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or Hashim Ali, or that confidence was reposed in them by Sheopal so as to bring the case within section 16 of "The Indian Contract Act, 1872," which was relied upon in the argument for the respondent. There is only Sheopal's statement that he had confidence in them, which is not sufficient proof of it. Their Lordships will, therefore, humbly advise Her Majesty to reverse the decree of the Additional Judicial Commissioner, to dismiss the appeal to her with costs, and to affirm the decree of the District Judge. The respondent will pay the costs of this appeal.

*Appeal allowed.*

Solicitor for the appellants: Mr. J. F. Watkins.

Solicitors for the respondent: Messrs. T. L. Wilson & Co.

C. B.

P. C. \*  
 1895  
 May 2 & 3.  
 June 29.

KASTUR CHAND RAI BAHADUR (APPELLANT) v. DHANPAT  
 SINGH BAHADUR (RESPONDENT.)

[On appeal from the High Court at Calcutta].

*Insolvency—Gomashta—Creditor's petition against trader alleging act of insolvency through his gomashta—Insolvent Act (11 & 12 Vic., clause 21), section 9—"Departure from place of business, with intent"—How the conduct of gomashta may amount to an act of insolvency by the principal.*

A principal employing a *gomashta* to carry on a trade, within the local limits of the High Court's jurisdiction, may, in some cases, be adjudged to have committed an act of insolvency within the meaning of section 9 of the Statute 11 and 12 Vic., clause 21, in consequence of the *gomashta's* act, without the principal's having specifically authorized it, or having had cognizance of it; and this might be applied upon a *gomashta's* having departed from the usual place of business with intent to defeat, or delay, the firm's creditors.

Not every *gomashta* stands, in this respect, in the same relation to his employer, there being a difference in the degree of control exercised by different owners. The *gomashta* may be only an ordinary manager, or he may represent the firm entirely. It is a question of fact in each case whether the *gomashta* occupies such a position that the principal stands or falls by his acts, and whether the *gomashta's* departure from the place of business, with the above intent, shall or shall not be, by imputation, the act of the principal, bringing section 9 into operation against the latter. Here a *munib gomashta* in charge of the business was alleged to have so departed;

\* Present: LORDS HOBHOUSE, MORRIS and DAVEY, and SIR R. COUCH.

but the owner of it, though at the time absent, was usually active and responsible in it.

The firm's payments had been suspended by the *gomashita*. But under the Indian Statute that is not an act of insolvency. The *gomashita* had withdrawn to his own apartment in the house occupied by the firm, but how this would defeat, or delay, creditors, some of whom visited him there, was not shown. Other acts before the arrival of the principal were done, but none amounted to departure with intent, or to departure at all.

*Held*, that the *gomashita*, even if he had departed from the place of business with the intent to defeat, or delay, creditors, was not in such a position as that he had authority rendering his principal liable to be adjudged insolvent.

The principle in the decision of *In re Hurruckhond Golicha* (1), which was that the act of a *gomashita*, his authority flowing from his general position, may in some cases be taken as the act of his principal rendering him liable within the Statute, was correct.

In the present case their Lordships agreed with the High Court that the *gomashita* did not occupy such a position as to make his principal liable to be adjudged insolvent on the ground of his (the *gomashita's*) personal conduct.

APPEAL from a judgment and order (2) (23rd May 1893), reversing a judgment and order (20th March 1893) of the Judge of the Court for the Relief of Insolvent Debtors, held under the 11th and 12th Vic., clause 25, and section 18 of the Letters Patent of 1865.

On the 16th February 1893, on the petition of the appellant, who carried on business in Calcutta under the style of Bansi Lal Ahir Chand Rai Bahadur, the respondent, Rai Dhunput Singh Bahadur, who carried on business as a banker in several places, having a *koti* in Calcutta, another at Azimghar, where he resided, and others in other places in Bengal, was adjudged insolvent under section 9 of the Indian Insolvency Act, 11 and 12 Vic., clause 21. The petitioner was the holder of *hundis* accepted by Dhunput Singh to the value of Rs. 15,000. The whole question now raised was whether or not the acts of Dhunput Singh's *munib gomashita* at the Calcutta *koti*, on the 6th, 7th, and 8th February, constituted a departure with intent to defeat or delay creditors, attributable by law to his principal, and within the meaning of section 9 of the Statute. This comprised whether there had been

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(1) I. L. R., 5 Calc., 605.

(2) *In re Dhunput Singh*, I. L. R., 20 Calc., 771.

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a departure at all, whether there had been such an intent, and whether the consequences were the same to Dhunput Singh, owing to the general authority given by him to his agent to conduct his business, as if he had committed the acts himself.

Section 9 enacts that "if any person, who would be deemed a trader liable to become bankrupt according to the bankruptcy laws passed in 6 Geo. IV, and in 5 and 6 Vic., shall depart from within the limits of the jurisdiction of any of the Supreme Courts with intent to defeat, or delay, his creditors, or, with the like intent, depart from his usual place of business, or abode, within the said jurisdiction, it shall be lawful for any person to present a petition to the Court for the Relief of Insolvent Debtors, whereupon, and upon such petition being duly verified, it shall be lawful for the Court to adjudge that such person has committed an act of insolvency." The provision follows that it shall be lawful for the Court to revoke, or confirm, such adjudication.

The appellant's petition alleged that on the 6th February 1893, at about 9 P.M., being then liable on *hundis* and receipts amounting to a large sum, the respondent closed his place of business, No. 4, Shama Bye's Lane, which had since remained closed, and that his *muni*b and other *gomashtas* and servants departed on the 7th and 8th February, with intent to defeat and delay the firm's creditors; that on the 9th February, and subsequently, some of the *gomashtas* attended, but no business was carried on; and that on the 12th and 13th February, the respondent, who had come to Calcutta on the 11th of February, informed his creditors that he was insolvent, and made proposals as to the payment of his debts. On the 16th February, the adjudicating and vesting orders were made, and on the 17th, the respondent petitioned that these orders might be set aside. The respondent denied the closing of his place of business, and stated that Punna Lal, his *muni*b *gomashta*, had remained there ever since the 6th February, and had been accessible to all the respondent's creditors, as he himself had been since his arrival on the 11th February.

The Court gave judgment on the 20th March 1893, confirming the adjudication and vesting order. The proceedings, with the appeal that followed, in which a Bench (Petheram, C.J., and Prinsep and Pigot, JJ.) gave the judgment of the High Court, are reported

at p. 771 of I. L. R., 20 Calc. (1). The judgment and order of the Court below were reversed.

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The suspension of payment by the firm, which had occurred on the 6th February, not being an act of insolvency under the 11th and 12th Vic., clause 21, they dealt with the question of the application of section 9, and the effect of Punna Lal's acts on the 7th and 8th. The Court found, in effect, that he had not departed with intent within that section, and expressed the opinion that, to have brought the consequence of insolvency upon his principal, the *gomashta's* specific authority to commit the acts was required to be shown, and had not been shown. They dissented from the view in *In re Hurruckchund Golicha* (2) that such a *gomashta* had authority as the result of his general position. The judgments of the Judges, and the cases cited, will be found in the report above referred to.

On this appeal,—

Mr. *R. B. Finlay, Q. C.*, and Mr. *Boydell Houghton*, for the appellant.—The evidence showed that the banking business of the Calcutta *koti* was left by the respondent altogether in the hands of Punna Lal the *munib gomashtha*, the respondent having been absent from May 1892 till he arrived in Calcutta on the 11th February 1893. There had been no real dispute as to the firm having stopped payment on the night of the 6th February, and the acts of the *munib gomashtha* had been rightly held, in the Insolvency Court of first instance, to have been a departure from the place of business by the *gomashtha* representing the firm, with intent to delay the creditors, whom he was putting off until his master should return to Calcutta. On arriving, Dhunpat Singh ratified and approved his *gomashtha's* acts, and, on the 13th, admitted to his creditors that he was insolvent.

The evidence showed that Punna Lal was not upon the business part of the premises on the 7th and 8th February; the first floor was practically left; no one was in the offices; and it was not disputed that the cash-room door was locked. Witness after witness had described his going to the office on the 7th February and finding no one there. Jhao Lal Chobe went twice, so did

(1) *In re Dhunpat Singh*, I. L. R., 20 Calc., 771.

(2) I. L. R., 5 Calc., 605.

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Cuverji Hari Das, finding no one there, "though the *guddi* doors were open." On the 8th, creditors, or their agents, who had given their evidence, went again, some of them more than once, between 10 A.M. and 11 P.M., but all agreed that Punna Lal was not in the business premises on that day, and that they appeared to be deserted. Evidence on the respondent's behalf, to show that business had been carried on during those two days, had failed.

Nor did the business recommence. The only business transacted after the firm had stopped payment was handing over a few small sums, taking possession of the cash, and making, on the 12th February, a preferential payment to Punna Lal's son-in-law, of Rs. 15,000, which the respondent expressly authorized, though he then knew that he could not pay his debts without getting time from his creditors. These facts justified the finding that Punna Lal by remaining in the private part of the premises had departed from the place of business on the 7th and 8th February 1893. As to the intent with which he so acted, he admitted that he did not like to remain in the business part of the house, having no money to meet demands; and to some of the creditors, who were aware that he lived on the top floor, he stated that he could do nothing until the arrival of his master, with whom, however, he was in communication. The respondent admitted that he attended a meeting held on the 13th February, which was attended by one hundred to one hundred and twenty-five of his creditors, and that he made an offer of 8 annas in the rupee down, and 8 annas in twelve months. As he had not then the money to pay the first moiety, and the creditors were not satisfied, nothing further was done. For some days after this the respondent was negotiating for the assignment of his estate to the Official Assignee. Punna Lal retained his confidence. He was aware that he was insolvent. He was cognisant of, approved, and adopted the conduct of Punna Lal, which constituted the act of insolvency alleged. The High Court had reversed the decision of the first Court on insufficient grounds. The Judges in appeal were of opinion that the case of *In re Hurruckhund Golicha* (1), relied on by the lower

(1) I. L. R., 5 Cal., 605.

Court, which had been followed in later cases, was distinguishable upon the facts ; but that, if necessary, they ought to overrule it, upon the ground that the particular act of insolvency was one which was personal to a debtor, and could only be committed by the insolvent himself, or by an agent expressly thereunto authorized. The Appellate Court was, however, of opinion that Punna Lal had not departed from the place of business with the intent alleged, or at all. It was argued that on both these points the High Court was in error. The fact of departure was established ; it was not the law that the act of insolvency could only be committed by the debtor personally, or by his agent thereunto specifically authorized ; and the proper inference from the evidence was that the respondent had authorized, or ratified, the acts of Punna Lal, knowing himself to be insolvent, as the fact was. The payment on the 12th February was also an act of insolvency, with knowledge of his insolvency, and with intent to delay his other creditors. They referred to *Mills v. Bennett* (1), *Ex parte Mavor* (2), *Coiton v. James* (3), *Ex parte Blain*, *In re Swyers* (4).

Mr. R. B. Haldane, Q. C., and Mr. J. H. A. Branson for the respondent.—Two propositions were maintainable. First, that even if the *muniḅ gomashṭa* had departed from the respondent's usual place of business, with the intent attributed to him, no act of insolvency would have been established against the respondent by the *gomashṭa's* conduct. Secondly, that the *gomashṭa* had not in fact departed, with intent to defeat, or delay, the respondent's creditors, from the usual place of business, within the meaning of section 9 of the Statute 11 and 12 Vic., clause 21. As to the first of these : if there might be a degree of authority delegated to a *gomashṭa* by his principal which would enable the former to alter the status of the later by an act of this kind, it was not shewn by any evidence in this case that Punna Lal had authority to that extent. There was nothing to shew that he was empowered by the system, under which he carried on the business, to exercise such authority. There was no ground for imputing to the respondent that he had committed the act of insolvency which the section specified. The evidence shewing that Dhumput Singh personally

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(1) 2 M. &amp; S., 554.

(2) 19 Ves., 539.

(3) Moo. &amp; Mal., 273 ; 1 B. &amp; Ad., 128.

(4) L. R., 12 Ch. D., 522.

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superintended the business, and that he took active steps when he heard from his *gomashta* as to the state of affairs, was referred to.

As to the second proposition, the acts of Punna Lal had been rightly viewed by the Appellate Court. There was neither evidence of actual departure, nor of intent on his part to defeat or delay creditors. In connection with his having resorted to the upper storey of the house, leaving the business part of it, reference was made to the trader's conduct in *Vincent v. Prater* (1).

Mr. R. B. Finlay, Q. C., replied.

Afterwards, on the 29th June, their Lordships' judgment was delivered by

LORD HOBHOUSE.—The respondent in this case is or was a banker carrying on business in Calcutta and other places, and the appellant is a creditor who seeks a declaration of insolvency against him. The act of insolvency relied on in the petition is that on the 7th and 8th February 1893, the respondent's principal *gomashta*, Punna Lal, and other *gomashtas* and servants, departed and were absent from his place of business in Shama Bye's Lane with intent to defeat the respondent's creditors. Two defences are raised by the respondent: one being that no such act was committed by Punna Lal, and the other that Punna Lal's act is not the act of the respondent on which he can be adjudged an insolvent.

The appellant's petition was presented on the 16th February 1893, and was supported by affidavits on which the Judge in Insolvency, Mr. Justice Trevelyan, made an adjudication and a vesting order. The respondent immediately moved to set that order aside, and a great body of evidence was adduced by both parties. Except on minor and irrelevant points there was very little contradiction in the evidence, and the two Courts below, though they have drawn different inferences, are in agreement on every material point of pure fact.

The respondent's principal office, or *koti*, was, as his residence was, at Azimgunge, near Moorshedabad. He had divers other *kotis*, the largest in point of business being in Calcutta. It was managed by Punna as head *gomashta*. The house in which it

was conducted appears to have consisted of : first, a ground floor, on which were the *durwans* ; secondly, a first floor, where was the *guddi* or office in which the *gomashita* sat to transact business, the cash-room, and another small room ; and, thirdly, a second or top floor in some of the rooms of which Punna slept, took his meals, and performed his *puja*. When the respondent visited Calcutta, he also, if alone, used the top storey ; but, if his family were with him, he used some other house.

Late in the night of the 6th February, Punna decided that he must stop payment. Between one and two in the morning of the 7th he telegraphed to the head *gomashita* at Azimgunge : " Business stopped ; no payment to-day. Wire other *kotis* yourself." On the 8th a like telegram was sent to the same quarter, enquiring where the *Huzoor* (*i. e.*, the " Master ") was. In fact the respondent was then in Ajmere, and was making his way to Calcutta. He had been on a pilgrimage to Palitana, almost at the other extremity of India, whence he was re-called by telegrams from Punna, which began as early as the 27th January, and which gave an alarming account of his Calcutta affairs. He did not arrive in Calcutta till the 11th February.

After the 6th the banking business in Calcutta was stopped. But under the Indian Statute that is not act of insolvency ; the act alleged is that Punna departed from the place of business on the 7th and 8th February, with intent to defeat, or delay, creditors. There is no doubt that he locked up the cash-room ; that he left the *guddi* empty, though it was open ; and that he betook himself to his own living rooms in the top storey. There is however no evidence that he prevented creditors from getting to him if they wished it. The strongest evidence in that direction is given by two creditors : Cuverji and Premjee. Cuverji went up to the *guddi* twice on the 7th. It was empty, and the *durwans* told him that " We cannot make payments now, therefore you cannot see the Babus." On the 8th he was met on the ground floor with a like intimation. Premjee went to the house on the 7th and was going upstairs, when the *durwan* said : " Do not go upstairs, there is no one upstairs." On the 8th he went up to the *guddi*, which he found empty. Neither of these witnesses appears to have made any attempt to see Punna in his own rooms. Mr. Justice Trevelyan

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remarks on this evidence: "I doubt very much whether there was anything amounting to a stoppage of persons going up." "He" (Premjee) "may have been discouraged and did not go up in consequence of what was said to him, but there was not forcible stopping." On the other hand, two of the appellant's witnesses, Narain Das and Kandarpa, and three of the respondent's witnesses, Nobin Chunder, Radha Roman Shaha, and Kedar Nath Mozoomdar, all five being creditors or acting for creditors, saw Punna in his own rooms on the top storey at different times on the two critical days. Their Lordships agree with the High Court in thinking that, contrary to the opinion of Mr. Justice Trevelyan, it is impossible to hold that under these circumstances Punna departed from the place of business at all.

Even had there been more evidence of departure than there is, it is not shown how it could defeat, or delay, creditors. They were injured by the fact that the respondent did not supply Punna with funds to pay them; but Counsel were unable to explain in what way any one of them was debarred from pursuing any process available to him by the fact that Punna kept his own rooms instead of sitting in the *guddi*. It is the view of the High Court that nobody was or could be so debarred; and their Lordships agree with it.

That would be enough to dispose of the appeal. But there is another question which also goes to the root of the case, *viz.*, the question whether the conduct of the agent can result in an act of insolvency by the principal. On that question also the High Court has differed from the first Court. The effect of the High Court's decision is to disturb views of the law which have prevailed in Calcutta for some years. And as the point has been raised again in this appeal, their Lordships think it their duty to pronounce an opinion on it.

Mr. Justice Trevelyan considers it to be a settled principle that a person who leaves a *gomashtha* in charge of a business can by that *gomashtha* commit an act of insolvency. He refers to the case of *In re Hurruckhund Golicha* (1) which is said to be the earliest reported case upon the point, though not the earliest decision, and

(1) I. L. R., 5 Cal., 605.

to have been since taken as correctly expounding the law. In that case the trader, residing at Azingunge, carried on business in Calcutta by a *gomashita* who absconded. Mr. Justice Broughton, the Judge sitting in Insolvency, expressed his opinion thus :—

“The first question is, whether a trader who trades by a *gomashita* can be adjudicated an insolvent, if the *gomashita* commits an act of insolvency. If he cannot, there must be numerous cases in which native traders in this city cannot be adjudicated insolvents 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 *gomashita*, who has the fullest authority, and who carries on the whole business on his behalf. . . . It requires indeed no departure from the literal meaning of the words, to hold that when a trader has established a business through a *gomashita*, he departs from the place of his business, if his *gomashita* departs, and if he does not come himself or send some one else to carry on the business.”

The abstract principle of law thus decided is, that the act of a *gomashita* may be taken as the act of his principal within the meaning of the Statute. And the learned Judge thought that the facts of *Hurruck's* case (1) fell within the principle. But it is obvious that the application of the principle must depend upon the position and authority of the *gomashita*; and as Mr. Justice Trevelyan points out, great care must be taken in applying it.

The view of the High Court, which is stated by Mr. Justice Pigot, is that *Hurruck's* case (1) was wrongly decided; and that, this being the first occasion on which it has been challenged in appeal, it ought to be formally overruled. They lay down in broad terms “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.” Of course in a sense every act of an agent must have the authority of the principal in order to affect him. But the meaning of the learned Judges evidently is that for the act in question the agent must have specific authority, and that the authority cannot flow out of his general position, as Mr. Justice Broughton thought it might.

So understood, their Lordships cannot assent to the principle laid down by the High Court. The position of a *gomashita* 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

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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 *gomashta* with even more force than does Mr. Justice Broughton. He says: "It often happens that a large business is carried on for years by a *munib gomashta* 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." He has himself known a case in which a family owned a business for more than a century, the owners being counted by scores, and many of their *kotis* being managed by *gomashtas* whose office passed from father to son, as though it were hereditary. Yet even in such a case as that he thinks that the principle of *Hurruck's* case (1) would not be applicable.

Their Lordships think otherwise. They cannot hold that the creditors of firms exclusively managed by *gomashtas* have no remedy by way of insolvency, whatever the *gomashta* may do; though he may make fraudulent conveyances, promote fraudulent executions, or, as in *Hurruck's* case (1), 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.

It may be desirable that, as Mr. Justice Pigot suggests, the Legislature should intervene. Their Lordships express no opinion on that subject. But in the meantime the Statute should be interpreted with reference to the facts of Indian life. And it is a question in each case whether the *gomashta* 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 the 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.

(1) I. L. R., 5 Cal., 605.

They are by no means prepared to say that *Hurruck's* case (1) was wrongly decided ; though the position of the *gomashta* 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 personal conduct. The respondent appears to have been an active and responsible owner. His residence and head *koti* at Azingunge 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 Lordships' opinion, be wrong to hold that his acts were those of the respondent.

The result is that the appeal ought to be dismissed. And their Lordships will humbly advise Her Majesty accordingly. The appellant must pay the costs of this appeal.

*Appeal dismissed.*

Solicitors for the appellant : Messrs. *Vallance & Vallance*.

Solicitors for the respondent : Messrs. *T. L. Wilson & Co.*

C. B.

## CRIMINAL REVISION.

*Before Mr. Justice Macpherson and Mr. Justice Bannerjee.*

MAHOMED ERSHAD ALI KHAN CHOUDHRY (PETITIONER) v. SARODA  
PROSAD SHAHA AND ANOTHER (OPPOSITE PARTY).\*

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July 16.

*Criminal Procedure Code (Act X of 1892), section 148, clause 3—Assessment of costs by Magistrate other than the Magistrate passing the decision and making the order for costs.*

When an order to pay costs under section 148 of the Criminal Procedure Code, Criminal Revision No. 414 of 1895, against the order of A. E. Staley, Esq., Sessions Judge of Rajshahye, dated the 15th of June 1895.

(1) I. L. R., 5 Calc., 605.

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