
(1996) 03 MAD CK 0113
In the Madras High Court

Shaana Thiruchelvam

APPELLANT

Vs

K.S. Varkey and Others

RESPONDENT

Date of Decision : 22-03-1996

Acts Referred:

Partnership Act, 1932 — Section 32(3)
Presidency Towns Insolvency Act, 1909 — Section 10, 12, 9

Citation : (1996) 1 MLJ 558

Hon'ble Judges : S.M. Abdul Wahab, J

Bench : Division Bench

Judgement

S.M. Abdul Wahab, J.—The 3rd respondent in I.P. No. 40 of 1990 is the appellant in this appeal. We will refer to the parties excepting the appellant, as per their ranks in the Insolvency Petition itself for convenience. This appeal has been preferred against the order dated 5.8.1991 in I.P. No.40 of 1990 adjudicating the respondents therein including the appellant herein as insolvents.

2. The Insolvency Petition was filed by the respondents 1 and 2 herein under Sections 9 and 10 to 12 of the Presidency Towns Insolvency Act. The 1st respondent in the Insolvency Petition is a partnership firm known as Fellowship Trading Corporation. The 2nd respondent is the Managing Partner of the 1st respondent and the 3rd respondent is the other partner. The case of the petitioners in the Insolvency Petition was that the firm collected huge amounts by way of deposits, etc., from the public and the 2nd respondent in the Insolvency Petition as managing partner deliberately diverted the funds with fraudulent intention of cheating the depositors purchased properties in the names of his children. The 1st petitioner deposited Rs. 5,000 on 7.8.1986 and the same matured on 7.8.1989. Similarly, the 2nd petitioner deposited Rs. 5,000 on 9.8.1986 and the same matured on 7.8.1989. Though the deposits matured for payments, the respondents in the Insolvency Petition failed and neglected to pay the same. The further case of the petitioners is that the respondents in the Insolvency Petition were heavily indebted to several depositors amounting to several crores of rupees. Since the respondents were not in a position to pay the

depositors, the depositors formed a registered association known as consumers protection social and welfare association to protect the interest of the depositors. The office bearers of the said association were invited to attend a meeting at the residence of Mr. P.C. Kurian, advocate on 3.3.1990, and the said office bearers of the association were informed that the 1st respondent (firm) suspended payments to all its creditors, and in another meeting held on 13.3.1990 at the residence of Mr. P.C. Kurian, advocate, the 2nd respondent, managing partner of the 1st respondent (firm) informed suspension of payment to all the creditors as there were financial difficulties. He offered to handover the management of the firm to the association. But it was not done so. Hence, according to the petitioners 1 and 2, the respondents committed an act of insolvency within the meaning of Section 9(g) of the Act. That apart from 6.2.1990 the business premises of the 1st respondent was closed and the forwarding address was not at all mentioned anywhere on the premises. The 1st petitioner visited the residence of respondents 2 and 3 on 8.3.1990, 15.3.1990, 21.3.1990 and 22.3.1990 but they were not available at all on any of the occasions. Therefore the respondents 2 and 3 departed from their dwelling house with intention to defeat and defraud the creditors. Therefore, they have rendered themselves liable to be adjudicated as insolvents u/s 9(d)(ii) and (iii) of the Presidency Towns Insolvency Act. In the abovesaid circumstances, the petitioners 1 and 2 filed the I.P. No. 40 of 1990 for adjudication.

3. The 3rd respondent (appellant) alone resisted the Insolvency Petition by filing her counter. Curiously the 2nd respondent, the father of the 3rd respondent did not file any counter either for himself or on behalf of the 1st respondent. The third respondent (appellant), Mrs. Shaana Thiruchelvam contended that she was only a dormant partner and she was not connected with the affairs of the 1st respondent (firm). Further, under a deed of declaration dated 19.10.1987, she resigned from the partnership from the midnight of 30.4.1987. As per the terms in the dissolution all the assets and liabilities of the firm vested with the 2nd respondent alone. She also denied that properties were purchased in her name by using the funds of the firm. She contended that inasmuch as no act of insolvency is attributed to her individually during three months prior to the date of presentation of the petition, the petition must be dismissed as against her.

4. It is worthwhile to mention before we proceed to consider the contentions raised by Mr. R. Krishnaswami, the learned Counsel for the appellant that the 2nd respondent K.C. Cherian was adjudicated insolvent on 5.11.1990 itself along with another firm Guardian Financiers (Madras). The main contention raised by the learned Counsel for the appellant is that the appellant herein ceased to be a partner in view of the resignation as evidenced by Ex. R-1 dated 19.10.1987. As per Ex. R-1 the appellant ceased to be a partner with effect from 30.4.1987. It is true that as per the said exhibit, the appellant is stated to have resigned from the firm. But it is very difficult to accept the genuineness of Ex. R-1. The original of the said Ex. R-1 has been taken away by the appellant after marking a xerox copy of the same. Why such an important document was taken away is un-

understandable. The xerox copy produced shows that the stamp papers for preparing Ex. R-1 are dated September, 1987. But the document has been prepared on 19.10.1987. Again, even though the resignation or retirement is stated to be from the midnight of 30.4.1987, why such resignation or retirement deed was not executed at that time is not at all explained. Further, the appellant has simply admitted in the cross examination that she did not know why there was delay, and she says that she gave the resignation in January, 1987. She has also admitted that she got a copy of the letter of resignation and she could produce it. But she has not done so.

5. The attester of Ex. R-1 has not been examined. If really there was a resignation or retirement of the appellant from the firm, notice would have been given about it to the public as required u/s 32(3) and (4) of the Indian Partnership Act. But there is no proof that any such notice was sent either to the public or to the Registrar of Firms. Even the South Indian Bank where the firm had its account was not informed about it. In the said circumstances, the suggestion that the said document was created for the purpose of saving the appellant from the insolvency proceedings is acceptable. The learned single Judge also has rightly termed the said document Ex. R-1 as a fabricated one. Mr. R. Krishnaswami, the learned Counsel for appellant cited two decisions, namely, P.V. Gandhi Vs. Gitanjali and Others, , A.M.S. Veerappa Chettiar and Sons and Others Vs. Kalidoss Chettiar and Sons and Others, and contended that since the appellant retired from the partnership, she is not liable to be adjudicated. In this case, the retirement has not been proved by acceptable evidence. Ex. R-1 has been found to be a fabricated ones. Therefore, the abovesaid two decisions, where the retirement was admitted, are not helpful to him.

6. The learned Counsel for the appellant next contended that acts of insolvency, namely, suspension of payment and departing from the dwelling house, have not been proved. As regards the first contention, we find that there is no substance in the same. The important person, namely, the 2nd respondent, has not filed counter in the insolvency petition, controverting the allegations contained in paras 11 and 12 of the petition. The petitioners have clearly and categorically stated that on 3.3.1990 and 13.3.1990 when the office bearers of the association, consumers protection social and welfare association attended the meeting held in the house of the advocate Mr. P.C. Kurian, 2nd respondent announced suspension of payments to all the creditors, and that they were in financial difficulty. The 2nd respondent has not only failed to refute the said allegations but also abstained from court. Further, the 3rd respondent who alone has filed a counter has not denied these specific allegations. Instead of traversing the serious allegations, she has simply chosen to state as follows:

This respondent does not traverse into the other allegations made in the petition against the first and second respondent as she is not in any way connected with the business during the period when this respondent was a partner.

Apart from these allegations in the petition and the counter, we have also the

evidence of P.W. 1 to P.W. 3. P.W. 2, the Vice-President of the Consumers Protection Social and Welfare Association has given detailed evidence about the two meetings held on 3.3.1990 and 13.3.1990. In the chief examination as well as in the cross-examination, he has asserted that in both the meetings Mr. K.C. Cherian, the 2nd respondent announced the suspension of payment to the creditors. Even though a suggestion was made to P.W. 2 that there was no meeting on 3.3.1990 and on 13.3.1990 in the residence of the Advocate Mr. K.C. Kurian, the respondents have not chosen to examine the said advocate. R.W. 1 has admitted that there was a meeting on 3.3.1990 at the residence of Mr. K.C. Kurian, advocate and for the said meeting, her husband took her father. R.W. 2, the husband of the appellant has also admitted that there was a meeting in the residence of the Advocate, Mr. K.C. Kurian. He has also stated that his father-in-law said that he would sell the farm and pay the creditors. Even though R.W. 2 has carefully avoided the statement about the suspension, from the evidence of P.W. 2 and the non-examination of the 2nd respondent Mr. K.C. Cherian, it is clear that there was a meeting at the residence of the advocate Mr. K.C. Kurian, and the 2nd respondent announced the suspension of payment.

7. With reference to the other contention that the respondents 2 and 3 secluded from the dwelling place and were not available, we have to hold here again, that the case of the petitioners is acceptable. P.W. 1 has stated that on 8.3.1990, 15.3.1990, 21.3.1990 and 22.3.1990 he visited No. 7, Beach Road, Harsha Apartments, Kalakshetra Colony, Madras-90 and on all those occasions the respondents 2 and 3 were out of station. In the petition I.P. No. 40 of 1990, in para 15, it is clearly stated that P.E. Chacko and K.S. Varkey visited the residence of respondents 2 and 3 on 8.3.1990, 15.3.1990, 21.3.1990 and 22.3.1990, but they were not available. In the cross-examination also when this allegation was put to R.W. 1, she has not denied these facts. Further in the cross-examination she chose to admit that she was present in Harsha Apartments from 1.5.1989 to 27.2.1990. Hence, this aspect also has been proved by the petitioners.

8. Mr. Krishnaswami cited M. Ratchaganadan, Proprietor of M. Arokiasami and son Vs. Kishindas Shamdass under by Shyam Sunder and Another, . It has been held that "absenting oneself is not an act of insolvency, unless it be with intent to defeat or delay creditors. Whether the intention exists is a question of fact. If a trader shuts up his shop during business hours or departs from his dwelling house 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". The said judgment is far from being in support of the appellant, really supports the case of the respondents because when P.W. 3 visited on a number of occasions both the father and the daughter were absent from the residence. Further, in this case there is evidence that the appellant and her father as the partners of the firm were heavily indebted. There were meetings of the creditors in the residence of their counsel to discuss their problems, and therefore, the absence must be presumed to be with intention to defeat or delay the creditors.

9. Mr. Krishnaswami relied upon *A.V. Iron Traders v. N. Jhamandas* (1978) 2 M.L.J. 356. That is a case where there was a mere expression of a desire to postpone the payment of debts. But, in this case we have found that there was an announcement of suspension of payment in the two meetings held on 3.3.1990 and 13.3.1990. Further, at the end of para 4, the learned Judges observed as follows:

As each case has to be decided on its own merits and as evidence let in this case is not sufficient or reasonably sufficient for us to hold that there was an interview between the creditor and the debtor, and even assuming that there was such an interview, the words spoken to by the debtor are sufficient to constitute unequivocally the express intention on his part to suspend payment of debts cannot at all be gathered.

Therefore since the facts in this case are different this decision not helpful to the appellant.

10. *Khiaram Khushiram and Others Vs. Kamadhenu Drinks and Others*, cited by the appellant's counsel lays down the essentials to be proved in a petition under Sections 9(d)(ii) and 9(g) of the Insolvency Act, In the said case, it is stated that 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. It lays down further that the essence of an act of insolvency u/s 9(g) is that the debtor must give sufficient indication to show that he had suspended payment of all the debts. In the present case, we have found as a fact that the abovesaid ingredients are present. As stated earlier this case also, apart from being not helpful to the appellant, helps the case of the respondents. The principle laid down in the following cases is applicable to this case. In *Chanahalu Siva Reddi v. The Official Receiver of Bellary* (1936) 2 M.L.J. 730, it has been held as follows:

It seems clear that Ayyanna Gowd alone conducted this business and that he was in exclusive control of everything that was done in pursuance of the objects of the partnership. On that finding Ayyanna Gowd's notice of suspension of payment is one by which his partners (the appellants) must also stand or fall in the words of their Lordships of the Privy Council in *Kastur Chand Rai Bahadur v. Dhanpat Singh Bahadur*. For these reasons we hold that the acts of insolvency committed by Ayyanna Gowd must be deemed to be the acts of the appellants also and that their adjudication as insolvents is correct.

11. *Structee Mech India, Partnership firm and Others Vs. Bharatkumar Pahlajrai and Others*, , is also to the same effect. It is stated in para 9 in the said case as follows:

From the cases mentioned above, it may be seen that the settled position of law is that the act of one partner can well be construed as an act on behalf of all the partners if the circumstances warrant such a conclusion. It is not absolutely necessary for the petitioning creditor to prove that a letter written by one of the partners stating that the firm was suspending or was going to suspend payments

to all creditors, had been written on the express authority given by each one of the partners to the particular partner who had written the letter. If the totality of circumstances go to show that the expression contained in the letter should be taken as an act done on behalf of all the partners, then the consequences that folio w should have application to all the partners and not only to the partner who had written the letter

In this case, we have not only found that the 2nd respondent announced the suspension of payment to the appellant, but also that the appellant secluded herself along with the father the 2nd respondent in the Insolvency petition. Therefore, the act of insolvency within the meaning of Section 9(d)(ii) has been proved with reference to the appellant also.

12. Even though the appellant herself has not expressed her intention to suspend payment to the creditors, the 2nd respondent has made such announcement in the meeting held on 3.3.1990 and 13.3.1990. Since we have found that the appellant continued to be a partner, she is bound by the acts done by the other partner, namely, the 2nd respondent, u/s 32(3) of the Indian Partnership Act.

13. For all the foregoing reasons, we hold that the appeal is devoid of any merit and hence the appeal is dismissed.