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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 26 OF 2009
IN
INSOLVENCY PETITION NO. 12 OF 2008

HSBC Bank USA ...Petitioning Creditor
Vs
Ravi Subramanian ...Debtor/Insolvent

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Mr J.P.Sen Senior Advocate a/w Ashok Purohit, Tejas Gokhale i/b Hiten Venegavkar for insolvent/ Applicant.
Mr H. C. Mehta i/b M/s Mehta & Co. for petitioning creditor to show cause.
Mr M. D. Narvekar, Official Assignee with Mrs U. S. Shrivastav Dy. Official Assignee present.

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CORAM : S.C. GUPTE, J.

SEPTEMBER 02, 2015

P.C. :

The Notice of Motion seeks recall and setting aside of an order of adjudication dated 21 October 2008 passed in the Insolvency Petition herein. The basis of the application is that the Applicant, who is the Respondent to the Insolvency Petition and who is declared as an insolvent under the order dated 21 October 2008, has neither resided ordinarily at any dwelling house nor has carried on business in person or through an agent, within the limits of the ordinary original civil jurisdiction of this Court, within a year prior to the date of presentation of the Insolvency Petition. It is also submitted that the instant case does not fall within other sub-clauses of Section 11 of the Presidency Towns Insolvency Act, 1909, namely, clauses (a), (c) or (d), either.

2 The brief facts leading to the present application may be noted as follows.

The Applicant insolvent was the Chief Executive Officer and initiator of a group of companies under the moniker Silverline Technologies which consist of (i) Silverline Technologies Inc., a Delaware Corporation, (ii) Silverline Technologies Limited, an Indian Corporation, (iii) Silverline Technologies (Canada) Inc., a Canadian Corporation, (iv) Silverline Technologies U.K. Limited, a United Kingdom Corporation, and (v) Seranova, Inc., a Dealware Corporation. The group of companies operated a successful dotcom business which grew in value to several hundred million U.S. dollars. As part of its financing, Silverline Technologies Inc. was extended a line of credit by the pertitioning creditors in the total sum of about $30,000,000.00. This credit was in part secured by guarantees of Silverline Technologies Limited, together with some other companies forming part of the group, and also the Applicant herein. As a result of financial troubles experienced by the group and inability of the principal borrower to repay, the petitioning creditors proceeded to enforce the guarantees of Silverline Technologies Limited and the Applicant. An action was commenced in that behalf before the United States District Court, Southern District of New York. In the course of this action, certain settlement terms were entered into, which *inter alia* provided for sale of the business of Silverline Technologies to a third party. This settlement, however, could not go through and finally having no means to pay the petitioning creditors on this guarantee, the Applicant filed for bankruptcy under Chapter Seven of the United States Bankruptcy Code. The proceedings were contested by the petitioning creditors herein, who obtained a default judgment from the U.S. Bankruptcy Court on 11 January 2005, preventing the discharge in bankruptcy of monies owed as due to them. Enforcement proceedings were thereupon initiated by the petitioning creditors in March 2005 in Torrento, Canada, where the insolvent had been residing. The proceedings were contested both at the Trial Court, i.e. the Ontario Superior Court of Justice, and in the appellate court, i.e. the Ontario Court of Appeal. The Onterio courts ordered the original United States District Court judgment to be recognized and enforced in Ontario. It appears that petitioning creditors also filed a suit in this court being Suit No.2488 of 2003, against Silverline Technologies Ltd. and the insolvent. A judgment and decree was obtained in that suit on 2 February 2006. Pursuant to this decree, an insolvency notice was issued by the petitioning creditors (the judgment creditors). The notice not having been complied with, the present

Insolvency Petition was filed on 21 February 2008. The Petition was allowed on 21 October 2008 and the debtor was adjudged as an insolvent.

3 The Applicant Insolvent has taken out the present Notice of Motion on the footing *inter alia* that there was no service of either the insolvency notice or the insolvency petition based thereon, on the Applicant. In fact, it is claimed that the Applicant did not even have a notice of the hearing of the suit and the decree passed by this Court on 2 February 2006 was in absence of, and without notice to, the Applicant. The Applicant claims to have gained knowledge of the adjudication only on 16 February 2009, when a flash news appeared about his insolvency on the BSE website. It is the case of the Applicant that this Court has no jurisdiction to make an order of adjudication against the Applicant, since none of the conditions provided for in clauses (a) to (d) of Section 11 is satisfied in the present case. It is submitted that the Insolvent has neither ordinarily resided nor has had any dwelling house or carried on any business in person or through an agent within the limits of the ordinary original civil jurisdiction of this Court. It is submitted that he does not personally work for gain and has not been under arrest in execution of any decree, within these limits.

4 The Notice of Motion is opposed by the petitioning creditor, firstly, on the ground that the adjudication order having become final, the Insolvent cannot seek recall of the same and secondly, on the ground that the Insolvent has ordinarily resided and also carried on business within the limits of the ordinary original civil jurisdiction of this Court.

5 In the first place, it must be noted that the adjudication order was passed ex-parte. The adjudication order would hold good and operate as res-judicata only if the petitioning creditors are in a position to show that the Insolvent was duly served with the Insolvency Petition and remained absent despite such service. From the record of case, it transpires that the insolvency notice was sought to be served by the judgment creditors at the last known place of business of the insolvent, i.e 'C/o Silverline Technologies Ltd., Unit No.121, SDF IV, Seepz, Andheri (east) Bombay – 400 096' and at his last known place of residence, i.e.

'Gulshan Villa, 1st floor, Umar Park, Bhulabhai Desai Road, Breach Candy, Bombay – 400 026.' The case of the judgment creditors is that the service could not be effected at either of the addresses. There is no material to show either that the Insolvent carried on business or resided at these places, as is discussed later, in this order. Based on non-compliance of this insolvency notice, the service of which is not proved, the judgment creditors filed the Insolvency Petition. The affidavit of service in respect of service of the Insolvency Petition on the insolvent makes it clear that no personal service could be effected on the insolvent at either the purported place of his residence or business as shown in the Petition. The judgment debtors, in the premises, prayed for substituted service *inter alia* by affixing the service on the last known addresses referred to above and also by display on the notice board of the Insolvency Registrar and by publication in local newspapers. This service again is not a good service if it cannot be shown that the Insolvent either resided or carried on business at any of the addresses mentioned in the Petition. In the absence of any proof that the Insolvency Petition was duly served on the Insolvent, it is not possible to accept the judgment creditors' submission that the order of adjudication in the Insolvency Petition operates as res-judicata or prevents the insolvent from taking out an application for recall.

6 Section 11 of the Presidency Towns Insolvency Act provides that the Insolvency Court shall not have jurisdiction to make an order of adjudication unless the case falls in either of clauses (a) to (d) of that Section. Clause (a) provides for the case of imprisonment of the debtor in execution of a decree for payment of money in any prison to which debtors are ordinarily committed by the Court in exercise of its ordinary original civil jurisdiction. Clause (b) provides for the case of ordinary residence of the debtor or his having a dwelling house or carrying on any business either in person or through an agent within the limits of the ordinary original civil jurisdiction of the Court. Clause (c) provides for a case, where the debtor personally works for gain within those limits, whilst clause (d) provides for the case of a petition by or against a firm of debtors, where the firm has carried on business within a year before the date of presentation of the Insolvency Petition within those limits. The judgment creditors' case is that the

debtor in the present case has ordinarily resided or had a dwelling and also carried on business within the limits of ordinary original civil jurisdiction of this Court. There is hardly any material placed on record by the judgment creditors in support of such case. In the first place, learned Counsel for the judgment creditor relies on an employment agreement executed by Silverline Technologies Limited, the Indian corporation, having its address within the local limits of jurisdiction of this Court in favour of the Insolvent. This agreement is as of 1 January 2004. There is nothing on record to show that this agreement was either subsisting or was valid or operating during the relevant period with which we are concerned, namely, 21 February 2007 and 21 February 2008, that is, the period of one year before presentation of the Petition. The second piece of evidence on which the judgment creditor relies upon is the so called vouchers showing trips of the Insolvent within India, which were paid for by Silverline Technologies Limited. There is nothing to show that these are authentic cash vouchers or that the Insolvent had actually taken these trips within the country for which these vouchers were raised and payments made to the Insolvent. (As noted below, the Insolvent was not present in India during most of the periods for which the vouchers claim that the insolvent made trips within India.) The last piece of evidence relied upon by learned Counsel for the judgment creditors is the Respondent's deposition before Ontario Supreme Court of Justice on 21 August 2008. This deposition indicates that when certain questions were put to him in his examination in the pending case before Ontario Supreme Court of Justice about his expenses, the Insolvent admitted that his expenses in connection with any business, marketing, credit card, and even personal expenses, were paid for by Silverline Technologies Limited. This aspect again does not advance the judgment creditors' case any further or show that the Insolvent did reside or carry on business within the limits of the ordinary original civil jurisdiction of this Court in terms of clause (b) of Section 11. On the other hand, we have the record of the Insolvent's passport, which is a US Passport, which shows that his presence in India was only on three occasions, and for 7, 5 and 19 days respectively between 20 February 2007 and 20 February 2008. The passport in fact indicates that from the period between 17 April 2003 and 10 March 2009 (i.e. the date of filing of the present Notice of Motion) the Insolvent was present in India only on

265 days in a period of more than six years. It is accepted by learned Counsel for the judgment creditors that the dwelling house where the Insolvent is claimed to have resided in Mumbai, does not belong to him but to his brother. It is submitted that whenever the Insolvent visited India, he resided with his brother at this address. On these facts, it cannot possibly be concluded that the Insolvent either resided or had a dwelling house within the limits of ordinary original civil jurisdiction of this Court. As for the judgment creditor's claim that the Insolvent carried on business within those limits, the only circumstance alleged in support of such case is the directorship of the Insolvent of Silverline Technologies Limited. Merely because the Insolvent is a director of a company, which carries on a business within the local limits of jurisdiction of this Court, it cannot be suggested that for that reason alone the Insolvent carries on business within those limits. In **Cain Vs Butler**[1] of Kings Bench Division was concerned with a case where similar contentions were raised. The Court held that the mere fact of a person, being a director of a company, having attended board meetings at the registered office of the company, does not amount to his carrying on business at the registered office of the company. The Court, in this behalf, observed as follows:

> "If the mere fact of a man being a director of a company and attending the board meetings at the registered office of the company amounted to a carrying on by him of his business there, one who was a director of a number of different companies having their head office each in a different town would carry on his business in all those towns and might at the option of the plaintiff be sued in any one of them. That cannot have been intended. I think that what the Country Courts Act meant was that a man who is carrying **on a business of his own is usually to be found at the place where it is carried on.** Whereas a director of a company may not go near the company's place of business more than two or three times in the year. It is not necessary here to decide whether a director could not be sued in the district in which his company's business was carried on if it were shown that the company was a private one and that he held all the shares. There is no evidence here that that was the case."

1 1916 Feb. 14, page 759

The jurisdiction exercised by the Insolvency Court is a jurisdiction over the person of the Insolvent and unless it is shown that the insolvent either in person or through an agent carries on business within the local limits of the jurisdiction of the Court, the Court cannot assume jurisdiction over the insolvent and adjudge the same.

7 In that view of the matter, the judgment creditors have not shown that the present case falls under either of the clauses of Section 11, on the basis of which alone this Court can make an order of adjudication. The order of adjudication, thus, cannot be sustained. The Notice of Motion is, accordingly, made absolute in terms of prayer clause (b). The Official Assignee is discharged. There shall be no order as to costs.

(S.C.GUPTE J.)