



OSA.Nos.268 & 269/2021

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 22.01.2025

Delivered on 29.04.2025

CORAM

THE HONOURABLE MR. JUSTICE S.S. SUNDAR

AND

THE HONOURABLE DR. JUSTICE A.D.MARIA CLETE

OSA.Nos.268 & 269/2021 & CMP.Nos.

Kotak Mahindra Bank Limited
No.3, Dass India Tower
2nd Floor, 2nd Line Beach
Parrys, Chennai 600 001

... Appellant in both
appeals

Vs.

1.Mr.A.Manohar Prasad

2.Official Assignee
Madras High Court
Chennai 600 104.

... Respondents in
both appeals

Prayer : Original Side Appeals filed under Section 8[2] of Presidency Towns Insolvency Act, 1909 read with Clause 15 of Letters Patent and Order 36 Rule 1 of the Original Side Rules against the judgment and decree dated 14.06.2021 made in A.Nos.299 & 298/2018 in IP.No.5/2013.



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For Appellant in
both appeals : Mr.H.Karthik Seshadri

For R1 in both
appeals : Mr.V.Raghavachari, Senior counsel
for M/s.Shubharanjani Ananth

For R2 in both
appeals : Mr.N.P.Jayakumar

COMMON JUDGMENT

S.S.SUNDAR, J.,

(1)The above appeals have been preferred by the creditor challenging the common order passed by the learned Single Judge dated 14.06.2021 in A.Nos.298 and 299/2018 in IP.No.5/2013 allowing the applications to annul the exparte order of adjudication dated 28.09.2015 and to stay all further proceedings in IP.No.5/2013.

(2)Since this Court is called upon to examine several factual and legal issues, this Court finds it appropriate to narrate the dates and events and the admitted facts for the sake of appreciating the arguments on both sides.

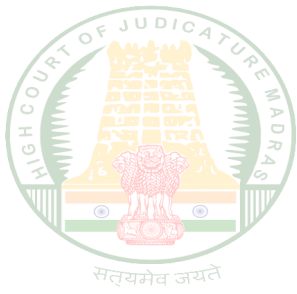


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- i. The 1st respondent and his brother were doing business by running a few Private Limited Companies, namely, M/s.Ravishankar Industries Private Limited, M/s.Green Gardens Private Limited, M/s.Gemini Arts Private Limited and M/s.Mahalakshmi Properties and Investments Private Limited. M/s.Ravishankar Industries Private Limited along with the 1st respondent and his brother approached M/s.IndBank Merchant Banking Services Limited and availed loan for business purpose. Similarly, M/s.Green Gardens Private Limited, Gemini Arts Private Limited, Mahalakshmi Properties and Investments Private Limited promoted by the 1st respondent and his brother, had availed loan facilities from M/s.IndBank Housing Private Limited.
- ii. Mr.A.Manohar Prasad, the 1st respondent herein and his brother Mr.A.Ravishankar Prasad, stood as guarantors. Since the borrowers and the guarantors had not repaid the loan, the following suits were filed:-

1. CS.No.1023/1998 filed against M/s.Mahalakshmi Properties



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and Investments Private Limited and Others.

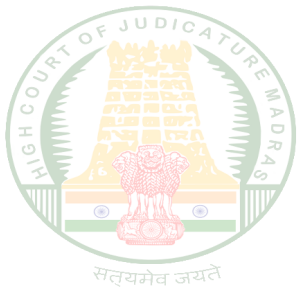
2. CS.No.33/1999 filed against M/s.Green Gardens Private Limited and Others.

3. CS.No.52/1999 filed against M/s.Gemini Arts Private Limited and Others.

4. CS.No.225/1999 filed against M/s.Ravishankar Prasad Properties and Others.

In all the suits, the 1st respondent and his brother Mr.A.Ravishankar Prasad were also parties as guarantors.

iii. In CS.No.225/1999, a Memorandum of Compromise was entered into on 30.11.2000 between M/s.IndBank Merchant Banking Services Limited and the defendants in the suits who are M/s.Ravishankar Industries Private Limited, Mr.A.Ravishankar Prasad and Mr.A.Manohar Prasad [1st respondent herein]. The defendants in the said Memorandum of Compromise submitted to decree, for a sum of Rs.4,21,71,000/- as on 24.07.2000. The terms of compromise enabled the borrowers to pay the amount in instalments and there was

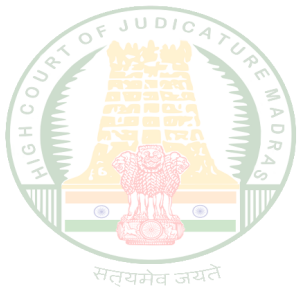


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a default clause by which the plaintiff was given the right to execute the decree for the entire amount with interest at 24% per annum in case there is delay or default, jointly and severally against the defendants. There were other terms also regarding withdrawal of company petition in CP.No.318/1997 and other criminal cases filed under Section 138 of Negotiable Instruments Act.

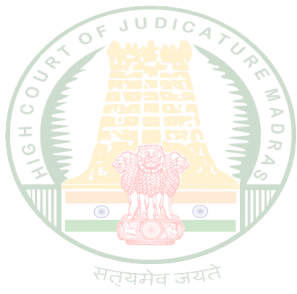
- iv. On 11.12.2000, the Memorandum of Compromise was recorded in CS.No.225/1999 and a decree was passed based on the said Memorandum of Compromise. Despite the decree dated 11.12.2000 based on Memorandum of Compromise, the judgment debtors namely, the defendants in the suit in CS.No.225/1999 committed default and hence, M/s.IndBank Merchant Banking Services Limited filed EP.Nos.45 to 47 of 2004 for execution of the decree dated 11.12.2000 passed in CS.No.225/1999. The decree holder obtained an order of attachment of properties on 11.04.2005. It was at that time, the judgment debtors came forward with a proposal to settle the dues on 30.08.2006. It is admitted that the 1st respondent's brother



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also approached the appellant to save the properties of 1st respondent and his brother being sold. Simultaneously, on 13.10.2006, a Deed of Assignment was executed by M/s.IndBank Housing Limited in favour of the appellant namely M/s.Kotak Mahindra Bank Limited [hereinafter referred to as 'KMBL']. On the same day, i.e., on 13.01.2006, another Deed of Assignment was executed by M/s.IndBank Merchant Banking Services Limited in favour of KMBL. By the two Deeds of Assignments, the rights, title and interest in respect of the decree in CS.No.225/1999 and EP.Nos.45 and 47 of 2004 was given to KMBL for a consideration of Rs.565 Lakhs. Similarly, M/s.IndBank Housing Limited assigned its right, title and interest in respect of the decree in CS.No.33/2009 and CS.No.1023/1998, 50 and 2/1999 to KMBL. Based on the Deed of Assignment, KMBL have come on record as plaintiff in all the suits and thereafter, a settlement was reached between the plaintiff and the defendants in all the suits.

v. The terms of Agreement [consent terms] in CS.No.225/1999 was

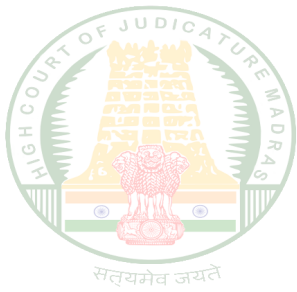


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entered into on 23.10.2006 wherien the defendants had agreed to pay a sum of Rs.10 Crores to satisfy the decree in CS.NO.225/1999 within 90 dys and the time was extended up to 270 days on payment of additional amounts. The consent terms between plaintiff and defendants are signed by the parties in the presence of their counsels on 23.10.2006.

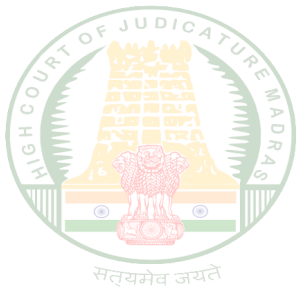
- vi. Similar consent terms are signed by the parties in respect of three suits in CS.NOs.1023/1998, 33/1999 and 52/1999 on 23.10.2006 and a consent decree was passed on 26.03.2007 in all the three suits. As per the terms of the consent decree, the defendants in CS.No.1023/1998, CS.No.33/1999 and CS.No.52/1999 have submitted to the decree and agreed to pay the sum agreed together with interest at 20% per annum at quarterly rest from 14.10.2006 till the date of payment in respect of financial facility granted by M/s.IndBank Housing Limited which was assigned in favour of KMBL. As per the terms of compromise, the plaintiffs have agreed not to execute the decree if the defendants pay to the plaintiffs a



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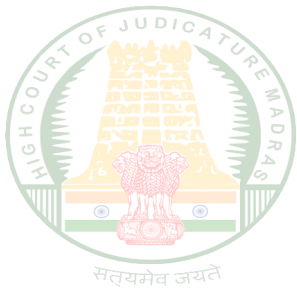
lesser amount than the decretal amount within a particular date, failing which the plaintiffs were given right to execute the decree as per the consent decree. This concession was extended upto 270 days from the date of entering into consent terms. The three different terms of compromise in respect of all the three suits were signed by the parties in the presence of their respective counsels. As per the terms of consent entered into on 23.10.2006 in CS.No.33/1999 the defendants had agreed for payment of a sum of Rs.29,49,81,355/- with interest at 20% per annum to KMBL from 14.10.2006 till the date of payment. As per the consent terms entered into on 23.10.2006 in CS.No.52/1999, the defendants had agreed to pay a sum of Rs.29,00,96,918/- with interest at 20% per annum to KMBL from 14.10.2006 till the date of payment. In the same manner, the terms of consent were entered into on 26.03.2007 in CS.No.1023/1998. However, the consent decree passed in CS.No.1023/1998 is not relevant in the present proceedings. The consent decrees passed in the three suits on 26.03.2007 has become final.



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vii. Based on the decree obtained on the basis of Memo of Compromise in the form of consent terms, M/s.KMBL issued notice of demand on failure to pay the amount in terms of compromise. However, the judgment debtors including the 1st respondent did not pay any amount as promised. Hence, the defendants including the 1st respondent is now liable for the whole amount as per the consent decree. Hence, KMBL initiated proceedings under the SARFAESI Act, 2002, against the defendants who failed to comply with the terms of compromise.

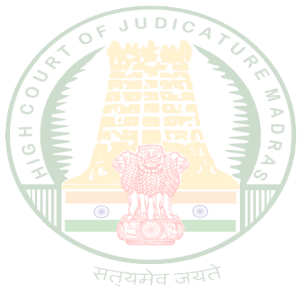
viii. M/s.KMBL on 03.07.2009 filed OA.Nos.46 and 47/2008 before the Debts Recovery Tribunal-1, Chennai, praying for issuance of recovery certificate against the judgment debtors. In the applications, interim orders were passed restraining the judgment debtors from dealing with the properties. The judgment debtors challenged the interim orders passed by DRT-1, Chennai in WP.Nos.13126 and 13138/2009 on the ground that DRT did not have jurisdiction to entertain the applications in view of Section 31 of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 [RDDB and FI Act,



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1993]. However, a Division Bench of this Court passed an order on 30.07.2009 remitting the matter back to DRT to consider the question of jurisdiction.

- ix. Meanwhile, on behalf of the appellant, insolvency notice in Form No.14-A under Order III-A Rule 2 in IN.No.11/2009 dated 01.09.2009 was issued to the 1st respondent, calling upon him to pay or furnish security to satisfy the decree amount due as on 27.01.2009 i.e., Rs.91,52,01,296/- as per the consent decree in CS.Nos.33 and 52/1999 under Section 9[2] of the Presidency Towns Insolvency Act, 1909 [hereinafter referred to as "Insolvency Act, 1909"]. Similar notice was issued in IN.No.110/2011 in respect of the amount due as per the decree amount in CS.No.225/1999 on 29.08.2011.
- x. The 1st respondent and his brother filed an application in A.No.435/2009 to set aside the notice in IN.No.11/2009 along with an application in A.No.399/2009 to condone the delay of 19 days in filing the application to set aside the insolvency notice earlier mentioned. This Court allowed the application in



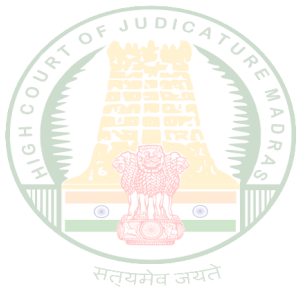
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xi. On 11.05.2011, the creditor filed OA.No.84/2011 against M/s.Ravishankar Industries Private Limited, Ravishankar Prasad and the 1st respondent herein before DRT-II, Chennai for issuing Recovery Certificate.

xii. It is admitted that in response to the insolvency notice dated 29.08.2011 in IN.No.110/2011 no payment was made nor an application is filed to set aside the insolvency notice. Thereafter, on 10.10.2011, IP.No.98/2011 was filed by the appellant to adjudicate the 1st respondent as insolvent for non-payment of the compromise amount of Rs.15,14,19,212/- as per the decree in CS.No.225/1999. On the same day, IP.No.94/2011 was also filed by the appellant to adjudicate Mr.A.Ravishankar Prasad, brother of 1st respondent as insolvent for non-payment of the same amount due under the decree in CS.No.225/1999.

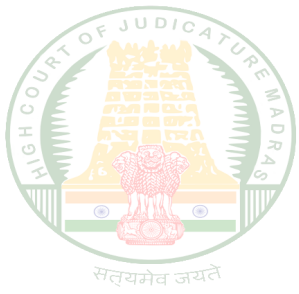
xiii. In the meanwhile, the application filed by the 1st respondent along with his brother Mr.A.Ravishankar Prasad in A.No.435/2009 in



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IN.No.11/2009 was dismissed by a learned Single Judge vide order dated 16.07.2012. It is relevant to point out that the 1st respondent raised the following contentions in A.No.435/2009 while seeking to set aside the insolvency notice in IN.No.11/2009:-

- (a) The debtors had already tendered payment to the respondent Bank and therefore, they do not owe any money to the Bank.*
- (b) M/s.IndBank Housing Limited which was the original plaintiff in both the suits was not a Bank at all and in the decree passed in both the suits, a record of tender of full payment and receipt of the same by the Bank has been made.*
- (c) The respondent Bank has not produced any proof to show the assignment of debt by M/s.IndBank Housing Limited.*
- (d) Even the consent decree passed in the suit record the handing over all post dated cheques for the entire decree amount and hence, full satisfaction had already taken*



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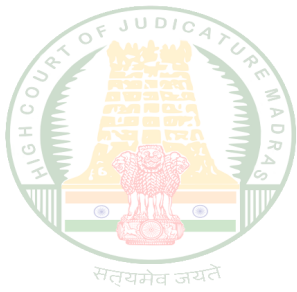


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place.

(e) In any case, the decrees have become unenforceable in view of the challenge made to the validity of the same before the DRT particularly, when opportunity is given by the Division Bench of this Court to agitate the issues before the Tribunal.

xiv. The learned Judge, after elaborately considering all the grounds raised by the 1st respondent in A.No.435/2009 and the terms of consent and the terms of the compromise decree passed by this Court in the suit in CS.No.33/1999 and CS.No.52/1999 held that none of the contentions raised by the 1st respondent and his brother can be sustained in view of the facts admitted. It is relevant to state that the same argument now advanced before this Court was also made raised relying upon Section 31-A of RDDB and FI Act, 1993. The learned Judge also considered the merits of the application and held that none of the points raised by the 1st respondent would fall under Clause [a] or Clause [b] or Clause [c] of sub-section 5 of Section 9. While

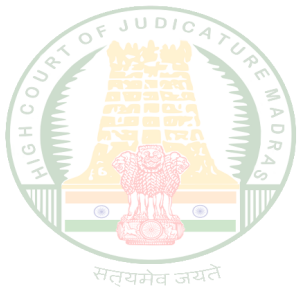


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considering the contention that the decrees have become unenforceable by referring to Section 31-A of RDDB&FI Act, 1993, the learned Judge specifically held that the said contention is frivolous. Learned Judge held that under 9[5][ii] of Presidency Towns Insolvency Act, 1909, the objection regarding inexecutability of the decree should be with reference to the provisions of law referred to in Clause [b] of sub-section 5 of Section 9. The learned Judge also held that in the absence of a challenge to the executability of the decree and the challenge is to the jurisdiction of DRT to execute the decree, the creditor can always execute the decree in the Court which passed the decree, namely, the High Court. It is specifically held that the objection to the Forum where the decree is sought to be executed cannot make the decree holder ineligible to come up with the insolvency notice.

xv. As against the order of the learned Single Judge in A.No.435/2009 in IN.No.11/2009, the 1st respondent and his brother filed an appeal in OSA.No.344/2012. Meanwhile, M/s.KMBL instituted IP.No.5/2013



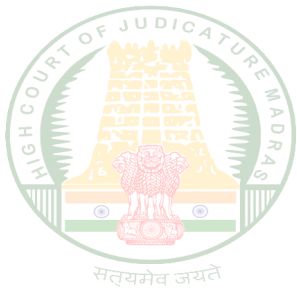
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WEB COPY to adjudge the 1st respondent as insolvent under Presidency Towns Insolvency Act, 1909 in July 2012.

xvi. On 19.11.2012, OA.No.84/2011 filed by M/s.KMBL before DRT-II, Chennai, [pertaining to the decree in CS.No.225/1999] against the defendants including the 1st respondent was allowed by issuing a Recovery Certificate for a sum of Rs.15,14,19,212/- along with interest. On 09.01.2013, Recovery Certificate in DRC.No.5/2013 in OA.No.84/2011 was also issued for a sum of Rs.20,72,92,541.91p. with future interest at 24% per annum.

xvii. On 10.06.2015, OSA.No.344/2012 filed by the 1st respondent against the order of learned Single Judge in A.No.435/2009 was dismissed for non-prosecution. However, CMP.No.765/2016 was filed by the 1st respondent to restore OSA.No.344/2012.

xviii. On 28.09.2015, the 1st respondent was adjudicated as insolvent in IP.No.5/2013 by this Court. A.Nos.312 and 313/2015 were filed by the 1st respondent to set aside the order of adjudication dated 28.09.2015 and to stay further proceedings in IP.No.5/2013.



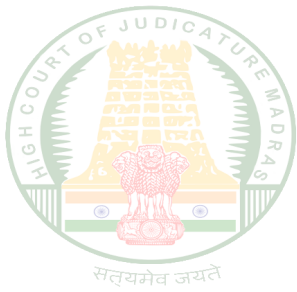
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xix. On 01.06.2016, CMP.No.765/2016 in OSA.No.344/2012 was dismissed on account of failure of 1st respondent to arrive at a settlement with KMBL.

xx. A.Nos.312 and 313/2015 in IP.No.5/2013 filed by the 1st respondent to set aside the order of adjudication dated 28.09.2015 and to stay the operation of the order dated 28.09.2015, were dismissed vide order dated 19.10.2016 after holding that the applications lacked *bona fide* after finding that the debtor who is a chronic defaulter, had evaded payment by using judicial process for more than a decade. The 1st respondent filed OSA.No.191/2017 as against the order dated 19.10.2016 in A.No.312/2015. On 11.12.2018, OSA.No.191/2017 was dismissed as withdrawn.

xxi. Meanwhile, the DRT passed an order under Section 31-A of RDDB&FI Act, 1993, in OA.No.46/2008 issuing a Recovery Certificate due under the compromise decree in CS.No.52/1999 on 31.03.2017. It is to be noted that the Tribunal rejected the contention of the 1st respondent raising the jurisdictional issue on the ground that



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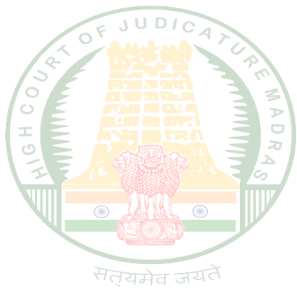
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the compromise decree had been passed with the consent of the parties and the debtors who have not raised any objections for the same, are estopped from questioning the jurisdiction of the Tribunal. Again on 30.06.2017, the DRT-I, Chennai passed an order under Section 31-A of RDDB&FI Act, 1993 in OA.No.47/2008 issuing a Recovery Certificate by DRC.No.251/2017 in respect of the compromise decree in CS.No.33/1999.

xxii.The Official Assignee who was supposed to take charge, filed Reports on 03.10.2017 and 30.10.2017 respectively stating that the 1st respondent had never assisted the Official Assignee to complete the investigation and has not furnished the required details of the immovable properties for taking further steps.

xxiii.On 29.11.2018 A.Nos.298 and 299/2018 in IP.No.5/2013 were filed by the 1st respondent to annul the adjudication dated 28.09.2015 and to stay further proceedings in IP.No.5/2013.

(3)It is contended that during the pendency of proceedings, the 1st respondent and his brother Ravishankar Prasad, indulged in several



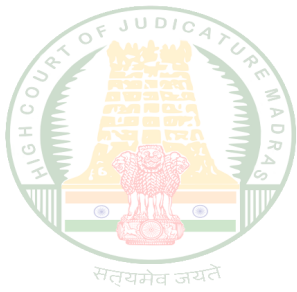
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alienations in respect of their properties clandestinely in favour of other family members and third parties. Hence, KMBL was forced to file A.Nos.44 to 48, 74 to 76 and 79 to 82/2020 seeking annulment of such alienations and for injunction restraining the alienees from creating further encumbrances.

(4) By order dated 14.06.2001, the learned Single Judge of this Court passed the impugned order allowing the applications in A.Nos.298 and 299/2018 in IP.No.5/2013. Challenging the order in A.Nos.298 and 299/2018 in IP.No.5/2013 annulling the adjudication in IP.No.5/2013, the above appeals have been preferred by the creditor.

(5) From the opening paragraph of the impugned order itself this Court is able to see that the learned Senior counsel appearing for the 1st respondent before the learned Single Judge projected the appellant/creditor as a greedy and unreasonable financier like Shylock wanting only the pound of flesh rather than recovery of money and compared the counsel playing the role of Portia to save the innocent borrower, the 1st respondent herein. This Court took pain to narrate the



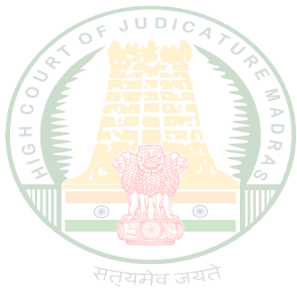
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factual details just to indicate how the 1st respondent, a chronic defaulter could manage not to pay a single pie all these years even after a consent decree was passed, admitting liability on 26.03.2007.

(6) Before the learned Single Judge, the 1st respondent raised the following grounds:-

- a) *The creditor had suppressed the facts that they have adequate security despite the debt and they have failed to comply with the provisions of Section 12[2] of the Presidency Towns Insolvency Act, 1909.*
- b) *The creditor has come forward with the false affidavit. In the petition in IP.No.5/2013, the creditor has stated that they do not hold any tangible security whatsoever for the said amount which is nothing but a blatant falsehood.*

(7) In the course of arguments, objection to the order of adjudication was expanded by pleading that the consent decree is a nullity. Therefore, the learned Judge entertained the following arguments on behalf of the 1st respondent:-



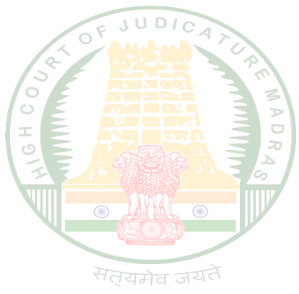
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(a) The compromise could not be recorded in respect of properties situated outside the jurisdiction of the Court as per the provisions of proviso to Order XXIII Rule 3 as amended by Madras High Court Amendment.

(b) The appellant/creditor is a Bank and therefore, proceedings had to be initiated only before the DRT as the Civil Court's jurisdiction is ousted. The substitution of the creditor as plaintiff and the recording of compromise before this Court, was without jurisdiction. Hence, the consent decree is a nullity. Since the adjudication is based on the consent decree, the same is liable to be annulled.

(c) The creditor has not relinquished the security and not made a mention about it in its petition. Hence, the petition for insolvency is in violation of provisions of Section 12[2] of the Presidency Towns Insolvency Act, 1909.

(8) An elaborate counter affidavit was filed meeting every legal issue that was raised in the affidavit filed in support of the application particularly

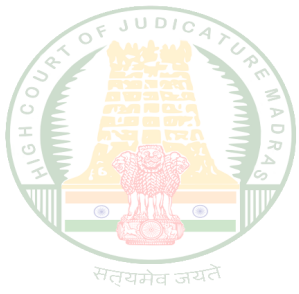


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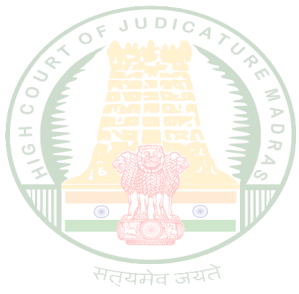
referring to the conduct of 1st respondent herein all along. Further, the appellant also explained how the properties which were given as security or embroiled in litigation. It is also contended that the insolvency Court cannot go into the correctness of the decree which has been passed with the consent of both parties. The appellant also relied upon the order passed by this Court in OA.No.435/2009 dated 16.07.2012 and the order dated 19.10.2016 dismissing Appln.Nos.312 and 313/2015 which have become final. It is contended that the applications are hit by the principles of res judicata. The contention that the appellant has sufficient security is specifically denied. It was contended by the Bank that the applications are nothing but abuse of process of Court and forum shopping.

(9)The Official Assignee also filed a counter affidavit specifically pointing out that the directions to the 1st respondent to appear before the Official Assignee to furnish details regarding the properties and other creditors, have not been complied with by the 1st respondent. He pointed out that the 1st respondent who appeared before the Official Assignee on



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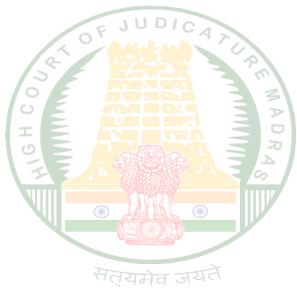
(10) On the issue whether the consent decree obtained by the creditor/appellant is null and void as it is without jurisdiction, the learned Single Judge, relying upon a few judgments and statutory provisions, particularly Sections 17, 18, 19 and 31 of RDDB&FI Act, held that the compromise decree is without jurisdiction and unenforceable. The learned Single Judge relying on facts, found that the subject matter of the suit and the subject matter of compromise are different. It is stated that the subject matter of the suits in CS.Nos.33 and 52/1999 is for recovery of money whereas, the compromise between the parties is for repayment of amount which has been crystallized between the parties through negotiation which is secured by two immovable properties. However, the



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learned Single Judge held that the validity of decree cannot be questioned on the ground that the properties which are secured, falls outside the territorial jurisdiction of this Court. The learned Single Judge also held that the Insolvency Court is vested with the power to examine the validity of the decree more particularly when the argument advanced is regarding inherent lack of jurisdiction.

(11)The learned Single Judge then concluded that the insolvency proceedings having been initiated on the basis of a decree which is a nullity, the adjudication has to fail and the applicants ought not to have been adjudged as insolvents. Further, the learned Single Judge held that the creditor has not complied with the provisions of S.12[2] of Presidency Towns Insolvency Act, 1909, by not divulging the security held by them, and by alienating and appropriating the proceeds realised from the sale of one of the secured assets pending this proceedings. The objections of the creditor Bank that the applications are barred by principles of res judicata in view of the findings of this Court in earlier proceedings, were rejected by the learned Single Judge. Aggrieved by the order of the learned Single



WEB COPY Judge, the above appeals have been preferred.

(12) Heard Mr.Karthik Seshadri, learned counsel appearing for the appellant and Mr.V.Raghavachari, learned Senior counsel appearing for the 1st respondent.

(13) Learned counsel for the appellant made elaborate submissions in consonance with the grounds raised in the appeal apart from relying upon the earlier orders passed by this Court. He submitted that the earlier order passed while dismissing the application to set aside the notice issued under Section 9[2] of the Insolvency Act, 1909 and to set aside the exparte order, by rejecting identical/similar contentions raised by 1st respondent would operate as *res judicata*. As far as the consent decree is concerned, the learned counsel submitted that the consent decree in CS.Nos.33 and 52/1999 are valid and binding, as the 1st respondent who had accepted voluntarily, the passing of consent decree in the two suits in the year 2007, is estopped from questioning the same in a collateral proceeding. He relied upon a few judgments to support his arguments.

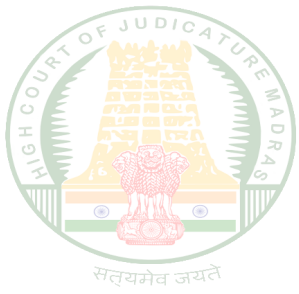


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(14) ***Per contra***, Mr.V.Raghavachari, learned Senior counsel appearing for the 1st respondent made a firm effort in defending the order of the learned Single Judge by referring to, not only the facts but also a few precedents. Referring to Sections 17 to 19 of DRT Act and Section 31 of RDDB and FI Act, 1993, and a few judgments, learned Senior counsel submitted that the consent decree is without jurisdiction and hence, a nullity. He then submitted that the adjudication being on the basis of an invalid decree, has to be annulled. Referring to Section 12[2] of the Insolvency Act, 1909, the learned Senior Counsel submitted that adjudication without disclosing the security is invalid and prayed for dismissal of the appeals.

(15) On a careful consideration of the submissions made on either side and on perusal of the materials placed before this Court, the following points arise for consideration:

- A) Whether the consent decree in CS.Nos.33 and 52/1999 is without jurisdiction and therefore, is a nullity?*
- B) Whether the adjudication of 1st respondent as insolvent, is liable to be annulled on the ground that the consent decree in CS.Nos.33*



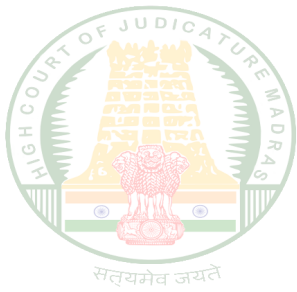
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and 52/1999 is a nullity in the sense that the same was passed by a Civil Court which is not competent by virtue of the provisions of RDDB&FI Act, 1993?

C) Whether the adjudication of 1st respondent as insolvent, can be annulled for non compliance of Section 12[2] of the Insolvency Act, 1909?

POINTS [A] & [B]:-

(16)The 1st respondent, as guarantor, had voluntarily entered into a Compromise which culminated into consent decrees in two suits in the year 2007, agreeing to pay a sum of Rs.29,49,81,355/- with interest at 20% per annum with quarterly rest in CS.No.33/1999 and to pay a sum of Rs.29,00,96,918/- with interest at 20% per annum with quarterly rest in CS.No.52/1999. The decrees in both the suits remain unsatisfied. Except the payment of a sum of Rs.25 Crores recorded on 08.07.2023 under the threat of contempt before the Hon'ble Supreme Court in connection with the proceedings initiated against the Company, no further

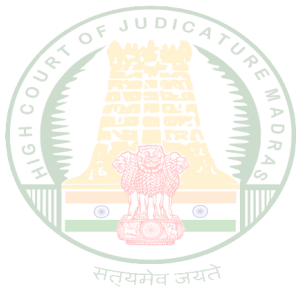


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amount was paid by the 1st respondent. The Insolvency Notice under Section 9[2] was challenged by the 1st respondent in A.No.435/2009 in IA.No.11/2009.

(17) All the grounds available to a debtor to set aside the adjudication were raised by the 1st respondent in A.No.435 of 2009 and a learned Single Judge of this Court dismissed A.No.435/2009 by a detailed order dated 16.07.2012. It is seen from the order dated 16.07.2012 in A.No.435/2009 that the said application is filed under Section 9[5] of the Insolvency Act, 1909, on the following grounds:-

- i. that the applicants had already tendered payment to respondent-Bank and that therefore, they do not owe any money to the Bank ;*
- ii. that Ind Bank Housing Limited, which was the original plaintiff in both the suits, was not a Bank at all and that in the decrees passed in both the suits, a record of tender of full payment and receipt of the same by the Bank has been made ;*
- iii. that the respondent-Bank has not produced any proof to show the assignment of debt by Ind Bank*



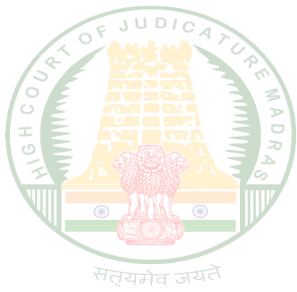
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Housing Limited ;

- iv. that even the consent decrees passed in the suits record the handing over of post-dated cheques for the entire decree amount and hence full satisfaction had already taken place ; and*
- v. that in any case, the decrees have become unenforceable in view of the challenge made to the validity of the same before Debtrs Recovery Tribunal-I, Chennai and the liberty given by the Division Bench of this Court to agitate those issues before the Tribunal.*

(18)The contentions No.2, 3 and 5 are relevant and the learned Judge has dealt with the issues in paragraphs 38 to 41 of the judgment which are extracted below:

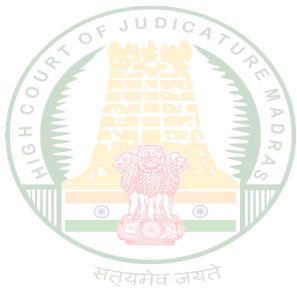
"38.The second and third contentions are that Ind Bank Housing Limited was not a Bank at all and that there was no proof of assignment of debt by them in favour of the respondent-Bank. But, it is too late in the day for the applicants to raise these contentions. As pointed out earlier, the applicants and the borrower companies entered into "consent terms" on 23.10.2006 even when Ind Bank Housing Limited was shown as the



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plaintiff in both the suits. It was only after the applicants and the borrower companies entered into "consent terms" with the respondent-Bank that the respondent-Bank filed applications in A.Nos.2453 and 2454/2007 for substituting them in the place of the original plaintiff Ind Bank Housing Limited. The applications were allowed on 21.03.2007. It was only thereafter that the Court passed decrees on 26.03.2007 in accordance with the "consent terms". Therefore, the applicants ought to have objected to the passing of decrees even at that time, if Ind Bank Housing was not a Bank and if there was no proper assignment. They cannot now question the assignment or even the decrees in favour of the respondent-Bank.

39.The fifth contention is that the decrees have become unenforceable in view of the challenge made to the same before the Debts Recovery Tribunal-I, Chennai. But, this is a frivolous contention. The objection that the applicants have raised before the Debts Recovery Tribunal is to the executability of the decrees by the Debts Recovery Tribunal, in view of the Section 31-A of the Act. This is seen from paragraph-3

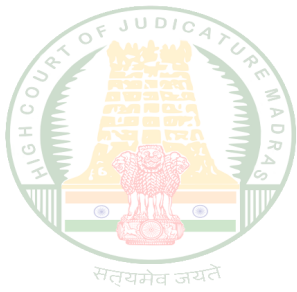


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of the judgment of the Division Bench dated 30.07.2009 passed in WP.Nos.13126 and 13138/2009.

40.In other words, the applicants do not challenge the executability of the decrees as such. They challenge only the jurisdiction of the Debts Recovery Tribunal to execute the decrees. This is why Section 31-A is sought to be invoked. Even if the Debts Recovery Tribunal holds that it cannot execute the decrees, the respondent-Bank can always execute the decrees in the Court which passed the decrees, viz., this Court. The decrees were only of the year 2007. Even the period of limitation has not expired. Therefore, the main objection to the Forum where the decrees are sought to be executed, cannot make the decree holder ineligible to come up with an Insolvency Notice.

41.As pointed in a previous paragraph, under Section 9[5][ic] of the Presidency Towns Insolvency Act, 1909, the objection regarding inexecutability of the decree should be with reference to the provisions of law referred to in Clause [b] of sub-section [5] of Section 9. The objection raised by the applicants to the



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jurisdiction of the Debts Recovery Tribunal does not fall under this category. Therefore, the fifth contention is also bound to fail."

(19) Finally, the learned Single Judge, in the order dated 16.07.2012 made in A.No.435/2009 held that the 1st respondent who is the 1st applicant in A.No.435/2009 has not satisfied any of the grounds available under Section 9[5] of the Insolvency Act, 1909, to set aside the insolvency notice.

(20) Section 9[5] of the Insolvency Act, 1909, reads as follows:-

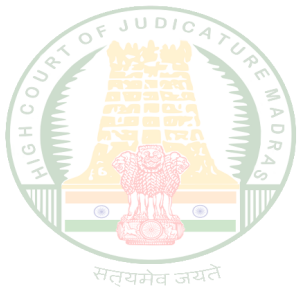
"9.Acts of insolvency:-

.....

(5) Any person served with an insolvency notice may, within the period specified therein for its compliance, apply to the Court to set aside the insolvency notice on any of the following grounds, namely:—

(a) that he has a counter-claim or set off against the creditor which is equal to or is in excess of the amount due under the decree or order and which he could not, under any law for the time being in force, prefer in the suit or proceeding in which the decree or order was passed;

(b) that he is entitled to have the decree or order set aside under any law providing for the



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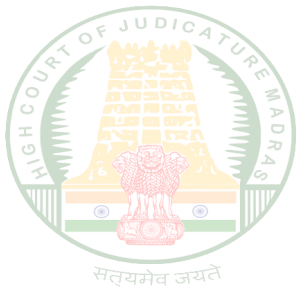
relief of indebtedness and that—

- (i) he has made an application before the competent authority under such law for the setting aside of the decree or order; or*
- (ii) the time allowed for the making of such application has not expired;*

(c) that the decree or order is not executable under the provisions of any law referred to in clause (b) on the date of the application.]

Explanation. —*For the purposes of this section, the act of an agent may be the act of the principal, even though the agent have no specific authority to commit the act."*

(21) It is pertinent to mention that the 1st respondent though relied upon Section 31 of RDDB&FI Act, 1993, has not even raised the issue about the validity of the consent decree in CS.Nos.33 and 52/1999. The 1st respondent, at the earliest point of time had an opportunity to plead that the consent decree is liable to set aside for want of jurisdiction. However, no plea was raised at that point of time. The principle of *constructive res judicata* is explained by several Courts in the light of Explanation [4] to Section 11 of CPC and the same cannot be ignored. It is to be noted that



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the 1st respondent, who ought to have raised this issue while challenging the insolvency notice, cannot raise this belatedly at this length of time just to prejudice the rights of the appellant. Since the objection is regarding Forum, the fact that recovery certificate had been issued by DRT is an additional factor which is also relevant. As per Section 9[2] of Insolvency Act, 1909, a debtor commits an act of insolvency if a creditor who has obtained the decree or order against him for the payment of money, has served on him a notice as provided under sub-section [3] and the debtor does not comply with the notice within the period specified therein. In this case, the consent decree was passed in the year 2007 in CS.Nos.33 and 52/1999. Absolutely there was no challenge to the consent decree before any Forum and the 1st respondent cannot challenge the consent decree in view of the time line. It is admitted that pursuant to the decree, notice of insolvency was issued and the 1st respondent had not paid any amount nor given a reply. This Court finds no *bona fides* in raising an issue on the jurisdiction of the Court and it is purely for the purpose of this litigation. Previously the point raised was that the DRT



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(22) However, we will also examine the merits of the submissions of the learned Senior counsel appearing for the 1st respondent that the consent decree is a nullity and unenforceable.

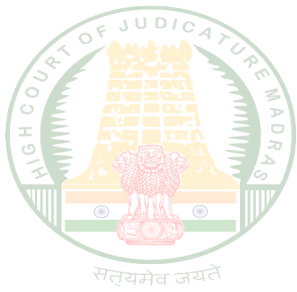
(23) Sections 17, 18 and 31 of RDDB&FI Act, 1993 read as follows:-

17. Jurisdiction, powers and authority of Tribunals.:-

(1) A Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions.

(1A) [Without prejudice to sub-section (1),-(a) the Tribunal shall exercise, on and from the date to be appointed by the Central Government, the jurisdiction, powers and authority to entertain and decide applications under Part III of Insolvency and Bankruptcy Code, 2016.

(b) the Tribunal shall have circuit sittings in all district headquarters.]



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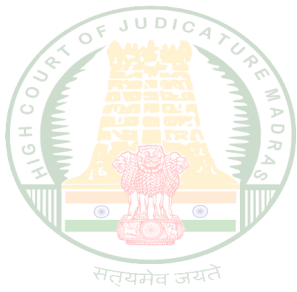


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(2) An Appellate Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain appeals against any order made, or deemed to have been made, by a Tribunal under this Act.

(2A) [Without prejudice to sub-section (2), the Appellate Tribunal shall exercise, on and from the date to be appointed by the Central Government, the jurisdiction, powers and authority to entertain appeals against the order made by the Adjudicating Authority under Part III of the Insolvency and Bankruptcy Code, 2016.] [Inserted by Insolvency and Bankruptcy Code, 2016, Section 249.].

18. Bar of jurisdiction.- *On and from the appointed day, no Court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under articles 226 and 227 of the Constitution) in relation to the matters specified in section 17.*



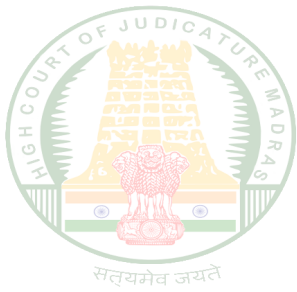
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*[**Provided** that any proceedings in relation to the recovery of debts due to any multi-State co-operative bank pending before the date of commencement of the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2012 under the Multi-State Co-operative Societies Act, 2002 shall be continued and nothing contained in this section shall, after such commencement, apply to such proceedings.] [Inserted by Act No. 1 OF 2013].*

31. Transfer of pending cases:- *(1) Every suit or other proceeding pending before any Court immediately before the date of establishment of a Tribunal under this Act, being a suit or proceeding the cause of action whereon it is based is such that it would have been, if it had arisen after such establishment, within the jurisdiction of such Tribunal, shall stand transferred on that date to such Tribunal:*

***Provided** that nothing in this sub-section shall apply to any appeal pending as aforesaid before any Court. [**Provided** further that any recovery proceedings in relation to the recovery of debts due to any multi-State co-operative bank pending before the date of commencement of the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2012 under the Multi-State Co-operative Societies Act, 2002, shall be continued and nothing contained in this section shall apply to such proceedings.] [Inserted by Act No. 1 OF 2013]*

(2) Where any suit or other proceeding stands transferred from any Court to a Tribunal under sub-section (1),

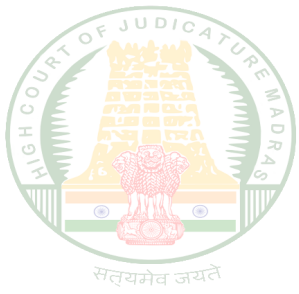


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(a) the Court shall, as soon as may be after such transfer, forward the records of such suit or other proceeding to the Tribunal; and

(b) the Tribunal may, on receipt of such records, proceed to deal with such suit or other proceeding, so far as may be, in the same manner as in the case of an application made under section 19 from the stage which was reached before such transfer or from any earlier stage [* *] [The words "or de novo" omitted by Act 1 of 2000, Section 13 (w.r.e.f. 17.1.2000).] as the Tribunal may deem fit."*

(24) Section 17 of RDDB&FI Act, 1993, confers jurisdiction on the Tribunal to entertain and decide the applications from the Banks and Financial Institutions for recovery of debts due to such Banks and Financial institutions. Similarly, Section 18 prescribes the bar of jurisdiction of a Civil Court on and from the appointed date in relation to matters specified in Section 17. Section 19 of the Act deals with the procedure and scope of proceedings and the power of the Tribunal. Section 31 of the Act mandates transfer of a suit or proceeding pending before any Court immediately before the date of establishment of Tribunal under the Act. In the present case, the objection is regarding the jurisdiction of the Civil Court after the RDDB&FI Act, 1993. In the instant case, the suit

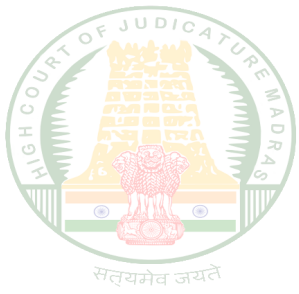


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was filed in the year 1999 by M/s.Ind Housing Limited. The suit was therefore, validly instituted before the Civil Court as M/s.Ind Housing Limited was not a Bank so as to apply the provisions of RDDBI&FI Act, 1993 or SARFAESI Act. Therefore, the cause of action for the suit confers exclusive jurisdiction only on the civil Court to pass a decree. Without an adjudication, based on the cause of action alleged, the successor in interest of the plaintiff, is entitled to enter into a compromise which does not require an adjudication for recovery of money. The consent decree therefore, based on a compromise, does not oust the jurisdiction of civil court when we read Sections 17, 18, 19 and 31 together.

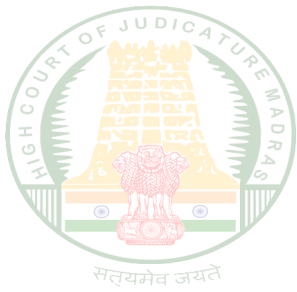
(25)Section 31 refers to the cause of action in relation to the suit or proceeding. The cause of action for the suit arose to M/s.IndBank Housing to file the suit. The cause of action just survives on the appellant by virtue of assignment . The suit itself was filed after RDDB&FI Act, 1993. From the language of Section 31 of the Act, this Court is unable to state that the suit has to be transferred to the Tribunal. Therefore, the



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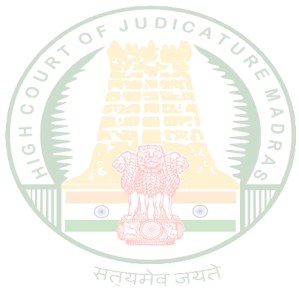
consent decree after substitution of the appellant as plaintiff, may not attract Section 31 to oust the jurisdiction of the Civil Court. The 1st respondent had voluntarily agreed to a compromise so as to avail a great deal of concession as provided in the compromise decree. In order to reduce / scale down the debt, the compromise was entered into by the 1st respondent consciously. In other words, on the promise of the 1st respondent to settle the dues within the specified time as indicated in the consent decree, the appellant/Bank agreed to the consent decree. There was no whisper at any point of time about the invalidity of the consent decree. The object of RDDB&FI Act, 1993, was to provide for the establishment of Tribunals for expeditious adjudication and recovery of debts due to Banks and Financial Institutions. Therefore, the Tribunals constituted under the RDDBI&FI Act, 1993 are meant for adjudication. Without adjudication, a consent decree was passed in the year 2007 and therefore, the question of jurisdiction in the context, cannot be understood ignoring the cause of action. Therefore, on a careful reading of provisions, this Court is unable to agree with the findings of the



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learned Single Judge that by virtue of Sections 17, 18, 19 and 31 of RDDB&FI Act, 1993, the consent decree passed by this Court in CS.Nos.33 and 52/1999, is without jurisdiction and therefore, the consent decree passed in the two suit is a nullity.

(26)The adjudication of 1st respondent as an insolvent is on the basis that the 1st respondent had committed an act of insolvency as he had not complied with the insolvency notice based on the consent decree in CS.Nos.33 and 52/1999. While challenging the insolvency notice, the 1st respondent contended that consent decree is not executable on the basis of an objection he had raised in a writ petition to the effect that the decree being obtained in a suit filed by M/s.Ind Housing Limited, is not executable before the DRT. Today, the objection is that the consent decree itself is invalid as the appellant is the Bank and by substitution of appellant, which is a Bank, the jurisdiction of the Civil Court to pass even a consent decree is ousted. As a matter of fact, the appellant has also obtained a Recovery Certificate under Section 19[22-A]. The Recovery Certificate issued by the Presiding Officer under sub-section 22 of

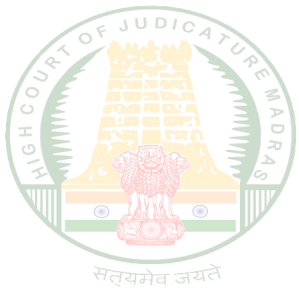


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Section 19 of the Act, shall be deemed to be a decree or order of Court for the purpose of initiation of insolvency proceedings against any individual or Partnership Firm under any law for the time being in force as the case may be.

(27)The fact that recovery certificate had already been issued is not in dispute. Having regard to the admitted facts and circumstances and the interpretation of the statutory provisions above referred to and the subsequent events that are not in dispute, this Court finds no valid reason to annul the adjudication of 1st respondent as an insolvent. The reasonings of learned Judge to annul the adjudication cannot be sustained.

(28)Learned Senior counsel appearing for the 1st respondent relied upon the judgment of Hon'ble Supreme Court in the case of ***M.D.Frozen Foods Private Limited and Others Vs. Hero Fincorp Limited [2017 [16] SCC 741]***. It is seen that the Hon'ble Supreme Court has only stated that the application under SARFAESI Act will be in addition and not in derogation of RDDB&FI Act, to mean that SARFAESI Act will not in any

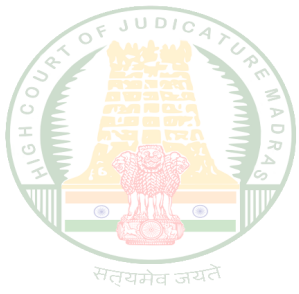


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way nullify or impact the provisions of RDDBI&FI Act as SARFAESI Act and RDDB&FI Act, are complementary to each other.

(29)Learned Senior counsel also relied upon a judgment of a Division Bench dated 05.03.2015 in WP.No.14994/2012 [*P.Ananda Baskaran Vs. The Debts Recovery Appellate Tribunal*]. The writ petition was filed to quash the conditional order passed by DRAT before whom the writ petitioner was pursuing an appeal as against the order passed in the SARFAESI application questioning the applicability of SARFAESI Act on the ground that the properties are agricultural properties. The Division Bench dismissed the writ petition however, giving liberty to the writ petitioner to urge all factual and legal grounds before DRAT. The judgment has no relevance to the case on hand.

(30)Similarly, the judgment of the learned Single Judge of Bombay High Court in *AIR 2018 Bom 111 [TJSB Sahakari Bank Vs. Global Trust Bank Limited]* ordering transfer of proceedings pending before Civil Court to DRT for adjudication of a dispute regarding recovery of dues to the Banks. Therefore, the said judgment has no relevance or application

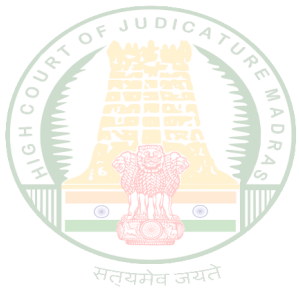


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to the case on hand. The said judgment is therefore, distinguishable on facts.

(31)The judgment of Hon'ble Supreme Court in the case of ***Bank of Rajasthan Limited Vs. VCK Shares and Stock Broking Services Limited [2023 [1] SCC 1]*** has no application. The Hon'ble Supreme Court in the said case held that the jurisdiction of the Civil Court in the case filed by the borrower against the Bank/Financial Institution is not ousted by virtue of Section 31 of RDDB&FI Act, 1993, when the suit is to declare the sale of shares as void and to return the pledged shares in respect of overdraft facility account and for a declaration that no sum is payable by the respondent therein to the appellant Bank in respect of term loan and overdraft account. The facts and circumstances of the case are entirely different.

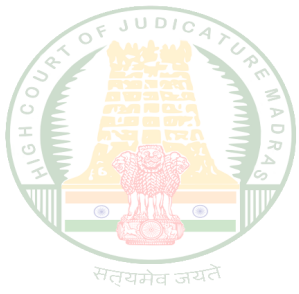
(32)Mr.V.Raghavachari, learned Senior counsel relied upon the judgment of Hon'ble Supreme Court in the case of ***State of Punjab Vs. Rattan Singh [AIR 1964 SC 1223]***. A few facts of the said case relevant to appreciate the law laid down by the Hon'ble Supreme Court are as follows: One



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Rattan Singh stood as surety to the extent of Rs.21 lakhs and entered into a contract of guarantee with a Bank to discharge the liability of borrower to the extent of Rs.21 lakhs in case of default by borrower. Since the borrower committed default, recovery proceedings were initiated against the guarantor under the Patiala Recovery of State Dues Act, 2002, BK without recourse to Court. On 26.05.1955, the Managing Director of the Bank dismissed the objections of the guarantor and held him liable for the debt on a guarantor. The appeal filed by the guarantor before the Board of Directors was also dismissed on 24.12.1955. In the meanwhile, on 10.05.1995, the State of Patiala filed an insolvency petition against the guarantor on account his transferring all his assets in favour of his wife and two children without consideration with an intention to delay his creditor Bank. The guarantor challenged the jurisdiction of the Insolvency Court to entertain the application. The Insolvency Court dismissed the application on the ground that Deed of Guarantee was not executed by the guarantor. The appeal preferred by the State of Punjab before the District Judge was also dismissed confirming the order of the

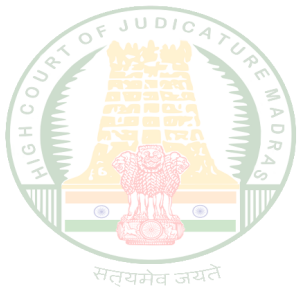


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Insolvency Court. Subsequently, the State filed a revision before the High Court under Section 75 of Provincial Insolvency Act. The revision was also dismissed by the High Court.

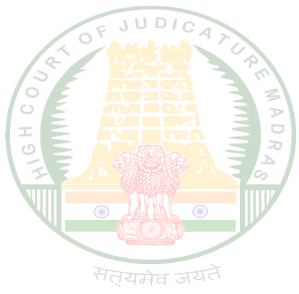
(33)The Hon'ble Supreme Court in paragraph No.23 has held as follows::

"23.The next question then to decide is whether the Insolvency Court can, in spite of the provisions of Section 11 of the Act and the jurisdiction which the head of the department has, under Section 4 as construed by us, go into the question whether the alleged debtor sought to be adjudicated insolvent really owed the debt which, has been determined or could be determined only by the head of department under Section 4 of the Act. It is well-settled that the Insolvency Court can, both at the time of hearing the petition for adjudication of a person as an insolvent and subsequently at the stage of the proof of debts, re-open the transaction on the basis of which the creditor had secured the judgment of a Court against the debtor. This is based on the principle that it is for the Insolvency Court to determine at the time of the hearing of the petition for Insolvency whether the



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alleged debtor does owe the debts, mentioned by the creditor in the petition and whether, if he owes them, what is the extent of those debts. A debtor is not to be adjudged an insolvent unless he owes the debts equal to or more than a certain amount and has also committed an Act of insolvency. It is the duty of the Insolvency Court therefore to determine itself the alleged debts owed by the debtor irrespective of whether those debts are based on a contract or under a decree of Court. At the stage of the proof of the debts, the debts to be proved by the creditor are scrutinized by the Official Receiver or by the Court, in order to determine the amount of all the debts which the insolvent owes as his total assets will be utilised for the payment of his total debts and if any debt is wrongly included in his total debts that will adversely affect the interests of the creditors other than the judgment creditor in respect of that particular debt as they were not parties to the suit in which the judgment debt was decreed. That decree is not binding on them and it is right that they be in a position to question the correctness of the judgment debt. It is on their behalf that the Insolvency Court or the Official Receiver is to



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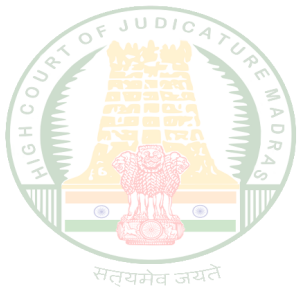
scrutinize the proof of debts to be proved and can even demand proof of the debts on which the judgment debt has been decreed. The decree is binding only on the parties. The debtor sought to be adjudged is bound by it and so is the creditor. But this binding effect of the decree is only to be respected by the Insolvency Court in circumstances where nothing is reasonably alleged against the correctness of the judgment debt. The Insolvency Court has the jurisdiction to re-open such debts and will do so ordinarily when such judgments have been obtained by fraud, collusion or in circumstances indicating that there might have been miscarriage of justice. On similar grounds it must be held that the determination of the amount of the debt and the liability of the defaulter to pay it could be open for scrutiny by the Insolvency Court in the aforesaid circumstances in spite of the provisions of Section 11 of the Act, which provisions really contemplate a decision of the dispute about the matters covered by it between the same parties, viz, the creditor Bank and the alleged defaulter. The determination of the amount of State dues recoverable from the defaulter under Section 4 of Act can have no better status than the ordinary



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judgment and decree of a civil court have. The head of the department could not have decided a dispute about the amount of the State dues recoverable from the defaulter between creditors other than the Bank and the defaulter and therefore such a dispute between the creditors in general and the defaulter cannot be a dispute which comes within the mischief of Section 11 of the Act."

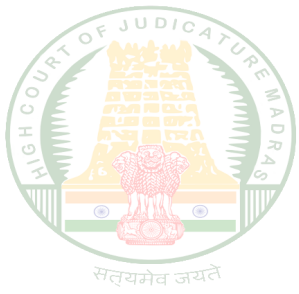
(34) From the reading of the above judgment, it is seen that there was no decree or order of Competent Court having exclusive jurisdiction. The Bank on the basis of the alleged Deed of Guarantee, started proceedings for recovery despite objections under a special enactment, Patiala Recovery of State Dues Act, 2002, BK. It is on the basis of recovery proceedings, the State filed a petition to adjudicate the guarantor as an insolvent on account of transferring his assets in favour of his wife. The Insolvency Court rejected the petition holding that the respondent had not executed the Deed of Guarantee. The order was confirmed by District Court and High Court. Before the High Court, the State contended that the Civil Court had no jurisdiction to determine matters which could be



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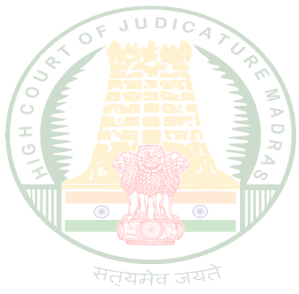
determined by the Head of the Department under Recovery of State Dues Act, 2002. Though it was held that no Civil Court can have jurisdiction to determine the amount of State dues recoverable and the liability, the Hon'ble Supreme Court held that it is for the Insolvency Court to determine at the time of hearing of the petition, whether the alleged debtor does owe the debts, mentioned in the petition for insolvency. It was explained that the binding effect of the decree is only to be respected by the Insolvency Court in circumstances where nothing is reasonably alleged against the correctness of the judgment debtor. The Insolvency Court has jurisdiction to reopen when judgments have been obtained by fraud, collusion or in circumstances indicating that there is miscarriage of justice. Since the Insolvency Court held that the guarantee deed was not executed by debtor, Hon'ble Supreme Court confirmed the order of High Court. The above judgment, of course, enable the Insolvency Court to decide any issue whether the alleged debtor was really a debtor and liable to pay at the time of adjudication. After adjudication by an exparte order, the maintainability of a petition to annul adjudication raising similar



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WEB COPY issues which have been raised but rejected earlier in the previous rounds in the applications to set aside insolvency notice and to set aside exparte adjudication.

(35) In the present case, as against the order dismissing A.No.435/2009, there was an appeal filed in OSA.No.344/2012 by the 1st respondent and the same was dismissed for non prosecution on 10.06.2015. Therefore, the order dismissing A.No.435/2009 has become final. Thereafter, the proceedings in insolvency petition in IP.No.5/2005 was taken up by a learned Single Judge exercising jurisdiction under the Insolvency Act, 1909. However, the 1st respondent / debtor, did not appear either in person or by an advocate despite notice. Therefore, the learned Single Judge of this Court after recording the facts that the debtor has committed an act of insolvency, held that the 1st respondent should be declared as an insolvent. As against the order of learned Single Judge dated 28.09.2015 declaring the 1st respondent as insolvent, the 1st respondent filed A.Nos.312 and 313/2015 in IP.No.5/2013 to set aside exparte order dated 28.09.2015 in IP.No.5/2013 and to stay the operation of the order in



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(36) It is to be seen that the 1st respondent/debtor raised grounds on merits apart from the ground that the exparte order is liable to be set aside on the ground that due to boycott of the Court by advocates, the learned counsel for the 1st respondent could not appear on that day when the exparte order of adjudication was passed. Having regard to the peculiar facts and circumstances of the case, the learned Single Judge of this Court considered elaborately the arguments advanced on the side of the 1st respondent on merits and held that there is no merit in the application. Incidentally, the factual and legal issues raised by the 1st respondent were also considered in the light of the order in A.No.435/2009. As against the order in the application to set aside the exparte order, an appeal was filed in OSA.No.191/2016 raising all the grounds including the ground that this Court has no jurisdiction after coming into force of RDDB&FI Act, 1993, as amended, and that therefore, the consent decree is a nullity. All the grounds that are available to invalidate the order passed by the Insolvency Court to declare the 1st respondent as insolvent, are raised

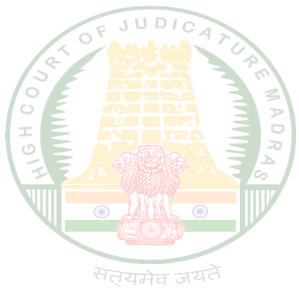


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before the learned Single Judge and the Division Bench in the appeal in OSA.No.191/2016. However, OSA.No.191/2016 was also dismissed as withdrawn vide judgment dated 11.12.2018. From the sequel of events, this Court is of the view that the 1st respondent who was unsuccessful in challenging the order of Insolvency Court, has come by way of another petition under Section 21 of the Insolvency Act, 1909 to annul the declaration.

(37)Section 21 of the Insolvency Act, 1909 reads as follows:-

21. Power for Court to annul adjudication in certain cases.—(1) *Where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent are paid in full, 3[the Court shall, on the application of any person interested,] by order annul the adjudication 4[and the Court may, of its own motion or on application made by the official assignee or any creditor, annul any adjudication made on the petition of a debtor who was, by reason of the provisions of sub-section (2) of section 14, not entitled to present such petition].*



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(2) For the purposes of this section, any debt disputed by a debtor shall be considered as paid in full, if the debtor enters into a bond, in such sum and with such sureties as the Court approves, to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt, with costs, and any debt due to a creditor who cannot be found or cannot be identified shall be considered as paid in full if paid into Court.

(38)As pointed out earlier, the 1st respondent who was unsuccessful in challenging the insolvency notice in terms of Section 9[5] of the Insolvency Act, 1909, cannot be allowed to once again file an application to annul the adjudication in terms of Section 21 of the Act when there is no change of circumstances or any intervening event. For all the above reasons, this Court is unable to sustain the order of learned Single Judge holding that the 1st respondent ought not to have been adjudged as insolvent for the reason that the Consent decree is invalid or nullity or unenforceable.



WEB COPY **POINT [C]:-**

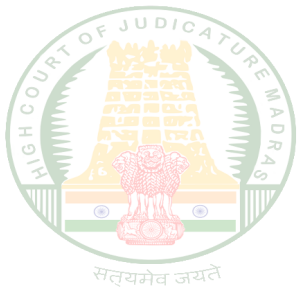
(39)The next question for consideration is whether the order adjudicating the 1st respondent as insolvent should be annulled on the ground that the security held by the creditor had not been disclosed in terms of Section 12[2] of the Insolvency Act, 1909. Section 12 of the Insolvency Act, 1909 reads as follows:-

12. Conditions on which creditor may petition.—(1) A creditor shall not be entitled to present an insolvency petition against a debtor unless— (a) the debt owing by the debtor to the creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to such creditors, amounts to five hundred rupees, and

(b) the debt is a liquidated sum payable either immediately or at some certain future time, and

(c) the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition:

[Provided that where the said period of three months referred to in clause (c) expires on a day when



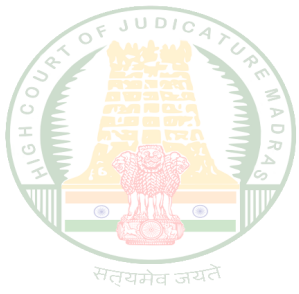
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the Court is closed, the insolvency petition may be presented on the day on which the Court reopens].

(2) If the petitioning creditor is a secured creditor, he shall in his petition either state that he is willing to relinquish his security for the benefit of the creditors in the event of the debtor being adjudged insolvent or give an estimate of the value of the security. In the latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same way as if he were an unsecured creditor.

(40) From the reading of Section 12, it is seen that it contains two parts. The first part appears to be mandatory. In other words sub-section [1] of Section 12 prescribes conditions which are mandatory for a creditor to maintain an insolvency petition, namely, [a]the aggregate amount of debts owing by the debtor to the creditor is not less than Rs.500/- ; [b]the debt should be quantified and payable either immediately or at some certain future time ; and [c]the act of insolvency had acquired within three months before the presentation of the petition.

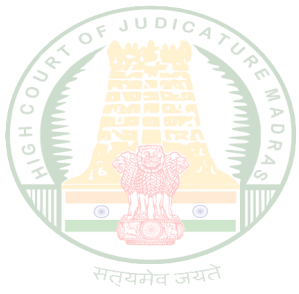
(41) The 1st respondent has no complaints and the admitted facts show that



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the appellant had satisfied all the three ingredients to present the insolvency petition. Sub-section [2] of Section 12 requires the 4th condition that the creditor should either state that he is willing to relinquish the security for the benefit of the creditors or to give an estimate of the value of the security. Sub-section [2] certainly indicates that the petitioning creditor is entitled to keep the security in tact to recover his dues in case the value of the property is less than the amount due to the petitioning creditor. Proviso to Section 17 of the Insolvency Act, 1909, protects the right of the secured creditor to realize or otherwise to deal with his security. The word 'any secured creditor' in the proviso cannot be read as any other creditor so as to exclude the rights of the petitioning creditor.

(42)The history behind the Insolvency Legislations is notable and the Indian Insolvency Act, 1958, was replaced by subsequent enactments and the object of the Bill to amend the law of Insolvency in 1909 and the subsequent amendments would indicate that the most effective way of instilling a healthy fear in the minds of Judgment Debtor would be to

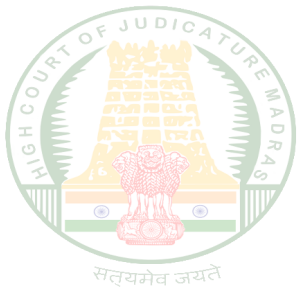


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enable the Court to adjudicate him as Insolvent, however, he does not pay the decreetable amount after notice by the Decree Holder, by specifying the period within which it should be paid. The recommendations of Law Commission was always to protect the innocent creditors who had obtained a decree or order against the debtor for payment of money on account of Acts of Insolvency.

(43) It is to be noted that there are precedents to hold that a Judgment Debtor who avoided notice and failed to file an application under Section 9(5) to set aside the notice is deemed to have committed an act of Insolvency. Therefore, Section 12 has to be interpreted and understood that the understanding of the Insolvency Legislations particularly the object and other statutory provisions of Presidency Towns Insolvency Act, 1909.

(44) Therefore, Section 12[1] is only to protect the interest of the other creditors in the event of debtor being adjudged as insolvent. When the option is available to secured creditor to give estimate or the value of the security and then to join with the common pool to recover the balance, this Court is of the view that the requirement of Section 12[2] is not fatal

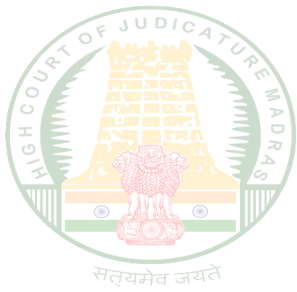


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and the defect if any, can be cured at a later point of time. Even after an order of adjudication, the power of secured creditor to realise and deal with the security is protected under the proviso Section 17. In such circumstances, this Court is unable to sustain the order of the learned Judge annulling the order of adjudication for non-disclosure of security.

(45)Learned counsel for the appellant relied upon a judgment of ***King's Bench Division 189 [In re A Debtor]***. In a similar situation with reference to similar provision, King's Bench held that the order of adjudication cannot be invalidated by any omission as the Court has always power to amend the petition even after making an order. The relevant portion of the judgment reads as follows:-

"LORD STERNDALÉ M.R. *This case does not present any merits. I do not know whether I may deal with a dictum of so great an authority as Jessel M.R. and say I am sorry to see such a technical objection raised on the strength of that dictum. The petitioning creditors in their petition omitted to mention a security which had been given fifteen years ago in respect of another matter altogether, which did, however, in form*



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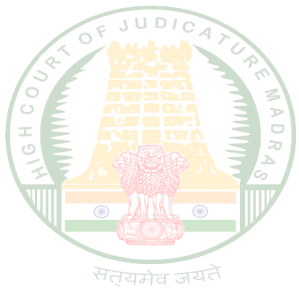
*cover this particular debt/ It was a matter of no importance, but, as the receiving order was made without this security having been mentioned in the petition, it is said that the receiving order is bad. The objection is founded upon a dictum of Jessel M.R. in **Moor V. Anglo-Italian Bank [10 Ch.D.681, 689]** where he says:"In the next place, I am not aware of any rule in bankruptcy that forfeits the petitioning creditor's debt. The rule in bankruptcy requires the judicial authority in bankruptcy-the Registrar or Judge as the case may be – before he adjudicates a man a bankrupt, to see there is a proper unsecured debt in the manner I have explained. But if the adjudication is made without this being looked into, the only result is, the adjudication is bad, and you may set it aside in due time." It is said that that dictum goes to this: that if any security be omitted, although of no importance or value, any order or proceeding on the petition is bad. If the learned Master of the Rolls meant his statement to extend to that, I think, with the greatest respect that one must always have for any dictum of Sir George Jessel, that it went too far. But it seems to me that he*



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never intended it to go so far. The question is, suppose there were an omission of something of no value, something not affecting the matter in any way, does that make the receiving order altogether bad? I think that in a case like that Sir George Jessel would himself have said "No, my dictum was never intended to go as far as that". The Registrar has decided and I think correctly, that this security is of no value, and I think that if the question had been raised before the receiving order was made he could have made the necessary amendment. The only question is whether he can make that amendment after the receiving order has been made. My view is that even without this amendment it is doubtful whether the order could be set aside, but I think that the case of Lovell & Christmas V. Beauchamp in the House of Lords shows that an amendment can be made after a receiving order has been made. That case decides the only point to be decided in this matter and I think the appeal should be dismissed with costs."

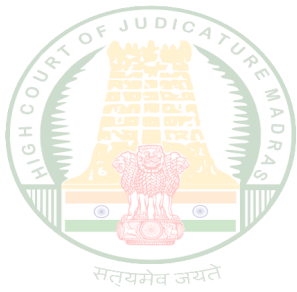
(46) In the present case, a few facts are not in dispute. The securities referred to by the 1st respondent are two properties. The land measuring



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about 5 acres in Andra Pradesh is the first item and the second item is a residential flat measuring 800 sq.ft., in Mumbai. The residential flat in Mumbai is the property of 1st respondent. As far as the property measuring 5 acres in Andra Pradesh, the same belongs to M/s.Prasad Properties and Investment Private Limited who created an inequitable mortgage by deposit of title deeds on 02.07.2001 in favour of M/s.Ind Bank Merchant Banking Services Limited with a second charge held by M/s.Ind Bank Housing Limited. The property was originally mortgaged in relation to a different loan altogether. Only a second charge is created by a letter of the mortgagor. The property is not the primary security for the appellant in connection with the debt for which the insolvency proceedings had been initiated against the 1st respondent. In other words, the property is mortgaged in connection with a different loan availed by M/s.Prasad Properties and Investment Private Limited. Assuming for the moment that the property in Andra Pradesh is also one of the securities offered by M/s.Prasad Properties and Investment Private limited, the availability of such security for realization of money based on the consent

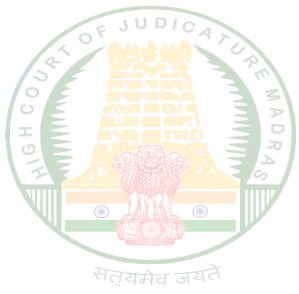


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(47)It is now brought to the notice of this Court that the property in Andra Pradesh is the subject matter of litigation where the right, title and interest of the mortgagor is an issue. Even though it is stated that the mortgagor supports the case of the appellant in those proceedings, this Court having regard to the several circumstances, cannot consider this as fatal to annul the adjudication. It is not the case of the 1st respondent that the value of security is substantial to satisfy the decree. As on date, the total amount due from the 1st respondent is stated to be more than Rs.300 Crores. Even the actual amount due is calculated with simple interest at 12% per annum, the sum due as on date is more than Rs.200 Crores. Nowhere in the proceeding, the 1st respondent could allege that the value of the property in Andra Pradesh offered by a company as security for the loan will satisfy the decree in CS.Nos.33 & 52/1999.

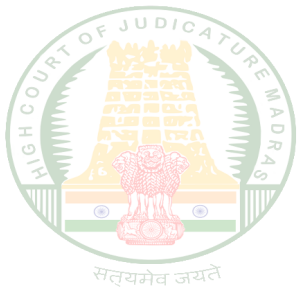
(48)The conduct of the 1st respondent has to be examined in this case. We have seen the stand taken by 1st respondent in the previous proceedings



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stalling recovery and insolvency proceedings simultaneously taking unreasonable stand quite contrary to the records. The object of the Insolvency Act, 1909 is to protect interest of public. Having regard to the whole gamet of facts and the records which are not in dispute, this Court is unable to cherish the arguments of 1st respondent before the learned Single Judge comparing the appellant as a Shylock. It is unreasonable and dishonest comparison especially in the case where the 1st respondent who is a chronic defaulter, who has defrauded the appellant/Bank to the tune of several Crores by offering no security worth for the liability. Even though the pleading in respect of the proceedings in relation to the property in Andra Pradesh which is not sufficient, this Court has reasons to accept the case of the appellant/Bank that the security by way of 2nd charge is also embroided in litigation and this Court finds no means or access to those securities.



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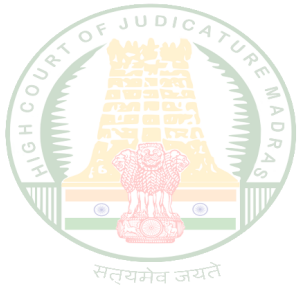
(49) For the foregoing reasons, this Court is of the view that the order of the learned Single Judge impugned in these appeals is liable to be set aside.

(50) Accordingly, the Original Side Appeals stand **allowed and the** judgment and decree dated 14.06.2021 made in A.Nos.299 & 298/2018 in IP.No.5/2013 is set aside. No costs. Consequently, connected miscellaneous petitions are closed.

(SSSRJ)
29.04.2025

AP
Index : Yes
Internet : Yes
Neutral Citation: Yes

To
Official Assignee
Madras High Court
Chennai 600 104.



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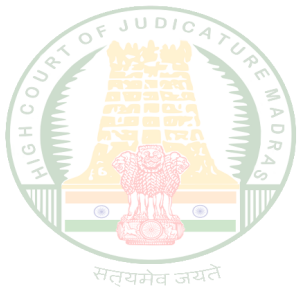
OSA.Nos.268 & 269/2021

S.S. SUNDAR, J.,
and
A.D.MARIA CLETE, J.

AP

Common Judgment in
OSA.Nos.268 & 269/2021

29 .04.2025



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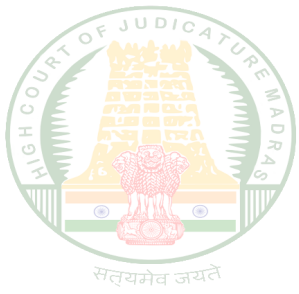
O.S.A.Nos.268 & 269 of 2021
and
C.M.P.Nos.12123 of 2022 & 12520 of 2021

DR.JUSTICE A.D.MARIA CLETE, J

The judgment prepared by my learned Brother Judge was circulated to me on the afternoon of 28.04.2025, and I have had the benefit of perusing the same. In view of the matter being listed for pronouncement of orders today, I proceed to record my brief separate reasonings as follows:

2.Insofar as the issue relating to the validity of the compromise decrees passed by the Madras High Court in the civil suits is concerned, I am in complete agreement with the findings recorded by my learned Brother Judge. Nevertheless, I propose to supplement those findings as set out below.

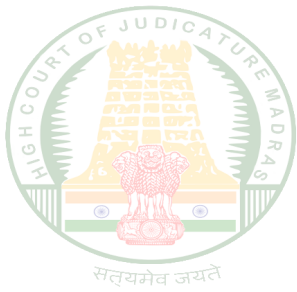
3.Whether the compromise decrees dated 26.03.2007 passed in C.S. Nos. 33 and 52 of 1999 are nullity?



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WEB COPY 4.The original plaintiff, Indbank Housing Limited, instituted Civil Suit No. 33 of 1999 seeking recovery of a sum of Rs.6,19,54,752/- with future interest at 20% per annum from 03.04.1998 till the date of payment from M/s Green Gardens Pvt. Ltd. Likewise, Civil Suit No. 52 of 1999 was filed to recover a sum of Rs. 6,15,17,512/- with future interest at 20% per annum from 15.04.1998 till the date of payment from M/s Gemini Arts Pvt. Ltd. and its directors, namely the first respondent and his late brother, A. Ravi Sankar Prasad. Both suits were filed on the Original Side of the Madras High Court.

5.Subsequently, the original plaintiff assigned the debts arising under the suits to Kotak Mahindra Bank Ltd. by way of an Assignment Deed dated 13.10.2006. The assignee, Kotak Mahindra Bank Ltd., was substituted as the plaintiff in both suits by an order dated 21.03.2007 passed in A. No. 2454 of 2007. The substituted plaintiff is a Bank as defined under Section 2(d) of the Recovery of Debts Due to Banks and Financial Institutions Act 1993. The original plaintiff is not a Bank or Financial institution hence the



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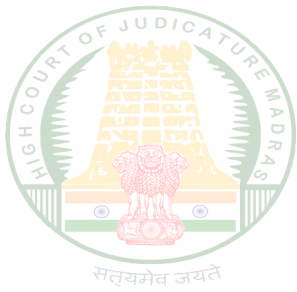
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suit initially filed by the original plaintiff before the High court is valid.

The Memorandum of Compromise was executed into between the substituted plaintiff and the defendants on 23.10.2006, and based on the terms of the compromise, a decree was passed on 26.03.2007 in favour of the plaintiff bank.

6.The Recovery of Debts Due to Banks and Financial Institutions Act, 1993, came into force on 27.08.1993. Section 18 of the Act expressly bars the jurisdiction of civil courts in matters relating to the recovery of debts due to banks and financial institutions, conferring exclusive jurisdiction on the Tribunals established under the Act. As per section 18 of the Act the jurisdiction of Civil court is ousted from the appointed date.

7.The term “appointed date” under Section 2(c) of the Act refers to the date on which the Debt Recovery Tribunal is established. In the State of Tamil Nadu, the Debt Recovery Tribunal at Chennai was established on 31.10.1996, and from that date onward, the jurisdiction of civil courts in matters falling within the ambit of “debt” under Section 2 (g) of the of the

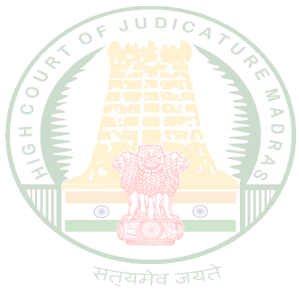


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Recovery of Debts Due to Banks and Financial Institutions Act 1993.

8. There is no quarrel that the amounts sought to be recovered by the substituted plaintiff in the suits fall within the definition of “debt” under the Act. Consequently, the jurisdiction of the civil court stood barred from 31.10.1996 in such matters, in terms of Section 9 of the Code of Civil Procedure. Section 31 of the Act provides for the transfer of pending suits from the civil courts to the Tribunal, no such transfer occurred in the present case. In the scenario the civil court has passed in C.S. No. 33 of 1999 and C.S. No. 52 of 1999 on 26.03.2007—well after the appointed date and after the Debt Recovery Tribunal had been constituted—raising a serious jurisdictional issue.

9. The first respondent strenuously contended that a decree passed without jurisdiction is a nullity. In response, the appellant submitted that an insolvency court does not have the authority to declare a compromise decree passed by the Original Side of the High Court as a nullity. It was further



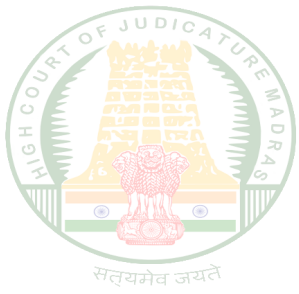
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argued that the jurisdiction of the Original Side of the High Court is not entirely ousted.

10.The landmark judgment of the Hon'ble Supreme Court on the issue of challenging a civil court decree on the ground of lack of jurisdiction is **Kiran Singh and Others v. Chaman Paswan and Others, AIR 1954 SC 344.**

“It is a well-settled and fundamental principle that a decree passed by a court lacking jurisdiction is a nullity, and its invalidity can be raised at any stage, including during execution proceedings or in collateral proceedings, whenever or wherever it is sought to be enforced or relied upon. A jurisdictional defect—whether it pertains to pecuniary limits, territorial scope, or the subject matter—goes to the very root of the court's authority to adjudicate the matter. Such a defect cannot be rectified even by the consent of the parties involved.”

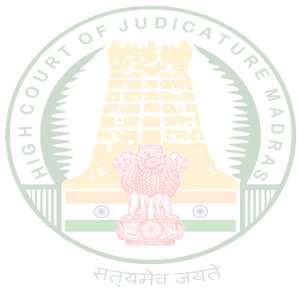
11.From the above passage, it is evident that a decree passed without jurisdiction can be challenged at any stage and in any forum where it is sought to be enforced or relied upon, including in collateral proceedings. In the present case, the adjudication order of the Insolvency Court is founded



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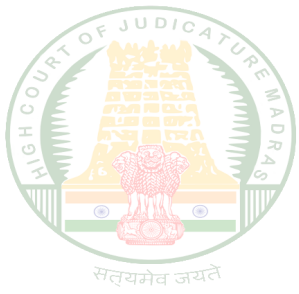
upon the compromise decrees passed in C.S. Nos. 33 and 52 of 1999. Since the appellant has relied upon these decrees in the insolvency proceedings, which are collateral to the civil suits, the first respondent is well within his rights to question the validity of those decrees in the present proceedings.

12.The appellant's contention that the original side jurisdiction of the High Court is not ousted even after the enactment of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, is untenable. Section 18 of the Act unequivocally bars the jurisdiction of civil courts in matters relating to the recovery of debts by banks and financial institutions, while carving out an exception only for the powers of the Supreme Court and High Courts under Articles 226 and 227 of the Constitution. However, the ordinary original jurisdiction exercised by Chartered High Courts under Clause 11 of the Letters Patent is not derived from the Constitution but from statutory charter. Therefore, the exception under Section 18 does not extend to the original civil jurisdiction of the High Court.



WEB COPY 13.The suits in C.S. No. 33 and C.S. No. 52 of 1999 were validly instituted before this Court by the original plaintiff, IndBank Housing Limited, which was neither a bank nor a financial institution within the meaning of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDB Act). It was only after the assignment of the debts that the appellant, a bank as defined under the RDB Act, was substituted as plaintiff in place of IndBank. The appellant, having derived rights from the assignor, merely stepped into the shoes of the original plaintiff and therefore stood bound by the forum originally chosen by the assignor.

14.The learned Single Judge, in the concluding portion of paragraph 52 of the impugned order, observed that although the suits were maintainable when originally filed, the jurisdiction of the Civil Court ceased after the substitution of the appellant, and the appellant ought to have taken steps to transfer the suits to the Debt Recovery Tribunal under Section 31 of the RDB Act. However, this reasoning overlooks the scope of Section 31, which only contemplates the transfer of suits pending before civil courts

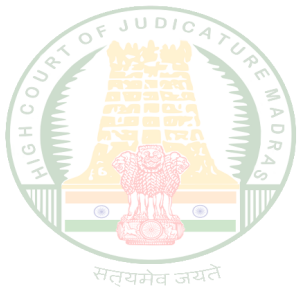


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before the date of establishment of the Tribunal. The first DRT in Chennai was established on 31.10.1996, whereas the suits C.S.No.33 & 52 of 1999 were not pending before the establishment Tribunal instead they were were instituted in 1999, well after the Tribunal's establishment. Therefore, Section 31 has no application.

15. Moreover, once a civil court is properly seized of a matter within its jurisdiction, such jurisdiction is not divested merely by a subsequent development, including substitution of parties. The appellant, having stepped into a suit validly instituted, was entitled to continue it before the same court. The mere change in the character of the plaintiff by assignment does not render the court's jurisdiction invalid.

16. When a suit is validly instituted and taken on file by a court having jurisdiction, there is no provision under the Code of Civil Procedure to subsequently return the plaint for presentation before another forum. Order VII Rule 10 of the CPC permits the return of a plaint only where the court finds that it lacks jurisdiction to entertain the suit at the time of its

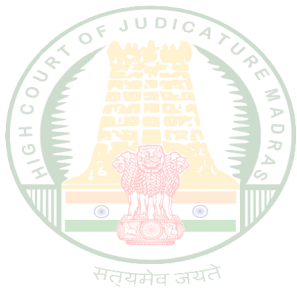


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institution. The provision is explicit in stating that such return is to facilitate presentation before the appropriate court which had jurisdiction on the date of the original filing. In the present case, as on the date of institution of C.S. Nos. 33 and 52 of 1999, the High Court of Madras had proper jurisdiction to entertain the suits. Therefore, the provisions of Order VII Rule 10 CPC have no application in the present context.

17. In this regard, the appellant relied on a similar decision rendered by the High Court of Kerala in **State Bank of India v. Ramakrishnan Babu and Others**, reported in **2015 (5) KHC 588**, specifically referring to paragraphs 14 and 15 of the judgment, which are extracted as follows:

“14. In the present case, the suits were perfectly maintainable before the civil court at the time when they were instituted, though the amount claimed in the suits were above Rupees Ten lakhs. The original plaintiff in the respective cases is not a bank or a financial institution. The mere accident of vesting of the assets and liabilities of the plaintiff in the State Bank of India after the institution of the suits would not take away the jurisdiction of the civil court to try the suits. Even when the State Bank of India comes on record under Rule 10 of Order XXII of the Code of Civil Procedure, the suits would be maintainable before the civil court. There is no lack of jurisdiction for the civil



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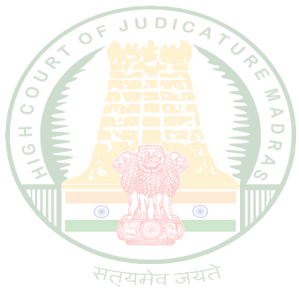
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court in such a situation and Section 18 of the Recovery of Debts Act would not apply.

15. Even assuming the State Bank of India did not apply to join as a party in the suits, the original plaintiff could have continued the suit and protected the interests of the assignee, namely, the State Bank of India. Even after the transfer of the assets and liabilities, the right of the SBI Home Finance Ltd. to continue to prosecute the suit would not be hampered since it was bound to protect the interests of the assignee. Therefore, the position would not change even if the assignee, namely, the State Bank of India had applied to substitute itself as the plaintiff. The jurisdiction of the civil court would rest upon the question whether it had jurisdiction on the basis of the cause of action of the suits.”

18. In the circumstances, it is held that once the Civil Court had validly taken cognizance of the suits, its jurisdiction would not be ousted merely because the plaintiff was subsequently substituted by an assignee who is a Bank, under Order XXII Rule 10 of the Code of Civil Procedure. Accordingly, the compromise decrees dated 26.03.2007 passed in C.S. Nos. 33 and 52 of 1999 are valid and binding on the defendants therein.

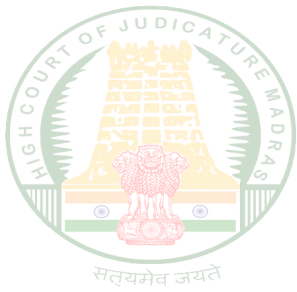
19. The deed of assignment is a bilateral agreement executed between



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the assignor and the assignee. No notice needs to be given to the debtor, it is sufficient that the debtor is intimated of the assignment once it is completed. In the present case, the debtor (1st respondent) has challenged the decree passed by the civil court after the debt was assigned by a non-banking financial company to a bank. There is a chance even to challenge the decree if passed by the DRT after assignment.

20.To illustrate: Suppose a person in Kanyakumari District avails a housing loan exceeding Rs.20 lakhs from a Housing company registered under the companies Act, non-banking financial institution (like the original plaintiff in C.S. Nos. 33 and 52 of 1999) and defaults, leading to a money suit being filed in the District Court of Kanyakumari at Nagercoil. If, during the pendency of the suit, the creditor assigns the debt to a bank and the bank seeks transfer of the suit to the DRT at Madurai, the debtor is likely to oppose it. This is because such a transfer would impose a practical hardship—the DRT at Madurai may be geographically distant and inconvenient for the debtor who resides in Kanyakumari. The suit was rightly instituted

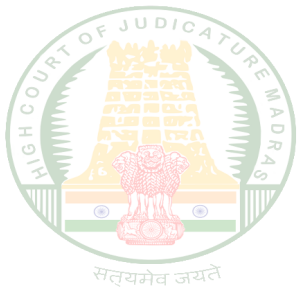


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before the Nagercoil District Court under Section 20 of the CPC, since the cause of action arose at Kannyakumari and defendant also resides at Kannyakumari.. If the case is transferred from civil court to the DRT, then as per section 22 of RBD Act, the DRT is not bound by the procedure laid down by Code of Civil procedure 1908, The procedure for trial of cases in DRT is summary. Trials before the DRT are summary in nature and do not involve extensive recording of evidence. This change of forum deprives the debtor of the full procedural safeguards of a regular civil suit. Hence, the defendant/debtor suffers a disadvantage through no fault of his own, merely because of an assignment between two financial entities. Even if the case was transferred from Civil Court to DRT and if the DRT proceeds and passes an order, such an order may still be susceptible to challenge on the ground that the forum was changed midstream in a manner prejudicial to the debtor.

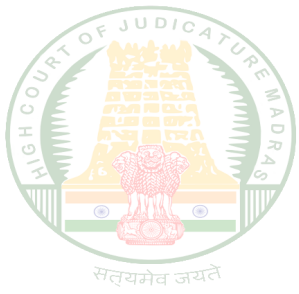
21.The learned Single Judge, in the order under appeal, observed that the term “debt” under the Recovery of Debts Due to Banks and Financial



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Institutions Act, 1993 (RDB Act) includes debts assigned payable to a bank, and therefore held that the DRT alone would have jurisdiction. While it is correct that the definition of “debt” under Section 2(g) of the RDB Act encompasses assigned debts, the determinative factor is whether the debt was payable to a bank or financial institution as on the date of institution of the suit—not subsequently. In the present case, when C.S. Nos. 33 and 52 of 1999 were filed, the debt was owed to a non-banking company, IndBank Housing Limited, which did not fall within the ambit of a bank or financial institution under the Act. Hence, the suits were properly instituted before the civil court.

22.It is a settled proposition of law that parties cannot, by consent, confer jurisdiction on a court that inherently lacks it. However, where more than one court has jurisdiction, the parties may by agreement choose one among them. Conversely, a unilateral act—such as the assignment of debt on the back of defendant/debtor—cannot strip the civil court of jurisdiction in the pending suit abruptly in the midway.



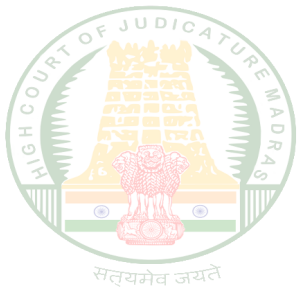
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23. In the present case, the appellant bank, having stepped into the shoes of the original plaintiff (a non-banking financial entity), merely acquired the rights and liabilities of the assignor. This substitution did not divest the civil court of its jurisdiction, as the court was competent to entertain the suits when originally instituted. Thus, the compromise decree dated 26.03.2007 passed in C.S. Nos. 33 and 52 of 1999 are valid and not nullity.

24. Whether compliance with Section 12(2) of the Presidency Towns Insolvency Act, 1909, is mandatory to initiate Insolvency proceedings?

25. So far as the point “C” is concerned, the first respondent seeks to annul the adjudication order on the ground of non-compliance with Section 12(2) of the Presidency Towns Insolvency Act, 1909 ("PTI Act"). The appellant, as creditor-petitioner, instituted I.P. No. 5 of 2013 under Section

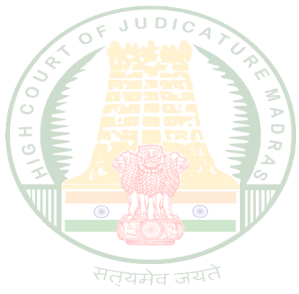


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12 of the PTI Act without relinquishing its security interest over certain immovable properties. In the insolvency petition, the appellant described itself either as a secured creditor or as a creditor not holding "tangible security," implicitly admitting the existence of some form of security, albeit allegedly intangible.

26.However, once a secured creditor files an insolvency petition under Section 12 of the PTI Act, compliance with Section 12(2) is mandatory, requiring the creditor to either surrender the security or express a willingness to relinquish it in the event of adjudication. In the present case, no such statement expressing willingness to relinquish the security was made in the insolvency petition filed by the appellant.

27.The counter filed by the Official Assignee is significant. In his report dated 07.12.2018, the Official Assignee categorically stated that the appellant had not surrendered its security interest as mandated by Section 12(2). This clearly indicates that the appellant was holding security over certain immovable properties but failed to either surrender it or



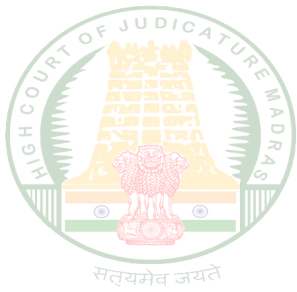
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communicate its willingness to do so to the Official Assignee.

28.The appellant contends that this issue was already considered and concluded in A. No. 312 of 2015, wherein an application was filed by the first respondent to set aside the ex parte order dated 28.09.2015 in I.P. No. 5 of 2013. However, the order in A. No. 312 of 2015 does not contain any discussion or finding on the compliance or non-compliance with Section 12(2) of the PTI Act. Furthermore, Section 21 of the PTI Act empowers the Insolvency Court, at any time, to annul an adjudication order if it is satisfied that the debtor ought not to have been adjudged insolvent.

29.The Official Assignee, in his common report, also stated that he had no objection to annulling the order of adjudication, particularly in view of the appellant's failure to express willingness to relinquish its security. Additionally, it is noted that the appellant actively pursued recovery proceedings against the insolvent before other fora, such as the Debt Recovery Tribunal (DRT), without notice to the Official Assignee, thus violating Section 18 of the PTI Act. No other creditor has filed any claim



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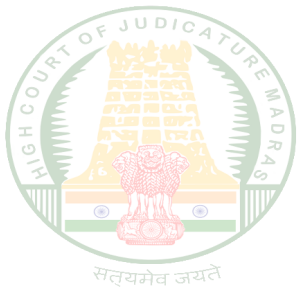
with the Official Assignee. The appellant, holding security over immovable properties of the debtor, cannot invoke insolvency jurisdiction solely for individual debt recovery purposes.

30. On the question of non-compliance with Section 12(2), the Madras High Court in **S. Neelakanta Sarma v. K. Govindarajulu and Another**, AIR 1982 Mad 18, has held as follows:

"22....The applicant has clearly established that the first respondent is a secured creditor who had not fulfilled the requirements of Section 12(2) of the Act before instituting I.P. No. 46 of 1975, and therefore it was a proceeding instituted without jurisdiction. Consequently, the applicant herein ought not to have been adjudged an insolvent and would be entitled to an order of annulment under Section 21 of the Act."

Thus, it is well-settled that non-compliance with Section 12(2) of the PTI Act is a valid ground for annulling an adjudication order.

31. In the present case, the contention is that Section 12(2) should not apply because the security held was ineffective: the appellant held only a second charge over a property situated in Andhra Pradesh, the value of the security was allegedly insufficient to cover the debt, and the first charge

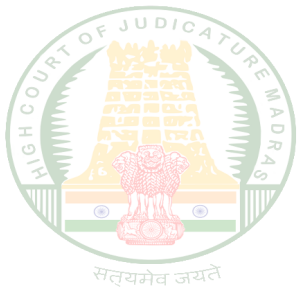


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holder had pending enforcement proceedings. It is contended that the security was thus illusory and ineffective, and failure to relinquish such a security should not vitiate the insolvency proceedings.

32. However, this argument cannot be accepted. Section 12(2) of the PTI Act imposes an unqualified obligation on every secured creditor to either surrender or value the security before initiating insolvency proceedings. The statute does not distinguish between “effective” and “ineffective” security. Whether the security is substantial or weak, enforceable or doubtful, the obligation to comply remains. A creditor holding a second charge or whose security may be insufficient in value is equally bound by Section 12(2).

33. The rationale is that insolvency jurisdiction requires that the petitioning creditor must be unsecured or must have valued any security interest properly at the time of initiating the proceedings. The creditor’s qualification as unsecured is substantive, not procedural. Non-compliance



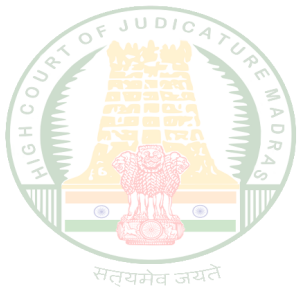
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with Section 12(2) strikes at the root of the creditor's standing and renders the adjudication fundamentally defective. Courts have consistently held that failure to comply with Section 12(2) is not a curable irregularity but a substantive defect that cannot be remedied after adjudication.

34. While procedural defects may sometimes be condoned, failure to surrender or value security as required under Section 12(2) is not a minor irregularity but a fundamental defect. Therefore, the adjudication obtained without compliance is liable to be annulled.

35. Consequently, the argument advanced by the appellant based on the alleged ineffectiveness of the security is untenable. The plain statutory mandate under Section 12(2) governs the situation, and reliance on outdated distinctions between effective and ineffective securities cannot override this requirement.

36. In view of the foregoing discussion, I am of a considered opinion that the insolvency petition in I.P. No. 5 of 2013 was instituted by the



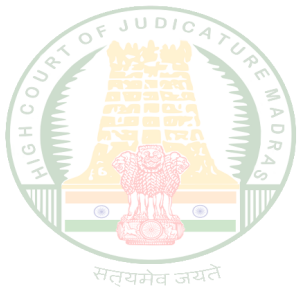
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appellant/creditor without complying with the mandatory requirement under Section 12(2) of the Presidency Towns Insolvency Act, 1909. The appellant, being a secured creditor, was under a statutory obligation to either surrender the security or value the same and proceed only for the balance amount as an unsecured creditor. The failure to do so strikes at the root of the creditor's locus to invoke insolvency jurisdiction. In such circumstances, and particularly in view of the law laid down by the Hon'ble High Court in **S. Neelakanta Sarma v. K. Govindarajulu [AIR 1982 Mad 18]**, I hold that the adjudication order dated 28.09.2015 is liable to be annulled. Accordingly, the adjudication of the first respondent as insolvent is hereby annulled under Section 21 of the Presidency Towns Insolvency Act, 1909.

37.In view of the conclusion reached on Point 'C' concerning the non-compliance with Section 12(2) of the Presidency Towns Insolvency Act, 1909, both the appeals are dismissed. No order to cost.

(A.D.M.C.J.)
29.04.2025



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Index : Yes/No

Neutral Citation: Yes / No

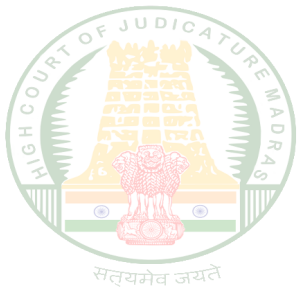
Speaking Order / Non-speaking Order

To

1.The Official Assignee,
Madras High Court,
Chennai – 600 104.

2.The Section Officer,
VR Section,
High Court of Madras,
Chennai.

S.S.SUNDAR, J
and
DR. A.D. MARIA CLETE, J



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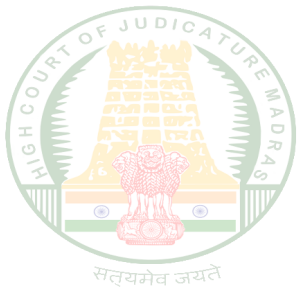
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Judgment made in
O.S.A.Nos.268 & 269 of 2021
and
C.M.P.Nos.12123 of 2022 & 12520 of 2021

29.04.2025

O.S.A.Nos.268 and 269 of 2021

S.S. SUNDAR, J.



OSA.Nos.268 & 269/2021

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and

Dr.A.D. MARIA CLETE, J.

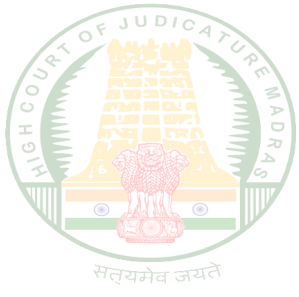
[Order of the Court was made by **S.S. SUNDAR, J.**]

In view of the dissenting judgments, the matter is directed to be placed before the Hon'ble Chief Justice for appropriate orders.

(S.S.S.R., J.) (A.D.M.C., J.)
29.04.2025

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S.S. SUNDAR, J.
and
Dr.A.D. MARIA CLETE, J.



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OSA.Nos.268 & 269/2021

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29.04.2025