

(1977) 06 MAD CK 0012

In the Madras High Court

Case No : Petition No's. 41 and 46 of 1976

Khiaram Khushiram and Others

APPELLANT

Vs

Kamadhenu Drinks and Others

RESPONDENT

Date of Decision : 15-06-1977

Acts Referred:

Presidency Towns Insolvency Act, 1909 — Section 10, 9

Citation : AIR 1978 Mad 252

Hon'ble Judges : V. Sethuraman, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

V. Sethuraman, J.—These two insolvency petitions have been filed by two sets of creditors for adjudicating the first respondent-firm and its

alleged partners, respondents 2 to 9 as insolvents. The first respondent is known as Kamadhenu Drinks. The creditors in I. P. No. 41 of 1976 had

advanced different amounts on hundies or promissory notes. The first respondent agreed to repay the amounts borrowed within a period of 90

days from the said date of the hundies, The said promissory notes or hundies were executed at No. 10, Kasturi Ranga Iyengar Road, Madras-18,

by one V. P. Muthukumaraswamy Gounder who is admittedly a partner in the said firm. According to the petitioning creditors in I. P. No. 41 of

1976 the first of them went to No. 10, Kasturi Ranga Iyengar road, on 1st, 2nd and 4th March, 1976 and did not find the board of Kamadhenu

Drinks previously found in the said premises. He was not able to contact anyone of the partners at the aforesaid premises and it is, therefore,

stated in the petition that the debtors had departed from the usual place of business at No. 10 Kasutri Ranga Iyengar Road and had thus

committed an act of insolvency within the meaning of Section 9(d)(ii) of the Presidency Towns Insolvency Act. Notices were given to the debtors

in March, 1976 and they were acknowledged by the debtors by their letter dated 20-3-1976, wherein it was stated that Kamadenu Drinks was at

No. 26, Agraharam Street, Erode. It is therefore, alleged that the debtors had changed their place of business from No. 10, Kasturi Ranga Iyengar

Road, Alwarpet, Madras-18, to No 26, Agraharam Street Erode, and had thereby committed an act of insolvency described in Section 9(d)(ii) of

the Presidency Towns Insolvency Act, It is further alleged in the petition that after the receipt of notices some of the debtors came over to Madras

and stayed in Hotel Ashoka and called for a meeting of the creditors in a room in the said Hotel on 7-4-1976 and also on 8-4-1976, On 7-4-

1976 two of the creditors viz., Seth Biharilal Prakashlal and Seth Motirarn Newendram attended the meeting and on that day it was represented

by two of the debtors viz., S.V. Balasubramaniam and V.K. Swaminathan respondents 5 and 6 respectively, and that they would call for the other

debtors also and have full discussions with the creditors on the next day. At the meeting on the next day, a number of other creditors were also

present and at that meeting it is alleged that the debtors expressed their inability to pay the amounts due immediately and stated that everything was

in a state of confusion due to the sudden death of a partner V.M. Kailasa Gounder, that the accounts had not been kept properly and that it was

not possible to discharge the huge liability incurred, as no partner was coming forward to give his share of debts and to co-operate in the discharge

of the debts. It is alleged also that they stated that they could not make payment and they would not be in a position to pay the amount in the near

future and that thus they suspended the payment. It is further alleged that the debtors told them that they could do whatever they wanted to do. It is

stated in the petition that the debtors had suspended payment and thus committed an act of insolvency described in Section 9(g) of the Act. The

prayer is, therefore, that the debtors should be adjudged as insolvents and that consequential orders should be passed.

2. A common counter-affidavit has been filed by respondents 1 and 3. They have denied the allegations that they had committed any act of

insolvency contemplated either by Section 9(d)(ii) or by Section 9(g) of the Act. According to them, there were several discussions and ultimately

a settlement was reached by which Multani Bankers, to which class the petitioning creditors belonged, would be paid certain amounts by sale of

No. 10, Kasturi Ranga Iyengar Road, for which purpose a special power of attorney was executed in favour of Sri R. Krishnaswami, Advocate. It

is also stated that they paid a sum of Rs. 2,00,000/- and the petitioning creditors were estopped from prosecuting this petition and that their only

remedy was to take suitable steps to enforce the arrangement dated 10-5-1976 as a result of which the power of attorney mentioned above had

been given and the property bearing Door No. 10, Kasturi Ranga Iyengar Road was to be sold. It is stated in the counter affidavit that assets of

the first respondent firm exceeded 1.5 crores of rupees and that the assets were more than sufficient to discharge all the liabilities of the firm and

that with a view to evade payment of court-fee, the petitioning creditors had chosen to fill the petitions for insolvency for adjudicating the

respondents as insolvents as a short cut for recovery, which was not permissible under the law.

3. The second respondent and the fourth respondent have filed counter affidavits which run more or less on the same lines as of the first and the

third respondents. In the counter affidavit filed by the fifth respondent it is stated that he was no longer a partner in the firm of Kamadhenu Drinks

and that the acts of insolvency said to have been committed would not in any manner justify his adjudication. Respondent No. 6 and respondent

No. 8 (for himself and on behalf of respondents 7 and 9) have filed counter affidavits denying the allegations of their having committed any act of

insolvency.

4. A reply affidavit has been filed in which the statements contained in the counter affidavits have been controverted and it has been reiterated that

the debtors said at the said meeting held on 8-4-1976 that the creditors could do whatever they wanted to do.

5. In the course of the trial of the petitions on the side of the petitioning creditors the first petitioning creditor has given evidence as P.W. 1. P.W. 2

by name Arjun was not a creditor of the first respondent-firm and was only representing his mother, who had advanced some monies, guaranteed

by the respondents to a mill called "Janardhana Mills Limited" in which the said Kailasa Gounder and others were interested. His evidence is

relevant only for the purpose of finding out what happened on the 8th April 1976, as he claimed to have been present at the said meeting. One

Beharilal has given evidence as P. W. 3, He is a creditor of the firm; but he is not one of the petitioning creditors. One Chandrabhan Ramchand has

given evidence as P.W. 4. He is a finance broker and according to him the finances were arranged through him and he was present at the meetings

held on 7-4-1976 and 8-4-1976. On the side of the respondents, evidence has been given by respondents 2, 3, 5, 6, 7 and 8. The only

respondents who did not give evidence were respondents 4 and 9.

6. I. P. No. 46 of 1976 was filed by four other creditors who have similarly advanced amounts to the first respondent-firm. They have also alleged

that the acts of insolvency contemplated by Section 9(d)(ii) and Section 9(g) of the Presidency Towns Insolvency Act had been committed by the

respondents. In the counter-affidavits filed in the said petition also, the respondents have taken the identical stand as in I. P. No. 41 of 1976.

Apparently because the facts are identical, the petitioning creditors in I. P. No. 46 of 1976 did not let in separate evidence.

7. The evidence recorded in I. P. No. 41 of 1976 was by consent of parties, taken as common to both the petitions.

8. In the context of these facts, the points that require consideration in the petitions are :--

1. Whether the respondents have committed acts of insolvency u/s 9(d)(ii) and Section 9(g) of the Presidency Towns Insolvency Act?

2. Whether the fifth respondent is not liable on the ground that he had retired from the first respondent firm.? and

3. Whether the acts of insolvency complained of are the joint acts so that all of them were liable to be adjudged as insolvents?

9. There was one Kailasa Gounder, who was interested as a partner of Kamadhenu Drinks and also of several other limited companies like

Janardhana Mills Limited, M. L. R. Drinks Limited, Amudam Enterprise Limited, etc. The partners of the first respondent-firm belonged either to

his family or to his brother's family or to the families of his relations. In fact, except the 9th respondent P. Chenniappan, the rest of the respondents

fall into three categories. The second, third and fourth respondents are the nephews of Kailasa Gounder, the sixth respondent is the son of Kailasa

Gounder, fifth, seventh and eighth respondents are brothers who are relations of Kailasa Gounder. The firm of Kamadhenu Drinks had an office at

261, Agraharam Street, Erode, and a factory in a village near Erode. Some of the partners or their relations had purchased a property bearing No.

10, Kasturi Ranga Iyengar Road, and it is not in dispute that the second respondent was residing in the said premises wherefrom he was also

borrowing monies for the first respondent-firm showing that place as the address of the said firm. On the death of Kailasa Gounder on 19-2-1976

the second respondent left Madras for the purpose of attending the funeral ceremonies of his uncle. There is some difference in the version

regarding the date of his return to Madras. In I. PL No. 41 of 1976, it is stated in para 20 that some of the creditors named therein went to the

business premises at No. 10, Kasturi Ranga Iyengar Road and were informed by V.P. Muthukumaraswamy the second respondent, that the

debtors were indebted to the extent of more than Rs. 1 1/2 crores and their total assets came to about Rs. 90 lakhs only. It is stated that the

second respondent told that they were in difficulties and they could not pay any amount unless the matter relating to Kailasa Gounder was settled.

Thus, from that petition it is clear that the second respondent was in Madras on 26-2-1976. However, on behalf of the respondents it is stated in

the counter affidavit as well as in the evidence that the second respondent, after he left Madras for attending the funeral ceremonies of Kailasa

Gounder, did not return to Madras till sometime late in March. It appears that on or about 30th of March, 1976, there was a meeting of the Board

of Directors of one of the companies in which some of the respondents were interested and that on 31-3-1976 the second respondent was taken

into the custody under the provisions of the Maintenance of Internal Security Act and taken to Coimbatore on the 1st of April 1976. If the

allegations in the petition are to be accepted with regard to the version, then the second respondent was available at premises No. 10, Kasturi

Ranga Iyengar Road on 26-2-1976. It is not alleged that any act of insolvency was committed on 26-2-1976 at the time of the meeting of some of

the creditors with him. However, the allegations in the petition is that the first of the petitioning creditors visited the premises No. 10, Kasturi Ranga

Iyengar Road, on the 1st, 2nd and 4th of March, 1976, and did not find the board and could not contact any of the respondents there. Though it is

in evidence that some of the other respondents, whenever they came to Madras, stayed in the said premises, there is nothing to show that they were ordinarily residing at the said premises. From the fact that the first respondent-firm is carrying on business in Erode for several years and is having an office at Erode it could be seen that the Madras Office was, if at all, only a branch, and from this branch the only transactions that were evidently transacted were borrowing by the second respondent on behalf of the firm apparently on a large scale. The said Kailasa Gounder, was a man of considerable resources and a well-known industrialist and businessman of Erode. On his death, which was sudden, problems arose and differences also erupted among the groups. It is clear that there was differences of opinion between his son and his nephews, respondents, 2, 3 and

4. From the petition it is also clear that a committee of five persons consisting of Subbaroya Gounder, Muthuvellappa Gounder, Muthuswami, Sengottuvellappan and Lakshminarayana Gounder had taken interest in the settlement of the liabilities of Kailasa Gounder and had called for a list of persons to whom Kailasa Gounder owed any amount. It is, thus evident that on the death of Kailasa Gounder, there was some confusion in the family and business affairs of the firms in which Kailasa Gounder was interested, I do not think it possible to discredit the evidence given by the second respondent himself in which he stated that he remained in Erode for sometime after his uncle's demise for the purpose of attending the funeral etc., From the evidence of the sixth respondent himself as R. W. 1, it is found that the second respondent attended funeral and was also visiting Kailasa Gounder's house off and on for sometime. R. W. 1 has also stated that the second respondent had his own house in Erode and also had an establishment in a village nearby, From the evidence of these two persons viz., Respondents 1 and 2, I am satisfied that the second respondent had moved out of Madras for the purpose of attending the funeral of his uncle and also for the purpose of attending to the affairs which arose consequent on the demise of Kailasa Gounder. It is not disputed that the 2nd respondent was not available at premises No. 10, Kasturi Ranga Iyengar Road on the 1st, 2nd and 4th of March, 1976. However, the reason for his absence is clear viz., to attend the funeral of his uncle and to the affairs which arose consequent on the demise of his uncle. On the death of Kailasa Gounder the second respondent was the senior most

among the two families. Even during the time of Kailasa Gounder it is in evidence that Kailasa Gounder and the second respondent were mainly

looking after the affairs of the first respondent firm. It is in these circumstances not inconceivable that the second respondent went to Erode and

stayed on for the purpose of arranging all the affairs. It is not also, as if the second respondent shut up his shop and made himself scarce with a

view to evade his creditors. The notices that were despatched to 10, Kasturi Ranga Iyengar Road, on the 5th March, 1976, had actually been

received at the Erode address. This itself goes to show that arrangements had been made for the purpose of seeing that communications could be

had with him and the firm. It appears from the evidence that No, 10 Kasturi Ranga Iyengar Road was not completely closed and that a person by

name Singaram was available to tell the parties as to where the respondents were. I am not, therefore, satisfied on the facts herein that the

respondents have committed any act of insolvency as provided in Section 9(d)(ii) of the Presidency Towns Insolvency Act.

10. The said provision runs as follows:--

A debtor commits an act of insolvency in each of the following cases, namely:--

(d) If, with intent to defeat or delay his creditors;--

(i) he departs or remains out of the States.

(ii) he departs from his dwelling house or usual place of business or otherwise absents himself.

(iii) he secludes himself so as to deprive his creditors of the means of communicating with him." From the language of the provision itself it is clear

that the act of insolvency is contemplated only where a person departs from his dwelling house or usual place of business or otherwise absents

himself with intent to defeat or delay his creditors. At page 84 of Mulla's Law of Insolvency in India, Third Edition, it is stated in para 103 as

follows:--

All the acts mentioned in this Clause 9 (d) (ii) are in themselves innocent, and to make them acts of insolvency, it is necessary to prove that the act

was done with intent to defeat or delay creditors.

In para 105 it is stated as follows:--

Absenting oneself is no act of insolvency unless it be with intent to defeat or

delay creditors. Whether that intention exists is a question of fact....If a trader shuts up his shop during business hours..... without leaving instructions where he is to be found if creditors call, or without making arrangements for carrying on his business, he must be presumed to have left to avoid his creditors; but the absence may be satisfactorily accounted for and the presumption may be rebutted. No such presumption, however, arises where the debtor has left a representative behind or has left a direction that letters are to be addressed to him at a particular place.

In the present case, therefore, it is necessary to see whether the second respondent, who alone was the resident in the said premises at No. 10, Kasturi Ranga Iyengar Road, had left the place with intent to defeat or delay creditors. There can be no presumption on the facts herein that his departure from the place was with intent to defeat or delay the creditors because he has left a representative behind. The letters addressed to him had also been redirected to the address at Erode as there is also a valid explanation as to why he was not present in Madras at the relevant time, It is common knowledge that ceremonies in connection with the demise of a Hindu take nearly a fortnight, and therefore, there is nothing surprising if he was away from Madras during the period of a fortnight commencing from 19-2-1976 when Kailasa Gounder died. In the context of the explanation, it is reasonable to draw the inference that the absence of the second respondent from the said premises was not with a view to defeat or delay creditors. In the context of the appropriate instructions having been left for the purpose of communications reaching him, I am not at all satisfied that he was making himself scarce with any intent to defeat or delay the creditors. The first respondent being a firm could only act through a human agency and in the present case it is only the second respondent who, according to the petitioners, was representing the firm at Madras.

Therefore, whatever applies to him would equally apply to the first respondent. There is nothing to show that the branch was closed with a view to defeat or delay creditors. Further there could have been no difficulty about contacting it at the Erode address. The other respondents who came to Madras casually stayed in the said premises. They cannot be charged with having departed from the place in which they did not reside. All of them have their own residences in Erode and other places and, therefore, they cannot

be charged with having absented themselves from the said premises with intent to defeat or delay the creditors.

11. A similar situation arose for consideration by a Bench of this court in *M. Ratchaganadan Vs. Kishindas Shamadasunder and Another*, . In that case, there was a cashewnut business in Panrutti. It had also an address in Madras. The money had been borrowed from the Madras address. The notice addressed to the said place in Madras was returned. It was, therefore, alleged that the debtor had committed an act of insolvency by departing from his place of business in Madras with intent to defeat or delay the creditors. It was pointed out at p, 550 (of Mad LJ): (at p. 280 of AIR) of the judgment as follows:--

We need not stress that insolvency is a status to which no person should be reduced, unless an act of insolvency is fully established to the satisfaction of the court. A creditor, in particular, ought not to be permitted to utilise this mode of obtaining an adjudication as insolvent, as a kind of pressure, in order to realise a debt more economically or by swifter means".

In that case it was held, differing from the trial court, that the adjudication of the debtor was wrong, as the temporary absence of the debtor from Madras was not with a view to defeat or delay his creditors. The same conclusion should follow in the present case.

12. In paragraph 245 of Volume 3, Halsbury's Laws of England, Fourth Edition dealing with Bankruptcy and Insolvency, the following passage occurs:--

The onus of proving that the debtor remained out of England with the intent to defeat or delay creditors rests on the petitioning creditor, and though proof must necessarily be a matter of inference from the circumstances of each case, it is wrong to hold that it can only be discharged by showing that the existence of the intent is the only possible explanation of the debtor's conduct; the standard of proof required demands at least that the court should be satisfied that in all the circumstances of the case the presence of intent to defeat and delay creditors is so much the most probable explanation of the debtor's conduct as to make it in effect the only probable one.

In the present case having regard to the peculiar facts, it cannot be said that the absence of the second respondent from the Madras premises was

only with a view to defeat or delay the creditors or most probably with a view to defeat and delay the creditors. The more probable explanation is

that he was away because of the unfortunate demise of his uncle, I, therefore, hold that the petitioning creditors have not made out any act of

insolvency as contemplated by Section 9(d)(ii) of the Act in either of these two petitions.

13. I have now to consider the question as to whether the act of insolvency contemplated by Section 9(g) of the Act has been made out here.

Section 9(g) runs as follows:--.

A debtor commits an act of insolvency in each of the following cases, namely:

(g) If he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.

What constitutes an act of insolvency under this provision may now be considered before going into the evidence, as the evidence has to be

examined in the light of the necessary requirements of the law. In para 118 of Mulla on the Law of Insolvency in India, third Edition at page 94 it is

stated as follows:--

What the section requires is notice of suspension of payment. Therefore, mere suspension of payment will not suffice.....

It is important to note that suspension of payment is something different from and over and above inability to pay. A statement made by a debtor to

a creditor that he is unable to pay his debts does not of itself and without reference to context or circumstances amount to a notice that he has

suspended or is about to suspend payment of his debts so as to constitute an act of insolvency within the meaning of this section. Such a statement

may in one set of circumstances be merely a statement that he cannot pay, but in another set of circumstances to which one is entitled to look for

the purpose of interpreting words that are not words of art, it may clearly mean to any ordinary human being listening to it, that he is stating that he

has not the intention of paying his debts when they become due. The result is that in each case all the circumstances must be looked at; and we

have to find, beyond a simple declaration of inability to pay, some evidence of an intention on the part of the debtor to suspend payment of his

debts -- that is to say, to abstain from paying his debts as they fall due, at least for a time." At page 95, para 120, it is stated as follows:--

The test whether or not a notice amounts to an act of insolvency under this clause, lies in the effect which the notice would produce on the mind of a creditor receiving it as to the intention of the debtor with regard to his creditors. If the language of the notice can only lead the creditors to infer that if an offer of composition made by the debtor is not accepted, suspension is the only alternative, it amounts to a notice that the debtor is about to suspend payment of his debts. A mere statement of debtors that they are unable to pay their debts, however, insolvent they may be is not a notice within the meaning of the Act, that they are suspending or about to suspend payment.

14. In *Ramaswami Chettiar and Another Vs. Muthialuswami Chettiar*, the question as to whether the debtor had suspended payment arose on the following facts: The debtors in that case were carrying on business and were in involved circumstances. There was a pressure for payment of the debts. On one such occasion when the creditors made a demand for payment, the debtors offered their properties consisting of two houses and a garden, omitting the house in which they were living in discharge of the debts. No settlement was reached on that day. Subsequently a few days later there was a discussion between the debtors and creditors as to how the debts were to be discharged. It was stated on that occasion that the title deeds for the sale of the properties had been given to one of the creditors. On these facts, this court held as follows:--

In the case before us though all the creditors might not have been present there is no doubt that what was discussed at the meeting was the payment of all the creditors and the impression that was left on their minds was that the appellants were unable to pay debts and would suspend payment or debts unless this offer of discharge of all the debts by the sale of the properties is accepted.

On the facts it was held that there was an act of insolvency.

15. In *Lakshmi Ammal and Others Vs. Ratna Naicker*, the debtors sold their property and offered to make a rateable distribution among their unsecured creditors, after satisfying the mortgage debt, of the balance of the sale proceeds. The amount so available for distribution was three annas nine pies in the rupee for each creditor. There was thus intimation to the creditors that the debtors did not intend to pay anything unless the

creditors agreed to accept in full settlement the small amount which they offered. It was held on these facts after discussing certain decisions as follows:--

Now applying these criteria to the present case we feel no doubt that the intimation given by the debtors to the petitioner amounted to a notice

that they had suspended or were about to suspend payment of their debts. The debtors were in insolvent circumstances. The sale of their property

was the last resource available to them for meeting their creditors' claim and the sale proceeds were far from sufficient to pay those claims in full.

We think it clear that when the debtors informed the petitioner that they could pay no more than three annas nine pies in the rupee to their creditors

they in effect gave notice that they were about to suspend payment of their debts. That was an act of insolvency.

16. In *Chanahalu Siva Reddi and Another Vs. The Official Receiver of Bellary and Others*, there was a partition among three members of a joint

family. One of the brothers was in sole and exclusive charge. When he was approached for repayment of the debts by the petitioning creditors he

stated: "I cannot pay your debts; you can do what you like". This was construed to be an act of insolvency within the meaning of Section 6 of the

Provincial Insolvency Act corresponding to Section 9 of the Presidency Towns Insolvency Act.

17. The essence of an act of insolvency under this head is as shown by these decisions, that the debtor must give sufficient indication to show that

he had suspended payment of all the debts. No particular form of expression is necessary. What is necessary is that the words should unmistakably

leave the impression in the mind of the creditor that the debtor has actually suspended or is about to suspend payment of all his debts. The words

used by the debtors must be reasonably construed. A creditor cannot approach the court with a petition for insolvency by merely misunderstanding

what was stated by the debtor.

18. In the present case, as already seen, there were two meetings held on 7-4-1976 and 8-4-76. The alleged act of insolvency viz., of suspension

of payment was said to have taken place only on 8-4-1976. On 7-4-1976 S.V. Balasubramaniam, the fifth respondent and V.K. Swaminathan the

sixth respondent were present. The evidence recorded goes to show that the fifth

respondent telephoned P.W.1 from Ashoka Hotel asking him to meet him at the said Hotel for solving the problem of discharging the debts. P.W. 1 went with Mothiram and Biharilal (P.W. 3). Only the fifth respondent and the sixth respondent were there. P.W. 1 in his evidence stated: ""They were telling that they wanted to settle with the creditors"". At another place P.W. 1 said that they wanted one year's time stating they were unable to pay. At another place he stated: ""They said they cannot pay; they have suspended payment and asked to wait"". In the course of the cross-examination the witness stated: ""They stated that they can settle. I said I do not represent all the creditors and must call all of them"". In the cross-examination the following questions were put to him by Mr.

Sivaramakrishniah appearing for respondents 5 to 9.

Q. At this meeting they stated that they would like to settle and you wanted a regular meeting?

A. We will discuss further how to settle it at a regular meeting."" P.W. 3 in the course of his deposition regarding the meeting on 7-4-1976 stated as follows:--

Q. What did they say?

A. They said tomorrow we will fix a meeting at the same place. You call the other debtors also and we will call our guarantors and we will see tomorrow.

Further he said as follows:--

Q. What happened as a result of the meeting?

A. Nothing happened as a result of the meeting with these two persons except saying "meet tomorrow". He said all other guarantors and persons are coming from Erode tomorrow we will meet."" P.W. 4 also stated in the course of his deposition:--

We discussed with the two partners. They told us that they would be calling the other partners also the next day and that we might have a fuller discussion then. We again met on 8th April 1976, at Ashoka Hotel (in the room above the reception). I do not remember the number of the room"".

19. Thus, taking the evidence let in on behalf of the petitioning creditors alone, it is clear that the meeting on the 7th was only a preliminary meeting with the two or three creditors by the two debtors and that a further meeting

was to be held on 8-4-76. Therefore, as far as the meeting on 7-4-1977 is concerned, there was no question of notice of suspension of payment coming within the scope of Section 9(g) of the Act.

20. I now have to discuss about the meeting of the 8th April, 1976, in which, according to the petitioning creditors, there was a notice of

suspension of payment. P.W. 1 stated that the debtors on that day were three in number viz., the fifth respondent, the sixth respondent and the

third respondent. There were a few other persons present at the said meeting. One was Mr. Rajaram, a former Minister of this State. The other

persons present included V.R. Balasubramaniam P. Sengottian, Director of Janardhana Mills Limited, G. Sriranga Gounder, father-in-law of the

second respondent, K.N. Kandaswamy and Vardamanan, Chairman of Lakshmi Vilas Bank. A number of creditors were present on that day. The

total number, who were present either on behalf of the creditors or on behalf of the debtors, was between 35 and 40. In the course of the

deposition, P.W. 1, stated that the debtors were not able to pay any amount, that they said that they must be given time for one year and that they

suspended the payment for one year. In the course of his deposition he further stated that each party put forward the ways and means to settle the

creditors of the first respondent. P.W. 2, in his deposition stated as follows:--

The debtors represented to us that one of their partners Kailasa Gounder had expired and other partners internally are not co-operating with each

other and therefore in these circumstances it is not possible to make us any payment. So we hereby suspend the payment at least for a period of

one year and we will not be able to pay. If you agree to this, well, otherwise go and do whatever you like.

P.W. 4, in the course of his deposition has stated the following regarding what happened on 8th:--

We are about 35 to 40 persons, both creditors as well as debtors and their relations. Other than the debtors, there were a couple of persons.

One was Mr. Vardamanan, Chairman of Lakshmi Vilas Bank and the other was the Chairman of the Karur Vysya Bank. They had also lent

monies to them to a great extent. On that day, we discussed about the repayment plan, and the same expression was made by the debtors stating

that assets could not be liquidated, particularly because Kailasam died, and

everything was in a mess and the partners were not co-operating and coming forward to pay the monies." Though the examination of the witness had gone on a wide range, the above represented the crucial passages regarding the allegations of suspension of payment. The question is what is the impression that could have been left in the minds of the debtors at such a meeting.

21. At this stage I may deal with one argument which was advanced on behalf of respondents 1 and 3 by Mr. Dolia, learned counsel who appeared for them. The submission of Mr. Dolia was that the meeting was confined to a few of the creditors and that any statement made in such a meeting could not be equated to a suspension of payment which, in order to fall within the scope of Section 9(g) of the Act, should be with reference to all the creditors. The learned counsel appearing for the other respondents did not take up this stand. I am not satisfied that this submission of Mr. Dolia is correct. It was not as if the meeting was confined to the Multani Bankers alone. There were large amounts due to the Karur Vysya Bank and the Lakshmi Vilas Bank. Their representatives were also present. I do not, therefore, consider that at the said meeting any declaration that was made was given only in relation to Multani Bankers who were singled out for any separate treatment. At any rate, this aspect had not been adverted to even in the counter-affidavit filed on behalf of respondents 1 and 3 and I do not think that this plea merits any further discussion for rejection.

22. Yet another contention on behalf of the other respondents was that the said meeting was merely for the purpose of working out a plan for liquidating the debts or for settlement of the liability and that no expression was used which could convey the impression to any of the creditors that the debtors were about to suspend payment. One crucial aspect which deserves to be noticed now is that apart from examining the four witnesses, who are either creditors of the first respondent firm or of some other entities in which Kailasa Gounder and others were interested, the petitioning creditors have not examined any of the other persons present at that meeting. For instance, if either of the two representatives of the Karur Vysya Bank or Lakshmi Vilas Bank had been summoned and examined, they would have furnished the most independent evidence on the point as to

whether there was any suspension of payment on the said day. In the absence of any such independent testimony, I have to consider the

correctness or otherwise of the plea of the petitioning creditors regarding the commission of act of insolvency only in the light of the evidence let in

by either side, it is more or less a case of oath against oath.

23. At this stage, I may set out as to how this act of insolvency has been described in the petition itself. In paragraph 23 of I. P. No. 41 of 1976 it

is stated as follows:--

On 8-4-1976 a schedule meeting was held at Room No. 408, Hotel Ashoka. The meeting was held between 3 and 5 p.m. The third debtor, 5th

debtor, 6th debtor and one V.R. Balasubramaniam, on behalf of the second debtor herein and P. Sengottian, Director and surety for Janardhana

Mills Ltd., and G. Sriranga Gounder, father-in-law of the second debtor and the father of the third debtor and one K.N. Kandaswamy, brother-in-

law of the second debtor were present and represented the debtors herein. On behalf of the creditors including the petitioning creditors herein, the

following persons were present:--

1. Prabudas Gurumukhsing; 2. Bhajandas Ramchand; 3. Atmaram Sadhuram; 4. Motiram Newandram; 5. Biharilal Prakashlal; 6. Hassasingh

Lalsingh; 7. Arjundas Gokuldas, partner Dharamdas Gokuldas and 8. Seth Khiaram Khushiram, the first petitioning creditor herein, One secured

creditor Lakshmi Vilas Bank represented by their Chairman Sri Vardamanan was also present. The debtors expressed their inability to pay the

amount immediately and stated everything is in a state of dismal due to sudden death of the partner V.M. Kailasa Gounder and they further

represented that the accounts were not kept properly and they said that it is not possible for them to discharge the huge liability incurred as no

partner is coming forward to give their share of debts and to co-operate to discharge the debts. They said, therefore, ""they could not make the

payment and they will not be in a position to pay the amount in the near future for nearly one year and thus suspended the payment"". They further

said that ""The creditors can do whatever they want to do."" Thus the debtors have suspended the payment and have committed Act of Insolvency

squarely within Section 9(g) of the Presidency Town Insolvency Act.

In para 8 of the petition (I. P. No. 46 of 1976) the following passage occurs:--

Again the meeting was adjourned to 8-4-76 and in that meeting several creditors were present of which the partner of the first petitioning creditor

also participated. The names of the persons representing the creditors are given as under:--

1. Prabhudas Gurumuksingh; 2 Bhajandas Ramchand; 3. Atmaram Sadhuran; 4. Motiram Newandram; 5. Biharilal Prakashlal; 6. Hassasingh

Lalsingh represented by Mohan Singh; 7. Arjundas Gokuldas; 8. Seth Khiaram Khushiram. On the side of the debtors 5th and 6th debtors and

one V.R. Balasubramanian representing on behalf of the second debtor, P. Senkottaiyan, Director of Janardhana Mills Ltd., G. Sreeranga

Gounder, father-in-law of the second debtor and the father of the third debtor, K.N. Kandaswami, brother-in-law of the second debtor

represented all the debtors and in addition the Chairman of the Lakshmi Vilas Bank, Sri Vardhamanan was also present in that meeting. The

debtors expressed their inability to make payment to the creditors owing to the non-co-operation of the partners and also gave notice of

suspension of payment of all their debts. The effect of the said meeting is that they have clearly expressed their intention in suspending the payment

to all their creditors of their debts. This action on the part of the debtors would amount to the act of insolvency u/s 9(g) of the Presidency Towns

Insolvency Act." Para 8 of I. P. No. 46 of 1976 is somewhat an improved version of para 23 of I. P. No. 41 of 19.76. In neither petition it was

stated that the debtors actually used the expression "Suspension of payment". But the witnesses for the petitioners have spoken to such

expressions being used as is shown by the extracts given above. I am satisfied that the version in the depositions as if they used the expression of

suspension of payment is not correct. If that was the expression used, that would have found a place in the petitions.

24. It is necessary to remember the course of events on and from 19-2-1978. Mr. Kailasa Gounder died on that day. Immediately on his death

there were certain claims made against the said Kailasa Gounder personally and for this purpose a committee of five persons had called for the

particulars of the amount due to any persons who claimed to have made any deposit with Kailasa Gounder. On 31-3-1976, V.P.

Muthukumaraswamy who, it is clear from the evidence, was attending to the affairs of the business of the first respondent along with Kailasa

Gounder had been arrested and detained and had been taken to Coimbatore. The other persons had left the affairs either in the hands of Kailasa

Gounder or in the hands of the second respondent. The fifth respondent was employed in Sakthi Sugars. His brothers were not in business. One of

the creditors of Janardhana Mills had filed a suit and obtained an order of attachment of the moveables of the fifth respondent.

25. In order to get the attachment set aside, the fifth respondent came over to Madras on the 7th April 1976 accompanied by the sixth respondent

to whom the fifth respondent had telephoned before he left for Madras. On the 7th, it is only these two persons who were present at the meeting.

On the 8th the third respondent joined them. Notices had been received from several of the Multani creditors. As far as the first respondent-firm is

concerned, the amount due to the Multanis came to about Rupees 12,00,000. If the liabilities of Janardhana Mills Ltd. are also taken into account,

the total liability to the Multani Bankers would have been about to Rs. 22,00,000. A reply notice had already been given on behalf of the second

respondent. In that reply notice, which is marked as Ex. P-5 and which is dated 20th March, 1976 it is stated that consequent on the sudden

death of Kailasa Gounder who was managing the firm, products were not moving fast, that recent developments had also contributed to a slump in

the trade and that the firm was making arrangements to pay its just dues. It was therefore, requested that those who had issued notices should not

take any hasty step which may tend to mar the cordial relationship that had been existing between the creditors and the first respondent-firm to

their mutual advantage. From the reply itself it is clear that the firm was making arrangements to pay its just dues when the parties came to Madras

on 7-4-1976; they could thus have come with a view to find out how best to settle all the liabilities that were due by the first respondent-firm. From

the fact that subsequently there were several meetings even after the filing of the insolvency petitions, it is clear that the respondents, who

participated in the meeting on 8-4-1976, were only trying to see how best the affairs relating to the debts due by the first respondent-firm could be

settled. It is rather curious to find that in para 20 of the petition in I. P. No. 41 of 1976 the second respondent is said to have told the creditors,

who met him, that the assets were worth only Rs. 90 lakhs and the liabilities were Rs. 1 1/2 crores while in I. P. No. 46 of 1976 in para 8 it is

stated that the liabilities came to nearly two lakhs of rupees as against their assets of Rs. 90,00,000 as estimated by them. Though the persons who are said to have made the declaration as set out in para 8 of the petition in I. P. No. 41 of 1976 are different from the person who was said to have given out the value of the assets and liabilities in I. P. No. 41 of 1976, still the difference in the version itself goes to show that both the versions could not be true at the same time. There is no independent evidence to confirm these versions. Further the respondents in their evidence have stated that their assets exceed their liability and that they are not in a position to pay immediately only because the assets are in the shape of immovable properties and machineries etc., which lack liquidity. Even in the evidence of P.W. 1 it was only stated that only four creditors said that the assets were worth Rs. 90,00,000 and the liability Rs. 1 1/2 crores and that the debtors did not say so. In the face of these statements, I am not at all satisfied that in the present case the debtors were summoning the creditors for the purpose of announcement to them that they were in such a hopeless condition, that they would have to settle with the creditors at a rateable amount or that if they did not wait for a period of one year or so, they could take whatever steps they liked. Significantly enough this meeting has been summoned by the debtors themselves. Though there were some pending proceedings in which action had been taken for attaching the moveables belonging to one of the respondents, still the evidence does not establish the existence of such a scramble or pressure that they had to summon the creditors and sue for peace by asking them to wait for some period or for telling them that they could do whatever they liked if they did not wait. I am unable to draw an inference on the facts herein that the respondents were declaring that they were suspending payments or words to that effect so as to come within the scope of Section 9(g) of the Act.

The whole discussion of the 8th April, 1976 in my opinion, was only with a view to find out how best to evolve a scheme for the settlement of all the liabilities. What happened on 8-4-1976 was only a discussion for the purpose of discharging the debts in a satisfactory manner, and not a declaration that there was any suspension of payment. In fact, the conduct of the debtors subsequently goes to confirm that they were making efforts to pay the liability. They paid Rs. 2,00,000 and also gave a power of attorney in favour of Mr. R. Krishna-swami, Advocate in order to

enable him to sell No. 10, Kasturi Ranga Iyengar Road. It is true that the sale could not go through because one of the persons, who resided there, would not vacate the premises. At the time when the power of attorney was given, the parties could not have anticipated this difficulty and it is not even suggested that the power of attorney was only with a view to bide time and was not a bona fide attempt at selling the property bearing Door No. 10, Kasturi Ranga Iyengar Road, and repaying the creditors.

26. Mr. R. Krishnaswamy in a very vehement argument submitted that the fact that the debtors were driven to the necessity of having to sell a property which did not belong exclusively to them itself went to show that they had not enough resources to repay all the debts. From the evidence of the respondents it appears that they have large Immovable properties in Erode and nearby places. It also appears that they have installed a valuable machinery for the purpose of the distillery which was owned by Kamadhenu Drinks, the first respondent. Though there may be some difference of opinion regarding the estimate of valuation of the properties, still it is not as if the respondents were in such a hopeless condition that they had to suspend payment. The contemplated sale of the Madras property was probably motivated by the fact that it is easier of realisation being a property in the City. I am unable to draw the inference that the offer of sale of the Madras property was itself proof positive of the hopeless condition in which the debtors were placed. Mr. Krishnaswami drew also my attention to Ex. R-34. That is a communication dated 7-4-1976 from the Commissioner of Land Revenue, Prohibition and Excise. The first respondent had given a security i.e. land, buildings, distillery etc., and estimated their value at Rs. 27.15 lakhs. This had been offered as security for a sum of Rs. 10,00,000 for which the Government wanted a security. In the said communication it was pointed out by the Board of Revenue as follows:--

The Board has already considered their request carefully and informed them its decision in its letters dated 17-3-1976 and 1-4-1976. The properties are heavily encumbered to the tune of Rs. 74 lakhs according to the petitioners. Interests on the said loans are accruing. The value of the lands are stated to have been estimated on the basis of a high rate. The valuation in respect of the buildings, distillery unit, etc., have evidently been

given without taking into account the depreciation etc. The Hon"ble High Court has also observed that if the Board of Revenue considers that the property offered as security cannot be accepted on the ground that they are insufficient as security having regard to their value, the petitioners are at liberty to offer other properties as security within four weeks from the date of the interim order. The petitioners are therefore, advised to furnish suitable and acceptable security in accordance with the instructions already issued in this matter within the time stipulated.

The inference sought to be drawn by the learned counsel from this letter is that the Government itself had pointed out that the respondents were heavily involved in debts for over Rs. 74 lakhs on the properties and that therefore, the Government insisted on the respondents to furnish further security. Merely because the Government wanted some security in accordance with certain regulations under the Excise Act. It does not follow that the respondents were in involved circumstances so as to be unable to pay their debts. It may be that the Government considered that the security offered by the respondents was not sufficient. But that does not mean that there was any independent valuation made by the Government of all the assets and liabilities belonging to the respondents in their entirety so as to show that they were in insolvent circumstances.

27. The learned counsel for the petitioners also submitted that the properties belonging to the first respondent had been transferred to a company called Coimbatore Alcohol and Chemicals Private Limited and that that itself showed that the first respondent did not have any property so that it had to be adjudged as an insolvent. With reference to this aspect, there is the evidence of the respondents which goes to show that the Tamil Nadu Industrial Investment Corporation and the Banks which had advanced monies to the respondents were insisting on the business of the first respondent being vested in a limited company. It is not clear as to how the interests of the institutions which lent the money are better safeguarded if the assets were vested in a Limited Company. However, it is unnecessary to go into this aspect for my present purpose. ""It is clear from the exhibits and the evidence that even during the life time of Kailasa Gounder there was such a request and time had been taken for the formation of a Limited Company. The Limited Company itself was formed on 16-3-1976. It commenced business soon thereafter. A partnership deed taking it

as a partner was executed on 1-4-1976 and subsequently on 10-4-1976 this partnership was dissolved when the said Coimbatore Alcohol and Chemicals Private Limited took over the assets. It is no doubt a cleverly designed scheme of transferring the properties of Kamadhenu Drinks in favour of Coimbatore Alcohol and Chemicals Private Limited without incurring the stamp duty and other tax liabilities. The fifth respondent made no bones about the intention behind the introduction of the Limited Company as a partner and the subsequent dissolution of the firm within a few days so as to vest the assets of the first respondent firm in the Limited Company. The motive behind the said arrangement was said to be to save stamp duty and the capital gains tax liability. If the firm had sold the assets directly to a limited company, then the sale would have attracted the Capital Gains Tax if the sale was for a price higher than the original costs. If the assets are taken over by a partner from the firm in which he is a partner on the dissolution of the firm, then there is no sale, as such, and it would only be a settlement inter se of the rights and liabilities of all the partners. The transaction was, therefore, put through on the basis that Coimbatore Alcohol and Chemical Private Limited was a partner on 1-4-1976 and that the firm was dissolved on 10-4-1976 when the assets were taken over by the said firm. I am not concerned with the motive behind the transaction or its effectiveness in avoiding the tax liabilities. I am now concerned to find out whether the vesting of the assets of the first respondent in Coimbatore Alcohol and Chemicals Private Limited was such as to show that the first respondent and others had committed an act of insolvency. The transaction of vesting itself was not challenged in the present proceedings as an act of insolvency. The learned counsel for the petitioning creditors relied on this transaction only to show that the assets of the firm had ceased to exist. This was not even pleaded. I do not, therefore, think it necessary to examine a contention which is not even based on the pleadings.

28. Thus, having given my anxious consideration to the submission made on behalf of the petitioning creditors I am not at all satisfied that any act of insolvency had been committed by the first respondent or by other respondents. The case u/s 9(g) has not also been made out before me.

29. In this view, it is unnecessary to go into the question as to whether the fifth respondent had retired from the firm so as not to be liable to the

petitioning creditors or others. This is a matter which can be gone into in any other appropriate proceedings. When there is no act of insolvency, the question as to whether it is a joint act of the partners or not does not arise. The result is that these petitions are dismissed with costs.