Application (IP) No. 172 of 2017
in
I.P.No.25 of 2014

Dr. G. JAYACHANDRAN, J.
&
C. V. KARTHIKEYAN, J.

This application had been filed by the Official Assignee, High Court, Madras, to declare that the payment made on 24.12.2013 by the first respondent / Arjunlal Sunderdas, insolvent, who is since deceased, of a sum of Rs.2,00,00,000/- to the second respondent / M/s. Lotus Castles Pvt. Ltd., Alwarpet, Chennai, is void as against the Official Assignee and to pass a decree and Judgment against the second respondent directing them to return the amount of Rs.2,00,00,000/- to the Official Assignee with interest at 18% p.a., and costs to be credited to the estate of the insolvent / Arjunlal Sunderdas. This application has been filed taking recourse to Section 56 of Presidency Town Insolvency Act, 1909.

2. In the report of the Official Assignee, it had been stated that a petitioning creditor, Chitra Desai had filed an Insolvency Petition under Section 9(d)(iii)(g) and 10 to 12 of the Presidency Town Insolvency Act, 1909 on 10.03.2014 against the first respondent, Arjunlal Sunderdas. By an order dated 21.04.2014, a learned Single Judge of this Court had adjudicated the said first respondent as an insolvent. It must also be stated that the first respondent had filed an affidavit admitting to insolvency and consenting to be declared as an insolvent. The adjudication was published as required. All the properties of the insolvent came to be vested with the Official Assignee.

3. It had been contended by the Official Assignee that the insolvent was engaged in finance and property estate business. He had also incorporated four separate private companies. After being adjudicated as insolvent, he had filed the Schedule of Affairs. It had been stated that the Official Assignee had taken all efforts to find out the actual and true list of debtors and creditors of the estate of the insolvent.

4. It was also pointed out that the insolvent did not co-operate with the Official Assignee in disclosing true and correct facts. Similarly, his auditor Ranga Ramanujam, also did not voluntarily come forward to disclose the true and correct facts. The Official Assignee therefore had to go along with the computer generated statements as produced and verified by the Chartered Accountant, Ranga Ramanujam.

5. It had been further stated by the Official Assignee that he had noticed that the insolvent had received a sum of Rs.2,00,00,000/- from the second respondent, which was shown as due and outstanding as on 01.04.2023. The statement of accounts showed that this amount had been received from the second respondent by the insolvent. It had been stated that the insolvent, at a time when he faced serious financial difficulties, had returned back that amount on 24.12.2013 to the second respondent. It is specifically alleged by the Official Assignee that this was not a bona fide transaction in good faith but a fraudulent and preferential payment made to the second respondent by the insolvent to the disadvantage and detriment of other creditors with intention to defeat their rights. It was also stated that this repayment was within the period of three months from the date of presenting the petition to declare the first respondent as insolvent. It was contended that on that particular date, the insolvent was unable to pay all his creditors their dues, but had transferred the sum of Rs.2,00,00,000/- in favour of the second respondent preferring the second respondent over other creditors. It is under those circumstances that this Petition has been filed seeking a direction that this payment made by the insolvent on 24.12.2013 is a fraudulent preferential payment is void against the Official Assignee and a Judgment and Decree against the second respondent to return the said amount to the estate of the insolvent together with interest and costs.

6. A counter affidavit had been filed by the second respondent admitting to the transactions. It had been stated that though the insolvent had returned back the amount of Rs.2,00,00,000/- to the second respondent on 24.12.2013, it was not a fraudulent preference and it was not with the intention to prefer the second respondent to the detriment of other creditors. It had also been stated that the second respondent was not aware of the financial position of the insolvent at the time when the amount was returned back. They were also not aware about the application filed seeking to declare the first respondent as insolvent. It was stated that the Official Assignee had not produced any evidence to show that the transaction was fraudulent in nature and had been executed with intention to cause detriment to the other creditors. It had therefore been stated that the application should be dismissed.

7. Both the parties were directed to advance oral and documentary evidence to justify their respective stands. The Assistant Section Officer, attached to the Office of the Official Assignee, P.Mangaiyarkkarasi was examined as PW-1. She filed her proof affidavit and also marked Exs. A-1 and A-2. Ex.A-1 was the relevant page relating to the second respondent from the report of the Auditor, Ranga Ramanujam along with covering letter dated 19.03.2015 and Ex.A-2 was the true copy of the statement of bank account of the insolvent relating to the second respondent.

8. On the side of the second respondent, Balamurugan, Assistant Manager, Accounts was examined as RW-1. He filed his proof affidavit. He produced Ex.R-1 the Board Resolution authorising him to tender evidence.

9. During the cross examination of PW-1, the witness was questioned to show the basis for the assertion that detriment was caused to the general body of creditors and the basis for the allegation that the payment made to the second respondent was made under coercion. PW-1 replied that she had deposed so on the basis of the statement of accounts produced by the auditor and on the basis of the statement of the insolvent. It was also put to her that the second respondent would have continued as a creditor entitled for repayment from the estate if not for this repayment and she answered in affirmative.

10. During the cross examination of RW-1, it had been suggested that the insolvent had repaid the loan under pressure given by the second respondent. The witness answered that the second respondent had received back the loan amount advanced but disclaimed knowledge of specific reason for such repayment.

11. Heard arguments advanced by Mr.K.V.Ananthakrushnan, learned counsel for the applicant/Official Assignee and Mr.Satish Parasaran, learned Senior Counsel for the second respondent.

12. It is the contention of Mr.K.V.Ananthakrushnan that the insolvent had repaid a sum of Rs.2,00,00,000/- which was payable by him to the second respondent on 24.12.2013 when he was in serious financial difficulties. It was alleged that the insolvent had preferred the second respondent over other creditors. The learned counsel was insistent on his submission that this preference was fraudulent. It was alleged to be in direct detriment to the interests of the other creditors.

13. The learned counsel pointed out that Section 56 of the Presidency Towns Insolvency Act 1909 requires five conditions to be satisfied, namely, that the debtor should have been unable to pay from his own money his debts, there must be transfer or payment in favour of a creditor and such transfer or payment should be a preferential transfer over other creditors and that the debtor must have been adjudged insolvent on a petition filed within three months after the date of such transfer or payment. The learned counsel pointed out the relevant dates and stated that the second respondent had advanced a sum of Rs.1,00,00,000/- [Rupees one crore only] on 26.10.2012 and another sum of Rs.1,00,00,000/- [Rupees one crore only] on 29.10.2012 to the insolvent and the total amount was returned back by the insolvent on

24.12.2013. It was then pointed out that the petition seeking to adjudicate as insolvent was filed on 10.03.2014 and therefore it was contended that since the repayment was within three months from the date of presentation of the petition, this particular payment to the second respondent must be declared as fraudulent preference and void against the Offical Assignee and the second respondent must be directed to return the same to the estate of the insolvent together with interest and costs.

14. Mr.Satish Parasaran, learned Senior Counsel for the second respondent however disputed every contention putforth. The learned Senior Counsel stated that the second respondent had advanced a sum of Rs.1,00,00,000/- each on two separate dates on 26.10.2012 and 29.10.2012 to totalling Rs.2,00,00,000/- to the first respondent. This amount was repayable to the second respondent. The insolvent was in the finance business and in the normal course of such business and had returned back the said sum of Rs.2,00,00,000/- on 24.12.2013. The learned Senior Counsel pointed out that it was just another repayment of an existing debt. At that particular point of time, the second respondent was not aware of the financial position of the insolvent and also not aware that there were other creditors to the insolvent.

15. The learned Senior Counsel placed reliance on the Judgment reported in ***AIR 1958 SC 1 [N.Subramania Iyer Vs. Official Receiver and another].*** That was an appeal against an orders allowing the application of the Official Receiver under ***Section 35*** of the ***Travancore Regulation 8 of 1090 (= 1915)***. Specific reliance was placed on paragraph No.4 and more particularly to the observation relating to the burden to prove that the transaction was supported by good faith and valuable consideration. The specific observations of the Hon'ble Supreme Court were as follows:-

> *"A number of points were raised on behalf of the appellant and at the threshold of the arguments* ***it was contended, and in our opinion rightly, that the courts below had erred in throwing the burden on the transferee of proving affirmatively that the transaction impeached,*** *namely, the usufructuary mortgage bond dated August 18, 1924, was supported by good faith and valuable consideration. "*
>
> [Emphasis supplied]

16. It was further held that *",* ***the onus is upon the Official Assignee***

to prove that a conveyance which he was seeking to set aside was not made in good faith and for valuable consideration. "

17. Pointing out the above observations, the learned Senior Counsel was vehement in his assertion that the onus was upon the applicant/Official Assignee to prove that this return of money by the insolvent was not in good faith. It was contended that there is no such evidence produced by the Official Assignee. The learned Senior Counsel therefore stated that this application should fail on the ground that the Official Assignee had not proved that the transaction was not a transaction of good faith.

18. The learned Senior Counsel then relied on the Judgment reported in ***1923 LW 696 [E.N.A.Samu Pattar Vs. The Official Assignee of the Property of "V.M.Appachi Chetty & Sons"]*** wherein it had been held as follows:-

> *"This leaves the question of fraudulent preference. Sect. 56 of the Presidency Towns Insolvency Act avoids all transfers of property, or*

payments made, by any person unable to pay his debts, as they become due, from his own money, in favour of any creditor, with a view of giving that creditor a preference over the other creditor, if such person is adjudged insolvent, on a petition presented within three months after the date thereof. In this case, the insolvent was undoubtedly unable to pay his debts, as they became due, from his own money and in giving the security in question he preferred the Garnishee to the other creditors. ***But the question remains whether he did so, with a view of giving him that preference. This has been explained to mean, looking at the mind of the bankrupt at the time, was the dominant view to give a preference to a particular creditor—See Sharp v. Jackson and The Official Assignee, of Madras v. T. B. Mehta & Sons.*** *If his real object was to continue trading, or to save himself from serious consequences, or if he was really induced to make the payment, or give the security, by the pressure of the creditor, and those were the dominant factors in his mind and the desire to prefer and the* ***giving of the preference were incidental only, the preference is not a fraudulent preference****, within the meaning of the* *section. The insolvent, the Garnishee and his son, the Bills Manager of the Madras Bank, who negotiated the matter on his father's behalf, have all been called as witnesses and all treated by the trial Judge as unreliable.”*

[Emphasis supplied]

19. Pointing out the above reasoning, the learned Senior Counsel stated that there has got to be evidence about the dominant factor in the mind of the insolvent or whether the preference was incidental. If it was incidental then it could not be fraudulent. The learned Senior Counsel pointed out that in this case, as a normal business man in finance business, the insolvent had returned back the debt he owed to the second respondent and this cannot be termed as fraudulent preference.

20. The learned Senior Counsel then relied on ***91 LW 305 [Dev.Traders and others Vs. S.Deenadayalu],*** wherein it was held as follows:-

*“In order to constitute a fraudulent preference, **the act of the debtor must be voluntary.** In other words, it must be a deliberate or spontaneous act, an act of free-will. Payment under pressure, legal or illegal, is not a voluntary act. Fraudulent preference implies a deliberate discrimination between creditors. If the dominent intention of the debtor was to benefit himself, then the payment to one creditor alone would not constitute an act of insolvency. Preference must be the dominent view, In **Williams on Bankruptcy** it is observed that **"Preference** need not be the sole view, but **must be the dominent view;** it is sufficient that the preferring should have been the substantial, effectual or cominent view; but not necessarily the sole view with which the debtor acted."*

*In the **Law of Insolvency in India,** by **D. F. Mullah, 3rd Edition,** it is observed at page 535 that "In order to avoid a transaction as a fraudulent preference, it is not sufficient that the creditor was preferred; **it is essential that the transfer or***

payment was made 'with a view' to giving a preference to that credi- tor over the other creditors*. The view to prefer must have been dominent or substantial; it is not necessary that it should have been the sole view."*

It is further observed at page 542 that-

"If the dominent view is to benefit the debtor himself, the fact that the particular creditor is preferred in the sense of obtaining a benefit not shared by others, will not constitute the transaction as a fraudutent preference.

Transfer or payment made under a threat of legal proceedings, whether civil or criminal, does not amount to fraudulent preference, even though there is no immediate power of rendering the threat available by taking legal steps, Similarly a transfer of payment under an apprehension of legal proceedings even though there has been no threat or demand or pressure from the creditor, does not amount to a fraudulent preference."”

[Emphasis supplied]

21. Pointing out the above observations, the learned Senior Counsel argued that to avoid a transaction as a fraudulent preference, it was not sufficient that the creditor was preferred but it was essential that the transfer was made with intention to give preference to that creditor over other creditors. This intention to give preference must be dominant or substantial. The learned Senior Counsel stated that the Official Assignee had not discharged this particular burden and therefore stated that the transaction cannot be declared as vitiated for any reason whatsoever.

22. We have carefully considered the arguments advanced. The facts are in this case are not in dispute.

23. Section 56 of the Presidency Towns Insolvency Act, 1909 is as follows:-

*"**56. Avoidance of preference in certain cases.***

(1)Every transfer of property, every

payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditor, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the official assignee.

(2)This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the insolvent. "

24. It would also be point out to refer to Section 328 of Companies Act, 2013 which is as follows:-

*"**328**. (1) Where a company has given preference to a person who is one of the creditors of the company or a surety or guarantor for any of the*

debts or other liabilities of the company, and the company does anything or suffers anything done which has the effect of putting that person into a position which, in the event of the company going into liquidation, will be better than the position he would have been in if that thing had not been done prior to six months of making winding up application, the Tribunal, if satisfied that, such transaction is a fraudulent preference may order as it may think fit for restoring the position to what it would have been if the company had not given that preference.

(2) If the Tribunal is satisfied that there is a preference transfer of property, movable or immovable, or any delivery of goods, payment, execution made, taken or done by or against a company within six months before making winding up application, the Tribunal may order as it may think fit and may declare such transaction invalid and restore the position. "

25. As a matter of fact, there are parallel provisions in the Companies

Act 1956 (Sec.531) and also in the Provincial Towns Insolvency Act (Sec.54). Thus, as a concept 'fraudulent preference' by a debtor of a creditor in the teeth of prevailing insolvent conditions to the detriment of the other creditors has always been frowned upon and statutes provide provisions to declare transactions tainted by fraudulent preference as void.

26. The central point to be decided in this application is whether in the circumstances in which the insolvent was, in December 2013, repayment of the loan to the second respondent was a preferential repayment and if it was a preferential repayment, whether it was a fraudulent preference shown by the insolvent to the second respondent.

27. In order to decipher the circumstances in which the insolvent was placed in and around December 2013, it would require examination of the facts pleaded in I.P.No. 25 of 2014.

28. The said petition was filed under Section 9 d(iii)(g) and 10 to 12 of the Presidency Towns Insolvency Act 1909 by a petitioning creditor, Smt. Chitra Desai, who claimed that she had forwarded a cheque on 08.04.2010 for a sum of Rs.10/- lakhs initially to the first respondent and later, on being impressed with promptly repayment of paying the interest, she and her husband had made deposits to a sum of Rs.60/-lakhs.

29. In the petition, she claimed that from August 2013, the first respondent started to default in making payments. He held out an assurance that he would pay the amounts due for August and September 2013 in the second week of September 2013, but the money was not so deposited. The petitioner claimed that she tried to contact him but was not able to get in touch with him. She had then contacted a mutual friend, who had initially introduced the insolvent to her but that friend was also not able to get through to the first respondent. This was the situation in September 2013. Thereafter, even in October 2013, the cheques for the interest amounts were not paid and efforts to reach out to the first respondent failed. In November again efforts to contact the first respondent proved vain. Again, the petitioner and many of the creditors met in Delhi in December 2013 and took a decision to take some action against the first respondent. She then stated that her friend, who had introduced the insolvent to her, and her brother K.Murali had lodged a complaint on 03.01.2014 before the police at Chennai. On 06.01.2014 the petitioner arrived at Chennai and was informed that the first respondent was interested in settling the dispute with the petitioner's friend and her family members. She was then issued with postdated cheques dated 06.04.2014 but on 25.01.2014 her friend contacted her and informed her that the first respondent had requested every one to whom he had issued postdated cheques to refrain from depositing the cheques till further instructions.

30. Thereafter, a copy of a letter was forwarded to her informing this aspect. In January 2014, the petitioner was convinced that the first respondent was in insolvent conditions. It was only thereafter, after making further efforts to contact him that she had presented a petition on 10.03.2014 seeking to declare him as an insolvent under Section 9 d (iii) (g) of the Presidency Towns Insolvency Act 1909.

31. A careful analysis of the facts stated would show that in December

2013, the first respondent had begun to avoid making payments to the creditors. But on 24.12.2013 in the midst of extreme distress conditions and crisis which he was facing, he had repaid a sum of Rs.2/- crores to the second respondent herein.

32. To conclude narration of the facts relating to the filing of the insolvency petition, it must also be stated that on service of notice, the first respondent had filed an affidavit and stating that he had no objection to be declared as insolvent. The said affidavit is extracted in entirety. It was as follows:-

> "*"I, Arjunlal Sunderdas, Son of K.Sunderdas, Hindu, aged 71 years permanent resident of No.23, Anderson Road, Chennai – 600 006 and presently residing at Lakshmi Nivas, No.16, Kumar Kripa Road, (West), Bangalore 560 001, do hereby solemnly affirm and sincerely state as follows:*
>
> 1. *I am the respondent in the above I.P., and am*

well acquainted with the facts of the case.

2. The above petition has been filed by the Petitioning Creditor seeking to declare me as an insolvent.

3. I am unable to pay the debts to my creditors. I have no objection to being declared as an insolvent.

4. I undertake to co-operate the official assignee as may be directed by this Hon'ble Court.

5. Presently I am taking treatment due to multi organ disfunction and I am unable to put my signature.

6. The contents of the affidavit was explained to me and after having understood the same, I have affixed my thumb impression."

33. Thus, the first respondent had himself admitted to insolvent circumstances. When that was the circumstance surrounding his financial position from August 2013, the fact that he had preferred the second respondent alone to effect repayment of a substantial sum of Rs.2/- crores clearly shows that such repayment was voluntary and a voluntary preference over and above the other creditors and to their detriment.

34. The conduct of the first respondent in submitting to insolvency his intention was to prefer the second respondent over and above the other creditors. That preference was dominant and can also be inferred from the fact that he also admitted to be declared as insolvent on receipt of notice in the insolvency petition.

35. One need not go beyond the facts stated in the insolvency petition. Those facts have been admitted by the first respondent himself. He had admitted each and every allegation including that in December 2013 he was not able to repay the amounts due to his creditors by filing an affidavit submitting to be declared as insolvent. Even during evidence, the Official Assignee had put a suggestion to the witness for the second respondent that coercion could have been exerted by the second respondent, but no specific affirmation or denial flowed from the mouth of the witness. This would only imply that the second respondent was preferred by the first respondent for repayment of the loan due and that preference being to the detriment of the other creditors has to be declared as fraudulent. Every other creditor had stood to loss as otherwise this amount of Rs.2/- crores would have been retained in the estate of the insolvent for distribution at prorata basis.

36. In this connection, the observations of the Division Bench in ***Dev. Traders (91 LW 305)*** *(referred supra)* can be again reiterated:

> *"In order to constitute a fraudulent preference, the act of the debtor must be voluntary. In other words,* ***it must be a deliberate or spontaneous act, an act of free-will. P****ayment under pressure, legal or illegal, is not a voluntary act.* ***Fraudulent preference implies a***

deliberate discrimination between creditors. ***I****f the dominent intention of the debtor was to benefit himself, then the payment to one creditor alone would not constitute an act of insolvency. "*

[Emphasis Supplied]

37. The cryptic words of ***Patanjali Sastri, J.*** [as his Lordship then was], in ***54 L.W. 259 [Vempati Venkayya Vs. The Official Receiver, Guntur],*** can also be reiterated:-

*"In other words according to these decisions****, though the onus of proving the intent to prefer lies on the Receiver and never shifts, it is open to the Court to infer such intention*** *when that is* ***the only way of explaining the transaction and no other explanation is possible."***

[Emphasis Supplied]

38. In 'The Law of Insolvency in India' by Sri Dinshaw Fardunji Mulla, Fifth Edition, the learned author at para 632, page 566 has reduced the conditions very succinctly as follows:-

> *"It is necessary to prove (1) that the debtor was, when he made the transfer or payment, unable to pay his debts as they became due out of his own money, in other words, that the preferential transfer or payment was made on the eve of insolvency, and (2) that insolvency ensued within three months of the date of the transaction. These are the two statutory tests now prescribed in lieu of an inquiry into the state of the debtor's mind whether the preferential payment was in contemplation of bankruptcy."*

39. The only way of explaining this act of preferential repayment of debt to the second respondent to the detriment of the other creditors is that the insolvent had preferred the second respondent over and above the other creditors. This is fraudulent preference. The five conditions stipulated under Section 56 of the Presidency Towns Insolvency Act, 1909 are satisfied on the date of repayment of Rs.2,00,00,000/- [Rupees Two crores only] to the second respondent, the first respondent was not able to pay the other creditors, there was a transfer in favour of the second respondent and this transfer was a preference of the second respondent over the other creditors and that the repayment was made on 24.12.2023 within a period of three months from the date of presentation of the Insolvency Petition which was on 10.03.2014. The repayment was certainly not bona fide as the first respondent himself admitted to insolvency by filing an affidavit urging the Court to declare him as insolvent. That conduct is relevant. He had admitted to insolvency after preferring the second respondent over other creditors and to their detriment at a time when he was under financial crisis. To reiterate the words of ***Patanjali Sastri J*** *"that is the only way of explaining the transaction and no other explanation is possible.*"

40. In view of the above reasons, we have no hesitation to hold and declare that the payment of Rs.2,00,00,000/- [Rupees Two crores only] made to the second respondent on 24.12.2013 was a fraudulent preference and void against the Official Assignee.

Dr. G. JAYACHANDRAN, J.
&
C. V. KARTHIKEYAN, J.

vsg

41. A Judgment and Decree is passed directing the second respondent to repay the amount of Rs.2,00,00,000/- (Rupees Two Crores only) together with interest at 18% p.a., from 24.12.2013 and with costs.

(Dr.G.J.J.,) (C.V.K.J.,)
22.03.2024

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Pre-Delivery Order made in
Application (IP) No. 172 of 2017
in
I.P.No.25 of 2014