

(1923) 11 MAD CK 0041
In the Madras High Court

M. Subbramiah

APPELLANT

Vs

Bausilal Abeerchand and Others

RESPONDENT

Date of Decision : 02-11-1923

Acts Referred:

Citation : 79 Ind. Cas. 966 : (1924) 19 LW 46

Hon'ble Judges : Walter Salis Schwabe, C.J.;Ramesam, J

Bench : Division Bench

Judgement

Walter Salis Schwabe, C.J.—This is an appeal from the dismissal of a petition in insolvency made on behalf of some Cuddappah creditors of the first insolvent who claimed that, as far as the assets of the Cuddappah business were concerned they were entitled to priority over the Madras creditors, who, they alleged, were creditors of the two insolvents in partnership in Madras. The learned Judge has found as a fact that, in respect of the Madras business, the Madras creditors did not know that the second insolvent was a partner but treated him only as an agent of the firm and that, therefore, they are entitled to prove, in competition with the Cuddapah creditors, against what may be called the Cuddapah assets. Assuming that the finding was open to him and that it was a correct finding of fact then on the authority of the Old English case, *In ex prte Hodgkinson* (1815) 19 Ves. Jun. 291 : 34 E.R. 525 : 113 R.R. 199, and *In ex parte Norfolk* (1815) 19 Ves. Jun . 454 : 34 E.R. 585 they are entitled to elect as to which assets they will go against, the general assets of the two partners or the separate assets of the one against whom they elect; and it is clear law that they could elect until the very end of the proceedings and that, only when they have actually received a dividend there is an election : and, I think, I am right in saying that even after they have received their dividend, they could still pay it back and prove against the other assets.

2. The main evidence given in this case was that of the second insolvent. There was also the evidence of the first insolvent given on a different occasion. There were a partnership deed, a power-of-attorney and the promissory notes or

hundis in respect of which the Madras creditors mainly were proving. The second insolvent swore that, although there was a partnership deed between him and the first insolvent, he was never in fact a partner that that deed had never been acted upon, and that he never mentioned it to anybody and never used it; and that story is very much corroborated by the fact that the power of attorney is given to him not as a partner but as though he was somebody not a partner of the firm, and was used by him as appears from an examination of the document itself, in this Court on many occasions, as an agent of the firm and not as a partner in it. Further the documents given to the Madras creditors were signed by him not as a partner but as an agent of the firm. I think the learned Judge was entitled to come to the conclusion he came to. I think further that, he would have been, if he thought it to be the fact, entitled to come to the conclusion on this evidence that the second insolvent, although he entered into this agreement was not in fact a partner at all. I think further on the document that it is fairly clear, and that is my view of the facts that, whether he was a partner or not, his interest in the Cuddapah business and his interest in the Madras business were exactly the same, and there was no separate Cuddapah or Madras business at all but that it was one firm, and that if that is the correct view of the case, it does not matter for the present purpose whether the second insolvent was a partner in the firm or not. I think there is ample evidence to support the learned Judge's view namely that, however, that may be, the Madras creditors did not know that he was a partner in Madras.

3. It is suggested that, if that was the view taken by the Judge, the Cuddapah creditors ought to have had some further opportunity of adducing evidence to contradict it. In my judgment there was no such evidence which in the face of this document could have been adduced with the remotest chance of being believed. On the view I take of the facts, such evidence would be irrelevant.

4. In my judgment, this judgment was right and the appeal must be dismissed with costs on the Original Side scale. There will be a separate set of costs for the Official Assignee.

Ramesam, J.

5. If the finding of the learned Judge is correct that the Madras creditors at the time of dealing with the Madras branch were under the impression that they were dealing only with the first insolvent through his agent the second insolvent, then they are entitled to say that the debts due to them were, so far as their knowledge was concerned, separate debts within the meaning of the expression in sub-clause (4) of Section 49 of the Presidency Towns Insolvency Act III of 1909. The only effect of their discovery at the time of filing the insolvency petition that there was a partnership would be merely to give them a right to an election. This is the English Law according to the authorities cited in my Lord's judgment just delivered, and Section 49 ought to be interpreted in accordance with the English Law. On the evidence I agree with my Lord's judgment and think that the learned Judge's finding is justified, that the Madras creditors did

not know of the partnership of the second insolvent at the time of their dealings with the Madras branch.

6. As to the other points that were argued in the case, I feel some hesitation in saying that the whole of the Cuddapah business of the first insolvent was the same in interest as the Madras business. Whatever amounts and jewels were sent from Cuddapah to Madras, to that extent the Cuddapah dealings were no doubt identical with the Madras business: but it may be that there is much more of the Cuddapah business, the object of which cannot be said to be the furtherance of the Madras business. I also feel some hesitation in saying that the interest of the Insolvent is the same in Madras as well as in Cuddapah. But, however, this may be, on the finding of the learned Judge that the Madras creditors had no knowledge of the second insolvent's partnership, the appeal must be dismissed with costs.