

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL (L) NO. 424 OF 2019
IN
INSOLVENCY PETITION NO. 21 OF 2019

WITH
NOTICE OF MOTION (L) NO. 856 OF 2019

Vardhman Developers Limited } Appellant

versus

Ravikiran Agarwal and Anr. } Respondents

WITH
APPEAL (L) NO. 425 OF 2019
IN
INSOLVENCY PETITION NO. 22 OF 2019

WITH
NOTICE OF MOTION (L) NO. 858 OF 2019

Vardhman Developers Limited } Appellant

versus

Pujit Ravikiran Aggarwal & Anr. } Respondents

Mr.Dinyar Madon-Senior Advocate with
Mr.Chetan Kapadia, Mr.Karl Tamboly and
Ms.Kausar Banatwala i/b. Mr.Tushar Goradia for
the appellant in both appeals.

Mr.Cherag Balsara with Mr.Ashish Parwani i/b
M/s.Rajani Associates for the respondents in
APPL/424/2019.

Mr.Gaurang Mehta with Ms.Ruta Shah and
Mr.Ashish Parwani i/b. M/s.Rajani Associates for
the respondents in APPL/425/2019.

**CORAM :- S. C. DHARMADHIKARI &
G. S. PATEL, JJ.**

DATED :- SEPTEMBER 20, 2019

P.C. :-

1. These two appeals preferred by the objectors to Insolvency Petition Nos. 21 and 22 of 2019 assail a common order dated 22nd August, 2019 of the learned Single Judge. By the order under challenge, the learned Single Judge has overruled the objections by holding that the insolvency petitions are maintainable. He has then proceeded to pass an order allowing the petitions, adjudging the debtors as insolvents and appointing the Official Assignee of the properties of the insolvents wherever situated. Further directions are also issued as incidental and ancillary to this main order.

2. Mr.Madon, learned senior counsel appearing in support of the appeals, would urge that the learned Single Judge has proceeded to decide these insolvency petitions by applying the parameters available in law, but not the applicable law. In the present case, the applicable law is the Presidency Towns Insolvency Act, 1909. In that Act, there is a power vesting in the Insolvency Judge to pass an order, but the provisions in that regard are not *pari materia* to the Provincial Insolvency Act, 1920.

3. Mr.Madon would submit that the Presidency Towns Insolvency Act, 1909 applies, as has been declared therein, to the presidency towns. There is no dispute that Bombay/ Mumbai is such a town. After the definitions, there are provisions regarding the constitution and powers of the presidency town insolvency court and it is said in clearest terms in section 3 that the courts having jurisdiction in insolvency under this Act would be the High Courts at Calcutta, Madras and Bombay. The jurisdiction is to be exercised by a Single Judge nominated by the Chief Justice. The delegation of powers to officers of court is limited to what has been set out therein. By section 7, there is a power to decide all questions arising in insolvency.

4. Mr.Madon would submit that section 8 provides for appeals in insolvency. Section 9 enumerates the acts in insolvency. Section 10 of this Act must be carefully perused. He would submit that a reading of section 10 reveals that there is a discretion in the learned Single Judge/ Insolvency Court in the Presidency Towns Insolvency Act, 1909 to make an order, namely, an order of adjudication adjudging the debtor as insolvent. In other words, the Insolvency Court is not bound to make an order adjudging the debtor as insolvent. The other provision to which our attention was invited was section 14 of the Presidency Towns Insolvency Act, 1909.

5. Mr.Madon would submit that in these two case, the subject insolvency petitions have been decided, though mindful of the language of the Presidency Towns Insolvency Act, 1909, but by applying the parameters under the Provincial Insolvency Act, 1920. In that Act, the language of the provisions enabling an order of adjudication to be made is quite distinct. In that regard, our attention has been invited to the Provincial Insolvency Act, 1920, which, by section 7, enables the making of petition and order of adjudication. Section 7 says that subject to the conditions set out in this Act, if a debtor commits an act of insolvency, an insolvency petition may be presented either by a creditor or by the debtor, and the Court may, on such petition, make an order adjudging him as insolvent. The conditions on which the creditor make a petition are set out in section 9.

6. Mr.Madon would submit that the order that has been passed in this case is traceable to section 27 of the Provincial Insolvency Act, 1920, which says, by sub-section (1), that if the Court does not dismiss the petition, it 'shall make' an order of adjudication and 'shall specify' in such order the period within which the debtor 'shall apply' for his discharge. Sub-section (2) says that the Court may, if sufficient cause is shown, extend the period within which the debtor shall apply for his discharge and in that case, shall publish notice of the order in such manner as it thinks fit. Therefore, according to Mr.Madon, the discretion to be found in the Presidency Towns Insolvency Act, 1909 is not to be found in the

Provincial Insolvency Act, 1920, and vice-versa. What is discretionary in the former act, namely the order of adjudication, is mandatory in the latter, and this is apparent from a plain reading of the wording of the two statutes.

7. The learned Single Judge, according to Mr. Madon, has, in coming to his conclusion, heavily relied upon a judgment of the Privy Council in the case of *Chhatrapat Singh Dugar vs. Kharag Singh Lachmiram*,¹ but that judgment was rendered by the Privy Council under the provisions of the Provincial Insolvency Act, 1920 and not under the statute applicable to a presidency town. There is a distinction in that regard between the two statutes. Therefore, in his submission, the impugned order overlooks a fundamental distinction, namely, that Provincial Insolvency Act, 1920 is a later law not applicable to presidency towns, for which a prior law is already made. Therefore, the Privy Council judgment may not have any application to the facts and circumstances and there was, therefore, enough discretion in the learned Single Judge to refuse to adjudge the respondents before us as insolvent. Mr. Madon is careful to point out that the appellants before us themselves did not notice this distinction or urge it as a distinct plea before the learned single Judge.

8. On the other hand, Mr. Balsara would submit that the learned Single Judge has not committed any error, much less

¹ Vol. XLIV Calcutta Series pg. 535.

an error of law of such magnitude as is projected before us. He has referred to both statutes and submits that the learned single Judge has correctly followed the provisions of the applicable law. However, if this court comes to the conclusion that this aspect of the matter has not been dealt with in detail, then, without prejudice to the first contention, Mr. Balsara would submit that the respondents are ready and agreeable to have the order under appeal set aside and the insolvency petitions restored to the file of the learned Single Judge for an order on merits in accordance with law afresh.

9. We have given our careful consideration to this submission. While sections 7 and 10 of the Provincial Insolvency Act, 1920 and the Presidency Towns Insolvency Act, 1909 may be similarly worded, *prima facie*, we cannot find in the Presidency Towns Insolvency Act, 1909 any provision akin to section 27 of the Provincial Insolvency Act, 1920. The argument is that section 27(1) of the Provincial Insolvency Act, 1920 leaves no discretion in the learned Single Judge and an order of adjudication 'shall be made'. The wording of section 10 of the Presidency Towns Insolvency Act, 1909 and the absence of something like section 27 from that statute may have some impact on the controversy. The judgment of the Privy Council and other judgments to which the learned Single Judge has made reference may have followed the Privy Council line, but the underlying statute and the difference in the language has not been emphasised and therefore, not considered in depth.

10. We believe, it would be unfair to the learned Single Judge if we upset his order and reverse the view taken by him on grounds and submissions which were not canvassed before him and the fundamental or underlying distinction was not brought to his notice adequately.

11. Mr.Madon has conceded that the appellant did not perform their entire duty of bringing to his notice this distinction and the legal provisions.

12. Once we have noted this aspect of the matter, then, it is our bounden duty to give an opportunity to the learned Single Judge to consider the issue afresh on merits and in accordance with law. It would not be fair on our part to express any opinion on the rival contentions in the light of the order that we propose to make on these appeals.

13. Without in any manner embarrassing either parties nor compelling them to give up their stand, it would be in fitness of things to set aside the impugned order and restore the insolvency petitions to the file of the learned Single Judge for a decision afresh in terms of above observations and in accordance with law uninfluenced by any earlier findings and conclusion. We are passing this order by consent of both sides as they did not wish to invite any observations from this court.

14. The order under appeals is set aside by consent and the insolvency petitions are restored to the file of the learned Single Judge for a decision afresh and in accordance with law.

15. We have expressed no opinion on the merits of the contentions. We have not said that there is any discretion in the learned Single Judge not to make an order of adjudication or otherwise. All contentions in that regard are kept open.

16. With the aforesaid directions, both the appeals are disposed of. In the light of the disposal of the appeals, the notices of motion do not survive and stand disposed of as such.

(S.C.DHARMADHIKARI, J.)

(G.S.PATEL, J.)