

(1880) 06 CAL CK 0002

Calcutta High Court

Case No: None

In Re: Hurruck Chund
Golicha

APPELLANT

Vs

RESPONDENT

Date of Decision: June 1, 1880

Citation: (1880) ILR (Cal) 605

Hon'ble Judges: Broughton, J

Bench: Single Bench

Judgement

Broughton, J.

On these facts, without reference to an affidavit in answer, filed a week ago by the petitioning creditor, and I think properly available to him in this enquiry, two questions have arisen: first, a question of construction; and secondly, a question of practice.

2. The first question is, whether a trader, who trades by a gomashta, can be adjudicated an insolvent, if the gomashta commits an act of insolvency. If he cannot, there must be numerous cases in which native traders in this city cannot be adjudicated insolvent at all, for nothing is more common than for a trader living in the mofussil, and scarcely ever visiting Calcutta, to leave an extensive business in the hands of his gomashta, who has the fullest authority, and who carries on the whole business on his behalf.

3. There are two ways in which a man may become insolvent. He may petition himself, u/s 5, or a creditor may petition under Sections 8 or 9.

4. u/s 5, the petitioning insolvent must "reside within the jurisdiction," but it has been held more than once, and very recently held, that residence within the meaning of this section may mean carrying on business in Calcutta, although at the time not actually dwelling within the limits of Calcutta: In re Tariney Churn Goho (11 B.L.R. App. 26) and In re Howard Brothers (11 B.L.R. 254), both cases decided by

Pontifex, J. There are several cases to the same effect cited in Millett and Clarke's *Insolvency in India*, p. 13, from the records of the office of the Official Assignee.

5. If the 5th section can bear this construction, a similar construction can be put on the words "depart from the limits of the jurisdiction" and "depart from his usual place of business within the jurisdiction." It requires, indeed, no departure from the literal meaning of the words to hold, that when a trader has established a business through a gomashta, he departs from the place of his business, if his gomashta departs, and if he does not come himself or send some one else to carry on the business. If, as in this case, the gomashta shuts up the place of business and stops payment, he does in fact depart from his usual place of business, for the usual place of business is inside his house where the business is carried on, and not outside his house with the door locked behind his back; and when he shuts the place up and stops payment, he departs from his usual place of business with intent to defeat or delay his creditors.

6. It has been held that a trader non-resident whose gomashta acts in this way may be adjudicated an insolvent: *In re Cullumjee Monjee* (Coryton, 8), a case decided by Sir C. Jackson, J., in 1858.

7. There it was alleged that the gomashta had departed from the usual place of business, and the principal was adjudicated an insolvent, unless the gomashta should, within eight days from the service of the order upon him, show good cause to the contrary.

8. I think, therefore, that the petition upon which the adjudication has been made is true when the words are construed as they have already been construed. The trader was present by the gomashta, and by his gomashta he absented himself.

9. It appears to me, therefore, that the question of practice need not be determined, that question being, whether, supposing the adjudication to have been on a defective petition, it ought to have been set aside, when, on further evidence, it appears that the trader has made himself liable to be adjudicated an insolvent.

10. But I think that such further evidence can be taken into consideration on an application to set aside the adjudication.

11. In the present case the further facts appear upon the petition of the insolvent, the affidavit filed in support of it, and the affidavit in reply.

12. Mr. Jackson argues that the affidavit in reply cannot be used, because it was not sworn until after the Court sat to dispose of the case last week, when the case should have come on to be heard. But it was filed on that occasion, and it has now been filed for a week. This is all that is required by the rules of practice: Rules 476 and 498, *Belchamber's*, p. 212. The insolvent had an opportunity of seeing the affidavit in answer if he desired to do so.

13. I think, therefore, that this petition must be dismissed, and that the adjudicating creditor may add his cost of opposing it to his debt, and that the costs of the Official Assignee ought to be paid out of the estate.