
(1985) 12 MAD CK 0006

In the Madras High Court

Case No : Insolvency Petition No. 25 of 1985

Rajathi Rajasingh

APPELLANT

Vs

The Aluminium Products Corporation and Another

RESPONDENT

Date of Decision : 18-12-1985

Acts Referred:

Insolvency Rules, 1958 — Rule 6
Presidency Towns Insolvency Act, 1909 — Section 10, 11, 12, 13, 9(2)
Tamil Nadu Court Fees and Suits Valuation Act, 1955 — Section 44(3)

Citation : AIR 1986 Mad 362

Hon'ble Judges : K.M. Natarajan, J

Bench : Single Bench

Judgement

1. This petition is filed by the petitioning creditor under Sections 9(2) and 10 to 13 of the Presidency Towns Insolvency Act to adjudicate the respondents as insolvents.

2. The grounds on which the above petition is filed, are that the petitioner filed a suit in O.S. No. 9100 of 1981 before the 17th Assistant Judge, City Civil Court, Madras, for recovery of possession of the suit property and for mesne profits. The said suit was decreed on 28-4-1984 and as per the decree the respondents are liable to pay a sum of Rs. 88,179.75. It is the further case of the petitioner that under the provisions of the amended Insolvency Act, insolvency notice was sent to the respondents in I.N. No. 9 of 1985 calling upon them to pay the above sum. Though the respondents acknowledged the said notices on 6-4-1985 and 9-4-1985 respectively, they did not, choose to send any reply nor comply with the said notice and hence they have committed an act of insolvency u/s 9(2) of the Act. According to the petitioner, the respondent are heavily

involved in debts and hence the petition.

3. The said petition was resisted by the respondents and they filed a counter inter alia contending that the petition is not maintainable either in law

or in facts inasmuch as the decree passed in O.S. No. 9100 of 1981 is neither enforceable nor conclusive and hence the petition is liable to be

dismissed in limine. They further denied that they are heavily involved in debts.

4. Both sides have not adduced any oral evidence and the learned counsel appearing on either side only advanced arguments in support of their respective contentions.

5. The only point that arises for consideration in this insolvency petition is, whether the petitioner can enforce the decree for recovery of Rs.

88,179.75 and whether the respondents can ignore the insolvency notice.

6. According to the learned counsel for the respondents, there is no decree at all for enforcing the claim of Rs. 88,179.75 towards the future

mesne profits since the petitioner has not paid the necessary court-fee for drafting the decree and at such, the insolvency notice issued for recovery

of the said amount in the absence of any decree is void ab initio and consequently it cannot be said that the respondents have committed an act of

insolvency on account of the failure of the respondents to take any step to set aside the insolvency notice within the time allowed or till this day. On

the other hand, it is the contention of the learned counsel for the petitioner that there is a valid decree in respect of the mesne profits and that the

question of paying court-fee arises only at the time of filing execution petition. Further, in the instant case, the respondents who failed to raise any

objection to the insolvency notice are deemed to have committed an act of insolvency and they are stopped from raising any contention. Further,

u/s 9(2)(5)(c) of the Presidency Towns Insolvency Act, the contention regarding the executability of the decree can be raised under any law

referred to in Clause (b) of Section 9(2)(5) which refers only to law providing for the relief of indebtedness.

7. To appreciate the respective contentions of the parties it is worthwhile to extract the relevant provision of the Presidency Towns Insolvency Act,

namely, the amended provision of Sec. 9(2) of the Presidency Towns Insolvency Act 1909. By virtue of the Insolvency Laws (Amendment) Act,

1978, No. 28 of 1978, the Parliament had enacted the following provision: -

9(2). Without prejudice to the provisions of sub-section (1), a debtor commits an act of insolvency if a creditor, who has obtained a decree or

order against him for the payment of money (being a decree or order which has become final and the execution whereof has not been stayed), has

served on him a notice (hereafter in this section referred to as the insolvency notice) as provided in sub-section. (3) and the debtor does not

comply with that notice within the period specified therein :

Provided that where a debtor makes an application under sub-section (5) for setting aside an insolvency notice -

(a) in a case where such application is allowed by the Court, he shall not be deemed to have committed an act of insolvency under this sub-section;

and

(b) in a case where such application is rejected by the Court, he shall be deemed to have committed an act of insolvency under this sub-section on

the date of rejection of the application or the expiry of the period specified in the insolvency notice for its compliance, whichever is later:

Provided further that no insolvency notice shall be served on a debtor residing, whether permanently or temporarily outside India, unless the

creditor obtains the leave of the Court therefor.

(3) An insolvency notice under subsection (2) shall -

(a) be in the prescribed form;

(b) be served in the prescribed. manner;

(c) specify the amount due under the decree or order and require the debtor to pay the same or to furnish security for the payment of such amount

to the satisfaction of the creditor or his agent;

(d) specify for its compliance a period of not less than one month after its service on the debtor or, if it is to be served on a debtor residing,

whether permanently or temporarily, outside India, such period (being not less-, than one month) as may be specified by the order of the Court

granting leave for the service of such notice;

(e) state the consequences of noncompliance with the notice.

(4) No insolvency notice shall be deemed to be invalid by reason, only that the sum specified therein as the amount due under the decree or order

exceeds the amount actually due, unless the debtor, within the period specified in

the insolvency notice for its compliance, gives notice to the creditor that the sum specified in the insolvency notice does not correctly represent the amount due under the decree or order;

Provided that if the debtor does not give any such notice as aforesaid, he shall be deemed to have complied with the insolvency notice if, within the period specified therein for its compliance, he takes such steps as would have constituted "a compliance with the insolvency notice had the actual amount due been correctly specified therein.

(5) Any person served with an insolvency notice may, within the period specified therein for its compliance, apply to the Court to set aside the insolvency notice on any of the following grounds, namely: -

(a) that he has a counter-claim or set off against the creditor which is equal to or is in excess of the amount due under the decree or order and

which he could not, under any law for the time being in force, prefer in the suit or proceeding in which the decree or order was passed;

(b) that he is entitled to have the decree or order set aside under any law providing for the relief of indebtedness and that -

(i) he has made an application before the competent authority under such law for the setting aside of the decree or order; or

(ii) the time allowed for the making of such application has not expired;

(c) that the decree or order is not executable under the provisions of any law referred to in Clause (b) on the date of the application"".

Order III-A of the Insolvency Rules, 1958, deals with the insolvency notice, and as per Rule 1, a creditor, desirous that an insolvency notice u/s

9(2) of the Act may be Issued, shall produce a certified copy of the decree or order on which the notice is founded and file the notice and an

affidavit of satisfaction of the decree together with a request to the Court for issue. The creditor shall at the same time lodge with the Court two

copies of the. insolvency notice to be scaled and issued for service. Under Rule 3, the particulars of the notice had been detailed, which includes

the aggregate amount due to the creditor and the particulars of the decree under which the amount is claimed. Under Rule 6, it is specifically

provided that the non-compliance by the debtor with the requirements of the notice within the specified period will be treated as an act of

insolvency on the debtor's part.

8. In the instant case, admittedly, though the respondents were duly served with the insolvency notice, they have not taken any step to set aside the notice or comply with the demand made therein by making payment or furnishing security for payment of the amount to the satisfaction of the creditor. It is to be noted that admittedly the petitioner has executed the decree regarding delivery of possession and the cost of the suit. The claim now made is only in respect of the mesne profits. Under Clause (2) of the decree in O.S. No. 9100 of 1981 it is Provided as follows : ""The defendants do pay to the plaintiff mesne profits at the rate of Rs. 2,000/-per month from 1-12-1981 till the date of delivery of vacant possession on payment of the requisite court-fee"". Learned counsel appearing for the respondents drew my attention to the relevant provisions of Section 44 of the Court-fees Act and submitted that unless the court-fees are paid, no decree or final decree can be drafted. The decree in O.S. No. 9100 of 1981 does not contemplate any final decree and that itself is a valid final decree. Learned counsel for the respondent drew my attention to sub-sections (1) and (2) of Section 44 of the Tamil Nadu Court-fees and Suits Valuation Act 1955, in this regard. Those sub-sections are not applicable to the facts of this case. The only relevant provision applicable is sub-clause (3) of section 44 which reads as follows:-

Where, for a period subsequent to the date of the decree or final decree, such decree or final decree directs payment of mesne profits at a specified rate, such decree or final decree shall not be executed until the fee computed on the amount claimed in execution has been paid"".

On a perusal of the above provision, it is clear that if a decree already directs payment of mesne profits at a specified rate, such decree can be executed on payment of necessary court-fee, and as such, it cannot be said that there is no decree at all-for the claim made by the petitioner regarding mesne profits. The quantum claimed by the petitioner as per the decree is also not in dispute. The question of paying the court-fees arises only at the time of filing the execution petition as a condition precedent. But, on that score it cannot be said that at the time when the insolvency notice was issued that the decree has not become final and the execution whereof has been stayed so as to invalidate the insolvency notice.

9. In this connection, the learned counsel for the respondents drew my attention to the decision of this Court reported in Karuppanna Gounder and

Others Vs. Chennimalai Gounder, where Ramaprasada Rao J. (as he then was) held : that the plaintiff, who had filed the appeal against the decree awarding mesne profits, had to pay court-fee at the rate of Rs. 1,700/- per annum towards mesne profits being the difference between the amount claimed in the appeal and that awarded by the trial court and that the plaintiff cannot seek for an indulgence to pay such court-fee after the disposal of the appeal and after the passing of the appellate final decree. The said decision is not in any way helpful to the contention of the respondents as it does not say that the decree is unenforceable or not executable. But, it reiterates that for maintaining the appeal, the necessary court-fee i.e. the difference between the amount claimed in the appeal and that awarded by the trial court has to be paid. The next decision relied on by the learned counsel for the respondents is Mohandass v. Haji Abdullah Sait (1978) 91 MLW 542. In that case, in a decree there is a provision for payment of mesne profits by the defendant at the monthly rate fixed by the court after paying the court-fees due on the mesne profits, the plaintiff applied to the court for payment out from out of the monies deposited by him, seeking adjustment therefrom of the court-fee paid by him, on the mesne profits and costs due to him. The defendants opposed the same on the ground that the decree did not provide for the petitioners reimbursing the plaintiff in respect of the court-fee payable by him on the mesne profits and therefore they were not liable to pay the court-fees. In the circumstances, this court accepted the contention of the plaintiff that once the court has directed that the plaintiff should pay the court-fees and realise the mesne profits, it is implicit that the judgment debtors were liable to reimburse the court-fees so paid by the plaintiff. It was held :

The plaintiff was entitled to adjust the sum towards the court-fees which he paid for Withdrawing the mesne profits deposited by the petitioners into the court".

Even in that case, it was observed that "whether the plaintiff pays the court-fee at the stage of execution or at the stage of, drafting the decree itself, the fact remains that he is required to pay the court-fee and he does pay the court-fee on mesne profits which he realises from the defendant". The said decision also is not of any assistance to the contention of the respondents in this case. As already stated the question of drafting the final

decree does not arise as the decree which has already been passed itself directed the payment of mesne profits at specified rate and that the payment of court-fees arises at the execution stage and as it stands today, it cannot be said that the decree is unenforceable or void ab initio as contended by the learned counsel for the respondents, and there is no nonest decree for mesne profits without paying any court-fee. On the other hand, the learned counsel for the petitioner drew my attention to the decision of this court reported in *Deivanai Achi v Radhakrishnan* (1985) 1 MLJ 250. In the above quoted-case also, the contention on behalf of the respondent raised is that the decree in O.S. No. 3821 of 1975 is more than two years old and the last execution petition filed by the petitioning creditor 1430 of 1979 was dismissed on 1-8-1980 and more than two years have elapsed after the disposal of the above E.P. and as such the decree in O.S. No. 3821 of 1975 is not executable straightway in view of Order 21 Rule 22, CPC unless a show cause notice is issued to the judgment debtor. The said contention was repelled on the ground of amendment of Section 9(2) of the Presidency Towns Insolvency Act wherein the term not executable occurring in Section 9(2)(5)(c) is restricted only to cases where the decree cannot be executed on account of special enactment relating to relief of indebtedness referred to in Section 9(2)(5) (b). The ratio laid down in the said decision is applicable to the facts of the instant case, as the issue of notice in the execution petition as (was?) a condition precedent for execution of decree which is of more than 2 years old and the question of paying court-fee for execution of the decree arises only if the execution petition is filed and till then it cannot be said that the liability of the petitioner to pay the mesne profits does not exist. For the foregoing discussion, in view of the fact that the respondents have not chosen to take any step to set aside the insolvency notice and not complied with the same, they have committed an act of insolvency under the amended provision of section 9(2) read with the rules framed under Order III-A. Further, it cannot be said that the decree filed along with the insolvency notice and this petition is unenforceable and inconclusive as contended by the learned counsel for the respondents and in any event, it is not open to the respondents to raise the same in view of the provision of Section 9(2)(5)(c) of the Presidency Towns Insolvency Act.

10. In the result, the petitioner has made out a case for adjudicating the respondents as insolvents and consequently the petition is allowed and the respondents are adjudged as insolvents and their assets will vest with the Official Assignee. Costs will come out of the estate.
11. Order accordingly.