IN THE HIGH COURT OF JUDICATURE AT BOMBAY

IN ITS INSOLVENCY JURISDICTION

DISCHARGE APPLICATION NO. 1 OF 2018
IN
INSOLVENCY PETITION NO. 138 OF 2004

Shreeniwas Heeralal Agarwal	...	Applicant/Insolvent
In the matter between		
Shreeniwas @ Shriniwas Agarwal	...	Debtor
Ex-parte :		
Indusind Bank Limited	...	Petitioning Creditor
And		
Small Industries Dept. Bank of India & Ors.	...	Other Creditors

Mr. Simit Purohit a/w Mr. Gauraj Shah a/w Amir Ali Shaikh for the Applicant.
Mr. Anil D'Souza i/b Rubina Khan for the Petitioning Creditor.
Mr. M.D. Narvekar, Official Assignee, present.
Mr. E.B. Shivkumar, Deputy Official Assignee, present.

CORAM : R.I. CHAGLA, J.

DATED : 20th AUGUST, 2019.

P.C. :

1 This Application has been taken out by the Insolvent seeking to be discharged from the insolvency. It is stated in the Application that the Applicant has fully cooperated with the Official Assignee of this Court and with the Creditors during private and public examination which were held and which are completed by disclosing his movable and immovable

properties. This Discharge Application had come up before this Court on 16.07.2019 when it was recorded that -

> "The learned Counsel for the Applicant had been heard for a considerable length of time. It was also recorded that the reply of the Petitioning Creditor would be necessary as the Petitioning Creditor had relied upon an F.I.R. filed on 14.11.2002 wherein it was claimed that an offence had been committed by the Applicant under various Sections of the Indian Penal Code."

2 The Official Assignee's Report is material and would necessarily have to be considered in the light of the opposition taken by the Petitioning Creditor and in view of Section 79 of the Presidency Towns Insolvency Act, 1909 (for short 'the said Act') as well as considering Section 39(4) of the said Act. The Official Assignee in the report dated 08.02.2019 observed that according to the Insolvent he has neither committed any offence under the provisions of the said Act, or under Sections 421 to 424 of the Indian Penal Code, nor they have done any act or thing or omitted to do anything contrary to the provisions of Section 39(2) of the said Act. It was further observed by the Official Assignee in the said report that the insolvents are not having any assets of value equal to 4 annas in a Rupee and the submission of the Insolvent of the cause of deficiency has been

considered. In the said report, it is recorded that on verifying the sheet "H" i.e. deficiency statement annexed to the Schedule of assets and liabilities, the Insolvent has declared that they have given the personal guarantee to various financial institutions being the Directors of the Companies and not personally borrowed any amount from them. The opinion of the Official Assignee has opined that the facts mentioned under Section 39(2), Sub-Section (a) and (e) of the said Act, exist in this case and has submitted to the order of this Court.

3 The learned Counsel for the Applicant has submitted that the Applicant was only a guarantor in respect of the loan which have been obtained by Chemox Securities Limited (the said Company) from the Petitioning Creditor. The said Company in turn was engaged in giving lease finance and one M/s. Rajendra Steel Limited which is listed on the Bombay Stock Exchange, had approached the said Company for lease finance. The Company had after due diligence agreed to grant lease finance vide agreement dated 16.03.1995. The learned Counsel for the Applicant has submitted that the lease finance has been granted under the said agreement with the consent of the Petitioning Creditor and for which a Tri-Party agreement dated 20.04.1995 was entered into between the said M/s. Rajendra Steel Limited and the Petitioning Creditor and under which the said amount was dispersed. The learned Counsel for the Applicant has

further submitted that one Mr. Batra, the Managing Director of M/s. Rajendra Steel Limited had thereafter absconded from India and that the lease finance which had been forwarded by the said Company to M/s. Rajendra Steel Limited, was not repaid and due to non-re-payment and bad market conditions, the said Company started losing funds and ultimately could not repay the loan to the Petitioning Creditor as well as other Institutions and bankers. He has submitted that the Applicant was proceeded with in insolvency in the capacity as guarantor before the D.R.T. and decree had been obtained against the Applicant. The Petitioning Creditor had, thereafter, taken out insolvency proceedings in the Insolvency Court. Pursuant to an ex-parte order passed, the Applicant was adjudged as insolvent by the Insolvency Court. He has submitted that the public examination has been conducted and no case or finding of any contravention of the provisions of the said Act or of any other provisions of law, has been found and that the Applicant has fully co-operated with the Official Assignee during the public examination and that is borne out in the said report of the Official Assignee.

4 The learned Counsel for the Applicant has further relied upon the judgment of the Madras High Court in *N.M. Rajesh vs. the Official Assignee*, 2014(6) CTC 423, wherein the Madras High Court has held that

the law of bankruptcy does not expect that the debtor should always be the slave of the Creditors, but he has to be released at the appropriate time by taking into consideration several factors referred to in Section 39 of the said Act. He submitted that the insolvency proceedings have been going on since 2004 and that the public examination had been conducted in the year 2016. However, the Applicant continues to be an insolvent despite not having assets which are equivalent to 25 paise in a rupee. He has relied upon the findings of the Official Assignee in the said report and has submitted that these findings are material and required to be considered by this Court under Section 39(4) of the said Act and the findings of fact by the Official Assignee shall be prima facie evidence and the Court may presume the correctness of any statement contained therein. He has also relied upon Section 79 of the said Act which provide the duties of an Official Assignee shall have in relation to the conduct of the insolvent as well as to the administration of his estate have been provided. It has been provided in Section 79(2)(a) that the Official Assignee shall investigate the conduct of the Insolvent and shall report to the Court upon any application for discharge, stating whether there is reason to believe that the insolvent has committed any act which constitutes an offence under the said Act or under Section 421 to 424 of the Indian Penal Code in connection with his insolvency or which would justify the Court in refusing, suspending or qualifying an order for his discharge. He has further submitted that there is no allegation of any offence having been committed under the said Act. Further, there is no offence committed under Sections 421 to 424 of the Indian Penal Code and this is borne out from the F.I.R. which had been filed on 14.11.2002 and which has been relied upon by the Petitioning Creditor. He has thus submitted that considering the age of the Applicant, who is currently 70 years old, this Court discharge the Applicant from Insolvency.

5 The learned Counsel for the Petitioning Creditor has submitted that although that the offences under Sections 421 to 424 of the Indian Penal Code have not been mentioned in the F.I.R. relied upon, however, the Applicant has not disclosed the charge-sheet which had been filed subsequent to the filing of the F.I.R. He has submitted that the Applicant has failed to satisfy the Court that the assets are not of a value equal to 25 paise in a rupee on the amounts of his unsecured liabilities which are on account of circumstance for which the Insolvent cannot be held responsible and accordingly under Section 39(2)(a) of the said Act, the Court is mandated to refuse a discharge for non- satisfaction thereof. He has submitted that the opening part of Section 39(1) of the said Act makes it clear that the Court shall refuse the discharge in all cases where the insolvent has committed any offence under this Act and shall, on proof of

any of the facts which have been mentioned in Section 39(2) which would include Section 39(2)(a). He has submitted that in the present case, from the Official Assignee's Report at paragraph 11, the submission of the Insolvent has been recorded as to the cause of the deficiency which is :

> "The Insolvent has signed Documents as Guarantor being Director of the Companies. The Companies have already taken out winding up proceedings and they are trying to go in to Liquidation. All the Assets of the Limited Companies will be in the possession of the Official Liquidator."

He has submitted that this is not a satisfactorily explanation on the part of the Insolvent and that the Official Assignee should not have merely relied upon such an explanation without the Insolvent furnishing proof as to its not having any assets of the value equal to 25 paise in a rupee. He has further submitted that the Official Assignee has merely relied upon the statement of the Insolvent that they have given personal guarantee to various financial institutions being the Directors of the Companies and not personally borrowed any amount from them.

6 He has submitted that such subjective satisfaction was required on the part of the Official Assignee in arriving at a finding that the facts mentioned under Section 39(2)(a) exist in the present case. He has accordingly submitted that the burden was on the Insolvent to satisfy the

Court of its assets not being equal to the value of 25 paise in a rupee on account of circumstance for which the Insolvent cannot be held responsible.

He has accordingly submitted that the failure on the part of the insolvent to satisfy the Court would require this Court to reject the Discharge Application.

7 The learned Counsel for the Insolvent in rejoinder has drawn this Court's notice to the judgment of the learned Single Judge of this Court in *Lav Chadha vs. Sicom Limited*, wherein paragraph 7, this Court had held that the burden of satisfying the Court under Section 39(2)(a) i.e. that there being no circumstance for which the Insolvent could be held responsible, is a negative burden, which the Insolvent is not expected to discharge. It was held therein that it must be for the opponents of the Discharge Application to establish that there is such circumstance for which the Insolvent was actually responsible. He has submitted that if the Insolvent makes out the two circumstances viz. that the insolvency has come about despite the insolvent's conducting his affairs in a business like manner and that he has fully co-operated with the Official Assignee for recovery of his assets in insolvency. Then upon the Opponents failing to discharge the negative burden, the Court is required to discharge the

Insolvent from Insolvency.

8 Having considered the submissions, it would be necessary to refer to Section 39 (1) and (2) of the said Act which reads thus:

> “Cases in which the Court must refuse an absolute discharge.-
>
> (1) The Court shall refuse the discharge in all cases where the insolvent has committed any offence under this Act, or under section 421 to 424 of the Indian Penal Code (45 of 1860), and shall, on proof of any of the facts hereinafter mentioned, either--
>
> (a) refuse the discharge; or
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> (b) suspend the discharge for a specified time; or
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> (c) suspend the discharge until a dividend of not less than four annas in the rupee has been paid to the creditors; or
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> (d) require the insolvent as a condition of his discharge to consent to a decree being passed against him in favour of the official assignee for any balance or part of any balance of the debts provable under the insolvency which is not satisfied at the date of his discharge; such balance or part of any balance of the debts to be paid out of the future earnings or after- acquired property of the insolvent in such manner and subject to such conditions

as the Court may direct; but in that case the decree shall not be executed without leave of the Court, which leave may be given on proof that the insolvent has since his discharge acquired property or income available for payment of his debts.

(2) The facts hereinbefore referred to are--

(a) that the insolvent' s assets are not of a value equal to four annas in the rupee on the amount of his unsecured liabilities, unless he satisfies the Court that the fact that the assets are not of such value has arisen from circumstances for which he cannot justly be held responsible;

(b) that the insolvent has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his insolvency;

(c) that the insolvent has continued to trade after knowing himself to be insolvent;

(d) that the insolvent has contracted any debt provable under this Act without having at the time of contracting it any reasonable or probable ground of expectation (the burden of proving which shall lie on him) that he would be able to pay it;

(e) that the insolvent has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities;

(f) that the insolvent has brought on or contributed to his insolvency by rash or hazardous speculations or by unjustifiable extravagance in living or by gambling, or by culpable neglect of his business affairs;

(g) that the insolvent has put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any suit properly brought against him;

(h) that the insolvent has within three months preceding the time of presentation of the petition incurred unjustifiable expense by bringing a frivolous or vexatious suit;

(i) that the insolvent has within three months preceding the date of the presentation of the petition, when unable to pay his debts as they become due, given an undue preference to any of his creditors;

(j) that the insolvent has concealed or removed his books or his property or any part thereof or has been guilty of any other fraud or fraudulent breach of trust.

9 It is clear from Section 39 of the said Act that the Court shall refuse a Discharge Application where the Insolvent has committed any offence under this Act or under Sections 421 to 424 of the Indian Penal

Code. It further provides that on proof of any of the facts which have been mentioned and which would include the facts mentioned in Section 39(2)(a), the Court may either refuse the discharge or suspend the discharge for a specified time or suspend the discharge until a dividend of not less than four annas in the rupee i.e. 25 paise in a rupee, has been paid to the Creditors; or require the insolvent as a condition of discharge to consent to a decree being passed against him in favour of the Official assignee for any balance or part of any balance of the debts provable under the insolvency which is not satisfied at the date of his discharge. The Court has thus, a discretion in Section 39 to pass an order in the above terms provided the facts mentioned in Section 39 (2) are proved. It is apparent that the first part of Section 39(1) i.e. commission of an offence either under this Act or under Sections 421 to 424 of the Indian Penal Code are non-existence in the present case. It has been admitted by the learned Counsel for the Petitioning Creditor that the F.I.R filed in the criminal case relied upon by the Petitioning does not mention any offence having been committed under Sections 421 to 424 of the Indian Penal Code. Hence, in the present case, there is no offence which has been found to have been committed under Sections 421 to 424 of the Indian Penal Code. Further it is not the case of the Petitioning Creditor that there has been any offence committed under this Act. The offences are provided under Section 103 of the said Act and neither of these offences have been alleged to have been committed by the Insolvent.

10 Thus, the issue which would fall for consideration is as to whether the Applicant has satisfied sub-Section 2(a) of Section 39 of the said Act that the assets of the Insolvent are not of a value equal to 25 paise in a rupee on the amounts of his unsecured liabilities on account of circumstance for which he cannot justly be held responsible. In order to ascertain as to whether there has in fact been a satisfaction of the above mentioned fact and which had arisen from circumstances for which the Insolvent cannot justly be held responsible, it would be necessary to consider the Report dated 08.02.2019 of the Official Assignee. It has been provided in Section 39(4) that on an application for discharge, the report of the Official Assignee shall be prima facie evidence and the Court may presume the correctness of any statement contained therein. In the said report, after extracting the submission of the Insolvent that in "H" sheet of the schedule of assets and liabilities, deficiency has been explained, the Official Assignee has on the facts before the Official Assignee found that at present a sum of Rs.417/- is lying by way of cash credit balance to the estate account of the insolvents. Further according to the Insolvents, all the assets of the Limited Companies will be in the possession of the Official Liquidator. In view thereof, the Official Assignee has held that the

insolvents are not having any assets of value equal to 4 annas in a rupee. This finding of fact in the report of the Official Assignee would be prima facie evidence and under Section 39(4) the statement made therein would be presumed to be correct. The Petitioning Creditor has sought to contend that the statement made by the Applicant/Insolvent which has been reproduced in the report that the assets of the said Companies will be in possession of the Official Liquidator as the said Companies are going into liquidation and this is the apparent explanation for the deficiency i.e. non-compliance with Section 39(2)(a) was an insufficient explanation and the Official Assignee should have independently ascertained these facts. Particularly the fact that presently only a sum of Rs.417/- is lying by way of cash credit balance of the estate account of the insolvency.

11 This contention on behalf of the Petitioning Creditor as to the burden of proving before the Court the assets not being of such value has arisen from circumstances for which the Insolvent cannot be held responsible has been considered by this Court in the decision of *Lav Chadha* (Supra). It has been held by this Court in paragraph 7 as under :

> " Whether the insufficiency of assets was due to circumstances for which the insolvent could not justly be held responsible is a question to be determined by the Court and the burden of establishing this is on the

insolvent. This much is clear. But the question is, what kind of proof or explanation needs to be furnished by the insolvent for the satisfaction of the Court about existence of such circumstances. The proof cannot be of there being no circumstance for which the insolvent could be held responsible. That is a negative burden, which the insolvent is not expected to discharge. It must be for the opponents of the discharge application to establish that there is such circumstance for which the insolvent was actually responsible. All that the insolvent must show to the Court is that the insolvency has come about despite the insolvent having conducted his affairs in a business like manner and he has fully co-operated with the Official Assignee for recovery of his assets in insolvency. If the insolvent satisfies the Court about these two circumstances, and the opponents cannot show either that the insolvent was actually responsible for the fact that his assets are not equal to twenty five paise in a rupee on account of unsecured liabilities or that such deficiency of assets is due to lack of co-operation on the part of insolvent in the endeavours of the Assignee to recover assets in insolvency, there should be no difficulty in the Court arriving at a satisfaction that the fact that the assets are so deficient has arisen from circumstances for which the insolvent cannot be justly held responsible. There may be cases, where even after both sides produce material before the Court for its consideration, there is still no satisfactory explanation why large debts over and above

> of the value of his total assets were incurred by the insolvent. As the scheme of Sections 38 and 39 indicates, that, however, cannot be a sole ground for refusal of discharge. After all, this scheme requires the Court to be satisfied that the deficiency of assets has arisen from circumstances for which the insolvent cannot be justly held responsible. That there is no satisfactory explanation how this deficiency has come about is consistent with the finding that there is nothing to suggest that it has come about as a result of any act on the part of the insolvent. In other words, it is still possible for the Court to record its satisfaction that the deficiency of assets has arisen from circumstances for which the insolvent cannot be justly held responsible, if the insolvent makes out the two circumstances mentioned above and the opponents are not able to show to the contrary. I am fortified in this view by a judgment of Madras High Court in the case of Abdul Nabi vs. Kallappa Rajappa, *AIR 1936 Madras 800,* where the Court held that the discharge could not be refused solely on the ground that there was no satisfactory explanation as to why large debts were incurred or that a false explanation was given that they were incurred by the insolvent's father. "

12 Thus, it is clear from the above decision that the proof of there being no circumstance for which the insolvent could be held responsible, is a negative burden, which the insolvent is not expected to discharge. It

would be for the opponents i.e. Petitioning Creditor and Creditors opposing the discharge application to establish that there is such circumstance for which the Insolvent was actually responsible. In the present case, in my view, the Petitioning Creditor has failed to discharge the negative burden. Hence, considering the finding in the report of the Official Assignee which are findings of fact and would be prima facie evidence and may be presumed to be correct would lead to the finding that the Applicant has satisfied the Court, that the fact that the assets are not of such value i.e. 25 paise in a rupee has arisen from circumstances for which the Insolvent/Applicant cannot justly be held responsible. Further, it is clear from the above decision that the Discharge Application cannot be refused solely on the ground that there is no satisfactory explanation as why there was loss of assets or any deficiency of assets to meet the liabilities.

13 It can also be seen that the insolvency proceedings have been going on since the year 2004 and the public examination where the Insolvent had fully co-operated had been concluded on 17.10.2016. However, the Applicant continues to be adjudged an Insolvent. It is further necessary to note that the Insolvent is of advanced age, claimed to be suffering from age related illnesses and has no real means of income. It has been held by the Madras High Court in *N.M. Rajesh* (Supra) that

proceedings in insolvency have to be dealt with as expeditiously as possible and that the Creditors shall be satisfied as expeditiously as possible in order that the Insolvent shall be free to start life again unburdened by his debts. The law of bankruptcy does not expect that the debtor should always be the slave of the Creditors, but would have to be released at the appropriate time by taking into consideration several factors referred to in Section 39 of the said Act.

14 In my view, the Insolvent has been able to make out a sufficient case for discharge from insolvency under Sections 38 and 39 of the said Act and that the Petitioning Creditor has failed to establish any of the cases in which the Court must refuse an absolute discharge under Section 39 of the said Act. Thus, it would be appropriate considering the several years i.e. over 14 years have lapsed since the insolvency proceedings were commenced against the Applicant for this Discharge Application to be allowed.

15 In view of my above findings, the Discharge Application is made absolute in terms of prayer clause (a).

16 The Discharge Application is accordingly disposed of in the above terms.

(R.I. CHAGLA, J.)