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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
IN ITS INSOLVENCY JURISDICTION

NOTICE OF MOTION NO. 50 OF 2015
IN
INSOLVENCY PETITION NO. 41 OF 2004

John Nobert Rodrigues ...Applicant

In the matter between

John Nobert Rodrigues & Ors. ...Insolvents

vs

Citizen Co-op.Cre.Bank Ltd. ...Petitioning Creditor

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Mr A.S.Ramesan for the Petitioning Creditor
Mr K.T.Thomas for T.N.Tripathi & Co.for the Judgment Debtor No.1
Mr M.D.Narvekar, OA present.

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CORAM : B. P. COLABAWALLA J.

JULY 05, 2016

P.C. :

` This Notice of Motion has been filed seeking to annul and set aside the order of adjudication dated 3 August, 2004 under Section 21(1) of the Presidency Towns Insolvency Act, 1909 ("Insolvency Act").

2 The brief facts giving rise to the present controversy is that the Petitioning Creditor Bank had granted a term loan of Rs.25 Lacs and also an overdraft of Rs.21 Lacs to the proprietary concern (M/s Tool Tech Engineers) of the Applicant. As the dues of the

Petitioning Creditor – Bank were not paid, on 29 April, 2002, the Bank filed a recovery application before the Divisional Joint Registrar Society (Appeals), Mumbai Division, under Section 74 of the Multi State Co-operative Societies Act, 1974. Pursuant to this, on 30 November, 2002 Divisional Joint Registrar (Society) issued a recovery certificate in favour of the Petitioning Creditor–Bank in the sum of Rs.47,16,733.80/-together with the interest at the rate 14.05 % per annum.

3 Armed with the recovery certificate, the Bank got insolvency notice No. N-338 of 2003 issued from this Honourable Court. Thereafter, on 8 March, 2004, the Bank filed Petition No. 41 of 2004 seeking an order of adjudication against the Applicant. This Petition was allowed by this Court vide its order dated 3 August, 2004 and adjudged the Applicant as an insolvent. It is, this order, that is sought to be annulled and set aside in the present Notice of Motion.

4 Mr Thomas, learned counsel appearing on behalf of the Applicant submitted that the insolvency notice that was issued by this Court at the instance of the Petitioning Creditor Bank itself was wholly without jurisdiction, in view of the fact that the same could

not have been issued on the basis of the recovery certificate issued by the Divisional Joint Registrar under Section 154 of the Maharashtra Co-operative Societies Act, 1960. He submitted that if the notice itself could not have been issued, then all proceedings that flowed therefrom are also wholly without jurisdiction and consequently the order of adjudication dated 3 August, 2004 needs to be annulled and or set aside under Section 21(1) of the Insolvency Act.

5 In support of the aforesaid proposition, learned counsel appearing on behalf of the Applicant relied upon the following decisions:

(i) **Paramjeet Singh Patheja Vs ICDS Ltd.**[1] ;

(ii) **HDFC Bank Ltd. Vs. Kishore K. Mehta**[2]

(iii) **Pravinchand Shah Vs Apna Sahakari Bank Ltd.**[3]

6 On the other hand, learned counsel appearing on behalf of the Petitioning Creditor relied upon a decision of this Court in the case of **In Re Ramavatar Kunjilal Gupta Vs. SICOM Ltd.**[4] to contend that the dues of the Petitioning Creditor have admittedly not been fully paid, and therefore, no order of annulment ought to be

1 (2006) 13 SCC 322
2 Appeal No.710 of 2007 in NMS No.40 of 2007 in Notice No. N-224-2007 decided on 30 June 2008
3 Notice of Motion No.2 of 2013 in Insolvency Petition No.48 of 2004 decided on 8 May, 2013.
4 2009(3) Mh.L.J. 901

passed.

7 I have heard learned counsel for parties at length and perused the papers and proceedings in the present Notice of Motion. It is not in dispute before me that the insolvency notice was issued at the instance of the Petitioning Creditor – Bank who obtained the recovery certificate under the provisions of Multi State Co-operative Bank Ltd. read with the provisions of the Maharashtra Co-operative Societies Act, 1960. In the case of **Paramjeet Patheja** (supra) the Supreme Court held that an insolvency notice cannot be issued under Section 9(2) of the Insolvency Act on the basis of an arbitral award. The Hon'ble Supreme Court further held that an arbitral award is neither an order nor a decree within the meaning of Section 9(2). In order to constitute a decree, the adjudication must be in a suit is what was held in the said decision. The Supreme Court further held that the suit must start with a plaint and the adjudication must be formal and final and to be given by the Civil or Revenue Court. The Supreme Court held that the arbitral award does not satisfy any of the requirements of a decree and, therefore, insolvency proceedings could not be initiated on the basis of an arbitral award.

8 Applying the ratio laid down by the Hon'ble Supreme

Court in the case of **Paramjeet Patheja** (supra) a learned Single Judge of this Court (A.S. Oka J.) in the case of **HDFC Bank Ltd.** [**2008 (1) MhLJ 451**) held that the Registrar or the Assistant Registrar of Co-operative Societies, for the purpose of Section 101 of the Maharashtra Co-operative Societies Act, 1960, cannot be regarded as a court and the recovery certificate issued by such Registrar / Assistant Registrar is not an order within the meaning of Section 9(2) of the Insolvency Act. The learned Judge held that in view of the law laid down by the Supreme Court, insolvency proceedings could not been initiated on the basis of the recovery certificate issued under Section 101 of the Maharashtra Co-operative Societies Act, 1960. This order of the learned Single Judge was subjected to an appeal. The Appeal Court in the case of **HDFC Bank Ltd. Vs. Kishore K. Mehta**[5] upheld the order of the learned Single Judge. Apart from the fact that I am in respectful agreement with the aforesaid decisions, the same are clearly binding on me.

9 As far as the contention of the Petitioning Creditor is concerned, regarding the fact that certain amounts are still due and payable by the Judgment Debtor to the Petitioning Creditor, I find that this submission does not carry case of the Petitioning Creditor any further. If the insolvency notice cannot be issued on the basis of

5 Appeal No.710 of 2007 in NMS No.40 of 2007 in Notice No. N-224-2007 decided on 30 June 2008

the proceedings that culminated in favour of the Petitioning Creditor under the provisions of the Multi State Co-operative Societies Act, 1984 read with the provisions of Maharashtra Co-operative Societies Act, 1960 then it is wholly irrelevant for the purposes of the present proceedings whether there are any dues payable to the Petitioning Creditor – Bank. In this regard I find that reliance placed by the learned advocate for the Petitioning Creditor on the decision of this Court in the case of **Apna Sahakari Bank Ltd.** (supra) is wholly misplaced. The facts of this case would reveal that the order of adjudication had been validly passed in view of the fact that the insolvency notice was issued on the basis of the decree that was passed by this Court. I, therefore, find no merit in the submission of the Petitioning Creditor – bank and the same is hereby rejected.

10 In the above said circumstances, I am of the view that the order dated 3 August, 2004 deserves to be annulled and set aside. The Notice of Motion is, accordingly, made absolute in terms of prayer clause (a), which read as follows:

(a) That the order of adjudication dated 3rd August, 2004 passed in Petition No.41 of 2004 be annulled and set aside under Section 21(1) of the Presidency Towns Insolvency Act, 1909."

11 The Official Assignee shall return all papers, records, documents, properties etc. received and collected pursuant to the order of adjudication dated 3 August, 2004, to the Applicant.

12 The parties to act on the ordinary copy of this order duly authenticated by the Associate of this Court.

13 In view of this order, private and public examination of the insolvent is dispensed with. The Official Assignee shall not charge any commission in view of the fact that the order of adjudication was passed on the basis of an Insolvency Notice that was itself without jurisdiction.

(B. P. COLABAWALLA J.)