IN THE HIGH COURT OF JUDICATURE AT MADRAS

(IN INSOLVENCY)

MONDAY, THE 10TH DAY OF JANUARY 2022

THE HON'BLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

APPLN. No.97 of 2021
in
IP.No.13 of 2007

In the matter of the Presidency Towns Insolvency Act, III of 1909 and
In the matter of Smt. S.Gayathri
- Debtor

IP.NO.13 OF 2007

1. Shree Kamakshi Kaingarya Trust,
Rep. by its Managing Trustee,
Shree Kamakshi Swamigal also known
as Shree Sankara Shastrigal.

2. Shree Kamakshi Swamigal
also known as Shree Sankara Shastrigal.

3. Smt.S.Bhagyalakshmi,
All residing at No.15, 24th Street,
Nanganallur, Chennai – 600 061. ...Petitioners

-Vs-

Smt.S.Gayathri,
W/o.Sri.S.Selvam,
No.10, Ist Main Road,
Srinivasapuram, Thiruvanmiyur
Chennai – 600 041. ...Debtor

APPLN. No.97 of 2021:-

Smt.S.Gayathri,
W/o.Sri.S.Selvam,
No.10, First Main Road,
Srinivasapuram, Thiruvanmiyur,
Chennai – 600 041. ...Applicant/Insolvent

-Vs-

1. Shree Kamakshi Kaingarya Trust,
Rep. by its Managing Trustee,
Shree Kamakshi Swamigal also known
as Shree Sankara Shastrigal.

2. Shree Kamakshi Swamigal
also known as Shree Sankara Shastrigal.

3. Smt.S.Bhagyalakshmi,
All residing at No.15, 24th Street,
Nanganallur, Chennai – 600 061.

4. The Official Assignee,
High Court of Madras,
Chennai – 600 104. ...Respondents

Application praying that this Hon'ble court be pleased to condone the delay of 4783 days to set aside the exparte order of adjudication as insolvent dated 21.07.2008.

The above application coming on this day before this court for hearing in the presence of Mr.V.Jayakumar, advocate for the Applicant/Insolvent herein; and of Mr.E.Senthilkumar, Advocate for M/s.Sampathkumar Associates, Advocates for the Respondents 1 to 3 and the Official Assignee of this court, the 4th Respondent herein; and upon reading the Judges Summon and Affidavit of S.Gayathri filed herein; and **the court made the following order:-**

The insolvent has filed an application to condone the delay of 4783 days in filing the application to set aside the ex-parte order of adjudication dated 21.07.2008 in I.P.No.13 of 2007.

2. Pursuant to earlier order dated 15.11.2021, the insolvent remitted a sum of Rs.5,72,015/- to the Official Assignee. The Official Assignee filed a report dated 27.01.2021 acknowledging receipt of the said sum. This sum includes the decretal amount in O.S.No.4793 of 2003, i.e. a sum of Rs.4,50,000/-, costs of Rs.40,575/- in terms of the said decree and interest at the rate of 6% per annum from June 2004 to February 2007 (i.e. from the date of decree up to the date of presentation of the insolvency petition.

3. By earlier orders, the matter was adjourned so as to determine the period up to which interest should be calculated and whether commission is payable to the Official Assignee.

4. Learned counsel for the insolvent contended that interest is payable only up to the date of presentation of the insolvency petition. In this connection, he relied upon Section 51 of the Presidency Towns Insolvency Act, 1909 and contended that the insolvency shall be deemed to relate back and commence on the date of presentation of the insolvency petition. In support of the said contention, he relied upon the following

judgments:

i)***U.P. Oil Mills Agency v. Saraswati Soap and Oil Mills Ltd. (AIR 1954 All. 129)*** and, in particular, paragraphs 5 to 8 thereof.

ii)***Kerala Financial Corporation v. Official Liquidator, High Court, [(1996) 87 Comp Cases 183 Ker]***.

5. As regards payment of commission, learned counsel for the insolvent contended that commission is payable only if the Official Assignee was involved in bringing the assets of the insolvent to sale. For this proposition, he relied upon the following judgments:

i)***K.Dhanalakshmi Ammal & Another v. T.Radha & Another, O.S.A.Nos.26 to 28 and 183 of 2017***, judgment dated ***06.10.2017***.

ii)***A.Sardarbasha v. The Official Assignee, High Court, Madras & Another, O.S.A.Nos.295 & 301 of 2019***, judgment dated ***01.04.2021***.

6. In response, the Official Assignee contended that the assets of the insolvent was valued by the Official Assignee and that it is on account of the efforts of the Official Assignee that the sum of Rs.5,72,015/- was realized. Therefore, it is submitted that the insolvent is liable to pay commission.

7. The creditor submits that he has not entered into a composition or compromise with the insolvent and that he has diligently prosecuted the petition by remitting necessary charges in that regard.

8. In light of the rival contentions, the first issue to be considered relates to the payment of interest. The decree in O.S.No.4793 of 2003 does not provide for payment of interest on the decretal amount. Learned counsel for the insolvent adverted to the agreement of sale dated 11.05.2003 between the creditor and the insolvent and pointed out that the said agreement also does not provide for payment of interest in the event of default in fulfilling the obligations under the said agreement. In cases where interest is not reserved or agreed upon between the parties to the relevant transaction, interest liability is determined by Rule 23 of the Second Schedule to the Presidency Towns Insolvency Act, 1909. The said Rule is as under:

> *"23.(1) On any debt or sum certain wherein interest is not reserved or agreed for, and which is overdue when the debtor is adjudged an insolvent, and which is provable under this Act, the creditor may prove for interest at a rate not exceeding six per centum per annum-*
>
> *(a)if the debt or sum is payable by virtue of a written instrument at a certain time, from the time when such debt or sum was payable to the date of*

such adjudication; or

(b)if the debt or sum is payable otherwise, from the time when a demand in writing has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment to the date of such adjudication.

(2)Where a debt which has been proved in insolvency includes interest or any pecuniary consideration in lieu of interest, the interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding six per centum per annum, without prejudice to the right of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled after all the debts proved have been paid in full.

9. On perusal of the above provision, it appears that a distinction is made between cases wherein the relevant contract provides for payment of interest and rate of interest and contracts which do not provide for interest. In the case at hand, admittedly, no interest is provided for in the relevant contract. Therefore, the stipulated rate of interest in Rule 23 namely, 6% per annum will apply. A creditor, in such cases, may prove the debt along with interest at 6% per annum. The said 6% interest shall be payable up to the date of presentation of the insolvency petition. However, in terms of Sub-Section 2 thereof, if a surplus is available after discharging all the debts of the insolvent in full, the creditor would be entitled to higher rate of interest.

The question with regard to payment of commission remains to be considered.

10. Order XVII, Rule 10(i) of the Insolvency Rules, 1958 reads as under:

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

11. On examining the above Rule, it is evident that the Official Assignee is entitled to charge a commission at the rate of 7% under the following circumstances:

i)If the principal amount due to the creditors is collected by the Official Assignee; or

ii)If the assets of the insolvent are brought to sale by the Official Assignee and the amounts are collected therefrom; or

iii)If amounts are paid to creditors pursuant to a composition or scheme of arrangement between the creditors and the insolvent.

12.In the case at hand, the creditor states that he did not enter into a composition or compromise with the insolvent. The admitted position is that the amounts were remitted by the insolvent to the Official Assignee. As such, this is an amount collected by the Official Assignee. Consequently, in terms of Rule 10(i) of the Insolvency Rules 1958, the Official Assignee is entitled to commission. In cases wherein a payment is made directly by the debtor to the creditor prior to the adjudication of the debtor as insolvent, Rule 10(i) of the Insolvency Rules 1958, may not be applicable. In all other cases, as long as one of the three circumstances set out above apply, the Official Assignee will be entitled to commission.

13. Since the insolvent has remitted the sum of Rs.5,72,015/- the delay in filing the application to set aside the adjudication is condoned. Consequently, it is open to the insolvent to number and list the application to set aside the order of adjudication.

WITNESS, THE HON'BLE MR.JUSTICE MUNISHWAR NATH BHANDARI, ACTING CHIEF JUSTICE, HIGH COURT AT MADRAS, AFORESAID THIS THE 10TH DAY OF JANUARY 2022.

Sd./-
ASSISTANT REGISTRAR
Original Side – I

//CERTIFIED TO BE TRUE COPY//
DATED THIS THE DAY OF 2022.

MANAGER
INSOLVENCY OFFICE

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PK
12/01/2022

HIGH COURT, MADRAS

APPLN. No.97 of 2021
in
IP. No.13 of 2007

THE HON'BLE MR.JUSTICE
SENTHILKUMAR RAMAMOORTHY

ORDER DATED:10/01/2022

FOR APPROVAL: 12/01/2022

APPROVED ON : 12/01/2022

COPY TO:-
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THE OFFICIAL ASSIGNEE
HIGH COURT, MADRAS.