

In Re Dhunput Singh

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Court : Kolkata

Decided On : May-23-1893

Reported in : (1893)ILR20Cal771

Judge : Comer Petheram, C.J., ;Prinsep and ;Pigot, JJ.

Appellant : In Re Dhunput Singh

Judgement :

Comer Petheram, C.J.

1. On Thursday, the 16th of February 1893, a petition was presented by Kustur Chand Rai Bahadur, who was the holder of hundis for Rs. 15,000 accepted by Rai Dhuuput Singh, but which were not then due, to adjudicate Rai Dhunput Singh an insolvent. The act of insolvency alleged in the petition was that on the 6th day of February 1893, at about 9 o'clock P.M., the said Rai Dhunput Singh Bahadur stopped payment of his liabilities, amounting to a large sum of money, which was payable by him that day on hundis and receipts, and the said Rai Dhunput Singh Bahadur, on the night of the said 6th of February, closed his said place of business, which has since been and still is closed, and his said principal gomasta, Panna Lall, and other gomastas and servants, departed and were absent from his said place of business at 4, Shama Bye's Lane aforesaid, on the 7th and 8th days of February 1893, with intent to defeat and delay the creditors of the said Rai Dhunput Singh Bahadur.' The usual adjudicating and vesting order was made on the morning of the 10th by Mr. Justice Trevelyan, and the Official Assignee at once

took possession of the estate.

2. The next day a motion was made on affidavits to set aside the order of adjudication. It was set down for hearing, and witnesses on each side examined upon it, and on the 20th of March Mr. Justice Trevelyan gave judgment, dismissing the application and confirming the adjudication, and this is an appeal from that judgment.

3. The facts as I find them from the evidence adduced are as follow:

4. From some time in the year 1861 down to the evening of February 6th, 1893, Rai Dhunput Singh Bahadur carried on business as a banker at various places in Bengal. He himself lived at Azimgunge, where the office or kothi was situated, which was known as the head kothi of his business, but the largest amount of business was done in Calcutta at 4, Shama Bye's Lane, which is a three-storeyed house, the whole of which was occupied by Dhunput Singh, the room on the second storey being used as the gadi, cash room and store rooms, and those on the third as dwelling rooms in which the principal gomasta lived, and where Dhunput Singh himself stayed when he was in Calcutta without his family, the durwans sitting at the outer door on the ground floor of the house. Each kothi was in charge of a head or moonib gomasta, but Dhunput Singh himself took an active part in the conduct of the whole of his business. In February last Mohabat Chand Shamsook, who was the moonib gomasta at Azimgunge, was considered the principal or head of the gomastas in his service, and at Calcutta Panna Lall Mohatta was in charge of the kothi as moonib. He had held that position for many years down to about three years before December last, but for those three years he had been absent from Calcutta. He returned to Calcutta on the 20th of December 1892, and on the 24th took over charge of the kothi there from Noltimal, who had held the office during his absence.

5. In February last the persons employed in Calcutta were Panna Lall Mohatta, the gomasta; Roma Nath Dhur, the cashier; three mohurrirs, Chutter Dass, Purasutum Dass, and Rojoni; an English speaking clerk, besides durwans and servants. Dhunput Singh was in Calcutta in May 1892, and at some time in that month went to Azimgunge, where he remained until the month of October, when he left it with

his family and servants on a pilgrimage to Palitana, where he was on the 27th of January 1893, on which day he received from Panna Lall in Calcutta a message by telegram 'Jute cannot be had, come back sharp.' In this telegram jute means money. On the 22nd of the same month, Panna Lall had telegraphed to three of the other kothis of the firm for money, and on the 27th he sent the telegram I have mentioned to his master. On the 28th he sent another telegram, 'Bazar very unreliable, start to-day please,' and on the 29th a third, 'Your message received, market very uncertain, come sharp.' Dhunput Singh did not reply to the last telegram, but on the night of the 29th left Palitana for Ajmere, where he remained about three days. On the 30th Panna Lall telegraphed: 'Market favourable just now, cannot say to-morrow's.' This telegram was received by Dhunput on the journey from Palitana to Ajmere, and on the 2nd of February he received another at Ajmere, 'Don't go Kasaria, immediately come sharp here, market very bad.' On Thursday, the 6th February, he left Ajmere for Agra, where he was on the 7th, on which day he left for Azimgunge, and arrived there on Thursday the 9th, and on his arrival received two telegrams which had been sent there by Panna Lall on the 6th and 7th; the first, 'Business stopped, no payment to pay, wire other kothis yourself.' The second 'Already wired business payment stopped, where is huzzur.' Dhunput Singh left Azimgunge, for Calcutta by the mail on the night of Friday, February the 10th, and reached Howrah station at about 10 o'clock on Saturday the 11th, where Panna Lall met him, and they went together to the kothi at 4, Shama Bye's Lane. As he informed his master in his telegrams, Panna Lall was in great straits at the beginning of February, and on the evening of Monday, the 6th of February, his position was that he had in hand about Rs. 17,000 in cash, and that on that day the sum of Rs. 73,000 was payable to customers in the ordinary course of business, and as it was impossible for him to meet the demands upon him, he on that evening with the Rs. 17,000 still in his possession refused to make any more payments, giving as his reason that he had no money to do so, and from that time forward no payments were, in fact, made at the kothi, except those which I shall presently mention. The moonib gomasta Panna Lall lived in the house 4, Shama Bye's Lane, his rooms being on the third storey; the cashier and the clerk lived in other places. There is no doubt that since the refusal of Panna Lall on the evening of the 6th to make any further payments, no banking transactions of any

kind by, or on behalf of, Dhunput Singh have been carried on in Calcutta, and his business transactions as a banker there have ceased from that time; but he was the owner of a sugar factory at Tarpore, a portion of the business of which was conducted in the house in Calcutta, and there is evidence that some small business was done there in connection with the factory after the cessation of the banking business on the evening of the 6th.

6. From the time when Panna Lall refused to make further payments, it is, I think, certain that the first floor was not used as much as it was when the banking business was going on. The cash room was locked, and I think it probable that the cashier and the clerks were not. In the house for the whole day on either the Tuesday, Wednesday, Thursday or Friday. Panna Lall remained in the house the whole time, but spent nearly all his time upstairs, though he did from time to time go down to the gadi room, and on the Wednesday certainly, if not on the Tuesday, he saw some persons in that room. He was not, on any of these four days, denied to any one, and any one who wished to see him might have done so; he did in fact see several persons at 4, Shama Bye's Lane, in the gadi, and some upstairs, and told them that he could make no payments as he had no money, but that the malik would arrive in a few days and would make arrangements, He was not denied to callers, but some persons were told by the durwans that it would be useless to see him, as he had no money to make payments, and this state of things continued until the arrival of Dhunput Singh himself at about 10 o'clock on the morning of Saturday, the 11th. Except for the time occupied in going to the station to meet his master, and in returning from it, there is no evidence that Panna Lall was ever absent from 4, Shama Bye's Lane, from the night of the 6th until the arrival there of Dhunput Singh on the morning of the 11th. Dhunput Singh did not bring any money with him, and payment was not resumed on his arrival; but during the afternoon of Saturday, and during the whole of the day on Sunday, he saw any persons who wished to see him, and endeavoured to persuade them to agree to accept 8 annas of their claims at once, and to give him a year for the payment of the remainder, and at the same time, on the Sunday he instructed Panna Lall to pay the sum of Rs. 15,000 out of the cash in the cash room to Hurro Lall Bangaj, to whom he owed Rs. 30,000, and who was some connection of his own. This payment was made on that day in accordance with his instructions. On Monday a

meeting of the creditors of the firm was held at 4, Shama Bye's Lane, which lasted from 1 to 4, at which Dhunput proposed to pay 8 annas at once, and the remainder in a year; but no money was actually forthcoming and no arrangement was come to. Another meeting took place at Mr. Kutter's office on the 15th, but nothing was done and matters remained as they were until the morning of Thursday the 16th, when the order of adjudication which I have before mentioned was made. Dhunput Singh became aware of the adjudication on the same morning, and he afterwards sent for the books of the kothi, ascertained that the cash which was then in the cash room amounted to about Rs. 14,000, and took possession of and removed the whole of it before the arrival of the persons sent by the Official Assignee to take possession. The question we have to consider is whether Dhunput Singh can be adjudicated an insolvent for what was done by Panna Lall on the 7th and 8th of February.

7. Mr. Justice Trevelyan in his judgment states that as the construction of the law stands in this Court, he is, he thinks, bound to hold that a person who leaves a gomasta in charge of a business can by that gomasta commit an act of insolvency, and on that view of the law he held that Dhunput Singh committed an act of insolvency by the acts of Panna Lall on the 7th and 8th. The records of this Court have been examined, and four cases, the first being in 1858, the last in 1889, have been found, in which persons who carried on business in Calcutta have been adjudicated insolvents upon petitions which alleged that their gomasta in Calcutta had departed from their employer's place of business with intent to delay his creditors. Mr. Justice Trevelyan has relied on these cases and upon the reported case of *In re Hurruck Chand Golicha* I.L.R. 5 Cal. 605 decided by Broughton, J., in 1880. In the course of his judgment that learned Judge said: 'It required no departure from the literal meaning of the words to hold that when a trader has established a business through a gomasta, he departs from the place of business if his gomasta departs, and if he does not come himself or send some one else to carry on the business. If, as in this case, the gomasta shuts up the place of business and stops payment, he does in fact depart from his usual place of business, for the usual place of business is inside his house where the business is carried on, and not outside his house with the door locked behind his back, and when he shuts the place up and stops payment, he departs from his usual place of

business with intent to defeat or delay his creditors.' I have had the advantage of seeing Mr. Justice PIGOT's judgment, and do not think it necessary for me to say more on the question whether this particular act of insolvency can be committed by an agent, than that I entirely agree with him that it cannot, and that the decision in the case of *In re Hurruck Chand Golicha* ought now to be formally dissented from, as whatever interpretation be given to it the decision is not warranted by law. I must, however, add that even if the law, as laid down in that judgment, could be supported, I do not think that the present case is within it. Mr. Justice Trevelyan finds that in spending his time on the third floor on the Tuesday and Wednesday, instead of in the gadi on the first floor, Panna Lall left the business. He thinks that he intended to keep the creditors waiting until his master arrived, and that he retired to the third floor on the Tuesday and Wednesday in order to keep them waiting until that time, and that by doing so he departed from the place of business with intent to delay the creditors of Dhunput Singh and so committed an act of insolvency upon which his master can be adjudicated insolvent with all the consequences which follow on such an adjudication. I am unable to agree in that opinion. I think that the person must go away from his place of business for the purpose of being absent in order that it may be impossible or difficult for his customers or creditors to find him, and that a mere retirement to the private part of the house, because there is no business to do in the office, would not necessarily be such a departure. In this case, even if the retirement to the private room by Panna Lall was literally a departure from his usual place of business, I cannot see how it could by any possibility have had the effect of delaying any single creditor of Dhunput Singh for a moment, or how any intention to delay them by leaving the gadi can, under the circumstances, be imputed to Panna Lall. The position of Panna Lall on the night of Monday the 6th, and until the return of Dhunput Singh on Saturday the 11th, was that of a Bank manager who had been left by his master without funds to meet the demands of his customers and who could only return the documents which were presented to him for payment, and inform the customers of the facts, and that he expected his master in a few days. This is what Panna Lall did, and I do not think his doing so can have delayed the creditors, or that any intent can be imputed to him to bring about something which could not have been brought about by his action, I think that the appeal should be allowed,

and the order of adjudication revoked. The petitioning creditor must pay the costs in both Courts on scale No. 2.

Pigot, J.

8. The appellant Rai Dhunput Singh Bahadur was by an order made on the 16th of February 1893 by the Court for the relief of insolvent debtors adjudicated an insolvent. On the 17th of February he presented a petition praying that this order should be set aside. The matter of the petition was heard on oral evidence given on behalf of the adjudicating creditor and on behalf of the insolvent, and on the 20th of March 1893 the Court made an order dismissing the application to set aside the order of adjudication. The insolvent appeals against the order of adjudication, and the order dismissing the application to set it aside. The act of insolvency charged is stated in the first and second paragraphs of the petition of adjudication, the first four of which are as follows:

1st.--That the above-named Rai Dhunput Singh Bahadur, who resides at Baluchur in the district of Murshedabad, in the province of Bengal, and who occasionally comes down and resides in Calcutta, heretofore and up to the 6th day of February 1893, carried on the trade or business of merchant and banker at No. 4, Shama Bye's Lane in Burra Bazar in the town of Calcutta, through his principal gomasta Panna Lall and other gomastas and servants, under the name and style of Bahadur Singh, Pertab Singh, Rai Dhunput; Singh, and therefore, as your petitioner is advised and believes, became a trader within the meaning of the Bankrupt laws.

' 2nd.--That on the said 6th day of February 1893, at about 9 o'clock P.M., the said Rai Dhunput Singh Bahadur stopped payment of his liabilities amounting to a large sum of money, which was payable by him that day on hundis and receipts, and the said Rai Dhunput Singh Bahadur on the night of the said 6th day of February closed his said place of business, which has since been and still is closed, and his said principal gomasta Panna Lall and other gomastas and servants departed and were absent from his said place of business at No. 4, Shama Bye's Lane, aforesaid, on the 7th and 8th days of February 1893, with intent to defeat and

delay the creditors of the said Rai Dhunput Singh Bahadur

'3rd.--That on the 9th day of February 1893, and subsequently, some of the gomastas of the said Rai Dhunput Singh Bahadur attended the said place of business, but no business was carried on nor any payment made to the creditors of the said Rai Dhunput Singh Bahadur, or any of them in respect of the overdue hundis and purjajs or receipts held by said creditors.

'4th.--That on the 12th and 13th days of February 1893, the above-named Rai Dhunput Singh Bahadur, who came to Calcutta on or about the 11th day of February 1893, informed several of his creditors, and among them the moonib or head gomasta of your petitioner in Calcutta, that he was unable to meet the claims of the creditors in full, and that he was in insolvent circumstances, and proposed to pay down to his said creditors eight annas in the rupee and to pay the balance within one year from that date.

9. There is no doubt that Dhunput Singh was a trader within the meaning of Section 9 of the Indian Insolvent Act, under the provision of which the order of adjudication was made. The provision of that section, under which he has been held to have committed an act of insolvency, enacts as to any person deemed a trader, that '** if any such person shall depart from within the limits of the jurisdiction of any of the said 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 creditor or creditors as described in the section, 'to present a petition to the Court of the Relief of Insolvent Debtors of the Presidency within which such person shall have resided at the time of such departure,' and then follows a provision as to the form of the petition. '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.' Then follows a provision enabling the Court to revoke or confirm such adjudication.

10. It is not suggested that Dhunput Singh himself departed from his usual place of business or abode within the jurisdiction, nor, of course, that he did so with the intent necessary under the section to render any departure an act of insolvency. Dhunput Singh's chief business is that of a banker, which business he has carried

on for many years. His head kothi is at Azimgunge, where he chiefly resides. He has several other kothis in different towns in Bengal. In Calcutta he had a place of business at Shama Bye's Lane, his principal business there being that of banking: he also had a sugar factory at Tarpore, part of the business connected with which was conducted at the kothi in Shama Bye's Lane. His business transactions were very large, and he has large landed estates : there seems no question as to this. The banking business of the Calcutta kothi was much greater than that of any of the other kothis. No. 4, Shama Bye's Lane, is a three-storeyed house, all of it tenanted by him; on the second floor is the gadi or office; on the third floor Panna Lall lives : and Dhunput Singh when staying in Calcutta without the members of his family used to put up there.

11. Dhunput was last in Calcutta in May 1892. He then went to Azimgunge his ordinary place of residence. In October he went with the ladies of his family to Palitana, the famous place of pilgrimage of the Jains in the Peninsula of Kathiawar. He went there on pilgrimage and to consecrate a temple, which he did. While he was at Palitana in January, he received telegrams from Panna Lall telling him the business in Calcutta was in a dangerous state, and urging him to come to Calcutta. He left Palitana on the 29th, reached Ajmere on the 2nd of February, proceeded to Agra on the 6th, and on the 9th reached Azimgunge. On that day he first learned that the Calcutta banking business had suspended payment on the 6th of February. On the 10th he left for Calcutta arriving on the 11th, when he proceeded to the kothi, and on that and the following days saw his creditors there and tried to make arrangements with them : on the 13th there was a large meeting of them at his kothi, attended, he says, by 100 or 125 of them. There was another assembly of them held at Mr. Butter's office on the 15th. The adjudication was next day.

12. So that not merely did Dhunput Singh not depart personally from his place of business with intent to defeat or delay his creditors, but on hearing that his firm was in difficulties, he returned from the very remote part of India where he then was, and came to Calcutta. He did not avoid his creditors, but came to confront them, and if possible arrange with them, unsuccessfully as it turned out. Nothing therefore was done by Dhunput Singh himself to bring him within those provisions

of the Insolvent Act under which he has been adjudicated an insolvent. The act of insolvency charged in the petition is that 'on the night of the 6th of February he closed his place of business which has since been, and still is closed, and his said principal gomasta Panna Lall and other gomastas and servants departed and were absent from his said place of business at No. 4, Shama Bye's Lane aforesaid, on the 7th and 8th days of February 1893, with intent to defeat and delay the creditors of the said Rai Dhunput Singh Bahadur.' The departure charged is that of Panna Lall and the other gomastas on the 7th and 8th of February, and the intent charged is their intent to defeat and delay the creditors of the said Rai Dhunput Singh Bahadur. The question for determination on the application to revoke the adjudication is thus stated in the judgment of the learned Commissioner of the Insolvent Court:

The question which I have to try is whether the act of insolvency alleged in the application for the vesting order was actually committed. This act of insolvency was not alleged to have been one personally committed by the alleged insolvent, but by the head or moonib gomasta in charge of his banking business at No. 4, Shama Bye's Lane in Calcutta. The act of insolvency alleged was that this principal gomasta and other gomastas departed, and were absent from the place of business on the 7th and 8th of February 1893, with intent to defeat and delay the creditors of Rai Dhunput Singh.

13. The finding of the learned Commissioner is: 'In conclusion, I find as a fact that on the 7th of February, Panna Lall, acting on behalf of his master, departed from his usual place of business with intent to defeat and delay his creditors, and that the act was continued on the 8th, and that Dhunput Singh ratified the acts of his gomasta on his arrival here. In the result the application to set aside the vesting order must be dismissed.'

14. The questions which chiefly arise on this appeal seem to be the following:

It is contended that the act of insolvency committed by a departure of a trader from his place of business with intent to defeat or delay his creditors is one which, to constitute an act of insolvency so as to affect him, must be a departure by the trader himself with the intent, harboured by himself, to defeat or delay his creditors

: that it cannot be committed by an agent on his behalf. This contention broadly stated impugns the correctness of the decision in the case of Hurrurk Chand Golicha I.L.R. 5 Cal. 605, which has been followed in different cases by members of this Court when sitting as Commissioners, but which has not hitherto been considered in the Appellate Court. It was argued that this decision is not warranted by the terms or scope of the section, or by the decisions in England upon the subject of acts of bankruptcy. It is further contended that this decision cannot be understood as laying down the principle that any gomasta in charge of a place of business in Calcutta may commit an act which will operate so as to be an act of insolvency committed by his employer; that the decision must be understood as at least limited to gomastas having an authority and control over the business conducted by them, of some exceptional character : and that whatever may be the degree of authority and control in a gomasta necessary in order that his acts should operate as acts of insolvency committed by his master, Panna Lall in the present case did not possess it. It is further contended that even if Panna Lall could be held to be clothed with powers of this nature, the acts or omissions by him proved in this case did not amount to a departure from his (or Dhunput's) place of business within the meaning of the section.

15. The last contention to which I shall refer relates to intent to defeat or delay creditors, an intent which is of the essence of the act of insolvency in question in the case. It is said that even if Panna Lall's acts or omissions as proved in the case could be construed as amounting to a departure on his part from the place of business, still no intent to thereby defeat or delay Dhunput's creditors was made out on his part, or could be imputed to him as necessarily to be inferred from his conduct. Further, it is said to be impossible that any intent of Panna Lall, whether proved or inferred, could be constructively imputed to Dhunput so as to make it his intent. And yet intent is an essential ingredient in the act of insolvency to be proved against Dhunput. I shall deal with these contentions in their order.

16. I take it to be quite clear that the acts of insolvency stated in the part of the 9th section with which we are here concerned are correctly classed as those which under the English Acts relate to the person of the debtor and are evidence of an intention to deprive his creditors of their remedy against his person. The

classification of acts of bankruptcy given in Robson's Bankruptcy and referred to in the argument seems quite accurate in placing the acts of this nature (which are more numerous in the English Acts in force when our Insolvent Debtors' Act was framed, than those set out in that Act) in the category of acts 'relating to the person of the debtor.'

17. With respect to all of them it is the intention to depart or delay creditors which gives the fraudulent character to the act, and makes 'an act of bankruptcy' (see page 116 of Robson on Bankruptcy, 4th Ed.). The manner in which those acts operate to defeat or delay creditors, I understand to be that they do deprive the creditors of their remedy against the debtor's person whatever that remedy may be, whether by process of law or by other lawful pressure on their behalf, as for instance in the case (not one arising under the Indian Act) of beginning to keep house 'generally if a trader seclude himself in his house to avoid the fair importunity of his creditors who are thus deprived of the means of communicating with him, he begins to keep his house and commits an act of bankruptcy.' Smith's Mercantile Law, page 576, citing *Dudley v. Vaughan* 1 Camp. 271, and *Cumming v. Baily* 6 Bing. 363.

18. These cases and many others were cited in argument upon this subject of defeating and delaying creditors, and I think it may be affirmed that there is no authority in the English reports which casts a doubt upon the correctness of the proposition, that the acts with which we have to deal here, and the cognate acts of bankruptcy of the same class in the English Acts relate to the person of the debtor himself, and that they are connected in all the statutes with the intent to defeat or delay creditors, because they are such as deprive the creditors of all access to or communication with him personally, and by depriving them of this advantage, such as it is, so far defeat or delay them.

19. It may be, as suggested during the argument, that such acts were made acts of bankruptcy or of insolvency by the Legislature for the reason that they would only be committed by persons in insolvent circumstances; that they were for this reason chosen as convenient badges of insolvency, as rough and ready tests practically sufficient to take the place of an enquiry which could not be summarily

made : the object being to ascertain summarily and with reasonable certainty that a state of insolvency did exist, showing it to be desirable that the debtor's property should be withdrawn from him and applied in payment of his debts. However that may be, they are made acts of bankruptcy or of insolvency of themselves, without any reference to the question whether the debtor is or is not actually in insolvent circumstances, save so far as his circumstances may guide the Court in determining whether his intent in doing them was to defeat, etc., his creditors.

20. I think that for the reason I have stated a departure such as is made an act of insolvency by the section is a departure by the debtor personally, and cannot be committed by any other person on his behalf.

21. No case has been cited to show that it was ever argued in England that an act of bankruptcy, such as that with which we are here concerned, could be committed by an agent, unless the case of *Mills v. Bennett* 2 M. & S. 556, where the agency was that of partners, be such a case. There it was contended that the act of bankruptcy constituted by the English Act of 'otherwise absenting himself' was committed by each of the three members of a banking firm by reason that the member of it who carried on the business at Collumpton shut up the business, that is, as appears from the report, the place of business, and stopped payment. It was held that, as to the two other members of the firm who lived, one in London, and the other at a considerable distance from Collumpton, this was no evidence of an act of bankruptcy. This case was referred to in the case before Lord Eldon of *Ex parte Mavor* (19 Ves. 539) where the proposition was treated as mere matter of course. In *Cotton v. James, Moo. & Mal.* 273 : 1 B & Ad. 128, (to which I believe I drew attention during the argument) the question arose whether an act of bankruptcy had been committed by the plaintiff under the 6 Geo. IV., c, 16, Section 3, by making a fraudulent delivery of his property. This, of course, belongs to a class of acts other than those with which we are here concerned, which relate to the person of the debtor. It belongs to the class of dispositions of property with intent to deprive creditors of remedy against the estate, and which no doubt can be done by an agent with his employer's authority; who if he does such an act by his agent with the intent specified by law, thereby commits an act of insolvency. The act the character of which was in question, was the delivery by the plaintiff's

son, who principally managed the business of the plaintiff in connection with which the question arose, of certain goods within his control at the time. One question in the case was whether the delivery which took place was in any case one which was within the terms of the statute: and Lord TENTERDEN inclined to think it was not. But he added [see p. 277 of the report in Moo. and Mal.] what is material in this case:-' The question, however, does not arise, for the transaction itself is not brought home to the plaintiff, and it is clear that a man cannot commit an act of bankruptcy by the conduct of his agent.' No doubt in that case if it had been brought home to him, it would have been his act, and not merely the act of the agent.

22. I think the general proposition laid down by Lord Justice BRETT in *Ex parte Blain, In re Sawers* (L.R. 12 Ch. D. 522), 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 authorised and of which act he had no cognisance.'

23. 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 Lall in this case assuming them to amount, so far as he personally was 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 authorised, and of which act he had no cognisance.

24. I think that the case of *Hurruck Chand Golicha* was wrongly decided, and that it ought now on this the first occasion on which it has been challenged in the Court of Appeal, to be expressly dissented from, although it has, of course, been followed in the Insolvent Court since it was decided. I shall refer to this consideration later on. The other questions arise with reference to the special facts

of this case. Assuming that the case of Hurruck Chand Golicha could be supported, having regard either to special considerations affecting the class of persons whose acts were there under consideration, or because it has been followed in other cases, and ought not now to be disturbed, does this case fall within it

25. Notwithstanding the general expressions used in that decision, I think they must be read and limited by reference to the facts of the case. In that case the gomasta stopped payment which of course is no act of insolvency, shut up the place of business, locked the doors, and went away. Those were the acts done. They were done by the moonib gomasta in charge of the business. Now it is a matter of common knowledge that in this country it often happens that a large business is carried on for years by a moonib gomasta 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 firm it is or may be difficult to determine who are, at any given time, actually members. Such cases are getting more and more rare, but I suppose many of us who have practised at the bar in India have met with some. I have myself known of the case of a great family firm which had lasted considerably over a century with places of business all over India, the members of which by successive inheritance had come to be counted by scores. Many of the kothis were managed by moonib gomastas with practically almost uncontrolled authority, so far as the outside public was concerned, and whose office of gomasta was itself in some sense hereditary and handed on from father to son; that is an extreme case and is no doubt now very rare. Yet the great authority still sometimes entrusted to moonib gomastas, and the great difficulties attending the law of partnership in India with which the Legislature has hitherto found itself unable to grapple, must be taken into account, in my opinion, in considering this decision in Hurruck Chand Golicha's case. It is to be explained, although it cannot, I think, be supported, by reference to these considerations. The proposition stated in the head note of the case is, I think, wholly beyond the scope of the decision, and I read the case as being founded upon the proposition that in India, according to a practice existing in some classes of business, a moonib gomasta is or may be (though in a way not defined with any

approach to distinctness by any ascertained custom) so completely the alter ego of his principal that his act in deliberately putting an end to the business, shutting up the house, and departing from the place, may be the act of the principal so as to constitute it an act of insolvency on his part. It does not lay down the conditions under which this anomalous authority may be possessed by the gomasta. Assuming that the decision, as I interpret it, can be supported, as, with great respect, I do not think it can, the present case does not seem to me to come within it.

26. Panna Lall neither had, nor was he held out to the world as having, any exceptional control or authority over the business. He was the gomasta of a perfectly well-known trader, who himself from time to time, when he came to Calcutta, superintended the business in person and, so far as appears, exercised full control over it, and was known to do so. Everyone who dealt with the business dealt with Dhunput Singh himself and knew that he was doing so. Whatever may be the special conditions of authority, real or apparent, existing in the case of some moonib gomastas, there are none shown in this case. Panna Lall was an ordinary managing gomasta to whom no special powers or position can be attributed of any kind.

27. Then as to the question whether, supposing Panna Lall's acts could be the acts of his principal, what he did or omitted to do amounted to a 'departure from the place of business' within the meaning of the section. In Hurruck Chand Golicha's case and in the case in which Wilson, J., followed that decision, the gomasta shut up the place of business and (in plain language) levanted, leaving the creditors to find him or his master if they could. The latter case was exactly similar to Hurruck Chand Golicha's, I understand Wilson, J's note only to mean that he followed that case, thinking himself bound to do so.

28. In this case Panna Lall never left the house at 4, Shama Bye's Lane at all. The gadi or office was on the second floor; when payment was stopped, the banking business ceased to be transacted there; that is, no further payments were made. Some small business connected with the sugar factory at Tarpore continued to be transacted there; but the chief business undoubtedly stopped.

29. The durwans continued to attend on the lower floor. No one was prevented by them or by any one from going upstairs to the gadi, the doors of which remained open. Whether Panna Lall was present in the rooms of the gadi or not, on the 7th or 8th, or was wholly absent from them on those days, is the question to which the evidence of the numerous witnesses was greatly directed. It is certain that he was, during those days, a good deal upstairs on the floor where he lived. He had no business to attend to in the gadi except the small business just referred to, and except that, after the suspension, some payments in the banking business seem to have been made to him whether in the gadi or not.

30. But it is quite clear that access to Panna Lall was not denied to any one who wished to see him, and that he did see several of the creditors upon his master's business after the suspension.

31. I see no reason whatever to doubt that the course taken by him during these days was that he saw any creditors who wished to see him, told them that he had no funds to meet their demands, told them that he expected his master to arrive shortly, begged them to await that arrival and expressed his belief that on his arrival Dhunput Singh would be able to make satisfactory arrangements with them. He neither avoided them nor concealed himself from them, nor was any obstacle interposed, in fact or intention, to hinder any of them from seeing him, except so far that when he was upstairs, such of them as wished to see him had the trouble of going upstairs too. One piece of contemporary evidence not depending on the recollection of a witness is referred to in the judgment. It is the entry in the day-book of Mr. Pittar of the 7th, deposed to by Nobin Chunder Banerji, the clerk, who, on that day, saw Panna Lall with reference to a claim against the firm of a client of Mr. Pittar. The clerk saw Panna Lall on the third storey, who said 'until his master comes he can't say anything.' This is proof of access to him on the firm's business by a creditor, on the 7th.

32. In the voluminous evidence which has been examined before us as to the exact degree of attendance, or the absence of attendance in the gadi on the 7th and 8th, a good deal of variance exists. I own that I cannot help the surmise that until it was determined to apply to the Court for an order of adjudication, but little

attention can have been paid by any one to the question whether or not Panna Lall was on the 7th and 8th of February sitting in the gadi room doing nothing, or whether he was similarly engaged upstairs on these days. What would engage the attention of the creditors would be the fact that they could not get payment, and that Dhunput was expected to arrive, but that it was not known how soon he would do so. It could not in the least affect their position or their remedies whether the gomasta sat in one room or in another, in his master's house, nor can I suppose any of them to have thought it did, and I think the evidence on both sides must be looked at in this light as directed to a fact of no consequence in their eyes when they saw Panna Lall. It seems to me that what the adjudicating creditor relies on is at the outside a sort of constructive departure by Panna Lall, of a purely technical character. The finding as to the departure is: 'That Panna Lall left the business there is no doubt, that the business was closed there is no doubt, that payment stopped there is no doubt, that the books were carried upstairs there cannot be much doubt, and therefore I hold that Panna Lall departed from the place of business on the 7th and 8th.'

33. It was contended by Mr. Phillips that stopping the business, if manifested by outward acts, would be enough : that the closing of the business, in the fact that the payment was suspended, was sufficient as an act of insolvency and was a departure from the place of business, that if a man is not at his place of business, to pay, he has departed : he also, of course, contended that there was an actual departure of persons; but it is the argument as to the closing of the business that I wish to advert to. I think it underlies the whole case of the adjudicating creditor in this appeal. Stoppage of payment is treated as equivalent to closing the business, closing the business as equivalent to closing the place of business; and that, again, as equivalent to a departure from the place of business within the meaning of the section.

34. In short, in another stage of the argument it was put, and I think it was a necessary consequence of the reasoning, that if a man continues to sit in his place of business, but stops his business and declines to speak to any one about his business, though he admits everything, this is a 'departure' under the Act.

35. This would, indirectly, make the mere act of stopping payment an act of insolvency. It is not an act of insolvency under the Act, and it was long ago held by Lord HOLT in *Hopkins v. Grey* 7 Mad. 139, cited in Blackstone, vol. II, p. 479 of the 19th Ed., that a banker's stopping or refusing payment is no act of bankruptcy, and by Lord Chancellor King in *Burroughs v. Jameneau Moseley*, 1(3): Sel. Ch. Ca. 69 that stopping payment is no act of bankruptcy.

36. Then it is argued that Panna Lall's going upstairs being a departure, it was also a departure with intent to defeat or delay creditors.

37. It is not safe to pronounce an opinion upon* the question whether, had what is relied on as a departure by Panna Lall in this case been done by Dhunput himself, this might or might not have been a 'departure.' The case is not before us. If an intent to defeat or delay creditors were found to be established in such a case as that with which such acts were done by the master of the business, it may be that a Court might hold a departure shown, for the intent itself being proved aliunde, acts of departure apparently trivial, have been held enough to constitute acts of bankruptcy. I express no opinion on this one way or the other, save that I think it would be going a long way to hold it.

38. The question in this place is as to Panna Lall's intent, which is relied on as having been proved. I find great difficulty in dealing with this subject.

39. It is clear that intent is of the essence of the act of insolvency, see *Ex parte Coates*, *In re Skelton* (L. R. 5 Ch. D. 979), where it was held that the omission in the petition to allege an intent to defeat or delay creditors was fatal, and that such a defect was matter of substance and not of form, and could not be cured by amendment. Now even if a man could commit an act by an agent without giving him authority, how can he be said to do it with an intent which is that of the agent alone, as it must be in this case; for confessedly, Dhunput never knew Panna Lall was going upstairs on the 7th and 8th, or had anything to do with his doing so? If the act of the agent being one which can be done by an agent, as the delivery of property, were done by the authority of the principal, then the act, and the intent, may well be the latter's. But I do not see how a man who neither did the act nor caused it to be done, nor had any knowledge or intention about it, can have an

intent on the part of his agent imputed to him. It is to be observed that the intent alleged in the petition is not the intent of Panna Lall only, but that of Panna Lall and of the other gomastas, a joint intent harboured by them all on behalf of their master. This is not noticed in the latter part of the judgment; it seems to me only to illustrate, and not materially to increase in this case, the difficulty of holding that one man may harbour an intent on behalf of another so as to make that other responsible for it to the extent of plunging his whole estate into insolvency.

40. But apart from this, I do not think that any intent to defeat or delay a creditor can be connected with what Panna Lall did. He could not pay the creditors, though he was most anxious to do so. His going upstairs did not make him the less able to pay them or affect their position in any way. They had no remedy against him, and recourse to him could not help them. It is true that if he had levanted and sent away all the servants, such of the creditors as might desire to file suits might have been delayed in serving the summons. He did not do this. I do not see what other act of his could have, or be supposed or intended to have, the effect of delaying them. We had highly subtle arguments addressed to us on the subject, but they all come back to this, that he did not, as he could not, pay : that is, he stopped payment, which would not in itself have been an act of insolvency by Dhunput himself had he been there,

41. It is said in the judgment that possibly where an owner when he heard of an act of insolvency by his agent came down and repudiated the act, it might be arguable whether he could not have the vesting order set aside. I own I do not see how this could be. The agent's act is either an act of insolvency by the owner, or it is not. If it is, it cannot be purged by matter subsequent. It is also found that Dhunput ratified the acts of his gomasta on his arrival here. I am bound, I think, to express an opinion on this. I am unable to find in this case any evidence of ratification of Panna Lall's acts by Dhunput, supposing them to be material. But if they needed such ratification, then they were not themselves acts of insolvency. It is on them alone that the adjudication was had, nor was there in the petition on which the order was made a suggestion of any subsequent ratification completing acts of insolvency incomplete until ratified.

42. I am of opinion, therefore, that whether the decision in Hurruck Chand Golicha's case I.L.R. 5 Cal. 605 should be overruled by us now or not, the order of adjudication in the present case should be revoked. But I think that the decision ought to be now formally dissented from; it seems to me that, whatever interpretation be given to it, the decision is not warranted by law. I do not understand the case referred to before Sir C. JACKSON in 1853 as shown to have been decided on the same grounds as the case of Hurruck Chand Golicha; if it was, I think it ought not to be followed. But no argument or judgment in the case are before us, and I am not clear that there may not have appeared to the learned Judge in that case sufficient ground for thinking that a fraudulent disposition of property was prima facie made out. Hurruck Chand Golicha's case has been followed in two or three cases; it is of course binding in cases which exactly fall within it.

43. I think it ought to be dissented from, on this the first occasion on which it has been challenged in appeal, for the following reasons. 1. Whether the narrow or the wide interpretation be given to it, the decision is, I think, against all authority to be found in the English law. 2. Even if restricted by a narrow interpretation, it cannot be safely applied, for there is no guide either in the decision itself or in defined custom of trade, by which to determine under what circumstances the formidable powers given by it to a gomasta are to be attributed to him. 3. If it is to be read in the widest sense as in the head note of the case, that introduces a tremendous change into the law of agency : an agent employed to supervise and conduct a particular house of business is given the power, by implication from that authority, to destroy it, and all the other houses of business in his employers' hands, and to put his employer in the Insolvent Court without recall. You cannot purge an act of insolvency, if it is completed. If the act of the agent is an act of insolvency on the part of the employer, I do not see, with great respect, how the subsequent repudiation of it by the employer could remedy it.

44. Further, if the law established as I understand it to be is to be departed from in the case of that class of agent with no specially defined powers called a gomasta, I do not see where we can stop. It was argued (as I thought with great force) by Mr. Woodroffe that if a partner cannot commit an act of insolvency of this nature on

behalf of his co-partner, as *Mills v. Bennett* and *Ex parte Mavor* show he cannot, then surely no other agent can do so. The converse may be argued, too, if *Hurruck Chand Golicha's* case be not now dealt with. It may be argued that, as in disregard of English authority, it is held that a gomasta can, then surely a partner may also (in disregard of those authorities), be held capable of committing such an act on behalf of the firm. This argument was in effect addressed to me in *Gisborne's* case, last vacation, when the argument upon which the adjudicating creditor has chiefly relied on before us was addressed to me, and *Hurruck Chand Golicha's* case was relied on. This I think must be the case before me, which is shortly referred to in the judgment in this case. *Gisborne and Co.* stopped payment, one of the three partners being here, the other two at home, and all the members of the firm were adjudicated insolvents upon grounds which upon examination appeared to me to be bad. One argument in support of the adjudication was founded upon the stoppage of payment by the partner who was in Calcutta and who remained here. It was argued that the closing of the business was a departure within the Act; in fact, a constructive departure such as is, I think, a feature of this case, constituting an act of insolvency either on the part of the firm or on the part of the member of it who continued to remain here. The point was fully argued. I was clearly of opinion that it could not be sustained in that case. But so long as *Hurruck Chand Golicha's* case remains unreversed such a point may be otherwise decided under slightly different circumstances, and no firm the principal members of which may be at home, with a managing partner or sub-partner here, can be safe, in my opinion, from this sort of insolvency, so long as *Hurruck Chand Golicha's* case is an authority.

45. It must be remembered that although the term gomasta, which is that employed in *Hurruck Chand, Golicha's* case, or moonib gomasta, is very freely used, it is one the precise meaning of which is wholly undefined. *Panna Lall* is called no doubt properly a moonib gomasta. It means, speaking generally I suppose, a managing clerk of a native firm, but you have not and cannot without legislation have a special law (apart from proved custom) for native firms or particular classes of native firms. *Hurruck Chand Golicha's* case, if it is to be applied to any, must, as the law now stands, be applied to all managing agents, and hence arises what I think is the danger of it. It may be that the mode in which

the business of some classes of native firms is conducted may make it convenient and just that some special rule as to insolvency should be framed which shall apply to them. But this cannot, I think, be properly done except by the Legislature. It may be that stopping payment ought to be made an act of insolvency in itself, but the Legislature has not done this.

46. I think the adjudication in this case should be revoked.

Prinsep, J.

47. I have very little to add, as I completely agree with the judgment of Mr. Justice PIGOT. I have had some doubt whether we should be right in upsetting what is said to have been the practice of this Court in insolvency for many years. It does not appear that except in the case of Hurruck Chand Golicha, the matters now raised before us have ever been made the subject of serious contention. At any rate I agree that the mischief which may result from following what we think to be the erroneous view of the law are very grave, and I agree that, sitting in appeal and unfettered by any judgment of a Court of equal or superior jurisdiction, we are bound now to overrule that decision.

48. In this case there was not in my opinion a 'departure' by the gomasta, Panna Lall, within the terms of the statute, and I also agree that even if there had been, there is nothing to connect such an act with the master Dhunput, so as to make him liable for the consequences of the conduct of his servant and gomasta. So far from departing, Dhunput hurried down to Calcutta to meet his creditors, and except that he was unable to provide sufficient funds and there was consequently a stoppage of business, there was nothing at least up to Dhunput's arrival which would amount to an act of insolvency. There was nothing done by Dhunput with intent to delay or defeat creditors. All that can be attributed to Dhunput is the stoppage of business from his not providing sufficient funds, and I agree that this is not an act of insolvency within the section.