THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
13.09.2023	20.10.2023

CORAM:

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

O.S.A.No.124 of 2005 and W.P.No.20492 of 2008
and all connected Miscellaneous Petitions

O.S.A.No.124 of 2005:

Enforcement Directorate,
(Foreign Exchange Regulation Act now FEMA)
Rep. by its Deputy Director,
Shastri Bhavan,
3rd Floor, 3rd Block, No.26, Haddows Road,
Chennai – 600 006. ...Appellant

Vs.

T.T.V.Dhinakaran ...Respondent

Prayer: Original Side Appeal filed under Order 36 Rule 11 of the Original Side Rules and Clause 15 of the Letters Patent, to set aside the order made in Application No.177 of 2001 in I.N.No.39 of 2001 dated 17.09.2002 and allow the appeal.

W.P.No.20492 of 2008:

T.T.V.Dhinakaran ...Petitioner

Vs.

1.The Collector of Chennai District,
Chennai.

2.The Tahsildar,
Mylapore Triplicane Taluk,
Mylapore, Chennai.

3.The Directorate of Enforcement,
Rep. by Deputy Director, Directorate of Enforcement,
Shastri Bhavan, III Floor, III Block,
26, Haddows Road, Chennai – 600 006.

[R3 impleaded as per Court order dated 17.09.2008 in M.P.No.2 of 2008 in W.P.No.20492 of 2008.]

...Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorai calling for the records of the 1st respondent dated 25.07.2008 made in G2/68311/2000 and quash the same.

Appearance:

For Appellant : Mr.AR.L.Sundaresan,
Additional Solicitor General of India
Assisted by Mr.Rajnish Pathiyil
for appellant in OSA.No.124 of 2005
for R3 in W.P.No.20492 of 2008.

For Respondents : Mr.B.Kumar, Senior Counsel
for Mr.A.Jenasenan
for respondent in OSA.No.124 of 2005
for petitioner in W.P.No.20492 of 2008.

Mr.S.Silambanan, Additional Advocate General,
Assisted by Mrs.C.Sangamithirai,
Special Government Pleader
for R1 and R2 in W.P.No.20492 of 2008.

****

C O M M O N J U D G M E N T

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

The Enforcement Directorate is on appeal against the order of the Hon'ble Single Judge allowing the application under Section 9(5) of the Presidency Towns Insolvency Act 1909, thereby setting aside the insolvency notice issued to the respondent herein.

The facts that are necessary for disposal of the appeal are:

2. The respondent was accused of violation of the provisions of the Foreign Exchange Regulation Act, 1973. Since the violation amounted to an offence under the provisions of the said Act and it also made him liable for penalty, proceedings were initiated by the appropriate Authority under the Foreign Exchange Regulation Act, 1973 for adjudication of the penalty. The Adjudicating Authority viz., the Special Director of Enforcement by its order in original dated 06.02.1998 imposed a penalty of Rs.31 Crores. Aggrieved the respondent preferred an appeal in A.No.51 of 1998 before the appellate Authority viz., the Foreign Exchange Regulation Appellate Board. The Appellate Board modified the order dated 05.05.2002 and reduced the

penalty as Rs.28 Crores. The respondent had preferred an appeal in CMA.No.914 of 2000 questioning the order of the appellate Board. Even during the pendency of the CMA, the Enforcement Directorate invoked Sub-Section 2 of Section 9 of the Presidency Towns Insolvency Act 1909 and got a notice of insolvency issued on 28.02.2001. On receipt of the said notice an application was filed by the respondent in A.No.177 of 2001 seeking to set aside the insolvency notice under Sub-Section 5 of Section 9 of the Presidency Towns Insolvency Act 1909, 1909. Several grounds of attack were made by the respondent in impugning the insolvency notice. Prominent among them are (1) There is no statutorily enforceable debt within the meaning of Section 2(b) of the Act and the applicant is not a debtor within the meaning of Section 2(b) of the Act; (2) The Enforcement Directorate is not a creditor within the meaning of Section 2(a) of the said Act; (3) The order imposing penalty has not become final and (4) The Enforcement Directorate is not the Authority vested with the power of execution of the orders of the adjudicating Authorities and therefore the application at the instance of Enforcement Directorate is not maintainable.

3. The learned Single Judge who heard the application agreed with the contentions of the respondent herein on the first three questions. He however held that the Enforcement Directorate could represent the Union of India and therefore the application filed by the Assistant Director of Enforcement Directorate is maintainable. Upon the conclusion that there is no legally enforceable debt and the Enforcement Directorate is not a creditor within the meaning of Section 2(a) of the Presidency Towns Insolvency Act 1909, the Hon'ble Judge set aside the insolvency notice. The third ground was that the order imposing penalty has not become final, since the appeal against the order of the appellate Authority in CMA.No.914 of 2000 was pending. For the sake of completion of the narration of facts we could add that the said Civil Miscellaneous Appeal in C.M.A.No.914 of 2000 came to be dismissed by this Court on 06.01.2017 and the attempted SLP.(Civil)No.17700 of 2017 against that order has also been dismissed on 21.07.2017. Therefore, the order imposing penalty has now become final.

4. The instant appeal is against the order of the learned Single Judge setting aside the insolvency notice. Proceedings for recovery were also initiated by the Enforcement Directorate invoking the Tamil Nadu Revenue Recovery Act, 1864. A notice was issued by the District Collector under Section 29 of the said Act in Form 6 taking over the management of the property of the respondent. This notice is subject matter of challenge in W.P.No.20492 of 2008 primarily on the question of jurisdiction and the powers of the Collector to invoke the Tamil Nadu Revenue Recovery Act for recovery of penalty levied under the Foreign Exchange Regulation Act which is due and payable to the Central Government.

5. We have heard Mr.AR.L.Sundaresan, learned Additional Solicitor General assisted by Mr.Rajnish Pathyil, learned counsel for the appellant in O.S.A.No.124 of 2005 and the 3rd respondent in W.P.No.20492 of 2008 and Mr.B.Kumar, learned Senior Counsel assisted by Mr.A.Jenasenan, learned counsel appearing for the respondent in O.S.A.No.124 of 2005 and the petitioner in W.P.No.20492 of 2008. Mr.S.Silambanan, learned Additional Advocate General assisted by

Mrs.C.Sangamithirai, learned Special Government Pleader appearing for the respondents 1 and 2 in W.P.No.20492 of 2008.

6. Mr.AR.L.Sundaresan, learned Additional Solicitor General appearing for the appellant in O.S.A.No.124 of 2005 would vehemently contend that the order of the adjudicating Authority imposing penalty would qualify as an order against the respondent for payment of money and therefore the provisions of Section 9(2) of the Presidency Towns Insolvency Act 1909, 1909 could be invoked by the Enforcement Directorate which would qualify as a creditor within the meaning of Section 2(a) of the said Act. Since the learned Additional Solicitor General relies heavily on the definition clause, we extract the same hereunder. Section 2(a) and (b) of the said Act are relevant for our purpose they read as follows:-

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

2(b) "debt" includes a judgment-debt, and "debtor" includes a judgment-debtor;

7. According to the learned Additional Solicitor General both the definitions are inclusive and they admit of a very wide meaning. Section 9(2)

of the Presidency Towns Insolvency Act 1909, which was introduced by Act 28 of 1978 with effect from 01.09.1979 reads as follows:-

> *(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.*

8. Sub Section 5 of Section 9 of the Presidency Town Insolvency Act which enables a person to whom a notice of insolvency is sent under Section 9(2) of the said Act reads as follows:-

> *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.]

Explanation.-- For the purposes of this section, the act of an agent may be the act of the principal, even though the agent have no specific authority to commit the act.

9. According to the learned Additional Solicitor General, a bare reading of the above provision would show that non-payment of monies payable pursuant to a decree or order which has become final and execution thereof has not been stayed would *per se* amount to an act of insolvency. The provision read without any addition or substraction conveys the above. However, there are certain judicial pronouncements which tend to restrict the

operation of Section 9(2) of the Presidency Towns Insolvency Act 1909 based on the consequences of an adjudication. The fundamental contention of the respondent before the insolvency Court was that, Section 9(2) of the Presidency Towns Insolvency Act 1909 can be invoked only by the creditor who has been favoured with an order or a decree by a civil Court. Drawing our attention to the language of Section 9(2) of the Presidency Towns Insolvency Act 1909, the learned Additional Solicitor General would contend that there is no justification for restricting the term decree or order found in Section 9(2) of the Presidency Towns Insolvency Act 1909 as a decree or order of the Civil Court.

10. The learned Additional Solicitor General would also point out that there are several enactments under which statutory Tribunals have been constituted and those Tribunals pass orders for payment of money. If a restrictive meaning is assigned to the term decree or order in Section 9(2) of the Presidency Towns Insolvency Act 1909 the very object of insertion of Section 9(2) of the said Act would be defeated. Reliance is placed on the statement of objects and reasons appended to Act 28 of 1978 by which

Section 9(2) to 9(5) were inserted in the Presidency Towns Insolvency Act 1909 which reads as follows:-

"Amending Act 28 of 1978

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

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

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

iv) The Bill seeks to achieve the above objects. (Gazette of India dated 18.03.1979 pt.II,S.2 Ext.p.188.)"

11. According to the learned Additional Solicitor General, the very object of inclusion of Section 9(2) of the said Act was to make non-payment of monies ordered to be paid under the decree or order as an act of insolvency bearing in mind the difficulties in execution of a decree or order. Therefore, according to the learned Additional Solicitor General, to exclude

other orders passed by other Forums from the sweep of Section 9(2) of the said Act would only aid defaulters to evade payment. While conceding that the object of the Insolvency law is not to collect the monies due, the learned Additional Solicitor General would submit that a fair interpretation would be one which aids the object of enactment.

12. He would also invite our attention to the meaning of the term debt in various judicial dictionaries to contend that non-payment of monies adjudicated to be due would amount to a debt. He would also refer to the meaning ascribed to the term debt, debtor and penalty in various law lexicons to contend that the sum adjudicated to be due by a judicial process would amount to a debt and the person liable to pay the same would be a debtor. He would also submit that the term penalty is a fine assessed for violation of a statute or a regulation and the same is not a fine imposed for an offence and therefore, according to the learned Additional Solicitor General the penalty levied after an adjudicatory process would be a money payable under the order, which would be a debt within the meaning of Section 2(b) of the Presidency Towns Insolvency Act 1909, 1909.

13. He would also rely upon the judgment of this Court in ***Commissioner of Wealth Tax, Madras Vs. Pierce Leslie and Co., Ltd., Kozhikode*** reported in ***AIR 1963 Madras 356,*** wherein, a Division Bench while considering the meaning of the term 'debt' held that debt broadly stated is a liquidated money obligation for recovery of which an action will lie. The essential requisites of the debt according to the Division Bench are

> *i) an ascertained or readily calculable amount;*
>
> *ii) an absolute unqualified and present liability in regard to that amount with the obligation to pay forthwith or in future within a time certain;*
>
> *iii) the obligation must have accrued and subsisting and should not be that which is merely accruing.*

14. Our attention is also drawn to the judgment of the Hon'ble Supreme Court in ***Kesoram Industries and Cotton Mills, Ltd., Vs. Commissioner of Wealth Tax (Central), Calcutta*** reported in ***AIR 1966 SC 1370,*** wherein, the Hon'ble Supreme Court had considered the meaning of the word 'debt' and concluded that the expression debt was wide enough to

take in a liability. In Paragraph 23 of the judgment in ***Kesoram Industries and Cotton Mills, Ltd., Vs. Commissioner of Wealth Tax (Central), Calcutta***, referred to *supra,* the Hon'ble Supreme Court set out the definition of the term 'debt' which according to it is unanimously acceptedas follows:

> *"a debt is a sum of money which is now payable or will become payable in future by reason of a present obligation : debitum in praesenti, solvendum in future."*

15. Reliance in this regard is also placed on the judgment of the Hon'ble Supreme Court in ***Commissioner of Wealth Tax, Lucknow Vs. Raja Vishwanath Pratap Singh*** reported in ***1996 (8) SCC 122,*** wherein, the definition that was set out in ***Kesoram Industries and Cotton Mills, Ltd., Vs. Commissioner of Wealth Tax (Central), Calcutta*** referred to *supra* was quoted with approval.

16. In ***Muthupalaniappa Chettiar Vs. Alagamai Achi and others*** reported in ***74-LW-145,*** a Division Bench of this Court had an occasion to consider the term debt and the following observations of the Division Bench are relevant,

"The term "debt" no doubt, is commonly used to describe liabilities which have an origin in contract, but we see no reason why we should restrict the connotation of that term to such liabilities only. Anything due and payable is a debt. "

17. As regards the meaning that is to be ascribed to the word penalty, the learned Additional Solicitor General would contend that a penalty levied for violation of the statutory provision is different from a fine imposed for an offence. Therefore, a penalty would only lead to a civil liability.

18. In support of the said contention Mr.AR.L.Sundaresan, learned Additional Solicitor General would draw out attention to the judgment in ***Shiv Dutt Rai Rateh Chand and others Vs. Unior of India*** reported in ***1983 (3) SCC 529,*** wherein, the Hon'ble Supreme Court had pointed out that the word penalty is a word of wide significance and sometimes it means recovery of an amount as a penal measure, even in a civil proceeding and the term penalty in Article 20(1) of the Constitution of

India is used in a narrow sense meaning a payment which has to be made or deprivation of liberty which has to be suffered as a consequence of the finding that the person accused of a crime is guilty of charge. Reliance is also placed by Mr.AR.L.Sundaresan, learned Additional Solicitor General on paragraph 31 of the said judgment which reads as follows:-

> *After giving an anxious consideration to the points urged before us, we feel that the word 'penalty' used in Article 20(1) cannot be construed as including a 'penalty' levied under the sales tax laws by the departmental authorities for violation of statutory provisions penalty imposed by the sales tax authorities is only a civil liability, though penal in character. It may be relevant to notice that subsection (2-A) of section 9 of the Act specifically refers to certain acts and omissions which are offences for which a criminal prosecution would lie and the provisions relating to offences have not been given retrospective effect by section 9 of the Amending Act. The argument based on Article 20(1) of the Constitution is, therefore, rejected.*

19. The learned Additional Solicitor General would also draw our attention to the judgment of the Hon'ble Supreme Court in ***Sova Ray and***

another Vs. Gostha Gopal Dey and others reported in ***1988 (2) SCC 134,*** wherein, the purport of the penal clause in a compromise agreement was considered. While rejecting the contention that clause 6 of the compromise agreement in issue which provided for the decree of the trial Court becoming final in the event of failure of the defendants to pay a certain sum of money before a particular date cannot be construed as penal. The Hon'ble Supreme Court observed as follows:-

> *"The expression 'penalty' is an elastic term with many different shades of meaning but it always involves an idea of punishment. The impugned clause in the present case does not involve infliction of any punishment; it merely deprives defendant 9 of a special advantage in case of default."*

20. Reliance is also placed by the learned Additional Solicitor General on the judgments in ***Suborno Bose Vs. Enforcement Directorate and another*** reported in ***2020 (14) SCC 241*** and ***Union of India and another Vs. Shantilal Jewellers and others*** reported in ***2003 SCC Online Bombay 1032,*** wherein, the Hon'ble Supreme Court and the Bombay High

Court had held that penalty imposed under the taxing statute is civil in nature.

21. Summarizing his submissions, the learned Additional Solicitor General would contend that the term debt and the term penalty are wide enough to cover a civil liability arising out of an adjudicatory process. He would further add that all that is required to enable a creditor to invoke sub-Section 2 of Section 9 of the Presidency Towns Insolvency Act 1909 is default in payment of money payable under a decree or order, despite a notice having been issued. Qualifying the term decree or order, according to Mr.AR.L.Sundaresan, learned Additional Solicitor General is impermissible. He would point out that the learned Single Judge had qualified the term decree or order as a decree or order of a civil Court. This action of the learned Single Judge according to Mr.AR.L.Sundaresan is uncalled for and does violence to the provisions of Section 9(2) of the Presidency Towns Insolvency Act 1909.

22. Arguing further, the learned Additional Solicitor General

would contend that the decision of the Hon'ble Supreme Court in ***Paramjeet Singh Patheja Vs. ICDS Ltd.,*** reported in ***2006 (13) SCC 322*** cannot be taken as a precedent for the proposition that the decree or order mentioned in section 9(2) of the Presidency Towns Insolvency Act, 1909 should be that of aCivil Court only, since the Hon'ble Supreme Court was concerned with an award passed by the Arbitrator which according to the Hon'ble Supreme Court was neither a decree nor an order.

23. The learned Additional Solicitor General would point out that the Hon'ble Supreme Court in a subsequent judgment reported in ***Kotak Mahindra Bank Limited Vs. A.Balakrishnan and another*** reported in ***2022 (9) SCC 186*** had pointed out that the judgment in ***Paramjeet Singh Patheja Vs. ICDS Ltd.,*** referred to *supra,* cannot be taken as a precedent for the proposition that the term decree or order in Section 9(2) would only mean a decree or order of the civil Court and nothing else. The learned Additional Solicitor General would also point out that while the Hon'ble Supreme Court was concerned with an award passed under the Arbitration and Conciliation Act, in ***Paramjeet Singh Patheja Vs. ICDS Ltd.,*** referred

to *supra,* it dealt with the recovery certificate issued by the Tribunal and the meaning to be attached to the term financial debt occurring in Section 5(8) of the Insolvency and Bankruptcy Code in ***Kotak Mahindra Bank Limited Vs. A.Balakrishnan and another*** referred to *supra.*

24. In fact the larger Bench of the Hon'ble Supreme Court in ***Kotak Mahindra Bank Limited Vs. A.Balakrishnan and another*** referred to *supra* had considered the meaning of the term 'and includes' occurring in Section 5(8) of the Insolvency and Bankruptcy Code. Rejecting the contention that the recovery certificate issued by Debt Recovery Tribunal will not create a financial debt within the meaning of sub-Section 8 of Section 5 of the Insolvency and Bankruptcy Code, based on the judgment in ***Paramjeet Singh Patheja Vs. ICDS Ltd.,*** referred to *supra,* the Hon'ble Supreme Court pointed out that the said judgment cannot be taken as a precedent as it had dealt with only the effect of an award and it is with regard to the deeming fiction created by Section 36 of the Arbitration and Conciliation Act 1996. While dealing with the definition of the financial debt under Section 5(8) of the Insolvency and Bankruptcy Code, the Hon'ble

Supreme Court in ***Kotak Mahindra Bank Limited Vs. A.Balakrishnan and another*** referred to *supra* observed as follows:-

> *"It is thus clear that it is a settled position of law that when the word "include" is used in interpretation clauses, the effect would be to enlarge the meaning of the words or phrases occurring in the body of the statute. Such interpretation clause is to be so used that those words or phrases must be construed as comprehending, not only such things, as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. In such a situation, there would be no warrant or justification in giving the restricted meaning to the provision."*

25. Inviting our attention to the definition of the terms creditor, debt and debtor in the Presidency Towns Insolvency Act, 1909 *extracted supra* Mr.AR.L.Sundaresan, learned Additional Solicitor General would contend that all the three being inclusive definitions they are capable of a wider interpretation to include the liability which accrues out of an adjudicatory process. According to the Learned Additional Solicitor General

it is not necessary that the liability should arise out of a decree or order of the civil Court as concluded by the Hon'ble Single Judge.

26. Reliance in this regard is placed by the learned Additional Solicitor General on the judgment of the Hon'ble Supreme Court in ***P.Mohanraj and others Vs. Shah Brothers Ispat Private Limited*** reported in ***2021 (6) SCC 258,*** wherein, it was held that the expression 'proceedings' used in Section 14 of the Insolvency and Bankruptcy Code would include a proceeding under Section 138/ 141 of the Negotiable Instruments Act. The learned Additional Solicitor General would submit that though the proceeding under Section 138/141 of the Negotiable Instruments Act are criminal proceedings held before a Magistrate, they cannot be termed as pure criminal proceedings since dis-honour of cheque is deemed to be an offence.

27. Reliance is also placed on the judgment of the Hon'ble Supreme Court in ***Dena Bank Vs. Shivakumar Reddy and another*** reported

in ***2021 (10) SCC 330,*** wherein, the Hon'ble Supreme Court had held that final judgment and or decree of any Court or Tribunal or any Arbitral award for payment of money, if not satisfied would fall within the ambit of the financial debt. The learned Additional Solicitor General would also submit that it will be too dangerous to restrict the meaning of the word debt, debtor and creditor to the dictionary meaning or to the common connotation ascribed to these words conventionally, since several adjudicatory processes have been introduced due to the formation of various recovery Tribunals and other alternate dispute redressal mechanisms. He would therefore submit that since the definition clause in the Presidency Town Insolvency Act admits of wider connotation, the Court should not limit the scope of the enactment by resorting to a narrow interpretation of the provision.

28. Drawing our attention to the relevant provisions of Foreign Exchange Regulation Act 1973, the learned Additional Solicitor General would submit that Foreign Exchange Regulation Act provides for both punishment treating the violation of the provisions of the Act as a criminal offence and for levy of penalty by providing for an adjudicatory process.

Section 50 of the Foreign Exchange Regulation Act provides for penalty for contravention of certain provisions of the Act. Section 51 empowers the officers of the Directorate of Enforcement to adjudicate and impose a penalty for contravention after conducting an enquiry. Section 52 of the Foreign Exchange Regulation Act provides for an appeal to the appellate Board and the appellate Board as well as the adjudicating officer are invested with all powers of the Civil Court under the Code of Civil Procedure while trying a suit. A further appeal is provided to the High Court under Section 54. Unlike other criminal offences, the proceeding for penalty initiated under Section 50 of the Foreign Exchange Regulation Act, 1973 can continue even after the death or insolvency of the person who is accused of contravening the provisions of the Act.

29. Therefore, according to Mr.AR.L.Sundaresan, learned Additional Solicitor General, the proceedings for penalty under Sections 50, 51 and 52 of the Foreign Exchange Regulation Act 1973 are quasi criminal in nature and they cannot be termed as pure criminal proceeding and the penalty levied cannot be termed as a fine or punishment imposed for

contravention. What is sought to be recovered as penalty under the above provisions of the Foreign Exchange Regulation Act is only the loss that is caused to the exchequer because of the violation of the provisions of the Act. Therefore, it cannot be treated as pure penalty or fine falling under the realm of the criminal laws.

30. The learned Additional Solicitor General would also point out that sub-Section 5 of Section 9 of the Presidency Towns Insolvency Act 1909 circumscribes the power of the Court to set aside the insolvency notice. According to him, an insolvency notice could be set aside only on the grounds available under sub-Section 5 and not others. Drawing our attention to the provisions of the Sub-Section 5 of Section 9 Presidency Towns Insolvency Act 1909 extracted *supra* the learned Additional Solicitor General would submit that none of the grounds raised in the application viz., the application filed to set aside the insolvency notice in A.No.177 of 2001 fall within the ambit of sub-Section 5 of Section 9 of the Presidency Towns Insolvency Act, 1909 and therefore the Hon'ble Single Judge was not right in setting aside the insolvency notice.

31. Reliance in this regard is placed on the judgment of the Hon'ble Mr.Justice V.Ramasubramanian in ***A.Manohar Prasad Vs. Kotak Mahindra Bank Ltd.,*** reported in ***2012 (5) CTC 20,*** wherein the applicant sought for setting aside the insolvency notice on the following grounds:

> *(i) that the Applicants had already tendered payment to the 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.

32. After considering the rival contentions, the learned Judge observed as follows:-

35. *The case of the Applicants does not fall under Clause (a) of sub-section (5) of Section 9, since they do not claim that they have a Counter Claim or set off against the Respondent-Bank. The case of the Applicants would not also fall under Clause (b) of sub-section (5), since the decrees were passed on "consent terms". The Applicants do not claim that the decrees were fraudulent. They have not filed any Suit or Application to set aside the decrees. On the contrary, the Applicants claim that payments have been tendered in accordance with the decrees. Therefore, the case will not come under Clause (b) of sub-section (5) of Section 9 of the Act.*

36. *The case of the Applicants would not also fall under Clause (c), since the pre-requirement to take shelter under Clause (c) of sub-section (5), is that the decree should be in executable under the provisions of any law referred to in Clause (b). At the most, the case of the Applicants is that the Debts Recovery Tribunal cannot execute the decrees in view of Section 31-A of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. This contention does not fall under any provisions of law referred to in Clause (b) of sub-section (5), so as to make the decrees in executable in terms of Clause (c).*

37. *Once it is found that the Applicants cannot successfully raise anyone of the 3 grounds mentioned in sub-section (5) of Section 9, it follows as a corollary that the Insolvency Notice cannot be set aside on any valid ground. Therefore, the above Application deserves to be dismissed.*

33. Therefore, according to the learned Additional Solicitor General, the very application under Section 9(5) of the Presidency Towns Insolvency Act 1909 on the grounds which are not enumerated thereunder is not maintainable.

34. Contending contra Mr.B.Kumar, learned Senior Counsel appearing for the 1st respondent would submit that the issue is squarely covered by the judgment of the Hon'ble Supreme Court in ***Paramjeet Singh Patheja Vs. ICDS Ltd.,*** referred to *supra*. He would submit that the Hon'ble Supreme Court had held that Section 9(2) of the Presidency Towns Insolvency Act 1909 could be invoked only when there is a decree or order for payment of money. According to Mr.B.Kumar, learned Senior Counsel, the decision of the Hon'ble Supreme Court in ***Paramjeet Singh Patheja Vs. ICDS Ltd.,*** referred to *supra* would leave no room for doubt that the order of an adjudicating Authority imposing a penalty under the special legislation viz., Foreign Exchange Regulation Act cannot give raise to a debt within the meaning of Section 2(b) of the Presidency Town Insolvency Act 1909 and the person in whose favour such an order is passed cannot be deemed to be creditor within the meaning of Section 2(a) of the said Act.

35. Mr.B.Kumar, learned Senior Counsel would seek to contend that unless there is a decree or order of a Court emanating out of a

conventional litigation, which is for payment of money, the provisions of the Presidency Towns Insolvency Act, 1909 cannot be invoked. He would submit that the later decision relied upon by the learned Additional Solicitor General in ***Dena Bank Vs. Shivakumar Reddy and another*** referred to *supra,* will be of no help, since it turned on the interpretation of the provisions of Section 5(8) of the Insolvency and Bankruptcy Code.

36. The learned Senior Counsel would further add that the Enforcement Directorate is not a juristic person and it cannot invoke the provisions of Sections 9(2) of the Presidency Towns Insolvency Act 1909 independent of the Central Government. Relying upon the judgment of this Court in the ***Director of Enforcement, Madras Vs. Rama Arangannal and another*** reported in ***AIR 1981 Mad 80,*** Mr.B.Kumar, learned Senior counsel would submit that the Director of Enforcement cannot maintain an appeal against the order of the appellate Board reversing his decision. In the said case this Court held that it is only the Central Government who is an aggrieved party and not the Director of Enforcement.

37. Therefore, according to Mr.B.Kumar, learned Senior Counsel Section 50 of the Foreign Exchange Regulation Act, provides for a penalty being levied and the same is payable to the Central Government and therefore it is only the Central Government that can initiate action and not the Enforcement Directorate, which is not a juristic person entitled to recover the penalties.

38. The learned Senior Counsel would also draw our attention to Section 70 which provides for recovery of penalty imposed, heading of which reads as "Recovery of sums due to Government." Relying heavily upon the above provision Mr.B.Kumar, learned Senior Counsel would submit that the notice issued at the instance of the Enforcement Directorate is not valid. Of course, the learned Single Judge has rejected the said contention. Mr.B.Kumar, learned Senior Counsel would however submit that while supporting of the order of the learned Judge, which is in his favour, he can also attack the findings that went against him.

39. We have no quarrel with the said argument of the learned Senior Counsel. While acknowledging his right to question the finding of

the learned Single Judge which are against him in the order, which is otherwise in his favour, we will have to consider the impact of the submission of the learned Senior Counsel.

40. In reply to the said contention of Mr.B.Kumar Mr.ARL.Sundaresan, learned Additional Solicitor General would submit that the provisions of the Insolvency Act are not a mechanism for recovery. The application in the instant case has been filed by the Enforcement Directorate. The notice of insolvency has been issued by the Enforcement Directorate represented by its Deputy Director. The respondent in the application No.177 of 2001 is shown as Deputy Director of Enforcement Directorate. Pointing out to the fact that the Deputy Director of Enforcement is an exofficio Under Secretary to the Government of India, Mr.Ar.L.Sundaresan, would submit that the notice of insolvency issued by him is perfectly valid.

41. Mr.B.Kumar, learned Senior Counsel would further contend that Section 9(2) of the Presidency Towns Insolvency Act 1909 cannot be invoked unless the decree or order has become final and the execution

thereof has not been stayed. Pointing out to the fact that on the date when the insolvency notice was issued, the appeal filed by the appellant in CMA.No.914 of 2001 was pending in this Court and therefore the order of penalty had not become final, the learned Senior Counsel would submit that issuance of insolvency notice itself is flawed.

42. In response to the said submission Mr.AR.L.Sundaresan, learned Additional Solicitor General appearing for the appellant would submit that even though the order had not become final on the date when the insolvency notice was issued, today the appeal filed by the respondent in CMA.No.914 of 2001 having been dismissed and the SLP against the said order also having been dismissed, there is no prohibition for continuation of the proceedings. The learned senior counsel would rely upon the judgment of the Hon'ble Supreme Court in ***C.C.Alavi Haji – Vs.- Palapetty Muhammed and another*** reported in ***2007(6) SCC 555*** rendered with reference to Section 138 of the Negotiable Instruments Act, wherein, it was held that a complaint filed before the expiry of 15 days from the date of receipt of notice need not be thrown out on the ground it is pre-mature, since

it was open to the drawer of the cheque to pay the money due under the cheque within 15 days from the date of receipt of the summons issued by the Magistrate.

43. On the above contentions, the following points arise for determination in the appeal.

1) Whether the words creditor, debt and debtor as defined under Section 2A and 2B of the Presidency Town Insolvency Act should be given a restricted conventional meaning?

2) Whether the term decree or order appearing in Section 9(2) of the Presidency Towns Insolvency Act 1909 would mean only a decree or order of a civil Court or would it include any order for payment of money passed after an adjudicatory process?

3) Whether the application under Section 9(5) on the grounds mentioned in it is maintainable?

4) Whether the Enforcement Directorate is competent to initiate proceedings in insolvency for failure in payment of penalty imposed?

5) Whether Section 9(2) can be invoked before the decree or order becoming final?

44. The 1st respondent in the appeal has filed a writ petition in W.P.No.20492 of 2008. Challenge in the writ petition is to the notice dated 25.07.2008 issued by the Tahsildar, Mylapore, Triplicane under Section 29 of the Tamil Nadu Revenue Recovery Act 2 of 1864. The challenge is mainly on the following grounds:

(1) The Tamil Nadu Revenue Recovery Act cannot be invoked for recovery of monies due to Central Government. The correct enactment would be Revenue Recovery Act, 1890 which provides for recovery of monies due to the Central Government.

(2) Though Section 70(1)(3) of Foreign Exchange Regulation Act, enables recovery of the penalty as if it is arrear of land revenue, Mr.B.Kumar, learned Senior Counsel would submit that since the monies are

due to the Central Government invocation of State Act by the respondent in the writ petition is erroneous. He would also point out that Section 70(1)(3) of the Foreign Exchange Regulation Act has been amended by the Finance Act of the year 1995 and the words "Collector of the District" have been substituted with "Commissioner of Customs". Therefore, according to him, notice issued by the Collector of the District pursuant to the certificate issued by the adjudicating officer under Section 70(1)(3) is not valid.

45. We have considered the submissions of the learned senior counsel on either side.

Point No.1:-

46. This relates to the definition of the terms creditor, debt and debtor. Section 2(a) of the Presidency Towns Insolvency Act 1909 defines the term creditor as follows:-

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

Section 2(b) of the said Act defines the term debt and debtor and it reads as follows:-

2(b) "debt" includes a judgment-debt, and "debtor" includes a judgment-debtor;

47. As could be seen from the definitions, both the definitions are inclusive definitions. In ***Regional Director, Employees State Insurance Corporation Vs. High Land Coffee Works*** reported in ***1991 (3) SCC 617,*** the Hon'ble Supreme Court had considered the import of the term 'includes' used in a definition clause, the Hon'ble Supreme Court had held as follows:-

> *The word "include" in the statutory definition is generally used to enlarge the meaning of the preceding words and it is by way of extension, and not with restriction, The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occur- ring in the body of the statute; and when it is so used, these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import but also those things which the interpretation clause declares that they shall include.*

48. The Hon'ble Supreme Court had also considered the purport of

the word "includes" in ***Kotak Mahindra Bank Limited Vs. A.Balakrishnan and another*** referred to *supra*, wherein, it was held as follows:-

> *It is thus clear that it is a settled position of law that when the word "include" is used in interpretation clauses, the effect would be to enlarge the meaning of the words or phrases occurring in the body of the statute. Such interpretation clause is to be so used that those words or phrases must be construed as comprehending, not only such things, as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. In such a situation, there would be no warrant or justification in giving the restricted meaning to the provision.*

49. The Court also referred to the judgment of ***Karnataka Power Transmission Corpn. & Anr. Vs. Ashok Iron Works Pvt. Ltd.*** reported in ***2009 (3) SCC 240***, wherein, the meaning of the expression "includes" was considered and it was held that resort to the word "includes" by the legislature often shows that it wanted to give an extensive and enlarged meaning to such expression.

50. In the light of the above judicial pronouncements of the Hon'ble Supreme Court, we do not think that the terms creditor, debt and debtor as defined under Sections 2(a) and 2(b) of the Presidency Towns Insolvency Act, 1909 should be given a restricted or a conventional meaning as a judgment creditor, a decreed debt or a judgment debtor.

51. The word “includes” as pointed out by the Hon'ble Supreme Court has been used with a intent to impart wider meaning to the terms defined. We should also be alive to the various developments in law since the enactment of the Presidency Towns Insolvency Act, 1909, more than a century ago. Various other Forums, Tribunals and alternative Dispute resolution mechanism have been put in place and those Forums and Tribunals have been empowered to decide legal disputes and have been empowered to pass orders for payment of money. Therefore, at this distant point of time, we do not think that we should restrict the meaning of the words appearing in Sections 2(a) and 2(b) of the Presidency Towns Insolvency Act, 1909 and deprive the other creditors from invoking the provisions of the Act.

52. We therefore answer the point No.1 to the effect that in view of the inclusive definition adopted in Section 2(a) and 2(b) of the Presidency Towns Insolvency Act, 1909, the terms creditor, debt and debtor defined thereunder should be given a wider meaning and it cannot be restricted to a decreed debt or a debt payable under order of a Court.

Point No.2:-

53. Moving to the second question which has been the bone of contention between the parties, while it is the attempt of the Additional Solicitor General to give a widest possible meaning to the words decree or order appearing in Section 9(2) of the Presidency Towns Insolvency Act, 1909, Mr. B.Kumar, learned Senior Counsel appearing for the respondent would attempt to restrict it to a decree or order of a civil Court as defined under Section 2(2) and 2(14) of the Code of Civil Procedure.

54. Heavy reliance is placed by Mr.B.Kumar, learned Senior Counsel on the judgment of the Hon'ble Supreme Court in ***Paramjeet Singh***

Patheja Vs. ICDS Ltd., referred to *supra.* In ***Paramjeet Singh Patheja Vs. ICDS Ltd.,*** referred to *supra,* the Hon'ble Supreme Court was concerned with an award passed under the Arbitration and Conciliation Act, 1996 and import of Section 26 of the Arbitration and Conciliation Act,1996 which provides for a deeming fiction that an award of the arbitrator is a decree of a civil Court for the purposes of execution. The Hon'ble Supreme Court mainly pointed out that arbitration is not an adjudicatory process provided by a statute. It is a consequence of an agreement between the parties and therefore the award of the arbitrator cannot be treated as a decree or order of a Court, in order to enable invocation of Section 9(2) of the Presidency Towns Insolvency Act, 1909 for non-payment of the monies due under the award.

55. In ***Kotak Mahindra Bank Limited Vs. A.Balakrishnan and another*** referred to *supra,* the Hon'ble Supreme Court had pointed out that the judgment in ***Paramjeet Singh Patheja Vs. ICDS Ltd.,*** referred to *supra* cannot be taken as a precedent to decide as to whether the recovery certificate issued by the Debt Recovery Tribunal would constitute a financial

debt as defined under Section 5(8) of the Insolvency and Bankruptcy Code or not. Section 5(8) of the Insolvency and Bankruptcy Code defines the financial debt as follows:-

> *(8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—*
>
> *(a) money borrowed against the payment of interest;*
>
> *(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;*
>
> *(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*
>
> *(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*
>
> *(e) receivables sold or discounted other than any receivables sold on non-recourse basis;*
>
> *(f) any amount raised under any other transaction, including any forward sale or purchase*

agreement, having the commercial effect of a borrowing;

[Explanation.--For the purposes of this sub-clause,--

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (regulation and Development) Act, 2016 (16 of 2016);]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

56. While considering this definition the Hon'ble Supreme Court after referring to the inclusive definition, held that the judgment in ***Paramjeet Singh Patheja Vs. ICDS Ltd.,*** referred to *supra* being one with regard to legal fiction provided under Section 36 of the Arbitration and Conciliation Act cannot be taken as a precedent for having decided on the effect of various orders that may be passed by various Tribunals or Authorities who are empowered to pass orders imposing financial liability.

57. We must also point out that in ***Dena Bank Vs. Shivakumar Reddy and another*** referred to *supra,* the Hon'ble Supreme Court had held that a final judgment and or a decree of any Court or Tribunal or any arbitral award for payment of money, if not satisfied, would fall within the financial debt under the Insolvency and Bankruptcy Code. In the light of the definition clause found in the Presidency Towns Insolvency Act, 1909 and in the light of the subsequent pronouncements of the Hon'ble Supreme Court, we do not think that the judgment in ***Paramjeet Singh Patheja Vs. ICDS Ltd.,*** referred to *supra* could be taken as a precedent for the proposition that Section 9(2) of the Presidency Towns Insolvency Act, 1909, could be

invoked only when there is an order or decree of the civil Court directing payment of money. A judgment is a precedent only for what it decides and not for other situations. While considering the binding nature of precedents, the Hon'ble Supreme Court in ***Regional Manager and another Vs. Pawan Kumar Dubey*** reported in ***1976 (3) SCC 334,*** had held that it is the Rule deducible from the application of law to the facts and circumstances of a case, which constitutes its *ratio decidendi* and not some conclusion based upon the facts which may appear to be similar. One additional fact can make a world of difference between the conclusion in two cases even when same principles are applied in each case of similar facts.

58. Again in ***Union of India and others Vs. Dhanwanti Devi and others*** reported in ***1996 (6) SCC 44,*** the Hon'ble Supreme Court had held that the decision is only an authority for what it actually decides. What is the essence in a decision is its ratio and not every observations found therein, nor what logically flows from various observations made in the judgment.

59. What Mr.B.Kumar, learned Senior Counsel is attempting to do

by relying upon the judgment in ***Paramjeet Singh Patheja Vs. ICDS Ltd.,*** referred to *supra* is exactly to impress us that the conclusion of the learned Single Judge to the effect that the decree or order must be one passed by civil Court logically flows from the conclusion arrived at by the Hon'ble Supreme Court in ***Paramjeet Singh Patheja Vs. ICDS Ltd.,*** referred to *supra*. In the light of what had been laid down by the Hon'ble Supreme Court on interpretation of its own judgment, we do not think that ***Paramjeet Singh Patheja Vs. ICDS Ltd.,*** referred to *supra* could be made a precedent for deciding the question as to whether the term decree or order used in Section 9(2) of the Presidency Towns Insolvency Act, 1909, should be a decree or order passed by a civil Court or would it mean to include any order passed by an authority empowered under the statute after following the adjudicatory process. We are therefore of the view that the term decree or order used in Section 9(2) of the Presidency Towns Insolvency Act, 1909, would take within its fold an order passed by an empowered Authority under the statue after following the adjudicatory process. Section 51 of the Foreign Exchange Regulation Act, 1973 provides for a reasonable opportunity and it also invests the powers of the civil Court in the adjudicating Authority and

therefore it cannot be denied that an order passed under Section 51 of the Foreign Exchange Regulation Act, 1973 is an order passed after the adjudicatory process. We are therefore of the considered opinion that it will be unfair and unjust to restrict the meaning of the words decree or order only to decrees or orders granted by a civil Court. They would include orders passed by any other Authority viz., the Adjudicating Authority under the Foreign Exchange Regulation Act.

60. We shall now advert to the contention that what is levied under Sections 50 and 51 of the Foreign Exchange Regulation Act is a penalty and therefore it cannot be a debt. As we had already adverted to Sections 50 and 51 of the Foreign Exchange Regulation Act, 1973 provides for a mechanism for determination of the penalty payable by a person who violates the provisions of the said Act. Section 56 of the said Act enables prosecution and that is without prejudice to the power to levy penalty. We had already referred to the judgment of the Hon'ble Supreme Court which considered the term penalty. Though the word penalty is used in Section 50 it is not a fine levied on the basis of conviction or a penalty as used under Article 20(1) of

the Constitution of India. The provisions of Sections 50 and 51 of the Foreign Exchange Regulation Act, 1973 are more in the nature of recovery of loss that is caused to the exchequer because of the violation of the provisions of the Foreign Exchange Regulation Act and the Act also provides for criminal prosecution without prejudice to the power to levy penalty.

61. We have already adverted to the judgments in ***Suborno Bose Vs. Enforcement Directorate and another*** reported in ***2020 (14) SCC 241*** and ***Union of India and another Vs. Shantilal Jewellers and others*** reported in ***2003 SCC Online Bombay 1032,*** wherein the Hon'ble Supreme Court and the Bombay High Court had taken a view that penalty imposed for the tax delinquency are civil in nature. The penalty imposed under Sections 50 and 51 of the Foreign Exchange Regulation Act being in the nature of a recovery mechanism cannot be treated as a penal levy. Though it is termed as penalty, it is necessarily a civil consequence for a violation of the provisions of the Act. We therefore conclude that the order of the Adjudicating Authority would give raise to enforceable debt within the meaning of Section 2(b) and the person against whom such order is made

would be a debtor within the meaning of the said Section. Needless to point out that the person in whose favour the order is made would be a creditor.

62. Therefore, we are unable to agree with the conclusion of the learned Single Judge where he held that an order of the Adjudicating Authority imposing penalty would not create a debt within the meaning of Section 2(b) and the person in whose favour the order is passed could not be creditor within the meaning of Section 2(a), in order to enable them to invoke Section 9(2) of the Presidency Towns Insolvency Act, 1909. In coming to the above conclusion, we have also taken into account the Tribunalization and promotion of other alternative dispute resolution mechanism by which several new Authorities empowered with statutory power to pass orders for payment of monies have been created and to give a restricted meaning in todays circumstance to the words which were designedly put in an inclusive definition by the legislature way-back in 1909, only with a view to give enlarged meaning to them.

Point Nos.3 and 5:-

63. The next question that arises is whether the grounds alleged in an application under Section 9(5) of the Presidency Towns Insolvency Act, 1909 are available to the respondent. Section 9(5) of the Presidency Towns Insolvency Act, 1909 reads as follows:-

> *(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.]

Explanation.-- For the purposes of this section, the act of an agent may be the act of the principal, even though the agent have no specific authority to commit the act.

64. It provides for setting aside an insolvency notice on certain grounds. We are not for a moment considering whether the Court would adjudicate a person as insolvent as a consequence of non-payment of money due, pursuant to the order passed under Section 51 of the Foreign Exchange Regulation Act,1973. We are only at the threshold. The failure to pay, on being served with the notice under Section 9(2) of the Presidency Towns Insolvency Act, 1909, would amount to an act of insolvency to enable the creditor to initiate insolvency proceeding. This is a reason why the grounds set out in Section 9(5) of the Presidency Towns Insolvency Act, 1909 are very relevant. Section 9(5) of the Presidency Towns Insolvency Act, 1909 extracted above would show that the specific grounds have been set out. The question as to whether a debt existed or not is not a ground that is postulated in the said provision.

65. We have already referred to the judgment of the Hon'ble Justice V.Ramasubramanian, wherein the learned Judge had considered the grounds available to a person in an application under Section 9(5) of the Presidency Towns Insolvency Act, 1909. If the case of the applicant does not fall within the clauses (a), (b) or (c) of Section 9(5), an application under Section 9(5) of the Presidency Towns Insolvency Act, 1909 has to be dismissed.

66. No doubt, the words "**being a decree or order which has become final and the execution thereof has not been stayed"** would definitely provide a ground under Section 9(5) of the Presidency Towns Insolvency Act, 1909. The very jurisdiction to issue an insolvency notice would be in doubt, since the appeal in CMA.No.914 of 2001 was pending on the date when the insolvency notice was sought to be issued. Though Mr.AR.L.Sundaresan, learned Additional Solicitor General would attempt to contend that the word 'and' appearing between the words decree or order which has become final and the execution thereof has not been stayed

should be read as 'or', we are unable to agree with the said contention of the learned Additional Solicitor General. In order provide a cause of action for a creditor to seek a notice of insolvency to be issued under Section 9(2) of the Presidency Towns Insolvency Act, 1909, there should be a decree or order which has become final and the execution of it should not have been stayed. Therefore, while concluding that the grounds that are set out in the application for setting aside the insolvency notice are not available to the respondent, we find that since the order imposing penalty had not become final, the insolvency notice issued on 28.02.2001 is not valid, inasmuch as the appeal in CMA.No.914 of 2001 was pending as on that date even though the stay petition in CMP.No.8587 of 2001 was dismissed as withdrawn. The argument of the learned Additional Solicitor General that as of today the order has become final and therefore the issuance of insolvency notice on 28.02.2001 should be sustained though appears attractive cannot be sustained.

67. The reference to the provisions of Section 138 of the Negotiable Instruments Act and the judgment of the Hon'ble Supreme Court

concluding that a complaint filed under Section 138 of the Negotiable Instruments Act before the expiry of 15 days time could still be sustained, if the drawer had not paid the money due under the cheque within 15 days from the date of receipt of summons cannot be applied to the instant case, inasmuch as it is the non-payment of money ordered to be paid within a particular time that constitutes the act of insolvency. In order to constitute an act of insolvency in terms of Section 9(2) of the Presidency Towns Insolvency Act, 1909, the following are essential:

i) an existence of decree or order for payment of money;

ii) it having become final;

iii) its execution is not stayed and

iv) non-payment within 31 days of the issuance of notice.

68. Therefore, the very act of insolvency would occur only if the debtor fails to pay within 31 days from the date of issuance of a notice, the money payable under an order which has already become final. The attempt of the learned Additional Solicitor General is to make us name the child before it is born. We do not think we could sustain that argument. We are

therefore of the considered opinion that the insolvency notice issued has to be set aside solely on the ground that the order imposing penalty had not become final on the date when the insolvency notice was issued.

Point No.4:-

69. In the light of the answer to question Nos.3 and 5, the question No.4 becomes academic and we do not venture to answer the same. Of course, the Hon'ble Single Judge had held that proceeding taken by Enforcement Directorate are competent, but, in the light of the view that we had taken to the effect that the insolvency notice issued is bad, since the order had not become final, we do not propose to go into the question of competence of the Enforcement Directorate.

70. In the light of the above conclusion, the OSA.No.124 of 2005 is **dismissed** upholding the order of the Hon'ble Single Judge only on the ground that the insolvency notice issued on 28.02.2001 is unsustainable, in view of the fact that it has been issued when the Civil Miscellaneous Appeal

was pending and the order has not become final. The findings of the Hon'ble Judge regarding the nature of the order passed by the adjudicating Authority are set aside. We conclude that the order of the adjudicating Authority would create a debt within the meaning of Section 2(b) of the Presidency Towns Insolvency Act, 1909 and the person against whom the order is made would be a debtor within 2(b) of the said Act and the person in whose favour the order is made would be a creditor within the meaning of Section 2(a) of the Presidency Towns Insolvency Act, 1909. It would be open to the Enforcement Directorate to take proceedings afresh if it is so adviced.

71. Adverting to the writ petition, we find that the contentions of the learned counsel for the petitioner will have to be sustained. The impugned notice has been issued under Section 29 of the Tamil Naud Revenue Recovery Act. It is the contention of Mr.B.Kumar, learned Senior Counsel that the Tamil Nadu Revenue Recovery Act cannot not be applied since it is an Act to consolidate the law for recovery of land revenue in the State of Tamil Nadu and the public revenue due on the land for the purposes

of the Act would only include assessment, quit rent or ground rent and other charges upon the land payable to the State Government, CESS or other dues payable to the State Government on account of water supplied for irrigation, pattam due on Kandukrishi lands in Kanniyakumari District. Therefore, the very Act is intended for recovery of monies due to the State Government and not to the Central Government. More over under Section 70(1)(iii) of the Foreign Exchange Regulation Act, it is the Collector of Customs who is empowered to recover the penalty, as if it is the arrears of land revenue and not the District Collector or the Tahsildar.

72. Though Mr.AR.L.Sundaresan, learned Additional Solicitor General would contend that the amendment is a mistake, we cannot proceed on such an assumption that the amendment is a mistake. Act 22 of 1995 had substituted the word 'Collector' with the words 'Commissioner of Customs of the District'. The Tamil Naud Revenue Recovery Act or the Revenue Recovery Act, 1890 which is a parliamentary enactment do not enable the Commissioner of Customs to recover monies due as land revenue. Section 142 of the Customs Act provides for recovery of monies due to the

Government and Section 142 (1)(c) of the Customs Act provides a similar procedure as in Section 70(1)(iii) of the Foreign Exchange Regulation Act for recovery of monies due to the Government and the same reads as follows:-

> *142.(1)(c)If the amount cannot be recovered from such person in the manner provided in clause (a) or clause (b)--*
>
> *(i) the Assistant Commissioner of Customs or Deputy Commissioner of Customs may prepare a certificate signed by him specifying the amount due from such person and send it to the Collector of the district in which such person owns any property or resides or carries on his business and the said Collector on receipt of such certificate shall proceed to recover from such person the amount specified thereunder as if it were an arrear of land revenue;*

73. If monies are to be recovered as if it was a land revenue, resort has to be made either to the provisions of the relevant State Revenue Recovery Act or the Central Revenue Recover Act of 1890. Even under the

Revenue Recovery Act of the year 1890 (The Central Act) it is the Collector of the District who is empowered to recover monies by issuing distraint proceedings. Section 3 of the said Enactment, authorises the Collector to effect recovery through such officer as he deems fit.

74. Mr.AR.L.Sundaresan, learned Additional Solicitor General would contend that even if Section 70(1)(iii) of the Foreign Exchange Regulation Act,1973 is not available. Sub-Section 3 of Section 70 of the said Act enables the Central Government to recover the monies under any other law for the time being in force relating to recovery of debts due to the Government. This provision which is an enabling provision would enable the adjudicating officer to invoke the provisions of Revenue Recovery Act 1890 (the Central Act) and not the State Act. Therefore, the notice impugned in the writ petition will have to be set aside solely on the ground that it is not competent for the Collector to effect recovery of monies due to the Central Government by invoking the State Act. Here again, we will have

to reserve the liberty to the Enforcement Directorate to seek recovery under the provisions of Central Act viz., the Revenue Recovery Act 1 of 1890.

75. In fine, the OSA is **dismissed** and the writ petition will stand **allowed**. Since we have accepted the contentions of the appellant on the vital issue relating to the effect of the order of the adjudicating Authority, we do not impose costs.

(R.S.M.,J.) **(R.K.M.,J.)**
20.10.2023

dsa
Index : Yes
Internet : Yes
Neutral Citation : Yes
Speaking order

To
The Deputy Director,
Enforcement Directorate,
(Foreign Exchange Regulation Act now FEMA)
Shastri Bhavan,
3rd Floor, 3rd Block, No.26, Haddows Road,
Chennai – 600 006.

R.SUBRAMANIAN, J.
and
R.KALAIMATHI, J.

dsa

O.S.A.No.124 of 2005 and
W.P.No.20492 of 2008

20.10.2023