R. Swarup Reddy Vs M/s. Kotak Mahindra Bank Ltd., I Floor, Ceebros Enclave, 45 Montieth Road, Chennai 600 008. also at M/s. M/s. Kotak Mahindra Bank Ltd., Asset Reconstruction Division, 3 Dass India Tower, 2nd Floor, 2nd Line Beach, Parrys, Chennai 600 001

Court: Madras High Court

Date of Decision: Sept. 10, 2009

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Section 2, 2(14), 2(2)
Companies Act, 1956 â€" Section 442, 446, 446(1), 446(2)(d), 529
Constitution of India, 1950 â€" Article 136(1), 141
Hindu Marriage Act, 1955 â€" Section 26, 27, 28
Presidency Small Cause Courts Act, 1882 â€" Section 9, 9(2), 9(3), 9(5)
Presidency Towns Insolvency Act, 1909 â€" Section 9, 9(1)(e), 9(2), 9(2)
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 â€" Section 18, 19, 19(19), 20, 32

Citation: (2010) 1 MLJ 437

Hon'ble Judges: G. Rajasuria, J

Bench: Single Bench

Advocate: S.R. Rajagopal, for the Appellant; R. Yashod Vardhan, for M/s. Ramalingam, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

G. Rajasuria, J.
The epitome and the long and short of the germane facts, absolutely necessary for the disposal of this application would

run thus: The Kotak Mahindra Bank Limited (the petitioning creditor in Insolvency Notice No.35 of 2009) is a Banking Company registered under

the Banking Regulation Act, 1949. One Trans India Lamps Limited borrowed money from the State Bank of India for which, the respondent viz.,

R.Swarup Reddy (the respondent in Insolvency Notice No.35 of 2009) stood as guarantor. The debt was not repaid. Whereupon, the State Bank

of India approached the Debts Recovery Tribunal and got an order dated 27.10.2004, whereupon a Certificate of Recovery was also issued by

the Debts Recovery Tribunal. Subsequently, the State Bank of India, the original creditor transferred the said debt in favour of the Kotak

Mahindra Bank Limited as per the assignment deed dated 23.03.2006. Wherefore, the Debts Recovery Tribunal was approached, which also

effected muttadis muttandis changes/amendments to the recovery Certificate indicating that the Kotak Mahindra Bank Limited stepped into the

shoes of the State Bank of India. Thereafter, the Kotak Mahindra Bank Limited, on understanding that the debt due was not discharged by

R.Swarup Reddy, resorted to issuance of Insolvency Notice dated 23.04.2009 by invoking Section 9(2) of the Presidency Towns Insolvency Act,

1909. Whereupon the respondent in Insolvency Notice No.35 of 2009 filed this application with the following prayer:

to pass an order setting aside the insolvency notice

The whole kit and caboodle of facts and the gist and kernel of the grounds on which the said prayer was made by Swarup Reddy, could be

portrayed thus:

a) Section 9 (2) of the Presidency Towns Insolvency Act, 1909 (hereinafter called as ""the Act"") cannot be invoked for the reason that the recovery

certificate issued by the Debts Recovery Tribunal, Bangalore under the DCP No.3489 of 2004 in O.A.No.436 of 2001 cannot be equated to that

of an order or decree contemplated in Section 9(2) of the Act. Even though the State Bank of India might have assigned the debt in favour of the

Kotak Mahindra Bank Limited, nonetheless it would not constitute a Banking transaction and accordingly Debts Recovery Tribunal itself had no

jurisdiction to effect such amendment/corrections in the recovery certificate; wherefore, the Kotak Mahindra Bank Limited, being a Bank, cannot

resort to recovery proceedings as against the applicant/respondent Swarup Reddy.

b) The leave of the Company Board u/s 446 (1) of the Companies Act for resorting to recovery proceedings was not obtained by the Kotak

Mahindra Bank Limited in the wake of the fact that already principal borrower company viz., Trans India Lamps Limited, went into liquidation.

2. Refuting and remonstrating, challenging and impugning, the averments/allegations in the petition filed by Swarup Reddy, the Kotak Mahindra

Bank Limited filed its counter justifying the action taken by them.

3. Heard both sides.

4. The points for consideration are as to:-

1. Whether the decision rendered by the Debts Recovery Tribunal and the consequent issuance of recovery certificate can be equated to that of a

decree or order as contemplated u/s 9 (2) of the Act?

2. Whether permission from the Company Board u/s 446of the Companies Act was a sine qua non for the State Bank of India or Kotak Mahindra

Bank Limited to proceed further in this matter by way of recovering the debt ? and

3. Whether the assignment of debt effected by the State Bank of India in favour of the Kotak Mahindra Bank Limited could be termed as a

Banking activity within the meaning of Banking Regulation Act and consequently attracting the provisions of the Recovery of Debts due to Banks

and Financial Institutions Act, 1993 for resorting to recovery proceedings?

5. The tour d'' horizon of the arguments as put forth by the learned counsel for the applicant/respondent would run thus:

a) The term decree and order as contemplated u/s 9(2) of the Act should be interpreted in accordance with the definitions as contemplated in the

CPC under sub-sections (2) and (14) of Section 2of the Code of Civil Procedure.

b) Insolvency Act, being punitive in nature, no liberal interpretation can be resorted to and it should be strictly construed. Accordingly, the decision

rendered by the Debts Recovery Tribunal and the consequent issuance of the Recovery Certificate cannot be taken as either a decree or an order

of a civil court within the meaning of Section 9(2) of the Act.

c) After the issuance of the recovery certificate by the Tribunal it had become functus officio and it had no power subsequently to record the

assignment of the debt by the State Bank of India in favour of the Kotak Mahindra Bank Limited and effect changes in the recovery Certificate.

d) Since as against the principal borrower company, the winding up proceeding was already initiated on 23.08.2005, without the permission from

the company Board, neither the State Bank of India nor the Kotak Mahindra Bank Limited possesses any right to proceed for recovery of the

debt.

6. By way of torpedoing and pulverising the arguments as put forth on the side of the applicant/respondent, the learned senior counsel for the

respondent/creditor would advance and set forth the following arguments:

(i) The term decree and order is not suffixed by any term, viz., ""of a civil court"" and in such a case, it could be construed that legislators intended

that not only the decree and order of a civil court alone could be the basis for invoking Section 9(2), but it could be the decree or order of any

other forum or fora including tribunals like Debts Recovery Tribunal. Such omission of the term ""of a civil court"" after the words ""decree or order

in Section 9(2) of the Act, is a conscious one so as to give wider scope for invoking the provisions of the Act and it cannot be throttled by narrow

interpretations.

ii) The winding up proceedings were initiated only as against the principal borrower and not against the guarantor, namely, R.Swarup Reddy, who

is not a company obviously. Hence the contention as put forth on the side of the applicant/respondent is untenable. The Tribunal has got plenary

powers to effect amendments and corrections and it is quite axiomatic from the very perusal of Section 19 of the Recovery of Debts Due to Banks

and Financial Institutions Act, 1993.

iii) Accordingly, he prays for the dismissal of this application.

Point No.1:-

7. At the outset, I would like to extract here u/s 9(2) of the Presidency Towns Insolvency Act, 1909.

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 has served, on him a notice (hereafter in this section referred to as the

insolvency notice) as provided in subsection (3) and the debtor does not comply with that notice with the period specified therein:

.....

It is pellucidly and palpably clear that the term ""decree or order"" is used of course without any suffix like ""of a civil court"". Even then the Hon''ble

Apex Court in the decision rendered in (2006) 13 SCC 322 = 2006-4-L.W.616 (Paramjeet Singh Patheja vs. ICDS Ltd.) (hereinafter called as

Paramjeet''s case) held that for understanding the said term ""decree or order"", the definitions as contemplated under sub-sections (2) and (14) of

Section 2of the CPC should be resorted to. An excerpt from it would run thus:

12. The substantial questions of law of paramount importance to be decided by this Court are:

(i) Whether an arbitration award is a ""decree"" for the purpose of Section 9of the Presidency Towns Insolvency Act, 1909?

(ii) Whether an insolvency notice can be issued u/s 9(2) of the Presidency Towns Insolvency Act, 1909 on the basis of an arbitration award?

14. Mr V.A. Bobde, learned Senior Advocate, appearing for the appellant submitted that:

(a) The Presidency Towns Insolvency Act, 1909 is a statute fraught with the grave consequence of ""civil death"" for a person sought to be adjudged

an insolvent. The Act has to be construed strictly; it is impermissible to enlarge or restrict the language having regard to supposed notions of

convenience, equity or justice.

(b) The insolvency law for Presidency towns was enacted in 1909 when the Civil Procedure Code, 1908 had recently been put on the statute

book. At that time, the Arbitration Act, 1899 was in force. It was clearly known to the lawmakers what is a ""decree"", what is an ""order"" and what

is an ""award"". It was equally known that there is a fundamental difference between ""courts"" and ""arbitrators""-that courts constitute the judiciary and

exercise the judicial power of the State whereas arbitrators are persons chosen by parties to a contract to resolve their disputes.

(k) The words ""suit or other proceeding in which the decree or order was made"" mean a suit in which a decree is made or a proceeding under

CPC which results in an order by a civil court which is not a decree. The word ""proceeding"" does not refer to arbitrations because they do not

result in an ""order"" but an ""award"", much less an order of a civil court as defined in Section 2(14) CPC. ""Proceeding"" means a proceeding such as

appellate or execution proceedings or applications under CPC during the pendency of the suit or appeal.

Thus by the amendments, the words ""or order"" have been added, so that even an order can sustain an insolvency notice. Similarly, the words ""of

any court"" figuring in Sections 9(1)(e) and (h) are omitted. Thereby the qualification that decree should be ""of any court"" has been consciously

removed and/or omitted. The expression ""decree or order"" in Sections 9(2)to (5) brought in by the 1978 Central Amendment is not restricted to a

decree or order of any court. Moreover, Section 9(5), which provides for setting aside of insolvency notice, in Clause (a) thereof, again uses the

phraseology ""decree or order"", without making it conditional that the same should be of the court. Similarly, the said clause also uses the words

suit or proceeding"" in which the decree or order was passed. Thus any decree or order can sustain an insolvency notice, irrespective of whether

they are of court or any other authority or tribunal.

(i) Even if an award is held not to be a decree, it is still an order within the meaning of Section 9(2) PTIA, which can sustain an insolvency notice.

31. When the Bombay Amendment came into force on 19-6-1939 by Bombay Act 51 of 1948, Clause (i) was added to Section 9. Section

9speaks of a ""decree"" and introduces the word ""order"". After so many years of CPC being in force the Bombay Legislature knew the meaning of

decree"" and ""order"" and used those terms as understood under CPC.

32. The fact that the Bombay Amendment and later the Central Amendment intended to refer only to decrees and orders as defined in CPC is

clear from the Statement of Objects and Reasons of the Central Amendment Act 28 of 1978 which introduced sub-sections (2) to (5) in Section

9. The SOR gazetted on 18-3-1978 reads, inter alia, as under:

The difficulties experienced by a litigant in India in executing even a simple money decree have been commented upon by the Privy Council as well

as the Law Commission and the Expert Committee on Legal Aid. The Law Commission in its Third Report on the Limitation Act, 1908, has

recommended that the most effective way of instilling a healthy fear in the minds of dishonest judgment-debtors would be to enable me court to

adjudicate him an insolvent if he does not pay the decretal amount after notice by the decree-holder, by specifying a period within which it should

be paid, on the lines of the amendment made to the Presidency Towns Insolvency Act, 1909 in Bombay. This recommendation was reiterated by

the Law Commission in its Twenty-sixth Report on insolvency laws.

2. The Expert Committee on Legal Aid was also of the view that the above recommendation of the Law Commission should be implemented

immediately without waiting for the enactment of a comprehensive law of insolvency.

3. It is, therefore, proposed to amend the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 to add a new act of

insolvency, namely, that a debtor has not complied with the insolvency notice served on him by a creditor, who has obtained a decree or order

against him for the payment of money, within the period specified in the notice. If the amount shown in the insolvency notice is not correct, it would

be invalidated if the debtor gives notice to the creditor, disputing the amount. The debtor can, however, apply to the court to have the insolvency

notice set aside on the ground, among others, that he is entitled to have the decree reopened under any law relating to relief of indebtedness or that

the decree is not executable under any such law.

9. ...Tribunals which fall within the purview of Article 136(1) occupy a special position of their own under the scheme of our Constitution. Special

matters and questions are entrusted to them for their decision and in that sense, they share with the courts one common characteristic; both the

courts and the tribunals are ''constituted by the State and are invested with judicial as distinguished from purely administrative or executive

functions''. ... The basic and the fundamental feature which is common to both the courts and the tribunals is that they discharge judicial functions

and exercise judicial powers which inherently vest in a sovereign State.''''1

(emphasis supplied)

35. That litigation is therefore very different from arbitration is clear. The former is a legal action in a court of law where judges are appointed by

the State; the latter is the resolution of a dispute between two contracting parties by persons chosen by them to be arbitrators. These persons need

not even necessarily be qualified trained judges or lawyers. This distinction is very old and was picturesquely expressed by Edmund Davies, J. in

these words:

Many years ago, a tinplated gentleman used to parade outside these law courts carrying a placard which bore a stirring injunction ''Arbitrate don''t

Litigate''.

43. For the foregoing discussion we hold:

(i) That no insolvency notice can be issued u/s 9(2) of the Presidency Towns In-solvency Act, 1909 on the basis of an arbitration award.

(ii) That execution proceedings in respect of the award cannot be proceeded with in view of the statutory stay u/s 22 of the SICA Act. As such, no

insolvency notice is liable to be issued against the appellant.

(iii) Insolvency notice cannot be issued on an arbitration award.

(iv) An arbitration award is neither a decree nor an order for payment within the meaning of Section 9(2). The expression ""decree"" in the Court

Fees Act, 1870 is liable to be construed with reference to its definition in CPC and hold that there are essential conditions for a ""decree"":

(a) that the adjudication must be given in a suit,

(b) that the suit must start with a plaint and culminate in a decree, and

(c) that the adjudication must be formal and final and must be given by a civil or Revenue Court.

An award does not satisfy any of the requirements of a decree. It is not rendered in a suit nor is an arbitral proceeding commenced by the

institution of a plaint.

(v) A legal fiction ought not to be extended beyond its legitimate field. As such, an award rendered under the provisions of the Arbitration and

Conciliation Act, 1996 cannot be construed to be a ""decree"" for the purpose of Section 9(2) of the Insolvency Act.

(vi) An insolvency notice should be in strict compliance with the requirements in Section 9(3) and the rules made thereunder.

(vii) It is a well-established rule that a provision must be construed in a manner which would give effect to its purpose and to cure the mischief in

the light of which it was enacted. The object of Section 22, in protecting guarantors from legal proceedings pending a reference to BIFR of the

principal debtor, is to ensure that a scheme for rehabilitation would not be defeated by isolated proceedings adopted against the guarantors of a

sick company. To achieve that purpose, it is imperative that the expression ""suit"" in Section 22 be given its plain meaning, namely, any proceedings

adopted for realisation of a right vested in a party by law. This would clearly include arbitration proceedings.

(viii) In any event, award which is incapable of execution and cannot form the basis of an insolvency notice, (emphasis supplied)

8. The learned senior counsel for the respondent/creditor would submit that the decision rendered by the Hon''ble Apex Court in Paramjeet''s

case, is being referred to a larger Bench of the Hon''ble Apex Court. It is an admitted fact that so far there is no stay and no judgment was

rendered by the larger Bench overruling or superseding the dictum as found enunciated in Paramjeet''s case. As such, as of now, the law as found

enunciated in Paramjeet''s case could be taken as a binding precedent.

9. Accordingly, on that ground itself, it could be held that the decision rendered by the Debts Recovery Tribunal as well as the issuance of the

recovery certificate cannot be equated to that of a decree or order within the meaning of Section 9(2)of the Presidency Towns Insolvency Act,

1909.

10. The learned counsel for the applicant/respondent cited the following decision of the Hon''ble Apex Court and certain excerpts from it would

run thus:

(1976) 3 SCC 800(Diwan Bros. versus Central Bank Of India, Bombay and others)

12. There are a number of other decisions of the High Courts which have also taken the view that the word ""decree"" appearing in Schedule II,

Article 11 has to be read in the same sense as used in the Code of Civil Procedure. In Ram Prasad v. Tirloki Nath5 a Division Bench of the

Allahabad High Court observed as follows:

The word ''decree'' has not been defined in the Court Fees Act or in the General Clauses Act; and it is safe to assume that the word has been

used in the Court Fees Act in the sense in which it is used in the Civil P. C, under which all the decrees are passed and which defines it as meaning

''the formal expression of adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard

to all or any of the matters in controversy in the suit''....

13. A Full Bench of the Hyderabad High Court in Dawood Karim Ashrafi v. City Improvement Board6 made a similar observation where the

Court observed as follows:

To have the force of a decree, an order must possess all the characteristics of a decree. It was further held that the word ""decree"" has not been

defined in the Court Fees Act or in the General Clauses Act and it was safe to assume that the word has been used in the Court Fees Act in the

sense in which it is used in the Civil Procedure Code.

A Division Bench of the Patna High Court also in Antala Gope v. Sarbo Gopain7 while interpreting the word ""decree"" used in the Hindu Marriage

Act, appears to have taken the same view and observed as follows:

The Act provides u/s 21that

all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908;

that is to say, the procedure to be adopted by the Court, in dealing with such proceedings, will be akin to that provided for the trial of suits in a civil

court. But that does not make the proceeding a suit or the application a plaint.

* * *

Therefore, in our view, Article 11of Schedule II of the Court Fees Act will be applicable to all appeals coming u/s 28 of me Hindu Marriage Act,

1955.

The later Full Bench decision of the Allahabad High Court in Mrs Panzy Fernandes v. M.F. Cusoros8 appears to have endorsed its previous view

and observed as follows:

The same result would, however, follow from a perusal of the various provisions of the CPC of 1859, as it stood in the year 1870.

The above provision of law, therefore, indicates that under the Code of Civil Procedure, 1859, a decree could only be passed in a proceeding

which could be termed a suit.

Section 26specified the particulars that are to be given in the plaint. Section 27laid down the manner in which the plaint was to be subscribed and

verified. Thus the scheme of the CPC of 1859 as disclosed by the aforementioned provisions, also points to the conclusion that a decree marks the

culmination of a proceeding which is described as a suit, and which, according to the said Code, is initiated by means of a plaint. Proceedings for

letters of administration under the Indian Succession Act (Act 39 of 1925) are not commenced by the institution of a plaint. On the other hand, as

Section 278 of the said Act shows, they are commenced by an ''application'' or a ''petition''.

For the above reasons we are of opinion that the decision of a court in proceedings for letters of administration cannot be described as a decree.

If executability was to be the invariable quality of all decrees, one would expect that the Legislature would incorporate this feature in the provisions

which define the nature, scope and contents of a decree. Further, if the Legislature wanted that Schedule II, Article 11should apply only to

executable orders it could very easily have added the word ''executable'' before ''order''.

In the above case the order passed in a proceeding before a Probate Court was held not to be a decree.

21. Having regard to these circumstances we are satisfied that the term ""decree"" used in Schedule II, Article 11, is referable to a decree as defined

in Section2(2) of the CPC and as the decision of the tribunal in the instant case does not fulfil the requirements of a ""decree"" as mentioned above,

the said decision is not a decree within the meaning of Schedule II, Article 11of the Court Fees Act and, therefore, the memorandum of appeal

filed by the appellants squarely falls within the ambit of Schedule II, Article 11of the Court Fees Act and ad valorem court fees under Schedule I,

Article 1are not leviable.

22. Apart from the above considerations, it is a well-settled principle of interpretation of statutes that where the Legislature uses an expression

bearing a well-known legal connotation it must be presumed to have used the said expression in the sense in which it has been so understood.

Craies on Statute Law observes as follows:

There is a well-known principle of construction, that where the legislature uses in an Act a legal term which has received judicial interpretation, it

must be assumed that the term is used in the sense in which it has been judicially interpreted, unless a contrary intention appears.

(emphasis supplied)

The cited precedent even though is not relating to The Presidency Towns Insolvency Act, nonetheless for the purpose of canvassing the distinction

between civil court''s decree and a Tribunal''s decisions not amounting to a decree, it has been relied on. The said citation also highlights that

definition as contained in the CPC relating to decree and order should be attributed to the words ""decree or order"" used in a statute.

11. It has been argued on the side of the applicant/respondent that Insolvency Act being punitive in nature, it should be strictly interpreted and

liberal interpretation should not be resorted to.

12. I could see considerable force in the submission made on the side of the applicant/respondent for the foregoing reasons.

13. My mind is reminiscent and redolent of the following excerpts from Maxwell on the Interpretation of Statutes.

2. The other main principles of interpretation In this section it is proposed to look in a preliminary way at what appear to be the main principles of

statutory interpretation, other than the literal rule. It goes without saying that the solution of a particular problem of interpretation will often be

determined by which principle or principles the court chooses to apply. But since there is not in English law any settled hierarchy governing the

order in which the various canons and presumptions of construction are to be employed, the existence of these principles does not make it possible

to predict with certainty the result which will be reached in a given case.

Moreover, where the question is whether the words of an Act do or do not apply to particular facts, ""the court or tribunal may be assisted by legal

principles or by so-called rules of construction, but these cannot solve the question"". Whether the juice of a single orange, freshly pressed to the

order of an hotel guest, is a ""manufactured beverage"", whether a piece of greaseproof paper on which meat stands in a shop window but which is

not large enough to wrap completely round the meat is ""any form of packaging.....partly enclosing the goods"" at precisely what stage of disrepair

a car ceases to be a ""mechanically-propelled vehicle"": in one sense these are all problems of construction in which the principles considered in this

work should be relevant, but in another they are rather questions of fact to be determined simply on the basis of ""common sense"".

14. I would also like to call-up and recollect the following maxims also:

(i) Expressio unius exclusio alterius: Mention of one or more things of a particular class may be regarded as silently excluding all other members of

the class.

(ii) Expressum facit cessare taciturn : That which is expressed makes that which is implied to cease (that is, supersedes it, or control its effect).

(iii) Non est interpretatio sed divination ,quae recedit a litera

As such those excerpts and maxims would oust the possibility of interpreting Section 9(2) of the Act as canvassed by the respondent/creditor.

15. Referring to the following maxims from the Black"s Dictionary would be fruitful in this factual matrix.

(i) Casus omissus et oblivioni datus dispositioni juris communis relinquitur - A case omitted and given to oblivion (forgotten) is left to the disposal of

the common law.

(ii) Casus omissus pro omisso habendus est -A case omitted is to be held as (intentionally) omitted.

The concept ""Casus Omissus would indicate a case omitted; an event or contingency for which no provision is made; particularly a case not

provided for by the statute on the general subject, and which is therefore left to be governed by the common law.

16. The pith and marrow, the gist and kernel of the above is that if in a beneficial legislation, unwittingly any word or phrase is omitted or certain

person or class of persons are left uncovered, certainly, the court could read into the provisions so as to extend the benefit of the beneficial

legislation even to that person or class of persons. But in the decision reported in 2009(4) CTC 74 (Nahar Industrial Enterprises Ltd. vs. Hong

Kong & Shanghai Banking Corporation) (hereinafter called as Nahar"s case), rendered by the Hon"ble Apex Court, the Apex Court clearly held

that such purposive interpretation cannot be applied in respect of enactments, which are punitive in nature. An excerpt from it would run thus:

110.....The principles of purposive construction, therefore, in our opinion, are not attracted in the instant case.....

111. Whereas the doctrine of purposive construction is a salutary principle, the same cannot be extended to a case which would lead to an

anomaly. It can inter alia be resorted to only when difficulty or doubt arises on account of ambiguity. It is to be preferred when object and purpose

of the Act is required to be promoted.

Though Nahar"s case is not on the provisions of the Insolvency Act, the obiter, as found set out there in would clearly exemplify and demonstrate

that while interpreting punitive legislations, liberal interpretation or purposive interpretation cannot be resorted.

17. The learned senior counsel for the respondent/creditor would ex-facie and prima facie put forth a plausible argument, which deserves

consideration. According to him, if the term decree or order as contemplated u/s 9(2) of the Presidency Towns Insolvency Act, 1909 is

interpreted as suggested by the learned counsel for the applicant/respondent, then it would lead to an anomalous situation wherein if the bank has

to recover debts over and above Rs.10 lakhs they will be handicapped from approaching the Insolvency Court, but on the other hand, if the same

bank has to recovery a debt, which is less than Rs. 10 lakhs, it could approach the Insolvency Court.

18. No doubt, it is glaringly and pellucidly clear that such anomaly occurs in implementing the provisions of law for which only the legislators have

to intervene and remedy the situation and the court cannot legislate on that.

19. Not to put too fine a point on it a posteriori approach and not a priori one would serve the purpose. Neither the word ""decree"" nor the word

order is found defined in the special enactment, viz., the Presidency Towns Insolvency Act but the earlier Civil Procedure Code, which could be

described as part of the general law of the land or Lex Loci, defined those terms and hence the Apex Courts and other High Courts, ushered in

such definitions as found in the CPC to understand the term ""decree or order"" in Section 9(2) of the Presidency Towns Insolvency Act. The

Recovery of Debts Due to Banks and Financial Institutions Act,1993 came into the Statute Book obviously only recently and the core question

arises as to whether the decision rendered and the Recovery Certificate issued by the Debts Recovery Tribunal could also be taken as either

decree or order by applying the concept ""Extension to new things

20. I recollect and call up an excerpt from Maxwell on the Interpretation of Statutes in this regard.

Extension to new things

The language of a statute is generally extended to new things which were not known and could not have been contemplated when the Act was

passed, when the Act deals with a genus and the thing which afterwards comes into existence was a species of it. Thus the provision of Magna

Carta which exempted lords from the liability of having their carts taken for carriage was held to extend to degrees of nobility not known when it

was made, such as dukes, marquises and viscounts.

So the Engraving Copyright Act 1734, which imposed a penalty for practically engraving, by etching or otherwise, or ""in any other manner

copying prints and engravings, applied to copying by photography, though that process was not invented until more than a century after the Act

was passed. And Edison''s telephone was held to be a ""telegraph"" within the meaning of the Telegraph Acts 1863 and 1869, even though it was

unknown in 1869.

Similarly, bicycles were held to be ""carriages"" within the provision of the Highway Act 1835 against furious driving, and tricycles capable of being

propelled by steam to be ""locomotives"" within the Locomotives Acts 1861 and 1865, though not invented when these Acts were passed.

Where an Act on 1790 (which was deemed to be a public Act) exempted ferry proprietors from assessment to any ""tax.....whatsoever"" in respect

of the ferry, it was held that the exemption extended to income tax even though that tax was first imposed considerably after 1790.

21. To the risk of repetition and pleonasm but without being tautologous, I would like to point out that in view of the Hon''ble Apex Court''s

verdict in Nahar''s Case, this court is precluded from interpreting the provisions like the one contained in the Insolvency Act, which is punitive in

nature liberally. Hence, I am of the considered opinion that the term ""decree or order"" in Section 9(2) of the Act, cannot be interpreted in such a

manner so as to include the decision rendered by the Tribunal and the consequent recovery certificate issued by it.

22. The learned counsel for the applicant/ respondent also placing reliance on the unreported judgment dated 30.06.2008 rendered by the Division

Bench of the Bombay High Court in Appeal No.710 of 2007 would highlight the fact that the respondent/creditor herein viz., the Kotak Mahindra

Bank Limited happened to be one of the parties in that appeal and certain excerpts from it would run thus:

20.....It is true that Patheja''s case was delivered while dealing with the point as to whether the arbitration award is a decree for the purpose of

Section 9of the Insolvency Act and whether insolvency notice can be issued on the basis of an arbitral award. While dealing with the said issue, the

Apex Court has considered the scope of the term ''decree and order'' u/s 9(2)of the Insolvency Act and has clearly held that the said terms have to

be understood as defined under the provisions of the CPC. As already seen above, the definition ''decree or order'' in terms of CPC necessarily

refers to the one issued by the Civil Court and not by any Tribunal as such, unless it is so provided under the statute under which the Tribunal is

constituted.

20. It is also to be noted that the RD Act is a complete Code by itself which provides not only for adjudication of the claim relating to the Bank

dues but also for execution of the decision arrived at by the adjudicatory authorities constituted under the RD Act without leaving any scope for

alternative proceedings in relation to such claims. Besides there is a specific bar provided u/s 18of the RD Act and further provision for overriding

effect of the RD Act in terms of Section 34thereof.

In respect of a similar issue involved in this petition, the Hon''ble Division Bench of the Bombay High Court rendered its decision and in that, the

very respondent/creditor herein happened to be one of the parties. It is an indubitable and indisputable fact that as against such judgment of the

Bombay High Court, SLP was preferred by the Kotak Mahindra Bank Ltd, but it was subsequently withdrawn.

23. The learned counsel for the applicant/respondent would submit that virtually the respondent/creditor herein is debarred and precluded from

pleading anything contrary to the said judgment rendered by the Division Bench of the Bombay High Court as it is having the effect of binding

Kotak Mahindra Bank Limited, which is a public institution as it is a Bank registered under the Banking Regulation Act; public policy also warrants

the bank like the Kotak Mahindra Bank Limited not to bye-pass the said judgment of the Division Bench of the Bombay High Court and take

totally a contradictory stand before this court.

24. However, the learned senior counsel for the respondent/creditor would by way of explaining and expounding the situation would submit that

still HDFC bank, which is one of the aggrieved parties in the said judgment rendered by the Bombay High Court, preferred SLP which is still

pending and inasmuch as the Kotak Mahindra Bank''s dues were paid by the persons concerned, the SLP was by it was withdrawn and that

would not operate as estoppel against them for taking a stand as the one. which has been taken now in this case. He would also try to highlight that

the judgment of the Division Bench of the Bombay High Court cannot be taken as a binding precedent so far this case is concerned, on the Single

Judge of this court.

25. In support of his contention, he would cite the following decision reported in Director of Settlements, Andhra Pradesh and Others Vs. M.R.

Apparao and Another,

7. So far as the first question is concerned, Article 141of the Constitution unequivocally indicates that the law declared by the Supreme Court

shall be binding on all courts within the territory of India. The aforesaid Article empowers the Supreme Court to declare the law. It is, therefore, an

essential function of the Court to interpret a legislation. The statements of the Court on matters other than law like facts may have no binding force

as the facts of two cases may not be similar. But what is binding is the ratio of the decision and not any finding of facts. It is the principle found out

upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence.

To determine whether a decision has ""declared law"" it cannot be said to be a law when a point is disposed of on concession and what is binding is

the principle underlying a decision. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in

which the judgment was delivered. An ""obiter dictum"" as distinguished from a ratio decidendi is an observation by the Court on a legal question

suggested in a case before it but not arising in such manner as to require a decision. Such an obiter may not have a binding precedent as the

observation was unnecessary for the decision pronounced, but even though an obiter may not have a binding effect as a precedent, but it cannot be

denied that it is of considerable weight. The law which will be binding under Article 141would, therefore, extend to all observations of points raised

and decided by the Court in a given case. So far as constitutional matters are concerned, it is a practice of the Court not to make any

pronouncement on points not directly raised for its decision. The decision in a judgment of the Supreme Court cannot be assailed on the ground

that certain aspects were not considered or the relevant provisions were not brought to the notice of the Court (see Ballabhadas Mathurdas

Lakhani v. Municipal Committee, Malkapur7 and AIR 1973 SC 7948). When the Supreme Court decides a principle it would be the duty of the

High Court or a subordinate court to follow the decision of the Supreme Court. A judgment of the High Court which refuses to follow the decision

and directions of the Supreme Court or seeks to revive a decision of the High Court which had been set aside by the Supreme Court is a nullity.

(See Narinder Singh v. Surjit Singh and Kausalya Devi Bogra v. Land Acquisition Officer.) We have to answer the first question bearing in mind

the aforesaid guiding principles. We may refer to some of the decisions cited by Mr Rao in elaborating his arguments contending that the judgment

of this Court dated 6-2-19861 cannot be held to be a law declared by the Court within the ambit of Article 141of the Constitution. Mr Rao relied

upon the judgment of this Court in the case of M.S.M. Sharma v. Sri Krishna Sinha wherein the power and privilege of the State Legislature and

the fundamental right of freedom of speech and expression including the freedom of the press was the subject-matter of consideration. In the

aforesaid judgment it has been observed by the Court that the decision in Gunupati Keshavram Reddy v. Nafisul Hasan1 relied upon by the

counsel for the applicant which entirely proceeded on a concession of the counsel cannot be regarded as a considered opinion on the subject.

There is no dispute with the aforesaid proposition of law.

The learned senior counsel for the respondent/creditor also cited the following other decisions:

(i) All India Reporter Karamchari Sangh and Others Vs. All India Reporter Limited and Others,

11. The expression ""news"" is not defined in the Act. Several definitions of the expression ""news"" collected from the different dictionaries and

digests have been cited before us. It is enough if we refer to the meaning of the word ""news"" given in the Shorter Oxford English Dictionary for

purposes of this case. It says that ""news"" means tidings, new information of recent events; new occurrences as a subject of report or talk. The law

reports which are being published by Respondent 1 are reports of recent decisions of the Supreme Court of India and of the High Courts in India

which are supplied to it by its agents appointed at New Delhi and other places where High Courts are situated. It cannot be disputed that these

decisions are of public importance. Article 141of the Constitution provides that the law declared by Supreme Court shall be binding on all courts

within the territory of India. Even apart from Article 141of the Constitution the decisions of the Supreme Court, which is a court of record,

constitute a source of law as they are the judicial precedents of the highest court of the land. They are binding on all the courts throughout India.

Similarly the decisions of every High Court being judicial precedents are binding on all courts situated in the territory over which the High Court

exercises jurisdiction. Those decisions also carry persuasive value before courts which are not situated within its territory. The decisions of the

Supreme Court and of the High Courts are almost as important as statutes, rules and regulations passed by the competent legislatures and other

bodies since they affect the public generally. It is well known that the decisions of the superior courts while they settle the disputes between the

parties to the proceedings in which they are given they are the sources of law insofar as all others are concerned. As soon as a decision is rendered

the members of the public would be interested in knowing it. At any rate lawyers and others connected with courts and judicial proceedings who

constitute a substantial section of the public are interested in knowing the contents and the effect of the decisions. Respondent 1, All India Reporter

Limited, and other publishers of law reports in the interests of their own business vie with each other to publish the judgments of the Supreme

Court or of the High Courts as early as possible in their law reports which are published periodically either weekly, fortnightly or monthly. They

believe that faster the decisions are published in their reports, larger will be the number of subscribers. In fact we have a law report which is

published from Delhi which publishes the judgments rendered by the Supreme Court within a day or two. The contents of these law reports

constitute news insofar as the subscribers and the readers of these reports are concerned. It is by reading these law reports they come to know of

the latest legal position prevailing in the country on any question decided in the decisions reported in the said reports. Hence it is difficult to agree

with the submission made on behalf of Respondent 1 that the law reports do not carry any news and that the public is not interested in them. We

are of the view that any decision published in the law reports of Respondent 1 contain information about the recent events which have taken place

in the Supreme Court or in the High Courts which are public bodies and these are matters in which the public is interested. We find it also difficult

to agree with the submission made on behalf of Respondent 1 that since the law reports are going to be preserved by the lawyers as reference

books after getting them rebound subsequently they should be treated as books. It may be that the decisions contained in these law reports may

cease to be items of news after some time but when they are received by the subscribers they do possess the character of works containing news.

The aforesaid excerpts would spotlight that the judgment of the Division Bench of the Bombay High Court is having only persuasive effect and not

binding effect on the Single Judge.

26. However by way of contradicting the argument as advanced by the learned senior counsel for the respondent/creditor on the issue relating to

binding nature of precedents the learned counsel for the applicant/respondent would cite the decision of the Bombay High Court reported in

(1983) 142 Income Tax Reports 410 (Amarchand Jainarain Agarwal vs. Union of India and others). An excerpt from it would run thus:

As far as this High Court is concerned, it is well settled that for the purposes of construing and applying Central enactments, in particular Tax Acts

such as the I.T.Act, 1961, the High Court should as far as possible accept the decisions given on similar points by other High Courts, leaving it to

the aggrieved party to go higher. Following the aforesaid principle, it will have to be held that the decision of the learned Single Judge suffers from

no infirmity and is required to be confirmed

and

(ii) 1975(16) Gujarat Law Reporter 1083 (J.D.Patel and another vs. Union of India and others)

As a matter of law the earliest decision of the Division Bench of the Bombay High Court in Maneklal Chunilal and Sons vs. Commissioner of

Income Tax, is binding on us. Apart from it, we are in respectful agreement with the salutary practice and the policy that in taxation matters where

a High Court is concerned with the interpretation of on All India statute, it should be the practice and policy that if one High Court has interpreted a

provision on section of a taxing statute, which is all India statute and there is no other view in the field, another High Court must ordinarily accept

that view in the interest of Uniformity and consistency in matters of application of taxing statute, so as to avoid the challenge of discrimination in

application and administration of tax matters. Mr.Shelat''s third contention, therefore, must clearly prevail"".

27. I am of the considered opinion that instead of dilating on this issue, concerning binding nature of the precedents of other High Courts on this

High Court, I would like to point out that the said decision rendered by the Division Bench of the Bombay High Court is convincing as it emerged

au fait with law and au courant with facts, and inasmuch as the said decision rendered by the Bombay High Court placed reliance on the Hon''ble

Apex Court''s decision in Paramjeet''s case also, a fortiori, I would like to follow it.

28. Hence, in the result, point No.1 is decided to the effect that the decision rendered by the Debts Recovery Tribunal and the consequent

issuance of the recovery certificate cannot be equated to that of a decree or order as contemplated u/s 9(2) of the Presidency Towns Insolvency

Act, 1909 and on that ground itself the insolvency Notice dated 23.04.2009 has to be set aside. Accordingly, it is set aside. Point No.2:

29. Consequently, upon the view taken by me under point No.1, it is not necessary to go deep into point No.2. However for the purpose of

deciding this point, I would like to discuss as under:

This court while dealing with this application is not very much concerned with the factum of the Debts Recovery Tribunal having effected

corrections/amendments to the recovery certificate issued by it. It appears after the issuance of the recovery certificate, at the instance of the State

Bank of India the principal lender of the money, there was transfer of the debt by it in favour of the Kotak Mahindra Bank Limited and

consequently recognising the said transfer, Debts Recovery Tribunal effected corrections.

30. Had the applicant/respondent herein had been affected by such act of the Tribunal, it could have very well approached the Appellate Tribunal

u/s 20of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. But it had not chosen to do so for the reasons best known to

itself. As such, in this application, it is not necessary to decide as to whether the Kotak Mahindra Bank Limited was justified in getting such

correction effected by the Debts Recovery Tribunal in the recovery certificate. Point No.2 is decided accordingly.

Point No.3:-

31. The learned senior counsel for the respondent/creditor would convincingly and correctly, highlight and spotlight the fact that the Kotak

Mahindra Bank Limited is not trying to proceed as against the principal borrower Trans India Lamps Limited but only as against the guarantor,

who is not a company and that there is no embargo for proceeding as against him.

32. I could see considerable force in his submission for the foregoing reasons. Section 446of the Companies Act, contemplates an embargo for the

creditor to directly proceed as against such company, which underwent liquidation or winding up, without the leave of the Company Board but

Swamp Reddy, the applicant/respondent herein, is not a company. A fortiori, I hold that the proceedings for recovery of debt initiated by the State

Bank of India and subsequently by the Kotak Mahindra Bank Limited as against the present guarantor, viz., Swarup Reddy is not hit by the

embargo as contemplated u/s 446of the Companies Act.

33. The learned senior counsel for the respondent/creditor would cite the decision of the Hon''ble Apex Court in Allahabad Bank Vs. Canara

Bank and Another, and develop his argument that the embargo contained in Section 446of the Companies Act, is not applicable relating to the

proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. An excerpt from it would run thus:

26. These points deal with the question whether the Company Court can stay proceedings before the Tribunal or the Recovery Officer u/s 442and

whether the said Court can stall proceedings u/s 537unless leave is obtained. Question also arises in regard to ""priorities"" u/s 446(2)(d), read with

Sections 529, 529-A, 530of the Companies Act and whether the Company Court alone can distribute and decide priorities among creditors or

whether the Tribunal can do this in view of Section 19(19) of the RDB Act, as introduced by Ordinance 1 of 2000.

34. While it is true that the principle of purposive interpretation has been applied by the Supreme Court in favour of jurisdiction and powers of the

Company Court in Sudarsan Chits (I) Ltd. case3, and other cases the said principle, in our view, cannot be invoked in the present case against the

Debts Recovery Tribunal in view of the superior purpose of the RDB Act and the special provisions contained therein. In our opinion, the very

same principle mentioned above equally applies to the Tribunal/Recovery Officer under the RDB Act, 1993 because the purpose of the said Act is

something more important than the purpose of Sections 442, 446and 537of the Companies Act. It was intended that there should be a speedy and

summary remedy for recovery of thousands of crores which were due to the banks and to financial institutions, so that the delays occurring in

winding-up proceedings could be avoided.

40. Alternatively, the Companies Act, 1956 and the RDB Act can both be treated as special laws, and the principle that when there are two

special laws, the latter will normally prevail over the former if there is a provision in the latter special Act giving it overriding effect, can also be

applied. Such a provision is there in the RDB Act, namely, Section 34. A similar situation arose in Maharashtra Tubes Ltd. v. State Industrial and

Investment Corpn. of Maharashtra Ltd.6 where there was inconsistency between two special laws, the Finance Corporation Act, 1951 and the

Sick Industries Companies (Special Provisions) Act, 1985. The latter contained Section 32which gave overriding effect to its provisions and was

held to prevail over the former. It was pointed out by Ahmadi, J. that both special statutes contained non obstante clauses but that the ""1985 Act

being a subsequent enactment, the non obstante clause therein would ordinarily prevail over the non obstante clause in Section 46-Bof me 1951

Act unless it is found that the 1985 Act is a general statute and the 1951 Act is a special one"". (SCC p 157, para 9)

Therefore, in view of Section 34of the RDB Act, the said Act overrides the Companies Act, to me extent there is anything inconsistent between

the Acts. (emphasis supplied)

I could see that the Hon''ble Apex Court adhered to the maxim ""Leges posteriors prioress contraries abrogant - Later laws abrogate prior laws

that are contrary to them."" Accordingly, Section 446of the Companies Act stood obligated by the provisions of the Recovery of Debts Due to

Banks and Financial Institutions Act, 1993.

34. I would like to reiterate that here the contention raised by the applicant/respondent is not tenable for the reason that the proceedings for

recovery are initiated by Kotak Mahindra Bank Limited only as against the guarantor, viz., Swamp Reddy, who is not a company axiomatically

and on that ground also, Section 446cannot be invoked by the applicant/respondent.

35. Point No.3 is decided accordingly. In the result, in view of the findings recorded under Point No. 1 this application is allowed and

consequently, the Insolvency Notice No.35 of 2009 is dismissed.