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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

IN INSOLVENCY

SHOW-CAUSE NOTICE NO. 1 OF 2018

IN

INSOLVENCY PETITION NO. 8 OF 2016

Ashok Mohansing Bajaj …Petitioning Creditor

Versus

Santosh Balendraprasad Upadhyay …Insolvent

Ms KS Lalwani, *for the Petitioning Creditor.*
Mr AP Bagwe, *for the Insolvents*
Mr MD Narvekar, *Official Assignee, is present.*
Mr EB Shivkumar, *Dy OA, is present.*
Mrs SA Pagedar, *Ist Assistant to the OA, is present.*

CORAM: G.S. PATEL, J
DATED: 5th March 2019

PC:-

1. The Insolvents satisfied in full the claim of the Petitioning Creditor. The Insolvent then filed Notice of Motion No. 71 of 2017 seeking an annulment of the order of adjudication of the insolvent as such. On 21st August 2016, this Court dismissed that Notice of Motion and issued a contempt show cause notice against the insolvents for failing to disclose on Affidavit that there were another claim of the State Bank of India and yet another one of Indian

Overseas Bank. The notice was to show cause why contempt and perjury proceedings should not be initiated against them not only for their failure to disclose these two liabilities but also for stating that other than the claim of the Petitioning Creditor there was no other liability.

2. Both Insolvents are personally present in Court. There is an Affidavit in Reply jointly by the Insolvents, Santosh and Asha Upadhyay. In paragraph 7 they tender an unqualified and unconditional apology. They say there was no intention to mislead. They cooperated with the Official Assignee. During their private examination, they filed a schedule of assets and liabilities, and in this the claims of Indian Overseas Bank and State Bank of India were shown in the "B" sheet. The total aggregate of the liabilities shown 69,43,979/-, but the claim of the Petitioning Creditor was not shown having by then been settled.

3. It is clarified today that these liabilities to the two banks are in respect of two commercial vehicles hypothecated to the State Bank of India and a flat mortgaged to the Indian Overseas Bank. These details are noted.

4. I am satisfied that the omission was inadvertent, and that there was no attempt to mislead or conceal. The liabilities to the banks were indeed disclosed during the private examination. The explanation is sufficient. Having regard to these circumstances, I will accept the unconditional apology and explanation tendered. The show cause notice is thus discharged.

5. There remains the question of what is to be done in regard to the order of insolvency and the Insolvents' Notice of Motion for annulment. Had the previous order been to simply adjourn the Notice of Motion while the show cause notice was pending disposal, I could have taken up that Notice of Motion immediately. The previous order however dismissed the Notice of Motion entirely. If the Insolvents are now required to file yet another Notice of Motion to annul their insolvency, it will be take several weeks, possibly months, before an order can be made on it. I see no reason why, having discharged the show cause notice, I cannot at least recall that part of the order that dismisses Notice of Motion No. 71 of 2017. I am urged by the learned Advocate for the Insolvent to do so. He submits that there is a complete explanation in the present Affidavit in Reply to the show cause notice and it is coupled with a conditional undertaking.

6. The Petitioning Creditors themselves are not pressing any relief against the Insolvent. The entire delay in coming out of insolvency is only on account of an inadvertent lapse on the part of the Insolvent and perhaps even a misunderstanding but nothing more. After all, the statement of liabilities in the private examination did disclose the two bank claims. It is evident that the two banks have claims that are fully secured and for which they have independent remedies including under separate statutes such as Recovery of Debts Due to Banks and Financial Institutions Act 1993 and the SARFAESI Act.

7. I believe there is substance to this submission. Every order of insolvency results in civil death. Our orders should not be operated so harshly as to visit unintended consequences on those who have conducted themselves in a reasonable manner and have been straightforward and candid.

8. Accordingly, paragraph 5 of the order dated 21st August 2018 is recalled. Notice of Motion No. 71 of 2017 is restored to file and forthwith taken up for hearing and final disposal.

NOTICE OF MOTION NO. 71 OF 2017

9. In view of what is stated above, and especially in the Affidavit in Reply to the show cause notice, Notice of Motion No. 71 of 2017 is made absolute in terms of prayer clauses (a), (b) and (c). There will be no order as costs with a clarification that the refund or release of funds from the Office of the Official Assignee will be after deducting all permissible costs, charges and expenses in accordance with the Rules.

10. The undertaking and indemnity in the usual form regarding future claims will also have to be furnished and this will be done within two weeks from today.

11. The Notice of Motion is disposed of in these terms.

(G. S. PATEL, J)