
(1981) 03 MAD CK 0035
In the Madras High Court
Case No : O.S.A. No. 101 of 1977

Structee Mech India, Partnership firm and Others	APPELLANT
Vs	
Bharatkumar Pahlajrai and Others	RESPONDENT

Date of Decision : 18-03-1981

Acts Referred:

Partnership Act, 1932 — Section 18, 2
Presidency Towns Insolvency Act, 1909 — Section 9

Citation : AIR 1982 Mad 51 : (1981) 94 LW 529

Hon'ble Judges : Sengottuvelan, J;Natarajan, J

Bench : Division Bench

Advocate : G. Nandalal, for the Appellant; K.N. Balasubramaniam and T. Dhanuakumar, for the Respondent

Judgement

Natarajan, J.—Respondents 1 to 5 in I. P. No. 72 of 1976, have preferred this appeal to canvass the correctness of the order of

adjudication passed against them in the said insolvency petition.

2. The first appellant is a registered partnership firm and appellants 2 to 5 are its partners. Respondents 1 to 3 herein filed a petition under S. 9(d)

(ii) and 9(9) read with Ss. 10, 11 and 13 of the Presidency Towns Insolvency Act (III of 1909) (hereinafter referred to as the Act) for adjudicating

the appellants and one Job Simon (the 6th respondent in the insolvency petition) as insolvents and for directing the estate of the insolvents to vest in

the Official Assignee for purposes of administration for the benefit of the general body of creditors. As regards the act of insolvency under S. 9(d)

(ii), it was alleged in the petition that the appellants and the said Job Simon had made themselves unavailable for being contacted at the office or at

the works. This contention was not accepted by the learned single Judge who

disposed of the insolvency petition and hence we need not deal with that aspect of the matter in this judgment. As regards the other ground an order of adjudication was viz., under S. 9(g) of the stated by respondents 1 to 3 that the appellants owed them a sum of Rs. 6,000/- in the aggregate and the said, sum besides being a liquidated amount was also payable immediately. But in spite of it, in response to the attempts made by them through their representative Mr. Motiram to collect the outstanding amount, the first appellant had sent a letter on 21-6-1976 where in it was stated that the appellants were suspending payments for the present to all the creditors in view of the fact that they had suffered misfortunes. This ground was found to be a sustainable one by the learned single Judge and hence he allowed the petition and passed an order of adjudication against appellants 1 to 5. In so far as, Job Simon, the sixth respondent in the insolvency petition is concerned, it was held that he was not a partner of the firm but was only a manager and he cannot be deemed to have committed any act of insolvency. In that view of the matter, the petition was dismissed as against Job Simon. The appellants have preferred this appeal to assail the correctness of the order of adjudication passed against them.

3. Mr. G. Nandalal, learned counsel for the appellants, contended that the order of adjudication passed against the appellants cannot be legally sustained because the appellants cannot be deemed in law to have committed an act of insolvency falling within the ambit of S. 9(g) of the Act. The principal contentions put forward by the learned counsel were as follows - (1) The letters Exs. P. 5 and P. 6 (Ex. P. 6. being a copy of Ex. P. 5) were not written by the 4th appellant of his own volition or free will but had been written by him at the behest of one Motiram who was acting as the agent of the Multani Bankers from whom the appellants had borrowed moneys for the firm. It had never been the intention of the 4th appellant or any of the other partners of the firm to suspend payments as envisaged under S. 9(9) of the Act. (2) The amounts claimed to be due by respondents 1 to 3 on the date when Ex. P. 5 and P. 6 were written, had not fallen due and were not immediately payable and in such circumstances even if the letters manifested an intention to suspend payments, an act of insolvency cannot be deemed to have been committed. (3)

The alleged suspension of payments referred to in Exs. P. 5 and P. 6 were not intended to stop payment to all the creditors of the appellants but

only to one class of creditors, viz., the Multani Bankers and (4) In any event., the letters Exs. P. 5 and P. 6 had been written only by the fourth

appellant in, his individual capacity and in the absence of proof to show that the letters had been written with the express consent of the other

partners, viz., appeal-. lands, 2, 3 and 5 or under an implied. authority given by them, the consequences of suspension of payment cannot be

visited on the other appellants in matters of insolvency.

4. These contentions were refuted by the learned counsel for respondents 1 to 3 and he tried to sustain the order of the learned single Judge by

pointing out that the story that Motiram had manoeuvred to get Exs. P. 5 and P. 6 from the fourth appellant has been found to be false by the

learned single Judge and likewise the contention that the suspension of payment was not applicable to the general body of creditors but only to a

limited class of creditors had also been found to be an, untenable proposition. As regards the other grounds, viz., about the amount not being

immediately payable to respondents 1 to 3 and about the action of the fourth plaintiff not binding on the other appellants, the learned counsel stated

that those contentions had not at all been raised before the learned single Judge and hence the appellants are not entitled to put forth these

contentions for the first time in this appeal.

5. We shall proceed to examine the various contentions put forward by the appellants counsel in seriatim. Taking up in the first contention, it was

stated that Motiram, who had been examined as P. W. 2, was acting as an agent for the Multani Bankers and " it was through him the appellants

had obtained credit from several Multani bankers. The names of the various Multani Bankers from whom amounts has been borrowed are set out

in Exs. P. 5 and P. 6 and among them respondents 1 to 3 are creditor Nos. 3, 4, and 6. P. W. 2, has gone into the witness box and has vehemently

denied the suggestion that he had played a fraud or deception on the fourth appellant and thereby obtained Exs. P. 5 and P. 6, from him. Apart

from his denial, the other circumstances in the case also go to show that the story Put forward by the appellants cannot be accepted. The fourth

appellant was dealing with the affairs of the firm and according to him the firm

was having an annual turnover of about Rs. 9 lakhs. Such being the scale, it is inconceivable that a man like the fourth appellant would have blindly and mechanically agreed to write out a letter as dictated by P. W. 2 and given it to him for the purpose of securing additional time for repaying the debts. It is opposite to mention here that about a week earlier, i.e., on 15-6-1976, the fourth appellant has written letters to several other Multani Bankers, under Exs. P. 7 to P. 14. In those letters, he has stated that their manager, Job Simon had been kidnapped by some gangsters, that in the absence of the manager, the bills could not be prepared and the outstandings collected and in such circumstances the first appellant firm was not in a position to pay the instalment payments to the addressees on the dates on which the payments fell due. In two of, the letters, it has been admitted that the instalment payments, which fell due in the months of March April and May 1976, have- also not been paid due to certain vicissitudes suffered by the business. It is in the background of those letters the question whether Exs, P. 5 and P. 6 has been, voluntarily written by the fourth appellant or whether he had been deceived, into writting those letters by P.W. 2, should be considered. In Exs. P. 5 and P. 6; there is not only a reference to the kidnapping of Job Simon, but there are also references to the death of the fourth appellant's father C. J. Simon, and about the death of the fourth appellant's wife Mrs. Varghese Simon on 7-5-1976. After referring to those calamities, it has been stated as follows:

As such there were some difficulties for collection of payments. Hence we have suspended the payments and not honoured your cheques. Please request all bankers to be sympathetic and bear with us till arrangement is made.

6. Obviously, after writing Exs. P. 7 to P. 14, the fourth appellant must have realised that the situation was far more serious than what it was when Exs. P. 7 to P. 14 were written. Therefore, there is every likelihood of the fourth appellant himself having realised that payments cannot be effected to any of the creditors and, hence there should be a general suspension of payments. We are, therefore, not persuaded by the contention that Exs. P. 5 and P. 6 had been clearly obtained by P. W. 2 and the fourth appellant had not intentionally used the words relating to suspension of payments and furthermore he was not aware of the consequences of using such words. The first contention has, therefore, to fail.

7. As regards the second contention; learned counsel for the appellants would say that respondents 1 to 3 had collected advance interest and the instalment payments totalling to Rs. 2000 to each of respondents 1 to 3 was not fully payable and in any event the appellants had time till 16-7-1976 to make the payments. Such a contention has not been raised before the learned single Judge. On the other hand, the appellants have proceeded on the basis that the last two instalments to respondents 1 to 3 were fully payable and the payment had to be made on 16-6-1976, and 16-7-1976. It must be borne in mind that Exs. P. 5 and P. 6 have been written on 21-6-1976, which is five days after the instalment in June 1976 had become payable. There is, therefore, no scope for the appellants to contend that the sums of Rs. 2000 were not fully payable and in any event the appellants had time till July 1975 to make payments and as such even if there was an expression in the letters about suspending payments, such suspension would not amount to an act of insolvency under S. 9(g) of the Act. In support of the abovesaid contentions, the appellants' counsel relied upon a decision of Ramaprasada Rao, J., as he then was, in Kamala, In re. I. P. Number 81 of 1976 judgment dated 30-9-1977 and reported in 1977 T. L. N. J. 449. That was a case where the debt due to the petitioning creditor had not become due and payable. Nevertheless, the petitioning creditor alleged that since the debtor had made himself scarce and was not available, the debtor had committed an act of insolvency u/s 9(d)(ii) of the Act. Such a contention was repealed and it was observed that it would be an anomaly to expect the debtor, before a debt has become payable, to voluntarily confine himself to his own house so as to answer the unexpected or expected calls of a creditor of his so as to satisfy him that even before the date when the debt has become due, he is available in his dwelling house or his business place. The facts of that case were entirely different and as such the ratio laid down in that case cannot have any application to the facts of the present case. Hence the second contention has also to fail.

8. The third ground of attack was on the hypothesis that the suspension of payments referred to in Exs. P. 5 and P. 6 was relatable only to the debts due to the Multani bankers and not to the general body of creditors of the appellants. It was argued that though Section 9(g) of the Act

mentions only the giving of notice to any of the creditors, yet, courts of law have taken the view that the intended suspension of payments must

have reference to the totality of the debts of the debtor. On this aspect of the matter, the appellants' case is on a very fragile ground, because in the

course of his examination, the fourth appellant has admitted in his evidence that the stop I page of payment was contemplated not only with

reference to the debts due to the Multani bankers but for all the persons who had lent moneys to the firm. In view of the unambiguous admission

made by the fourth appellant in the witness box, there is hardly any scope for the appellants to contend that the suspension of payment was limited

to a class of debtors and as such the requirements of Section 9(9) of the Act were not fulfilled. Hence the third ground of attack has also to fail.

9. Taking up the last of the grounds it was on this aspect of the matter the appellants considerable stress. He, argued that there was nothing to

show that Exs. P. 5 and P. 6 had been written by the fourth appellant on behalf of all the partners of the firm and such being the case, the other

partners cannot be made liable in insolvency for any dereliction committed by the fourth appellant. In support of such a contention, the learned

counsel cited various authorities. The cases cited by the learned counsel and the ratio laid down in them are as follows V. Gopal Naidu Vs.

Mohanlal Kanyalal and Others, . It is a question of fact in each case whether the act of one partner in closing the business of the firm and thus

committing an act of insolvency so far as he is concerned is imputable to another partner so as to entitle the creditors of the firm to get the other

also adjudicated an insolvent. It was held in that case, that the mere fact of closing the firm by one partner without more, e.g. evidence to show that

the other either expressly or impliedly authorised the same was insufficient to lead to such imputation. In re: Mahomed Hasham and Co., . In that

case it was held, that in the case of a firm with two partners, the departing from the usual place of business with intent to delay and defeat the

creditors, must be a departure of both the partners and not merely the departure of one of them. Firm Mukand Lal Veer Kumar and Another Vs.

Purushottam Singh and Others, . In that case, it was held as follows ""In order to support an adjudication against a firm there must be proof that

each of the partners has committed some acts of insolvency. If, however, a joint act of insolvency is relied upon it must be shown to be the act of

all the partners." The following passage from the Law of Insolvency in India by Mullah, 3rd, Edn. at page 65, was also referred to. The passage

runs as follows:-

To support an adjudication against a firm each of the partners must have committed some act of insolvency. If a joint act of insolvency is relied

upon, it must be shown to be the act of all." Countering the arguments of the appellants' counsel, the respondents' counsel took the stand that the

fourth appellant had been managing the affairs of the firm and hence it must be taken that he had the full authority of the other partners also to act

on their behalf. He also stated that as per the provisions of the Partnership Act, every partner has the status of an agent with reference to the other

partners and the acts of one partner will bind the rest of the partners of the firm. In this behalf, he referred to S. 2(a), and S. 18 of the Indian

Partnership Act. In his turn, the respondents' counsel cited the following cases. The first case cited by him is In the matter of petition by Messrs.

David Sassoon and Co. Ltd., 100 Ind Cas 389: AIR 1927 Sind 155 which is a judgment by a learned single Judge of the Sind Judicial

Commissioner's Court. It was observed in that case that whatever may be said of the effect of one partner absenting himself from the place of

business as against other partners who have either never lived in that place or who for other valid reasons have temporarily withdrawn from there,

the act of a partner who gives notice that his firm has suspended or is about to suspend business stands on a different footing And it is prima facie a

joint act, on behalf of all persons who are liable as partners in that firm unless they can show that they were solvent and able to pay the debts of the

firm and for which they were liable. The correctness of this decision has, however, been doubted by Mullah at page 106 of the Law of Insolvency

in India. It has been pointed out in the commentary that the initial burden of proving an act of insolvency by all the partners lies upon the person

who alleges the commission of such act and it is not for the partners to prove that the individual act of one of the partners will not bind the rest of

them. The second case cited by the respondent's counsel is Chanahalu Siva Reddi v. Official Receiver of Bellary, 166 Ind Cas 80 : AIR 1937

Mad 13 . That is a Bench decision of this court. The facts were that a business belonging to three brothers was carried on by the eldest brother.

The eldest brother had secluded himself and had also expressly stated to the creditors that he could not pay their debt. The two younger brothers

contended that they cannot be adjudicated on the basis of the acts committed by their eldest brother. This court held that so far as the question of

seclusion was concerned that was an act of the eldest brother alone and could not be attributed to his younger brothers and treated as an act of

insolvency committed by them; but as the eldest brother was carrying on the business, his statement of inability to pay his debts was binding on the

younger brothers and was an act of insolvency so far as the younger brothers were concerned, and they could properly be adjudicated as

insolvents on the basis of this statement. In laying down this ratio, the Bench referred to a decision of the Privy Council in *Kasturchand Rai*

Bahadur v. Dhanput Singh Bahadur, ILR (1896) Cal 26. The Privy Council dealt with a case where the principal was sought to be made liable for

an act of insolvency alleged to have been committed by his gumastha. After pointing out that an extreme view either way cannot be taken in the

matter, the Privy Council held as follows-

And it is a question in each case whether the gumastha occupies such a position that the owner must stand or fall by his acts, so that his fraud or

his flight shall by imputation be the fraud or the flight of the owner or multitude of owners for the purpose of bringing their case within the statute of

insolvency. Their Lordships agree with the Judges who have held that the statute admits of application to such cases, and that to exclude it may

lead to injustice and confusion in many cases.

From the cases mentioned above, it may be seen that the settled position of law 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 creditor, 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 follow should

have application to all the partners and not only to the partner who had written

the letter. In the instant case, we find that even according to the fourth appellant, his brother the third appellant had written the letter to the dictation of PW 2 and subsequently typed the letters. Hence the third appellant must have had knowledge of the contents of the letter and he had actively associated himself with the fourth appellant in the typing and i. e of the letters. Appellants 2 and 5 are ladies and the second appellant is the wife of a brother of the fourth appellant. They had admittedly left the management of the firm with the fourth appellant. The letters, Exs. P. 5 and P. 6 also purport to have been issued behalf of all the partners of the firm. This inference may be drawn from the following fact. While the fourth appellant has referred to C. J. Simon as his father and Mrs. Varghese Simon as his wife and the works manager Sri C. Job Simon as his elder brother, he has used the plural term "we" when he comes to the statement regarding suspension of payments. We have already extracted the relevant sentences in an earlier portion of this judgment. Having regard to the words used in the letter and the fact that the third appellant had also participated with the fourth appellant in the preparation of the letter, it is difficult for us to accept the contention that the letters Exs. P. 5 and P. 6 had been written by the fourth appellant acting for himself alone and not acting for and on behalf of all the partners of the firm as laid down in *Chanahalu Siva Reddi v. Official Receiver, Bellary*, 166 Ind Cas 80 : AIR 1937 Mad 13. We are of opinion that though the letters Exs. P. 5 and P. 6 have been signed only by the fourth appellant, it must be taken that the suspension of payments indicated therein was an expression made by all the partners of the firm. In view of such a conclusion, it follows that the main ground of attack of the appellants must also fail.

10. For all the aforesaid reasons, we hold that the appeal is devoid of merits and should, therefore, fail. Accordingly, it will stand dismissed; but in the circumstances, we make no order as to costs.

11. Appeal dismissed.