APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

1932

Nov. 29.

M.S.M.M. CHETTYAR FIRM

v.

P. MOODALIAR AND ANOTHER.*

Insolvency—Notice of suspension of payment—Strict proof of particulars—Notice of inability to pay—Notice praying for time—Presidency Towns Insolvency Act (III of 1909), s. 9 (g).

The proof of the commission of an act of insolvency must be strict and precise. Where it is alleged that a debtor has given notice that he has suspended or is about to suspend payment of his debts, the time, place and particulars of the notice should be accurately specified. The notice of suspension of the payment of debts must be a specific and deliberate act on the part of the debtor, and the suspension, actual or intimated, must apply to all the creditors. It is something different from a notice of inability to pay his debts.

Clough v. *Samuel*, (1905) A.C. 442—*followed*.

The petitioning creditor demanded from the debtor the immediate payment of a mortgage debt. In reply the debtor admitted the debt, but prayed for time to pay the debt when better trade conditions prevailed, and invited the creditor's assistance to enable him to carry on his business in the meantime.

Held, that the letter was not a notice of suspension of the payment of debts within s. 9 of the Presidency Towns Insolvency Act.

Hay for the appellants. The lower Court was wrong in holding that the notice coupled with the oral statements of the respondent was insufficient to constitute an act of insolvency under s. 9 (g) of the Presidency Towns Insolvency Act. In each case the circumstances surrounding the act of insolvency alleged must be considered, and in this case the notice taken together with the oral statements makes it clear that the debtor has definitely given notice that he was about to suspend payment of his debts. Though some of the oral statements were made prior to the three-month limit prescribed by s. 12 they will be relevant to explain the circumstances surrounding the notice.

* Civil Miscellaneous Appeal No. 53 of 1932 from the order of this Court in Insovency. Case No. 406 of 1931.

Certain acts of insolvency can, moreover, be deemed to be continuing acts of insolvency, as in Re *Alice Alderson* Ex-parte *Jackson* (1), which was a case of a debtor absenting himself.

Burjorjee (with him *Doctor*) for the 1st respondent. The petitioning creditor must allege specifically an available act of insolvency. It is not for the debtor to ask for particulars if the petition is vague. The lawyer's letter in this case merely asked for time to pay, or in the alternative suggested a business proposition, *viz.*, to hand over the business of the debtor to the creditor for him to carry on. The test to determine whether a debtor's letter amounts to notice of suspension of the payment of debts by him is to see what effect it produces on the minds of the persons to whom it is addressed. As expressed by Lord Robertson, in *Clough* v. *Samuel* (2), this is merely a case of a man who, faced by a balance sheet which means speedy ruin, tries to arrange with his more pressing creditors, and so staggers on.

Moreover, in this case there has been no actual suspension of the payment of debts to creditors generally, because right up to the day of the presentation of the petition the debtor has been meeting his obligations, and had, in fact, paid interest to the petitioning creditor himself on the previous day.

PAGE, C.J.—This appeal must be dismissed.

In paragraph (3) of the amended petition the appellant firm alleged :

"(3) That the said P. Dorasawmy Moodaliar *alias* P. D. Sawmy has within three months before the date of presentation of this petition committed the following act of insolvency, *viz.* :—

(*a*) That the debtor gave notice on several occasions orally and finally by his pleader's letter dated the 12th day

(1) (1895) 1 Q.B. 183. (2) (1905) A.C. 442, 448.

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of November 1931, a copy of which is attached hereto, gave notice that he has suspended or is about to suspend payment of his debts."

Now, the first matter that calls for comment is the form of this paragraph in the petition. It is to be observed that in paragraph 3 the appellant firm does not purport to set out separate acts of insolvency by reason of one or more notices that the debtor has suspended or was about to suspend payment of his debts, but sets out what it states to be "the following act (not acts) of insolvency," and that on several occasions orally, and finally by a letter of the 12th November 1931, the debtor gave notice that he had suspended or was about to suspend payment of his debts.

The proof of the commission of an act of insolvency must be strict and precise, and where it is alleged that a debtor has given notice that he has suspended or is about to suspend payment of his debts, the time, place and particulars of the notice should be accurately specified. It is true that no formal objection appears to have been taken to the vagueness of the allegations in paragraph (3) of the petition, but in my opinion it is incumbent upon the Court to scrutinise with meticulous care the evidence which is led in support of so inadequately defined an act of insolvency. What is meant by the words in s. 9 (g) of the Presidency Towns Insolvency Act "if he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts" is explained in *Clough* v. *Samuel and others* (1). Lord Robertson observed that

"the suspension of payment of his debts is a specific and deliberate (in the sense of intentional) act of the debtor,

(1) (1905) A.C. 442 at p. 448.

and the suspension, actual or intimated, must apply to all the creditors. It is something different from and over and above inability to pay. It is one of the several courses among which a debtor may elect when he finds himself insolvent. A man faced by a balance sheet which means certain and speedy ruin may try to arrange with his more pressing creditors, or he may put off the evil day and stagger on, leaving the stoppage of his career to be brought about by the action of others. Either of those courses is different from suspending payment of his debts.

"It is, of course, entirely consistent with this view that the question whether notice of suspension has been given must depend on the import of what was said or written and is relied on as notice."

It is common ground that the act of insolvency alleged in paragraph (3) (*a*) of the petition is to be found first and foremost in a letter written on behalf of the debtor by his pleader on the 12th November 1931. The letter runs as follows:

"*12th November* 1931.

"E. HAY, Esq.,
Advocate for M.S.M.M. Chettyar Firm,
Rangoon.

"Dear Sir,

"My client Mr. P. Dorasawmy Mudaliar has placed in my hands your letter of the 10th instant (delivered to him on the following day) with instructions to reply thereto as follows:

"My client admits owing Rs. 70,000 and balance of interest on the mortgage. It was agreed between the parties in 1930 that the exhorbitant rate of interest, *viz.*, Rs. 1-3-0 per cent per mensem, charged in the mortgage for such a large sum as Rs. 70,000 should be reduced to Re. 1 per cent *per mensem*. Your client in part performance of the said arrangement took a pronote from my client for Rs. 12,000 charging interest thereon at Rs. 1-3 per cent per mensem and gave credit for the said amount in the mortgage account. No payment was actually made towards the principal amount of Rs. 70,000 due under the mortgage and the payment referred to in your letter under reply is only a paper adjustment. Though your client was repeatedly informed of the arrrangement to accept

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interest on the mortgage debt at the agreed rate of Re. 1 per cent per mensem he has been putting off the matter from time to time.

"It is true that my client has not paid interest for a few months. Owing to the depression in trade and more especially in the printing trade my client has found it difficult even to pay his employees and meet taxes regularly. It is no surprise that in these hard days my client has been unable to pay interest. My client has been paying interest amounting to Rs. 800 and odd regularly every month for the past three years on the mortgage and it is only when it became impossible to continue any longer that he had very reluctantly postponed payment.

"Under the circumstances my client desires to have at least six months' time to pay up all the arrears of interest and if possible even to settle up the mortgage debt entirely.

"If your client is unwilling to allow any time he is welcome to take over the mortgage property worth over a lakh of rupees in settlement of the debt and if this is not feasible your client is also welcome to run the business and take away to account of his debt all the profits arising from the business.

"My client is not in the least inclined to either give trouble to your client or to cause any loss to him. If your client as threatened in your letter under reply resorts to legal proceedings he will be only wasting a large amount of money which he may not eventually realise.

"My client hopes to hear from your client soon as to which of the arrangements proposed above is agreeable to him so that no further delay need be caused in the matter.

"As regards insuring mortgage property my client is negotiating with some fire insurance companies and as soon the insurance is effected the policy will forthwith be forwarded to your client.

"In conclusion I may add that on the very day you were instructed to write the letter under reply your client received from mine Rs. 950 towards interest account.

Yours faithfully,

(Sd.) P. C. S. PILLAY."

In my opinion it cannot be held that the petitioning creditor reading this letter would come to the conclusion, if he were a reasonable man, that

by sending it to him the debtor specifically and deliberately intended to give notice to the petitioning creditor that he had either actually suspended or intended to suspend payment of the debts due to his creditors generally. The letter was written in answer to a demand by the learned advocate on behalf of the petitioning creditor that the debtor should forthwith pay the debt due on a mortgage to the petitioning creditor. The impression which this letter leaves upon my mind is not that the debtor had suspended or intended or was about to suspend payment of his debts that were due to his creditors generally, but that he intended to carry on his business as best he could, and was praying the petitioning creditor to give him time until better trade conditions might ensue when he would be able to pay the debt due to him. The whole tenor of the letter, to my mind, indicates that hard times have come upon the debtor, that he recognises that he owes some Rs. 70,000 to the petitioning creditor and that he is bound to pay that sum to him. At the same time the debtor, in my opinion, by this letter is inviting the petitioning creditor to assist him so far as he could in carrying on the business, and thereby liquidating the petitioning creditor's debt.

It is only necessary to refer to one or two passages in the letter to illustrate the view that I take of it. In the last paragraph the debtor stated that before the letter of demand to which the letter under consideration was an answer had been written he had paid a sum of Rs. 950 towards interest on the mortgage. Whether that statement was true or not is immaterial. It is an indication that the debtor wanted to impress upon the petitioning creditor that he was doing what he could to liquidate the debt which he owed to the petitioning creditor.

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In the preceding paragraph the debtor states that he is negotiating with certain insurance companies in respect of the renewal of the insurance upon the property which is the subject-matter of the mortgage. Whether he was doing so or not is also immaterial, the point being that such a statement is quite out of place in a specific and deliberate notice which is sent by a debtor to his creditor that he is about to suspend payment of his debts; for if such was the tenor of this letter the debtor would not be concerned any longer to reinsure the premises. It is, of course, true that in considering whether a particular statement amounts to a notice of suspension within s. 9 (*g*) of the Presidency Towns Insolvency Act the surrounding circumstances leading up to the statement ought to be considered; but unless the statement itself is capable *per se* of conveying the intention that the debtor has suspended or intends to suspend or is about to suspend payment of his debts, it is unnecessary to consider the surrounding circumstances. In support of this view I refer to the observations of Lord Halsbury in *Clough* v. *Samuel and others* (1) where his Lordship observed:

"I think he had no intention of giving notice that he intended to suspend payment, either in express words or in anything he said, from which an ordinary business man would infer that what Spyer said on his behalf, or what he said himself, was a notice of intention to suspend payment of his debts. I daresay a business man would infer that he was likely to do it, or perhaps that he was likely even to become bankrupt, but he would infer that from the circumstances and not from anything said by either Spyer or Reis."

So in the present case, in my opinion, if the petitioning creditor came to the conclusion from a

(1) (1905) A.C. 442 at p. 445.

perusal of the letter of the 12th November 1931 that thereby the debtor intended to give notice that he was about to suspend payment of his debts to his creditors generally, he would have reached that conclusion not because it was warranted by the language in which the letter was couched, but because he would expect the debtor to suspend payment of his debts by reason of what had happened before the letter was received.

I think that this is a case in which a man in great financial difficulties was trying to arrange with one of his more pressing creditors, and that by the letter under consideration he did not intend to give notice that he had suspended or was about to suspend payment of his debts to his creditors generally.

Now, as regards the oral notices of which evidence was led, apart from the vague allegations which were set out in that behalf in paragraph 3 (*a*) of the petition, it is necessary to bear in mind that the oral notices to which the agent of the appellant firm and a clerk of the firm deposed were not mentioned to the learned advocate of the petitioning creditor before he was instructed to write the letter of the 10th November 1931. Why not? If the statements were made, and the impression created by those statements upon the mind of the petitioning creditor was that for months before the letter was written the debtor had given him deliberate and specific notice that he had suspended or was about to suspend payment of his debts, and if any reliance had been placed by the petitioning creditor upon the alleged oral notices, I cannot help thinking that the particulars of these oral notices of suspension would have been set out in the petition upon which the order of adjudication was sought.

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In the second place it is to be borne in mind that the agent of the appellant firm who was called as a witness stated :

"*Q.*—When he told you that he will not be able to pay any creditors did you understand that he was going to stop his business?

"*A.*—I could not infer from that that he was going to stop his business"; and again

"*Q.*—Did he ever tell you or lead you to infer that he will not be able to carry on his business?

"*A.*—How can I express my own attitude of mind? He showed me his books and explained to me that his business was not doing so well as before."

The learned Judge in his judgment did not specifically find whether or not any particular statements which might amount to a notice of suspension were made; but in the circumstances obtaining in the present case I do not think it necessary that the case should be remanded in order that a finding upon that matter should be recorded. For the reasons that I have stated it does not appear to me that it could reasonably be contended that the effect of any of the alleged notices referred to in the evidence was that by them the petitioning creditor was given to understand that the debtor had suspended or was about to suspend payment of his debts to his creditors generally. Further, the testimony of the agent of the appellant firm and of the clerk of the firm in that behalf does not prove to my satisfaction that the statements to which they deposed would amount to an available act of insolvency.

The learned advocate for the appellant firm referred to the evidence of the agent of the appellant firm in which he stated

"the debtor said 'I cannot pay, don't worry me. Take away all the machinery, key and all therein.' I was to take them for the mortage due. He did not tell me anything about paying

other creditors. I infer that he must have made this offer with a view to rid himself of the worry which I was giving him in demanding payment of interest."

In order that such a statement, even if it amounted to a notice of suspension, should be an available act of insolvency, it must have been made within three months before the presentation of the petition, that is, within three months before the 26th November 1931.

I am not satisfied upon the evidence that this statement was made within the period limited by law in order to make such a statement an available act of insolvency. Moreover such a statement would not amount to a deliberate and intentional notice on behalf of the debtor that he had suspended or was about to suspend payment of his debts to his creditors generally.

The second statement is:

"My business became dull. I am unable to pay you, so take this. I am even unable to pay my employees."

The witness added:

"I think he said this in August or September."

There again I am not satisfied that the statement was made within three months before the presentation of the petition.

The third statement was to the following effect:

"I have already told you I am unable to pay you. You may do your worst."

In my opinion that statement in the circumstances cannot be regarded as a notice of suspension within the meaning of s. 9 (*g*) of the Presidency Towns Insolvency Act.

The fourth statement is:

"*Q.*—But he went on repeating that he will not be able to pay any of the creditors?

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"*A.*—I think he expressed so on two or three occasions after August.

"*Q.*—When he told you that he will not be able to pay any creditors did you understand that he was going to stop his business?

"*A.*—I could not infer from that that he was going to stop his business. In fact I found that he was carrying on the business."

It is clear to my mind that such a statement could not be regarded as a deliberate and intentional notice by the debtor that he suspended or was about to suspend payment of his debts to his creditors generally.

The fifth and last alleged statement was made to the clerk Pillay, but that statement, in my opinion, did not amount in itself to a notice of suspension; nor do I think, made as it was to a clerk of the petitioning creditor, it was intended to be a deliberate notice of suspension given by the debtor to the petitioning creditor.

For these reasons, in my opinion, there is no substance in this appeal, which must be dismissed.

As regards costs, the debtor is entitled to ten gold mohurs a day, that is, Rs. 850 for the hearing of the petition, and ten gold mohurs for the hearing of the appeal. As regards the order of the Trial Court, that the Diamond Playing Card Company should receive ten gold mohurs as costs, we think that neither in the Insolvency Court nor in this Court is the Diamond Playing Card Company entitled to any costs. The order of Das J. will be varied to that extent.

MYA BU, J.—I agree.