## APPELLATE CIVIL.

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

1935

*Mar.* 20.

# C.A.P.C.S. CHETTIAR FIRM

*v.*

# V.V.R. CHETTIAR FIRM.*

*Insolvency—Notice of suspension of payment—Clarity and precision of statements essential—Petition the foundation—Verifying affidavit no part of petition—Purpose of affidavit—Suspension of payment and inability to pay, distinction—Presidency-Towns Insolvency Act (IV of 1909), ss. 9 (g), 13 (1).*

In a petition to adjudicate the appellant firm insolvent the respondents, who were creditors, set out the act of insolvency as being "that the debtors have given notice to the petitioners as well as to their other creditors that they have suspended or are about to suspend payment of their debts." The verifying affidavit of their agent contained the following statement: "I say that the debtors' manager and *karika* further told me that they were not in a position o pay in full to their creditors."

*Held*, that (1) the act of insolvency alleged in the petition was not in the form required by law, and was not couched in terms sufficiently clear and precise to be the basis of an insolvency petition or to justify the Court in passing an order of adjudication on a petition of which it was the sole foundation;

*A.M.M. Murugappa Chettiar* v. *N. C. Galliara*, I.L.R. 12 Ran. 150; *M.S.M.M. Chettiar Firm* v. *P. Moodaliar*, I.L.R. 11 Ran. 96—*followed.*

(2) the verifying affidavit forms no part of the petition which itself must contain clear and precise allegations of fact upon proof of which the Court can adjudicate the debtors. The operative document is the insolvency petition, not the affidavit the purpose of which is to prevent reckless allegations being made in the petition.

(3) assuming that the allegations in the affidavit could be considered by the Court in the circumstances of the case they did not amount to a notice of suspension of payment by the debtors. Suspension of payment is something different from inability to pay;

*Clough* v. *Samuel*, (1905) A.C. 442; *Crook* v. *Morley*, (1891) A.C. 316; *In re A Debtor*, (1929) 1 Ch. 362; *Ex parte Oastler*, 13 Q.B.D. 471—*referred to.*

The evidence showed that the appellant firm intended to pay first the pressing demand of Government revenue out of the sale proceeds of paddy in their hands, that they had arranged with their more pressing creditors by offering them additional security, and were trying to struggle on until the price of paddy improved. *Held*, that this did not amount to a notice of suspension of payment of debts.

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* Civil Misc. Appeal No. 181 of 1934 from the order of this Court on the Original Side in Insolvency Case No. 162 of 1934.

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*Hay* (with him *Krishnasawmy*) for the appellants. The proof of the commission of an act of insolvency must be strict and precise. The petition here is defective, and does not disclose any available act of insolvency. A notice by a debtor that he has suspended or is about to suspend payment of his debts must be a clear and deliberate act, and particulars thereof must be alleged. A notice of suspension of payment of one's debts is something over and above mere inability to pay.

*M.S.M.M. Chettiar Firm* v. *P. Moodaliar* (1) ; *A.M.M. Murugappa Chettiar* v. *N. C. Galliara* (2) ; *Narain Das* v. *Chimman Lal* (3) ; *Clough* v. *Samuel* (4).

*Kalyanwalla* for the respondents. This case is distinguishable from the *M.S.M.M. Chettiar*'s case where the particulars were meagre. The affidavit annexed to the petition discloses the act of insolvency with sufficient clearness, and the affidavit should be read as part of the petition. If further particulars were needed it was the duty of the appellants to have asked for them.

Where a debtor says that he is unable to pay his debts in full, and asks his creditor to take lands by way of security, such a statement may amount to an act of insolvency. The question has to be determined in conjunction with the surrounding circumstances, and the point for determination is what effect the statement would have on the minds of the creditors. See *In re A Debtor* (5).

*Hay* in reply. An admission made by an insolvent that he is unable to pay his debts in full is not necessarily an act of insolvency sufficient to

(1) I.L.R. 11 Ran. 96.
(2) I.L.R. 12 Ran. 150.
(3) I.L.R. 49 All. 321.
(4) (1905) A.C. 442.
(5) (1929) 1 Ch. 362, 371.

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found a creditor's petition, though it may be the basis of a debtor's petition. Such an oral statement is not notice that the debtor has suspended or is about to suspend payment of his debts generally as understood by the Presidency-Towns Insolvency Act. *Ex parte Oastler. In re Friedlander* (1).

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

The proceedings out of which the appeal arises were founded upon a creditor's petition for an order adjudicating the appellant firm insolvent. A number of alleged acts of insolvency are set out in the petition, but all except one have been rejected by Braund J., and the only alleged act of insolvency which now remains is contained in paragraph 3 (*b*) of the petition, and runs as follows :

"(*b*) That the debtors have given notice to the petitioners as well as to their other creditors that they have suspended or are about to suspend payment of their debts."

Now, in two recent judgments of an appellate Bench of this Court [*M.S.M.M. Chettiar Firm* v. *P. Moodaliar and another* (2) and *A.M.M. Murugappa Chettiar* v. *N. C. Galliara and others* (3)], it has been laid down that

"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"

[*M.S.M.M. Chettiar Firm* v. *P. Moodaliar and another supra* at p. 98].

The petition in the present case was filed after the publication of these two judgments. We do

(1) 13 Q.B.D. 471. (2) (1933) I.L.R. 11 Ran. 96.
(3) (1934) I.L.R. 12. Ran. 150.

not propose to re-state once more what is but a commonplace of the law of insolvency. We think that our duty on this appeal is not to repeat the law but to act upon it; and we hold that the act of insolvency alleged in paragraph 3 (*b*) of the petition is not in the form required by law, and is not couched in terms sufficiently clear and precise to be the basis of an insolvency petition or to justify the Court in passing an order of adjudication on a petition of which it is the sole foundation.

On behalf of the respondents it was contended that the Court ought to treat the affidavit filed in support of the petition as forming part of the petition; and while it was conceded that the allegation of an act of insolvency as set out in paragraph 3 (*b*) of the petition was inadequate, that the allegations in the petition could be supplemented by the allegations in the verifying affidavit. In my opinion that is not the law. The operative document by which proceedings in insolvency are commenced is the insolvency petition and the object of the Legislature in providing under section 13 (*1*) that

"a creditor's petition shall be verified by affidavit of the creditor, or of some person on his behalf having knowledge of the facts,"

was to prevent proceedings in insolvency being launched against a debtor recklessly and unless the allegations in the petition are affirmed on oath by the creditor or some other person with knowledge of the facts. Indeed, the verifying affidavit may be quite general in its terms, and forms no part of the petition which must contain clear and precise allegations of fact upon proof of which the Court would be enabled and entitled to adjudge the respondent an insolvent. For these reasons we hold, as with

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deference we think that the learned Judge in insolvency ought to have held, that paragraph 3 (b) of the petition is not in the form required by law, and as there is no other subsisting allegation of an act of insolvency before the Court the petition must be dismissed.

As, however, we are differing from the learned Judge in insolvency who has delivered an elaborate judgment upon the case as a whole, we think it advisable to state the opinion that we have formed upon the merits of the case. Assuming, therefore, (contrary to the view that we hold) that the allegations in the verifying affidavit ought to be treated as forming part of the petition the learned advocate for the respondents properly and inevitably conceded that the only allegation of an available act of insolvency in the verifying affidavit, which was sworn by the agent of the petitioning creditors, is contained in clause 8, which runs as follows:

> "I say that the debtors' manager and *kartha* further told me that they were not in a position to pay in full to their creditors."

Now, such a statement may or may not amount to a notice that the debtor had suspended or was about to suspend payment of his debts within section 9 (*g*) of the Presidency-Towns Insolvency Act [*Ex parte Oastler. In re Friedlander* (1); *John Crook* v. *I. & R. Morley* (2); *Clough* v. *Samuel and others* (3) and *In re A Debtor* (4)].

It depends on the circumstances in which the statement was made. As was pointed by Greer L.J. in *In re A Debtor* (4)

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(1) 13 Q.B.D. 471.
(2) (1891) A.C. 316, 324.
(3) (1905) A.C. 442.
(4) (1929) 1 Ch. 362, 371.

"you are not confined to the literal meaning of the words used in order to ascertain whether they do amount to a notice that a debtor is about to suspend; a statement by a debtor that he cannot pay his debts may in one set of circumstances be merely a statement that he cannot pay, but in another set of circumstances, to which you are entitled to look for the purpose of interpreting words that are not words of art, it may clearly mean to any ordinary human being listening to it, that he is stating that he has not the intention of paying his debts when they become due."

Again, in *John Crook* v. *I. & R. Morley* (1) Lord Watson observed that

"a declaration of his inability to pay his debts may be made by a debtor to one or more of his creditors, in terms and under circumstances which do not suggest that he means to stop payment of his debts as they fall due. But that such a declaration may be couched in language which clearly implies that the debtor means to pay nobody in full, and to place his assets at the disposal of his creditors, does not appear to me to be doubtful."

In *Clough* v. *Samuel and others* (2) Lord Robertson observed:

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

Now, even if it was open to the Court in the present case to consider the merits of the petition with the allegation in clause 8 of the verifying

(1) (1891) A.C. 316, 324. (2) (1905) A.C. 442.

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affidavit inserted in lieu of paragraph 3 (*b*) of the petition, in my opinion the petition inevitably must fail. The present case shows how essential it is, if justice is to be done, that in alleging an act of insolvency under section 9 (*g*) precise particulars of what the debtor wrote or said should be set out in the petition. In the present case the course adopted by the respondent was that the agent of the petitioning creditors was called as a witness at the hearing of the petition, and in addition a number of assistants and clerks of other Chettyar firms gave testimony in support of the petition. With all due deference, as I appraise the evidence of these witnesses, it cannot reasonably be supposed that the appellant would intentionally and deliberately give notice of suspension to clerks or assistants who came to him in the circumstances to which they deposed, or that any creditor would reasonably conclude that he had done anything of the sort. As regards the statements alleged to have been made by the appellant to Chokalingam, the agent of the petitioning creditors, I cannot persuade myself having regard to the circumstances in which they were made that from anything that the debtor said Chokalingam was justified in inferring that the debtor was deliberately giving him notice that he had suspended or was about to suspend payment of his debts. Consider the position. The debtor, who is a Chettyar money-lender, by reason of the depression in the price of paddy found himself with large areas of paddy land on his hands. At the hearing of the petition he produced the title deeds of at least 1,500 acres of unencumbered paddy land in his possession, and it was stated that there were outstanding a considerable number of debts due to him from the cultivators. Of course, in his own interest and in that of his other creditors his

first and paramount duty was to allocate the proceeds of the sale of his paddy to the liquidation of the claims of the Government for revenue. The position in which he was placed is one in which many Chettyar money-lenders find themselves at the present time. So far from intending to suspend payment of his debts to his creditors generally, however, it appears to me that his intention was to "try to arrange with his more pressing creditors", and "to put off the evil day and stagger on" until the price of paddy improved, as in the event it has. In these circumstances when his more pressing creditors, who were for the most part Chettyar money-lenders themselves, asked him if he would liquidate their debts he pointed out to them as well as to Chokalingam that at the moment he was unable to pay their debts in full because he had to provide in the first instance for the most insistent and important of his creditors, that is the Government, which was claiming land revenue. He told them that in the circumstances most of his creditors were not pressing for payment, and that some of them had taken portions of his unencumbered immovable property as additional security, and were prepared to wait until better times should come. Meanwhile, with the proceeds of the paddy which had come into his hands he said that he proposed in the first instance to liquidate the claim of the Government for land revenue, and out of any surplus that remained to pay the debts of the other creditors.

According to Chokalingam, the agent of the petitioning creditors, the appellant told him in June on the occasion when he stated that the act of insolvency set out in clause 8 of the verifying affidavit was committed, that

"all the paddy had been sold, that he had utilised part of the sale proceeds for paying revenue, that he had arrears of revenue

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to pay, and that he could not pay me anything but that he would give me a mortgage of lands. I said that we did not want any mortgage but that we wanted only cash. He said that he did not pay any money to the creditors to whom he owed, and that he could not pay me also. I told him that we wanted only cash and not a mortgage. He still had arrears of revenue to be paid. He said that he still had to pay arrears of revenue. He did not tell me from where he was going to pay the arrears of revenue. He said that he had no money in hand just then, and that he had not paid any of his creditors. That is all he said about his other creditors."

In my opinion, in the circumstances in which those statements were made, no reasonable creditor would assume that in making these statements the debtor had specifically and deliberately given notice that he had suspended or was about to suspend payment of his debts to each and every of his creditors. If he had given notice in that sense the statement would not have been true, because, having arranged with his other creditors that they would not press for their debts, he was in fact allocating the proceeds of the sale of the paddy towards paying the debt of one of his creditors, namely, the Government, which was claiming that its revenue should be paid. The appellant himself stated that he did not tell Chokalingam

"I have no cash. I did not pay cash to my other creditors. I could not pay you! Why should I say so if I own some other property? I did not tell him that I did not pay my other creditors. As I have given security to my other creditors they were not pressing me."

I have no doubt that what in fact happened, when the agent of the petitioning creditors and the assistants or clerks of other creditors came to the insolvent after the fruits of the harvest had been

gathered in, and asked the appellant what steps he was prepared to take to liquidate their debts, was that he told them that the money which he had in his possession must be applied in the first instance towards the payment of the land revenue, that at the moment he could not pay them what he owed them, but that when he had paid the revenue he would pay them what he could out of any surplus that there might be left. It may be that the petitioning creditors' agent then said to him " well, you say you cannot pay me just now. Have you been paying the other creditors ? And that the appellant replied " No; I have not paid the other creditors " ; meaning that he was not treating the other creditors more favourably than he was treating the respondent. But assuming that it is competent for the Court to consider clause 8 of the verifying affidavit on its merits, and that the statement alleged therein was made it appears to me, having regard to the surrounding circumstances with all respect to be plain that it was not intended by the appellant thereby to give notice that he had suspended or was about to suspend payment of his debts. The finding of the learned trial Judge is to the following effect :

" In those circumstances and having regard to the evidence as I have heard it, I have little doubt that in substance the evidence of Chokalingam Chettyar and Walliappa Chettyar is correct, and that some verbal intimation was given to them by Shanmugam Chettyar at the respective interviews to which they have referred to the effect, not only that the debtor firm was unable to pay their particular debts, but that the debtor firm had also failed to pay their creditors in general as their debts had fallen due."

The learned Judge then proceeded to hold " that the words spoken amounted to a notice that the debtor ' had suspended payment of his debts.' "

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The above finding, which does not purport to embody any definite statement in fact made by the appellant, is something different from what the finding would have been if it had been held that the allegation in clause 8 of the verifying affidavit had been made out. But, with all respect, I am of opinion that the facts of the case as disclosed in the evidence would not justify a finding such as that at which the learned Judge in insolvency arrived, and that this insolvency petition also fails on the merits.

For these reasons the appeal will be allowed, the order from which the appeal is brought set aside, and the petition dismissed. The appellant is entitled to his costs in both the Courts, advocate's fee in each Court, ten gold mohurs.

MYA BU, J.—I agree.

## APPELLATE CIVIL.

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

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*Apl.* 2.

## A. R. M. JAMAL

*v.*

## ALBERT JOSEPH & SONS.*

*Negotiable Instruments—Accommodation note—Holder after maturity—Deposit of note by payee with creditor as security—Subsequent endorsement of note to creditor—Creditor's right to recover full amount from drawer—Common-law rights of a holder by way of lien—Bills of Exchange Act (45 & 46 Vict. c. 61), s. 27 (3)—Negotiable Instruments Act (XXVI of 1881), s. 59, proviso.*

The defendants drew three promissory notes for Rs. 600 each in favour of *A* for his accommodation. The notes were payable some four months after the respective dates of execution. After the maturity of these notes *A* who was indebted to the plaintiff to the extent of about Rs. 1,650 deposited the notes with the plaintiff and subsequently endorsed them to him. The latter sued the defendants for the full amount due thereon.

*Held*, that the plaintiff did not hold the notes merely as security but that he was the indorsee thereof in good faith and for consideration, and therefore

* Civil First Appeal No. 163 of 1934 from the judgment of this Court on the Original Side in Civil Regular No. 191 of 1934.