

IN THE HIGH COURT OF JUDICATURE AT MADRAS

<i>RESERVED ON ::</i> <i>10.03.2021</i>	<i>PRONOUNCED ON ::</i> <i>14.06.2021</i>
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THE HONOURABLE Ms. JUSTICE P.T. ASHA

Appln.Nos.298 and 299 of 2018

and

I.P.No.5 of 2013

and

Application Nos.38 to 42 of 2020 and 70 to 73 of 2020

and 84 and 85 of 2020

I.P.No.5 of 2013:

Kotak Mahindra Bank Limited.

No.3, Dass India Tower,

2nd Floor, 2nd Lines Beach,

Parrys, Chennai - 600 001.

... Petitioning Creditor

Mr. A. Manohar Prasad

... Debtor

Appln.Nos.298 and 299 of 2018:

Mr. A. Manohar Prasad

...Applicant in both applications

Vs.

1. Kotak Mahindra Bank Limited.

No.3, Dass India Tower,

2nd Floor, 2nd Lines Beach,
Parrys, Chennai - 600 001.

2. Official Assignee,
Madras High Court,
Chennai - 600 104.

...Respondents in both applications

Prayer in I.P.No.5 of 2013: Petition filed under Sections 9(2)(3), 12 and 13 of the Presidency Towns Insolvency Act, 1909 and Order III A of the Insolvency Rules, 1958 to adjudicate the debtor as an insolvent under the provisions of the Presidency Towns Insolvency Act, III, 1909, to direct the estate of the Debtor to be vested with the Official Assignee of Chennai with powers to administer the same for the benefit of the general body of the creditors of the debtor and to order the cost of the Petitioning Creditor to be paid by the Official Assignee of Chennai from and out of the estate of the Debtor.

Prayer in Appln.No.298 of 2018 : Application filed under Order 2 Rule 1 of the Insolvency Rules read with Sections 8, 12 and 21 of the Presidency Towns Insolvency Act, 1909 to annul the Adjudication in Order dated 28.09.2015 in I.P.No.5 of 2013.

Prayer in Appln.No.299 of 2018 : Application filed under Order 2 Rule 1 of the Insolvency Rules read with Section 94 of the Presidency Towns Insolvency Act, 1909 to stay all further proceedings in I.P.No.5

of 2013.

For Applicant : Mr. R. Thiyagarajan
for Mr. K. Ravidranath
and Mr. J. Balagopal

For Respondents : Mr. Om Prakash,
Senior Counsel
assisted by Mr. Elaya Rajkumar
for M/s. Ramalingam Associates for R1.

Ms.Uma, Official Assignee for R2.

COMMON ORDER

The applicant who has been adjudged an insolvent has moved this Court to annul the *ex parte* order of adjudication dated 28.09.2015 (A.No.298 of 2018) and to stay all further proceedings in I.P.No.5 of 2015 (A.No.299 of 2018) accusing the first respondent of being a Shylock wanting its pound of flesh, the counsel for the applicant playing Portia to his Bassanio claiming that the 1st respondent Bank had launched a multi pronged legal battle despite being adequately secured.

2. In order to appreciate the grievance of the applicant it is necessary to recapitulate the suits filed by M/s.Ind Bank Housing Limited in C.S.No.1023 of 1998 and C.S.Nos.33 and 52 of 1999 and the consent decree obtained by the first respondent herein who had got themselves substituted as plaintiff just prior to the passing of the consent decree.

Facts preceeding the filing of the applications:

2.1. The applicant herein and his late brother Ravi Shankar Prasad and their companies M/s. Mahalakshmi Properties and Investment Private Limited, M/s. Green Gardens Private Limited and M/s. Gemini Arts Private Limited had borrowed money from M/s. Ind Bank Housing Ltd.. Since the amounts were not repaid as promised, M/s. Ind Bank Housing Ltd., had filed CS.No.1023 of 1998 against M/s. Mahalakshmi Properties and Investment Private Limited and

their Directors A. Sriramulu and Gopalkrishnan. Likewise M/s. Ind Bank Housing Ltd., had filed a suit C.S.No.33 of 1999 against M/s. Green Gardens Private Limited and the applicant herein and his late brother Ravi Shankar Prasad and C.S.No.52 of 1999 was filed against M/s. Gemni Arts Private Limited and the applicant and his late brother Ravi Shankar Prasad.

2.2. While the above suits were pending, the defendants had approached the plaintiff namely M/s. Ind Bank Housing Limited with a proposal to settle all their dues which was to the tune of Rs.1910 lakhs towards full and final payment of their outstanding. The said proposal was also accepted by M/s. Ind Bank Housing Limited vide their letter dated 30.08.2006.

2.3 M/s. Ind Bank Housing Limited had thereafter assigned the debts due from the defendants in the suit C.S.Nos.1023 of 1998, 33 and 52 of 1999 to M/s. Kotak Mahindra Bank Limited, the first

respondent herein under a Deed of Assignment dated 13.10.2006. The assignment was made for a consideration of Rs.1885 lakhs. Consequently, the first respondent had filed applications for substituting themselves as the plaintiff in A.No.2453 of 2007 and the said application was ordered on 21.03.2007. Thereafter, the first respondent as plaintiff had entered into a Memorandum of Compromise dated 23.10.2006 with the applicant and others. The said Memorandum of Compromise was filed into Court and a decree dated 26.03.2007 was passed in C.S.Nos.1023 of 1998, 33 and 52 of 1999.

2.4. As per the Compromise decree, different amounts were payable in each of the suits. The amounts payable in C.S.No.1023 of 1998 was to the tune of a sum of Rs.29,18,59,531/-. The payment was to commence from 14.10.2006 and was to be concluded within a period of 90 days from 14.10.2006. The terms of the Compromise further provided that in case payments were not made within 90 days

then a further grace period of 180 days starting from the 91st day was to be given to the defendants. The Memorandum of Compromise contains a clause that post dated cheques have been issued to the plaintiff by the defendants. In case the amounts were not paid as per the schedule or in the event of default as mentioned in the Compromise then the entire amount with interest at 20 per cent per annum from 14.10.2009 till date of payment would become payable by the defendants therein. The plaintiff namely the first respondent herein was entitled to recover this amount from the defendants and / or the Mortgagor. On the payment being made, the terms of the consent decree would stand satisfied. The Memorandum of Compromise further stipulated that until payments are fully made, the defendants could not transfer, sell or part with the possession or in any other manner dispose off the immovable properties which are described as Schedule A to the terms of the Compromise. As regards the suit C.S.No.33 of 1999, the outstanding was a sum of Rs.29,49,81,355/- together with interest. Similar terms were

incorporated herein and the very same properties were also the subject matter of this Compromise. In C.S.No.52 of 1999 the outstanding was a sum of Rs.9,00,00,000/-. Here again the terms of the Compromise were identical as that of the other two suits and the properties secured were also the same.

2.5. Since the defendants including the applicant had not complied with the terms of Compromise, the first respondent Bank initiated proceedings under the SARFAESI Act by issuing a notice dated 04.01.2008 under Section 13 (4) of the Act. Immediately, the applicant had moved an application before the Debt Recovery Tribunal and by order dated 09.01.2008, DRT I Chennai granted an ad interim injunction of further proceedings subject to the deposit of a sum of Rs.1,00,00,000/- within a period of 6 (six) weeks.

2.6. The first respondent Bank had included the name of applicant and the other defendants in their list of defaulters and the

same was uploaded on their website. Immediately, the applicant and others filed W.P.No.24292 of 2008 seeking removal of their names from the list of defaulters. Interim orders injuncting the Bank from proceeding further was also moved.

2.7. Meanwhile, the Bank had also initiated proceedings to execute the consent decree by filing O.A.Nos.46 and 47 of 2008 on the file of the Debts Recovery Tribunal I ,Chennai, hereinafter, for the sake of brevity, referred to as the DRT. The Bank had also moved a slew of applications - restraining the respondent company from transferring or alienating or dealing with the Schedule mentioned properties, for a direction that the judgment debtors should disclose their assets and file annual returns into court and restraining the applicants from leaving the country without prior permission apart from seeking an order of attachment. By order dated 03.07.2009, the DRT had allowed all the applications which were challenged in W.P.Nos.13126 and 13138 of 2009. The challenge to the said interim orders was that the DRT had no jurisdiction to entertain the original

applications in view of Section 31(A) of the Recovery of Debts Due To Banks and Financial Institutions Act, 1993, now known as the Recovery of Debts and Bankruptcy Act, which is referred as the RDB Act as and when required in the succeeding paragraphs. These Writ Petitions were disposed off on 30.09.2009. Thereafter, the Bank has filed I.N.No.11 of 2009. Though notice was served on the applicant, they did not choose to appear before the Court. Therefore, I.N.No.11 of 2009 came to be allowed.

2.8. Thereafter, the applicant herein had filed A.No.435 of 2009 in I.N.No.11 of 2009 seeking to set aside the Insolvency notice in I.N.No.11 of 2009. In the affidavit filed in support of the said application the applicant herein would raise the following grounds:

(a) The 1st respondent has not filed the assignment deed said to have been executed between them and M/s.Ind Bank Housing Limited.

(b) Even assuming that the assignment is true the debts are that of the respective companies and it is only these debts that have been assigned.

(c) Even in the Compromise decree the respondent Bank has received post dated cheques for the entire amount, which implies that there is no amount outstanding, in other words no debt is due from the applicant herein. The DRT has been directed by this Court to consider all the issues that have been raised by the applicants and at this juncture the question of issuing the Insolvency notice does not arise. The respondent Bank is guilty of the forum shopping.

2.9. A counter was filed by the 1st respondent and after hearing

the detailed arguments on either side this Court by order dated 16.07.2012 was pleased to dismiss the said application. The main basis on which the application has been dismissed is on the ground that the post dated cheques which are set out in the Compromise decree have not been encashed and that it is not the case of the applicant that the amounts have been recovered from these post dated cheques.

3. The applicant herein has questioned the jurisdiction of the DRT to entertain the original applications which are the subject matter of the W.P.Nos.13126 and 13128 of 2009 in view of Section 31 A of the RDB Act. The Court had dismissed the application by holding that none of the grounds contemplated under Section 9 (5) of the Presidency Towns Insolvency Act (hereinafter, for the sake of brevity, referred to as PTI Act) are made out by the applicant.

4. This order was taken up on appeal by the applicant and his

late brother Ravi Shankar in O.S.A.No.344 of 2012. On 10.06.2015, since no steps had been taken to bring on record the legal heirs of the 2nd appellant and as the 1st appellant, the Applicant herein had not entered appearance in the proceedings either in person or through pleader, the appeal was dismissed for default. Thereafter, the applicant herein had filed C.M.P.No.765 of 2016 to restore O.S.A.No.344 of 2012.

5. Pending the said application the applicant herein had undertaken that in the first item of the property annexed to the memorandum of compromise, namely, the land situate at Andhra Pradesh there was a Developer's Agreement with a third party and that a sum of Rs.18 Crores would be made over by the third party to the respondent Bank. The respondent Bank accepted the offer but however informed the Court that there were litigations pending before the High Court at Hyderabad at the instance of third parties and that their clearance may be required before the sale. The matter

was directed to be listed on 17.03.2016. Ultimately, since the matter could not be settled the said application was dismissed by orders of this Court dated 01.06.2016.

6. The 1st respondent therefore had filed I.P.No.5 of 2013 (Creditor Application). In the said Insolvency Petition, the 1st respondent as petitioning creditor had filed the said petition invoking the provisions of Section 9 (2), 9 (3), 10, 12 and 13 of the PTI Act. The Insolvency Petition was filed on the basis of the consent decree obtained by the 1st respondent. The 1st respondent has contended that since the applicant has not satisfied the decree passed, there is a clear indication that the applicant is not in a position to clear the debt especially since he has not made the payment even after the issue of the Insolvency notice and therefore under the provisions of Section 9 (2) of the PTI Act the applicant / debtor had committed an acts of Insolvency.

7. The 1st respondent has stated that the applicant is guilty of misappropriation of public funds, availing of loans by fraudulent means and by producing fabricated documents. In the petition, the 1st respondent had categorically stated that there was "*no tangible security for the said amount*". Therefore, the application to adjudge the respondent as an insolvent was filed.

8. Once again, despite notice, the applicant had not chosen to appear and consequently by order dated 28.09.2015 the applicant was adjudged as insolvent.

9. Thereafter, the applicant had filed A.Nos.312 and 313 of 2015 for the following reliefs: सत्यमेव जयते

(a) To set aside the ex parte order dated 28.09.2015 passed in I.P.No.5 of 2013.

(b) To stay the operation of the order dated 28.09.2015 in I.P.No.5 of 2013.

10. In the common affidavit filed in support of the two applications the Applicant had stated that on 28.09.2015 lawyers were abstaining from Court as a mark of protest against the action initiated by the Bar Council of India against some lawyers. however, the Court proceeded to pass orders. Except for giving reason for the non appearance on 28.09.2015, the affidavit did not contain any averments on merits. The 1st respondent filed a detailed counter to rebut the contentions of the applicant as being nothing but the untruth.

11. The learned Judge after perusing the records and the applications dismissed the said applications by order dated 19.10.2016. As against the said order the applicant had filed O.S.A.No.191 of 2016. Thereafter on 29.11.2018 the appeal was withdrawn and the present application for annulment has been filed by the applicant herein.

Applications now under consideration:

12.The grounds on which the instant application is filed are as follows:

" (a) The 1st respondent / petitioning creditor has suppressed the fact that they have adequate security in respect of the debt and they have failed to comply with the provisions of Section 12 (2) of the PTI Act.

(b) The 1st respondent has come forward with a false affidavit. In the petition in I.P.No.5 of 2013 the 1st Respondent Bank has stated that they do not hold any tangible security whatsoever for the said amount which is nothing but a blatant falsehood."

These are the allegations that are contained in the affidavit filed in support of the petitions.

13. However, during the arguments the objections to the order of adjudication have been expanded to include a plea that the very consent decree is a nullity. The applicant would contend that consent decree was passed by a Court which did not have the territorial Jurisdiction to entertain the Compromise since it fell fowl of the language of the proviso to Order XXIII Rule 3 of the Code of Civil Procedure as amended by the Madras High Court Amendment. The grounds of challenge under this head was:

"(a) The Compromise could not be recorded in respect of properties situate outside the jurisdiction of the Court as per provisions of the proviso to Order XXIII Rule 3 as amended by the Madras High Court Amendment;

(b) The 1st respondent is a Bank and therefore proceedings had to be initiated only before the Debt Recovery Tribunal and the

*substitution of the 1st respondent as plaintiff
and the recording of Compromise before this
Court was without jurisdiction.*

*(c) The 1st respondent has not
relinquished the security and not made a
mention about it in his petition while filing the
petition for Insolvency, which is in violation
of the provisions of Section 12 (2) of the PTI
Act.*

*(d) The 1st respondent is adequately
secured in the form of post dated cheques as
well as the security of immovable property.*

*(e) The assignment deed has not been
brought to the notice of the Court and further
it has not been stamped in the State of Tamil
Nadu.*

(f) The 1st respondent ought to have

*moved this Court by filing necessary
Execution Petition and not by filing an
Insolvency Petition."*

For the above reasons the applicant sought to have the order of adjudication annulled.

Counter of the First Respondent:

14. The 1st respondent had filed a common counter affidavit in respect of these applications *inter alia* contending that the application is not maintainable as it is hit by the principles of res judicata since the issue relating to Section 12 (2) of the PTI Act has already been raised by the applicants and rejected by this Court in the earlier proceedings.

15. The 1st respondent would contend that the applicant's challenge to the order of adjudication in A.No.435 of 2009 ended in a dismissal and the same was confirmed by the Division Bench in

O.S.A.No.344 of 2012. It is after exhausting this remedy that the Applicant has come up with the instant Insolvency Petition. The applicant who had received the notice and who had entered appearance through counsel did not proceed with the case as a result of which the applicant was adjudged as insolvent. The applicant had filed an application to set aside the adjudication order and for a stay in A.Nos.312 and 313 of 2015 which after contest was dismissed by this Court by order dated 19.10.2016. In its order dismissing A.Nos.312 and 313 of 2015 the Learned Judge has relied upon the earlier order in A.No.435 of 2009.

16. The 1st respondent would refute the contentions of the applicant that the 1st respondent was adequately secured. The 1st respondent would submit that the properties which were received as security are embroiled in litigation. The 1st respondent would submit that it is not open to the applicant to question the decree passed without filing an appeal against the same or without seeking to set aside the consent order.

17. It is their contention that the Insolvency Court cannot go into the correctness of the decree which has been passed with the consent of both parties. The 1st respondent would submit that this application is nothing but an attempt to protract the proceedings and ensure that the 1st respondent creditor does not enjoy the fruits of the decree. The 1st respondent would submit that the applicant has faced *suo moto* Contempt Petition even before the Hon'ble Supreme Court and their contention is nothing but malafide and an attempt to put of paying their debt. They therefore sought for a dismissal of the application.

Counter of the Second Respondent, Official Assignee:

18. The Official Assignee has filed a common report in respect of the two applications in which the Official Assignee has reported that despite directions to the applicant to appear before the Official Assignee to furnish the details regarding their properties and creditors, the applicant has not been cooperating with the Official Assignee. In

fact it was only pursuant to directions of this Court that the applicant had appeared and his statement partly recorded on 02.05.2017. Once again it was only pursuant to orders of the Division Bench that the applicant had appeared before the Official Assignee on 09.10.2017 promising to file an affidavit of assets by the end of the day. However, this assurance as usual was observed in the breach. The affidavit in question came to be filed only on 20.10.2017. The applicant had disclosed 7 items of property.

19. The Official Assignee however admitted that the petitioning creditor, namely, the 1st respondent herein had neither relinquished the security in favour of all the creditors nor have they stated that they are willing to surrender the security as contemplated under Section 12 (2) of the Act. The report of the Official Assignee further states that they have no objection to the adjudication being annulled.

Submissions:

20. Extensive arguments have been addressed by both the parties, namely, the applicant and the 1st respondent. These arguments have also been condensed into the form of written arguments by all parties.

21. The sum and substance of the arguments put forward by Mr. R. Thiagarajan, learned counsel appearing on behalf of the counsel for the applicant is briefly set out herein below:-

(i) The consent decree obtained by the 1st respondent is null and void as it is without jurisdiction for the following reasons:

(a) The properties which form the subject matter of the Compromise decree are situate outside the jurisdiction of this Court and therefore violative of the proviso to Or.XXIII R.3 of the CPC as amended by the Madras High Court Amendment.

(b) The 1st respondent being a Bank had to move the Debt Recovery Tribunal for recording the Compromise as per the provisions of the RDB Act, 1993, which clearly ousted the jurisdiction of the

Civil Court.

(ii) The 1st respondent has not complied with the provisions of Section 12 (2) of the PTI Act by either relinquishing the security in favour of the 2nd respondent Official Assignee or making a statement that they are ready to surrender the secured assets to the Official Assignee.

(iii) The deed of assignment under which the 1st respondent substituted itself as the plaintiff is not properly stamped in the State of Tamil Nadu as required by law.

22. The main ground of challenge put across by the applicant was that the consent decree passed was nullity and all proceedings flowing therefrom was a non-starter. The arguments of the applicant was that the 1st respondent Bank has deliberately suppressed the securities that have been offered under the memo of Compromise. The *ex parte* order is passed without following the due process of law. The 1st respondent rushed to the Court without complying with the

terms of the consent decree. As per the terms of the consent decree in the event of default the Compromise decree had provided for appointment of a receiver to alienate the properties either by public auction or by private treaty. Without exhausting the same the 1st respondent has hastily filed the Insolvency Petition which has very serious ramifications as it renders the civil death of a person once he is adjudicated as an insolvent.

23. The following Judgements had been relied on the side of the applicant:

(i) A.No.280 of 2005 dated 16.08.2005 -

Kumari Ananthan Vs. A.Jayagopal

(ii) 1986 SCC Online Mad 221 -

P.K.Venkateswaran and others Vs.

R.Shanmugam.

(iii) Appeal No.710 of 2007 - Kotak

Mahindra Bank Vs. Om Prakash Aggarwal

and others.

(iv) I.P.No.35 of 2009 - Kotak

Mahindra Bank Vs. R.Swarup Reddy.

(v) A.No.94 of 2013 - D.M.Sripathy

*Managing Partner Vs. B.S.Ramachandran and
another.*

*(vi) 1989 (1) MLJ 93 - M/s.Raghavan
and Veera and another Vs. Lachmandas.*

*(vii) (1964) 5 SCR 1098 - State of
Punjab Vs. Rattan Singh*

*(viii) AIR 1982 Mad 18 - S.Neelakanta
Sarma Vs. K.Govindarajulu and another*

*(ix) 1975 SCC Online Cal 21 - Dulal
Chand Auddy (Debtor).*

*(x) AIR 1940 Mad 375 -
P.R.S.A.R.Periakaruppan Chettiar Vs.
P.S.A.R.A.R.Arunachalam Chettiar.*

(xi) 2014 (5) CTC 209 - Veena Textiles

Limited Vs. Authorised Officer, IFCI Limited.

(xii) 2009 (2) CTC 381 - C.K.Sasankan

Vs. The Dhanalakshmi Bank Ltd.

(xiii) O.S.A.No.83 of 2009 dated

*12.04.2011 - Uttamchand Vs. T.Joseph
Benzinger .*

(xiv) (1978) 2 M.L.J. 356 - The

*Audilakshmi Venkateswara Iron Traders Vs.
V.Mayavanthi Jhamandas.*

(xv) (1973) 3 SCC 187 - Sarat Chandra

Roy Vs. Harak Chand Damani and another.

(xvi) AIR 1963 Mad 181 -

*S.A.Ramalinga Mudaliar Vs. T.K.Ratna
Mudaliar and another*

(xvii) (1943) 1 MLJ 262 - Vemuri

Nagiah and another Vs. Vasi Reddi Venkata

Suryanarayana Prasad.

(xviii) 2010 (5) CTC 146 - Megastuff

Computers Vs. P.Chandrasekar.

24. Mr.Om Prakash, Learned Senior Counsel appearing on behalf of the 1st respondent had made his extensive arguments and the learned counsel for the 1st respondent has also filed the written arguments. The application is prima facie objected to on the ground that this is a second application seeking the very same relief which has been turned down in the earlier round of litigation. The claim that the 1st respondent has not handed over security or given an affidavit to the effect that the security would be available to all creditors is fallacious since the properties in question are already the subject matter of other litigations and are encumbered. The applicant has not chosen to set aside the consent decree or to file an appeal against the consent decree. Therefore, the same has attained finality.

25. The application is nothing but an abuse of process of Court and forum shopping. The lands at Hyderabad which is one of the property which was offered as security does not belong to the applicant but it belongs to another company. The flat at Mumbai which belongs to the applicant is already charged for other liabilities in respect of the debt due under C.S.No.225 of 1999. The suit filed by Ind Bank Housing Limited was only a money suit and not a mortgage suit.

26. The 1st respondent would countenance the arguments advanced that the consent decree is violative of the proviso to Order XXIII Rule 3 by stating that the subject matter of the suit is only recovery of money and the subject matter of Compromise is also the same. The properties have only been offered as security as an undertaking for complying with the Compromise. The assignment deed did not require stamping in the State of Tamil Nadu since the property was situate at Mumbai and parties have also signed the

agreement at Mumbai. He has relied on the following Judgements in support of his contentions:

(i) 1883 SCC Online PC 21 - Ram

Kirpal Shukul Vs. Mussumat Rup Kuari.

(ii) (1960) 3 SCR 590 - Satyadhyan

Ghosal Vs. Deorajin Debi.

(iii) (1962) 1 SCR 574 - Daryao Vs.

State of Uttar Pradesh.

(iv) (1976) 4 SCC 66 - Y.B.Patil Vs.

Y.L.Patil

(v) (1994) 2 SCC 14 - Sulochana Amma

Vs. Narayanan Nair

(vi) (1999) 5 SCC 590 - Hope

Plantations Ltd Vs. Taluk Land Board.

(vii) (2004) 4 SCC 281 - Escorts Farms

Ltd. Vs. Commissioner, Kumaon Division.

(viii) (2013) 15 SCC 655 - Erach Boman

Khavar Vs. Tukaram Shridhar Bhat.

(ix) (2017) 13 SCC 138 - Kaushik Coop.

Building Society Vs. N.Parvathamma.

The judgements relate to the issue of Res Judicata.

27. The Official Assignee has also submitted their written submissions in which they would submit that the property situate at Mumbai had been sold in public auction by the Kotak Mahindra Bank Mumbai. The property situate at Kanchipuram and Arcot Road were already mortgaged to the Punjab National Bank, PNB Housing Finance Limited and HDFC Bank respectively. As regards the lands in Hyderabad, which is also one of the properties that has been offered as security the same measures an extent of about 5 acres out of which 2 acres have been encumbered.

28. The Official Assignee has further stated that apart from the petitioner no other claim has been filed. The Official Assignee has also submitted further written submissions enclosing the statement of

the insolvent applicant which had been recorded on 23.12.2020, 16.03.2021 and 17.03.2021. In the statement recorded before the Official Assignee the applicant has submitted that a sum of Rs.25 Crores have been realised by sale of the property at Mumbai of which 24.5 Crores was paid to Kotak Mahindra Bank, Mumbai Branch and the applicant and his brother had paid Rs.5 Crores to Ind Bank Housing Limited and Ind Bank Merchant Services. This information has come to his knowledge pending the instant applications.

Discussion:

29. From the arguments and perusal of the records the following points emerge for the consideration of this Court:

i. that the decree obtained by the 1st Respondent Bank is a nullity since:

(a) The properties which have been offered as mortgage and which forms the subject matter of the Compromise are both situate outside the territorial jurisdiction of this Court at Ranga Reddy

District, Andhra Pradesh and Andheri West, Mumbai and therefore the compromise entered into is violative of the proviso to Order XXIII Rule 3, CPC as amended by the Madras High Court amendment.

(b) The plaintiff (the first respondent herein) who ultimately signed the Compromise and obtained the consent decree is a Bank and therefore the 1st respondent ought to have moved the Debt Recovery Tribunal in view of the bar under Section 18 of the RDB Act, 1993.

(ii) The 1st respondent Bank has not disclosed the securities held by them and have also not undertaken to relinquish the said security in favour of the Official Assignee for the benefit of the body of the creditors as contemplated under Section 12 (2) of the PTI Act. The assignment deed is not properly stamped.

(iii) Under the Memorandum of Compromise entered into in each of the suits the parties to the compromise apart from the plaintiff and the respective defendants therein also includes a private company,

M/s.Prasad Properties and Investment Private Limited, herein after referred to as the Prasad Properties. The said company has been described as the mortgagor and their properties have been offered as a security which has been described in the schedule to the Compromise. The consent terms would set out that the amounts which were due and payable by the defendant to M/s Ind Bank Housing Limited in respect of a financial facility granted by them has been assigned to the 1st respondent herein. The terms would further provide that the amount due is secured by an enforceable and subsisting mortgage of the properties without any further deed or writing to that effect.

30. Before proceeding to discuss the various grounds raised it is necessary to extract some of the legal provisions which are relevant for the case on hand.

31. The *proviso to Order XXIII Rule 3 of the Code of Civil Procedure* as per the Madras High Court Amendment reads as follows:

"High Court Amendment (Madras): In the proviso to Rule 3, for the words "provided that" the following shall be substituted, namely:

"Provided that the subject matter of the agreement, Compromise or satisfaction, in so far as it differs from the subject - matter of the suit, is within the territorial and pecuniary jurisdiction of the Court concerned: Provided further that". (Amendments dated 03.10.1979 and 23.01.1981)."

32. **Sections 2g, 17, 18, 19 and 31 of the Recovery of Debts and Bankruptcy Act, 1993** is herein below extracted:

Section 2g : "debt" means any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under

any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application;

"Section 17. Jurisdiction, powers and authority of Tribunals. - (1) A Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions.

Section 18. Bar of jurisdiction - On and from the appointed day, no Court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under articles 226 and 227 of the Constitution) in relation to the matters specified in section 17.

[Provided that any proceedings in relation to the recovery of debts due to any multi-State co-operative bank pending before the date of commencement of the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2012 under the Multi-State Co-operative Societies Act, 2002 shall be continued and nothing contained in this section shall, after such commencement, apply to such proceedings.]

Section 19. Application to the Tribunal. - (1) *Where a bank or a financial institution has to recover any debt from any person, it may make an application to the Tribunal within the local limits of whose jurisdiction,*

[(a) the branch or any other office of the bank or financial institution is maintaining an account in which debt claimed is outstanding, for the time being; or]

[(aa)] the defendant, or each of the defendants where there are more than one, at the time of making the application, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of making the application, actually and voluntarily resides, or carries on business, or personally works for gain; or

(c) the cause of action, wholly or in part, arises:

Section 31 Transfer of pending cases -

(1) Every suit or other proceeding pending before any Court immediately before the date of establishment of a Tribunal under this Act, being a suit or proceeding the cause of action whereon it is based is such that it would have been, if it had arisen after such establishment, within the jurisdiction of such Tribunal, shall

*stand transferred on that date to such
Tribunal."*

33. **Section 12 (2) of the PTI Act** would read as follows:

"If the petitioning creditor is a secured creditor, he shall in his petition either state that he is willing to relinquish his security for the benefit of the creditors in the event of the debtor being adjudged insolvent or give an estimate of the value of the security. In the latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same way as if he were an unsecured creditor."

34. A perusal of the terms of the Compromise would indicate that the signatories therein had agreed upon a repayment schedule of a quantified amount. The terms of agreement contemplated that the

entire amount would be paid on or before 90 days from the cut off date, namely, 14.10.2006. The terms also gave a grace period of further 180 days starting from the 91st day. Therefore, in all the defendants had been given 270 days to repay the quantified sum. M/s.Prasad Properties has signed the Compromise deed along with the defendants and they have been described as the mortgagor, under this deed.

35. The said Prasad Properties and the applicant herein have offered their respective properties as securities for the due repayment of the amount quantified in the Memorandum of Compromise. Under this Compromise memo, the mortgagors have also bound themselves to repay the said sum along with the defendants. The deed further provides that in the event of default the 1st respondent herein could have a Court receiver or any other fit and proper person from the panel of the High Court be appointed as a Court Receiver in respect of properties mortgaged. The receiver was to take possession of these

properties and thereafter sell the same through public auction and / or by way of private treaty and the sale proceeds were to be paid over to the 1st respondent for satisfying their dues.

36. It appears that the defendants and the applicant herein had not repaid the amount as undertaken. Therefore, the 1st respondent has approached the Debt Recovery Tribunal for enforcing the decree and have also taken out an application under Section 9 (2) for issue of insolvency notice.

37. Meanwhile, the Mumbai branch of the 1st respondent has sold the property at Mumbai, which is one of the properties mortgaged under the Compromise deed. However, the date of the sale and the exact amount realised out of the sale has not been divulged to the Court. The applicant in his statement to the 2nd respondent had stated that the sale fetched them a sum of Rs.25 Crores. This statement has not been refuted by the 1st respondent Bank.

38. The counsel for the applicant has contended that the adjudication has to be annulled as the ground on which the Insolvency Petition has been filed is the consent decree which is a nullity. Let us examine the reason put forth by the applicant in support of this contention that the consent decrees in C.S.No.33 and 52 of 1999 are null and void. The applicant would submit that under the Memorandum of Compromise the defendants had offered two properties as security for the due performance of the terms of the Compromise. These properties are both situate outside the jurisdiction of this Court.

39. The properties are:

*"(i) Land measuring 5 acres comprised in S.No.11
Guttla Begumpet Village, Serillingam Patty Mandal,
Ranga Reddy District, Andhra Pradesh.*

(ii) Flat measuring 800 Sq.ft. at B 006, Atlantic

*Apartments, Lokandwala Complex, 1st Cross, Andheri
West, Mumbai (This property has been sold by the 1st
respondent's Mumbai Branch pending these
applications."*

I am discussing the arguments pertaining to nullity in the same
order as it was argued.

**a) Nullity as it is violative of the proviso to Order 23 Rule 3
C.P.C as amended by the Madras High Court Amendment.**

40. Order XXIII Rule 3 of the Code of Civil Procedure provides
for the Compromise of a suit either as a whole or partly by any lawful
written agreement or Compromise. On such written Compromise
being filed into Court, the Court after being satisfied with the same
shall record the same agreement and pass a decree in accordance there
of. Rule 3 further provides that such agreement should relate the
parties in the suit whether or not the subject matter of the compromise

/ agreement / satisfaction is the same as the subject matter of the suit.

41. The proviso to the Rule provided that if there is a challenge to the Compromise or the same is questioned by one party the Court should decide the dispute then and there without any adjournments and in case an adjournment is granted adequate reasons should be recorded. However, an amendment was introduced to the said proviso by the Tamil Nadu Government in the Government Gazette dated 18.02.1981 in and by which the 1st proviso would read as follows:

"Provided that the subject matter of the agreements Compromise or satisfaction, in so far as it differs from the subject matter of the suit is within the territorial and pecuniary jurisdiction of the Court concerned."

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42. It is this amended proviso that the applicant would rely upon. The properties which are offered as security under the

Memorandum of Compromise are situate outside the jurisdiction of this Court. The amended proviso as applicable to our Court provides for the following:

"(i) Subject matter of the agreement / compromise / satisfaction can be different from the subject matter of the suit.

(ii) however, this subject matter of compromise / agreement / satisfaction should not be situate outside the jurisdiction of this Court both on its territorial as well as pecuniary jurisdiction."

43. Therefore, we have to first analyse as to whether the subject matter of the suit and the subject matter of the Compromise are one and the same or different. The subject matter of both the suits C.S.Nos.33 and 52 of 1999 is for recovery of money. The Compromise that has now been entered into between the parties is for

repayment of the amounts that has been crystallised between the parties through negotiations which is secured by two immovable properties. Therefore, the subject matter of the suit and the subject matter of the Compromise differs.

44. In the Memorandum of Compromise in addition to undertaking to repay the amount as per the schedule given thereunder the defendants have offered a security for the due performance of terms of the Compromise. M/s.Prasad Properties has joined in executing the Memorandum of Compromise as a mortgagor. Therefore, though the properties do not form the subject matter of the suit it is offered as security under the Compromise Deed and therefore forms the subject-matter of the compromise. These properties are admittedly situate outside the jurisdiction of this Court. Therefore it falls within the terms of the proviso and the compromise entered into and recorded is contrary to the provisions of the proviso to Or. XXIII R.3 CPC as amended by the Madras High Court Amendments.

However, the same is only an irregularity as it falls within the genre of "*lack of territorial jurisdiction*". Parties by consent can confer jurisdiction on such courts and defendants may also waive their right by not questioning jurisdiction at the earliest point of time. The Hon'ble Supreme Court in its judgment in "***(Harshad Chiman Lal Modi vs DLF Universal & Anr reported in [2005 (7) SCC 791])***" has categorised jurisdiction into territorial or local jurisdiction, pecuniary jurisdiction and jurisdiction over subject matter and observed that with regard to the first two categories parties can confer or waive their right to question the same.

This judgment has been relied upon by the Hon'ble Supreme Court in the judgment reported in "***2019 (3) SCC 567- Sneh Lala Goel vs Pushplata.***". The court was considering the jurisdiction of the executing court to consider the validity of a decree for want of territorial jurisdiction this after the question had been tried and held against the defendants in the preliminary decree which culminated in a final decree. The learned Judge observed as follows in paragraph

No.13:

"13.Sub-section (1) of Section 21 provides that before raising an objection to territorial jurisdiction before an appellate or revisional court, two conditions precedent must be fulfilled:

- i) The objection must be taken in the court of first instance at the earliest possible opportunity; and*
- ii) There has been a consequent failure of justice.*

This provision which the legislature has designedly adopted would make it abundantly clear that an objection to the want of territorial jurisdiction does not travel to the root of or to the inherent lack of jurisdiction of a civil court to entertain the suit. Hence, it

has to be raised before the court of first instance at the earliest opportunity, and in all cases where issues are settled, on or before such settlement. Moreover, it is only where there is a consequent failure of justice that an objection as to the place of suing can be entertained. Both these conditions have to be satisfied."

The Bench held that an objection to territorial jurisdiction does not travel to the root of or the inherent lack of jurisdiction of a civil court to entertain the suit.

Therefore, in the case on hand the decree has been passed on consent of parties and the applicant had not questioned the territorial jurisdiction of the court to record the compromise though the subject matter of the compromise dealt with properties situate outside the jurisdiction of this Court. The decree is not a nullity under this head.

b) Nullity of account of Section 18 :

45. The applicant would contend that considering the fact that the 1st respondent was a Bank, as defined under the RDB Act, the Jurisdiction of the Civil Court is ousted and the 1st respondent ought to have recorded the compromise before the Debt Recovery Tribunal.

46. In this connection, if Section 18 of the RDB Act, extracted supra in Paragraph No.31 is considered it is clearly evident that the bar of Jurisdiction is only in relation to matters specified in Section 17. A perusal of Section 17 would indicate that the jurisdiction vested in the Tribunal is to entertain and decide applications from the Banks for "*recovery of debts*". This is further amplified by reading Section 19 of the RDB Act which clearly says that the application to the Tribunal shall be made by the Bank or Financial Institution to "*recover any debt from a person*".

47. Therefore, a conjoint reading of Sections 17, 18 and 19

would explicate that it is only the Debts Recovery Tribunal that has the jurisdiction to entertain and decide any application filed by a Bank for recovery of its dues. In fact, the language of Section 18 is peremptory as it clearly mandates that on and from the appointed day (the date of which the Tribunal is established under Section 3(1) or 8(1) as the case may be) no Court or other authority shall have the power or be entitled to exercise jurisdiction/power/authority in respect of matters specified in Section 17. Therefore, Section 18 prohibits any Court or authority from exercising not only jurisdiction but also power and authority in respect of the matters falling under Section 17.

48. The suit, which is the genesis for the present proceedings, is one for recovery of money. The suit was originally filed by M/s Ind Bank Housing Limited. They have assigned "*the debt*" in favour of the 1st respondent Bank under an Assignment Deed dated 13.10.2006.

49. A perusal of this Assignment Deed which has been produced before me would reveal that M/s.Ind Bank Housing Limited have assigned the debt covered under the suits C.S.No.1023 of 1998 and C.S.Nos.33 and 52 of 1999 (which forms the basis for the instant proceedings) after receiving a sum of Rs.1885 lakhs from the 1st respondent Company. The recitals of the Assignment Deed relevant for our discussion is extracted hereinbelow:

"On receipt of the entire amount, the Assignor assigns the debts and also the right to claim the amount under C.S.Nos.33 of 1999, 1023 of 1998 and 52 of 1999 on 06.04.1998, 15.04.1998 and 15.04.1998, respectively, pending on the files of the Hon'ble High Court at Chennai, filed against the borrowers and recover the amounts in terms thereof with costs and expenses."

"The Assignee at their own costs and

*expenses, make arrangements to pursue the
Civil Suits in terms of C.S.Nos.33 of 1999,
1023 of 1998 and 52 of 1999 on 06.04.1998,
15.04.1998 and 15.04.1998."*

50. Schedule A to the Assignment Deed contains the list of documents handed over by M/s.Ind Bank Housing Limited (the Assignor) in favour of the 1st respondent Bank (the Assignee). The 9th document is a Letter dated 27.05.2004 executed by M/s.Prasad Properties and Investments Private limited creating a 2nd charge in favour of M/s.Ind Bank Merchant Banking Services Limited in respect of the properties situate at Andhra Pradesh. The 10th document is a Letter dated 10.10.2006 executed by the applicant herein creating a 2nd charge in favour of M/s.Ind Bank Merchant Banking Services Limited in respect of the Flat at Mumbai.

51. Thereafter, the 1st respondent Bank moved Appln.No.2454

of 2007 in C.S.No.33 of 1999 and A.No.2453 of 2007 in C.S.No.52 of 1999 for substituting them as the plaintiff in the respective suits. These applications came to be ordered on 21.03.2007. A perusal of the Compromise Deed would further reveal that the Deed was signed by the parties on 23.10.2006 describing the 1st respondent herein as a plaintiff (1st respondent has been substituted as plaintiff only on 21.03.2007). Thereafter, this Compromise Deed has been filed into Court and a Decree passed in terms of this Compromise on 26.03.2007. One of the terms of the Compromise is that the amounts are secured by a valid enforceable and subsisting mortgage of the immovable properties set out in Exhibit "A" annexed to the Compromise without any further Deed or writing to the effect.

52. The sequence of the events narrated supra would show that on 21.03.2007 when the substitution was ordered, the 1st respondent Bank had replaced the original plaintiff in a suit which was one for recovery of money due towards a debt. Admittedly, the 1st respondent

is a Bank as defined under the RDB Act. Therefore, on 21.03.2007, the 1st respondent Bank was prosecuting a suit for recovery of debts as contemplated under Section 19 of the RDB Act. Therefore, the bar under Section 18 of the RDB Act would come into effect on 21.03.2007. At this juncture it would also be useful to extract the definition of debt as provided under Section 2(g) of the RDB Act.

"Section 2g : "debt" means any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or

*any arbitration award or otherwise or under a
mortgage and subsisting on, and legally
recoverable on, the date of the application. "*

A reading of this definition shows that even an assigned debt would be covered under this definition. Therefore, on and from 21.03.2007, this Court ceased to have jurisdiction to entertain the suit. The first respondent Bank ought to have taken steps to transfer the suit to the DRT as provided under Section 3 of the RDB Act. The suit filed by the original plaintiff was very much maintainable before the original court. It is only when the first respondent substituted itself as the plaintiff that the bar under Section 18 came into play and only the DRT would have jurisdiction in respect of the suit.

53. There is a catena of Judgments which say that a Decree passed by a Court lacking inherent jurisdiction is a nullity and that consent cannot confer jurisdiction on a Court which inherently lacks jurisdiction. The judgements referred to hereinbelow would draw a

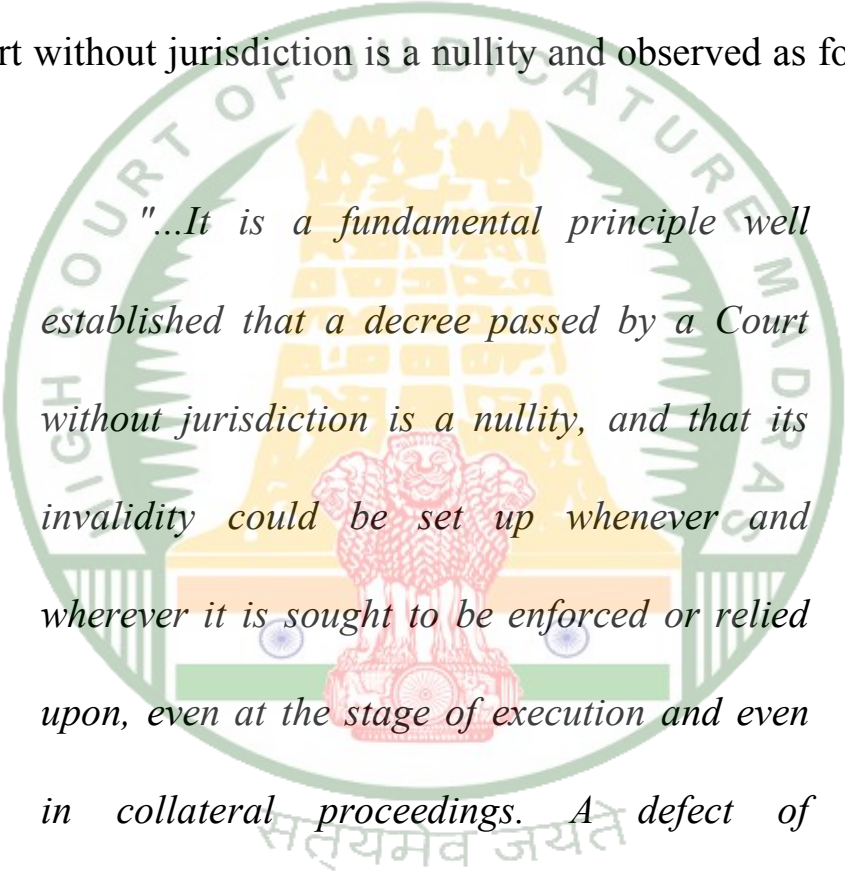
distinction between a challenge to the (i) territorial jurisdiction (Sec.21 of the CPC) (ii) pecuniary jurisdiction (Sec.11 of the Court Fees Act); and (iii) subject-matter of the suit. As regards the 1st two, objections have to be raised at the earliest and parties could either confer jurisdiction or waive their right to question the same. However with regard to the 3rd category, the same being an inherent lack of jurisdiction, consent or waiver will not confer jurisdiction and an objection can be taken at any stage; before the appellate court, in the execution proceedings or in collateral proceedings.

54. The following decisions of the Hon'ble Supreme Court discusses what is lack of inherent jurisdiction and the parties right to consent and/or waive their right to question the jurisdiction of a court which inherently lacks jurisdiction.

(a) AIR 1954 SC 344 - Kiran Singh and others vs. Chaman Paswan and others.

The issue in this case related to the appeal being entertained by

a Court which was not competent to hear the same in view of the valuation of the suit. The appellants argued that the Decree having been passed by a Court not competent to hear the same, the Decree must be treated as a nullity. The Bench observed that a Decree passed by a Court without jurisdiction is a nullity and observed as follows:



"...It is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and

*such a defect cannot be cured even by consent
of parties."*

However, the Bench dismissed the appeal by holding that no prejudice has been caused to the appellant and the defect in jurisdiction arose only on account of under valuation. This view was also taken on account of the fact that the appellant had not raised any objection to the jurisdiction at any time and had participated fully in the trial and given a fair hearing. The Learned Judges held that the Decree in question cannot be termed a nullity and the appeal was dismissed.

(b) In the Judgment reported in "**1990 (1) SCC 193 - Sushil Kumar Metha v. Gopind Ram Bohra**", the facts were as follows:

*"1....The suit was originally laid in the
Court of Sub Judge, IIIrd Class, Gurgaon,
which was transferred later to the Sr. Sub*

Judge, Gurgaon, which was decreed ex-parte on October 20, 1977. The application under Order 9 Rule 13 C.P.C. to set aside the ex-parte decree was dismissed on January 10, 1979, and was confirmed on appeal on August 17, 1979 and in revision by the High Court on October 15, 1979. When the landlord laid the execution application for ejectment the appellant objected under section 47 of C.P.C. contending that the decree of the Civil Court is a nullity as the premises in question is governed by the Haryana Urban (Control of Rent & Eviction) Act II of 1973, for short 'the Act'. The Controller under the Act is the competent forum regarding claims for ejectment on fulfilment of any of the conditions enumerated under Section 13 thereof. The

Civil Court is divested of jurisdiction to take cognisance and pass a decree for ejectment of the appellant. That objection was overruled and on further revision the High Court dismissed the revision by order dated March 19, 1980. Simultaneously he also filed Writ Petition under Article 227 which was dismissed on September 30, 1988. This appeal is directed against that order of dismissal."

The appellant had primarily raised a defense that the Civil Court lacked inherent jurisdiction to take cognisance of the cause and pass a Decree and therefore, the Decree passed is a nullity. The learned Judges relied upon the Judgments reported in **AIR 1954 SC 130** referred supra, and **AIR 1979 SC 794 - Ferozi Lal Jain v. Man Mal and another**, to hold as follows:

"A decree passed by a Court without jurisdiction over

the subject matter or on other grounds which goes to the root of its exercise or jurisdiction, lacks inherent jurisdiction. It is a coram non judice. A decree passed by such a Court is a nullity and is non est. Its validity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings."

The Learned Judges have succinctly brought out the difference of a defect striking at the very authority of the Court which cannot be cured by consent or waiver of the parties and a defect in its exercise of jurisdiction which does not strike at its authority like a pecuniary or territorial jurisdiction which can be waived by parties or jurisdiction conferred by consent. The learned Judges have discussed this by drawing from earlier judgments:

*"In **Ledgard v. Bull**, [1886] Law Report, 13 AC, 134 the Privy Council laid down that where the original Court in a suit was inherently lacking jurisdiction, and was incompetent to try the same, on its transfer by consent of parties, to a Court with jurisdiction such consent did not operate as a waiver of the plea of want of jurisdiction.*

*In **Bartan v. Fincham**, [1921] 2 Kings Bench Division, 291 at 299 it was held that:*

"Parties cannot by agreement give the Courts jurisdiction which the Legislature has enacted they are not to have The Court cannot give effect to an agreement whether by way of

*compromise or otherwise, inconsistent with the
provisions of the Act."*

They also relied on the Judgment in the case of **Ferozi Lal Jain** **supra** in which the Hon'ble Supreme Court had observed that if the civil court lacked inherent jurisdiction then even a compromise entered into between the parties by incorporating the grounds prescribed in Section 13 of the Delhi and Ajmer Rent Control Act and a decree passed thereon would still be a nullity as under the above Act the jurisdiction of the civil court had been ousted. The Learned Judges therein had also observed that objections could be raised at any time, even at the time of execution.

(C). In the judgment reported in **2005 (7) SCC 791 - Harshad Chiman Lal Modi vs DLF Universal Ltd and another** the issue for consideration was whether the Delhi Civil Court had jurisdiction to try and entertain a suit for recovery of possession of a property situate at

Gurgaon. Originally, the suit was filed before the Delhi High Court. In the written statement filed before the Delhi High Court, the defendants had accepted the jurisdiction of the court to entertain the suit. Thereafter due to an enhancement of the pecuniary jurisdiction the suit was transferred to the District Court, Delhi. At this juncture, the defendants sought to amend their original written statement by raising an objection regarding jurisdiction and this application was allowed. After the amended written statement was filed the Additional District Judge had framed an additional issue regarding jurisdiction. The plaint was ultimately returned to be presented before the proper court as the court had held that the District Court, Delhi lacked the jurisdiction to entertain the suit. This order which was upheld by the Delhi High Court was taken up on appeal to the Hon'ble Supreme Court. In the course of their discussion, the Learned Judges had classified jurisdiction into:

- i. territorial or local jurisdiction;
- ii. pecuniary jurisdiction; and

iii. jurisdiction over the subject-matter.

As regards the first two, they held that an objection to the jurisdiction should be taken at the earliest, atleast before the settlement of issues.

However, parties can consent to confer jurisdiction on such courts or the defending party may waive his right to question jurisdiction.

However, with reference to the third category, they have observed as follows: "*Where a Court has no jurisdiction over a subject-matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is a nullity.*"

This judgment has been relied upon in the judgement in ***Sneh Lata Goel vs Pushplata - 2019 (3) SCC 594.***

(D) The question as to whether such a plea can be taken at the time of execution is also no longer *res integra* in the light of the above judgement and the judgement of the Hon'ble Supreme Court in ***Urban Improvement Trust, Jodhpur v. Gokul Narain and another*** reported in 1996 (4) SCC 178 wherein the learned Judges had

observed as follows:

"The question then is: whether the objections can be raised in execution? This controversy is no longer res integra. In Sushil Kumar Mehta vs. Gobind Ram Bohra (Dead) through his Lrs. [(1990) 1 SCC 193] a three-Judge Bench of this Court was to consider whether the nullity of a decree can be raised in execution. Under the Haryana Urban [Control of Rent and Eviction) Act, 1973 the building was governed by the provisions of the said Act. The Civil Court granted decree of eviction. When objection was raised in execution the executing Court rejected the same. On appeal, this Court had held that a decree passed by a Court jurisdiction over the subject matter or on any other ground which

goes to the root of its exercise of jurisdiction or inherent jurisdiction, is a nullity. A decree passed by such a court is a nullity and is non est. Its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right even at the stage of execution or in collateral proceedings. The defect of jurisdiction strikes at the authority of the court to pass a decree which cannot be cured by consent or waiver of the party."

This Judgment in ***Urban Improvement Trust*** also sought to clarify that if the defect in the exercise of jurisdiction does not go to the root of its authority like territorial jurisdiction the same can be waived by consent of parties. The learned Judges also held that "*As regards the nullity or lack of inherent jurisdiction, the Hon'ble Supreme Court in the case of **Hiralal Moolchand Doshi vs. Barotraman Lal Ranchhoddas** [1993] 2 SCC 458, observed that a Decree is said to be*

a nullity if it is passed by a Court having no inherent jurisdiction."

(iv) The Hon'ble Supreme Court in ***United Bank of India, Calcutta v. Abhijit Tea Co. Pvt. Ltd. and others*** reported in **2000 (7) SCC 357** was considering a case where a compromise decree was passed and in the appeal, the same was set aside and the matter remanded back to the trial Court. At this juncture, the RDB Act came into force in West Bengal, the application to restrain the suit was allowed and that was the challenge before the Hon'ble Supreme Court. The learned Judges considered the bar of jurisdiction and explained and differentiated the terms "entertained", "instituted", "disposed of", "no decree shall be passed" and "no Court shall exercise powers or jurisdiction". The Bench held as follows:

"In some statutes the legislature no doubt says that no suit shall be 'entertained' or 'instituted' in regard to a particular subject matter. It has been held by this Court that

such a law will not affect pending actions and the law is only prospective. But, the position is different if the law states that after its commencement, no suit shall be "disposed of" or "no decree shall be passed" or "no court shall exercise powers or jurisdiction". In this class of cases, the Act applies even to pending proceedings and has to be taken judicial notice of by the civil Courts."

Ultimately, the appeal was allowed and the suit was transferred to the DRT.

55. Therefore, on an analysis of the above, it is clear that the Decree passed by this Court is one without jurisdiction since on the date of the 1st Respondent Bank substituting itself as a Plaintiff and the suit as it stood being one for recovery of a debt, the bar under Sec.18 of the RDB Act has stepped in. The consent decree thereafter

passed is a nullity.

However, this court would like to clarify that the the Compromise dated 26.10.2006 has been voluntarily executed by the applicant, his late brother and their Companies and the validity of the same cannot be called into question for the reasons elaborated in Paragraph No.44 supra. It is open to the first respondent Bank to enforce the same in the manner known to law and following due process of law.

56. The argument that this Court cannot re-appreciate the validity of the Decree is without any basis. The Insolvency Court is vested with the power to examine the validity of the Decree more particularly when the argument advanced in one that a Court which lacks inherent jurisdiction has passed the Decree. The Constitution Bench of the Hon'ble Supreme Court in the Judgment in **AIR 1964 SC 1223 - *State of Punjab v. Rattan Singh*** was considering a question as to whether the Insolvency Court while hearing a petition by the creditor for declaring a debtor insolvent, could once again determine

the liability of the debtor. The Bench held as follows in Paragraph 23 of the Judgment:

"23. It is well-settled that the Insolvency Court can, both at the time of hearing the petition for adjudication of a person as an insolvent and subsequently at the stage of the proof of debts, reopen the transaction on the basis of which the creditor had secured the judgment of a court against the debtor. This is based on the principle that it is for the Insolvency Court to determine at the time of the hearing of the petition for Insolvency whether the alleged debtor does owe the debts mentioned by the creditor in the petition and whether, if he owes them, what is the extent of those debts. A debtor is not to be adjudged an insolvent unless he owes the debts equal to or

*more than a certain amount and has also
committed an act of insolvency."*

They further went on to held as follows:

"The decree is binding only on the parties. The debtor sought to be adjudged is bound by it and so is the creditor. But this binding effect of the decree is only to be respected by the Insolvency Court in circumstances where nothing is reasonably alleged against the correctness of the judgment debt. The Insolvency Court has the jurisdiction to reopen such debts and will do so ordinarily when such judgments have been obtained by fraud, collusion or in circumstances indicating that there might have been miscarriage of justice."

The learned Judges held that the Insolvency Court derived the power to decide all questions of any nature whatsoever which arises in an insolvency case before it. They derive this power under the provisions of the Provincial Insolvency Act. The PTI Act is also in *pari materia* to the above Act. In fact, the Bench has gone on to hold as follows in Paragraphs 28 and 29 of the Judgment:

"28. It is clear from the above provisions of the Insolvency Act that it is the duty of the Insolvency Court and therefore clearly within its jurisdiction to require proof to its satisfaction of the debts sought to be proved at the stage of the hearing of the insolvency petition or subsequent to the adjudication.

29. There is plenty of case law in support of the view that the Insolvency Court can go behind the decree of a court in order to probe

into the genuineness of the debt in connection

with which the decree is passed."

Therefore it is clear that this Court as the Insolvency Court can reappreciate the decree/go behind the decree more particularly when the decree itself is a nullity.

57. The conduct of the applicant and the other defendants however require to be deprecated. In these proceedings, the applicant would question the jurisdiction of the Civil Court in the light of the provisions of the RDB Act, however, when the 1st respondent Bank had moved the DRT under Section 31A the same is objected to by the defendants. it is also brought to the notice of this Court that the applicant and his family members have created an encumbrance in respect of their other properties all with a view to deprive their creditors of any assets to recover their dues.

Non- compliance of the provisions of Section 12 (2) of the PTI Act:

58. We now come to the next major objection to the adjudication. The applicant would contend that the proceedings for insolvency is in violation of the provisions of Section 12 (2) of the PTI Act. Section 12 (2) of the PTI Act would make it mandatory that a petitioning creditor should in his petition state that he is willing to relinquish his security for the benefit of the creditors in the event of the debtor being adjudged an insolvent or give an estimate of the value of the security. Once the value is given, the petitioning creditors would be admitted as a petitioning creditor only for the balance amount.

59. Admittedly, the 1st respondent has not complied with this requirement which is evident from a reading of the petition in respect of I.P.No.5 of 2013. The same does not contain any such statement. On the contrary the first respondent Bank has stated that they have no tangible security. It is also seen that after the applicant had been adjudged as an insolvent the property at Mumbai has been sold and

the sale proceeds have not been deposited with the Official Assignee as mandated under Sec.17 of the PTI Act, but has been adjusted by the 1st respondent towards their dues.

60. The Official Assignee in the report dated 07.12.2018 has stated that the applicant has not given any details of the security that they held nor had they handed over the sale proceeds or made the Official Assignee a party to the sale. It is necessary to recollect that under the terms of the Compromise on the happening of the event of default (non-payment of the dues) the remedy available to the 1st respondent Bank has been stated in Clause 12 of the Compromise, which states that a receiver be appointed, who shall undertake the sale through public auction or through private treaty. The 1st respondent has not resorted to the above but has proceeded to sell it by themselves. Therefore, not only is there a violation of the provisions of Section 12(2) of the PTI Act but also the terms of the Compromise.

61. Let us now examine if the non compliance of the provisions of Section 12(2) of the PTI Act would be a ground for annulling the Order adjudicating the applicant as an insolvent. In a judgement reported in *AIR 1982 Madras 18 - S. Neelakanta Sarma vs K. Govindarajulu and another*, one of the grounds for seeking annulment was that the Petitioning Creditor, a secured creditor has failed to comply with the provisions of Sec.12 (2) of the PTI Act. This plea was upheld.

Section 21 of the PTI Act empowers the Insolvency Court to annul the adjudication for the following reasons:

(i) In the opinion of the Court, a debtor ought not to be adjudged an insolvent.

(ii) where the debts have been paid in full.

Therefore, on the happening of the above, the adjudication can be annulled.

62. The following reasons would clearly demonstrate that the Applicant ought not to have been adjudged an insolvent:-

a. The 1st respondent Bank has filed this Insolvency Petition since the applicant had not complied with the notice of insolvency as provided under Section 9(2) of the PTI Act claiming the decree amount. Therefore, the proceedings have been initiated only on the strength of the Decree obtained by the 1st respondent Bank in C.S.Nos.33 and 52 of 1999. Considering the earlier discussion with regard to the Decree and its validity, **the Insolvency proceeding having been initiated on the basis of a decree which is a nullity the adjudication has to fail and the applicant ought not to have been adjudged as insolvent.**

b. The 1st respondent Bank has not complied with the provisions of Section 12(2) of the PTI Act by not divulging the security held by them but also by alienating and appropriating the proceeds realised from the sale of one of the secured assets pending these proceedings.

c. The 1st respondent Bank without taking recourse to the

agreed procedure under Clause 12 of the Compromise Deed has proceeded to sell one of the securities viz; the property at Mumbai pending these proceedings.

d) The objections of the 1st Respondent bank that the instant applications are barred by the principles of Res Judicata also fails considering the fact that the decree based upon which the Insolvency proceedings has been initiated is a nullity.

In fine, Application Nos.298 and 299 of 2018 are allowed and the adjudication is annulled. Consequently, connected applications are closed.

14.06.2021

Index : Yes/No
Speaking order/Non-speaking order
mrn/mps

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P.T.ASHA, J.

mrn/mps



Appln.Nos.298 and 299 of 2018
in
I.P.No.5 of 2013
and Applc.Nos.38 to 42 of 2020
and 70 to 73 of 2020
and 84 and 85 of 2020

14.06.2021

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