

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 06.10.2017

Coram

The Honourable Mr.Justice RAJIV SHAKDHER

and

The Honourable Mr.Justice N.SATHISH KUMAR

O.S.A.Nos.26 to 28 and 183 of 2017

1. K.Dhanalakshmi Ammal
2. A.V.K.Balamurugan ... Appellants in OSA Nos.26 -28
/2017

Vs.

1. T.Radha ... Respondent No.1 in OSA
Nos.26 to 28/2017/Appellant
in OSA No.183/2017

2. The Official Assignee,
High Court, Madras. ... Respondent No.2 in OSA
Nos.26 to 28/2017/Respondent
in OSA No.183/2017

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Prayer in O.S.A.Nos.26 to 28/2017 : Appeals filed under Order XXXVI, Rule 1 of the Original Side Rule, praying to set aside the fair and decretal order dated 06.01.2017 in A.No.74, 71 and 73 of 2016 in I.P.No.138 of 2003 respectively, passed by this Court.

Prayer in O.S.A.No.183/2017 : Appeal filed under Order XXXVI, Rule 1 of the Original Side Rule, praying to set aside the decretal order dated 06.01.2017 made in A.No.152 of 2016 in I.P.No.138 of 2003, passed by this Court.

For Appellants in OSA : Mr.R.Selvakumar
No.26 to 28/17

For Respondent No.1 in OSA: Mr.J.Balagopal
No.26 to 28/17/Appellant
in OSA No.183/2017

For Respondent No.2 in OSA: Ms.C.B.Meena,
Nos.26 to 28/2017/Respondent Official Assignee
in OSA No.183/2017

C O M M O N J U D G E M E N T

(Judgement of the Court was delivered by RAJIV SHAKDHER, J.)

1. The captioned appeals, which are four in number, have been filed against a common judgement and order dated 06.01.2017, passed by the learned Single Judge.

1.1. While O.S.A.No.183 of 2017 has been filed by, one, Ms.T.Radha, i.e. the insolvent, O.S.A.Nos.26 to 28 of 2017 have been filed by Messrs K.Dhanalakshmiammal and A.V.K.Balamurugan.

2. Before the learned Single Judge, Ms.T.Radha/ the insolvent had filed A.No.152 of 2016, whereas, Messrs K.Dhanalakshmiammal and A.V.K.Balamurugan had filed four (4) applications, i.e., A.No.71 to 74 of 2016. All five applications were dismissed by the learned Single Judge via the impugned judgement and order dated 06.01.2017.

2.1. In so far as A.No.152 of 2016 was concerned, Ms.T.Radha/the insolvent sought setting aside of the order dated 16.12.2015, passed by the Insolvency Court annulling her adjudication as insolvent vide adjudication order dated 28.08.2003. The order dated 16.12.2015, was passed at the behest of the Official Assignee (in short, "OA"), based on an application moved under Section 41 of the Presidency Towns Insolvency Act, 1909 (in short, "1909 Act").

2.2. To be noted, in A.No.71 of 2016, relief sought was to call for the records concerning Ms.T.Radha/the insolvent, placed on File No.87/2003-B in I.P.No.138 of 2003, in the office of the OA.

2.3. In so far as A.No.72 of 2016 is concerned, relief sought is for grant of ad-interim stay of further proceedings which would follow the issuance of the order dated 08.03.2016, placed in the aforementioned file. This order was, evidently, passed in I.P.No.138 of 2003, which pertains to Ms.T.Radha/the insolvent. Ad interim stay was sought till such time, the petition filed by Messrs K.Dhanalakshmiammal and A.V.K.Balamurugan under Section 21 of the 1909 Act was disposed of.

2.4. In A.No.73 of 2016, the prayer made was to annul the order of adjudication dated 28.08.2003, passed in I.P.No.138 of 2003.

2.5. As far as A.No.74 of 2016 was concerned, the prayer made was to recall the annulment order dated 16.12.2015, passed under Section 41 of the 1909 Act.

2.6. The Record shows that, though, five (5) applications were dismissed by the learned Single Judge, only four (4) appeals were filed.

2.7. As a matter of fact, no appeal has been preferred against the order passed qua A.No.72 of 2016.

3. Before we proceed further, in respect of the appeals filed before us, in our view, certain broad facts need to be noted.

3.1. Ms.T.Radha/the insolvent (the appellant in O.S.A.No.183 of 2017) was adjudicated insolvent, based on her own petition. This order was passed by the insolvency court on 28.08.2003.

3.2. Ms.T.Radha/the insolvent, it appears, had disclosed that she owed moneys to one (1) secured creditor and seven (7) unsecured creditors. The debt owed to the secured creditor was pegged at Rs.8,00,000/-, while the amount owed to the seven (7) unsecured creditors was quantified at Rs.9,90,000/-.

3.3. Ms.T.Radha/the insolvent, had also disclosed that she had 1/3rd undivided share in an immovable property described as : Door No.33, Ramanuja Iyer Street, Old Washermanpet, Chennai-600 021 (in short, "the subject property").

3.4. The record also shows that Ms.T.Radha/the insolvent, failed to give details of her creditors, debtors and / or assets, as required under Section 24 of the 1909 Act. Ms.T.Radha/the insolvent was required, in this behalf, to file the said details in the Schedule, as prescribed, supported by an affidavit.

3.5. It appears that, Ms.T.Radha/the insolvent, not only failed to file the aforementioned Schedule, but also failed to present herself for public examination, as required under Section 27 of the 1909 Act. It appears that Ms.T.Radha/the insolvent did not assist the OA in conducting investigation with regard to her assets.

3.6. Since, Ms.T.Radha/the insolvent failed to file an application for discharge within the stipulated time of eighteen (18) months, the OA moved this Court for annulling the order of adjudication under Section 41 of the 1909 Act. Based on the said application, on 16.12.2015, the Insolvency Court allowed the application of the OA and annulled the order of adjudication, which, consequently, resulted in the property of Ms.T.Radha/the insolvent vesting in the OA, in terms of the provisions of the Section 23 of the 1909 Act.

3.7. In order to facilitate the distribution of the proceeds, which would have arisen on the liquidation of the property of Ms.T.Radha/the insolvent, notices were sent to the creditors at the addresses furnished by Ms.T.Radha/the insolvent.

3.8. It appears that as per the report of the OA, only two creditors, namely, Mr.Gajapathy and Mr.Padmanabhan could be served with notice. Furthermore, without the knowledge or intercession of the OA, Ms.T.Radha/the insolvent had redeemed the property from a secured creditor and also settled the liabilities without the knowledge of the OA.

3.9. The report of the OA filed before us is also indicative of the fact that Ms.T.Radha/the insolvent had cleared

the debts of all unsecured creditors. These aspects have been mentioned in the report of the OA dated 15.09.2017.

4. Notices in O.S.A.No.26 to 28 of 2017 were issued on 16.03.2017. These appeals were, thereafter, admitted on 27.04.2017. At the hearing held on 12.07.2017, we were informed by Mr.J.Balagopal, Advocate, who appeared for Ms.T.Radha/the insolvent (Respondent No.1 in O.S.A.26 to 28 of 2017) that he had also preferred an appeal against the order date 06.01.2017, which, though, not numbered should be heard along with the said appeals. Consequently, on that date, we adjourned the matter to 19.07.2017.

4.1. On 19.07.2017, since, Ms.T.Radha/the insolvent's appeal was not listed, the matter was adjourned to 01.08.2017. In the interregnum, on 31.07.2017, O.S.A. No.183 of 2017 was listed, which was adjourned to 01.08.2017.

4.2. On 01.08.2017, all the four (4) appeals came up for hearing before us. Directions were issued to the OA to file a report in O.S.A.No.183 of 2017. Furthermore, the OA was also, inter alia, directed to publish a notice in one English daily, and in a daily, printed in vernacular language, so that, once again claims of creditors could be invited afresh. This direction was issued, as it was observed by us that notices had already been issued to secured and unsecured creditors, as far back as on 18.12.2015. For this purpose, to enable the OA to carry out this direction, Ms.T.Radha/the insolvent was directed to deposit a sum of Rs.10,000/- with the OA. A further direction was given which is, that Ms.T.Radha/the insolvent will furnish fresh addresses of secured and unsecured creditors.

4.3. In so far as O.S.As.No.26 to 28 of 2017 were concerned, which, as indicated above, have been filed by Messrs K.Dhanalakshmiammal and A.V.K.Balamurugan, opportunity was given to Ms.T.Radha/the insolvent to file her reply, while the OA, was directed to file a report.

4.4. On 24.08.2017, we were informed that publication was carried out as directed by us vide order dated 01.08.2017. Furthermore, the OA informed us that service of notice was awaited vis-a-vis one creditor i.e Mr.D.Gnanaprakasam. On that date, the OA as indicated above, reiterated that dues of all creditors has been settled. Having said so, the OA indicated to us that Ms.T.Radha/the insolvent was required to pay commission at the rate of 7% on the amount paid to the creditors as per the provisions of Order XVII, Rule 10(1) of the Insolvency Rules, 1958. We were also informed that the commission would work out to a sum of Rs.1,25,300/-.

4.5. On the other hand, learned counsel for Ms.T.Radha/the insolvent contented before us, on that very date, that since, the settlement with creditors were made without the aid and assistance of the OA, no commission was payable. We had, accordingly, deferred the examination of the issue, after noting

the stand taken by the parties before us. The matter was, thus, posted for further proceeding on 01.09.2017.

4.6. On 01.09.2017, further time was given to the OA, to file her report in the captioned appeals. The matter was thereafter posted on 04.10.2017, when, the counsel for Ms.T.Radha/the insolvent, stated that, de hors, the contention made in O.S.A.No.183 of 2017, a sum of Rs.10,000/- would be deposited towards costs incurred by the OA albeit, by 05.10.2017. Consequently, the matter was posted on 06.10.2017, when, it was taken up for arguments.

5. As indicated in the reports filed by the OA, the secured and unsecured creditors had been fully paid by Ms.T.Radha/the insolvent. Furthermore, though, public notices were taken out, as per the direction issued by us, no fresh claims were made. Therefore, quite clearly, no intercession or involvement of the OA was required to realise the property of Ms.T.Radha/the insolvent and / or to distribute the proceeds to the secured and unsecured creditors. The record also show that Messrs K.Dhanalakshmiammal and A.V.K.Balamurugan, have taken the stand that Ms.T.Radha/the insolvent had shown fictitious creditors and as such, ought not to have been adjudged insolvent.

5.1. It is in this background that Messrs K.Dhanalakshmiammal and A.V.K.Balamurugan had sought annulment of the order of adjudication. Messrs K.Dhanalakshmiammal and A.V.K.Balamurugan claim that they have purchased out of the entire property which ad-measures 4230 sq.ft., an area equivalent to 1620 sq.ft from Ms.T.Radha/the insolvent and her two sisters. The record shows that Ms.T.Radha/the insolvent is a co-owner along with her two sisters. Ms.T.Radha/the insolvent's share in the entire property is about 1410 sq.ft, which is equivalent to 1/3rd of the total area, is, 4230 sq.ft.

5.2. It is also the claim of Messrs K.Dhanalakshmiammal and A.V.K.Balamurugan that they are bona fide purchasers of a part of the aforementioned property qua which, valuable consideration was paid to Ms.T.Radha/the insolvent.

5.3. The OA has taken the stand that once, Ms.T.Radha/the insolvent was declared an insolvent, no transaction qua the subject property could have been undertaken, as it vested in her. In other words, according to the OA, notwithstanding the fact that Messrs K.Dhanalakshmiammal and A.V.K.Balamurugan had purchased the subject property for a valuable consideration, the said transaction was void as against her.

6. In these circumstances, three (3) issues arise for consideration :

6.1. First, whether Ms.T.Radha/the insolvent, having paid the dues of all creditors, was entitled to seek the setting aside of the order dated 16.12.2015, and the adjudication order dated 28.08.2003.

6.2. Second, whether in the given facts and circumstances, the OA ought to be paid commission under Order XVII, Rule 10(1) of the Insolvency Rules, 1958.

6.3. Lastly, what relief, if any, ought to be granted in O.S.A.No.26 to 28 of 2017, filed by Messrs K.Dhanalakshmiammal and A.V.K.Balamurugan.

First issue :

7. We had asked the OA as to whether any purpose will be served in continuing with the insolvency proceedings, in view of the fact that all secured and unsecured creditors had been paid.

7.1. The OA informed us that, while, she had no objection to the insolvency proceedings being terminated, in view of no pending or outstanding claims, remaining, Ms.T.Radha/the insolvent should pay commission at the rate of 7% of the principal amount, or, the value of the assets realised by her.

7.2. Keeping in mind the stand taken before us by the OA, in our opinion, the first issue can only be answered in favour of Ms.T.Radha/the insolvent, since all creditors, which include, secured and unsecured creditors, have, admittedly, been paid. No purpose would be served, in our view, in continuing with the the insolvency proceedings.

7.3. Furthermore, as indicated by us, despite public notice being issued, no fresh claims have been lodged with the OA. Thus, order dated 28.08.2003, would have to set aside. It is ordered accordingly. Consequently, the order dated 16.12.2015, would also stand set aside.

Second Issue :

8. As regards the second issue, which pertains to the payment of commission, one may have to look to the language of the provision in issue. For the sake of convenience, the relevant provision is extracted hereafter :

"10(1). The Official Assignee shall charge a commission at the rate of 7 per cent on the principal amount or value of assets collected by him in each estate and on the amounts paid to creditors in pursuance of a composition or scheme of arrangement."

8.1. A plain reading of the language of order 10(1) would show that the OA is empowered to charge commission at the given rate on the principal amount, or, value of assets, so collected by him qua each estate and on the amount paid to the creditors in pursuance of the scheme of composition or arrangement.

8.2. In the instant case, Ms.T.Radha/the insolvent has settled the dues of the creditors, albeit, without the intercession of the OA. Therefore, on a plain reading, it is clear that the said provision is not applicable to the facts of the instant case.

8.3. As to how funds were sourced is a matter which the OA has not commented upon in the report filed with the Court. Therefore, at this juncture, in the peculiar facts and circumstance of the case, a further enquiry by the OA would only result in expending energy, time and expense with very little possibility of obtaining substantial results.

8.4. As noticed by us hereinabove, notwithstanding the aforesaid aspect concerning the liability to pay commission, Ms.T.Radha/the insolvent has paid a sum of Rs.10,000/- to the OA towards costs. While, the OA, in these circumstance, may not be able to insist on payment of commission, she will, surely, be entitled to seek a direction from this Court that sum of Rs.10,000/- received by her be permitted to be credited to the contingency fund account maintained by her. It is ordered accordingly.

Third Issue :

9. Which brings us to the last aspect of the matter. In view of the fact that Ms.T.Radha/the insolvent has paid all her creditors, and that, she is no longer insolvent, and the adjudication order dated 28.08.2003, having been annulled, the appeals filed by Messrs K.Dhanalakshmiammal and A.V.K.Balamurugan, i.e., O.S.A.No.26 to 28 of 2017 have been rendered infructuous. No further orders are called for in these appeals.

9.1. The fact that no appeal was filed qua the decision rendered in A.No.72 of 2017, would not effect the final outcome of the captioned appeals, as that application only sought stay of the order dated 08.03.2016, passed in I.P.No.138 of 2003.

10. The net result, is that, O.S.A.No.183 of 2017, will stand allowed. Consequently, the order dated 06.01.2017, passed in A.No.152 of 2016 is set aside. Furthermore, as prayed in A.No.152 of 2016, the adjudication order dated 28.08.2003, is also set aside.

11. Since, the order dated 28.08.2003, has been set aside, O.S.A.No.26 to 28 of 2017, have been rendered inefficacious; as indicated above. Resultantly, O.S.A.No.26 to 28 of 2017 are dismissed, as having been rendered infructuous. There shall, however, be no order as to costs.

Sd/-

Assistant Registrar (CS-VI)

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Sub Assistant Registrar

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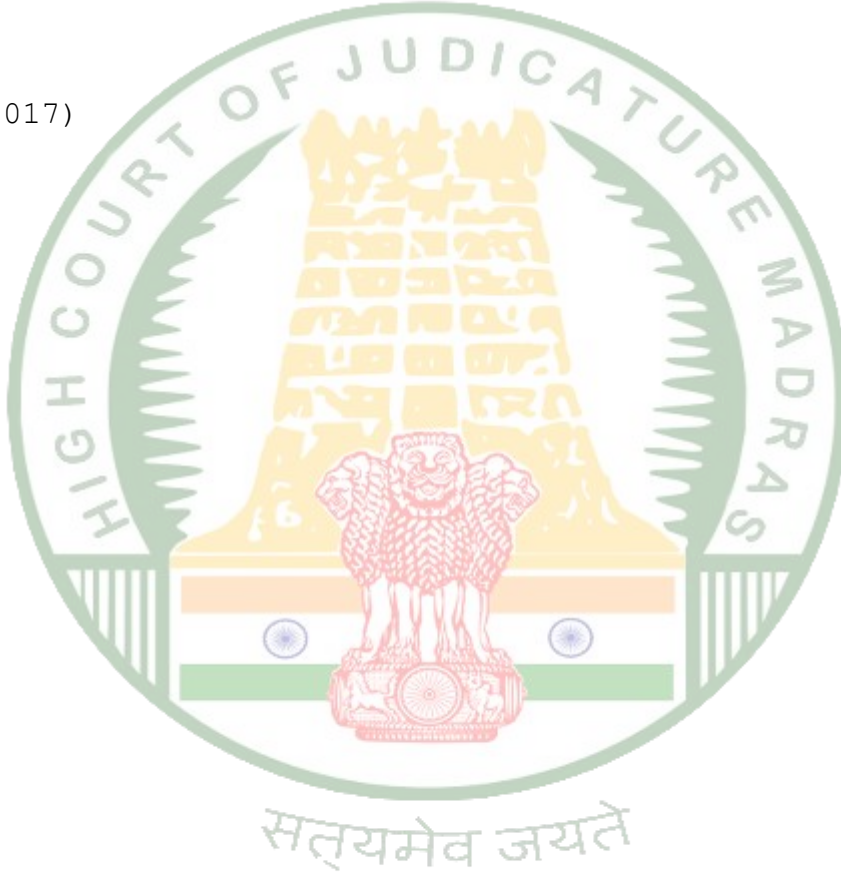
1. The Sub Assistant Registrar (Original Side),
High Court, Madras.

2. the Official Assignee,
High court, madras.

+1cc to Mr.R.SELVAKUMAR, Advocate, S.R.No. 72026

O.S.A.Nos.26 to 28 and 183 of 2017

VD(CO)
TR(06/12/2017)



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