

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
IN ITS INSOLVENCY JURISDICTION
APPEAL NO.583 OF 2019
WITH
INTERIM APPLICATION NO.1729 OF 2020
IN
NOTICE OF MOTION NO.22 OF 2018
IN
INSOLVENCY PETITION NO.5 OF 2010

Akshay D. Thakkar,)
having his office at A 228, Antop Hill,)
Warehousing Complex, Vidyalankar)
College Road, Wadala (E), Mumbai – 400 037)...**Appellant**

IN THE MATTER BETWEEN :

Akshay D. Thakkar,)
having his office at A 228, Antop Hill,)
Warehousing Complex, Vidyalankar)
College Road, Wadala (E), Mumbai – 400 037)...**Insolvent**

Versus

1. Kotak Mahindra Bank Limited,)
a Banking Company within the meaning)
of Banking Regulation Act, 1949,)
having its Office at 6th Floor, 12 – BKC, Plot)
No.C-12, “G” Block, Bandra Kurla Complex,)
Bandra (E), Mumbai – 400 051)

2. Manipal Finance Corporation Limited,)
Having Reg. Office at Manipal House,)
Manipal & Branch Office at 105/106,)
Shyamkamal “D” Building, BN Agarwak)
Market, Vile Parle (E), Mumbai – 400 057.)...**Respondents**

Mr.Akshay D. Thakkar, Appellant present in person.

Mr.Rohit Gupta with Mr. Nikhil Rajani i/by V. Deshpande and Co., for Respondents.

**CORAM: S.J. KATHAWALLA &
PRITHVIRAJ K. CHAVAN, JJ.**

**RESERVED ON : 3rd NOVEMBER, 2020
PRONOUNCED ON : 31st MARCH, 2021**

JUDGMENT : (PER S.J.KATHAWALLA, J.)

1. By an Order dated 22nd April, 2010 in Insolvency Petition No.5 of 2010, the Appellant – Akshay B. Thakkar was adjudicated insolvent.

2. Thereafter, by an Order dated 3rd December, 2014 passed in Notice of Motion No.52 of 2014, the Order of adjudication dated 22nd April, 2010 was annulled under Section 22(1) of the Presidency Towns Insolvency Act, 1909 (“Insolvency Act”).

3. Respondent No.1 Bank i.e. Kotak Mahindra Bank Ltd., filed a Notice of Motion No.22 of 2018 seeking recall of the Order of annulment dated 3rd December, 2014 primarily on the ground that the Appellant deliberately concealed from the Court, the fact that the Respondent Bank herein was one of the creditors, having a

recovery certificate from the Debts Recovery Tribunal (“DRT”) and therefore, without considering the Respondent’s claim, the Order of annulment ought not to have been passed.

4. By an Order dated 18th September, 2018, the learned Single Judge allowed Notice of Motion No.22 of 2018 filed by the Bank i.e. the Order of annulment dated 3rd December, 2014 was recalled.

5. By the present Appeal, the Appellant / Insolvent has impugned the Order dated 18th September, 2018 passed by the learned Single Judge in Notice of Motion No.22 of 2018 recalling the Order of annulment dated 3rd December, 2014. The Order dated 18th September, 2018 shall thereafter be referred to as ‘the impugned Order’.

6. Before going into merits of this Appeal, it is necessary to record certain facts which have transpired after filing of the present Appeal.

7.1 By an Order dated 25th February, 2020, this Court (Appeal Court) stayed the impugned Order and admitted the above Appeal.

7.2 Being aggrieved by the aforesaid stay order, the Respondent herein preferred Special Leave Petition Nos. 7380 of 2020 and 7381 of 2020 challenging the Order dated 25th February 2020 passed by this Court. The Special Leave Petitions were disposed of by the Supreme Court by its Order dated 27th August 2020 which reads thus :

“From the perusal of the order passed by the learned Single Judge, it could be seen that the order is well reasoned. It also appears from the order of the learned Single Judge that there was suppression of some material facts before the learned Single Judge. In such circumstances, the learned Division Bench ought to have considered the matter from this perspective.

It appears from the impugned interim order that the division Bench has not considered the suppression of material facts before the learned Single Judge. We request the Division Bench of the High Court to reconsider the issue of interim order. We also request the High Court to consider the impact of suppression and also consider the reason given by the learned Single Judge.

We further request the High Court that if it considers appropriate to decide the matter finally instead of deciding the question of interim relief, the same may be done within a period of one month from today. We are inclined to pass such order taking into consideration the huge public money involved in the litigation.

Accordingly, the Special Leave Petitions are disposed of.”

8. We have gone through the impugned Order, the pleadings and Written Submissions filed by the parties.

9. Mr. Thakkar, appearing in person made submissions and contended that the Appellant seeks to challenge the impugned Order primarily on the ground that the claim of the Respondent Bank is a claim arising out of recovery certificate issued by the DRT and therefore; it is not a claim based on which insolvency proceedings can be commenced, as it is not a “decree” as contemplated under the provisions of the

Insolvency Act. Therefore, according to him, the Order dated 03rd December 2014 was rightly passed. It was further submitted that in view of this legal position, the Appellant was correct in his submission that at that stage there was no other creditor. In order to substantiate his contentions, the Appellant placed reliance on the judgment of this Court in the matter of *HDFC Bank Ltd. & Anr Vs. Kishore K Mehta & Ors.*¹. In his Written Submissions, the Appellant also contended that the NOM filed by the Respondent Bank was at a belated stage and only to pressurize the Appellant. That the Respondent Bank's conduct is vindictive in nature and insolvency proceedings cannot be permitted to be initiated with ulterior motives.

10. As opposed to the aforesaid submission, Mr. Gupta, appearing for the Respondent Bank, has drawn our attention to the impugned Order and submitted that no interference is required in respect thereof. The issue in the matter of Kishore Mehta is completely different from the issue in hand. In view of the law laid down in Kishore Mehta's case, the Respondent Bank is not entitled to initiate proceedings for Insolvency if they have a recovery certificate from DRT as the same is not considered as a "decree" as contemplated under the Insolvency Act. However, the Respondent Bank will still remain a creditor for the purpose of the Insolvency Act and no Order of annulment can be passed without taking into consideration the claim of the Respondent Bank. Mr. Gupta further submitted that Kishore Mehta's case dealt with

1 2008 (6) Bom. C.R.340

the scope of Section 9(2) of the Insolvency Act, where this Court has held that based on recovery certificate, no insolvency proceedings can be initiated. In the present case, the issue is of annulment, where, as per Section 21(2) of the Insolvency Act, an Insolvent is required to satisfy the debts of all creditors and not just those having a decree from the Civil Court. In order to support this contention, reliance was placed on Sections 2(a), 2(c) and 46 of the Insolvency Act. It is his submission that the word “creditor” and “debts” as defined under the Insolvency Act are wide enough to include the Respondent Bank’s debt.

11. Prior to dealing with the merits of this Appeal, it would be necessary to set-out the following facts as already narrated by the learned Single Judge in the impugned Order :

“6.

Before I proceed further, it will be useful to give a few chronology of dates and events.

During 1994-1998, State Bank of India (“SBI”) sanctioned certain credit facilities to one Duck Tarpaulins Limited (“Borrower”). Insolvent was one of the guarantors for the said facilities. In 2003, SBI filed an Original Application being Original Application No. 90 of 2003 before the Hon’ble Debts Recovery Tribunal, Ahmedabad (hereinafter referred to as “DRT”) for recovery of dues and enforcement of the securities created in its favour. On 23rd March 2006, SBI assigned the debts due from the Borrower to Kotak Mahindra Bank Limited (Applicant) along with all the underlying securities.

7. On 20th May 2009, DRT was pleased to allow the said Original Application directing the Borrower and guarantors to jointly and severally pay Applicant a sum of Rs. 9,60,97,800.69/- with simple interest at the rate of 8% per annum from the date of filing till realization along with cost and charges. Pursuant to the same, Recovery Proceeding (RP) was initiated.

On 22nd April 2010, Insolvent was adjudicated an Insolvent in the Insolvency Petition No. 5 of 2010.

On 13th August 2010, DRT attached two properties, inter-alia, belonging to Insolvent.

On 25th April 2011, insolvent filed an application dated 25th April, 2011, seeking to set aside the attachment order. DRT was pleased to issue Notice under Section 28(4A) for disclosure of assets. Insolvent, however, did not bring to notice of DRT that he had been declared insolvent vide order dated 22nd April 2010.

On 18th May 2011, Insolvent filed further affidavit informing that he has been declared insolvent by an order dated 22nd April 2010.

On 8th December 2011, Applicant filed an Application before DRT seeking to bring Official Assignee on record.

On 24th February 2012, Official Assignee, High Court, Bombay was brought on record in place of Insolvent in the said RP.

On 12th October 2012, Applicant issued letter dated 12th October 2012 and served the copies of the application filed before DRT and Order dated 24th February 2012 to the Official Assignee.

On 6th November 2012, Official Assignee's letter issued to DRT seeking time to take direction from this Court to appoint an advocate.

In 2014, Applicant approached DRAT to transfer the said RP to DRT, Mumbai.

On 1st October 2014, Notice of Motion No. 52 of 2014 filed for annulment.

On 3rd December 2014, the Order of adjudication dated 22.04.2010

declaring Mr. Akshay Thakkar as Insolvent, was annulled. Dues of the Original Petitioning Creditor were paid by a well-wisher of Insolvent who had also given an undertaking to this Hon'ble Court to pay all other creditors, if required. The relevant portion of the Indemnity Cum Undertaking Bond is reproduced herein below :-

“.....I also undertake that if any creditor came forward and claimed any amount from the Official Assignee on or before the passing of the order of annulment against the insolvent i.e. Akshay D. Thakkar I will deposit the said amount of the said creditor with the Official Assignee....”

8. The Official Assignee, however, failed to bring to the notice of this Hon'ble Court the fact of the order and judgment by DRT being passed against Insolvent which remained unpaid on that date despite Insolvent being represented by the Official Assignee in the pending Recovery Proceeding (RP). On 28th January 2015, the Official Assignee issued letter informing the DRAT about the annulment order dated 3rd December 2014. A copy of the said letter was also marked to advocate of Applicant. According to applicant, it never received the said letter. On 13th January 2016, DRAT allowed application for transfer and the RP was transferred to DRT, Mumbai.

On 22nd December 2017, Demand Notice was issued by DRT Mumbai to all the parties including the Official Assignee, Mumbai.

On 15th December 2017, Official Assignee issued a letter informing that the said Insolvent is no longer Insolvent and the order of adjudication has been annulled by this Court, vide an order dated 3rd December 2014.

On 15th January 2018, Applicant issued letter dated 15th January 2018 to the Official Assignee informing about its dues and requesting him to call upon the well-wisher of Insolvent to pay the dues of Applicant. In January 2018, applicant filed the present notice of motion.”

12. A perusal of the above narrated facts demonstrates the following :

(i) On 20th May, 2009 there was already an Order passed by the DRT holding that the Insolvent is liable to pay an amount of Rs.9.61 Crores to the Respondent Bank together with interest thereon @ 8% p.a.;

(ii) The Insolvent was well aware about the Order being passed by the DRT and was appearing before the DRT;

(iii) The Order of Insolvency dated 22nd April, 2010 was initially not brought to the knowledge and attention of the DRT. The Insolvent later on brought this fact to the knowledge and attention of the DRT;

(iv) The Official Assignee was brought on record in the Recovery Proceedings before the DRT and the Official Assignee was well aware about the fact of the Judgment and Order being passed by the DRT and Respondent Bank being one of the creditors of the Insolvent.

(v) Despite the aforesaid facts being to the knowledge of the Appellant, these facts were not brought to the notice of the Court at the time of passing of the Order dated 03rd December 2014.

(vi) In fact, paragraph 3 of the impugned Order takes note of the Affidavit filed by the Appellant at the time of applying for Annulment which reads as under : -

“3.I say that other than the above Creditor I do not have any creditor payable either jointly or personally.

(emphasis supplied)”

13. The learned Single Judge in paragraphs 4 and 5 of the impugned Order also took note of the Order passed on 03rd December 2014, which reads as follow :

“4. In view of this statement made by the insolvent, this Court believed the averments made by the insolvent and recorded in the order dated 3rd December 2014 in paragraphs 2 and 3 which read as under :

“2. The learned Advocate for the Insolvent states that the Insolvent has set out the name of his Creditor in the Affidavit- in-Support of the above Notice of Motion and the Petitioning Creditor M/s. Manipal Finance Corporation Ltd., is the only creditor of the Insolvent. It is further stated that the claim of the Petitioning Creditor has been duly settled by the well-wisher of Insolvent. Mr. Varma also states that the Insolvent has also complied with the requisitions raised in the above Rule Nisi.

3. Mr. Ramesh Jain, Advocate for the Petitioning Creditor states that the claim of his client has been duly settled by the well-wisher of the Insolvent. 1st Assistant to the Official Assignee states that the claim of the Petitioning Creditor whose name is disclosed by the Insolvent in the Schedule of Assets and Liabilities has been settled and there are no claims pending with the Office of the Official Assignee. However, she has stated that the original receipt is not lodged with the Office of the Official Assignee.”

(emphasis supplied)

5. Therefore, the Counsel for the insolvent and the 1st Assistant to the official assignee had made a statement to the Court that apart from Manipal Finance Corporation Limited, there are no other creditors. Of course the Official Assignee has qualified by saying “.....disclosed by

the insolvent in the Schedule of Assets and liabilities.....”. Therefore, if not disclosed the Official Assignee also would not know. One Madan K. Salve, the alleged well-wisher of the insolvent has also filed undertaking-cum-indemnity bond with the official assignee that he has paid off the creditors in full and final settlement and also given an undertaking to pay/deposit all additional amount if subsequently it comes to light that there are other creditors.”

14. A perusal of the aforesaid pleadings and averments make it abundantly clear that though the Respondent Bank was one of the creditors of the Appellant, this fact was never disclosed to the Court at the stage of annulment and instead; an *ex-facie* incorrect statement was made that there was no other creditor. Had it been the Appellant’s case since the outset that the Respondent Bank is not a creditor as contemplated under the Insolvency Act, he ought to have specifically said so in the Application filed for annulment. However, the Application is absolutely silent in this regard. This omission, in our opinion, clearly demonstrates that the stand now taken by the Appellant is an afterthought and therefore merits rejection on this count alone.

15. In any event, even on merits, we do not subscribe to the Appellant’s submissions. Prior to arriving at our reasoning, the following provisions of Insolvency Act are relevant -

Section 2(a): "Creditor" includes a decree-holder.

Section 2(b): "Debt" includes a judgment- debt, and "debtor" includes a judgment-debtor.

Section 9 (2): Without prejudice to the provisions of sub- section (1), a debtor commits an act of insolvency if a creditor, who has obtained a decree or order against him for the payment of money (being a decree or order which has become final and the execution whereof has not been stayed), has served on him a notice (hereafter in this section referred to as the insolvency notice) as provided in sub- section (3) and the debtor does not comply with that notice within the period specified therein:

Provided that where a debtor makes an application under sub- section (5) for setting aside an insolvency notice:

(a) in a case where such application is allowed by the Court, he shall not be deemed to have committed an act of insolvency under this sub- section; and

(b) in a case where such application is rejected by the Court, he shall be deemed to have committed an act of insolvency under this sub- section on the date of rejection of the application or the expiry of the period specified in the insolvency notice for its compliance, whichever is later: Provided further that no insolvency notice shall be served on a debtor residing, whether permanently or temporarily, outside India, unless the creditor obtains the leave of the Court.

Section 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 [the Court shall, on the application of any person interested,] by order annul the adjudication [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].

(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.

Section 46 : Debts provable in insolvency.-

(1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or breach of trust shall not be provable in insolvency.

(2) A person having notice of the presentation of any insolvency petition by or against the debtor shall not prove for any debt or liability contracted by the debtor subsequently to the date of his so having

notice.

(3) Save as provided by sub- sections (1) and (2), all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable in insolvency.

(4) An estimate shall be made by the official assignee of the value of any debt or liability provable as aforesaid which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value:

Provided that if in his opinion the value of the debt or liability is incapable of being fairly estimated, he shall issue a certificate to that effect, and thereupon the debt or liability shall be deemed to be a debt not provable in insolvency.

Explanation: For the purposes of this section "liability" includes any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring, before the discharge of the debtor, and generally it includes any express or implied engagement, agreement or undertaking to pay, or capable of resulting in the payment of, money or

money's worth, whether the payment is, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any contingency or contingencies; as to mode of valuation, capable of being ascertained by fixed rules, or as matter of opinion.

16. Section 21 as reproduced hereinabove, specifically provides that the debtor (Insolvent) is required to prove to the satisfaction of the Court that the debts of the Insolvent are paid in full. Under Section 21, there is no distinction made with respect to the debt being adjudicated or non-adjudicated.

17. Furthermore, Section 21(2) mandates that the Insolvent is required to secure even disputed debts in order to seek an Order of annulment. As opposed to such disputed Debts, the Respondent Bank's debt duly adjudicated by the DRT stands on a much higher footing.

18. Further, Section 46(3) of the Insolvency Act even provides for present or future, certain or contingent liabilities to be proved in Insolvency proceedings. The Insolvency Act defines the word "*Creditor*" as well as the word "*Debt*". The Definition of the word "*Creditor*" as well as the word "*Debt*" is a wide definition which would in our opinion, include the Respondent Bank's claim.

19. When read as a whole, the provisions of Insolvency Act clearly demonstrate that whilst a specific class of creditors are permitted to initiate

proceedings under the Act, all creditors must be taken into consideration whilst passing an Order of annulment.

20. In this regard, it would be apposite to reproduce the following reasons of the learned Single Judge : -

“11. Therefore, under the insolvency act, a creditor includes a decree-holder. It is an inclusive definition. A debt includes a ‘judgment debtor’ which is an inclusive definition. Merely because applicant was not entitled to serve an insolvency notice based on the recovery certificate issued by the DRT, does not lead to the conclusion that the applicant cannot, relying upon an act of insolvency, proceed with the petition for adjudication in substitution of the petitioning creditor. When the claim of Manipal Finance Corporation was settled, in my view, applicant could have stepped in as a substituting creditor. The only bar against the applicant relying upon the recovery certificate issued by DRT was to serve a notice under Section 9(2) of the Insolvency Act. There is no bar against such a creditor from proving its claim in insolvency.

The inability of the creditor to serve an insolvency notice under Section 9(2) does not reflect upon such creditor’s right to even present an insolvency petition. Section 10 of the Insolvency Act entitles an insolvency petition to be presented, inter-alia, by a creditor in the event of a debtor committing an act of insolvency. Section 10 is not restricted only to the creditors contemplated under Section 9(2). To be entitled to present an insolvency petition, a creditor must fall within the ambit of the expression “creditor” under Section 2(a) of the Insolvency Act. The Apex Court in Yenumula Maluoor Vs. Peruri Seetharathnam & Ors.² has held that an act of insolvency is available to all the creditors of the debtor. Paragraph 6 of the said judgment reads as under :

2 AIR 1969 SC 918

“6 An act of insolvency once, committed cannot be explained or purged by subsequent events. The insolvent cannot claim to wipe it off by paying some of his creditors. This is because the same act of insolvency is available to all his creditors. By satisfying one of the creditors the act of insolvency is not erased unless all creditors are satisfied because till all creditors are paid the debtor must prove his ability to meet his liabilities. In this case the petitioning creditors had their own decrees. It was in the decree of another creditor that the payment was made but only after the act of insolvency was committed. Besides the petitioning creditors there were several other creditors to whom the appellant owed large sum of money and his total debts aggregated to Rs. two lakhs. It is plain that any of the remaining creditors, including the petitioning creditors, could rely upon the act of insolvency even though one or more creditors might have been paid in full. The act of insolvency which the appellant had committed thus remained and was not purged by payment of decretal amount after the sale in execution of the money decree.

(emphasis supplied)”

12. Therefore, if the insolvent had disclosed that applicant was another creditor and given notice to applicant and not made false statement in the affidavit in support, certainly applicant would have stepped in as a substitute to the petitioning creditor and continued to maintain and prosecute the petition. In *Ram Avtaar Kunjilal Gupta & Anr. - Judgement Debtors and Ex-parte Sicom Ltd. - Petitioning Creditor*³, paragraph 12 reads as under :

12. There is nothing in Section 46 which provides that the debts provable in insolvency are only those where the creditor is entitled to avail of Section 9(2). Once an order of adjudication is validly passed, all debts and liabilities falling within the ambit of Section 46, to which the debtor is subject when he is adjudicated an insolvent or to which he may become subject before his discharge by reason of any obligation

incurred before the date of such adjudication, are provable in insolvency.

Section 2(b) defines a "debt" to include a "judgment debt" and a "debtor" to include a "judgment debtor". The definition is inclusive. Moreover, Section 46(3) permits not only all debts but even all liabilities to be provable in insolvency. Indeed, to be provable in insolvency, it is not even necessary for a debt or liability to be adjudicated.

Thus, keeping aside the aspect as to whether a secured creditor can prove its debts in insolvency, it must be held that the debts due to Canara Bank are provable in insolvency in view of the admitted position that the same have to date, not been paid."

If the submission of Shri Bhure is accepted, in cases where the original petitioning creditor and judgment debtor settle their dispute, the claims of all creditors except of those entitled to serve notice under Section 9(2) would be barred.

I find support for this view in the judgment of a Single Judge of this Court in *Jayantilal Khandwala & Sons & Ors. - Debtors, Ex-parte Neebha Kapoor & Anr.*⁴

13.A similar view was taken in *Mandvi Co-operative Bank Ltd. & Anr. Vs. Anant V. Hegade*⁵, where it was contended that under Section 9A of the Insolvency Act, the claim of a creditor prosecuting an insolvency proceeding should be based on a decree or order of a competent court and that, therefore, a claim under a hire-purchase agreement did not amount to a valid claim. Rejecting the contention, the learned Judge held as follows:

"2. An affidavit in reply has been filed on behalf of the Debtor to the Insolvency Petition. The first line of defence is that under Section 9A of the Presidency Towns Insolvency Act, 1909, the claim of a creditor who is prosecuting an insolvency proceeding should be based on a

⁴ Insolvency Petition No.10 of 2007 dt. 03.09.2016

⁵ AIR 2007 Bom. 50

decree and order of the Competent Court. Hence, it has been submitted that the claim under a hire purchase agreement did not amount to a valid claim in the eyes of law. Now in the present case, the proceedings in insolvency were initiated by the Bank, based on an award of the Co-operative Court. The act of insolvency was complete on 20th July 2004, on the expiry of the statutory period after the service of the Insolvency Notice. The substituted Petitioning Creditor is entitled in law to pursue the proceedings on the basis of the act of insolvency as originally committed by the Debtor since the consequence thereof would enure to the benefit of the general body of Creditors. The substituted Petitioning Creditor is required to meet the definition of the expression "creditor" in the Presidency Towns Insolvency Act, 1909 and it is to be noted that Section 2(a) defines the expression "creditor" to include a decree holder. Therefore, once an Insolvency Notice was validly issued by the original Petitioning Creditor and the act of insolvency was complete upon the failure of the Debtor to comply with the requisition contained therein, the consequence of the commission of an act of insolvency must enure to the benefit of the general body of Creditors. The fact that the original Petitioning Creditor has lost interest in the proceedings would not make any difference to the position in law; for the substituted Petitioning Creditor steps into the shoes of the original Petitioning Creditor in pursuing the insolvency proceedings. The contention that there was no decree or order in favour of the substituted Petitioning Creditor is, as already noted above, without any merit since the expression "creditor" is defined to include a decree holder. Section 13(2) postulates that at the hearing of the Petition, the Court shall require proof of the debt of the Petitioning Creditor and of the act of insolvency or if more than one act of insolvency is alleged in the petition, some one of the alleged acts of insolvency. Apart from the claim of the Petitioning Creditor which is crystallised in an adjudication by the Co operative Court, the claim

*of the substituted Petitioning Creditor has also been crystallised in an arbitral award.” It has, therefore, been held in the above judgment that a substituted petitioning creditor is required to meet the definition of the expression ‘creditor’ as contained in section 2(a) of the said Act. Apart from being bound by, I am in respectful agreement with the judgment in *Mandvi Co-operative Bank Limited vs. Anant Hegade*. I would only add a few words in support of this view.”*

(emphasis supplied)

Therefore, the substituted petitioning creditor (it would have been the applicant in our case) was entitled in law to pursue the proceedings on the basis of the act of insolvency as originally committed by the Debtor since the consequence thereof would enure to the benefit of the general body of creditors. The substituted petitioning creditor is only required to meet the definition of the expression “Creditor” in the Insolvency Act and Section 2(a) defines the expression “Creditor” to include a decree holder.

15. Further, under Section 46 of the Insolvency Act, sub-section 3 which provides “.....*all debts and liabilities, present or future, certain or contingent to which the debtor is subject to when he has adjudged as an insolvent.....shall be deemed to be its debts provable in insolvency*”. The definition of the word 'debt' in Section 2(b) read with Section 46(3) makes it clear that any debt which is present or future, certain or contingent can be proved in insolvency proceedings. It may be that the order passed by DRT, may not be a decree or order under Sub-section 2 of Section 9 of the Insolvency Act, but there was a debt payable by the insolvent to the applicant. In order to seek an annulment, all the debts which can be proved are required to be proved before the order of insolvency can be annulled by an order of the Court.

15. In view of the settled legal position and the provisions of the Insolvency Act, it is abundantly clear that in order to seek an order of

annulment, a Debtor is required to discharge all his Creditors which include the decree holders also. However, the same will not be restricted only to the decree holders. While it may be that a decree holder is the only person entitled to file a Petition under Section 9(2) of the said Act, it is not necessary for a creditor to hold a decree for proving its claim once a person is adjudged as an insolvent. The Legislature has consciously permitted a specific class of creditors who have obtained an adjudicated claim from a competent Civil Court to file proceedings under the Insolvency Act, i.e., to issue a notice under Section 9(2). However, at the same time, the Legislature has consciously permitted all the creditors to prove their claim once the petition is admitted and the act of insolvency is committed. At the same time, when it comes to annulment, the debtor is required to discharge all his debts and not just the claim of the Creditor who had initiated the proceedings for insolvency.”

21. We are in complete agreement with the aforesaid view adopted by the learned Single Judge.

22. If the Appellant’s interpretation is to be accepted, an Insolvent will be in position to settle the debts of only certain creditors and seek annulment whereas other creditors will remain outstanding. Such interpretation will be contrary to the law laid down by the Supreme Court in *Yenumula Maluooru Vs. Peruri Seetharathnam & Ors.* (supra) wherein it was held that settlement of only some creditors is not permissible as the Insolvency Act is available for the benefit of all creditors.

23. As far as Kishore Mehta’s case is concerned, the Division Bench of this Court in paragraph no. 2 of the judgment recorded the issue under consideration.

The said paragraph reads as under:

“2.Since common questions of law and facts arise in both these appeals, they were heard together and are being disposed of by this common judgment. The short but very important point which arises for consideration in both these appeals is whether an insolvency notice can be issued under section 9(2) of the Presidency-Towns Insolvency Act, 1909, hereinafter called as “the Insolvency Act”, on the basis of a recovery certificate issued under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1994, hereinafter called as “the RD Act”.

(emphasis supplied)

24. The issue as recorded was whether a notice under Section 9(2) of the Insolvency Act can be issued based on a recovery certificate. On this count alone, the said decision in Kishore Mehta is wholly distinguishable and inapplicable to the facts of this case. In any event, the law as laid down is that an Insolvency Notice (*as contemplated under Section 9 of the Insolvency Act*) cannot be issued on the basis of a recovery certificate issued under The Recovery of Debts Due to Banks and Financial Institutions Act, 1993. This is not the question of law that has arisen for determination before us. We are concerned with Section 21 and not Section 9 of the Insolvency Act.

25. In our opinion, in order to seek an order of annulment, the Appellant was required to discharge the debts of all his Creditors including the Respondent Bank. The contemplation is not restricted to such creditors who are entitled to file a

Petition under Section 9(2) of the Insolvency Act. The Ld. Single Judge has rightly remarked that the Legislature has consciously permitted a specific class of creditors who have obtained an adjudicated claim from a competent Civil Court to file proceedings under the Insolvency Act, i.e., to issue a notice under Section 9(2). However, at the same time, the Legislature has consciously permitted all the creditors to prove their claim once the petition is admitted and the act of insolvency is committed. At the same time, when it comes to annulment, the debtor is required to discharge *all* his debts and not just the claim of the Creditor who had initiated the proceedings for insolvency.

26. In our considered opinion, the fact that a creditor may not be entitled to avail of the provisions of section 9(2) does not lead to the conclusion that such a creditor cannot oppose an application made by the judgment debtor under Section 21.

27. Whilst none of the parties have brought to our notice a decision of a learned Single Judge of this Court in *Ramavatar Gupta vs. Sicom Ltd.*,⁶ we have learnt that a similar view was also adopted in the said decision. The relevant extracts read as under:

“This Notice of Motion has been taken out by the insolvent for an order annulling and/or setting aside an order dated 21-6-2005 adjudicating them insolvents; for an order discharging the Official Assignee and for a declaration that there is no claim of whatsoever nature due on the basis of an ex parte decree dated 30-6-1989 passed in Summary Suit No. 3646 of

6 2009 SCC online Bom 102

1989 against the insolvent.

4.Canara Bank filed O.A. No. 256 of 2001 in the Debts Recovery Tribunal, Mumbai, against several parties, including the judgment debtors who were Respondent Nos. 2 and 3 therein.

By a judgment dated 5-9-2005 the claim of Canara Bank was adjudicated for the sum of Rs. 69,90,782.58 together with further interest thereon at 12% per annum from the date of the filing of the O.A. till realisation. The Debts Recovery Tribunal also recognised the charge on the properties in favour of Canara Bank.

5.The present Notice of Motion has been taken out under section 21 of the Presidency Town Insolvency Act, 1909. I will for the purpose of this judgment, proceed on the basis that the Notice of Motion under section 21 is maintainable at the instance of the judgment debtors.

6.Mr. Bulchandani submitted that Canara Bank could not have taken out a notice under section 9(2) of the said Act on the basis of the recovery certificate issued by the D.R.T. in view of the judgment of the Supreme Court in the case of Paramjeet Singh Patheja v. ICDS Ltd., JT 2006(10) SC 41 : (2006) 13 SCC 322 and in view of an unreported judgment of a learned Single Judge of this Court in the case of Re: Kishore K. Mehta dated 4-9-2007 in a group of Notices of Motion, the first of which is Notice of Motion No. 40 of 2007 in Notice No. N/224 of 2006. He submitted that Canara Bank therefore cannot intervene in the proceedings or oppose this Notice of Motion. It was thereafter contended that the judgment debtors are entitled to the reliefs claimed in the Notice of Motion despite the claim of Canara Bank not having been satisfied on the ground that Canara Bank is a secured creditor. It was also contended that in any event the value of securities held by the Canara Bank are more than adequate to meet the claim of the Canara Bank against the judgment debtors.

11. The present Notice of Motion has been taken out on the basis that the debts of the insolvent are paid in full. If, the debts of the insolvents are in fact not paid in full, they would not be entitled to an order annulling the

adjudication. If the debts due by the insolvent are not paid any creditor entitled to prove the debt in insolvency would be entitled to oppose such an application. Mr. Bulchandani's submission is based on the erroneous premise that even after an order of adjudication only creditors entitled to avail of the provisions of section 9(2) may prove their debt in insolvency. The answer to Mr. Bulchandani's submission lies in the fact that debts provable in insolvency are not restricted to the dues only of creditors who are entitled to avail of the provisions of section 9(2).

Section 2(b) defines a "debt" to include a "judgment debt" and a "debtor" to include a "judgment debtor". The definition is inclusive. Moreover, section 46(3) permits not only all debts but even all liabilities to be provable in insolvency. Indeed, to be provable in insolvency, it is not even necessary for a debt or liability to be adjudicated.

Thus, keeping aside the aspect as to whether a secured creditor can prove its debts in insolvency, it must be held that the debts due to Canara Bank are provable in insolvency in view of the admitted position that the same have to date, not been paid.

In the present Notice of Motion the ground on which the order annulling the adjudication is sought is that the debts of the insolvents are paid in full. Canara Bank admittedly was not the Petitioning Creditor in the present case. The judgment therefore is of no relevance in the present Notice of Motion.

21. In the circumstances, the Notice of Motion is dismissed. There shall however be no order as to costs.

Notice of Motion dismissed."

28. We are once again in agreement with the aforesaid view and are therefore unable to accept the Appellant's contentions.

29. As far as the Appellant's argument with respect to delay is concerned, the same has no merit. It was the Appellant's duty to inform the Court regarding the pending claim of the Respondent Bank. A perusal of the facts set-out above demonstrate that in response to the notice issued by DRT on 22nd December 2017, the Official Assignee informed the DRT as well as the Respondent by its letter dated 15th December 2017 that the Appellant is no longer insolvent. It was on receiving this intimation that the Respondent Bank approached the Court on 1st February 2018. There is therefore no delay which would be sufficient to defeat the Respondent Bank's rights. The further contention of the Appellant that the Respondent Bank's actions were undertaken with ulterior motives and are vindictive in nature also merit no appreciation. Barring vague averments, there is nothing on record to substantiate such allegations.

30. In respect of the issue of suppression of facts, on a perusal of the record, it is evident that the Appellant was aware about the recovery certificate issued in favour of the Respondent Bank, yet he decided not to disclose this fact. On the contrary, a statement was made on oath that the Appellant has no other creditor. It is based on this representation that the Order of annulment came to be passed *albeit* incorrectly. This *ex-facie* amounts to suppression of material facts and therefore; we agree with the view adopted by the learned Single Judge.

31. In our considered opinion, the impugned Order has been passed after taking into consideration all relevant provisions of the Insolvency Act as well as the applicable law. In our opinion, there is no legal infirmity in the impugned Order which requires interference by us.

32. For the reasons aforestated, the above Appeal is dismissed. Interim Application No.1729 of 2020 also stands disposed off.

(PRITHVIRAJ K. CHAVAN, J.)

(S.J.KATHAWALLA, J.)