



O.S.A.Nos.268 and 269 of 2021

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Date of Reserving the Judgment	Date of Pronouncing the Judgment
19.11.2025	27.11.2025

CORAM:

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

O.S.A.Nos.268 and 269 of 2021
and
C.M.P.Nos.12123 and 12520 of 2021

O.S.A.No.268 of 2021:-

Kotak Mahindra Bank Limited,
No.3, Dass India Tower,
2nd Floor, 2nd Lines Beach,
Parrys, Chennai – 600 001.

... Appellant

vs.

1.A.Manohar Prasad

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

... Respondents

PRAYER : Original Side Appeal filed under Section 8(2) of the Presidency Towns Insolvency Act, 1909 read with Clause 15 of the Letters Patent and Order 36 Rule 1 of the Original Side Rules, against the judgment and decree dated 14.06.2021, made I.A.No.299 of 2018 in I.P.No.5 of 2013, on the file of the



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Original Side of this Court.

O.S.A.No.269 of 2021:-

Kotak Mahindra Bank Limited,
No.3, Dass India Tower,
2nd Floor, 2nd Lines Beach,
Parrys, Chennai – 600 001.

... Appellant

vs.

1.A.Manohar Prasad

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

... Respondents

PRAYER : Original Side Appeal filed under Section 8(2) of the Presidency Towns Insolvency Act, 1909 read with Clause 15 of the Letters Patent and Order 36 Rule 1 of the Original Side Rules, against the judgment and decree dated 14.06.2021, made I.A.No.298 of 2018 in I.P.No.5 of 2013, on the file of the Original Side of this Court.

For Appellant in both the O.S.As. : Mr.H.Karthick Seshadri

For R1 in both the O.S.As. : Mr.V.Raghavachari
Senior Counsel
for Ms.Shubharanjani Ananth

For R2 in both the O.S.As. : Mr.N.P.Jayakumar



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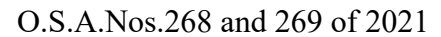
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COMMON JUDGMENT

The Hon'ble the Chief Justice, by noting dated 28.08.2025 had nominated this Court under Clause 36 of the Letters Patent to hear the point on which the Division Bench [*S.S.Sundar* and *Dr.A.D.Maria Clete, J.J.,*] had differed while delivering the common judgment in O.S.A.Nos.268 and 269 of 2021 on 29.04.2025.

2. A perusal of the judgment of the Division Bench revealed that both the learned Judges did not specify the exact point of difference, as required under Clause 36 of the amended Letters Patent. However, I am fortified by the decision reported in **2007 (2) MLJ 129 [All India Anna Dravida Munnetra Kazhagam, Chennai vs. State Election Commissioner and others]**, wherein at Paragraph 182, it has been held as follows:-

"182.Even though Clause 36 of the Letters Patent requires that if the opinion of the Judges should be equally divided, "they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be



3. I have heard Mr.H.Karthik Seshadri, learned counsel for the appellant in both the appeals and Mr.V.Raghavachari, learned Senior Counsel for the first respondent in both the appeals on the specific point on which difference had arisen in the reasoning of the learned Judges. The learned Official Assignee for the second respondent was also present.

4. The learned counsels pointed out that both the Original Side Appeals have arisen from a common order dated 14.06.2021, passed by a learned Single Judge of this Court [*P.T.Asha, J.*] in Appln.Nos.298 and 299 of 2018 in I.P. No.5



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of 2013.

5. The primary point on which the learned Judges differed was regarding the applicability of Section 12(2) of the Presidency Towns Insolvency Act, 1909 [hereinafter called 'the Act'].

6. In the judgment, *S.S.Sundar, J.* held that the provisions was directory and not mandatory.

7. However, *Dr.A.D.Maria Clete, J.* held a contrary view, stating that compliance under Section 12(2) of the Act was mandatory and constituted a pre-requisite for initiating insolvency proceedings. She further opined that failure to comply would result in annulling the order of adjudication.

8. The only question that therefore arises for consideration in this reference is "*whether the provisions of Section 12(2) of the Act are mandatory or directory in nature?*"

Background facts:-

9. The appellant herein had filed I.N.No.11 of 2009 seeking recourse to Section 9(2) of the Act and for issuance of an insolvency notice to the



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respondents therein, A.Ravi Shankar Prasad and A.Manohar Prasad, both sons of L.V.Prasad. It must be stated at the outset that the Original Side Appeals have been filed against A.Manohar Prasad, as A.Ravi Shankar Prasad had expired during the pendency of the proceedings. In the affidavit filed in I.N.No.11 of 2009, the appellant, M/s.Kotak Mahindra Bank Ltd., contended that M/s.Green Gardens Private Ltd. and M/s.Gemini Arts Private Ltd., in which both A.Ravi Shankar Prasad and A.Manohar Prasad were Directors, had enjoyed banking facilities with M/s.Ind Bank Housing Ltd. The respondents had also stood as guarantors in their individual capacities. M/s.Ind Bank Housing Ltd. had filed C.S.No.33 of 1999 and C.S.No.52 of 1999 on the Original Side of this Court seeking recovery of the outstanding dues.

9.1. M/s.Ind Bank Housing Ltd. assigned the debts in favour of the petitioning creditor, M/s.Kotak Mahindra Bank Ltd., by an assignment deed dated 13.10.2006, consequent to which all the rights and liabilities of M/s.Ind Bank Housing Ltd., as against M/s.Green Gardens Private Ltd. and M/s.Gemini Arts Private Ltd., and the respondents, A.Ravi Shankar Prasad and A.Manohar Prasad, stood vested with the petitioning creditor, M/s.Kotak Mahindra Bank Ltd., who



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was also substituted as plaintiff in the two Civil Suits.

9.2. Both the suits ended in a compromise and a compromise decree was passed on 26.03.2007. A.Ravi Shankar Prasad and A.Manohar Prasad became liable to pay the decree amount.

9.3. In I.N.No.11 of 2009, complaining that the decree amounts of Rs.29,49,81,355/- and Rs.29,00,96,918/- in the two suits, C.S.No. 33 of 1999 and C.S.No.52 of 1999, were not paid and the decrees were not satisfied, and claiming the said amounts together with interest at 20% p.a. from the date of the assignment of rights in favour of the petitioning creditor till the date of filing of the petition in I.N.No.11 of 2009, the application was filed seeking issuance of an insolvency notice as provided under Section 9(2) of the Act.

9.4. The first respondent herein and A.Ravi Shankar Prasad filed Application No.435 of 2009 to set aside the insolvency notice. This application came up for consideration before a learned Single Judge of this Court [*V.Ramasubramanian, J.*] [*as His Lordship then was*], who, by an order dated



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16.07.2012, rejected the contentions raised, namely-

"(i) that the applicants had already tendered payment to respondent-Bank and that therefore, they do not owe any money to the Bank;

(ii) that Ind Bank Housing Limited, which was the original plaintiff in both the suits, was not a Bank at all and that in the decrees passed in both the suits, a record of tender of full payment and receipt of the same by the Bank has been made;

(iii) that the respondent-Bank has not produced any proof to show the assignment of debt by Ind Bank Housing Limited;

(iv) that even the consent decrees passed in the suits record the handing over of post-dated cheques for the entire decree amount and hence full satisfaction had already taken place; and

(v) that in any case, the decrees have become unenforceable in view of the challenge made to the validity of the same before Debts Recovery Tribunal-I, Chennai and the liberty given by the Division Bench of this Court to agitate those issues before the Tribunal."

9.5. It was further held that, on a perusal of the decree, which had been extracted in the order, that *"the judgment-debtors would be deemed to have committed default, if the amount indicated in the table under Clause 7(b), were*



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not paid even after the expiry of 270 days from 14.10.2006."

9.6. The learned Judge had also affirmed 14.10.2006 as the starting point for computing the period from which the final settlement amount under the decree was required to be paid. Finally, the learned Judge held that the grounds raised to set aside the insolvency notice do not withstand judicial scrutiny and, therefore, dismissed the application filed to set aside the insolvency notice.

9.7. The appellant herein then filed I.P.No.5 of 2013 against the first respondent herein, under Sections 9(2)(3), 10, 12 and 13 of the Act and Order IIIA of the Insolvency Rules, 1958, seeking to adjudicate the respondent as an insolvent and to direct that his estate be vested with the Official Assignee, along with consequential reliefs. In the affidavit filed in support of the Judge's Summons, the appellant herein had stated as follows:-

"9. The Petitioning Creditor does not hold any tangible security what so ever for the said amount. The Debtor has committed the act of Insolvency commencing from expiry of 35 days from the date of service of the insolvency notice dated 16.03.2009 ordered by this Hon'ble Court in



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I.N.No.11/2009 and the dismissal of Application No.435 of 2009, seeking to set aside the insolvency notice. The Debtor has committed the act of insolvency as stated above and this Insolvency Petition is filed to adjudicate the Debtor as an Insolvent based upon his aforesaid act of Insolvency. The petition is filed well within the time and this Hon'ble Court has jurisdiction to entertain this petition and adjudicate upon the subject matter."

9.8. In the meanwhile, the respondent herein and A.Ravi Shankar Prasad had also filed O.S.A.No.344 of 2012 challenging the order passed in Application No.435 of 2009, and the said Original Side Appeal came up for consideration before a Division Bench of this Court on 10.06.2015. It was noted that one of the appellants, A.Ravi Shankar Prasad, had died and his legal representatives had not been brought on record. The appeal was disposed of as abated as against the second appellant and for non-prosecution as against the first appellant, A.Manohar Prasad.

9.9. I.P.No.5 of 2013 then came up for consideration before a learned Single Judge of this Court [*K.Ravichandrababu, J.*], who, by an order dated



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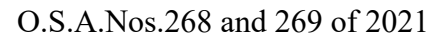
28.09.2015, after examining all the issues, observed as follows:-

"(iv) Various proceedings, including criminal proceedings are filed against the debtor on the allegations of misappropriation of public funds, availing loans by fraudulent means and by producing fabricated documents, and same are pending against him. The debtor does not have sufficient means and sources to discharge his liabilities, and hence, is liable to be declared as an insolvent. The petitioning creditor does not hold any tangible security, whatsoever, for the said amount. The debtor has committed the act of insolvency commencing from 35 days of Insolvency Notice dated 16.03.2009. The above act of insolvency is to be considered for adjudicating the debtor as insolvent."

9.10. The learned Single Judge further observed and held as follows:-

"5. This Petition is not opposed by the respondent/debtor, either by making the appearance through his counsel or by any other person, even though the counsel undertook to file Vakalat on behalf of the debtor on the last occasion. Therefore, this Court has got no other option, except to accept the contentions raised in this petition and consequently, to adjudicate the debtor as insolvent. Accordingly, this Petition is allowed."

9.11. Thereafter, the respondent herein, A.Manohar Prasad, filed I.A.Nos.312 and 313 of 2015, setting out various reasons for his failure to appear



"The appellants have a history of persistent defaults and non-compliance of directions and settlements. At one stage, it was accepted by the appellants that the amount due is Rs.43 Crores in March, 2007. After battling it out right till the Hon'ble Supreme Court, a direction was passed to deposit Rs.25 Crores at the first instance which was so deposited with the respondent/bank. However, the balance of Rs.18 Crores to be deposited, which is an aspect agreed to before the High Court, was not honoured within time-there is stated to be delay of two days.

We are making it clear that the restoration of the appeal does not amount to revival of the interim order and that is an aspect we will examine on the next date of hearing.



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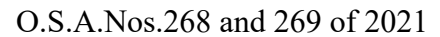
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List for directions on 06.01.2016."

9.12. The amount of Rs.18 Crores was not deposited, however, time was granted till 20.01.2016. On that date, the Division Bench held as follows:-

"The learned counsel for the appellants states that out of the two mortgaged properties as stated in Exhibit "A" at page No.118 of the typed set of papers, in respect of the first one i.e. land admeasuring 5 Acres situated in Survey No.11, Guttala Begampet village, Serilingam Pally Mandal and Municipality, Ranga Reddy District, Andhra Pradesh what has been proposed is developer`s agreement with the third party, which will directly pay a sum of Rs.18.00 Crores to the respondent Bank. This, ofcourse, does not end the larger question as the amount was settled in 2006/2007 and thus, the question of interest payable would arise. In order to secure the interest amount/operation of default clause, if any, the portion falling to the share of the appellants of the built up area would continue to remain mortgaged with the respondent Bank.

2. The aforesaid is acceptable to the learned counsel for the respondent Bank, but subject to the caveat that some third party has apparently filed proceedings in Hyderabad High Court in respect of this property and the appellants would have to obtain clearance from that third party/Court in this behalf. The documents in this scenario would be released directly to the developer by the respondent Bank, recording



3. *The period which is sought for by the appellants to carry out the exercise is 45 days from today, whereafter it can be safely assumed that even this last endeavour of the appellants has failed.*

5. List on 17.03.2016."

9.14. The Applications in Application Nos.312 and 313 of 2015, seeking to set aside the order adjudicating the first respondent as an Insolvent and to stay the said order, came up for consideration before a learned Single Judge of this Court



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[M.M.Sundresh, J.] [as His Lordship then was], who, by an order dated 19.10.2016, extracted the orders passed by the Hon'ble Supreme Court in S.L.P. No.23569 of 2011 preferred by the first respondent herein, and held as follows:-

"11. Thus, the principle governing the issue of éstoppal would govern the case. The other contentions relating to law and facts have already been dealt with, including the executability of the decree with reference to the Recovery of the Debts Due to the Banks and Financial Institutions Act, 1993. It is not, as if, the secured creditor cannot maintain the insolvency petition. The properties, which are subject matter of the suit, offered as security are admittedly involved in multiple litigations. A fraction of an amount paid impending strong and adverse action for having committed contempt cannot a ground to wriggle out of the insolvency proceedings. The decisions relied upon by the learned counsel for the applicant do not have any application to the case hand. Despite several opportunities given, there is absolutely no bona fides on the part of the applicant to comply with the requisite payment admitted by him."

9.15. It was finally held as follows:-

"11. After all, we are dealing with a chronic defaulter, who has evaded payment by using the judicial process for more than a decade.



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Therefore, this Court does not hesitate to hold that the applications lack absolute bona fides. Accordingly, they are dismissed."

9.16. As against the said order, the first respondent filed O.S.A.No.191 of 2017. Among the various grounds raised in the said Original Side Appeal, it would be relevant to extract Ground No.6, which has a direct bearing on the stand of the respondent in the present Original Side Appeals. Ground No.6 was as follows:-

"6. The learned Judge failed to see that the petition by a secured creditor was not maintainable without giving up the security or alleging something which would be plausible for it to maintain such petition. On the ground itself, the insolvency petition itself was liable to be dismissed."

9.17. This was the only ground urged before the Division Bench in the instant Original Side Appeals seeking to annul the adjudication of the first respondent as an Insolvent. After raising this specific ground in O.S.A.No.191 of 2017, the learned counsel for the first respondent, who was the appellant in the said Original Side Appeal, withdrew the appeal, and consequently, the following order was passed on 11.12.2018.



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Insolvent and to stay further proceedings. These applications had been addressed in detail, point by point, by the learned Single Judge in the order dated 19.10.2016. When that order was taken up in appeal on specific grounds, the appeal was withdrawn by the learned counsel.

9.21. Thereafter, the very same ground was again agitated in Application Nos.298 and 299 of 2018, the only change in relief being that, instead of setting aside the order of adjudication, the first respondent sought to annul it. These two applications came up for consideration before a learned Single Judge of this Court [*P.T.Asha, J.*], who, by order dated 14.06.2021, allowed both applications, thereby annulling the order of adjudication of the first respondent as Insolvent.

9.22. Challenging the said order, O.S.A.Nos. 268 and 269 of 2021 were filed by the appellant herein. The appeals came up for consideration before a Division Bench [*S.S.Sundar and Dr.A.D.Maria Clete, J.J.*], and in their judgment



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dated 29.04.2025, they differed on the point of whether Section 12(2) of the Act was mandatory or directory. *Justice S.S.Sundar* held that it was directory, while *Justice Dr.A.D.Maria Cleto* held that it was mandatory. In view of this difference of opinion, the matter has been assigned to this Court under Clause 36 of the Letters Patent.

10. It is under these circumstances that the following question has been framed for consideration:-

Whether the provisions of Section 12(2) of the Act are mandatory or directory in nature?

11. Even before taking up the said question for determination, it would only be appropriate to set out the relevant provisions of the Act.

11.1. Section 2(a) of the Act is as follows:-

"2. Definitions.—*In this Act, unless there is anything repugnant in the subject or context,—*

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(a) "creditor" includes a decree-holder;"

11.2. Section 12(1) and (2) and Act is as follows:-

"12. Conditions on which creditor may petition.—(1) *A creditor shall not be entitled to present an insolvency petition against a debtor unless*

(a) the debt owing by the debtor to the creditor; or, if two or more creditors join in the petition, the aggregate amount of debts owing to such creditors, amounts to five hundred rupees, and

(b) the debt is a liquidated sum payable either immediately or at some certain future time, and

(c) the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition:

Provided that where the said period of three months referred to in clause (c) expires on a day when the Court is closed, the insolvency petition may be presented on the day on which the Court reopens.

(2) 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



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the same way as if he were an unsecured creditor."

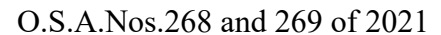
11.3. Section 17 of the Act is as follows:-

"17. Effect of order of adjudication.—*On the making of an order of adjudication, the property of the insolvent wherever situate shall vest in the official assignee and shall become divisible among his creditors, and thereafter, except as directed by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt or shall commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose:*

Provided that this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed."

11.4. Section 21 of the Act is as follows:-

"21. Power for Court to annul adjudication in certain cases.—*(1) Where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent are paid in full, the Court shall, on the application of any person interested, by order annul the*



(2) *For the purposes of this section, any debt disputed by a debtor shall be considered as paid in full, if the debtor enters into a bond, in such sum and with such sureties as the Court approves, to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt, with costs, and any debt due to a creditor who cannot be found or cannot be identified shall be considered as paid in full if paid into Court."*

"26. Meeting of creditors.—(1) *At any time after the making of an order of adjudication against an insolvent, the Court, on the application of a creditor or of the official assignee, may direct that a meeting of creditors shall be held to consider the circumstances of the insolvency and the insolvent's schedule and his explanation thereof and generally as to the mode of dealing with the property of the insolvent.*

11.6. The relevant portion of Section 112 of the Act is as follows:-



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"112. Rules.— (1) *The Courts having jurisdiction under this Act may from time to time make rules for carrying into effect the objects of this Act.*

(2) *In particular and without prejudice to the generality of the foregoing power, such rules may provide for and regulate—*

(a) - (i) * * *

(j) *the proceedings to be taken in connection with proposals for composition and schemes of arrangement with the creditors of insolvent debtors;"*

11.7. Section 118 of the Act is as follows:-

"118. Formal defect not to invalidate proceedings.—(1) *No proceeding in insolvency shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that Court.*

(2) *No defect or irregularity in the appointment of an official assignee or member of a committee of inspection shall vitiate any act done by him in good faith."*

11.8. It would also be appropriate to extract Rules 11 and 13 of the First



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Schedule, which relate to Section 26 of the Act. Rules 11 and 13 are as follows:-

"11. Secured creditor.—*For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance, if any, due to him after deducting the value of his security. If he votes in respect of his whole debt, he shall be deemed to have surrendered his security, unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence.*

13. Power to require creditor to give up security.—*It shall be competent to the official assignee, within twenty-eight days after a proof estimating the value of a security has been made use of in voting at any meeting, to require the creditor to give up the security for the benefit of the creditors generally, on payment of the value so estimated."*

12. Heard arguments and perused the material records.

13. The following facts are admitted and cannot be denied or disputed:

(i) M/s.Green Gardens Private Limited and M/s.Gemini Arts Private Limited, represented by their Directors, A.Ravi Shankar Prasad and A.Manohar



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Prasad, had obtained loans from M/s.Ind Bank Housing Limited.

(ii) The first respondent herein, along with his brother A.Ravi Shankar Prasad, stood as guarantors for the due repayment of the loans.

(iii) A.Ravi Shankar Prasad passed away during the pendency of the proceedings.

(iv) M/s.Ind Bank Housing Limited instituted two separate suits, C.S.Nos.33 of 1999 and 52 of 1999, seeking recovery of the amounts due.

(v) A Memo of Compromise was entered into between the plaintiff and the defendants, including the first respondent.

(vi) A Deed of Assignment was executed by the plaintiff, M/s.Ind Bank Housing Limited, assigning its rights and liabilities to the appellant, M/s.Kotak Mahindra Bank Limited.

(vii) A consent decree was passed based on the compromise on 26.03.2007.

(viii) C.S.No.52 of 1999 was decreed, directing the first respondent and other defendants to pay a sum of Rs. 29,00,96,918/- together with interest at 20%



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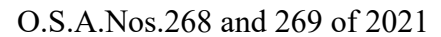
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p.a., calculated at quarterly rests, from 14.10.2006 until the date of payment to the appellant.

(ix) C.S.No.33 of 1999 was also decreed, directing the first respondent and other defendants to pay a sum of Rs.29,49,81,355/- together with interest at 20% p.a., compounded quarterly, from 14.10.2006 until the date of payment to the appellant.

14. The appellant had taken various steps to recover the amounts due and ultimately filed I.N.No.11 of 2009 under Section 9(2) of the Act. The steps taken by the first respondent herein to set aside the notice met with dismissal both before a learned Single Judge and before the Division Bench. Thereafter, the appellant filed I.P.No.5 of 2013 seeking to adjudicate the first respondent as an insolvent.

15. The first respondent herein was adjudicated as insolvent by order dated 28.09.2015. The efforts of the first respondent to set aside the said order were dismissed both before a learned Single Judge of this Court and before the



16. The first respondent also approached the Hon'ble Supreme Court, but the order of adjudication of insolvency was not set aside.

17. In one of the appeals preferred by him in O.S.A.No.191 of 2017, the first respondent raised a specific ground that, as a secured creditor, the appellant had not given up the security, and therefore, the application filed to adjudicate him as insolvent was not maintainable. The appellant abandoned O.S.A.No. 191 of 2017 by withdrawing it, allowing it to be dismissed by order dated 11.12.2018, which effectively meant that the grounds raised in the said Original Side Appeal were also abandoned.

18. Subsequently, the first respondent filed Application Nos.298 and 299 of 2018 seeking to annul the adjudication on the ground that the appellant had failed to comply with the requirements under Section 12(2) of the Act. The first respondent contended that, as a secured creditor, the appellant should have



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disclosed the security and its value and could have proceeded with the Insolvency Petition only if the amount due exceeded the value of the security, and only for the deficit amount thereafter.

19. A learned Single Judge found force in the said argument and annulled the order of adjudication of insolvency by an order dated 14.06.2021.

20. The appellant herein then filed the present O.S.A.Nos.268 and 269 of 2021.

21. A Division Bench of this Court delivered a split verdict, with one learned Judge holding that compliance with the requirements under Section 12(2) of the Act was directory, while the other learned Judge held that it was mandatory. It is under these circumstances that this Court must now examine the sole question, whether the requirements or stipulations under Section 12(2) of the Act are directory or mandatory?



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22. In this context, it is necessary to examine Section 118 of the Act. The provision has already been extracted supra, and for immediate reference, it is again extracted here.

"118. Formal defect not to invalidate proceedings.—(1) No proceeding in insolvency shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that Court.

(2) No defect or irregularity in the appointment of an official assignee or member of a committee of inspection shall vitiate any act done by him in good faith."

23. This provision had been pressed into service by a Division Bench of the Calcutta High Court in **Ahamed Mahammad Paruk vs. Praphullanath Tagore** reported in **1934 SCC OnLine Cal 313 : ILR (1934) 61 Cal 924 : AIR 1935 Cal 84**, wherein the following contention had been raised.

"The other point taken by Mr. Page is that the petition itself, on which these proceedings were founded, is bad and, therefore, no order



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involving adjudication could in any case be made. The point relied upon by Mr. Page is that section 12 of the Presidency-towns Insolvency Act sets out the conditions upon which a creditor can make a petition and in sub-section (2) of section 12 it is enacted that—

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.

The object of that sub-section is of course this:— The creditor cannot have it both ways. He has got his security. He must, therefore, use it to discharge the debt either wholly or pro tanto according to the value of the security or he must relinquish it. If he retains his security and uses it to discharge his debt as far as the security goes then if there is any balance remaining unsatisfied he can use that to constitute a debt for the amount of the deficit for the purpose of founding proceedings in insolvency.

In the present case, Mr. Page has taken exception to the statement in paragraph 3 of the petition. The petitioning creditor Praphullanath Tagore there said this:

I do not, nor does any person on my behalf, hold any security on



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the said debtor's estate or any part thereof for the payment thereof. That the said money is payable to me immediately.

That, says Mr. Page, is an incorrect statement

By virtue of the provisions of that section, Mr. Page has argued that Praphullanath Tagore is a secured creditor; as regard's the debts upon which he is bringing the insolvency proceedings because in section 2, sub-section (g) of the Presidency-towns Insolvency Act, "secured creditor" is described as including "a landlord who under any enactment for the time being in force has a charge on land for the rent of that land". Mr. Page says that the petitioner is a landlord and he has a statutory charge on the property for the rent. He is, therefore, a secured creditor and must comply with the provision of sub-section (2) of section 12.

It seems clear that has not been done.

.....

*Mr. Page relied upon the case of **Moor v. Anglo-Italian Bank [(1879) 10 Ch.D. 681, 689.]**, where Sir George Jessel, M.R., at page 689, says:—*

The rule in bankruptcy requires the judicial authority in bankruptcy — the Registrar or the Judge, as the case may be—before he adjudicates a man a bankrupt, to see there is a proper unsecured debt in the manner I have explained. But if the adjudication is made without this being looked into, the only result is, the adjudication is bad, and you may



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set it aside in due time. It does not deprive the petitioning creditor of anything that I am aware of, and you must carefully distinguish between the notion of for, feiture and the decisions on the doctrine of election in bankruptcy which relate to a totally different subject.

*But I would point out that this passage in the judgment of Sir George Jessel has been strongly commented upon in **In re A Debtor** [[1922] 2 K.B. 109, 111] , the headnote of which says that:—*

Where a petitioning creditor had inadvertently omitted to mention in his petition a security which he in fact held, but which had been given many years ago in respect of another matter, and was admittedly valueless:—

Held, that a receiving order made upon the petition was not invalidated by the omission, inasmuch as the Court had power to amend the petition even after the making of the receiving order.

Lord Sterndale, M.R., in that case said—

This case does not present any merits. I do not know whether I may deal with a dictum of so great an authority as Jessel, M.R., and say I am sorry to see such a technical objection raised on the strength of that dictum. The petitioning creditors in their petition omitted to mention a security which had been given fifteen years ago in respect of another matter altogether, which did, however, in form cover this particular debt.



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It was a matter of no importance, but, as the receiving order was made without this security having been mentioned in the petition, it is said that the receiving order is bad.

*He goes on to say that the objection was founded upon a dictum of **Jessel, M.R., in Moor v. Anglo-Italian Bank [(1879) 10 Ch.D. 681, 689]**, where he says “in the next place, I am not aware of any rule in bankruptcy that forfeits the petitioning creditor's debt.” Later on. Lord Sterndale continued—*

It is said that dictum goes to this that if any security be omitted although of no importance or value, any order or proceeding on the petition is bad. If the learned Master of the Rolls meant his statement to extend to that, I think, with the greatest respect that one must always have for any dictum of Sir George Jessel, that it went too far. But it seems to me that he never intended it to go so far. The question is, suppose there were an omission of something of no value, something not affecting the matter in any way, does that make the receiving order altogether bad? I think that in a case like that Sir George Jessel would himself have said “No my dictum was never intended to go so far as that.”

I respectfully adopt all that Lord Sterndale said, and I agree that if the position was that the petitioning creditor inadvertently, and not deliberately, omitted to include or mention a security it might not be right



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that the proceedings should be wholly set aside."

24. The Division Bench held that the petition was not invalidated by the omission, as the Court had the power to amend the petition even after the making of the receiving order. In this connection, I must further point out Rule 11 of the First Schedule to the Act, which has been extracted above. For useful reference, Rule 11 is extracted again below:—

"11. Secured creditor.—For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance, if any, due to him after deducting the value of his security. If he votes in respect of his whole debt, he shall be deemed to have surrendered his security, unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence."

25. It has been very clearly stated that a secured creditor shall be deemed to have surrendered his security unless the Court, on application, is satisfied that the omission to value the security has arisen from inadvertence.



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26. This saving clause, which provides a window for filing an application either explaining the omission to value the security or furnishing the value of the security, clearly indicates that the stipulation under Section 12(2) of the Act is directory and not mandatory.

27. The omission can therefore be regarded only as a '*formal defect*'. In **V.Rajendran and another vs. Annasamy Pandian (Dead) Through Legal Representatives, Karthyayani Natchiar** reported in (2017) 5 SCC 63, the Hon'ble Supreme Court had occasion to examine the meaning of the term '*formal defect*'. It was held as follows:—

"9. Order 23 Rule 1(3) CPC lays down the following grounds on which a Court may allow withdrawal of suit. It reads as under:

"1. Withdrawal of suit or abandonment of part of claim.—

*(1)-(2) * * **

(3) Where the Court is satisfied—

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,



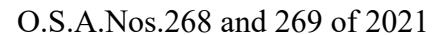
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it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim." (emphasis supplied)

As per Order 23 Rule 1(3) CPC, suit may only be withdrawn with permission to bring a fresh suit when the Court is satisfied that the suit must fail for reason of some formal defect or that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit. The power to allow withdrawal of a suit is discretionary. In the application, the plaintiff must make out a case in terms of Order 23 Rules 1(3)(a) or (b) CPC and must ask for leave. The Court can allow the application filed under Order 23 Rule 1(3) CPC for withdrawal of the suit with liberty to bring a fresh suit only if the condition in either of the clauses (a) or (b), that is, existence of a "formal defect" or "sufficient grounds". The principle under Order 23 Rule 1(3) CPC is founded on public policy to prevent institution of suit again and again on the same cause of action.

*10. In **K.S.Bhoopathy vs. Kokila [(2000) 5 SCC 458]** , it has been held that it is the duty of the Court to be satisfied about the existence of "formal defect" or "sufficient grounds" before granting permission to withdraw the suit with liberty to file a fresh suit under the same cause of action. Though, liberty may lie with the plaintiff in a suit to withdraw the suit at any time after the institution of suit on*



28. This concept of 'formal defect' has also been applied to special laws, such as the Arbitration and Conciliation Act, in a situation where an award had been presented, despite the mandatory statutory requirement that an award must be signed by the arbitrator and that an unsigned award cannot be enforced. This is the rule of the Court.



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29. A careful perusal of Section 12 of the Act in its entirety would show that Section 12(1) is certainly mandatory, since it begins with the words "*a creditor shall not be entitled to present an insolvency petition against a debtor unless*". These words are clear and definite, and they prohibit the filing of an insolvency petition unless the conditions stipulated in sub-section (1) of Section 12 of the Act are complied with.

30. However, in sub-section (2), the stipulation is not expressed with such definiteness. It merely signifies what a petitioning creditor must state, and when this provision is read along with the power conferred on the Court to record its satisfaction, on an application, that the omission to value the security had arisen from inadvertence, as provided under Rule 11 of the First Schedule to the Act, it becomes clear that Section 12(2) is only directory and not mandatory.

31. The judgment of the Division Bench of the Calcutta High Court lays down the same proposition, and I would align myself with that view.



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32. I must however also readily acknowledge that a contrary view has been taken by a very respected and revered learned Judge of this Court, [Sathiadev, J.], who in a judgment reported in **AIR 1982 Madras 18 : (1981) 94 LW 534 [S.Neelakanta Sarma vs. K.Govindarajulu and another]** held in paragraph 21, in facts similar to the present case, as follows:—

"21. For all the reasons above stated the applicant has clearly established that first respondent is a secured creditor, who had not fulfilled the requirements of S. 12 (2) of the Act before instituting I.P. No.46 of 1975 and therefore, it was a proceeding instituted without jurisdiction, and hence the applicant herein ought not to have been adjudged as an insolvent, and therefore, he would be entitled to an order of annulment under S. 21 of the Act."

33. The learned Judge had held that the applicant therein ought not to have been adjudged an insolvent, since the first respondent, a secured creditor, had not fulfilled the requirements of Section 12(2) of the Act before instituting the petition for adjudication.



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34. I am however constrained to point out, with due respect to the learned Judge, that in the order, reference was not made to Section 118 of the Act, which specifically provides, as extracted above, that a *formal defect* shall not invalidate proceedings. The attention of the learned Judge was not drawn to the judgment of the Division Bench of the Calcutta High Court, which had held that non-compliance with the stipulations under Section 12(2) of the Act would not result in annulment of an adjudication as insolvent.

35. On an examination of the facts of this case, it is evident that the first respondent had continuously defaulted in availing every opportunity granted to satisfy the decree. As a matter of fact, arguments were advanced that the consent decrees were not enforceable and not valid. However, both the learned Judges had agreed that the decrees were enforceable and valid. Once such a conclusion had been reached, the decree-holder must be afforded an opportunity to invoke the legal avenues available to realise the fruits of the decree. There is no bar preventing a decree-holder from filing an application seeking adjudication of the judgment-debtor as an insolvent.



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36. The only objection raised is that the petitioning creditor is a secured creditor and must therefore comply with the stipulations under Section 12(2) of the Act, failing which, the adjudication as insolvent should be annulled. But, as already held, the stipulation is directory and not mandatory.

37. For these reasons, I concur with the view expressed by the learned Senior Judge [*S.S.Sundar, J.*] that the provision is directory and not mandatory. Accordingly, the question framed for reference is answered by holding that Section 12(2) of the Act is directory and not mandatory.

38. I have consciously refrained from entering into the value of the securities or the availability of the securities, as these are matters to be examined by the learned Single Judge. The petitioning creditor is granted liberty to seek necessary amendment to the Insolvency Petition by furnishing details regarding the value of the securities, which are available and which may be proceeded against by the Official Assignee. Such application seeking amendment shall be



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dealt with in accordance with law in I.P.No.5 of 2013.

39. List I.P.No.5 of 2013 in the usual course before the learned Single Judge for further proceedings.

Index : Yes
NCC : Yes
smn2

27.11.2025

To

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



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C.V.KARTHIKEYAN, J.

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PRE-DELIVERY COMMON JUDGMENT MADE IN
O.S.A.Nos.268 and 269 of 2021

27.11.2025