

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS INSOLVENCY JURISDICTION**

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**(26) OFFICIAL ASSIGNEE REPORT NO. 46 OF 2025
IN
INSOLVENCY PETITION NO. 28 OF 2001**

Uttamchand Devichand ShahPetitioning Creditor

IN THE MATTER BETWEEN :

Bansi Jairamdas Jaising and
Ravi Bansi JaisingInsolvents

Ex-parte :-

Uttamchand Devichand ShahPetitioning Creditor
AND
The official assignee, High Court, Bombay.Respondent

**WITH
(27) OFFICIAL ASSIGNEE REPORT NO. 47 OF 2025
IN
INSOLVENCY PETITION NO. 82 OF 2002**

Suraj Prakash KhemchandPetitioning Creditor

IN THE MATTER BETWEEN :

Avinash Bansi Jaising and
Bansi Jairamdas JaisingInsolvents

Ex-parte :

Suraj Prakash KhemchandPetitioning Creditor
AND
The official assignee, High Court, BombayRespondent

Mr. Gaurang Mehta a/w. Ms. Rhea Mehta i/b Ms. Dipal Mehta for Insolvent No.1 in INPT No.82 of 2002.

Mr. Aakash Desai i/by Sukanya Bhaumik for Insolvent Nos. 1 and 2 in OAR No. 46 of 2025 and Insolvent No.2 in OAR No.47 of 2025.

Ms. C. J. Bhatt, official assignee, present, alongwith Mr. Subodh Patil, Deputy official assignee, present.

Ms. R.V. Rane, Insolvency Registrar, present.

Mr. Darshit K. Jain, Amicus Curiae.

CORAM : JITENDRA JAIN, J.

DATED : 2 JULY 2026

JUDGMENT :-

1. On 30 January 2026, following question was framed by the Court for adjudication.

“Whether the official assignee is required to satisfy the claim only on the basis of a Decree or Order of the Court or whether the claim can be adjudicated or satisfied on the basis of documents submitted by the Claimant with the official assignee after a person is declared as insolvent without there being any Decree or Order of the Court to that effect ?”

BACKGROUND:

2. A claim was lodged by the creditor with the official assignee. The official assignee relying on certain orders of this Court stated that unless claim is adjudicated by a Court or competent authority, she cannot consider the same. This was objected by the counsel for the insolvent. It was on this backdrop that above question came to be framed.

3. This Court requested Mr. Mehta and Mr. Darshit Jain, learned counsel to assist the Court in resolving the above question. Both graciously accepted and ably assisted the Court. The Court appreciates assistance rendered by both counsel in answering the question.

4. Mr. Mehta appearing for Insolvent No.1 in Insolvency Petition No.82 of 2002 has made following submissions in support of his proposition that no decree is required for making a claim before the official assignee.

SUBMISSIONS OF MR. MEHTA

5. Mr. Mehta explained the scheme of the Presidency-Towns Insolvency Act, 1909 (“the Act”) in support of his submissions.

6. Section 2(a) and 2(b) of the Act defines “creditor” and “debt” respectively in an inclusive manner, which indicates that requirement of possessing a decree is not a pre-condition for making a claim since only creditor can make claim and it would include all creditors and not only decree-holder.

7. Mr. Mehta further submitted by referring to Section 6 of the Act that powers have been delegated to the official assignee for adjudication of the claim and therefore, this also supports that there is no requirement of obtaining a decree from a Civil Court for making a claim. Section 6 confers power of the Court delegated to the official assignee for adjudication of the claim.

8. Mr. Mehta, refers to Section 9 dealing with acts of insolvency and states that except for clauses (e) and (h) of Section 9(1), no other clause refers to a decree though Section 9 lists down various acts of insolvency. He further submitted that Section 9(2), which refers to a “decree” is independent of and in addition to Section 9(1) and this also indicates that insistence on a decree for making a claim is not justified.

9. Mr. Mehta refers to Section 12 of the Act and submits that on satisfaction of the conditions specified therein a creditor may present the Insolvency Court with an insolvency petition against the debtor and even Section 12 does not refer to any decree.

10. Section 13(2)(a) of the Act which provides for order on a creditor’s petition, refers to “debt” which is wider than a decree and therefore even

this provision gives a clue that there is no requirement of possessing a decree for making a claim by a creditor because if a creditor not holding decree can file petition then certainly he is entitled to make claim.

11. Mr. Mehta, further, submitted that even if there is a decree which is not challenged by a debtor, the official assignee has the power to go beyond decree and reject the same for sufficient reasons.

12. Mr. Mehta, thereafter, refers to Section 17 of the Act which provides for effect of order of adjudication. Section 17 provides for a debt provable in insolvency and does not refer to a decree. Section 17 further bars commencement or proceeding with legal proceedings on adjudication order being passed except with the leave of the Court.

13. Mr. Mehta, thereafter, refers to Section 21(1) of the Act which deals with the power of the Court to annul adjudication. He submits that on a reading of Section 21(1) and (2), even if a debt which was earlier disputed, on execution of a bond for payment of the same and on the Court approving the same an order of annulment can be passed since the disputed amount is now admitted by the debtor and he undertakes to make payment and therefore an order of annulment follows. This indicates non-requirement of a decree.

14. Mr. Mehta relied upon Section 24 of the Act and made reference to Form-23 which is a schedule, verified by affidavit of insolvent, about the assets and liabilities of the insolvent. He submitted that, on a perusal of Form-23 and various lists referred to therein, there is no reference made to a decree but the reference is only to a debt. He specifically emphasized the estimate to be made of the value of bills of exchange etc. on the assets side. The schedule refers to unsecured and secured creditors but there is no reference to a decree or an adjudicated claim. The reference to bills of

exchange etc. in Form-23 can be found not only on the asset side but also on the liability side.

15. Mr. Mehta further relied upon Section 28 of the Act to contend that even in case of composition and scheme of arrangement propounded by insolvent, there is no distinction made between claim adjudicated and not adjudicated but reference is only to a debt. Section 33 of the Act refers to creditors, debtors and debts. It does not make any reference to a decree. Section 33 specifically deals with duties of insolvent as to discovery and realization of property.

16. Mr. Mehta, thereafter, submitted that Part-III of the Act deals with administration of property of the insolvent and same is important for answering the question raised herein. He submitted, that on a perusal of Section 46 of the Act it is clear that a claim which is required to be made with the official assignee should be only for a debt and not a decree. He submitted that any unliquidated damages arising otherwise than by reason of contract or breach of trust cannot be proved in insolvency proceedings and further any debt or liability incurred after the notice of the presentation of insolvency petition also cannot be proved in these proceedings. Section 46(3) of the Act provides for debts which are to be proved in insolvency proceedings and such debts and liabilities can be present or future, certain or contingent and in respect of any obligation incurred prior to the date of adjudication. He further submitted that, if in the opinion of the official assignee, the value of debt or liability cannot be fairly estimated then the official assignee is required to issue a certificate to that effect and such debt or liability cannot enter the insolvency proceedings. He referred to Explanation to Section 46 and contended that the definition of "liability" is not only inclusive but is also very wide enough to cover a debt. If the intention of the legislature was to cover

only a decree then the definition of “liability” would have stated so and would have been very restrictive to include only amount payable as per the decree.

17. Mr. Mehta, thereafter, laid emphasis on Section 48 of the Act which deals with Rules as to proof of debts and such rules are provided in Second Schedule to the Act. The mode of proving a debt and the procedure is specified in the said Schedule. An affidavit by the creditor has to be filed referring to the statement of accounts showing particulars of the debt on the basis of which claim is made. The affidavit should also state whether the creditor is a secured creditor or an unsecured creditor. Second Schedule to the Act further specifies the deduction to be made from the proof of debts. Form No.45 deals with proof of debt, wherein the creditor has to state on oath the consideration and amount of debt which remains unpaid on the date of the order of adjudication. The said Form also requires the creditor to annex original copies of promissory notes, bills of exchange etc, and various other proofs in support of his claim.

18. Mr. Mehta, thereafter, relied upon Section 49 of the Act which provides for priority of debts. Even in Section 49 the emphasis is on debts and not on a decree.

19. Mr. Mehta pressed into service Section 53 and 54 of the Act and contended that it is only in these two sections that the phrase “decree” has been promulgated. He submits that, on a reading of these Sections it is clear that the contention that there has to be a decree for making a claim before the official assignee is contradictory to the Scheme of the Act.

20. Mr. Mehta, thereafter, referred to Section 68(1)(d) of the Act which deals with powers of the official assignee and submitted that, with the leave of the Insolvency Court, the official assignee may institute, defend or

continue any suit or other legal proceeding relating to the property of the insolvent. It is his contention relying on the decision of the Madras High Court reported in the case of *The official assignee, High Court, Madras & Ors. vs. Mangalambal & Ors.*¹ that in the case of a money claim, the official assignee cannot be brought on record in place of the insolvent in the matters pending before the Civil Court. It is the insolvent who has to pursue the matter on his own. The emphasis in this judgment is on the phrase “property of the insolvent” used in Section 68(1)(d) which has been exhaustively interpreted in the said decision. The decision of the Madras High Court has been followed by the decision of this Court in the case *Om Prakash Nihalani & Anr. vs. S.M.S. Thakur*².

21. Mr. Mehta also placed reliance on Section 69(1) of the Act in support of his submission that what is to be proved is a debt for the purpose of distribution of dividend and there is no requirement of a “decree”. He further relied on Section 72 of the Act and contended that if a creditor has not participated in the distribution process prior to the declaration of dividend then he cannot disturb the distribution which has already taken place before his participation but he can be considered for the purpose of distribution post his participation. Referring to Rule 25 of the Second Schedule to the Act, it is submitted that the official assignee has the power to examine every proof in support of a debt and after examining the same, has to either admit or reject the debt and if he rejects the proof of debt then he has to give reasons for the same. This indicates the power of the official assignee is akin to that of an adjudicating authority. Mr. Mehta also relied on Rule 119 of the Bombay Presidency Rules, 1910 which deals with the time for admission or rejection of proof by the official assignee. The emphasis on Rule 119 is to

1 AIR 1980 MAD 200

2 2009 2 Mah. L. J. 905

the powers of the official assignee for adjudication of the claim.

22. Mr. Mehta, learned counsel relied upon the decision of the Supreme Court in the case of *Official Receiver, Kanpur & Anr. Vs. Abdul Shakoor & Ors.*³ and the decision of this court in the case of *In Re : Khushalchand B. Daga*⁴ to contend that the official assignee has the power of examining the claim and for that to take evidence on record. The official assignee, thereafter, has to take a decision on whether to accept or reject the claim. This clearly indicates that a claim made with the Official Assignee need not be only on the basis of a decree.

23. The learned counsel, Mr. Mehta further relied upon the decision of this Court in the case of *Mandvi Co-operative Bank Ltd. & Anr. Vs. Anant V Hegade*⁵. The issue before the Court was that an adjudication order was passed on a petition by a creditor. Subsequently, the said creditor's claim was settled. Whether, in these circumstances, the other creditors can be substituted in place of the original petitioning-creditor, who had filed the original petition. The Court, after analyzing various provisions of the Act, came to the conclusion that once an order of adjudication is passed, then that order is for the benefit of not only the petitioning creditor, but also for all the creditors and, therefore, even if the petitioning creditor may have settled his claim, the proceedings have to continue qua the other creditors. Similar view was taken by another decision of this Court in the case of *In Re : Ramavatar Kunjilal Gupta and Sanjay Ramavatar Gupta, Ex parte : Sicom Ltd.*⁶.

24. Mr. Mehta, thereafter, relied upon the division bench judgment of this Court in the case of *Akshay D. Thakkar vs. Kotak Mahindra Bank Ltd.*

3 AIR 1965 SC 920

4 1966 Mah. L. J. 179

5 AIR 2007 Bombay 50

6 2009 (3) Mah. L. J. 901

& Anr.⁷ In that case, the debtor was declared as an insolvent. Subsequently, an application for annulment was made and an order of annulment was passed on an incorrect premise that there were no other creditors. In the appeal, the Court observed that the insolvent has suppressed the fact that there were other creditors and after considering the provisions of Sections 2, 9, 21 and 46 of the Act, the Court held that once an order of adjudication is passed, annulment cannot be granted unless all the creditors have been settled. Settlement with petitioning creditor does not entitle annulment. This decision, according to Mr. Mehta, supports the plea that for a claim to be made before the official assignee, a creditor need not hold a decree. The division bench has affirmed the decision of Single Judge in the case of **Mandvi Co-operative Bank Ltd. (supra) and Ramavatar Gupta (supra)**.

25. In view of above submissions, he contended that insistence of decree by the official assignee is erroneous.

SUBMISSIONS OF MR. JAIN, AMICUS CURIAE:-

26. Mr. Jain, amicus adopted the submissions made by Mr. Mehta and further submitted that the Insolvency and Bankruptcy Code (IBC) provisions are more or less *pari materia* with the Presidency Towns Insolvency Act, 1909. He tendered a table showing the similarity in various material provisions of these Acts.

27. The reason why he relied on the comparative chart is to bring to the notice of this Court decision of the Hon'ble Supreme Court in **Swiss Ribbons Private Limited & Anr. vs. Union of India & Ors.**⁸. He particularly relied upon paragraphs 79, 82, 88 and others and submitted that the

⁷ Appeal No.583 of 2019 in Insolvency Petition No.5 of 2010 decided on 31 March 2021

⁸ 2019 (4) SCC 17

Resolution Professional (RP) is not a judicial authority and the claim made before the RP can be challenged in appeal. He further submitted that once Sections 7 or 9 are triggered then the only way to withdraw the same would be by obtaining consent of 90% of the creditors. The reason why this decision has been relied upon is to show that once an adjudication order under the present Act is passed against a person declaring him to be an insolvent on a petition filed by even one creditor, effect would be that such an order would be an order *in rem* and thereafter it will be for the benefit of all the creditors of that insolvent.

28. Learned counsel, therefore, submitted that even on this ground, the decision of this Court in the case of *Amarpreet Kaur Chadha (supra)* cannot be said to be good law. He, therefore, pleaded that for making a claim before the official assignee, there is no requirement of having a decree or final adjudication order by a Competent Court and same is neither borne out from the provisions of the Act or Rules but on the contrary such an insistence would be contrary to the Scheme of the Act.

ANALYSIS AND CONCLUSIONS:-

29. The present controversy arose because the official assignee relied upon certain orders of the Insolvency Court and contended that unless there is a decree or order of the appropriate Court/adjudicating authority, the claim made by the creditor cannot be considered. It was on this backdrop that the above question of law was framed for consideration of this Court.

30. At the outset, it is made clear that only issue which is posed for my consideration is whether for making claim by the creditor with the official assignee is it mandatory that such a claim should be based only on the basis of a decree or final adjudication order. No other issue other than

above is addressed by me in the present order. Also, reference to decree in the present order would not only include decree as understood in civil proceedings but would mean final adjudication order passed by competent forum under various Acts determining monetary liability against the insolvent.

31. For answering the above question, it is necessary to briefly analyse the Scheme of the Presidency-Towns Insolvency Act, 1909.

ANALYSIS OF THE ACT

32. As per Section 3 and 4 of the Act, the High Court at Bombay has jurisdiction in insolvency matters and such jurisdiction is to be exercised by a Single Judge.

33. Section 6 of the Act provides for delegation of powers to officers of the Court for hearing insolvency petitions, holding public examination, making any order, deciding *ex-parte* application and summoning any person. Section 7 of the Act empowers the Court to decide all questions of priorities and all other questions which may arise in any case of insolvency which comes within the cognizance of the Court or which the Court deems it necessary to decide for doing complete justice or for the distribution of property.

34. Section 9 of the Act deals with acts of insolvency. Section 9(1) sets out various acts which would constitute acts of insolvency. Section 9(2) provides for the commission of an act of insolvency by a debtor on non-satisfaction of a decree. Section 12 of the Act deals with conditions to be satisfied before a creditor files the petition and Section 13 of the Act provides for hearing of the creditor's petition and the passing of an order of adjudication or dismissal of the petition.

35. Section 14 of the Act deals with petition to be filed by a debtor and Section 15 provides for passing of appropriate orders thereon either of adjudication or of dismissal.

36. Section 17 of the Act provides for the effect of an order of adjudication. It states that the property, on adjudication order shall vest in the official assignee and shall become divisible amongst the creditors. It further bars any remedy against the property of the insolvent except with the leave of the Court. Section 18 of the Act provides that if there are any proceedings pending against the insolvent in any Court, then the same may be stayed subject to the superintendence of the Court. Section 21 of the Act provides for annulment of adjudication order in certain cases.

37. Section 24 of the Act provides for Schedule of assets and liabilities to be furnished by an insolvent to the official assignee. Section 26 of the Act deals with meeting of creditors which may be called either by the creditor or the official assignee for dealing with the property of the insolvent. Thereafter, Section 27 of the Act provides for public examination of the insolvent.

38. Section 38 of the Act provides for the discharge of the insolvent and Section 39 provides for cases in which the Court must refuse an absolute discharge.

39. Part III of the Act comprising Sections 46 to 76 of the Act deals with administration of property. Section 46 provides for debts which have to be proved in insolvency proceedings. If the official assignee is not able to estimate the value of the debt or liability, then a certificate to that effect has to be issued. Section 48 read with the Second Schedule of the Act and the Rules thereunder provides for the mechanism to prove the debts. Section 49 of the Act provides how the property of the insolvent should be

distributed amongst the creditors. Sections 53 to 57 of the Act provides for enquiry into antecedent transactions. Section 58 of the Act provides for possession of property by official assignee and appropriation thereof for the benefit of creditors. Section 68 of the Act provides for duty and powers of official assignee as to realization of the assets of the insolvent. Section 71 of the Act deals with calculation of dividends.

40. Part IV provides for the role of official assignee and power to administer oath and duties of an official assignee as regards the insolvent's conduct. Section 83 provides for name of the official assignee for suing.

41. The Scheme of the Insolvency Act appears to be that if a person commits an act of insolvency and is adjudicated as an insolvent, then it would result into his assets being vested in the official assignee, who is an officer of the Court. The petition for declaring a person as an insolvent can be made by the debtor himself or any of his creditor. Once an order of adjudication is passed, legal proceedings against insolvent may be stayed and the official assignee takes steps for realizing the assets and distributing the same amongst the creditor as per the Act.

ANALYSIS OF THE SITUATIONS IN WHICH THE ISSUE MAY ARISE:

42. The question raised for my consideration would arise only in case of the following two situations :-

SITUATION A :

Where on the date of adjudication order under the Act, the creditor has not taken any legal proceedings for recovery of the amount due from the insolvent.

SITUATION B :

Where on the date of adjudication order under the Act , the

creditor has taken legal proceedings but there is no final adjudication order or decree , by the court/ authority before which it is pending, on that day.

SITUATION A :

43. I now propose to deal with the first situation A viz., where the creditor has not taken any legal steps for recovery of the sum due on the date of adjudication order under the Act.

44. The contention of the official assignee that, for making a claim there has to be a decree or order of the Court or of a competent authority cannot be accepted on a harmonious reading of the Scheme of the Act which is analysed hereinafter.

45. Section 2 (a) of the Act defines “creditor” to include a decree holder. If the intention of the legislature was that only a decree-holder creditor should make a claim, then the definition clause would have expressly said so and would have been very restrictive. The definition is inclusive and, therefore, not only a decree holder, but also all other persons who claim to be a creditor of the insolvent would be governed by the provisions of the Act. Similarly, the definition of debt is an inclusive definition and so is the definition of debtor which includes a judgment debtor and all three definitions need to be interpreted harmoniously. The scheme of the Act from the time of filing petition to its closing refers to creditor and not decree-holder.

46. The definition of creditor has also to be interpreted in line with definition of “liability” in Explanation to Section 46 of the Act dealing with administration of property, which is very widely worded to include every possible debt due by the insolvent.

47. The decision of this court in the case of ***Mandvi Co-op Bank Ltd. (supra)*** has interpreted section 2(a) of the Act and observed that same being inclusive definition would include creditor claiming under hire purchase agreement and would be entitled to pursue insolvency petition though original petitioning creditor's dues who was decree-holder were settled.

48. The inclusive definition of creditor also came up for consideration before the division bench of this Court in the case of ***Jugalkishore Saraf vs. Raw Cotton Co. Ltd.***⁹. This Court after referring to Section 9 of the Act and the Bombay amendment of 1948 came to the conclusion that assignee of a decree holder would be covered by the definition of "creditor" since it is an inclusive definition, in addition to other reasoning.

49. The Madras High Court in the case of ***Enforcement Directorate (FEMA), Rep. by its Deputy Director vs. T.T.V. Dhinakaran***¹⁰, in paras 52 and 53 observed as under :-

"52. 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.

53. 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."

9 AIR 1955 Bom 77

10 2023 SCC OnLine Mad 6659

50. If a non-decree holder creditor can lodge petition for insolvency then certainly insistence of a decree at the time of lodging claim with the Official Assignee is erroneous and in that situation non-decree holder creditor's entitlement conferred by the Act for lodging petition would render otiose because he would never file a petition if he is not going to get any relief by excluding him from making a claim. Insistence of a decree or a final order would make Insolvency Court as Execution Court which is not the purpose of the enactment of the Insolvency Act.

51. Section 9(1) of the Act provides for various acts of insolvency. Section 9(2) provides for an act of insolvency when a debtor does not satisfy the decree. The scheme of Section 9 gives a clue that it is not in all cases that a creditor should be a decree holder, but it is only one of the cases mentioned in Section 9 for commission of an act of insolvency. The reference to a decree in Section 9(1) can be found only in clauses (e) and (h) and not in other clauses. Though provision of section 9 provides for acts of insolvency, the necessity of holding a decree under section 9(2) is only one of the act and not the only act and that too is in addition to those provided in section 9 (1) of the Act.

52. Section 12 of the Act provides for the conditions on which a creditor may file a petition of insolvency and the condition is that the debt owing by the debtor to the creditor should amount to five hundred rupees and the debt is a liquidated sum payable immediately or at some future time and the act of insolvency should have occurred within three months before filing the petition. In the case of a secured creditor, he should specify whether he is willing to relinquish his security in the event of the debtor being declared as an insolvent. If the intention of the legislature was that only a decree holder should file a petition, then it would have provided for the same as the only condition in Section 12 of the Act.

Therefore, if a non-decree holder creditor can file a petition, then it cannot be accepted that such a non-decree holder creditor or any other creditor cannot file a claim with the official assignee.

53. Similarly, Section 14 of the Act provides for conditions to be satisfied by a debtor to file a petition for declaring himself as an insolvent. Section 14(1) of the Act provides for three alternative contingencies in which a debtor can file a petition viz., where the debt amounts to five hundred rupees or debtor is arrested and imprisoned in execution of a decree for the payment of money or there is an order of attachment in execution of a decree against the property of the debtor. The first alternative condition is of a debt of Rs. 500 and debt would include sum payable not only under a decree but under contract etc.

54. Section 13 and 15 of the Act provides for the orders to be passed by the Insolvency Court on a petition filed by the creditor or a debtor. Even in these sections it is not a pre-condition that there has to be a decree for passing an adjudication order. The Court has to only see whether an act of insolvency has been committed, which are specified in Section 9 of the Act and are discussed above wherein I have already observed that holding a decree is one of the acts and not the only acts of insolvency. On the contrary, Section 13 and 14 of the Act provides for the Court to satisfy itself with respect to the proof of the debt which includes not only a judgment creditor or a decree holder but also all the debts payable by the debtor to its creditors.

55. Section 17 of the Act provides for effect of an order of adjudication of a person as an insolvent. On an adjudication order being passed no creditor to whom insolvent is indebted in respect of any debt which has to be proved in insolvency can take any legal proceedings or commence any

suit. Even this provision clearly shows and supports the conclusion that there is no requirement of holding a decree for making a claim. If contention of the official assignee is to be accepted then such creditors who have not initiated legal proceedings would never be able to recover because section 17 prohibits them from initiating legal proceedings for recovery and the official assignee will not entertain their claim *de hors* the decree. Such an interpretation cannot be accepted and would run contrary to the object and scheme of the Act and would take away rights of such creditors which can never be the object of the Act.

56. The insolvent has to submit a Schedule under Section 24 of the Act of his assets and liabilities in Form-23. On a perusal of the said Form, the insolvent has to provide details of all the creditors, liabilities, assets etc and not only of a decree holder. The object of this Schedule is to assist the official assignee to realize the assets of the insolvent for distribution amongst the creditors. List A of the said Form provides for details of the unsecured creditors. The particulars of any bills of exchange etc held by any creditors should be mentioned below the name and address of the creditor. Similarly List G provides for details of bills of exchange, promissory notes, etc available as assets of the insolvent and their estimated value. List B provides for details of secured creditors and one finds a mention in column 4 to “amount of debt” and not of a “decree” only. Similarly, details of preferential creditors have to be provided in List D. In my view, on a perusal of Form No.23 which is required to be furnished under Section 24 of the Act by the insolvent, the requirement is that the debtor should be indebted to the creditor either by way of holding a decree or otherwise.

57. Section 25 deals with power of the Court to pass protection order protecting insolvent from arrest or detention. Sub-section (4) entitles any

creditor to oppose such grant of protection order. It is important to note that this right is given to any creditor and not to a decree holder only. This indicates active participation of all creditors in the insolvency proceedings.

58. Section 26 of the Act provides for a meeting of creditors after the order of adjudication under the Act is passed either on an application of a creditor or of the official assignee to consider the Schedule of assets and liabilities of the insolvent and to deal with the property of the insolvent. Creditor is defined in section 2(a) of the Act which I have analysed above, to include not only a decree holder but also any other person to whom the insolvent is indebted. Therefore, Section 26 also indicates that there is no necessity to have a decree in the hands of a creditor for participating in the proceedings post order of adjudication. This also indicates that the meeting has to be of all creditors and not only decree holder.

59. Section 27 of the Act provides for public examination of the insolvent and sub-section (3) provides that “any creditor” who has tendered a proof may question the insolvent concerning his affairs and the causes of his failure. The phrase “any creditor” would include not only a decree holder but also any person to whom the insolvent is indebted.

60. Sections 28 to 32 of the Act deal with scheme of arrangement by an insolvent after an order of adjudication, for satisfaction of his debts. Such scheme shall be submitted by the official assignee to each creditor who has proved his debt and these creditors have a right to agree or to dissent from such proposal. The phrase used in Section 28 is “each creditor” and “any creditor” which clearly indicates that the creditor need not be a decree holder only. Section 29(4) provides that if the Court is of the opinion that the proposal or scheme of arrangement is not for the benefit of general body of creditors then the Court shall refuse to approve the

proposal. The phrase “to benefit general body of creditors” clearly directs to all creditors including a person holding a decree.

61. Section 33 of the Act provides that an insolvent shall provide a list of debtors and creditors and all the debts due to and from them respectively and assist the official assignee in realizing his property for distribution of the proceeds amongst his creditors. Section 33 of the Act nowhere provides that the insolvent has to give details only of a decree holder-creditor and such decree holder-creditor is only entitled to distribution of the proceeds. The phrase used in Section 33 of the Act is “creditor” which is defined in Section 2 (a) of the Act to include not only a decree holder but even other creditors as analyzed by me above while dealing with the definition.

62. Section 39 of the Act provides for situation in which the Court must refuse an absolute discharge of insolvent. Section 39(2) of the Act provides for refusal of discharge, if the insolvent has put any creditors to unnecessary expense by a frivolous defence to any suit brought against him. Here also the emphasis is on a suit by any of the creditor which clearly establishes that possession of decree is not a pre-requisite for making the claim before the official assignee.

63. Section 46(3) of the Act provides for all debts and liabilities, present or future, certain or contingent to which the debtor is subjected to on the date of him being declared as an insolvent or by reason of any obligation incurred before the adjudication order. Similarly, Section 46(4) of the Act provides for the official assignee to estimate a value of the debt and if it is not possible to do so, then to issue a certificate. Explanation to Section 46 defines “liability” in its broadest sense. In my view Section 46 supports the submission that it is not only the decree holder but even other creditors

including non-decree holder who can participate in the insolvency proceedings with regards to the distribution of dividends realized from the assets of the insolvent. Section 46 read with Schedule II does not provide for a decree as a pre-condition for proving the debt. There is no much difficulty in estimating value in case of a decree but such a contingency would arise only in case of a claim not supported by a decree or final order.

64. Part III of the Act provides for administration of property and Section 46 provides for the manner in which the debts have to be proved by a creditor so as to be entitled to the distribution of dividends arising out of realization of the property of the insolvent. The phrase used in the part III is “debts” and not “a decree holder”

65. Rule 23 of the Second Schedule to the Act caps rate of interest at six percent per annum and provides that, only if any assets remain after discharge of all liabilities then a higher rate may be paid. All liability would cover liability under a decree as well as those not supported by a decree. Rule 25 of the Second Schedule requires the official assignee to examine every proof and the grounds of the debt and thereafter, in writing, admit or reject the whole or in part or call upon the creditor to furnish further evidence in support of his claim. If the official assignee rejects a proof, he shall do so by giving reasons in writing to the creditor. This also indicates that a creditor who does not hold a decree can make a claim before the official assignee and prove his debt and the official assignee after examining the proof of debt can either accept or reject the same. This would govern only those cases where there is no decree. If submission of official assignee is to be accepted then this provision would become redundant.

66. Rule 123 of the Bombay Insolvency Rules provides that every bills of exchange, hoondee, promissory note etc. shall be exhibited before payment of dividend and the amount of dividend paid shall be endorsed thereon. This indicates that claim based on these instruments can be considered by the Official Assignee without there being a decree of Competent Court.

67. The issue as to whether the official assignee can adjudicate the claim came up for consideration before the Madras High Court in the case of ***The Official Assignee, High Court, Madras. VS. P. Veerasamy and Others***¹¹. Paragraph 30 of the said decision is reproduced hereinunder:

“30. Further, the scheme of the Act shows that the Official Assignee is entitled to proceed by way of motion in those cases he has a money claim against a stranger to the insolvency and it is then for the Courts to say whether the matter is one which it is reasonable, having regard to the convenience of all concerned to deal with on a motion or whether it should be dealt with in a regular Suit. Only simple cases capable of easy and speedy disposal should be so dealt with, Therefore if the matter, is complicated involving question of law and fact with regard to title and ownership, in the discretion of the Court, the same may have to be relegated to be agitated and adjudicated before the appropriate forum.”

68. The division bench of the Madras High Court in the case of ***T.P. Parameswaran V. The High Court of Judicature at Madras, represented by its Registrar General, Chennai & Ors.***¹² in paragraph 51 observed as under:

*“51. When that being the factual position and also when there is nothing in the provisions of the Presidency Towns Insolvency Act, which necessitated the Official Assignee to pronounce an order, as is being done in the case of Judgment of Courts and also bearing in mind another fact that in strict sense of the term, **he is not a Judicial Officer.** Further that when insolvent's property vests in his hand as 'Owner' though only for the benefit of others and in such a matter, he is only a litigant.”*

(emphasis supplied)

11 2007 SCC OnLine MAD 542

12 2013 SCC OnLine Mad 1927

69. The Privy Council in *Sooniram Ramniranjandass V. Alagu Nachiyar Koil*¹³ observed as follows:

“4.....It is at least clear that the present case cannot be concluded by regarding the Official Assignee as a trial Judge whose estimate of the witnesses' evidence must prima facie be accepted.”

70. Therefore, Scheme of the Act clearly postulates that it is not only a decree holder but also any other creditor who has not taken any legal proceedings prior to the date of the order of adjudication can participate in the insolvency proceedings by making a claim with the official assignee which is subject to verification and examination by the official assignee resulting in either acceptance of the debt or rejection of the same. If there is any rejection, then the Act provides for a remedy of appeal under Section 86 of the Act. In appeal, the court if satisfied may grant leave for commencement of any suit or legal proceedings, in which case creditor on obtaining final adjudication order from competent authority can make a claim with official assignee on that basis. The creditor would inform the official assignee of such proceedings. This course would be adopted if the court is of the opinion that claim would require detailed trial which the official assignee is not empowered and/or competent to conduct as per the scheme of the Act. The Act does not empower the official assignee with all the powers of the civil court for adjudicating complex claims. The decision relied upon by Mr. Mehta in the case of *Abdul Shakoor (supra)* also supports the analysis done by me above but on the contrary the Hon'ble Supreme Court observes that even if there is a judgment, in insolvency proceedings it can be examined whether same was obtained by fraud etc. However this judgment cannot be relied upon in support of the submission that pending proceedings get transferred to the official assignee or insolvency court for adjudication. It is only in certain exceptional cases, the official assignee can reject decree.

13 (1939) 1 Mad L.J. 192

71. It is important to note that the role of the official assignee is not to accept the claim made by the creditor mechanically and without any verification or examination. Even if the insolvent agrees that the debt is payable to the creditor, the official assignee has to independently examine and verify whether such a debt is payable at all and if so, to what extent it is payable by the debtor to the creditor or by the insolvent to the creditor. If the official assignee is of the view that, for any reasons in law or on facts, the amount does not become payable to the creditor, then the official assignee is entitled to reject the same by giving reasons in writing and merely because the insolvent does not object to such a claim, it would not entitle the creditor to recover any dividend from the assets of the insolvent. There could be various reasons for the amount not becoming payable, which the official assignee has to examine on the facts of each case. The official assignee has to also examine whether there is any collusion between the insolvent and the creditor in this regard and take appropriate decision thereon. The blanket submission that once the insolvent agrees, the official assignee has to consider the claim of the creditor positively, cannot be accepted. This would also not be in the interest of the other creditors if it is found that the amount is not payable and/or due and payable to such a creditor whose debt the insolvent admits.

72. Section 47 of the Act provides for set off, it states that where there have been mutual dealings between an insolvent and a creditor proving or claiming to prove a debt then sum due from one party can be set off against sum due from the other party. The phrase “proving or claiming to prove a debt” clearly indicates that it would govern a case of a non-decree holder because if there is a decree then a debt is already proved and no further proof is required except in some cases as narrated in the decision in the case of *Abdul Shakoora (supra)*.

73. Section 48 of the Act provides for the mode of proving debts as per Second Schedule and the rules thereunder. Second Schedule of the Act refers to every creditor who has lodged the proof of his debt after an order of adjudication is made. It should be accompanied by an affidavit. Form No.45 provides for the manner in which the debt is required to be applied for and proved. Form No.45 requires the creditor to specify the consideration which remains unpaid or unsatisfied. The creditor has to annex all the documents including originals in support of his claim. The details of consideration and the manner in which the consideration arose should also be specified. The affidavit should also specify if the creditor is holding any security. This indicates that even a secured creditor can make a claim in the insolvency proceedings and such a secured creditor need not hold a decree. The creditor lodging a proof is also entitled to examine the proof of other creditors. Rule 1 of Second Schedule of the Act refers to every creditor to lodge the claim and not only a decree-holder.

74. Section 49(5) of the Act provides that after complying with subsection (1) dealing with priority of debts, all debts proved in insolvency shall be paid rateably according to the amounts of such debts without any preference. The phrase “all debts” shows that it is not only a decree holder but also a creditor who has proved his debt according to Second Schedule who would be entitled to the proportionate amount.

75. Section 53 of the Act contemplates a situation where the amount realized prior to the date of admission of insolvency petition pursuant to execution of a decree will not be disturbed but the benefit of such a decree cannot be granted post the date of the admission of the insolvency petition and a decree holder whose decree remains unsatisfied on the date of admission will join other creditors. This indicates that insolvency proceedings are not only for benefit of decree holder but all creditors.

76. Section 54 of the Act provides for handing over of possession of the property which was taken over in execution proceedings prior to the adjudication order. The possession has to be delivered to the official assignee. This indicates that post the adjudication order, the assets whose possession is taken over prior to the said date, on the adjudication order being passed vests with the official assignee for the benefit of all the creditors and not only for the decree-holder.

77. Section 60(2) of the Act provides that in case of an insolvent who is in receipt of a salary, an order shall be made by the official assignee for distribution of such a salary amongst the creditors of so much of such salary that can be attached in execution of a decree. This also clearly indicates that a person who is not a decree holder but has a claim against an insolvent is entitled to prove his debts, so as to be the beneficiary of distribution of dividend.

78. Section 68(1)(h) of the Act deals with duty and powers of the official assignee to refer any dispute to arbitration and compromise all debts, claims and liabilities. The phrase “all debts, claims and liabilities” clearly contemplates a situation where a creditor is not holding any decree or adjudication order in his favour and the claim has not been adjudicated by any Court or competent authority.

79. Section 69 deals with declaration and distribution of dividends and on a reading of sub-sections (1), (4) and (5) each creditor who has proved his debts is entitled to the dividends. There is no distinction made between a creditor who is holding a decree and a creditor who has not taken any legal proceedings for recovery of the dues. Similarly, Section 71 provides for calculation of dividends and refers to debts provable in insolvency which clearly indicates that it is a case of a claim not supported

by a decree or any adjudication order but has to be proved in accordance with Second Schedule of the Act.

80. Section 72 gives a right to a creditor who has not proved debt before declaration of a dividend. This clearly indicates that even if a creditor has not proved his debts but if the conditions of Section 72 are satisfied then he would be entitled to a dividend and lastly Section 74 provides that no suit for dividend shall lie against the official assignee except on an application made by the creditor, and on the Court permitting so.

81. Therefore, in my view, a creditor need not be a decree holder for making a claim of his dues with the official assignee on the day the order of adjudication is passed against a debtor declaring debtor as an insolvent. On a reading of the Act as a whole along with the Schedule, Rules and Forms and the object of the insolvency proceedings, in my view, a creditor who has not initiated any legal proceedings on or before the date of the adjudication order can make a claim before the official assignee and the official assignee is statutorily required to examine the same independently before admitting or rejecting the claim and any such decision should be in writing, supported by reasons. If rejected, then same can be appealed against and the Court if it accepts rejection may or would permit the creditor to initiate legal proceedings by exercising its discretion and power under Section 17 of the Act or direct the official assignee to admit it.

SITUATION B :

82. The second situation B would arise where a creditor has filed some legal proceedings that have not culminated into final order or decree on the date of the adjudication. In such a case how a debt is required to be

proved in insolvency proceedings so as to entitle the creditor to participate in the distribution of dividend requires consideration, which I now propose to discuss hereinafter which would be in addition to certain common reasoning set out while dealing with situation A above.

83. Section 18 of the Act gives a discretion to the Court after an order of adjudication is passed to stay any suit or other proceedings pending against the insolvent before any Court subject to the superintendence of the Insolvency Court. Section 18 deals with situation where the legal proceedings are pending on the date of order of adjudication. It is important to note that under Section 17, the moment an order of adjudication is passed, the remedy of creditor against the insolvent for commencement of any legal proceedings is frozen except with the permission of the Court. However, under Section 18 with regard to pending proceedings, the stay order is passed only “after” order of adjudication and not “on” order of adjudication and that too, it is discretionary power granted to the Court. Therefore, Section 18 gives a clue that the Court may in an appropriate case either stay pending the suit or direct such suit or other proceedings to be proceeded with under the supervision of the Court. In such a situation, the creditor has to make a claim with the official assignee and state the details about the legal proceedings taken by him which were pending on the date of adjudication. The official assignee, therefore, cannot at the time of making the claim insist upon a decree because the proceedings are pending and have not culminated into final adjudication order. Once the Court, before whom the proceedings are pending, passes final order, the creditor may intimate the same to the official assignee who will thereafter, proceed with consideration of the claim for distribution of dividend.

84. Section 18 empowers Insolvency Court to stay pending proceedings and it could be for various reasons including insolvent to propound composition scheme, to enable official assignee to arrive at settlement etc. However, certainly the stay cannot be forever and same have to be lifted on appropriate progress being made and after considering the time of the insolvency proceedings.

85. There is no provision in the Insolvency Act where all the pending proceedings before any forum can be transferred to the official assignee nor does the official assignee has the power of the Civil Court or any other forum for adjudication of the pending proceedings. It is the exclusive domain and jurisdiction of the forum before whom the proceedings are pending to adjudicate the same. Also matters pending before various specialised Forums can never be transferred to Civil Court. The Insolvency Court may request the forum for expeditious disposal keeping in mind the completion of the insolvency proceedings and distribution of dividend in accordance with the Act. Delegation of powers under section 6 would not include power to decide matters pending before other forums.

86. Section 21 (2) of the Act also gives a clue that if the proceedings are pending on the date of adjudication order and the insolvent prays for annulment, then on furnishing a bond to pay the amount to be recovered in any proceedings for the recovery or concerning the debt, the Court would consider debt due to a creditor as having paid in full if same is paid into the Court. This also indicates that the pending proceedings have to be adjudicated finally by the appropriate forum and the official assignee cannot take over such pending proceedings. This also indicates that there is no requirement of a decree on the date of making the claim if the proceedings are pending on the date of adjudication order.

87. Section 39 of the Act provides for situation where the Court must refuse an application for discharge of insolvent. Section 39 (1) (d) requires the insolvent as a condition of his discharge to consent to a decree being passed against him in favor of the official assignee for any balance or part of any balance of the debts provable under the insolvency which is not satisfied on the date of discharge and in that case, the decree shall not be executed without the leave of the Court which leave may be given on proof that the insolvent has discharged the acquired property or income available for payment of his debts. Form 38 also is to the same effect giving clue that on the date of making claim, there is no need for a decree or final order but such can come into existence in future. This also indicates that in case of pending proceedings, it is the appropriate forum who has to adjudicate and pass a final order which forms the basis for distribution subject to making a claim with the official assignee and therefore at the time of making claim it is not a pre-condition that the creditor should be a decree-holder.

88. Section 53 of the Act provides that a decree holder shall not be entitled to the benefit of execution against the official assignee except in respect of assets realised before the adjudication order. This indicates that post the adjudication order, the decree holder has to stand in queue with other creditors for recovery of his claim like any other non-decree creditor.

89. Section 68 of the Insolvency Act provides for duty and powers of official assignee and it states that the official assignee with the leave of the Court may institute, defend or continue any suit or other legal proceedings relating to the property of the insolvent and further to refer any dispute to arbitration and compromise all debts, claims and liabilities on such terms as may be agreed upon. This also indicates that the pending proceedings have to be carried further by the appropriate forum and cannot be

transferred to the official assignee and on being finally adjudicated upon can be considered by the official assignee for satisfaction of the claim at the time of distribution of dividend but certainly at the time of making claim, creditor need not have final adjudication order.

90. On adjudication order being passed, the official assignee may be sued by the name of the official assignee. This indicates that the proceedings post adjudication order have to be by making official assignee, a party. This supports the reasoning that pending matters have to be decided by the competent forum and not by official assignee and same can be considered for dividend distribution.

91. Section 71 of the Act provides for calculation of dividend for distribution of dividend. Sub-section (1) of Section 71 provides that the official assignee shall retain sufficient assets to meet debts not yet determined and disputed proofs or claims. This also indicates that even if there is no decree or adjudication order by competent authority on the date of calculation of dividend, official assignee should make provision for the same. This could be only on the basis that official assignee need not insist on final decree or adjudication order by competent authority on the date of making claim by the creditor.

92. As per Section 78 of the Act, official assignee is empowered to administer oath and further under Section 79 the duty of the official assignee is to investigate the conduct of the insolvent to make reports concerning the conduct and to give assistance in relation to prosecution of the insolvent. Part IV which deals with official assignee does not empower the official assignee to take upon itself the proceedings pending before various forums on the date of adjudication order and adjudicate the same. The said exercise has to be carried out by the appropriate forum and the

final order passed thereon needs to be placed before the official assignee for recovery of the claim.

93. Merely because the proceedings may be pending across the country before various forums cannot be a ground to contend that the Insolvency Court or the official assignee should transfer the pending proceedings to itself and adjudicate the claim. This is not borne out from the Scheme of the Act. Therefore, the only harmonious way of reconciling would be that the creditor would inform the official assignee about their claim which on the date of adjudication order is pending before various forums and the official assignee would either keep aside certain amounts to be paid on the receipt of final order of the adjudication authority and will factor the said fact in calculating dividend for distribution.

94. The contention that if the pending proceedings are permitted to be proceeded with by the adjudicating authority, then it would lead to delay in completion of insolvency proceedings and therefore, pending proceedings should be transferred to the official assignee or the Insolvency Court cannot be accepted since same is not borne out from the Scheme of the Act. The Insolvency Court, however, can request the adjudicating authority to expedite the disposal of the pending proceedings, which would curtail the time for completion of the insolvency proceedings. The Scheme of the Act has analyzed above, nowhere suggest that on the date of making claim the creditor should hold a decree or final adjudication order but on the contrary, such a creditor has to only inform the official assignee about the claim and it being pending before the appropriate forum and based on the outcome of the appropriate forum's adjudication claim can be settled.

95. Therefore even in situation B, after adjudication order under the Act is made, creditors whose legal proceedings are pending should inform the official assignee and make a claim which would be considered at the time of making payment of dividend based on final adjudication order to be passed by the forum before whom proceedings were pending. Therefore, official assignee should entertain the claim pending final adjudication but to await final outcome of the proceedings before distribution of dividend or to keep aside certain amounts for satisfying future claim arising out of adjudication orders to be passed by the competent authority.

96. Now I propose to deal with precedents relied upon by the parties.

CONSIDERATION OF DECISIONS RELIED UPON BY MR. MEHTA

97. The decisions of the Madras High Court in the case of *Mangalambal (supra) and Om Prakash Nihalani (supra)* relied upon by Mr. Mehta are not applicable to the issue raised for consideration before this Court. In both these decisions the issue was whether the official assignee was a necessary or a proper party in the suit relating to money claim. The court after analyzing provisions of Section 68(1)(d) of the Act observed that since a suit for money claim does not fall within the phrase “property of the insolvent”, as used in that section official assignee is not a necessary or a proper party. The issue before me is not whether official assignee is a necessary or a proper party in a suit but the issue before me is whether a creditor who is not a decree holder can make a claim with the official assignee and this issue is not addressed by both these decisions and therefore, reliance placed by the learned counsel on both these decisions are not applicable to the issue raised for my consideration.

98. Mr. Mehta has placed reliance on the decision of this Court in the case of *Akshay D. Thakkar (supra)* which in turn has confirmed the

decisions of the Single Judge in cases of *Mandvi Co-operative Bank Ltd. (supra)* and *Ramavatar Gupta (supra)* is justified. The ratio of these judgments demonstrates that though insolvency petition may have been filed by a decree holder but once an adjudication order is passed, thereafter, the said order enures for the benefit of all the creditors, whether creditors are decree holder or not. Therefore, at the time of making a claim with the official assignee, a creditor need not hold a decree in his favour.

99. The decisions relied upon by the learned counsel, Mr. Mehta in the cases of *Abdul Shakoor & Ors. (supra)* and *In Re : Khushalchand B. Daga (supra)* also supports the view which I have expressed that the official assignee has the power to examine the claim made by the creditors after considering the evidence and if the official assignee rejects the claim with reasons, then it becomes the subject matter of an appeal to the Insolvency Court. The Insolvency Court may, thereafter, allow the appeal and if the appeal is dismissed, then the consequence would be to direct the creditor to take appropriate legal proceedings before the appropriate forum for determining his claim and thereafter, lodge the claim with the official assignee. The Insolvency Court based on the facts of each particular case, can either direct the appropriate forum for expeditious disposal of the legal proceedings or direct the official assignee to keep aside certain amounts for making good the claim if the creditor succeeds by obtaining an order from the appropriate forum. However this decision does not support the submission that in case of pending proceedings same should be transferred to the official assignee for adjudication. I have already discussed the decision in case of *Abdul Shakoor (supra)* in earlier part of this order.

CONSIDERATION OF DECISIONS RELIED UPON BY THE OFFICIAL ASSIGNEE

100. The first decision relied upon by the official assignee is in the case of *Vikas Jhunjunwala Vs. Northwest Enterprises and Anr.*¹⁴. In this case, the insolvent entered into consent terms with the petitioning-creditor which were taken on record. In paragraph 6, the Court observed that there is one more claim lodged with the official assignee by a private entity for recovery of the price of goods alleged to be sold to the debtor. However, no suit was filed and the invoices were of 2014. The Court was of the prima facie view on the facts of that case that said claim cannot be accepted simply on presentation of invoices since the debtor firm may have various defences including limitation and on merits. It was in these circumstances that the Court directed the official assignee not to adjudicate the claim or make any payment in respect thereof. In my view, this order does not lay down that in each and every case, there has to be an adjudication order by a Competent Court or authority for making the claim. I have already observed while dealing with situation A that the claim can be made before the official assignee who will satisfy himself and decide whether to accept or reject the claim with reasons and such a decision is appealable to the Insolvency Court and the Insolvency Court can, thereafter, consider whether to accept the claim or direct the creditor to take legal proceedings for proving the claim. Therefore, in my view, this decision cannot be relied upon for the proposition that in each and every case before a creditor makes a claim with the official assignee, there has to be a decree or a final adjudication order by a competent Court. In that case, since Court was of the view that claim may be barred by limitation directed official assignee not to make payment. The question which is framed for consideration of this Court was not before the Court in the case of *Vikas Jhunjunwala (supra)* and, therefore, the said decision cannot be

of any assistance for insisting upon a decree. Furthermore, this Court in *Manoj Arvinbhai Sukhadia (Applicant), In the matter between M/s. Shreenathji Steel Yard Pvt. Ltd. Vs. Karakal Varka Varghese*¹⁵ in paragraph 17 has observed that the decision in the case of *Vikas Jhunjhunwala (supra)* stood overruled by the Division Bench of this Court in the case of *Akshay D. Thakkar (supra)*.

101. The second decision of this Court relied upon by the official assignee is in the case of *Amarpreet Kaur Chadha Vs. Kulwant Singh Prehlad Singh Kohli*¹⁶. The facts of the said decision were that the petitioning-creditor had obtained a decree against the insolvent and the insolvency petition was filed under Section 9(2) of the Act. The petitioning-creditor was agreeable to settle his debt with the judgment-debtor. The issue arose whether the adjudication order declaring judgment debtor as an insolvent can be recalled on such settlement though there were other claimants who have filed their claims before the official assignee. The learned judge relying upon the decision of the Hon'ble Supreme Court in the case of *Sarat Chandra Roy vs. Harak Chand Damani & Anr.*¹⁷ rejected the contention of the other creditors to continue with proceedings and the order of insolvency was set aside and insolvency petition was also dismissed.

102. In my view, above decision cannot be of any assistance in support of the submissions made by the official assignee for insisting upon a decree before entertaining the claim by a creditor. This decision was rendered in the context of Section 9(2) of the Act which provides for act of insolvency on the basis of non-satisfaction of a decretal amount. Furthermore, the learned judge rejected the contention of other creditors for continuation of

15 Notice of Motion No.5 of 2022 in Insolvency Petition No.20 of 2016 decided on 7 January 2025

16 Insolvency Rule Nisi No.6 of 2018 in Insolvency Petition No.6 of 2017 decided on 18 June 2019

17 (1973) 3 SCC 187

the insolvency order. Two prior decisions of this Court in the case of ***Mandvi Co-operative Bank Limited (supra)*** and ***Ramavatar Gupta (supra)*** were not brought to the notice of the learned judge. These two decisions lay down that once an insolvency order is passed and even if the petitioning-creditor is settled, the insolvency order against the debtor continues qua other creditors. The Court permitted substitution of other creditors in place of the petitioning-creditor in the case of ***Mandvi Co-operative Bank Limited (supra)***. Had both these decisions brought to the notice of the learned Judge, then the learned Judge may have taken a different view. Also, any decision without noticing earlier decision would be *per incuriam*.

103. The aforesaid decision was rendered on 18 June 2019. Thereafter on 31st March 2021, division bench of this Court in the case of ***Akshay D. Thakkar (supra)*** has examined this very issue and held that even if the petitioning- creditor may have been settled, proceedings of insolvency do not come to an end, but have to be proceeded further qua other creditors. The division bench considered Sections 2, 9, 21 and 46 of the Act and observed that there is no distinction made with respect to the debt being adjudicated or non-adjudicated. The decision in the case of ***Mandvi Co-operative Bank Limited (supra)*** and ***Ramavatar Gupta (supra)*** were cited and approved by the division bench of this Court. Therefore, the judgment of the division bench being post the decision of the learned single judge, the ratio of the decision of the division bench is binding on me.

104. Therefore, the contention raised by the official assignee that there has to be a decree for entertaining the claim of the creditor cannot be accepted and moreso on the basis of the analysis of the Act done by me above and in the light of the decision of the division bench of this Court.

105. This Court in the case of *Manoj Arvindbhai Sukhadia (supra)* has observed that the decision in the case of *Amarpreet Kaur Chadha (supra)* stood overruled by the decision of the Division Bench of this Court in the case of *Akshay D. Thakkar (supra)*. Mr. Mehta, learned counsel for the insolvent has also submitted that various grounds on the basis of which the decision in the case of *Amarpreet Kaur Chadha (supra)* does not lay down correct position in law. I do not wish to delve upon on these grounds since it is already observed in *Manoj Arvindbhai Sukhadia (supra)* that decision in the case of *Amarpreet Kaur Chadha (supra)* stood overruled.

106. The decision of *Sarat Chandra Roy (supra)* also does not lay down the law that a non-decree holder creditor cannot make a claim. In that case, the only issue before the Supreme Court was if the claim of the petitioning-creditor has been paid after the specified date, whether an order of adjudication can still be allowed to continue. The Hon'ble Supreme Court observed that delay in promptly paying decretal amount is no ground for continuing insolvency proceedings. From the facts narrated in paragraph 1, it is not clear whether there were other creditors who had made a claim with the official assignee. The issue before the Supreme Court was not whether the official assignee is empowered to insist upon a decree for considering the claim of a non-decree holder creditor. Therefore, this decision also cannot be of any assistance in support of the submission of the official assignee that there has to be a decree for making a claim. The decision in the case of *Sarat Chandra Roy (supra)* is distinguishable on facts. The decision in the case of *Sarat Chandra Roy (supra)* is prior to the year 1978. Section 9(2) has been introduced after the year 1978. Furthermore, it is settled that it is the ratio of the decision which is binding and not what logically follows therefrom. The question raised for my consideration was not before the Hon'ble Supreme Court

and, therefore, same cannot be read to mean that in all cases the decision of the Hon'ble Supreme Court applies.

107. The last decision relied upon by the official assignee is in the case of ***Manoj Arvindbhai Sukhadia (supra) (Applicant), In the matter between M/s. Shreenathji Steel Yard Pvt. Ltd. Vs. Karakal Varka Varghese***¹⁸. In that case, the annulment was opposed on the ground of a claim made by a creditor which was based on cancelled cheques. It was on these facts that the Court observed that no claim can be made on the basis of cancelled cheques nor any proceedings have been filed or were pending on the basis of cancelled cheques and therefore, the claim was not entertained. The learned judge further observed that the debts incurred after the order of adjudication and before discharge are not debts provable in insolvency proceedings and therefore, claim could not have been proved and unless debt is proved in insolvency, even if a claim can be lodged after the adjudication of insolvency, such a claim is not tenable. In my view, the facts of that case were totally different and it does not lay down that in all cases, there has to be an adjudication order or a decree for making a claim. It was on the basis of peculiar facts of that particular case that the Court observed that the claim itself is not maintainable. Therefore, this decision cannot come to the rescue of the official assignee. Also I have considered such an eventuality while dealing with situation A above.

DECISION RELIED UPON BY MR. JAIN, AMICUS CURIAE:-

108. The decision in the case of ***Swiss Ribbons Private Limited (supra)*** relied upon by the Mr. Jain supports the view taken by me that the official assignee cannot act as a trial court for adjudicating the dispute which are pending before the other forums or which the official assignee feels cannot

18 Notice of Motion No.5 of 2022 in Insolvency Petition No.20 of 2016 decided on 7 January 2025

be adjudicated by the said authority. The said decision also supports that once an adjudication order under the Presidency Towns Insolvency Act, 1909 is passed, same would enure for the benefit of all the creditors even if the creditor who had initiated the proceedings has been settled.

109. To conclude, in my view, insistence upon a decree or a final order by the official assignee at the time of making a claim in situation A and B for detailed reasons set out above is erroneous but at the time of distribution of dividend, in situation B and in cases where court relegates creditor to adopt legal proceedings in situation A, would require final decree or adjudication order passed by the competent authority to be produced before the official assignee.

110. Before parting I once again appreciate the assistance provided by Mr. Mehta and Mr. Jain, learned counsel to the Court in deciding the question raised.

(JITENDRA JAIN, J)