

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 06.03.2015

Date of verdict: 24.03.2015

CORAM

THE HONOURABLE MR. **JUSTICE R.SUBBIAH**

I.P.No.46 of 2010

Indian Bank,
Tiruvanmiyur Branch,
rep. by its Chief Manager

... Petitioning Creditor

VS.

1.S.P.Bhooma

... Respondent / Debtor

2.V.Goumi

... Respondent /
Transferee

This petition has been filed under Sections 7, 9(1)(b) and (c), 10, 11 and 12 of the Presidency Towns Insolvency Act, 1909 read with Rule 106 of Insolvency Rules.

For petitioner : Mr.T.Sundar Rajan

For respondents : Mr.S.Chandrasekaran, for R.1

ORDER

This petition has been filed by the petitioning creditor viz., the Indian Bank, for the following reliefs:-

(i) to adjudicate the first respondent / debtor as an insolvent.

(ii) to appoint the Official Assignee with direction to administer the estate of the first respondent / debtor, excluding the schedule A secured asset of the petitioner creditor, for the benefit of the general body of creditors in a regular manner.

(iii) to direct the costs of this petition to come out of the estate of the first respondent / debtor.

2. The case of the petitioning creditor, in brief, is as follows:-

(a) The petitioning creditor had sanctioned a credit facility of Rs.16.06 crores to M/s.Ind Solders & Alloys Pvt. Ltd., a company incorporated under the Companies Act, 1956 on 23.2.2008. The said

credit facilities are covered by documents dated 12.3.2008 executed by M/s.Ind Solders & Alloys Pvt. Ltd., represented by its Managing Director T.R.Viswanathan and Director S.Swaminathan. The said M/s.Ind Solders & Alloys Pvt. Ltd. started availing the credit facilities both Medium Term Loan of Rs.2.06 crores and working capital credit facilities, which included Fund Based Exposure of Rs.8 crores and Non Fund Based Exposure of Rs.6 crores. The first respondent / debtor, who is the wife of T.R.Viswanathan, stood as a personal guarantor of the loan facilities availed by M/s.Ind Solders & Alloys Pvt. Ltd. Further, the first respondent / debtor had executed an agreement of guarantee dated 12.3.2008 thereby guaranteeing the due repayment of the loan facilities availed by the said M/s.Ind Solders & Alloys Pvt. Ltd.

(b) Further, the said M/s.Ind Solders & Alloys Pvt. Ltd. created an equitable mortgage of three properties belonging to the said company viz., (i) plot No.59, SIDCO Industrial Estate, Thirumazhisai measuring 24.7 cents comprised in S.No.116 part and 128 part of Medavilagam Village, (ii) plot No.62, SIDCO Industrial Estate, Thirumazhisai measuring 41.8 cents comprised in s.No.132 part of Sembarambakkam Village and (iii) plot Nos.9, 10 and 11 in S.No.188 of Kovoor Village measuring 7470 sq.ft. on 28.4.2008 as a

security for the loan in favour of the petitioning creditor. Further, T.R.Viswanathan had created equitable mortgage of one immovable property being land measuring acre 1.09 cents in S.No.32/3 of Othivakkam Village, Kumili Panchayat on 28.4.2008 as a security for the loan availed, in favour of the petitioning creditor.

(c) The first respondent / debtor had created an equitable mortgage of her two immovable properties viz., (i) plot No.3 measuring 1 ground in Vishnu Nagar, S.No.126, Perungulathur Village, Saidapet Taluk and (ii) land measuring 6-1/2 cents in S.No.87/2 part, Pallavaram Zamin Village, Saidapet Taluk, on 28.4.2008, as a security for the loan facilities availed by M/s.Ind Solders & Alloys Pvt. Ltd. in favour of the petitioning creditor and executed a letter dated 29.4.2008 confirming the creation of equitable mortgage of the said properties. Having availed the loan facilities from the petitioning creditor, the said company has to transact all its business through the O.C.C. account with the petitioning creditor bank. But the company failed to do the same and transacted its major financial transactions through Axis Bank and also discounted the bills which were hypothecated with the petitioning creditor bank, with Can Bank Factors Ltd. without the knowledge of the petitioning creditor bank, which is a breach of trust resulted in siphoning off the

funds out of the system. Hence, the account of the said company was classified as a non-performing asset since 30.4.2009 and the said company is liable to pay a sum of Rs.15,68,88,928.99 as on 16.11.2009. Therefore, the petitioning creditor initiated proceedings under the SARFAESI Act and took possession of the secured assets mortgaged by the said company and the first respondent / debtor.

(d) The said SARFAESI proceedings have been challenged by the company and the first respondent / debtor in S.A.No.96 of 2009 which is pending before the Debt Recovery Tribunal II at Chennai. The petitioning creditor has also filed an application in O.A.No.210 of 2009 before the Debt Recovery Tribunal I at Chennai for recovery of a sum of Rs.15,68,88,928.99. The first respondent / debtor as a guarantor of the loan facilities availed by M/s.Ind Solders & Alloys Pvt. Ltd., is jointly and severally liable to pay the debts of the said company under the agreement of guarantee dated 12.3.2008.

(e) In order to cover the unsecured balance loan amount, the petitioning creditor had taken steps to trace out the other personal properties belonging to the guarantors of the said company in order to attach the same. While so, it was found that the first respondent / debtor owned a property being Flat No.8E, in the 8th

Floor of Ceebros Shyamala, at Door No.136, Arcot Road, Chennai-93 described in the schedule B of the petition, which was purchased by her by way of a sale deed dated 23.6.2009 registered as document No.2500 of 2009 on the file of the SRO, Virugambakkam. When they initiated proceedings under the SARFAESI Act and took possession of the secured assets on 22.8.2009, the first respondent / debtor, in order to delay and defeat the creditors, had fraudulently settled the schedule B property in favour of her daughter V.Goumi, the second respondent herein by way of a settlement deed dated 25.9.2009 as Document No.3912 of 2009 on the file of the SRO, Virugambakkam. The first respondent being a guarantor of M/s.Ind Solders & Alloys Pvt. Ltd. under an agreement of guarantee dated 12.3.2008, her liability being co-extensive with that of the principal debtor, is equally liable. The first respondent / debtor would not be able to pay her debts to the petitioning creditor without the aid of the property covered under the settlement. Such a transfer of the schedule B property has been done by the first respondent / debtor on 25.9.2009, only to delay and defeat the creditors including the petitioning creditor to keep the property away from them. Thus, the first respondent / debtor has committed an act of insolvency on 25.9.2009 within the meaning of Section 9(1)(b) and (c) of the Presidency Towns Insolvency Act. Hence, the present petition has been filed.

3. The first respondent / debtor filed a counter, wherein it has been stated as follows:-

(a) The first respondent's husband T.R.Viswanathan is the Managing Director of M/s.Ind Solders & Alloys Pvt. Ltd. The said company is involved in the manufacturing of Aluminium Alloys, Au.Extrusion and Au.castings catering to the leading automobile industries and transport corporation, etc. The petitioning creditor Indian Bank approached the company in the year 2003 and forced the company to avail loan from their bank. But, later, the petitioning creditor compelled the company to come to their fold and in final stage before giving the sanction limit, they put queries and stopped the advancement of final loan amount. Her husband and one S.Swaminathan were with Indian Bank only for six months and not even availed their full limit and have used LC limit of only Rs.3.2 crores out of Rs.6 crores limit and term loan of Rs.32 lacs. Due to sudden world recession, particularly in automobile and metal field, the company incurred heavy loss and hence, the company could not meet out LC bills in time. When they approached the General Manager and explained their position and asked for restructure programme to regularise their account, he threw the papers on their face. On the

very next day, the General manager sent bank officials to her residents and threatened her with dire consequence. Immediately, they have sent a lawyer notice to the bank about the atrocities done to them. Thereafter, they approached the Court and got injunction restraining the bank officials from disturbing their unit. After that, since the General Manager and other officials started giving trouble, they have taken serious steps to switch over to other bank. In fact, the Indian Bank has given two times credit report to other bank for switch over. But, they have purposely initiated SARFAESI proceedings before they shifted to the other bank.

(b) During recession, all the banks have given restructure plan and stimulus package to the industries as per RBI advice, but the Indian Bank has not given even single chance to them to regularise and gave lot of trouble to close down their units. The first respondent has given properties as collateral security. The bank is unnecessarily giving problems by filing insolvency proceedings. The first respondent is not responsible for the liability of the company and she is not a Director and she is not looking any day to day affairs of the company. The first respondent is not a proprietor of the company and she is not a guarantor for the proprietor company and hence, she is not responsible for the loss and she has given only two of her properties

as collateral.

(c) The first respondent owned a housing property purchased during the year 1986 and since the said property was 40 years old, she had disposed the same in June 2009. Thereafter, she purchased a flat in Virugambakkam, Chennai 92 on 23.6.2009 and immediately, she settled the same in favour of her daughter by way of settlement deed dated 25.9.2009 to avail loan from her source. But, the possession of the property belongs to her husband was taken only on 10.10.2009 by the petitioning creditor i.e., much after the first respondent settled the property in favour of her daughter. Hence, absolutely there is no mala fide intention on the part of the first respondent in settling her property in favour of her daughter. Moreover, the petitioning creditor has already initiated DRT proceedings and hence, the present petition is not maintainable. Thus, the first respondent sought for the dismissal of the petition.

4. On the side of the petitioning creditor, the Assistant General Manager examined himself as P.W.1 and marked 6 documents as Exs.P.1 to P.6. viz.,

Ex.P.1: Original Agreement of Guarantee dated 12.3.2008.

Ex.P.2: Original Valuation Report dated 22.8.2009 in respect of five immovable properties and one agricultural land.

E.P.3: Original Valuation report dated 5.11.2009 in respect of secured movable properties.

Ex.P.4: Certified copy of the sale deed which was registered as document No.2500/2900 on 26.6.2009 before the Sub Registrar, Virugambakkam.

Ex.P.5: Office copy of the possession notice dated 22.8.2009.

Ex.P.6: Certified copy of the settlement deed dated 25.9.2009 registered as document No.3912/2009 before the Joint Sub Registrar, Virugambakkam.

5. On the side of the respondents, the first respondent examined herself as R.W.1 and marked Ex.R.1 - The order passed in S.A.No.108 of 2011 by the DRT-III, Chennai dated 30.7.2012.

6. Learned counsel appearing for the petitioning creditor submitted the petitioning creditor sanctioned credit facility of Rs.16.06 crores to one M/s.Ind Solders & Alloys Pvt. Ltd., a company which was incorporated under the Companies Act, 1956 on 23.2.2008.

The first respondent, who is the wife of one T.R.Viswanathan, the Managing Director of the said company stood as a guarantor for the loan facilities availed by the Company. The said company had created an equitable mortgage in respect of three properties belonging to it and the first respondent had also created an equitable mortgage of two of her immovable properties. Item No.7 of the schedule A property is the movable property, that is plant and machineries of the company. The estimated value of the secured assets described in the A schedule property is Rs.8,84,42,000/-. Even after adjustment of the estimated value of the secured assets, there is a balance of Rs.6,84,46,928.99 Hence, the petitioning creditor initiated SARFAESI proceedings and took possession of the secured assets on 22.8.2009. Out of 7 items in A schedule property, 1 to 6 items are immovable properties and the 7th item is movable property viz., plant and machineries hypothecated to the petitioning creditor. As per the Engineer valuation report-Ex.P.2, the total value of item Nos.1 to 6 of the A schedule property is Rs.8,08,30,000/-. The account of the company was classified as Non-performing assets since 30.4.2009. On 8.5.2009, a demand notice was issued under Section 13(2) of the SARFAESI Act. On 22.8.2009, the petitioning creditor took possession of the schedule A properties under Section 13(4) of the SARFAESI Act, except item No.7, which are hypothecated movable properties. On

7.9.2009, the company and the first respondent / debtor have filed S.A.No.96 of 2009, which was subsequently renumbered as S.A.No.108 of 2011 before the Debt Recovery Tribunal challenging the possession notice. On 30.7.2012, the possession notice was set aside in S.A.No.108 of 2011 on technical grounds. Aggrieved over the same, the petitioning creditor preferred an appeal in R.A.No.116 of 2012 and in that appeal, the operation of the order of the Tribunal has been stayed and the said appeal is still pending before the Debt Recovery Appellate Tribunal. Further, the learned counsel appearing for the petitioning creditor submitted that before setting aside the possession notice dated 30.7.2012 in S.A.No.108 of 2011, item Nos.1 to 5 of the schedule A properties were sold for a sum of Rs.4.99 crores. Item No.6 is an agricultural property and the same is yet to be sold. Similarly, for item No.7 of the property, the application for permission to sell the same is still pending before the Tribunal. As per the Engineer Valuation Report - Ex.P.2, the valuation of item No.6 of the property is Rs.31,12,000/- and the valuation of item No.7 is Rs.76,12,000/-, whereas, the total liability of the company is Rs.16 Crores. Even after adjusting the sale proceeds of item Nos.1 to 5 and estimated value of item Nos.6 and 7, still a sum of Rs.10 crores is due from the company and the first respondent, apart from interest. In such circumstances, the first respondent in order to delay and defeat

the claim of the petitioning creditor, fraudulently transferred the schedule B property on 25.9.2009 in favour of her daughter, thereby the first respondent has committed the act of insolvency within the meaning of Section 9(1)(b) and (c) of the Presidency Town Insolvency Act. Hence, the present petition has been filed within three months from the date of act of insolvency. Thus, he sought to adjudicate the first respondent as a insolvent.

7. Per contra, learned counsel appearing for the first respondent submitted that the first respondent is only a guarantor in respect of the loan availed by the company, in which her husband T.R.Viswanathan is the Managing Director. Schedule B property is not the secured asset. The said property was purchased by the first respondent out of her own income on 23.6.2009. But, subsequently, she settled the said property in favour of her daughter, the second respondent herein, to avail loan for higher studies at USA. Further, the B schedule property was not given as a collateral security to the petitioning creditor. Moreover, since the the bank has already initiated SARFAESI proceedings, the present petition is liable to be dismissed. It is the further submission of the learned counsel appearing for the first respondent that as per Section 2(a) of Presidency Insolvency Act, a creditor must be a decree holder and a

debtor should be a judgment debtor. In the instant case, neither the petitioner is a decree holder nor the first respondent is a judgment debtor. Hence, the petition is not maintainable.

8. Keeping the submissions made on either side, I have carefully gone through the entire materials available on record.

9. According to the petitioning creditor, as on date, a sum of Rs.10 crores is due in respect of a loan availed by the company, for which the first respondent stood as a guarantor. Totally 7 items of the property mentioned in schedule A, were mortgaged as security for the said loan. The Engineer valuation report Ex.P.2 would show that the total valuation of item Nos.1 to 6 properties is Rs.8,08,30,000/- and the total liability as on date is Rs.16 crores. Item Nos.5 and 6 are immovable properties owned by the first respondent, which were given as a collateral security. It is the case of the petitioning creditor that the total amount realised from the sale of item Nos.1 to 5 of the schedule A properties is Rs.4.99 crores and as per the Engineer valuation report - Ex.P.2, the valuation of item No.6 of the property is Rs.31,12,000/- and the valuation of item No.7 of the property is Rs.76,12,000/-. Even after adjusting the sale proceeds and the estimated value of item Nos.6 and 7, still there is a due of Rs.10

crores apart from interest. Hence, the petitioning creditor took possession of the schedule A properties under Section 13(4) of the SARFAESI Act. But, the said possession notice was set aside in S.A.No.108 of 2011 and aggrieved over the same, the petitioning creditor preferred an appeal in R.A.No.116 of 2012 and in that appeal, the operation of the order of the Tribunal has been stayed and the said appeal is still pending before the Debt Recovery Appellate Tribunal. While so, now, in order to delay and defeat the claim of the petitioning creditor, B schedule property has been settled by the first respondent / guarantor in favour of her daughter on 25.9.2009. Therefore, she has committed the act of insolvency under Section 9(1)(b) and (c) of the Presidency Town Insolvency Act. Therefore, the present insolvency petition has been filed within 3 months from the date of act of insolvency as per section 12 (c) of the Act. However, according to the first respondent, schedule B property was not given as a collateral security to the Bank and the said property was settled in favour of her daughter to avail loan from her source for her higher studies in USA. Therefore, even according to the case of the first respondent, she has admitted the alienation of the property by way of settlement in favour of her daughter. The only explanation given by her is that to pursue the higher studies of her daughter at USA, the property was settled in favour of her daughter. As per Section 9(1)(b)

and (c) of the Presidency Town Insolvency Act, if she makes any transfer of her properties with intent to defeat or delay her creditors, it would be void as a fraudulent preference, if she has been adjudged as insolvent. Section 9(1)(b) and (c) reads as follows:-

" 9. **Acts of insolvency:-** (1) A debtor commits an act of insolvency in each of the following cases, namely:-

(a) ...

(b) if, in the States or elsewhere, he makes a transfer of his property or of any part thereof with intent to defeat or delay his creditors;

(c) if, in the States or elsewhere, he makes any transfer of his property or of any part thereof, which would, under this or any other enactment for the time being in force, be void as a fraudulent preference if he were adjudged as insolvent;

(d) ...

(e) ... "

Therefore, the settlement of the B schedule property by the first respondent in favour of her daughter would fall under clause 9(1)(c). Further, as per clause 12(2), the creditor shall present the insolvency petition within a period of three months from the date of act of

insolvency. In the instant case, the petitioning creditor has also filed the present petition on 21.12.2009, i.e., within a period of three months from the date on which the first respondent had settled her property in favour of her daughter. Therefore, it is clear that the present petition has been filed within three months from the date of 'Act of Insolvency' committed by the first respondent. Though a submission was made by the learned counsel appearing for the first respondent that as per Section 2(a) of Presidency Town Insolvency Act, a creditor should be a decree holder and the debtor should be a judgment debtor, a close reading of the said section would show that the word 'creditor' includes a decree holder and the word 'debtor' includes a judgment debtor and the said section does not convey any meaning as contended by the learned counsel appearing for the first respondent that the creditor should be only a decree holder and the debtor should be only a judgment debtor. Hence, the said submission made by the learned counsel appearing for the first respondent does not have merit acceptance. Though a submission was made by the learned counsel appearing for the first respondent that only to pursue the higher studies of her daughter at USA, the property was settled in favour of her daughter, absolutely no documents were filed in support of the said contention. Hence, I am not inclined to accept the submission made by the learned counsel appearing for the first

respondent that only in order to pursue the higher studies of her daughter, the property was settled in favour of her daughter.

10. For all the reasons stated above, I am of the opinion, the petitioning creditor is entitled for the relief as sought for in this petition. Hence, this petition is allowed as prayed for.

24.03.2015

Index:Yes/No
sbi

R.SUBBIAH, J
sbi

**Pre-delivery order in
I.P.No.46 of 2010**

DATED: 24.03.2015