

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

**NOTICE OF MOTION NO. 22 OF 2018
IN
INSOLVENCY PETITION NO. 5 OF 2010**

Kotak Mahindra Bank Ltd.

...Applicant

In the matter between :-

Re: Akshay D. Thakkar

... Insolvent

Ex-Parte:

M/s. Manipal Finance Corporation Ltd.

...Petitioning Creditor

Mr.Vaibhav Bhure a/w. Mr.Abhineet Sharma I/b Vox Law for Erstwhile insolvent.

Mr.Rohit Gupta a/w. Mr.Nikhil Rajani for applicant.

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

CORAM : K.R.SHRIRAM, J.

DATE : 18TH SEPTEMBER 2018

P.C.

1 This application is taken out by Kotak Mahindra Bank Limited as assignee of State Bank of India to recall the order dated 3rd December 2014 in Notice of Motion No. 52 of 2014 by which the Hon'ble Court was pleased to annul under Section 21(1) of the Presidency Town Insolvency At, 1909 (Insolvency Act), the order of adjudication dated 22nd April 2010 passed against Akshay D. Thakkar (Insolvent).

2 The reason why applicant wants this order to be recalled is because on 3rd December 2014 when the order of annulment was passed, to the knowledge of the insolvent and to the knowledge of the official assignee, there was an order and judgment passed by the Debt Recovery Tribunal on 20th May 2009 against the insolvent to pay to applicant a sum of Rs.9,60,97,800.69 with simple interest @ 8% per annum from the date of filing till realization along with costs and charges. Applicant to the application and both insolvent and official assignee were also aware that recovery proceedings have been initiated against the insolvent and even two properties belonging to the insolvent had been attached. Applicant also states that the insolvent has also filed an application to set aside/vacate the attachment order before the Debt Recovery Tribunal (DRT) of which nobody is aware what the status is. Shri Bhure states that the attachment order still continues.

3 The insolvent was adjudicated insolvent on a petition filed by one Manipal Finance Corporation Limited. The claim, according to the insolvent, of Manipal Finance Corporation Limited was settled by a well-wisher of the insolvent based on which insolvent took out a Notice of Motion No. 52 of 2014 for annulling the order of adjudication on the grounds that the petitioning creditor's claim has been settled and there are no other creditors. The affidavit in support filed by the insolvent in the

notice of motion affirmed on 30th August 2014, paragraph no.3 reads as under :-

“3.I say that other than the above Creditor I do not have any creditor payable either jointly or personally.”

(emphasis supplied)

4 In view of this statement made by the insolvent, this Court believed the averments made by the insolvent and recorded in the order dated 3rd December 2014 in paragraphs 2 and 3 which read as under :-

“2. The learned Advocate for the Insolvent states that the Insolvent has set out the name of his Creditor in the Affidavit-in-Support of the above Notice of Motion and the Petitioning Creditor M/s. Manipal Finance Corporation Ltd., is the only creditor of the Insolvent. It is further stated that the claim of the Petitioning Creditor has been duly settled by the well-wisher of Insolvent. Mr. Varma also states that the Insolvent has also complied with the requisitions raised in the above Rule Nisi.

3. Mr. Ramesh Jain, Advocate for the Petitioning Creditor states that the claim of his client has been duly settled by the well-wisher of the Insolvent. 1st Assistant to the Official Assignee states that the claim of the Petitioning Creditor whose name is disclosed by the Insolvent in the Schedule of Assets and Liabilities has been settled and there are no claims pending with the Office of the Official Assignee. However, she has stated that the original receipt is not lodged with the Office of the Official Assignee.”

(emphasis supplied)

5 Therefore, the counsel for the insolvent and the 1st Assistant to the official assignee had made a statement to the Court that apart from

Manipal Finance Corporation Limited, there are no other creditors. Of course the Official Assignee has qualified by saying “.....*disclosed by the insolvent in the Schedule of Assets and liabilities.....*”. Therefore, if not disclosed the Official Assignee also would not know. One Madan K. Salve the alleged well-wisher of the insolvent has also filed undertaking-cum-indemnity bond with the official assignee that he has paid off the creditors in full and final settlement and also given an undertaking to pay/deposit all additional amount if subsequently it comes to light that there are other creditors.

6 Having considered the affidavits and documents and after hearing the rival counsel, I am satisfied that the insolvent had made deliberate false statement.

Before I proceed further, it will be useful to give a few chronology of dates and events.

During 1994-1998, State Bank of India (“SBI”) sanctioned certain credit facilities to one Duck Tarpaulins Limited (“Borrower”). Insolvent was one of the guarantors for the said facilities. In 2003, SBI filed an Original Application being Original Application No. 90 of 2003 before the Hon’ble Debts Recovery Tribunal, Ahmedabad (hereinafter referred to as “DRT”) for recovery of dues and enforcement of the securities created in its favour.

On 23rd March 2006, SBI assigned the debts due from the Borrower to Kotak Mahindra Bank Limited (Applicant) along with all the underlying securities.

7 On 20th May 2009, DRT was pleased to allow the said Original Application directing the Borrower and guarantors to jointly and severally pay Applicant a sum of Rs. 9,60,97,800.69/- with simple interest at the rate of 8% per annum from the date of filing till realization along with cost and charges. Pursuant to the same, Recovery Proceeding (RP) was initiated.

On 22nd April 2010, Insolvent was adjudicated an Insolvent in the Insolvency Petition No. 5 of 2010.

On 13th August 2010, DRT attached two properties, *inter-alia*, belonging to Insolvent.

On 25th April 2011, insolvent filed an application dated 25th April 2011, seeking to set aside the attachment order. DRT was pleased to issue Notice under Section 28(4A) for disclosure of assets. Insolvent, however, did not bring to notice of DRT that he had been declared insolvent vide order dated 22nd April 2010.

On 18th May 2011, Insolvent filed further affidavit informing that he has been declared insolvent by an order dated 22nd April 2010.

On 8th December 2011, Applicant filed an Application before DRT seeking to bring Official Assignee on record.

On 24th February 2012, Official Assignee, High Court, Bombay was brought on record in place of Insolvent in the said RP.

On 12th October 2012, Applicant issued letter dated 12th October 2012 and served the copies of the application filed before DRT and Order dated 24th February 2012 to the Official Assignee.

On 6th November 2012, Official Assignee's letter issued to DRT seeking time to take direction from this Court to appoint an advocate.

In 2014, Applicant approached DRAT to transfer the said RP to DRT, Mumbai.

On 1st October 2014, Notice of Motion No. 52 of 2014 filed for annulment.

On 3rd December 2014, the Order of adjudication dated 22.04.2010 declaring Mr.Akshay Thakkar as Insolvent, was annulled. Dues of the Original Petitioning Creditor were paid by a well-wisher of Insolvent who had also given an undertaking to this Hon'ble Court to pay all other creditors, if required. The relevant portion of the Indemnity Cum Undertaking Bond is reproduced herein below:-

“.....I also undertake that if any creditor came forward and claimed any amount from the Official Assignee on or before the passing the order of annulment against the insolvent i.e. Akshay D. Thakkar I will deposit the said amount of the said creditor with the Official Assignee. ...”

8 The Official Assignee, however, failed to bring to the notice of this Hon'ble Court the fact of the order and judgment by DRT being passed against Insolvent which remained unpaid on that date despite Insolvent being represented by the Official Assignee in the pending Recovery Proceeding (RP). On 28th January 2015, the Official Assignee issued letter informing the DRAT about the annulment order dated 3rd December 2014. A copy of the said letter was also marked to advocate of Applicant. According to applicant, it never received the said letter.

On 13th January 2016, DRAT allowed application for transfer and the RP was transferred to DRT, Mumbai.

On 22nd December 2017, Demand Notice was issued by DRT Mumbai to all the parties including the Official Assignee, Mumbai.

On 15th December 2017, Official Assignee issued a letter informing that the said Insolvent is no longer Insolvent and the order of adjudication has been annulled by this Court, vide an order dated 3rd December 2014.

On 15th January 2018, Applicant issued letter dated 15th January 2018 to the Official Assignee informing about its dues and requesting him to call upon the well-wisher of Insolvent to pay the dues of Applicant.

In January 2018, applicant filed the present notice of motion.

9 Shri Bhure appearing for the insolvent submitted, relying upon a

judgment of this Court in *Kishor K. Mehta Vs. HDFC Bank*¹ that a recovery certificate issued by the Debt Recovery Tribunal cannot be considered as a decree of a Court and hence will not amount to an act of insolvency. Shri Bhure submitted that non-payment under a recovery certificate, if it cannot be termed as an act of insolvency, applicant in this notice of motion could not have approached this Court as a petitioning creditor under that recovery certificate and hence the insolvent was justified in stating that all creditors have been paid in full.

I do not agree with Shri Bhure.

10 Before I proceed further, it will be useful to reproduce paragraphs 2(a), 2(b), 9(2) and 10, 21, and 46 of the Insolvency Act which read as under :-

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

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

.....

9(2) Without prejudice to the provisions of sub- section (1), a debtor commits an act of insolvency if a creditor, who has obtained a decree or order against him for the payment of money (being a decree or order which has become final and the execution whereof has not been stayed), has served on him a notice (hereafter in this section referred to as the insolvency notice)

As provided in sub- section (3) and the debtor does not comply with that notice within the period specified therein: Provided that where a debtor makes an application under sub- section

1 2007 (6) Bom. C.R. 666

(5) for setting aside an insolvency notice--

(a) in a case where such application is allowed by the Court, he shall not be deemed to have committed an act of insolvency under this sub- section; and

(b) in a case where such application is rejected by the Court, he shall be deemed to have committed an act of insolvency under this sub- section on the date of rejection of the application or the expiry of the period specified in the insolvency notice for its compliance, whichever is later: Provided further that no insolvency notice shall be served on a debtor residing, whether permanently or temporarily, outside India, unless the creditor obtains the leave of the Court therefor.

10 Power to adjudicate.—

Subject to the conditions specified in this Act, if a debtor commits an act of insolvency, an insolvency petition may be presented either by a creditor or by the debtor, and the Court may on such petition make an order (hereinafter called an order of adjudication) adjudging him an insolvent. Explanation —The presentation of a petition by the debtor shall be deemed an act of insolvency within the meaning of this section, and on such petition the Court may make an order of adjudication.”

.....

21 Power for Court to annul adjudication in certain cases.-

(1) Where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent are paid in full, the Court shall, on the application of any person interested,] by order annul the adjudication and the Court may, of its own motion or on application made by the official assignee or any creditor, annul any adjudication made on the petition of a debtor who was, by reason of the provisions of sub- section (2) of section 14, not entitled to present such petition].

(2) For the purposes of this section, any debt disputed by a debtor shall be considered as paid in full, if the debtor enters into a bond, in such sum and with such sureties as the Court approves, to pay the amount to be recovered in any proceeding

for the recovery of or concerning the debt, with costs, and any debt due to a creditor who cannot be found or cannot be identified shall be considered as paid in full if paid into Court.

46 Debts provable in insolvency.-

(1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or breach of trust shall not be provable in insolvency.

(2) A person having notice of the presentation of any insolvency petition by or against the debtor shall not prove for any debt or liability contracted by the debtor subsequently to the date of his so having notice.

(3) Save as provided by sub- sections (1) and (2), all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable in insolvency.

(4) An estimate shall be made by the official assignee of the value of any debt or liability provable as aforesaid which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value: Provided that if in his opinion the value of the debt or liability is incapable of being fairly estimated, he shall issue a certificate to that effect, and thereupon the debt or liability shall be deemed to be a debt not provable in insolvency. Explanation.-- For the purposes of this section" liability" includes any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money' s worth on the breach of any express or implied covenant, contract, agreement or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring, before the discharge of the debtor, and generally it includes any express or implied engagement, agreement or undertaking to pay, or capable of resulting in the payment of, money or money' s worth, whether the payment is, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any contingency or contingencies; as to mode of valuation, capable of being ascertained by fixed rules, or as matter of opinion."

11 Therefore, under the insolvency act, a creditor includes a decree-holder. It is an inclusive definition. A debt includes a 'judgment debtor' which is an inclusive definition. Merely because applicant was not entitled to serve an insolvency notice based on the recovery certificate issued by the DRT, does not lead to the conclusion that the applicant cannot, relying upon an act of insolvency, proceed with the petition for adjudication in substitution of the petitioning creditor. When the claim of Manipal Finance Corporation was settled, in my view, applicant could have stepped in as a substituting creditor. The only bar against the applicant relying upon the recovery certificate issued by DRT was to serve a notice under Section 9(2) of the Insolvency Act. There is no bar against such a creditor from proving its claim in insolvency.

The inability of the creditor to serve an insolvency notice under Section 9(2) does not reflect upon such creditor's right to even present an insolvency petition. Section 10 of the Insolvency Act entitles an insolvency petition to be presented, *inter-alia*, by a creditor in the event of a debtor committing an act of insolvency. Section 10 is not restricted only to the creditors contemplated under Section 9(2). To be entitled to present an insolvency petition, a creditor must fall within the ambit of the expression "creditor" under Section 2(a) of the Insolvency Act. The Apex Court in

Yenumula Malludora vs. Peruri Seetharathnam & Ors.² has held that an act of insolvency is available to all the creditors of the debtor. Paragraph 6 of the said judgment reads as under :-

6 An act of insolvency once, committed cannot be explained or purged by subsequent events. The insolvent cannot claim to wipe it off by paying some of his creditors. This is because the same act of insolvency is available to all his creditors. By satisfying one of the creditors the act of insolvency is not erased unless all creditors are satisfied because till all creditors are paid the debtor must prove his ability to meet his liabilities. In this case the petitioning creditors had their own decrees. It was in the decree of another creditor that the payment was made but only after the act of insolvency was committed. Besides the petitioning creditors there were several other creditors to whom the appellant owed large sum of money and his total debts aggregated to Rs. two lakhs. It is plain that any of the remaining creditors, including the petitioning creditors, could rely upon the act of insolvency even though one or more creditors might have been paid in full. The act of insolvency which the appellant had committed thus remained and was not purged by payment of decretal amount after the sale in execution of the money decree.

(emphasis supplied)

12 Therefore, if the insolvent had disclosed that applicant was another creditor and given notice to applicant and not made false statement in the affidavit in support, certainly applicant would have stepped in as a substitute to the petitioning creditor and continued to maintain and prosecute the petition. In ***Ram Avtaar Kunjilal Gupta & Anr.-Judgement Debtors and Ex-parte Sicom Ltd.- Petitioning Creditors***³, paragraph 12 reads as under :-

2 AIR 1966 SC 918

3 2009 (3) Mh.L.J. 901

12 There is nothing in Section 46 which provides that the debts provable in insolvency are only those where the creditor is entitled to avail of Section 9(2). Once an order of adjudication is validly passed, all debts and liabilities falling within the ambit of Section 46, to which the debtor is subject when he is adjudicated an insolvent or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, are provable in insolvency.

Section 2(b) defines a "debt" to include a "judgment debt" and a "debtor" to include a "judgment debtor". The definition is inclusive. Moreover, Section 46(3) permits not only all debts but even all liabilities to be provable in insolvency. Indeed, to be provable in insolvency, it is not even necessary for a debt or liability to be adjudicated.

Thus, keeping aside the aspect as to whether a secured creditor can prove its debts in insolvency, it must be held that the debts due to Canara Bank are provable in insolvency in view of the admitted position that the same have to date, not been paid."

If the submission of Shri Bhure is accepted, in cases where the original petitioning creditor and judgment debtor settle their dispute, the claims of all creditors except of those entitled to serve notice under Section 9(2) would be barred.

I find support for this view in the judgment of a Single Judge of this Court in *Jayantilal Khandwala & Sons & Ors. -Debtors, Ex-parte Neebha Kapoor & Anr.*⁴

13 A similar view was taken in *Mandvi Co-operative Bank Ltd. & Anr. Vs. Anant V. Hegade*⁵, where it was contended that under Section 9A of

4 Insolvency Petition No.10 of 2007, dt. 3.09.2010

5 AIR 2007 BOM. 50

the Insolvency Act, the claim of a creditor prosecuting an insolvency proceeding should be based on a decree or order of a competent court and that, therefore, a claim under a hire-purchase agreement did not amount to a valid claim. Rejecting the contention, the learned Judge held as follows :-

“2. An affidavit in reply has been filed on behalf of the Debtor to the Insolvency Petition. The first line of defence is that under Section 9A of the Presidency Towns Insolvency Act, 1909, the claim of a creditor who is prosecuting an insolvency proceeding should be based on a decree and order of the Competent Court. Hence, it has been submitted that the claim under a hire purchase agreement did not amount to a valid claim in the eyes of law. Now in the present case, the proceedings in insolvency were initiated by the Bank, based on an award of the Co-operative Court. The act of insolvency was complete on 20th July 2004, on the expiry of the statutory period after the service of the Insolvency Notice. The substituted Petitioning Creditor is entitled in law to pursue the proceedings on the basis of the act of insolvency as originally committed by the Debtor since the consequence thereof would enure to the benefit of the general body of Creditors. The substituted Petitioning Creditor is required to meet the definition of the expression "creditor" in the Presidency Towns Insolvency Act, 1909 and it is to be noted that Section 2(a) defines the expression "creditor" to include a decree holder. Therefore, once an Insolvency Notice was validly issued by the original Petitioning Creditor and the act of insolvency was complete upon the failure of the Debtor to comply with the requisition contained therein, the consequence of the commission of an act of insolvency must enure to the benefit of the general body of Creditors. The fact that the original Petitioning Creditor has lost interest in the proceedings would not make any difference to the position in law; for the substituted Petitioning Creditor steps into the shoes of the original Petitioning Creditor in pursuing the insolvency proceedings. The contention that there was no decree or order in favour of the substituted Petitioning Creditor is, as already noted above, without any merit since the expression "creditor" is defined to include a decree holder. Section 13(2) postulates that at the hearing of the Petition, the Court shall require proof of the debt of the Petitioning Creditor and of the act of insolvency or if more than one act of insolvency is alleged in the petition, some one of the alleged

*acts of insolvency. Apart from the claim of the Petitioning Creditor which is crystallised in an adjudication by the Co-operative Court, the claim of the substituted Petitioning Creditor has also been crystallised in an arbitral award.” It has, therefore, been held in the above judgment that a substituted petitioning creditor is required to meet the definition of the expression ‘creditor’ as contained in section 2(a) of the said Act. Apart from being bound by, I am in respectful agreement with the judgment in *Mandvi Co-operative Bank Limited vs. Anant Hegade*. I would only add a few words in support of this view.”*

(emphasis supplied)

Therefore, the substituted petitioning creditor (it would have been the applicant in our case) was entitled in law to pursue the proceedings on the basis of the act of insolvency as originally committed by the Debtor since the consequence thereof would enure to the benefit of the general body of creditors. The substituted petitioning creditor is only required to meet the definition of the expression “Creditor” in the Insolvency Act and Section 2(a) defines the expression “Creditor” to include a decree holder.

15 Further, under Section 46 of the Insolvency Act, sub-section 3 which provides “.....all debts and liabilities, present or future, certain or contingent to which the debtor is subject to when he has adjudged as an insolvent.....shall be deemed to be its debts provable in insolvency”. The definition of the word 'debt' in Section 2(b) read with Section 46(3) makes it clear that any debt which is present or future,

certain or contingent can be proved in insolvency proceedings. It may be that the order passed by DRT, may not be a decree or order under Sub-section 2 of Section 9 of the Insolvency Act, but there was a debt payable by the insolvent to the applicant. In order to seek an annulment, all the debts which can be proved are required to be proved before the order of insolvency can be annulled by an order of the Court.

15 In view of the settled legal position and the provisions of the Insolvency Act, it is abundantly clear that in order to seek an order of annulment, a Debtor is required to discharge all his Creditors which include the decree holders also. However, the same will not be restricted only to the decree holders. While it may be that a decree holder is the only person entitled to file a Petition under Section 9(2) of the said Act, it is not necessary for a creditor to hold a decree for proving its claim once a person is adjudged as an insolvent. The Legislature has consciously permitted a specific class of creditors who have obtained an adjudicated claim from a competent Civil Court to file proceedings under the Insolvency Act, i.e., to issue a notice under Section 9(2). However, at the same time, the Legislature has consciously permitted all the creditors to prove their claim once the petition is admitted and the act of insolvency is committed. At the same time, when it comes to annulment, the debtor is required to discharge **all** his debts and not just the claim of the Creditor who had initiated the

proceedings for insolvency.

16 In Notice of Motion 52 of 2014, it was the bounden duty of the insolvent to disclose that the applicant herein was armed with an order and judgment in their favour against the insolvent passed by a forum of competent jurisdiction, i.e., DRT holding that the insolvent was liable to pay substantial amount of money to applicant. There were orders passed by the DRT attaching the properties of the insolvent. Therefore, the insolvent could not have made a statement that there are no other creditors except Manipal Finance Corporation Ltd. To that extent I have no hesitation in holding that the insolvent made a deliberate false statement and by that statement even obtained an order of annulment.

17 Therefore, the order dated 3rd December 2014 stands recalled.

18 The Registry to issue a notice returnable on 4th December 2018 to the insolvent to show cause as to why he should not be held guilty of contempt of Court and as to why perjury proceedings should not be initiated against the insolvent.

19 On the next date, the insolvent shall remain present in Court and the advocate on record for the insolvent shall communicate this order to the insolvent and file an affidavit of compliance.

20 Official Assignee to issue notice to Mandan K. Salve who has given undertaking-cum-indemnity bond on 9th December 2014 calling upon him to make the payment as claimed by the applicant.

Official Assignee's office shall ensure in future that in such applications, they exercise extra care.

21 Notice of Motion stands disposed.

22 Insolvency Petition stands restored. Applicant be substituted as petitioning creditor in place of Manipal Finance Corporation Ltd.

23 Shri Bhure seeks stay of this order. In normal circumstances, I would have given a stay but herein is a case where a deliberate false statement has been made to the Court in an affidavit by stating that there are no other creditors when insolvent was aware that applicant was one of the creditor and the insolvent's properties have been attached by applicant.

Therefore, stay refused.

(K.R. SHRIRAM, J.)