

(1923) 11 MAD CK 0005
In the Madras High Court

M. Subramiah

APPELLANT

Vs

Bansilal Abeerchand and Others

RESPONDENT

Date of Decision : 02-11-1923

Acts Referred:

Presidency Towns Insolvency Act, 1909 — Section 49(4)

Citation : AIR 1924 Mad 595

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

Bench : Full Bench

Judgement

Schwabe, C.J.—This is an appeal from the dismissal of a petition in Insolvency, made on behalf of some Cuddappah creditors of the 1st

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 Cuddappah creditors, against what may be called the Cuddappah 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 cases, *In Ex parte*

Hodgkinson (1815) 19 Ves. 296 and *In Ex parte Norfolk* 19 Ves. 454, 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 1st insolvent given on a different

occasion. There was 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 1st 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

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 in my view of the facts that, whether he was a partner or not, his interest in the Cuddappah business and

his interest in the Madras business were exactly the same, and there was no separate Cuddappah 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 ha was a partner in Madras.

3. It is suggested that, if that was the view taken by the Judge, the Cuddappah 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 19 ought to be interpreted in accordance with the English law. On the evidence I agree with my Lord's judgment and I

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 Cuddappah business of the first

insolvent was the same in interest as the Madras business. Whatever amounts and jewels were sent from Cuddappah to Madras, to that extent the

Cuddappah dealings were no doubt identical with the Madras business; but it may be that there is much more of the Cuddappah 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 second

insolvent is the same in Madras, as well as in Cuddappah. But, however, this may be, on the finding of the learned Judge that Madras creditors

had no knowledge of the second insolvent's partnership, the appeal must be dismissed with costs.