

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**IN INSOLVENCY****NOTICE OF MOTION NO. 60 OF 2016****IN****INSOLVENCY PETITION NO. 142 OF 2005****Neha Bhagwandas Vakani****..... Applicant/Petitioner****IN THE MATTER BETWEEN****Ex-parte :-****Smt. Sushila Chandrakant Mehta****..... Petitioning Creditor****VERSUS****Dineshchandra Govindji Joshi****..... Insolvent****AND****The Official Assignee****..... Respondent**

Mr.U.G.Makhija, i/b. Mr.Rajiv Jadhav for the Applicant.

Mr.A.P.Bagwe for the Insolvent.

Ms.K.A.Shah, Amicus Curiae present.

Mr.E.B.Sivakumar, Deputy Official Assignee present.

CORAM : R.D. DHANUKA, J.**DATE : 4th APRIL, 2017****P.C.**

By this notice of motion, the applicant prays for adjournment of the proceedings in the present insolvency petition including the public examination proceedings pending before the Insolvency Registrar, Bombay High Court, during the pendency of the Suit No.388 of 2000 filed against the insolvent by the relatives of the applicant who were partners of the insolvent in a partnership firm known as M/s.Tulsidas Valji & Co.

2. Mr.Bhagwandas Tulsidas Vakani and Mr.Jatin Bhagwandas Vakani were partners along with the insolvent, of M/s.Tulsidas Valji & Co. The said

Mr.Bhagwandas Tulsidas Vakani and Mr.Jatin Bhagwandas Vakani however expired. The applicant herein is brought on record as one of the legal heir in S.C.Suit No.388 of 2000.

3. In the year 2000, the said Mr.Bhagwandas Tulsidas Vakani and Mr.Jatin Bhagwandas Vakani had filed a suit against the insolvent herein inter alia praying for dissolution of the said partnership firm, for accounts and for various other reliefs. The said suit is defended by the insolvent herein and is pending for hearing and final disposal before the Bombay City Civil Court of Bombay since 2000.

4. In the meanwhile, the petitioning creditor Mrs.Sushila Chandrakant Mehta filed Insolvency Petition No.142 of 2005 inter alia praying that the insolvent herein be adjudicated as an insolvent.

5. Admittedly the matter is at the stage of public examination. The private examination of the insolvent is admittedly concluded. The public examination of the insolvent by some of the creditors is also concluded. The cross examination of the insolvent however by the applicant is still pending.

6. Mr. Makhija, learned counsel for the applicant invited my attention to the order passed by the City Civil Court on 19th January, 2000 in the interlocutory proceedings thereby appointing the Court Receiver in respect of all the assets of the said firm. He also invited my attention to the order dated 28th March, 2000 passed by the City Civil Court thereby directing the defendants therein to disclose on oath all the true affairs of the partnership firm such as loans, advances, borrowings, investments, purchases, acquisitions etc. He invited my attention to the Court Receiver's Report dated 25th January, 2000 placing on record the non-

cooperation on the part of the insolvent with the Office of the Court Receiver in implementing the order passed by the City Civil Court on 19th January, 2000.

7. Learned counsel invited my attention to the order passed by this court on 6th February, 2017 in Appeal from Order Nos.146 of 2006 and 187 of 2006 and other connected matters arising out of the order of contempt order passed by the City Civil Court against the insolvent. He invited my attention to various observations about the conduct of the insolvent made by this court in the said order. He submits that the insolvent has not purged the contempt committed by him till date.

8. It is submitted by the learned counsel that since the books of accounts and other related documents of the partnership firm are not handed over by the insolvent to the other partners, the applicant today is not in a position to proceed with the public examination of the insolvent properly. He submits that the insolvent should be directed to purge the contempt committed by him and shall make the documents and the books of accounts available to enable the applicant to proceed with the cross examination of the insolvent before the learned Insolvency Registrar.

9. Learned counsel invited my attention to some of the averments made by the insolvent in the affidavit in reply filed before this court on 2nd February, 2017. He submits that the insolvent has falsely alleged that he was partner only in the working capacity and he did not have any books of accounts of the partnership firm with him.

10. Learned counsel appearing for the insolvent placed reliance on averments made by him in the affidavit in reply. He submits that the cross examination of the

insolvent in public examination by the other creditors is already over and because of the applicant not proceeding with the public examination of the insolvent, the said proceedings are delayed and cannot be concluded.

11. Ms.Shah, learned counsel appointed as amicus curiae by this court has invited my attention to section 27(7) of the Presidency Towns Insolvency Act, 1909, and would submit that for want of books of account and other documents, the public examination of the insolvent cannot be withheld. she submits that if the court is of the opinion that the affairs of the insolvent has been sufficiently investigated, this court can pass an order and declare the examination as concluded. She submits that however even if such order is passed by this court, it would not preclude the court for directing further examination of the insolvent, if this court deems fit in future in the event of the parties bringing to the notice of the court that certain documents were withheld by the insolvent.

12. Mr.Makhija, learned counsel for the applicant in fairness invited my attention to sections 38, 39 and section 103 of the Presidency Towns Insolvency Act, 1909. He submits that though non co-operation on the part of the insolvent and suppression and concealment of the material facts and documents can be brought to the notice of the court, when the insolvent makes any application for discharge, in view of the conduct of the insolvent having been noticed and deprecated by this court in the order dated 6th February, 2017 and by various orders passed by the City Civil Court, the reliefs as prayed in this notice of motion deserves to be granted by this court.

13. It is not in dispute that the suit filed by the applicant for dissolution and accounts is pending before the City Civil Court against the insolvent. The Court

Receiver appointed by the City Civil Court has already made a statement before this court in the hearing held on 7th March,2017 that no books of accounts are found while taking inventory in the premises of the insolvent. In my view, public examination of the insolvent cannot be stayed or adjourned on the ground that the insolvent has not handed over the books of accounts and other documents of the partnership firm to the applicant or on the ground that the insolvent has not purge the contempt.

14. A perusal of the order passed by this court in Appeal from Order No.146 of 2006 and other connected proceedings indicates that the impugned order dated 24th January, 2006 passed by the City Civil Court is modified by the said order and direction for detention of the insolvent in civil prison is set aside on the condition that the insolvent pays a sum of Rs.2,50,000/- to the applicant for having committed wrongful breaches of the orders passed by the Trial Court. It is not in dispute that the insolvent has already complied with the said order passed by the High Court.

15. A perusal of sections 38 and 39 and more particularly section 39(2)(b) of the Presidency Towns Insolvency Act, 1909 indicates that this court can take into consideration the fact that if the insolvent has omitted to keep such books of accounts which are as usual and proper in the business carried out by him along with the other partners and has not sufficiently disclosed his business transactions and financial position within three years immediately proceeding his insolvency, the court can refuse to allow the application for discharge if any, made by such applicant.

16. A perusal of section 103(A) of the Act indicates that if the insolvency court

comes to the conclusion that the insolvent has fraudulently and intently concealed the state of his affairs or to defeat the objects of the Act and has destroyed or otherwise willfully prevented or purposefully withheld the production of any books, papers or writing relating to such of his affairs as are subject to investigation under the Act, such insolvent can be punished for such offence and can be punished on conviction with imprisonment for a term which may extend to two years.

17. It is made clear that this court has not expressed any views in this order whether the insolvent has destroyed or willfully withheld any books of accounts from this court or from the applicant. I am conscious of the fact that the City Civil Court has made various observations about the conduct of the insolvent in the orders passed by the City Civil Court. A perusal of the report submitted by the Court Receiver also indicates about his objectionable behaviour in not co-operating with the Receiver in implementing the order passed by the City Civil Court. This court has also made observations in paragraph 27 of the order dated 6th February, 2017 that the insolvent has adopted all means to frustrate the order passed by the City Civil Court. This court can of course take into consideration the observations made by the City Civil Court and by this court in the order dated 6th February, 2017 as well as further facts as may be proved during the course of the public examination while considering the application if any made by the insolvent in future for seeking discharge.

18. In my view, Ms.Shah learned counsel appearing as amicus curiae who has assisted this court in deciding this issue has rightly placed reliance on section 27(7) of the Presidency Towns Insolvency Act, 1909. If this court comes to the conclusion, even after declaration of the examination as concluded that certain

more material is produced by the applicant or is brought to the notice of this court in future, an appropriate opportunity can be granted to the applicant for further examination of the insolvent. In my view the said provision can be invoked by the applicant or even by this court suo-motu in future if any such material is brought on record. In my view the public examination cannot be further delayed. This court appreciates the valuable assistance rendered by Ms.Shah who was appointed as amicus curiae.

19. Insolvency Registrar shall proceed with the public examination. The insolvent as well as the applicant shall co-operate with the Insolvency Registrar in proceeding with the further public examination.

20. In view of the request of Mr.Makhija, learned counsel for the applicant on instruction, the Insolvency Registrar is directed to fix the next date of the meeting for the purpose of public examination on 12th June, 2017 at 03.00 p.m. The parties are directed to appear before the Insolvency Registrar on **12th June, 2017 at 03.00 p.m.**

21. Notice of Motion is disposed of in the aforesaid terms. No order as to costs.

22. Learned advocate on record who has assisted Mr.Makhija, learned counsel for the applicant shall file Vakalatnama within one week from today.

(R.D.DHANUKA, J.)