

(1986) 10 MAD CK 0011

In the Madras High Court

Case No : Petn. No. 45 of 1984 and Application No. 240 of 1986

S. Ramalingam Chettiar (Deceased) and Others

APPELLANT

Vs

J. Prasanna Chandrasekaran

RESPONDENT

Date of Decision : 15-10-1986

Acts Referred:

Presidency Towns Insolvency Act, 1909 — Section 108, 90, 99

Citation : AIR 1987 Mad 140

Hon'ble Judges : K.M. Natarajan, J

Bench : Single Bench

Advocate : G. Nandalal and P. Rajamanickam, for the Appellant; R. Sukantharaj and A. Kothandaraman, for the Respondent

Judgement

1. This application is filed by the petitioning creditors under S. 90(4) of the Presidency Towns Insolvency Act, 1909, for permission to amend the

cause title and para (1) of the petition by substituting the names! of the three surviving partners Baburam Gagoria, Mamchand Gagoria and

Subashchand Gagoria in the place of the deceased partner Kailashchand Gagoria.

2. It is alleged in the affidavit filed in support of the application by one of the partners that at the time of filing the Insolvency Petition for

administering the estate of the deceased-debtor under S. 108 of the Insolvency Act, his brother's name was shown in the cause title as

representing the firm. His brother Kailashchand Gagoria died at Madras on 18-8-1986. It is further averred that the names of all the partners are

given in the Insolvency Petition in para (1). Since the respondent's counsel has taken an objection that the partner, who represented the firm died,

the matter cannot be proceeded further unless the other partners are shown as representing the firm. It is further submitted that inasmuch as the

names of the other partners have already been shown in para (1) of the Insolvency Petition, permission is sought for, to amend the cause title of the Insolvency Petition by substituting the names of the other partners for the name of the deceased partner and that no prejudice will be caused to the respondent while doing so. It is also further averred that all the partners concurred in filing the Insolvency Petition.

3. This application is resisted by the 1st respondent, who is the only respondent in the main Insolvency Petition. He inter alia contended as follows

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The main petition, I. P. No. 45 of 1984, was, filed by Kailashchand Gadoria alone as representing the 1st petitioner-firm and no other person has

represented the same. Further, the names of the other partners are not finding a place in the cause title. Since in the main petition, all the partners

were not added, the statutory requirement was not fulfilled. It is further reiterated that one of the several joint creditors cannot file an Insolvency

Petition against the debtor. At this stage, the third-party-petitioning-creditors cannot implead themselves as petitioners by amending the cause title

by substituting their names. It is also contended that there is no provision in the Partnership Act that in the event of death of one of the partners, the

other partners can be substituted in the place of the deceased partner. Under the guise of this application, the third-parties are sought to be

added as legal representatives of the deceased partner. The petition filed under S. 90(4) of the Presidency Towns Insolvency Act is not

maintainable and hence he prays for dismissal of the application.

4. The learned counsel for the petitioner drew my attention to the main Insolvency Petition filed in this case, wherein the first petitioner is the firm,

namely, Messrs Mohan Steel Corporation and it was represented by its partner Kailashchand Gadoria. While describing the 1st petitioner-firm in

the first para of the long cause title, the other partners of the firm, namely the present petitioners are shown as partners of the first petitioner-firm

with their addresses. The contention of the respondent in this case is that the main petition filed on behalf of the firm by one of the partners itself is

not maintainable and as such the main petition itself is liable to be dismissed. Under O. V, R. 1 of the Insolvency Rules 1958, it is provided as

follows : -

When any petition, notice or other "document is signed by a firm of creditors or debtors in the firm's name, the partner signing for the firm shall

add also his own signature in the following manner :

"B & Co., by A. B., a partner in the said firm" "".

In this case also, the deceased partner has signed ""For Mohan Steel Corporation, as Partner"". Learned counsel for the respondent submitted that

under R. 3 of O. V of the Insolvency Rules, if an insolvency petition was filed, it should contain the names in full of the individual partners and unless

it is signed by all of them, it shall be accompanied by the affidavit of the partner signing it that all the partners concur in filing of the same. It is seen

that the said rule is in respect of the petition filed by the firm of debtors and only in that case, the said provision of filing an affidavit by the partner

signing it that all the partners concur in the filing of the same is to be complied with. But, in this case, this application is filed by the firm of creditors

and not the firm of debtors and that too for the administration of the estate of the deceased, under S. 108 of the Insolvency Act.

5. As regards the power of the Insolvency court to amend the petition, it is provided under S. 90 of the Presidency Towns Insolvency Act as

follows : -

In proceedings under this Act, the Court shall have the like powers and follow the like procedure as it has and follows in the exercise of its

ordinary original civil jurisdiction.

Provided that nothing in this sub-section shall in any way limit the jurisdiction conferred on the Court under this Act.

Thus, it is clear that the provisions of the Code of Civil Procedure, particularly relating to the amendment of the pleadings, can certainly be applied

by this Court in exercising the powers under the Insolvency Act. Under S. 99 of the Presidency Towns Insolvency Act, proceedings in partnership

name has been dealt with. It is provided under the above section:

Any two or more persons, being partners, or any person carrying on business under a partnership name, may take proceedings or be proceeded

against under this Act in the name of the firm.

Provided that in that case the Court may, on application by any person interested, order the names of the persons who are partners of the firm, or

the name of the person carrying on business under a partnership name, to be disclosed in such manner and verified on oath or otherwise, as the

Court may direct".

In this case, even in the main Insolvency Petition, the applicant disclosed the names of all the partners. A similar question has been considered by a

Division Bench of this Court consisting of Ramanujam and Swamikannu, JJ., in O.S.A. No. 25 of 1979 reported in K. Lakshmandoss Vs.

Raghava and Veera and Ors ., . While dealing with the powers to change carriage of petition under S. 92 of the Presidency Towns Insolvency

Act, it was held:

Insolvency proceedings are for the administration of the estate of the debtor for the benefit of not any particular creditor but the general body of

creditors. Very often petitions are made not with the bona fide intention of administration of the estate of the debtor under the Insolvency Laws but

for the collateral purpose of bringing pressure to bear upon the debtor. It is to check this abuse of the process of the Court, sub-s. (8) of S. 13 has

been enacted. S. 92 enables another creditor to be substituted when the original petitioner does not proceed with due diligence on his petition. This

shows that the creditor presenting the petition is regarded as prosecuting the petition not only for his own benefit but also for the benefit of the

creditors generally.

It was also held :

It cannot be said that the insolvency petition filed by the original petitioner was for his own and exclusive benefit. The petition had been filed only

on behalf of and for the benefit of all the creditors. Therefore, if the original petitioner dies, the other creditors are entitled to substitute themselves

as petitioning creditors, if they are so inclined.

In Thiruvengadam Pilla v. T. K. Krishnaswamy Naidu & Co. represented by one of its partners, 1978 TLNJ 14, Balasubramanyam, J., while

dealing with S. 47 of the Partnership Act, 1932 observed as follows : -

This provision has been advisedly enacted by the Legislature, because ordinarily there is bound to be a hiatus between the date of dissolution and

the complete winding up of the firm's affairs, in the sense of realization of outstandings, payment of debts and distribution of the balance amongst

the partners in accordance with their aliquot shares. Hence, for the effective winding-up and dissolution of the firm, it is essential that every partner should have continued authority to represent the firm and his other partners for realisation of outstandings, sale of assets, payment of creditors and the like.

In *Sajjan Singh v. Nadeali and Bros.*, AIR 1978 NOC 21 S (Madh Pra) it was held: "

A suit by a firm under O. 30, R. 1, CPC is in fact a suit by all the partners of which the firm is constituted. It is merely giving an abbreviated name

for the partners but in effect all the partners are before the Court as plaintiffs. Therefore where under the pendency of the suit filed in the name of

the firm by one of its partners A for eviction of the tenants from the premises and for arrears of rent the firm was dissolved and the premises were

assigned to the other partner B the suit can be continued by A on behalf of the firm even if B did not apply under O. 22, R. 10 and the decree

obtained in favour of the firm can be executed by A for the benefit of B. S. 47, Partnership Act is no bar. The procedural law contained in O. 20,

R. 1, and O. 21, R. 5 does not stand abrogated by the Partnership Act.

It may be noted that S. 47 of the Partnership Act is analogous to O. 30, R.1, Code of Civil Procedure. The learned Counsel for the petitioners

drew my attention to the decision of this Court reported in *Miss C. Pushpam Vs. D. Jeevaraj*, where Mohan, J., has considered the application

filed under O. 6, R. 17, CPC and disposed of the same on the question of limitation and it is clear from the said decision that the Insolvency Court

has certainly ample powers to allow amendment. Learned counsel for the petitioner drew my attention to the decision *A. Ramalinga Reddy Vs.*

Official Assignee, Madras, where Venkataraman, J., held that S. 151 of Civil Procedure Code, 1908, made applicable by S. 90 of the

Presidency Towns Insolvency Act, would also come into play for doing substantial justice to the discharged insolvent. In *Sohan Lal and Others Vs.*

Amin Chand and Sons and Others, it was held as follows:-

Order 30, R. 4 of the CPC provides that notwithstanding anything contained in S. 45 of the Indian Contract Act, two or more persons may sue or

be sued in the name of the firm under the foregoing provisions and if any of such persons dies, whether before the institution or during the pendency

of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit. The injunction order was directed against

the partners in the names of the firms and that it operated as against them. The partners filed the appeal in the names of the firms against the order

and when one of the partners died, the failure to implead his legal representatives would not cause the appeal to abate.

Thus, it is clear from the above decisions that since the Insolvency Petition itself was filed in the name of the firm, the necessity for impleading the

legal representatives does not arise and that the names of the partners which were already disclosed are entitled to be substituted by way of

amendment. In *Rm. V. Vaithinatha Aiyar and Others Vs. Kochi S. Vaithinatha Aiyar and Another*, , relied on by the learned counsel for the

respondent is not of any help in this case. In this case a petition by one of the several creditors of the firm was filed and there was no representation

by the other partners. Subsequently an application was filed by another partner after the expiry of three months" period of limitation. In the

circumstances, it was held as follows : -

An insolvency petition filed by one of several creditor-partners of a firm, notwithstanding that he is described in the body of the petition as the

managing partner of the firm, is not legally sustainable when it is not in the firm name or in the names of all its members, nor signed by the petitioning

partner on behalf of the firm or its members. Such a petition cannot be permitted to be amended by the addition as party of another creditor-

partner when the application for that purpose is made after the expiry of three months since the date of insolvency. And the power of the Court to

add parties under the incorporated provisions of the CPC cannot be invoked as it is subject to the time-limit prescribed by S. 9 of the Provincial

Insolvency Act. Nor can the provisions of S. 5 of the Limitation Act be applied to such a case because an insolvency petition is not an

"application" within the meaning of S. 78 of the Provincial Insolvency Act.

The said decision only supports the case of the petitioner since the Insolvency Petition itself was filed in the firm"s name and not in the name of the

individual partner as such and this application was filed only to represent the said firm in the place of the deceased partner. Further, the question of

limitation does not arise as it is not filed under S. 13 for adjudication of the

insolvent; but filed under S. 108 for administration of the estate of the deceased and the only condition prescribed under S. 108 is that any creditor of a deceased debtor may present to the Court, within the limits of whose ordinary original civil jurisdiction the debtor resided or carried on business for the greater part of the six months immediately prior to his decease a petition in the prescribed form praying for an order for this administration of the estate of the deceased-debtor. It is to be noted that even in the counter filed in the main insolvency petition the respondent has not raised, any question of limitation. Now we are concerned only about the continuance of the proceedings in the name of the firm filed by one of the deceased-partner. Since the petition has been filed in accordance with the insolvency rules as discussed above and in view of S. 90 of the Presidency Towns Insolvency Act that this Court is possessed of like powers and like procedure as has been held by the Court in the exercise of ordinary original civil jurisdiction, certainly the present application for substituting partners to continue the proceedings is maintainable. It is not a case where the petition was filed by the deceased partner in his individual name. But, as already stated, it was filed in the firm's name. I do not find any legal impediment whatsoever for substituting the other partners to continue the proceedings, who were already described as partners in the main Insolvency Petition "while describing the firm in the first para of the long cause title of the main petition.

6. In the result, the petition is allowed and the petitioners are permitted to be substituted themselves as partners to continue the proceedings as prayed for. In the circumstances of the case, there will be no order as to costs.

7. Petition allowed.