Madras to show that the exchange could not have been fixed up in time for the suit contract. Whether the fault be the first defendant company's or Mr. Tod's, in either case the second defendant company is entitled to be reimbursed the loss caused by the failure to fix up the exchange in time. In this view neither the first defendant company nor the plaintiffs will be entitled to any amount as damages from the second defendant company. On this ground also the suit would fail.

For the above reasons I agree that the appeal should be allowed and the decree of the trial Judge against the 2nd defendant company should be set aside and the suit dismissed against them with costs in the trial Court and of the appeal.

A. P. Sundarajan, Attorney for appellants.

K.R.

APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., Chief Justice and Mr. Justice Viswanatha Sastri.

GOPAL NAIDU (RESPONDENT) APPELLANT

v.

MOHANLAL KANYALAL (PETITIONER) AND TWO OTHERS (CREDITORS), RESPONDENTS.*

1925, August 24.

Section 9, Explanation, Presidency Towns Insolvency Act (III of 1909)—Closing of business by one partner—Right to get another partner adjudicated insolvent—Question of fact.

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.

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* Original Side Appeal No. 70 of 1924.

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Held 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 authorized the same was insufficient to lead to such imputation.

ON APPEAL from the judgment and order of Mr. JUSTICE RAMESAM, dated 23rd September 1924 and passed in the exercise of the Insolvency Jurisdiction of the High Court in I.P. No. 7 of 1923.

The appellant who was adjudicated an insolvent at the instance of his creditors preferred this appeal.

The facts are given in the judgment.

K. S. Krishnaswami Ayyangar for appellant.—The order adjudicating my client is illegal. The only evidence upon which the order was made is that my client's partner closed the business when in difficulties and went away. This evidence is insufficient. There is no evidence that my client either expressly or impliedly authorized the closing of the business. That is the test laid down by decisions on the point. On the other hand there is evidence in this case that though my client resided in the mufassal he was always available there for any one who wanted to see him and that he was from time to time coming to Madras, looking into the accounts of the firm and seeing how the business was progressing. It is a question of fact in each case depending on various circumstances whether the act of one partner in closing the business is imputable to another. He referred to section 9 (3) (*d*) and Explanation to section 9 of the Presidency Towns Insolvency Act, Williams on Bankruptcy 13th Edition, page 186 and *Mills* v. *Bennet*(1), *Ex parte Mayor*(2), *Ex parte Blain*, *In re Sawers*(3), *Cooke* v. *Charles A. Vogeler Company*(4), In re: *Dhunput Singh*(5), *Kastur Chand Rai Bahadur* v. *Dhanpat Singh Bahadur*(6). He relied on *Harish Chandra Mukherjee* v. *The East India Coal Company, Ltd.*(7) and commented on *Kalianji* v. *The Bank of Madras*(8), *Abu Haji* v. *Haji Jan*(9) and *In the matter of Brij Mohun Dobay*(10).

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(1) (1814) 2 M. & S. 556 = 105 E.R. 488.
(2) (1815) 19 Ves. 539 = 34 E.R. 616.
(3) (1879) 12 Ch. D., 522.
(4) [1901] A.C., 102.
(5) (1893) I.L.R., 20 Calc., 771.
(6) (1896) I.L.R., 23 Calc., 26 (P.C.)
(7) (1912) 16 C.W.N., 733.
(8) (1916) I.L.R., 39 Mad., 693.
(9) (1936) 8 Bom. L.R., 648.
(10) (1897) 2 C.W.N., 306.

O. Thanikachalam, for respondent did not contest the legal proposition of the appellant's counsel.

JUDGMENT.

COUTTS TROTTER, C.J.

COUTTS TROTTER, C.J.—This case raises a point of some interest. Two persons traded together in partnership. A man called Anantha Mudali, about whom no question arises in these proceedings, and the Appellant Gopal Naidu had carried on a produce business in Madras and the facts seem to be that Anantha Mudali was managing the business in Madras, whereas Gopal Naidu resided ordinarily at Wallajabad, but the evidence which is given in the case—and that is the evidence that was relied upon by the adjudicating creditors themselves—establishes two things. The first is that when anybody—after the difficulties arose and in this concern they did arise—wanted to see Gopal Naidu when he went to Wallajabad, he found Gopal Naidu without difficulty and was able to put whatever he wanted to put before him. The other fact that emerges is that, although Gopal Naidu ordinarily resided at Walajabad, he did from time to time come to Madras and look into the accounts and see how the business was progressing. What is before us is an appeal by Gopal Naidu against his adjudication. The circumstances which led to it are these. The business got into difficulties when the debts due to the petitioning creditors amounted to something over Rs. 10,000 and the difficulties came to a head,—we will take it as proved, for it is not disputed—when Anantha Mudali closed the business and went away in order to get out of the clutches of his creditors, thereby committing an act of insolvency, so far as he is concerned, under section 9 (*d*) (iii) of the Presidency Towns Insolvency Act. That is a perfectly good foundation for the insolvency petition and the adjudication

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consequent upon it as against Anantha Mudali but it has been sought in this case to use that act of Anantha Mudali in order to lay the foundation not merely of the petition against Anantha Mudali himself, but of the petition against the appellant Gopal Naidu.

We had a very interesting argument practically giving us the whole of the history of the law on this matter both in England and in India. There is no doubt that the English cases (of which I may take as instances *Mills* v. *Bennett*(1) as one of the earlier and *Ex parte Blain*; *In re Sawers*(2) and *Cooke* v. *Charles A. Vogeler Company*(3) as some of the later), clearly lay down the principle that, in order that a man may be made a bankrupt, the act of bankruptcy relied upon must in English law be some act which can be definitely brought home to him, and the learned Judges point out that the act of an agent cannot ordinarily found a petition in bankruptcy. The chief pronouncement, which has been approved of in many subsequent cases, is contained in the judgment of BRETT, L.J., in *Ex parte Blain*; *In re Sawers*(2) at page 529. He says:

"It was said that a person may commit an act of bankruptcy by his agent, and that the partner in England was the agent of these foreign partners, and therefore they committed an act of bankruptcy by their agent in England, that is, by allowing the execution to go without satisfying the judgment, and that, this having been done by their agent in England, they ought to be adjudged bankrupts. That assumes that a man can commit an act of bankruptcy by his agent, whether he has authorized the particular act or not, and that assumption seems to me to be equally wrong. I think that a man cannot commit an act of bankruptcy by a particular act of his agent which he has not authorized, and of which act he has had no cognizance."

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(1) (1814) 2 M. and S. 556. (2) (1879) 12 Ch. D., 522.
(3) [1901] A.C., 102.

That is what BRETT, L.J., said in *Ex parte Blain; In re Sawers*(1) and, in my opinion, that is good law to-day in England and with a certain modification is probably good law in India. Meanwhile, the matter had arisen on several occasions in Calcutta as to whether a man could be adjudicated a bankrupt, because of the act of some person whom he left in charge of his business, namely, a munim gumastha or a quasi partner with the authority of an agent to act for his fellow partners; and, so far as the High Court of Calcutta is concerned, the matter came to a head in the case of *In re Dhunput Singh*(2) which was decided in the year 1893 by a Bench consisting of SIR COMER PETHERAM, C.J., PRINSEP and PIGOT, JJ. In that case there was a pronouncement of Mr. Justice TREVELYAN, which lends colour to the suggestion that the act of an agent in departing with intent to defeat creditors was always, as a matter of course, to be treated as a departure by the principal on the ordinary principles of agency, and that view was definitely rejected by the Court very largely on the authority of the English cases. The learned Judge who deals most clearly with the matter is PIGOT, J. At page 795 of the Calcutta Reports, he says:

"I think the general proposition laid down by BRETT, L.J., in *Ex parte Blain*; *In re Sawers*(1) only affirms, and is intended to affirm, the rule stated before by Lord TENTERDEN:—'I think a man cannot commit an act of bankruptcy by a particular act of his agent which he has not authorized, and of which act he had no cognizance.' This general rule is, I apprehend, applicable in cases outside those of the class with which we are here concerned and it seems to me absolutely to govern this case. There are, therefore, two reasons why the acts of Panna Lal in this case, assuming them to amount, so far as he personally was

(1) (1879) 12 Ch. D., 522. (2) (1893) I.L.R., 20 Calc., 771.

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concerned, to a departure, etc., with intent, etc., cannot be acts of insolvency committed by his master, Dhunput Singh. The first is that the nature of the acts themselves, as described in the section, is incompatible with the possibility of their being committed by any one but the debtor himself, the departure must be his departure and the intent proved must be his intent. The second is that a man cannot commit any act of bankruptcy by an act of his agent which he has not authorized, and of which act he had no cognizance."

He then goes on to say that, in accordance with the principles stated above which he accepts as correct, he thinks he must pronounce that the earlier case in the Calcutta High Court of *In re Hurruck Chand Golicha*(1) decided by BROUGHTON, J., sitting in insolvency was wrongly decided. This very case of Dhunput Singh came up before the Privy Council and was dealt with in *Kastur Chand Rai Bahadur* v. *Dhanpat Singh Bahadur*(2) in a judgment which was delivered by Lord HOBHOUSE. Their Lordships adopted what I may call a middle course. They thought that PIGOT, J., had put the supposed rule much too broadly and they thought that it was impossible to say that there can be no case in which the act of an agent in closing down the business and absconding from the creditors could be treated as an act of the principal and they proceeded to say that there might be cases, of which that before them they clearly considered not to be one, in which a Court would be justified in certain circumstances in holding that the act of the agent in violation of the section of the Bankruptcy Act might and should be treated as the act of the principal and in the light of that, the expression of opinion by PIGOT, J., required modification and a much more flexible rule should be laid down. I am reading from page 35 in which, after setting out the view taken by

(1) (1880) I.L.R., 5 Calc., 605. (2) (1896) I.L.R., 23 Calc., 26 (P.C.).

PIGOT, J, and the High Court, their Lordships go on to observe as follows:—

"So understood, their Lordships cannot assent to the principle laid down by the High Court in *In re Dhanpat Singh*(1). The position of a gumastha differs in different cases. In some cases he may be little more, or no more, than an ordinary manager. In others he may represent the business so entirely that the beneficial owners have no practical control over it and are quite unknown to the customers. Mr. Justice PIGOT states the possible position of a gumastha with even more force than does Mr. Justice BROUGHTON [I think in *In re Hurruck Chand Golicha*(2).] He says: 'It often happens that a large business is carried on for years by a munim gumastha or by a succession of them, in the name of principals, who never are seen, or personally known, in connection with the business at all; sometimes in the name of family firms the members of which are constantly fluctuating from generation to generation, and of which firms it is or may be difficult to determine who are, at any given time, actually members."

Then their Lordships go on as follows:—

"Their Lordships think otherwise. They cannot hold that the creditors of firms exclusively managed by gumasthas have no remedy by way of insolvency, whatever the gumastha may do; though he may make fraudulent conveyances, promote fraudulent executions, or as in *In re Hurruck Chand Golicha*(2) levant 'leaving the creditors to find him or his master if they could.' And yet that consequence must follow if the principle laid down by the High Court in this case be the true one."

And then they go on to say:—

"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 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. They are

(1) (1893) I.L.R., 20 Calc., 671. (2) (1880) I.L.R., 5 Calc., 605.

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by no means prepared to say that Hurruck's case was wrongly decided; though the position of the gumasta there is not stated so fully as they would think desirable if the case were before them for decision. On the other hand they have no hesitation in agreeing with the High Court that Punna did not occupy such a position as to make the respondent liable to be declared insolvent on the ground of his conduct. The respondent appears to have been an active and responsible owner. His residence and head koti at Azimgunge were well known. He occasionally came to Calcutta and to the koti. When difficulties arose, Punna applied to him to meet them; and when payment was suspended, Punna openly, by himself or by his servants, told the creditors that his principal was coming, and that they must wait for his action. Under such circumstances, even if Punna himself had committed the acts alleged by the appellant, it would, in their Lordship's opinion, be wrong to hold that his acts were those of the respondent."

In that case a hint had been thrown out by Mr. Justice PIGOT in the High Court and then by way of encouragement of the suggestion by Lord Hobhouse in the Judicial Committee that the case was one which might aptly be met by further legislation, and I suppose that it was that suggestion which brought about finally the Presidency Towns Insolvency Act of 1909 long after. We have the desired legislative machinery in the explanation to section 9. That explanation runs as follows:—

"For the purpose of this section, the act of an agent may be the act of the principal, even though the agent may have no specific authority to commit the act."

I take that section to be an attempt by the draftsman to carry out broadly and in spirit the effect of the observations of their Lordships of the Judicial Committee in *Kastur Chand Rai Bahadur* v. *Dhanpat Singh Bahadur*(1), and I am content to deal with it on that footing.

(1) (1896) I.L.R., 23 Calc., 26 (P.C.)

Unfortunately in this country a misinterpretation, as we feel constrained to regard it, has been put upon that section, and, for this purpose, I wish to refer to two cases. One is the case *In the matter of Brijmohun Dobay*(1), a decision of Mr. Justice SALE sitting alone in insolvency. What Mr. Justice SALE says on this point is very brief and I will read his exact words. He deals first with a different point with which we are not concerned and then he goes on to say this :

"If I had taken another view of this point, the question would still remain as to whether the departure of the gumastha under the circumstances and under the instructions of the debtor did not constitute an act of insolvency."

Why indeed should it not? For, as is clearly expressed in the learned Judge's words, the departure of the gumastha was under the express instructions of the master. We are here concerned with a case where the departure of the agent is *ex hypothesi* an act done by himself without express authority of the principal. Then he goes on to say,

"The difficulties which arose in Dhanpat Singh's case are absent from this. (We do not know what those difficulties are, but one of them was clearly the absence of express instructions of the principal) and I am inclined to think that the departure of the gumasta did, under the circumstances, amount to an act of insolvency on the part of the debtor."

This is really a decision on the facts of that case, and we entirely agree with the learned Judge that the facts of that particular case were such that certainly under the section of the Presidency Towns Insolvency Act and also previously to it under the guidance of the judgment of the Privy Council in *Kastur Chand Rai Bahadur* v. *Dhanpat Singh Bahadur*(2), his was a perfectly correct determination of the matter before him.

(1) (1897) 2 C.W.N., 306. (2) (1896) I.L.R., 23 Calc., 26 (P.C.).

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The judgment of SALE, J., was brought to the notice of a Division Bench of this Court consisting of SPENCER, J., and PHILLIPS, J. There is no doubt, looking at the report *Kalianji* v. *The Bank of Madras*(1)—that those learned Judges regarded this decision of Mr. Justice SALE as laying down the sweeping principle that in all circumstances the act of an agent in closing down the principal's place of business must be treated to be the act of the principal and they treated that as being the existing law. They refer to English cases and they go on in these words :—

> "In India it has been expressly enacted as an explanation to section 4 of the Provincial Insolvency Act (that is the same in words as section 9 of the Presidency Towns Insolvency Act) that for the purpose of that section, which deals with acts of insolvency committed by a debtor, the act of an agent might be the act of the principal. It was accordingly held in *In the matter of Brijmohun Dobay*(2) that the departure of an agent from the place of business did constitute an act of insolvency on the part of the principal."

It did on the particular facts of that case, but unfortunately the learned Judges of the Madras High Court have taken to be a hard and fast rule of law what in truth and in fact was a decision on the particular facts of that particular case and the same fallacy undoubtedly vitiates the reasoning of Mr. Justice RAMESAM when he tried this case. He took the decision of the Calcutta Weekly Notes case and he took the decision of the Madras High Court as laying down a hard and fast rule which he was bound to respect, and without reference to the particular circumstances of the case, he thought he was in law bound to treat the act of the agent as inevitably the act of the principal, which is clearly incorrect.

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(1) (1916) I.L.R., 39 Mad., 693. (2) (1897) 2 C.W.N., 306.

In the light of these principles, Mr. Thanikachalam Chetti very wisely does not seek to uphold the decision of the learned Judge on this point. When we look at the affidavits it is clear that the facts of the case which are put by the creditors themselves before the Court constitute just the kind of facts which would enable the Court in its discretion to say in a particular case,

> "this is not the sort of case where we will do what the Act allows us to do, namely, treat the unauthorized act of the agent in closing down the business as in law being the act of the principal."

Mr. Thanikachalam Chetti does not therefore press us to remit the case back. On a further consideration in the light of these principles, he is content that the adjudication of Gopal Naidu should be quashed on the ground that circumstances exist here which do not permit of the Court saying that the act of Anantha Mudali in closing down the business could be treated on the materials before the Court as being necessarily in law the act also of Gopal Naidu. That is the sole ground on which we decide this case.

It was argued before the learned Judge on behalf of Gopal Naidu that he was in no circumstances accountable for the debts of the business which were relied upon by the petitioning creditors because it was said that he had before these debts were incurred executed a deed of dissolution of partnership and ceased to be a partner. That question has not been gone into before us. The learned Judge found against Gopal Naidu on that and Mr. Krishnaswami Ayyangar has not, in view of the other point on which he felt he was likely to succeed, touched that question. If, therefore, the matter ever comes before the Court in any other form, the whole subject is open and it is competent to Mr. Krishnaswami Ayyangar to contend that the learned Judge was wrong

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in forming the conclusion that the supposed deed of dissolution of partnership was a sham. It is open to Mr. Thanikachalam Chetti, on a proper view of the documents and the circumstances which were not put forward before, to say that the learned Judge is right and it was a sham. In the view we have taken it is not necessary for us to deal with that point at all and we are content to decide on the ground that has been argued before us.

The result will be that the appeal is allowed. Costs of the appeal of both sides on the Original Side scale will come out of the estate.

V. Varadaraja Mudaliar, Attorney for appellant.

Short Bewes & Co., Attorney for respondent.

N.R.

APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., Chief Justice and Mr. Justice Viswanatha Sastri.

1925, August 24.

GANDHA KORLIAH (PLAINTIFF), APPELLANT

v.

JANOO HASSAN (DEFENDANT), RESPONDENT.*

Sections 32, 56 *and* 65, *Contract Act* (*IX of* 1872), *Charterparty —Impossibility of voyage—Advance freight paid, right to recover.*

Advance freight paid by a shipper to a shipowner under a charterparty can under the Indian Contract Act be recovered back on the frustration of the venture, owing to circumstances which were beyond the control of the parties, and which they had not warranted not to exist. *Sivanandam Chettiar* v. *Surayya*, (1925) I.L.R., 48 Mad. 459 and *Boggiano & Co.* v. *The Arab Steamers Co., Ltd.*, (1916), I.L.R., 40 Bom. 529, followed.

Quære: Whether a chartered ship is a common carrier?

ON APPEAL from the judgment of the Honourable Mr Justice WALLER passed in the exercise of the Ordinary.

* Original Side Appeal No. 83 of 1924.