

LAW OF INSOLVENCY

AVTAR SINGH



FIFTH EDITION



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Law of Insolvency

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Preface

The insolvency law as applicable in the country is contained in a set of two different Acts, one being for Presidency Towns of Bombay, Calcutta and Madras and the other being for the rest of the country formerly known as Mofussil Towns. The dichotomy is no longer holding ground because the concept of Presidency Towns has ceased to exist. While the set of two Acts has lost its meaning, it continues to be a cause of confusion. Suggestions have been made by all quarters for enactment of a single Act applicable throughout the country.

The two Acts being there, authors have to proceed accordingly. The present work takes them up together, treating parallel provisions separately wherever necessary. The statutory changes have been reflected in the up to date version of the Acts reproduced in the Appendix to the book. The contribution of the judiciary to the making of the two Acts socially and economically useful is being noted here. The mere sale of a property is not enough to make it an act of insolvency. There should be a positive intention of selling for the purpose of taking away the proceeds out of the reach of the claimants so as to delay and defeat them. This is so because the statutory provisions are comprehensive enough for capturing properties and for bringing about equitable distribution of the insolvent's resources. The provisions of the two Acts are mostly factual and procedural. The result is that there is not much scope for appeals against trial court decisions. Persons who remain on life's routine, like a bank employee regularly coming to his office, cannot be described as absconding. The efforts of a debtor by exercising his legal options to prevent enforcement of a decree were not taken as an act of insolvency. The words "decree or order of payment" have been interpreted in a number of decisions with this conclusion that an arbitration award for payment and the Debt Recovery Tribunal's order for payment cannot provide the foundation for an act of insolvency. The notice by a debtor for suspension of payments need not necessarily be in writing. A debtor with sufficient means at his disposal for payment of debts is not entitled to make a debtor's petition for insolvency. Requirements of service of insolvency

notice have been highlighted in a number of decisions. A decree which is final and executable is sufficient to support an order of insolvency. It is not necessary that its execution should have been launched. Insolvency courts have jurisdiction to decide about the nominal or fictitious character of property transactions of the insolvent. A petition cannot be dismissed only because questions raised are very difficult to decide. The courts have had to consider whether inherent powers under the Civil Procedure Code can be exercised for providing interim protection under the Insolvency Acts. Legal heirs can be proceeded against under insolvency jurisdiction only if they have in their hands assets belonging to the deceased insolvent debtor. Limitation for the purpose of filing an insolvency petition on the ground of transfer of assets is to be reckoned from the date of registration of sale deed. The requirements of a petition against joint debtors and partners have been explained. There has been an incessant flow of cases on the position and rights of secured creditors. Entries in the schedule to a petition can be altered only with judicial orders. A remedy which provides an alternative to setting aside of a sale has been suggested in a judicial decision.

All such ruling and many others have gone into the book to enrich the existing text material.

Ghaziabad, 2013

AVTAR SINGH
(Vidya Bhushan)

Preface to the Fourth Edition

The law of insolvency was supposed to lose its value because of the better sense of socio-economic and business responsibility which is prevailing at present. But this has not happened. The growing volume of case-law on the subject shows a greater number of insolvencies at present. Reasons may not merely be the disregard of business responsibilities. The trend may be more due to economic strains caused by open-door and highly competitive economy and, therefore, the dwindling share of the home product. Foreign competition is going to bring about vast structural changes in the economy of the country and this may involve collapse of the individual businessman, particularly the smaller one. More demands are going to be placed on the law of insolvency for protecting sinking businessmen, and safeguarding their lenders by distributing available assets among them.

But the law on the subject is not very efficient. It has remained a slow-motion machinery and has not changed with the speed which the modern business life has picked up. No other branch of law needs more speed than this branch. Time evaporates assets which, if caught in time, could have been used in giving some justice to those who were supporting the insolvent businessman with credit and thus building his assets. There is also the needless dichotomy of Presidency Towns Insolvency and Provincial Insolvency Acts. The distinction no longer holds good. While the dichotomy serves no useful purpose, it is capable of causing needless confusion. A new Insolvency Act, one for the whole country, is needed. In the process of re-enactment many an outmoded expressions occurring in the two Acts would also get eliminated and the law would naturally become much simpler and expeditious. As it is, there is only the judicial struggle against complications and an effort towards simplification.

The contribution of the judiciary has been laudable. Many decisions have been formulated by using the provisions of the Acts by keeping in mind the basic purpose of seizing and administering the debtor's property. This branch of the law is more of administrative and procedural nature than otherwise. The duty of the person who himself seeks that

he should be declared an insolvent has been highlighted. The role of dishonour of cheques has also been considered in this connection. The points of law touching upon the requirements of an insolvency notice became the subject of serious judicial scrutiny. The importance of voluntary arrangements has been emphasised. A more humane approach has been advocated in depriving the insolvent of his personal earnings. The utility in the context of this law of the application of mutual dealings and set-off has been specially noted. The doctrine of repudiated ownership has attracted decisions explaining the scope of its application.

The judicial contribution as discovered through reported cases has been absorbed into the text at appropriate places.

2004

AVTAR SINGH
(Vidya Bhushan)

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