

Atul

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

IN INSOLVENCY JURISDICTION

NOTICE OF MOTION NO. 30 OF 2018

IN

INSOLVENCY NOTICE NO. 8 OF 2018

Rupindra Singh Arora

...Petitioning
Creditor

Versus

Kapil Puri

...Insolvent

Ms Ankita Singhania, i/b Kanga & Co., for the Petitioning Creditor.

Ms Neha Naik, i/b Phoenix Legal, for the Judgment Debtor/Applicant.

CORAM: G.S. PATEL, J

DATED: 5th February 2019

PC:-

1. The application is to set aside the Insolvency Notice No. 8 of 2018. The slight delay of two days in filing the Notice of Motion is condoned.
2. I have heard both sides.
3. The dispute stems from Summary Suit No. 394 of 2016. On 17th October 2016, the Applicant/Judgment Debtor obtained conditional leave to defend on depositing an amount of Rs. six

crores (today predictably described as “oneruos” and “burdensome”, but that concerns me not at all).

4. The Judgment Debtor filed Commercial Appeal No. 40 of 2017 against this order. He did not obtain a stay. The suit was, in the meantime, decreed on account of non-deposit by an order dated 31st October 2017 (later slightly corrected on 6th November 2017). Thus, the Judgment Debtor withdrew Commercial Appeal No. 40 of 2017 on 16th November 2017 with liberty to challenge the decree on account of non-deposit dated 31st October 2017/6th November 2017.

5. The Judgment Debtor filed Appeal No. 75 of 2018. It seems that this was admitted on 17th April 2018 but without any order of stay of either the decree or its execution.

6. What was before the Appeal Court was, essentially, not a challenge to an order of a conditional deposit, but a final order and decree passed in what was, for non-deposit, an undefended suit. This was, therefore, a First Appeal before the Appellate Court. The regular course of action in such matters is of course, that the Judgment Debtor must deposit the decretal amount. This has not been done. Certainly there is no express order of the Appellate Court waiving that requirement.

7. That is not the justification for the Notice of Motion although the order of admission of Appeal is. Ms Naik for the Judgment Debtor/Applicant says that under Section 9(5) of the Presidency

Towns Insolvency Act 1909 the Judgment Creditor is entitled to have the notice set aside if he is able to show that he has made an application to have the decree or order set aside under any law providing for the relief of indebtedness or that the time for such application has not expired.

8. Section 9 through its various sub-sections (1) to (5) in its entirety reads:

"9. Acts of insolvency.—

(1) A debtor commits an act of insolvency in each of the following cases, namely:—

(a) if, in the States or elsewhere, he makes a transfer of all or substantially all his property to a third person for the benefit of his creditors generally;

(b) if, in the States or elsewhere, he makes a transfer of his property or of any part thereof with intent to defeat or delay his creditors;

(c) if, in the States or elsewhere, he makes any transfer of his property or of any part thereof, which would, under this or any other enactment for the time being in force, be void as a fraudulent preference if he were adjudged an insolvent;

(d) if, with intent to defeat or delay his creditors,
—

(i) he departs or remains out of the States,

(ii) he departs from his dwelling-house or usual place of business or otherwise absents himself,

(iii) he secludes himself so as to deprive his creditors of the means of communicating with him;

(e) if any of his property has been sold or attached for a period of not less than twenty-one days in execution of the decree of any Court for the payment of money;

(f) if he petitions to be adjudged an insolvent;

(g) if he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts;

(h) if he is imprisoned in execution of the decree of any Court for the payment of money.

(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 (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.

(3) An insolvency notice under sub-section (2) shall—

(a) be in the prescribed form;

(b) be served in the prescribed manner;

(c) specify the amount due under the decree or order and require the debtor to pay the same or to furnish security for the payment of such amount to the satisfaction of the creditor or his agent;

(d) specify for its compliance a period of not less than one month after its service on the debtor or, if it is to be served on a debtor residing, whether permanently or temporarily, outside India, such period (being not less than one month) as may be specified by the order of the Court granting leave for the service of such notice;

(e) state the consequences of non-compliance with the notice.

(4) No insolvency notice shall be deemed to be invalid by reason only that the sum specified therein as the amount due under the decree or order exceeds the amount actually due, unless the debtor, within the period specified in the insolvency notice for its compliance, gives notice to the creditor that the sum specified in the insolvency notice does not correctly represent the amount due under the decree or order:

Provided that if the debtor does not give any such notice as aforesaid, he shall be deemed to have complied with the insolvency notice if, within the period specified therein for its compliance, he takes such steps as would have constituted a compliance with the insolvency notice had the actual amount due been correctly specified therein.

(5) Any person served with an insolvency notice may, within the period specified therein for its compliance, apply to the Court to set aside the insolvency notice on any of the following grounds, namely:—

(a) that he has a counter-claim or set off against the creditor which is equal to or is in excess of the amount due under the decree or order and which he could not, under any law for the time being in force, prefer in the suit or proceeding in which the decree or order was passed;

(b) that he is entitled to have the decree or order set aside under any law providing for the relief of indebtedness and that—

**(i) he has made an application before the competent authority under such law for the setting aside of the decree or order;
or**

(ii) the time allowed for the making of such application has not expired;

(c) that the decree or order is not executable under the provisions of any law referred to in clause (b) on the date of the application.

Explanation.— For the purposes of this section, the act of an agent may be the act of the principal, even though the agent have no specific authority to commit the act."

(Emphasis added)

9. To begin with, the argument before me makes no reference to Section 9(2). This sub-section tells us when an act of insolvency is complete. This is deemed to happen once the insolvency notice is served in accordance with law on the Debtor and that there is a failure to comply within the period specified in that notice. What is important is that sub-section (2) is specifically made subject to sub-section (5), on account of the proviso to sub-section (2). Sub-clause (b) of the proviso says that if the application under sub-section (5) is rejected, the act of insolvency is deemed to be complete on the date of rejection of the application.

10. What is it, therefore, that the Debtor can say under sub-section (5) and in particular its sub-clause (b)? I believe correctly analysed what this section says is in three distinct parts. The first is

that he has today a counter-claim or a set off capable of adjudication (i.e. not barred by statute or limitation) that is equal to or in excess of a decretal debt and that he has not been able for whatever reason to pursue this. In other words, this claim must yet be “live”.

11. The second option is an application in which the Debtor says that he is entitled to have the decree or order set aside under any law providing for the relief of indebtedness and that he has applied before the appropriate authority within time.

12. The final is of course that the decree or order is not executable, or in other words, that no payment can be demanded by the Decree Holder under such a decree.

13. We are concerned with the second of these. It is true that sub-clause (b) does not specifically speak of any stay being required. But to accept the argument of the Debtor today would mean that the mere pendency for years together in this Court would result in, first, a decree being rendered entirely non-executable and, second, the insolvency proceedings being staved off for an indefinite period of time without the Appellant/Debtor having to even take trouble to apply for a stay. That cannot possibly be correct. An Appellate Court hearing even a First Appeal may simply admit it and, perhaps, a debtor is entitled as a matter of right to admission of a First Appeal. But no Judgment Debtor is ever entitled to an automatic stay merely because an Appeal has been filed, even it be a First Appeal. Such a stay is always a matter in the discretion of the Court. It can never be assumed.

14. The application, however, seems to proceed on the footing that sub-clause (b) applies to Appeals because the Debtor “is entitled to have the decree or order set aside”. But that is only a partial reading of sub-clause (b). Of course, every losing party is entitled to file an Appeal as allowed in law but that is not the same thing as being “entitled to have the decree or order set aside under any law providing for the relief of indebtedness”. There are two elements to this. The first is the question of having the decree or order set aside, and the second is that this has to be under a law providing for the relief of indebtedness which, to my mind, speaks not of some general law in a civil suit but of a specific law related to such cases. Even this sub-clause (b), read without any qualification, cannot mean that the admission of an appeal must automatically result in a stay. The Debtor in appeal must apply for and obtain that stay and it is only that order of stay of the decree or its execution that will operate to save or stop the insolvency proceedings. A mere order of admission without an explicit order of stay will not result in the Debtor being entitled to invoke the provisions of Section 9(5)(b). Otherwise it will simply mean that every single admission of a statutory First Appeal carries with it an automatic stay irrespective of whether it is applied for and whether or not it is granted.

15. Indeed, correctly read I believe sub-clause (b) is only a transitory or a temporary provision to allow a Debtor to move a forum to have the decree or order set aside and to hold off on the insolvency notice till that application is made. That is why sub-clause (b) speaks of the Debtor having made an application and of that application being in time. Nothing in sub-clause (b) relates to the order on the application itself.

16. There are two possible avenues. Let us assume that a Debtor applies under Order IX Rule 13 of the Code of Civil Procedure 1908 (“CPC”) for a recall or setting aside of an *ex parte* decree, and that application for setting aside is filed within time. While that application is pending, the Debtor is entitled to have the insolvency notice set aside on account of such pendency. If that application for setting aside the decree fails, then obviously there is no impediment. Equally, if that application for setting aside the decree succeeds then the entire foundation of the insolvency proceeding is lost and nothing further remains. Very different considerations will obtain in appeal because there the Appellate Court may simply admit (as it has done in this case), or it may admit *and* stay, or it may dismiss or reject the appeal *in limine*. Sub-clause (b) cannot apply to a case where an appeal is admitted simpliciter without an explicit order of stay.

17. Ms Singhania for the Petitioning Creditor also points out, I think correctly, that this interpretation by the Application today of Section 9(5) would render completely otiose the provisions of Order 41 Rule 5 of the CPC which speaks of a stay by the Appellate Court. This makes it clear that the Appeal itself does not operate as a stay of the proceedings. Sub-rule (5) contains a non-obstante clause and says that irrespective of anything in the previous sub-rules if the Appellant does not make a deposit or furnish a security as specified in sub-rule (3) of Rule 1 then no order staying execution can be made. Now sub-rule (3) says that no order for stay of execution is to be made under either sub-rule (2) or (1) unless there is a specific order of the Court showing that it is satisfied that such a deposit should not be made (sub-clause (c)) and also fulfilling the criteria in

sub-clauses (a) and (b). There is no indication before me today that the Applicant ever applied to deposit the decretal debt in Court. In fact, the only submission that he has done from the beginning is, it seems, to say that the order for deposit of the decretal amount is “unreasonable”, “burdensome” and “onerous”.

18. Indeed, the applicant’s submission is more than somewhat alarming in its implications. The applicant has never deposited anything. He had an opportunity to make a deposit after the order for conditional leave to defend. He deposited nothing. He filed a first appeal after the suit was decreed. He deposited nothing. Now the argument is that he is saved from making any deposit at all, notwithstanding the order of this court and notwithstanding the provisions of Order 41 Rule 5, and despite never even having applied for a stay of the decree or its execution only because his appeal is admitted. This is entirely incorrect. By this reasoning, the admission *simpliciter* of every appeal must automatically operate as a stay of execution and perhaps even of the decree itself. There is no basis for this.

19. This is the only ground taken in the present Notice of Motion. I find no substance in it. The Notice of Motion is dismissed.

20. The Affidavit in Reply is to be filed in the Registry.

(G. S. PATEL, J)