of

suspension of payment. Further, Jiwanmal Bhutoria, in para. 6(b) of the petition has mentioned only four banks as the other creditors of Kajarias. The learned trial Judge strongly relied on the fact that this letter was written on the letter-head of the debtors' firm Joharmal Jugalkishore. But this fact, by itself, cannot be strong ground inasmuch as the letter-heads can be procured or printed. The learned trial Judge without being satisfied with correctness of Bani Kanta's evidence has observed that if reliance is to be placed on experts' evidence, he would prefer Bani Kanta's evidence, But the learned Judge's reasons for rejection of evidence adduced by the experts called by the Kajarias are existing in Bani Kanta's evidence also. A comment was made that the expert witnesses called on behalf of the Kajarias compared the admitted signature of S. L Kajaria with the photograph of their signatures and not with the originals. But, Bani Kanta was asked to give his opinion on the genuineness of the photographed signatures of S.L. Kajaria (Exs. 3, 4, 5, and 6) and his answer was "yes" (Qs. 187 189) . In fact, he found no difficulty in identifying the signatures of S.L. Kajaria on the photographs. All these aforesaid facts go to show that the contents of this letter, dated November 20, 1959, could not possibly be correct and this letter must have been manufactured by the creditor and the signature seems to have been forged to support the creditor's case. For all these reasons, we are not convinced that the Bhutorias did deposit from their own till cash moneys amounting to Rs. 3,34 000 on different occasions before they issued cheques for the corresponding amount to the International Traders and Joharmal Jugalkishore. Insolvency proceeding is a serious matter to be taken recourse to. There is no doubt that a creditor whose debt exceeding Rs. 500 remains unpaid has got a statutory right to apply for an order of adjudication against the debtor, if the conditions in Section 9 of the Presidency-towns Insolvency Act, 1909, are satisfied. But, it should be remembered that the order of adjudication is substantially quasi-penal in character and is highly detrimental to businessman's reputation in the market. The creditor always has the remedy of instituting civil suits to realize his debt particularly when the debtor admittedly has moveable or immoveable properties which could be attached in interlocutory proceedings. But this ordinary remedy does not extinguish or diminish the creditor's statutory right to proceed under the Insolvency Act. In our view, the order of adjudication could only be made where the creditor's application is made bona fide and evidence is laid on behalf of the creditor in such a way that the Judge passing an adjudication order is convinced beyond any reasonable doubt that the act of insolvency has been committed by the debtor. In this connection reliance may be made on the portion of the judgment in *In Re: Harsukhdas Balkissendas*, , which the learned trial Judge has set out in his judgment. Even assuming the debtors' case or explanation is improbable or doubtful, the creditor's case cannot succeed unless the creditor makes out a strong case. In the instant case, the creditor closed his Bombay business in 1958 and all his accounts with the various banks were closed in 1955-56. The only bank account which he had in respect of his business was the Bank of India Ltd. and that was also closed on December 18, 1958 (vide Bahadur: Qs. 264 266). Statements of account of the creditor's bank

disclose the state of creditor's bank balance upto 1953-1954. The hundis which were produced to show that the creditor dealt with large sums of money amounting to lakhs of rupees all took place in 1953-1954 (Bahadur: Q. 427). To avoid payment of income tax the creditor closed not only the banking account but also the business itself in Bombay ; the money covering the cheques drawn by him in favour of the debtors was cash money kept secretly in his iron-safe; the pay-in-slips by which moneys were deposited in the bank for the purpose of granting loan to the debtors, according to the debtors' requirements on different dates were filled in by the debtors' employees; the counterfoils of the cheque book were produced by the debtors; the debtors' cheque for Rs. 36,000 was dishonoured and yet the creditor continued to give more advances to the debtors ; the joint venture between the debtors and the creditor continued in which, under the agreement among themselves, 50 % of the profit was to be given to the debtors; the books "of account of the creditor's business not produced on the plea that they were kept in the custody of the debtors. There were many other facts creating doubts in the Petitioner's case which may be added as follows:

(a) Jiwanmal Bhutoria has affirmed paras. 1 to 6 as true to his knowledge and para. 7 as information received from Paramsukhlal Agarwalla. But the evidence shows that Jiwanmal had no personal knowledge about the alleged loan (Jiwanmal: Q. 21).

(b) The evidence also shows that the story of the information having been received from Paramsukhlal Agarwalla was entirely false. According to Agarwalla, the debtors with the sole intention of defeating or delaying the creditor's claim were intending to transfer the properties mentioned in para. 7 of the petition. In spite of the challenge no attempt was either made to call him as witness.

(c) Similarly, Jiwanmal has no knowledge about the para. 6(b) or 6(a) of the petition although the said paragraphs were affirmed as true to his knowledge (vide Jiwanmal: Qs. 36-124, 130).

(d) A case was made out in para. 6(b) of the petition that there were four creditors who happened to be Bank of Bikaner, Canara Bank Ltd., Central Bank of India Ltd. and State Bank of India. According to this sub-paragraph there was stoppage of payment by the debtors to these banks. The creditor at the time of hearing of the application did not press this ground. Similarly, the ground mentioned in para. 6(c) where the allegation was that the debtors had already transferred certain properties, were also not proceeded with.

(e) There is evidence to show that the debtors were not in a hopeless position to pay their alleged debts, as the creditor has wanted us to hold. The following documents also repel the creditor's case. Overdraft accounts showing that credit facilities for large amounts were granted by banks, some of these overdrafts having been found to be against security, for instance, (i) Hindusthan Mercantile Bank Ltd. (Ex. 32, pp. 129-136, bk. IV); (ii) State Bank of India (Ex. 30, pp.

112-127, bk. IV); Hindusthan Commercial Bank Ltd., Burrabazar (Ex. 33/ pp. 133-161, bk. IV); (iv) Statement and certificates of withdrawal and deposits from State Bank, Canara Bank, Hindusthan Commercial Bank Ltd., Hindusthan Mercantile Bank Ltd., showing that large payments were being made to the banks during September-December, 1959 (vide Ex. 31, p. 128, bk. IV ; Ex. 36, p. 194, bk. IV ; Ex. 37, p. 194, bk. IV ; Ex. 38, p. 195, bk. V); the trust receipt facilities granted by the State Bank (Ex. 37) also shows that the credit facilities being continued in favour of the debtors from November 21, 1956 to February 16, 1960. There were immoveable properties valued between 19 to 23 lakhs (vide p. 413, vol. IV of the paper book and Srilal: Qs. 39-69).

(f) Srilal has stated that a sum of Rs. 4,50,000 was due to their firm from the State Trading Corporation (Qs. 100-101). The debtors have large stocks of goods, and outstanding bills for the goods sold remained unpaid (Jugalkishore: Qs. 162-176, 177, 721, 734, 761 and Srilal: Qs. 165, 166). Jugalkishore also has stated in his evidence that the firm of Kajarias have got a goodwill in the market and credit facilities were available to them (Qs. 338-342, 316 and 317). All these facts were not disproved in the cross-examination.

(g) The order of adjudication against the creditor was confirmed by Bombay High Court on August 26, 1957 (Ex. 53).

(h) The agreement between the State Trading Corpn. of India (P.) Ltd. and the creditor on September 2, 1957, in fulfillment of which the debtors' money was secured and invested by the Bhutorias (vide Exs. 14, 11, 16 and 17) is admitted by Bhutorias.

(i) Notices u/s 46(5A) of the Indian income tax Act, 1922, were served on the creditor's banks directing them not to make payment to the creditor (vide Ex. P), (j) Letter from State Bank to Joharmal Jugalkishore indicates assignment of a part of the letter of credit to the extent of Rs. 7,66,000 in favour of Joharmal Jugalkishore in respect of supply of 5,000 long tons manganese ore to State Trading Corpn. which was to be made from May 2, 1958 to December 3, 1958 (Ex. 20).

(k) Letter dated December 3, 1957 from State Bank of India to Joharmal Jugalkishore regarding further assignment of L/C 3/239 to the extent of Rs. 14,06,000 for shipment of manganese ore (Ex. Y) also shows the brisk business done by the debtors. (1) On November 19, 1958, Srilal Kajaria agreed with Jiwanmal Bhutoria to settle accounts regarding manganese business (Ex. CC).

(m) Letter dated November 21, 1959, was written by State Bank of India to Joharmal Jugalkishore agreeing to the continuation of Trust Receipt till February 16, 1960 (Ex. 57).

(n) Documents support the debtors' case of withdrawal of cash money by Kajarias from their banks (Exs. 42 to 49).

9. Before we conclude, reference may be made to certain facts to which our

attention has been drawn in support of the creditor's case:

(a) The letter of credit No. 3/239 issued by State Bank of India in favour of Chandmal Jiwanmal (P.) Ltd. upto the sum of Rs. 2,00, 000 on December 3, 1957, (Ex. V) shows that the creditor's financial condition was such that they were in a position to advance money to the Kajarias. But it should be remembered that the letter of credit was issued not in favour of the Respondent creditor but in favour of the latter's limited company. This amount was arranged in connection with manganese business and as early as December 3, 1957.

(b) The cash book of the Kajarias has been found by the learned trial Judge as not having been maintained contemporaneously. Although the cash books of Joharmal Jugalkishore (Ex. 62, pp. 349-362, vol.4) of International Traders (Ex. 63, pp. 364-384, Vol. 4), and of Pannalal Kishanlal (Ex. 61, pp. 380-387, vol. 4) indicate their ability to pay off the debts, we cannot put much reliance on these documents in view of the material discrepancies pointed out in the judgment.

(c) The debtors' case as to accommodate the Bhutorias, at the latter's request, to enable the latter to take overdraft from the Bank of India Ltd. by depositing money in their account, should not be believed inasmuch as there is no evidence on the factum or particulars of the overdraft. It is true that the explanation given by Kajarias would have been more easily acceptable if there is some documentary evidence to show that Bhutorias did take advantage of overdrafts from their bank. But absence of such evidence by itself cannot make the debtors' story improbable and make the case of Bhutorias probable.

10. In conclusion, it may be stated that the only act of insolvency that the creditor complained of and tried to prove in this case was that, the debtors gave notice on November 20, 1959, to the Petitioners of their inability to pay and/or that they had suspended payment of their debts and/or that they were about to suspend payment of their debts. It may be stated that stoppage of the business of International Traders and the transfer of their properties or inability to pay not being the grounds of insolvency the evidence on this point, strictly speaking, should not be given weight to. It appears that the petition was directed to be tried on evidence and as six issues were raised and evidence was adduced on these issues.

Both the parties have contended that in order to believe or disbelieve the act of insolvency as set out in para. 6(a) of the petition, the evidence as to the solvency of the debtors or the creditor should be considered. Be that as it may, submissions were made before us on the oral and documentary evidence in details by the Learned Counsel for both the parties and naturally it is not possible for us to ignore the various aspects of the case of the debtors and the creditor. In fact, as the letter dated November 20, 1959, has been, challenged by the debtors, evidence that was necessary to controvert the contents of this letter and to prove that they are inconsistent with the surrounding events have got to be evaluated. In our opinion, the evidence on which reliance was made by us is

relevant to consider the genuineness of the letter dated November 20, 1959. The main issue between the parties is whether there was an admission on the part of the debtors as to their indebtedness. Such admission presupposes a debt and whether the debt in fact existed or payment did take place or whether the creditor is in a position to advance the money or whether the debtors have in fact received the money as implied in the said letter dated November 20, 1959, are all relevant factors to be considered. In this connection, reference may be made to *Bhagwati Prasad v. Chandramaul* AIR 1966 S.G. 735 (738).

11. In our opinion, the learned Judge has not considered the improbabilities of the creditor's case as disclosed in the evidence before him and has expressed his opinion more on the basis of the genuineness of three documents than on evaluation of surrounding circumstances. In this connection, reference may be made on the following observations of B. K. Mukherjee, J. in the Supreme Court judgment in *Sarju Prashad Ramdeo Sahu v. Jwaleshwari Pratap Narain Singh* (Supra, p. 121):

The rule is and it is nothing more than a rule of practice that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate Court should not interfere with the findings of the trial Judge on a question of fact.

12. For all these reasons, this appeal should be allowed and the order of the learned trial Judge directing the order of adjudication in respect of the estate of the debtors set aside. The Respondent must pay the costs to the Appellant. All interim orders vacated.

B.N. Banerjee, J.

13. I agree with the findings arrived at by my Lord and the reasons therefor. Were I inclined to deliver a separate judgment, I could not have done so in more felicitous language than his.