

Shephali

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
IN INSOLVENCY JURISDICTION
NOTICE OF MOTION NO. 43 OF 2018
IN
INSOLVENCY NOTICE NO. 21 OF 2018**

Mahendrakumar Prakashchandra

...Petitioning
Creditor

Versus

Patel Biscuitwalla & Sons & Ors

...Insolvents

Ms RC Nichani, *with Kumar Nichani, for the Petitioning Creditor.*
Ms Soniya Putta, *with Devyani Deshmukh & Mustafa Bohra, i/b*
M/s. Solomon & Co., for the Applicant in INOT/21/2018.

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

PC:-

1. The Motion is by the Judgment Debtor to set aside the Insolvency Notice No. 21 of 2018 dated 11th September 2018 and to stay its operation. The application is made in somewhat peculiar circumstances. The Plaintiff Decree Holder filed Summary Suit No. 1572 of 1994 on the Original Side of this Court. The Defendant having entered appearance, the Plaintiff filed a Summons for Judgment No. 830 of 1998. RM Lodha J (as he then was) granted unconditional leave to defend on 14th March 2000. The Defendants entered a Written Statement on 10th July 2000. A copy of this

Written Statement was served on the Plaintiff's Attorneys shortly thereafter, on 7th August 2000. It seems that the Applicant's now deceased brother, Jayantilal, was attending to the litigation on behalf of Defendants Nos. 1 to 4. He died on 11th May 1994. His four heirs and legal representatives were impleaded. The Judgment Debtor No. 4 (Defendant No. 4(d) in the suit) died on 15th July 2015.

2. It seems that in the meantime, on account of the change in the pecuniary jurisdiction of the City Civil Court, the suit was transferred to that Court some time in 2012. The Applicant says that he received no notice of this transfer and was not informed of it by his then Advocate, Ms Ananya Dutta. It is only after the Applicant made enquiries that they found that the Trial Court had passed a decree on 12th January 2018.

3. Ms Nichani for the Applicants makes a limited point. The Written Statement having been served and issues having been framed, in her submission, the Trial Court ought not to have proceeded in the absence of the Defendants in circumstances such as these. At the very least, the Court could have given notice to the Defendants to remain present. It could have directed the Plaintiff's Advocates to give private notice. At no point were the Plaintiff's Affidavit of Documents, Compilation or Evidence Affidavit served on the Defendants.

4. The point being made is, I think sound, for the simple reason that with issues having been framed the Defendants were certainly entitled to cross-examine the Plaintiff's witnesses fully. It is not as if

they have failed to defend the suit. They have opposed it consistently from the time of service of the Writ of Summons.

5. The Applicant has already applied to the Trial Court to have that decree recalled and set aside. That application is pending. Of course, it will be decided on its own merits uninfluenced by any of the observations that I make today. All contentions on both sides are expressly kept open. However, in the meantime, and having regard to the provisions of Section 9 of the Presidency Towns Insolvency Act 1909 it is not possible to either adjourn this matter or to sustain the present Insolvency Notice.

6. The Notice of Motion is made absolute in terms of clauses (a) and (b). No costs.

(G. S. PATEL, J)