THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.09.2023

CORAM:

THE HONOURABLE MR JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MRS JUSTICE R.KALAIMATHI

O.S.A.No.153 of 2012

S.Parimala ...Appellant

Vs.

G.Ramkumar ...Respondent

Prayer: Original Side Appeal filed under Order XXXVI Rule 1 of the Original Side Rules read with Clause 15 of the Presidency Town Insolvency Act against the order dated 15.12.2011 passed in Insolvency Petition No.130 of 2006.

For Appellant : Mr.A.Babu

For Respondent : No appearance

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J U D G M E N T

(Judgment of the Court was made by **R.SUBRAMANIAN, J.**)

Challenge in the appeal is to the dismissal of a petition seeking to adjudicate the respondent as insolvent.

2. The appellant obtained a money decree against the respondent for payment of a sum of Rs.1,15,000/- with interest thereon. Since the Judgment Debtor did not pay the decreetal amount, despite the notice of insolvency having been issued in I.N.No.16 of 2006, the appellant came up with I.P.No.130 of 2006. During the currency of insolvency petition certain amounts were paid by the respondent. A counter was filed in the insolvency petition to the effect that the petitioner in the insolvency petition/ the appellant herein had undertaken to withdraw the criminal complaint and the suit on settlement of liability at Rs.59,000/-. Despite the said undertaking, she had proceeded to issue insolvency notice and follow it up with the present insolvency petition. The Insolvency Judge had dismissed the insolvency petition on the sole ground that it cannot be used as a machinery for recovery of monies. Hence, the appeal.

3. Despite service of notice and the counsel having entered appearance, there was no appearance for the respondent when the appeal taken up yesterday. Hence, it was posted for orders today. Even today there is no representation for the respondent.

4. We have heard Mr.A.Babu, learned counsel appearing for the appellant.

5. Mr.A.Babu, learned counsel appearing for the appellant would contend that in view of the judgment of this Court in ***M/s. Mohammed Siddique & Co. by Partners and 7 others Vs. Ghanshamdas and another*** reported in ***1994 (2) LW 269,*** the dismissal of Insolvency petition on the ground that the petitioning creditor has remedy through execution is wholly unsustainable. In fact, this judgment was brought to the notice of the Insolvency Judge, but, the Hon'ble Judge however exercised his discretion and held that since certain monies have been paid after institution of the suit, this will not be a proper case to allow the insolvency proceedings.

6. We are constrained to observe that the exercise of discretion is not judicious. No doubt, the insolvency Judge has got discretion, but, that discretion has to be exercised judiciously. Section 9(2) was put in the statute book by the amending Act 28 of 1978. The Statement of Objects and Reasons of the Act 28 of 1978 are as follows:-

> *"**Amending Act 28 of 1978***
>
> *(i) The difficulties experienced by a litigant in India in executing even a simple money decree have been commented upon by the Privy Council as well as by the Law Commission and Expert Committee on Legal Aid. The Law Commission in its Third Report on the Limitation Act, 1908 has recommended that the most effective way of instilling a healthy fear in the mind of dishonest judgment-debtor would be to enable the Court to adjudicate him an insolvent if he does not pay the decretal amount after notice by the decree holder by specifying a period within which it should be paid on the lines of the amendment made to the Presidency Towns Insolvency Act, 1909 in Bombay. This recommendation was reiterated by the Law Commission in its Twenty Sixth Report on Insolvency Laws.*

(ii) The Expert Committee on Legal Aid was also of the view that the above recommendation of the Law Commission should be implemented immediately without waiting for the enactment of a comprehensive law of insolvency.

(iii) It is therefore proposed to amend the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act 1920 to add a new act of insolvency namely that a debtor has not complied with the insolvency notice served on him by a creditor who has obtained a decree or order against him for the payment of money within the period specified in the notice. If the amount shown in the insolvency notice is not correct it would be invalidated if the debtor gives notice to the creditor disputing -the amount. The debtor can however apply to the Court to have the insolvency notice set aside on the ground among others that he is entitled to have the decree re-opened under any law relating to relief of debted-ness or that the decree is not executable under any such law.

(iv) The Bill seeks to achieve the above objects. (Gazette of India dated 18.3.1978 pt.II,S. 2Ext.p.188.)"

7. The above being the object that is sought to be achieved by the Amending Act, dismissal of the insolvency petition on the ground that remedy by way of execution is available, in our opinion, cannot be sustained. We are therefore constrained to set aside the order of the Insolvency Judge. The appeal is allowed, the order dismissing the Insolvency Petition is set aside. The rsepondent is adjudged insolvent. The Insolvency Pettion is remitted to the Insolvency Court for further proceedings in accordance with law. The Insolvency Court will proceed further from where the proceedings stopped. No costs.

(R.S.M.,J.) **(R.K.M.,J.)**
12.09.2023

dsa

Index :No
Internet :Yes
Neutral Citation : No
Speaking order

<u>R.SUBRAMANIAN, J.</u>
<u>and</u>
<u>R.KALAIMATHI, J.</u>

dsa

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