

(1988) 01 GUJ CK 0001
Gujarat High Court
Case No: First Appeal No. 1078 of 1977

Rana Narendrasinhji
Jerawarsinhji and
Others

APPELLANT

Vs

Dipchand Jaterbhai
and Co. and Others

RESPONDENT

Date of Decision: Jan. 19, 1988

Acts Referred:

- Provincial Insolvency Act, 1920 - Section 6

Citation: AIR 1988 Guj 226 : (1988) 2 GLR 849

Hon'ble Judges: R.A. Mehta, J; N.B. Patel, J

Bench: Division Bench

Advocate: P.M. Raval, for the Appellant; M. Kapur, for K.N. Valikarimwala and D.D. Vyas,
for the Respondent

Judgement

R.A. Mehta, J.

The main question involved in this appeal is whether the appellants-debtors who are partners along with respondents 7, 8 and 9 can be said to have committed any act of insolvency and could be adjudged, insolvent.

2. The respondents Nos. 1 to 5 being creditors of a partnership firm in the name of M/s. Labhshanker Joravarsinh at Limbdi had filed an Insolvency Petition No. 4 of 1970 alleging that the respondents debtors had committed acts of insolvency and therefore prayed that the six partners be adjudged insolvent.

In the insolvency petition it was alleged that the defendants were carrying on business in partnership as commission agents for cotton and cotton pods and ginning and pressing cotton. It is not in dispute that originally, the partnership consisted of only two partners, namely Jorawarsinh Chandrasinh and Acharya Devshanker Jadavji having equal shares. That partnership deed dated 1-6-1964 is at

Ex. 216. It also provided that in case of death of any partner, the firm would not stand dissolved, but the heirs of the deceased partner would become automatically partners of the firm. In July 1969, one of those two partners namely Jorawarsinh Chandrasinh expired and a new partnership was constituted by a partnership deed dt. 29-7-1969 (vide Ex. 217) and three sons of Jorawarsinh namely Narendrasinh Jorawarsinh, Dilawarsinh Jorawarsinh and Harisinh Jorawarsinh (the three appellants) were taken as partners and 50 paise share of deceased Jorawarsinh was divided in equal three shares among the three sons. That partnership deed also provided that in case of death of any partner, the firm would not stand dissolved, but the legal heirs of the deceased partner would automatically become partners in place of the deceased partner. On 20-8-1970, another partner Devshanker died and it appears that by virtue of the aforesaid clause in the partnership deed, his three sons were taken and continued as partners of the firm.

3. The insolvency petition further alleged that after the death of Devshanker, his legal heirs who were taken and continued as partners were carrying on the business in the same name and title. It further showed that the five creditors pointed out their individual claim totaling to Rs. 1, 13,366-07 and by addition of other creditors, the total debts of the firm were said to be Rs. 4,13,000/-. It is further alleged that the defendants had committed acts of insolvency by defendant 3 departing from his dwelling house and leaving his usual place of business on 14-10-1970 with an intention to defeat or delay the claim of the creditors. From that date i.e. 14-10-1970, the business of the firm was completely closed and it was closed with a view to defeat the claim of the creditors. It is further alleged that the petitioners 2 and 4 had approached defendant 2 and the defendant 2 had stated in categorical terms for himself and on behalf of the firm that the debts of the firm were very large and they were not able to discharge the debt even at a later stage and neither the firm nor the partners had any money to make payments to the creditors and that neither the firm nor the partners had any intention to make any payment to any individual creditor in any circumstances and that they would not make the payment and the creditors may do whatever they liked. Similarly when other creditors approached the defendants 2 and 6, they had also given the same reply that they would not make any payment and the creditors may do anything they liked and thus, the defendants had clearly told and given notice that they had suspended the payment of their debts. These are the averments in para 9 of the insolvency petition. In para 10, it is further stated that the Chief Munim of the firm Chhagandas Popatlal had also departed and absconded from the usual place of business and when he returned, the applicants had met him and he had told them that the firm was unable to make any payment to the creditors and that the creditors may do whatever they like. In para 11 of the insolvency petition, it is stated that thereafter the applicants had told defendants 2 and 5 that they would have to face the legal proceedings. On this, the defendants 2 and 5 had expressed a desire to have a settlement with the creditors and thereupon, on behalf of the firm and the partners (the debtors)

defendants 2 and 5 and Mehtaji Chhabildas and on behalf of the creditors, the applicants had gathered together at the place of Dipchandbhai and there were proposals and counter-proposals. The defendants 2 and 5 had initially proposed payment of 60% of the debts and ultimately it was raised to 65% and the remaining 35% was to be let off. Thereafter drafts for the settlement were prepared. However, ultimately the settlement could not be finalised because no initial payment in cash was made. In this talk of composition deed, the defendants 2 and 5 had participated on behalf of the firm. Thus, it is alleged that in the preceding three months, the defendants debtors had committed acts of insolvency and therefore it was -prayed that the defendants be adjudged insolvent.

4. The learned Civil Judge, Senior Division Surendranagar, by his judgment and order dt. 30-8-1977 allowed the insolvency petition and adjudged all the opponents as insolvent.

5. As far as opponents Nos. 2 and 3, Kishorkant and Amratlal, sons of Devshanker are concerned they had given pursis Ex. 220 wherein it was stated that in view of the decisions and decrees in Special Civil Suits Nos. 65. 66. 67 of 1971 and 21/1972 and 41/1973, they had withdrawn their objections to the insolvency petition and stated that the firm as well as those two defendants were unable to pay the debts.

6. At the trial two witnesses were examined on behalf of the petitioning creditors and on behalf of the debtors, only one witness was examined being defendant 7 (appellant No. 3).

7. Mr. P. M. Raval, the learned Counsel for the appellants (defendants 5, 6 and 7) namely, Narendrasinhji. Dilawarsinhji and Harisinhji Jorawarsinhji has submitted that there is no act of insolvency committed by any of the three appellants and there is no act of insolvency committed by the firm and therefore no order could be passed adjudging these appellants as insolvent. It is submitted that these appellants were not in the management of the business of the firm and had not left their usual residence and had not absented themselves and had not suspended payment of debts of the firm. It is submitted that merely because the defendant No. 5 Dilawarsinhji has participated into negotiations for settlement with the creditors, it cannot be said that he has committed any act of insolvency or suspension of payment of debts.

8. The evidence of Ranchhodbhai, a partner of respondent 2 a creditor firm is at Ex. 161. In his deposition, he has stated that he had gone to the place of business of the firm in Navratri of Aso month and at that time, the office of the firm was closed and he used to visit his office for inquiring about the rates of cotton and at that time, Amrutlal, Dilawarsinh and Kishore kumar i.e. defendants 2. 3 and 6 were found sitting in the office on all those occasions and all these three partners were found working in the firm and Chhabildas (Mehtaji) and Amrutlal used to take his signatures on the accounts. In para 6 of his deposition, he has stated that the office

of the defendant-firm was closed from 14- 10-1970 and thereafter the firm had not done any business and at no point of time, the office of the defendant-firm was open. He has also stated that with a view to see that they have not to pay, they used to keep the office closed. He has stated that for demanding money, he had gone to the office for 4 to 3 times after 14-10-1970. As the office was found closed, he and another creditor Motibhai Dahyabhai had gone to the house of Amrutlal and demanded the dues and the defendant No. 2 had replied that he had no money and he would not pay and that the creditor (witness) should mind his own work. He has also stated that the Mehtaji of the said firm i.e. Chhabildas had prepared a list of creditors of the firm. He has also stated that this Munim of the firm had also left Limbdi. This list of creditors prepared by Chhabildas was handed over to defendant 2 on 14-10-1970. The witness had demanded the dues from the Munim and he was told that it was not possible to pay and that he would not pay and that the creditors should take the steps as deemed proper. He had told the Munim that he would take legal action in the Court and therefore the defendants had shown willingness to arrive at a settlement and therefore the creditors had collected at the place of Dipchandbhai and defendants 2, 5 and 6 and the Munim Chhabildas had also come there and three debtors had requested the creditors to accept the dues as 60% and the creditors insisted for 100% dues and ultimately it was decided that the debtors should pay 65% dues and the creditors should let go 35% dues. This witness has further stated that the debtors had agreed to pay Rs. 10,000/- in cash towards 65% and the rest by selling the properties. After this discussion, the parties had dispersed and thereafter after 8 to 10 days, they had again collected at the gin of Fatesinhji along with pleaders Hariharbhai Bhatt and Mangasinh and A. C. Shah. The defendants 2 and 6 were also present along with the Munim Chhabildas. Both the lawyers Mangalsinhji and Hariharbhai had prepared a draft and the conditions were read over. However, in that there was no writing about the cash payment and therefore the composition failed in the said meeting. About 8 to 10 days thereafter, the debtors had again called the creditors at Fatesinhji Gin. In that meeting also Munim Chhabildas and lawyers were present. Some additions and alterations were made in the draft. This draft letter is Ex at Ex. 199. This draft composition deed runs into 16 pages excluding the appendix. It is a fairly detailed composition deed wherein the firm and its partners are described as debtors and party of the first part and the representative committee of the creditors is stated to be the party of the second part represented through five members of the Committee. Two persons are sought to be appointed as Joint Managers to carry out the scheme of arrangement of the composition deed. It is recited that as mentioned in Schedule-A to the composition deed, there were number of creditors and since the firm was unable to pay the debts, they had stated that they were not in a position to make payment of 65% of the dues and therefore they had reached a composition with the creditors on the terms mentioned in the said deed. Out of total debt of Rs. 5,25,000/- as mentioned in Schedule-A, 65% amount which was required to be paid under the said composition deed came to be Rs. 3,41,250/-. Out of this amount, Rs. 1,14,000/- was

agreed to be paid by defendants 1 to 4 out of their properties mentioned in Schedule-B and those properties were reserved for the benefit of the creditors. The remaining amount of Rs. 2,27,250/- was agreed to be paid by defendants 5, 6 and 7 (the appellants) out of their own properties as mentioned in Schedule-C to the composition deed and those properties were reserved for the benefit of the creditors. These properties mentioned in Schedule-B & C were transferred to the representative committee of creditors and the representative committee was authorised to manage the properties as mentioned in Schedule-B and C and they were constituted irrevocable attorneys. The detailed provisions are made regarding administration of properties, rights of the debtors, use and occupation of the properties etc.

9. Although this composition deed is only a draft and it is not a final agreement between the parties, it does reveal certain things and probabilises and corroborates the version given by the witness in the deposition and the averments made in the insolvency petition.

10. In the cross-examination, witness Ranchhodbhai stated that defendants 2, 3 and 6 were carrying on the management of the firm and he has denied that only defendants 2 and 3 were carrying on the management. He has denied that Dilavarsinh defendant 6 was not carrying on the business. In the cross-examination, a Suggestion was made that these defendants 5, 6 and 7 were not partners in the firm. However, that suggestion has been denied and in fact there is clear evidence and admission that they were partners Ex 217 the partnership deed shows them as partners. Dilavarsinh defendant 6 resides in Limbdi. This witness had gone to his house and demanded his dues and defendant 6 Dilavarsinh had refused payment saying that he was not in a position to pay anything. The witness has also stated that he passed from the shop of the firm several times and found that it was closed.

11. From the evidence of this witness, it clearly appears that all the defendants had suspended payments of debts of the firm Dilavarsinh, defendant 6 had taken an active part on behalf of defendants 5 and 7 in working out a scheme of settlement. Defendant No 5 Narendrasinh had also remained present and participated on behalf of defendants 5, 6 and 7. Their Advocate had also participated in the negotiations for settlement and drafting a composition deed. It is not disputed or denied that such negotiations for settlement have taken place and such a draft was prepared. In fact neither Narendrasinh nor Dilavarsinh had disputed the same. Therefore, this evidence of the petitioning creditor remains unchallenged. There is no reason whatsoever to disbelieve the evidence of this witness. From the evidence of this witness, it clearly appears that the usual place of business of the firm was closed down and the payments of the debts of the firm were suspended. The business of the firm is said to be completely closed from 14-10-1970 and the suspension of payments of the debts by the firm and all its partners is also clear and fortified by the draft settlement dt. 27-10-1970.

12. Another witness is a partner of the creditor firm named and styled as M/s. Amarchand Nanaji & Co. His evidence is at Ex. 200 which is also on the similar line. He has also stated that Chhabildas Munim was managing the affairs of the firm and three other partners were also attending the shop. He has also stated that the firm and its business was closed down and when he went to demand money from Chhabildas, he found the shop closed and Chhabildas could not be found. He had also attended the meetings and negotiations for settlement. The defendants 2, 5 and 6 and the pleaders of both the sides were present. He has also stated about the terms of the settlement. He has also further stated that he had asked for payment of debts and the debtors had refused to make payment and the firm was closed. In the cross examination, he also stated that Dilavarsinh was also managing the affairs of the firm and he has also stated that he was given one cheque under the signature of Dilavarsinh.

13. It is significant to note that though there is evidence of these two witnesses, showing negotiations and attempt of settlement and draft of settlement, on behalf of the defendants, neither Dilavarsinh nor Narendrasinh has entered the witness box. The only witness examined on behalf of defendants 5, 6 and 7 is defendant No. 7 Harisinh. He has admitted that defendants 2, 3 and 4 who are the sons of Devshanker and defendants 5, 6 and 7 who are the sons of Jorawarsinh are the partners of the firm. He has produced partnership deed at Exbts. 216 and 217. According to him, defendant 2 was managing the Vahivat of the firm and he was not taking consent of defendants 5, 6 and 7. He has also denied that Dilawarsinh was also sitting in the shop and was looking after the management of the firm. He has stated that although he was residing in village Ankewaliya in Limbdi taluka, he used to come to Limbdi on alternate days. According to this witness they had asked Devshanker to close this firm after the death of father of this witness i.e. Jorawarsinh. He has denied that the firm remained closed. He has stated that they had not committed any act of insolvency and not created any ground for declaring them insolvent. In the cross- examination, he admitted that decrees have been passed in five suits against the firm and that they have not made any attempt to pay the decretal dues to the persons concerned. From the evidence of this witness, it is clear that the evidence led by the applicants is not rebutted.

14. Section 6 of the Provincial Insolvency Act. 1920 provides that:

"A debtor commits an act of insolvency in each of the following cases, namely : -

X x x x x x

(d) if, with intent to defeat or delay his creditors :

x x x X X X

(ii) he departs from his dwelling-house or usual place of business or otherwise absents himself;

x x x x X x

(g) if he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts: or

x X x x X x

Explanation to S. 6 provides that :

"For the purposes of this section, the act of an agent may be the act of the principal."

In the case of [Firm Mukand Lal Veer Kumar and Another Vs. Purushottam Singh and Others](#), it has been held that an order of adjudication under the Act against the firm in the firm's name can be made, if proper conditions are satisfied and in order to support the adjudication against the firm, there must be proof that each of the partners has committed some act of insolvency. However, if a joint act of insolvency is relied upon, it must be shown to be the act of each partner. It has been further held that if there is an act of insolvency by an agent of the firm which was such as must necessarily be imputed to the firm, the order for adjudication can also be made against the firm and the question whether an act of insolvency of one or more partners can be regarded as an act of all the partners is a question of fact to be determined on the facts and circumstances of each particular case.

15. The learned Counsel for the appellants relying on this judgment submitted that no case has been made out against these appellants for adjudication as insolvents. On the other hand the learned Counsel for the respondents has submitted that all the partners have individually and collectively manifested their intention and acts of suspension of payments of debts and the notice of suspension of payment under Clause (g) of S. 6 is not required to be a written notice and even an oral request to the creditors not to press for payment is a sufficient notice. In the case of *M/s. David Sassoon & Co. Ltd.*, AIR 1926 Sind 246, it has been held that notice contemplated by Clause (g) is a notice to be given by the debtor, but the intention of the debtor can best be gathered from the circumstances under which communication is made. Whether notice given by a debtor is sufficient or not must be determined on the facts of each case. In that case, the request by the debtor to his creditor that they should not press for payment till such time as the market improved and in the alternative, an offer to settle at a certain percentage is a sufficient notice under S. 6(g).

In the present case, the undisputed talk of settlement and draft settlement shows that the debtors had requested for payment of only 65% of the debts and further requested for remission of balance amount of 35% and even that payment of 65% was also to be made in future. Thus, there was not only request to settle but there was clear suspension of payments. Admittedly no payment has been made by any of the debtors during this period of three months immediately preceding the

presentation of the petition for insolvency. The petitioning creditors, has stated on oath that the payments to all creditors were not made and were suspended. As against that, there is not a single word from any of the defendants that the payments were not suspended or that any payment whatsoever was made to any of the creditors.

16. In the case of *Siva Reddi v. Official Receiver Bellary* AIR 1937 Mad 13, the facts were that three brothers formed a partnership and the elder brother was in charge of and had the full and exclusive control over the business of the firm and the eldest brother was adjudicated insolvent and along with him the remaining two brothers were also adjudicated insolvent and it was held that the eldest brother became the agent of his two brother partners who became his principal within the meaning of S. 6. The act of insolvency committed by the eldest brother was therefore held to be the act of the two remaining brothers (principals) and they were rightly adjudicated insolvents along with him. Reliance was placed on Mulla's Treatise on Insolvency in the following words :

"It will be seen from what is stated above that there is a distinction between an ordinary agent and an agent who has exclusive control of the business and occupies such a position that the principal must stand or fall by his acts. In the former case. the act of insolvency committed by the agent is not the act of the principal. In the latter case. the act of insolvency committed by the agent will be the act of the principal."

In that case the eldest brother had stated "I cannot pay your debts. You can do what you like". This was held to be not only his own intention to suspend the payments, but was held to be also a notice as agent of his brothers because the eldest brother alone conducted the business and he was in exclusive control of the business and therefore the notice of suspension of payment was held to be one by which his partners must also stand or fall. in the words of the Privy Council in ILR (1896) Cal 26. *Kasturchand v. Dhanpat Singh*.

In the present case, after the death of Devashanker. there is some dispute as to who was in the management of the affairs of the firm. According to the appellants, defendants 2, 3 and 4 were in the exclusive management of the firm. If that be right, then their acts including the acts of insolvency would be attributed and bindings to the principals namely the appellants defendants Nos. 5, 6 and 7. According to the petitioning creditors, the defendant No. 6 Dilawarsinh was also in the management of the firm. In that case the act of Dilawarsinh in suspending the payments would bind his brothers the other two sleeping partners of the firm. In either case the partners who have voluntarily remained out of management have constituted the managing partner/s as their agent for carrying on the business of the firm and his act would bind the other partners. In fact suspension of payment, negotiations and draft settlement etc. were carried out on behalf of all the partners of the firm by active participation of Dilawarsinh and Narendrasinh for the branch of the

appellants. Therefore all the acts of these partners on behalf of the firm in suspending the payment and requesting the creditors to remit part of the debts and defer remaining part of the debt is clearly an act of suspending the payments of debts and such act is a joint act making liable all the Partners.

17. The case of David Sassoon & Co. Ltd. AIR 1927 Sind 155 was a case of joint adjudication of insolvency and it was held that in order to sustain a joint adjudication against two or more persons, it is necessary that some act of insolvency shall have to be committed by each one of them. But the act of insolvency may be a joint act committed by one partner on behalf of himself and as agent of others or as a matter of fact it may be committed by a person who is not a partner but a mere agent and his authority need not be special or explicit. It was further held that the act of a partner who gives notice that his firm has suspended or is about to suspend business 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 for which they were liable.

In the present case the appellants have utterly failed to show or to rebut what has been stated by the petitioning creditors. This, David's case (supra) even goes to the extent that an act of insolvency could be committed by an agent who is not even a partner of the firm. In the present case also, the Chief Munim Chhabildas is said to have committed acts of insolvency by closing the usual place of business and by declaring suspension of payments by the firm and by his active participation in the negotiations and drafting of the composition deed. Thus the totality of the circumstances clearly establish the joint acts of insolvency on behalf of the partners in the firm.

18. In the case of [Structee Mech India, Partnership firm and Others Vs. Bharatkumar Pahlajrai and Others](#), the Division Bench of Madras High Court held after referring and relying on the judgments of the Supreme Court, Privy Council, Bombay High Court and other judgments referred to earlier 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 conclusion and it is not absolutely necessary for the petitioning creditor to prove that the letter written by one of the partners stating that the firm was suspending or was going to suspend payments to all creditors has 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 the circumstances were 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, the totality of the circumstances as discussed earlier clearly go to show that it was a joint act of all the partners and of the firm to close the business and suspend the payments of the debts of the firm and this clearly constituted the act of insolvency of all the partners of the firm.

19. Our attention was also drawn to the Provincial Insolvency Rules 1924 framed by the Bombay High Court under S. 79 of the Provincial Insolvency Act. 1920. Rule XXVIII provides procedure where the debtor is a firm and sub-rule (5) provides, that an adjudication order made against a firm shall operate as if it were an adjudication order made against each of the persons who at the date of the order is a partner in that firm. In the present case as discussed earlier, there is a joint act of insolvency of all the partners and on behalf of the firm and therefore all the defendants are rightly adjudicate insolvent.

20. In the result, the appeal fails and is dismissed with costs. Interim relief granted in Civil Application No. 3593 of 1977 is vacated.

21. Appeal dismissed.