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Application (IP) No. 170 of 2017
in
I.P.No.25 of 2014

Dr. G. JAYACHANDRAN, J.
&
C. V. KARTHIKEYAN, J.

This application had been filed by the Official Assignee, High Court, Madras, seeking a Judgment and Decree against the second respondent, M.Karthe, resident of Kondappanaciken Patty, Salem, to pay a sum of Rs.9,00,00,000/- together with interest at 18% p.a., from 30.04.2013 till date of realization with costs.

2. In the report of the Official Assignee filed in support of the Judges summons, it had been stated that the petitioning creditor Chitra Desai had filed a Insolvency Petition on 10.03.2014 and the Insolvency Court had adjudicated the first respondent Arjunlal Sunderdas as insolvent. It had also been stated that pursuant to such adjudication, the properties of the insolvent stood vested with the Official Assignee. It was also stated that the insolvent



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was engaged in finance and real estate business under the name of 'Arjunlal Sunderdas'. He had also incorporated four separate companies and was a major shareholder in them. It was further stated that though the insolvent should have filed schedule of affairs as provided under Section 24 of the Presidency Town and Insolvency Act 1909, within 30 days from the date of adjudication, he had not filed the same and had also not produced the books of accounts maintained by him. It had been stated that during the course of investigation and from the statements made by the insolvent, he had disclosed some assets but not liabilities. Thereafter, the auditor of the insolvent had handed over a list of debtors and creditors with a computer generator bank statement.

3. The Official Assignee had also engaged a Chartered Accountant to verify the list of debtors and creditors with the computer generator bank statement and to furnish the correct position as on the date of adjudication. The auditor of the insolvent had also produced his computer generated bank statements of all the transactions as stated by the insolvent. The Official Assignee thereafter had examined the statements received from both the



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auditor appointed by him / M/s. Annamalai Associates and the auditor of the insolvent / Mr. Ranga Ramanujam and on examination had found that the second respondent had received a sum of Rs.9,00,00,000/- from the insolvent and the said amount was shown as outstanding and due as on 30.04.2013. It was also stated that there was no subsequent transactions to prove discharge.

4. It had been further stated that the second respondent had submitted his nomination to contest in the general elections for the Legislative Assembly in the year 2011 at Edappadi Constituency in Salem District and declared his assets and liabilities to the Election Commission. In the said affidavit, he had declared liabilities to the insolvent to a sum of Rs.9,00,00,000/-. It had been stated that therefore the second respondent was bound to return back the said amount together with interest.

5. It had been further stated that the insolvent had been adjudicated as insolvent on 21.04.2014. On 07.04.2014. Later, the counsel for the insolvent had issued a letter and a statement of accounts which also reflected a sum of Rs.9,00,00,000/- as due from the second respondent as on



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30.04.2013. It had also been stated that the liability did not arise out of any contractual obligations or damages or sales of goods or materials to show loan extended to the second respondent. It had been further stated that the insolvent did not assist the Official Assignee and therefore the Master, High Court, had issued a warrant under Section 33 of the Presidency Towns and Insolvency Act, 1909 on 27.08.2015. The warrant could not be executed. It had been stated that thereafter, the insolvent had appeared but had not co-operated during the investigation. It had been further stated that the debts to the second respondent was due and payable on the date of adjudication and this application had been filed within three years from the date of adjudication / 21/04/2014. It was under these circumstances that the application had been filed seeking a Judgment and Decree against the second respondent for a sum of Rs.9,00,00,000/- together with interest at 18% p.a., from 30.04.2013 till date of realisation together with costs of the recovery proceedings.

6. A counter affidavit had been filed by the second respondent denying the averments made in the report of the Official Assignee. It had been stated that the Official Assignee does not have an actionable claim



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against the second respondent. It had been further stated that the details obtained from the statement produced by the auditor of the insolvent could not be the basis of the claim. It had also been stated that the list of debtors and creditors obtained from the auditor or of the insolvent could not be considered as a credible list. It had been further stated that specific details had not been given as to the date of borrowal and therefore, it had been reiterated that the Official Assignee cannot maintain a claim against the second respondent. The second respondent further denied that he had declared before the Election Commission that a sum of Rs.9,00,00,000/- as due to the insolvent.

7. The respondent specifically denied the said averment made by the Official Assignee. It had been further stated that the office of the Official Assignee cannot be misused as a collection agent for recovery of the dues to the estate. It had been finally stated that the petition should be dismissed as not maintainable.



WEB COPY 8. On consideration of the pleadings, the following issues arises for consideration:

“(i) Whether the application is bad for non joinder of necessary party / spouse of the second respondent;

(ii) Whether the claim of the Official Assignee against the second respondent is barred by the law of limitation?;

(iii) Whether the claim by the Official Assignee against the spouse of the second respondent is barred by the law of limitation?;

(iv) Whether the doctrine of relation back would apply to the facts and circumstances of the case?;

(v) Whether the affidavit filed by the second respondent before the Election Commission could be termed as an admission of debt or as a liability declared to be due?;

(vi) Whether the application is to be allowed? If it is to be allowed, the rate of interest which can be awarded on the amount so declared as due?; and

(vii) To what other reliefs are the parties entitled to?”



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9. The issue then moved to trial and on the side of the Official Assignee, one witness R.Padma, Sub Assistant Registrar, Office of Official Assignee was examined as PW-1. On the side of the second respondent, the second respondent M.Karthe examined himself as RW-1.

10. The Official Assignee marked Exs. A-1 to A-5. Ex.A-1 are the relevant pages from the report of the Auditor, Ranga Ramanujam, Ex.A-2 is the copy of demand notice sent by the Official Assignee together with acknowledgment card, Ex.A-3 is the list of debtors as furnished by insolvent counsel for the insolvent, Ex.A-4 series are the statement of accounts of the insolvent from Indian Bank, Ethiraj Salai Branch, Chennai, with respect to the transactions with the second respondent. Ex.A-5 is the copy of the affidavit filed by the second respondent together with Annexure before the Election Commission. During the course of examination of RW-1, Ex.A-6 was marked, which is the certified copy of the affidavit filed by the second respondent before the Election Commission of India and Ex.A-7 is the copy of the notice to produce issued by the counsel for the Official Assignee to the counsel for the second respondent. The respondent did not mark any document.



WEB COPY 11. Heard arguments advanced by Mr. K.V.Ananthkrushnan, learned counsel for the Official Assignee and Mr. P.B.Sampath Kumar, learned counsel for the second respondent.

12. Mr. K.V.Ananthkrushnan, learned counsel for the applicant/Official Receiver stated that a creditors application in I.P.No. 25 of 2014 had been filed by one Chitra Desai on 10.03.2014 against the first respondent Arjunlal Sunderdas, seeking to declare the said first respondent as an insolvent. It is stated by the learned counsel that by an order dated 21.04.2014, the first respondent was adjudicated as an insolvent. The order of adjudication had also been published in Vernacular and English newspapers on 18.07.2014.

13. It is the specific contention of the learned counsel that on and from 21.04.2014, all assets / properties / credits of the insolvent stood vested with the Official Assignee. The learned counsel further pointed out that the insolvent was engaged in finance and real estate business and was also the shareholder in several companies dealing with finance and real estate. It had



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been further stated that during investigation by the Official Assignee into the assets and liabilities of the insolvent, it came to be known that the insolvent had numerous creditors and debtors. There were claims made against the estate and the estate also had numerous actionable claims against several individuals. The learned counsel further stated that the insolvent did not come forward to declare his assets and liabilities and failed to file the schedule of affairs and also did not produce any books of accounts. The Official Assignee however took steps to take possession of the properties of the insolvent.

14. It was further contended that the list of debtors and creditors were made available only from the statement and list given by the auditor of the insolvent, Ranga Ramanujam. The Official Assignee had also engaged an independent auditor M/s. Annamalai Associates to examine the books of accounts of the insolvent from the computer generated statements and to determine the list of debtors and creditors. It was then stated that the counsel for the insolvent had forwarded a letter dated 07.04.2017 giving a list of debtors and creditors to the estate. The insolvent died on 07.05.2018.



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15. The learned counsel further pointed out that a correlation of the bank statements of the insolvent with the statement of debtors and creditors revealed the actual list of debts to the estate of the insolvent. He further pointed out that a perusal of the statements revealed that the second respondent had received a sum of Rs.9/- crores from the insolvent which was declared as due as on 30.04.2013. It was further contended that there were no further transactions after that date to prove discharge.

16. It was further contended by the learned counsel that the second respondent had contested the general elections for the Tamilnadu State Assembly held in the year 2011 a Edappadi Constituency in Salem District and as a pre-requisite for his candidature to be accepted by the Election Commission had filed an affidavit disclosing his assets and liabilities. The learned counsel stated that in the said affidavit, the second respondent had disclosed that his wife Tmt.K.Shanthi had a debt to Arjunlal Sunderdas to a sum of Rs.2.75 crores and the second respondent had a debt of Rs.6.25 crores. The learned counsel pointed out that the documents in this regard had been marked as Ex.A-5, during the chief examination of PW-1. Since the second



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respondent had denied knowledge of the contents of the said affidavit, certified copy had been marked as Ex.A6 during the cross examination of the second respondent.

17. It was further contended by the learned that the statements of accounts revealed that as between the second respondent and the insolvent, the last transaction was on 17.08.2011. He further stated that the affidavit before the Election Commission confirming that the second respondent was liable to the insolvent to a sum of Rs.6.25 crores and that his wife was due to a sum of Rs.2.75 crores was filed on 24.03.2011.

18. It was further pointed out by the learned counsel that the creditor petition seeking to declare Arjunlal Sunderdas as an insolvent was filed on 10.03.2014. In the said petition, the last act of insolvency by the insolvent was stated to have been committed on 25.01.2014 when post dated cheques were issued and a subsequent letter dated 25.01.2014 was given by the insolvent seeking not to present the said cheques for payment. The learned counsel then pointed out that the insolvent was adjudicated as insolvent by



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order dated 21.04.2014. It was then pointed by the learned counsel that this application was filed on 17.04.2017 within a period of three years from the date of such adjudication.

19. It was also pointed out that the date of adjudication was also within a period of three years from the date of last transaction between the second respondent and the insolvent which was on 17.08.201. It was further contended that the doctrine of relationship back as enunciated in Section 51 of the Presidency Towns Insolvency Act, 1909, if applied, would make it clear that the petition had been filed within three years from the date of adjudication and therefore the learned counsel contended that the petition is well within the period of limitation.

20. The learned counsel however also contended that in so far as the transaction with Tmt. K.Shathi, wife of the second respondent is concerned, there is no document to show that there were transactions between her and the insolvent independent to the transactions between the second respondent and the insolvent. The learned counsel was fair to state that the Court will have to



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examine the issue of limitation in so far as the liability of Tmt.K.Shanthi is concerned.

21. The learned counsel further pointed out that he had issued a notice to produced which had been marked as Ex.A-7 on 27.09.2018 to the learned counsel for the second respondent calling upon the second respondent to produce the office copy of the affidavit given before the Election Commission and pointed out that the failure to do so, would necessarily lead to a presumption drawn by the Court that the said document had not been furnished only because if so furnished, it would be adverse to the interests of the second respondent. The learned counsel therefore stated that the application should be allowed atleast with respect to the claim against the second respondent is concerned.

22. Mr. P.B.Sampath Kumar, learned counsel for the second respondent however disputed the contentions of the learned counsel for the Official Assignee. The learned counsel pointed out that the only basis on which the claim was made were Bank statements produced by the auditor of



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the insolvent and there had been no independent verification whether the said statements could be relied upon by a Court of law or were only self serving statements. The learned counsel also pointed out Ex.A-3 the letter given by the counsel for the insolvent wherein the debt due by the second respondent to the insolvent as declared as bad debts. It was therefore contended that the amount would not therefore been recoverable from the second respondent. The learned counsel also pointed out that the statements of accounts produced do not reflect transactions indicating that they all constituted one continuous transactions. It was stated that there had been borrowals in the year 2007 and thereafter there had been no transactions at all and it is therefore contended that even if it is to be presumed that the second respondent had borrowed money from the insolvent, the said borrowal was barred by the law of limitation.

23. With respect to the declaration before the Election Commission, learned counsel brushed aside the same by stating that the said declaration has no evidentiary value. The learned counsel also strenuously assailed the maintainability of the petition on the ground of non joinder of necessary party



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particularly the spouse of the second respondent. He stated that if the Official Assignee were to rely on the affidavit given before the Election Commission, then a very perusal of the affidavit would reveal that the amount claimed in the application is severable into two distinct parts, one by the spouse of the second respondent and the other by the second respondent – HUF. It was contended that therefore, the second respondent cannot be proceeded against independently or individually and stated that the application will necessarily have to be dismissed.

24. We have carefully considered the materials on record and the arguments advanced.

Issue Nos. 1 & 3:

25. Both these issues relate to non joinder of the spouse of the second respondent Tmt. K.Shanthi and whether the claim against her could be maintainable and whether it is barred by the law of limitation. The applicant relies on Ex.A-1 which are the relevant pages from the report given by the



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Auditor of the insolvent, Ranga Ramanujam and Ex.A3 the list of debtors as furnished by the counsel for the insolvent and Ex.A-4 which are the statements of accounts of the insolvent in Indian Bank, Ethiraj Salai, Chennai and Exs. A-5 and A-6 which are copies of the affidavit filed by the second respondent before the Election Commission of India.

26. All these documents will have to be examined to determine whether the application would be maintainable for the sum which is sought in the application namely Rs.9/- crores together with interest or whether the said claim could be severed into two separate heads.

27. The first would be the liability of the second respondent and the other would be the liability of his wife Tmt.K.Shanthi. The document in which this severance of the amount claimed becomes evident is Ex.A-5, a copy of the affidavit filed by the second respondent together with annexures before the Election Commission when he contested the Tamilnadu State Legislative Assembly elections for Edapadi constituency in Salem District in 2011.



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28. In the particular affidavit, while declaring his assets and liabilities, the second respondent had declared as his liabilities, in his name and in the name of his spouse a sum of Rs.9/- crores which was divisible into two halves. He had declared that his wife Tmt.K.Shanthi was liable to Arjunlal Sunderdas, the insolvent to a sum of Rs.2.75 crores and that he/HUF was liable to a sum of Rs.6.75/- crores. This declaration was dated 22.03.2011.

29. The present issues now concern the liability of the spouse of the second respondent. In this application, she has not been made a party respondent. The affidavit filed before the Election Commission was available in the office of the Official Assignee. They knew that the debt of the estate of the insolvent was independent of the debt of the second respondent. However, for reasons best known to the Official Assignee, she has not been made a party to the proceedings. Since she is not a party to the proceedings, it may not be prudent on the part of this Court to declare any liability on her. Even during the pendency of the petition, the Official Assignee had not taken



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steps to implead her as a party. It is trite in law to point out that the debts for loans obtained are personal in nature and it is the borrower, who is liable to repay the same. By no stretch of imagination, can the borrowal of once spouse be termed as borrowal of the other spouse. Every loan transaction is independent and has a separate cause of action, if ever a claim is made for repayment of the loan. The terms of borrowal would be independent and the terms on which it was agreed to be repaid would be independent and specific to that particular borrowal. Therefore, the Court can never adjudicate the claim made by the Official Assignee against the spouse of the second respondent as she is not a party to the application.

30. The issue which would then require examination is whether the application itself has to be struck down for non joinder or whether the application could still be maintainable against the second respondent with respect to the amount which he had borrowed from the insolvent. As stated, every borrowal is independent of the other and when it is found that the transaction consists of two separate transactions and they are severable in nature, then the application could be maintained against the one for which the claim would lie in law.



WEB COPY 31. In the instant case, therefore, it will have to be examined whether, even if the borrowals are separable, the claim against the spouse of the second respondent is barred by the law of limitation. The mere declaration in the affidavit filed by the second respondent before the Election Commission can never bind his wife. It is only a statement given by him. It would be a binding statement so far as the second respondent is concerned, since he had signed the affidavit. In so far as his wife is concerned, there is no document to show the date of borrowal, whether there are any further transactions and whether it had been discharged after the affidavit had been filed before the Election Commission. The only statement is that of the second respondent before the election commission by way of his affidavit and we hold that it is a poor piece of evidence so far as the spouse of the second respondent Tmt.K.Shanthi is concerned.

32. But we would also hold that since it is held that she is not liable for any claim, the issue of non joinder becomes redundant and since the claim is also severable, we hold that the application is maintainable and not bad for non joinder of Tmt.K.Shanthi, wife of the second respondent. The first issue



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is answered accordingly. With respect to the third issue, we hold that the application is barred by law of limitation so far as the claim against Tmt.K.Shanthi, wife of the second respondent is concerned. Thus the issues answered accordingly.

Issue Nos. 2, 4 & 5:

33. All these issues relate to the transactions between the second respondent and the insolvent. Even before examining them any further, the evidence on these transaction will have to be examined. It primarily revolves around the letter given by the learned counsel for the insolvent to the office of the Official Assignee which had been received in the office of Official Assignee on 07.04.2017 wherein the list of debtors had been given. In that list, as a bad debt the name of the second respondent is given and the amount mentioned is Rs.9/- crores. However as is evident from Exs.A5 and A-6, in the declaration before the Election Commission by the second respondent, the individual debt of the second respondent is Rs.6.75/- crores. The transactions relating to this amount range from 06.09.2007 and the last transaction is on 17.08.2011. This is evident from Ex.A-4 the statements of accounts of Indian



Bank, Ethiraj Salai, Chennai, with respect to account No. 422156084 of Arjunlal Sunderdas, the insolvent.

34. It is seen that the transactions were between the insolvent and the second respondent, M.Karthe. There has been a credit of Rs.1 crore on 06.09.2007 and a corresponding debit also on 06.09.2007 to the same amount. There had been subsequent credits on 06.09.2007 for a sum of Rs.1,70,000/-, for a further sum of Rs.70,000/- and a further sum of Rs.8,00,000/- and to a further sum of Rs.11,90,400/- and to a further sum of Rs.19,40,000/- and to a further sum of Rs.58,40,000/-. There has been a debit account on 06.07.2007 to a sum of Rs.1 crore.

35. It is thus seen there has been continuous debits and credits between the insolvent and the second respondent. Thus, that there were transactions between the insolvent and the second respondent stand established by the said document / Ex.A-4. Thereafter on 17.08.2011, there has been a further credit of Rs.40/- lakhs and also a debit of Rs.40/- lakhs on the same day. The last transaction between the second respondent and the



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insolvent was therefore on 17.08.2011. In the interregnum period since the transaction were alive, the second respondent had filed an affidavit before the Election Commission of India again stating that he was liable to pay to Arjunlal Sunderdas, a sum of Rs.6.25 crores. This affidavit was filed on 24.03.2011.

36. It is the contention of the learned counsel for the official assignee is that even if it cannot be taken as an acknowledgment for debt, it must be taken as a declaration of liability. On that date, the second respondent had made a declaration that he is liable to the insolvent to a sum of Rs.6.75/- crores.

37. The insolvency petition had been filed by a creditor Chitra Desai on 10.03.2014. The last date of commission of the act of insolvency was 25.01.2014. The insolvent was adjudicated as an insolvent on 21.04.2014. Thus even if the affidavit Exs.A5 and A6 before the Election Commission are taken only as a declaration of liability, the last transaction between the second respondent and the insolvent was on 17.08.2011. The debt therein



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would be enforceable till 16.08.2014. On the date when the insolvent committed his last act of insolvency on 25.01.2014, the debt was live. On the date when the creditor application was actually filed on 10.03.2014 again the debt was liable. On the date when the insolvent was declared as insolvent on 21.04.2014 again the debt was live. The present application was filed on 17.04.2017 within three years from the date of adjudication as insolvent by the Court. It is in this connection that the doctrine of relation back has to be examined.

38. Section 17 of the Presidency Towns Insolvency Act 1909 is as follows:-

“17. Effect of order of adjudication.- On the making of an order of adjudication, the property of the insolvent wherever situate shall vest in the official assignee and shall become divisible among his creditors, and thereafter, except as directed by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall, during the pendency of the insolvency proceedings, have any



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remedy against the property of the insolvent in respect of the debt or shall commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose: Provided that this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.”

39. A plain reading of the above would show that on making the order of adjudication, the property of the insolvent wherever situated shall vest with the Official Assignee. The loan due to the estate also stands vested with the Official Assignee who has a right to collect the debt to paid back to the creditors. Therefore, since the last transaction was on 17.08.2011 and Arjunlal Sunderdas was adjudged as insolvent on 21.04.2014, within a period of three years from the date of the last transaction, we hold that the debt of the second respondent vested with the Official Assignee.



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40. This application was filed on 17.04.2017. The issue is whether this application seeking recovery of the money would be barred by the law of limitation. It is in this connection that Section 51 of the Presidency Towns Insolvency Act, 1909 has to be referred.

41. Section 51 of the Presidency Towns Insolvency Act, 1909 is as follows:-

51. Relation of assignee's title.- The insolvency of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to and to commence at--

(a) the time of the commission of the act of insolvency on which an order of adjudication is made against him, or

(b) if the insolvent is proved to have committed more acts of insolvency than one, the



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time of the first of the acts of insolvency proved to have been committed by the insolvent within three months next preceding the date of the presentation of the insolvency petition: Provided that no insolvency petition or order of adjudication shall be rendered invalid by reason of any act of insolvency committed anterior to the debt of the petitioning creditor.

42. This particular provision had been interpreted by Courts of law and there are precedents for the same.

43. In a Division Bench Judgment of this Court reported in **(1918) 8 LW 281, [T.V.Sankaranayana Aiyar Vs. Alagiri Aiyar and others]**, the issue before the Court was whether the adjudication as insolvent is to be treated as made on the actual date of order of adjudication or with reference to the date of presentation of the petition in which the insolvency originated. With respect to the Section 51 of the Presidency Towns Insolvency Act, 1909 it had been held as follows:-



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“By Sect. 51 of the Presidency Towns Insolvency Act of 1909, it is enacted that the insolvency of a debtor shall be deemed to have relation back to and to commence at the time of the commission of the act of insolvency on which the order of adjudication is made against him or the time of the first of the acts of insolvency (if there are more than one) committed by the insolvent within three months next preceding the dates of the presentation of the insolvency petition. Thus Sect. 51 of 1909 Act follows the English law while Sect. 16, cl.6 of the provincial Insolvency Act dates the effect of the order of the adjudication from the date of the petition.”

44. It had thus been held that the insolvency shall be deemed to have relation back to commence at the time on which the order of adjudication was made.

45. It must be kept in mind that I.P.No. 25 of 2014 was an application filed by creditor and therefore, the date of adjudication as



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insolvent is crucial and that was 21.04.2014. This application being filed on 17.04.2017, would relate back to the date of adjudication and therefore, we hold that the application has to be held as being within the time and not barred by the order of limitation.

46. In *AIR 1963 SC 754 [Official Assignee, High Court, Bombay Vs. Haradagiri Basavanna Gowd and others]*, while examining Section 51 of the Presidency Towns Insolvency Act, it had been held as follows:-

“Sec. 17 of the Presidency Act provides, inter alia, that on the making of an order of adjudication, the property of the insolvent wherever situate shall vest in the official assignee and shall become divisible among his creditors. Under section 51 of the said Act it is provided, inter alia, that the insolvency of a debtor shall be deemed to have relation back to, and to commence at, (a) the time of the commission of the act of insolvency on which an order of adjudication is made against him, or (b) if the insolvent is proved to have committed more acts



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of insolvency than one, the time of the first of the acts of insolvency proved to have been committed by the insolvent within three months next preceding the date of the presentation of the insolvency petition. It is thus clear that when an adjudication order is made under s.17 it relates back to the date specified by section 51. As a result of the combined operation of the said two sections, the insolvency under the Presidency Act commences on the commission of the act of insolvency and it is on that date that the property of the insolvent vests in the Official Assignee. Sec. 51 clearly shows that the insolvency is deemed to commence from the moment when the debtor committed the earliest act of insolvency which is proved to have been committed within three months before the presentation of the petition on which the order of adjudication is made. This petition can be made either by the debtor himself or by any of his creditors. This position about the effect of the doctrine of 'Relation back' is not in dispute. ”



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47. In that particular case, as against the insolvent, the Bombay High Court had passed an order of adjudication on 17.04.1950. The earliest act of insolvency within three months was 14.03.1950. It was held that the adjudication was would relate back to 14.03.1950. Subsequently, the District Court at Bellari had invoked the provisions of the Provincil Towns Insolvency Act and had appointed an Official Receiver for the very same estate. The Hon'ble Supreme Court held that the property had vested only with the Official Assignee by the Bombay High Court and not with the Official Receiver of the District Court and the reasons given were as follows:-

“In our opinion, the property of the insolvent vests in the Official Assignee by virtue of the operation of s. 17 of the Presidency Act. Section 17 provides for the vesting of the property on the making of the order of adjudication, and so, when the District Court at Bellary passed an adjudication order in the insolvency proceedings pending before it, section 28(2) could not in law operate in respect of the insolvent's property because the said property had by virtue of the statutory provisions contained in s. 17 of the Presidency Act



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already vested in the Official Assignee. The doctrine of relating back on which section 28(7) of the Provincial Act and section 51 of the Presidency Act are based, could have no application in the present case because the vesting in the Official Assignee is the result of a statutory provision; and so, in the absence of any provision in the Provincial Act for the divesting of the property which has already vested in the Official Assignee, it cannot be said that the doctrine of relating back has that effect. The object of providing for the vesting of the insolvent's property in the Court Officer obviously is to protect the said property in the interests of the creditors of the insolvent and to facilitate its fair and just administration. If for achieving that object by operation of an adjudication order passed by the Bombay High Court in exercise of its jurisdiction under section 17 the said property has vested in the Official Assignee, there would be no purpose in providing that the said property should be divested from the Official Assignee and vested in the Official Receiver of the District Court.”



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“It is correct to say that I have filed my declaration about the assets and liabilities to the Election Commission during 2011 election. I have also disclosed the assets and liabilities of my wife before the Election Commission. Witness is shown documents filed by the official assignee Ex.A1 to Ex.A5. Witness answered that the documents are in English so that he is not able to understand. It is true that I have filed my proof affidavit which is in English. I have studied upto 10th standard, to some extent I can understand English.

It is true that Ex.A5 is the declaration which was given by me before the Election Commission.

Q: In the said declaration ie., Ex.A-5 you have disclosed that you and your wife have borrowed loan from Arjunlal Sunderas, is it correct?



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A: I am not aware as the same was given by my Auditor.

Q: Whether your Advocate and your Auditor only prepared the information for Ex.A5?

A: It is true that lawyer and Auditor prepared the report for the disclosure of assets and liabilities.”

49. The extract shows the evasiveness of the second respondent during the cross examination. He had not committed himself to the affidavit filed by him before the Election Commission. This itself shows that since he had not produced the affidavit even though notice to produce was issued, it could only lead to an presumption that the affidavit was not produced by the second respondent only because it would be adverse to him.

50. In this connection, Section 114(g) of the Indian Evidence Act can be referred to:-



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“114 Court may presume existence of certain facts. —The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. Illustrations The Court may presume—

(g) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it; ”

51. We also draw an adverse inference against the second respondent.

52. Thus the authority of the Official Assignee to claim any debt due to the estate is a statutory right. It is thus seen that if the doctrine of relation back is applied to the application filed on 17.04.2017, it would relate back to the date of adjudication as insolvent on 21.04.2014 which would also relate



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back to the date of filing of the application on 10.03.2014 and which would relate back to the date of act of insolvency on 25.01.2014 and would relate back to the last transaction on 17.08.2011. Thus there is a complete chain and the applications having been filed within three years from the date of adjudication as insolvent, and since I.P.No. 25 of 2014 was a petition filed by a creditor, we hold as follows with respect to the issues under consideration.

(i) With respect to issue No.2 we hold that the petition is not barred by law of limitation.

(ii) With respect to issue No.4 we hold that the doctrine of relation back would bring the debt of the second respondent would relate back to the date of adjudication 31.04.2014 and therefore, the application filed on 17.04.2017 was within the period of limitation.

(iii) With respect to issue No.5, the affidavit filed before the Election Commission even though it is a declaration of a liability, we hold it as a statement of fact made by the second respondent and therefore, the fact



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becomes relevant and thus gives a further statutory right to the Official Assignee to claim the debt. The claim will have to relate back to the date of last transaction which was on 17.08.2011 and the date of adjudication, 21.04.2014 was within the period of three years and we hold that the application is maintainable and within the period of limitation. The affidavit before Election Commission may not have evidentiary value but will have to be taken as a statement of fact and as a declaration of existing liability. The issues 2, 4 and 5 are answered accordingly.

Issue Nos. 6 & 7:

53. In the result the application is partly allowed and a decree is passed directing the second respondent to pay a sum of Rs.6.25/- crores together with interest would be 18% since no contra evidence had been produced that the borrowal was not for commercial transaction. Therefore, we would uphold interest at 18% p.a. The issues are answered accordingly.

Issue No.8:



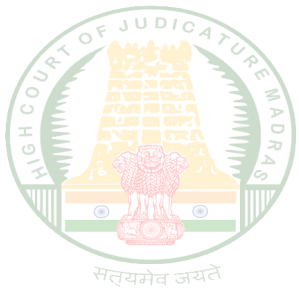
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54. In the result, the application is partly allowed. A decree is passed directing the second respondent to pay a sum of Rs.6.25/- crores together with interest at 18% p.a., from 30.04.2013 till the date of realisation together with costs of the recovery proceedings.

(Dr.G.J.J.,) (C.V.K.J.,)
04.10.2023

vsg

Dr. G. JAYACHANDRAN, J.
&



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C. V. KARTHIKEYAN, J.

vsg

Pre-Delivery Order made in
Application (IP) No. 170 of 2017
in
I.P.No.25 of 2014

04.10.2023