A(IP).No.153 of 2023
in
I.P.No.16 of 2014

C.SARAVANAN, J.

The above application was heard on 05.01.2024. After hearing the learned counsel for the applicant and the learned Official Assignee, Court was of the view that the above application filed for discharging the applicant from insolvency proceeding was liable to be dismissed. Therefore, the above application was dismissed.

2. However, after finalizing the order in the Chamber after the draft was presented for correction and uploaded, the it was brought to the attention of the Court that the order would require a review in the light of the case-laws cited by the learned counsel for the applicant. Hence the case was listed for hearing today for Clarification.

3. A reading of the provisions of the Presidency Town and Insolvency Act, 1909, it is noticed that the discretion under Section 38

read with 39 of the Presidency Town Insolvency Act, 1909 can be exercised in favour of the applicant in the light of the decision cited by the learned counsel for the applicant.

4. It was therefore felt that order passed on 05.01.2024 has to be y recalled and therefore the above application deserves to be reheard. Accordingly, the case was reheard once again.

5. Any time, after the order of adjudication of Insolvency, an insolvent may, apply to the Court for an order of discharge from Insolvency Proceedings under Section 38(1) of the Presidency Town Insolvency Act, 1909 Act. The Court which is seized of the applicant for discharge shall appoint a day for hearing the applicant, except, where the public examination of the insolvent has been dispensed with under the provisions of the Act.

6. The application shall not be heard until after such examination has been concluded. The application shall be heard in open Court. While exercising its powers under Section 38(2) of the Presidency Town Insolvency Act, 1909 Act, the Court has to keep in mind the report of the Official Assignee as to insolvent's conduct and affairs.

7. Subject to provisions of Section 39 of the Presidency Town Insolvency Act, 1909, the Court may :-

(a) grant or refuse an absolute order of discharge, or
(b) suspend the operation of the order for a specified time, or
(c) grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the insolvent, or with respect to his after acquired property

8. Under Section 39(1) of the Presidency Town Insolvency Act, 1909, the Court shall refuse in all cases an order of absolute discharge, where the insolvent has committed any offence under the Presidency

Town Insolvency Act, 1909, or under Section 421 to 424 of the IPC (45 of 1860). In this case, the applicant has not committed any offence.

9. There are no records to infer involvement of the applicant in any criminal case. The report of the Official Assignee is also silent on this aspect.

10. The report of Official Assignee dated 25.08.2023 indicates that 11 unsecured claims were received for a sum of Rs.47,91,326/-. In para Nos.9 to 11 of the report, the Official Assignee has stated as follows:-

> "9. It is submitted that the aforementioned shop was sold by the insolvent to one Mohanlal, vide Document No.711 of 2012 dated 21.06.2012, on the file of Sub Registrar Office, Sowcarpet, Chennai-600 001. Since the said transaction took place within 2 years from the date of adjudication passed by this Hon'ble Court on 13.02.2014 in 1.P.No.16 of 2014, a letter dated 24.11.2022 was addressed to the Sub Registrar, Sowcarpet, Chennai, and obtained Encumbrance Certificate and

certified copies of documents which confers title for the subject property. After ascertaining the title of the property, Valuer Er P.Anbarasan was engaged to value the subject property. As per the valuation Report submitted by Valuer Er P.Anbarasan, the shop was valued at Rs.6,00,000/- as on 07.11.2014.

10. It is submitted that the vesting rights of the Official Assignee has been duly incorporated in the Encumbrance Certificate vide Document No.11 of 2018 dated 12.11.2018 and the property is to be brought for auction sale.
11. It is submitted that in the event of admission of 11 claims for a sum of Rs.47,91,326/- with the available amount of Rs.79,000/-, a dividend at the rate of 0.01 paise in a rupee alone can be paid. The insolvency estate is not in a position to declare dividend of at least 25 paise in a rupee as provided under section 39 (2) (a) of Presidency Towns Insolvency Act, 1909, which is a pre-requisite for granting discharge. Hence, the application for discharge is liable to be dismissed."

11. The report filed by the Official Assignee does not indicates that the applicant who was adjudged as an insolvent on 13.02.2014, has committed any offence either under the provisions of the Presidency Town and Insolvency Act, 1909 or under Section 421 to

424 of the Indian Penal Code.

12. Under Section 39(1) of the Presidency Town Insolvency Act, 1909, a Court can on proof of any of the facts mentioned therein, *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".

13. For the purpose of exercise discretion under 2nd Part of Section 39(1) of the Presidency Town Insolvency Act, 1909, the facts mentioned therein are enumerated below:-

> *"(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;*
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> *(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;*
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> *(c) that the insolvent has continued to trade after knowing himself to be insolvent;*
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> *(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;*
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> *(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".

14. Under Second Part of Section 38(2) of the Presidency Town Insolvency Act, 1909 the word used is "*may"* under Section 39(1) of the 2nd Part of Section 39(1) of the Presidency Town Insolvency Act, 1909 word is "either".

15. Thus, an insolvent can be discharged an insolvent from an insolvency proceeding. Discretion is vested with the Court under 2nd Part of Section 39(1) of the Presidency Town Insolvency Act, 1909. Only where an insolvent has committed any offence under this Act, or under sections 421 to 424 of the Indian Penal Code,1860, the Court must refuse an absolute discharge. Section 39 of the Presidency Town Insolvency Act, 1909 is reproduced below:-

Section 39: 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 sections 421 to 424 of the Indian Penal Code,1860(45 of 1860), and shall, on proof of any of the facts hereinafter mentioned, either— (a) refuse the discharge; or (b) suspend the discharge for a specified time; or (c) suspend the discharge until a dividend of not less than four annas in the rupee has	(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

been paid to the creditors; or (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.	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.

16. Therefore, the arguments of the Official Assignee that the insolvent's assets are not of a value equal to four annas in the rupee on the amount of his unsecured liabilities is not relevant if Section 39(1)part I and part II and section 39(2) of the of the Presidency Town Insolvency Act, 1909 are read harmoniously. The argument that the insolvent has not satisfied the value of asset criteria is not relevant for rejecting the application.

17. No doubt, the assets of the insolvent are not of a value equal to four annas in Rupees as compared to his unsecured liabilities, it can be inferred that he is not responsible for his present predicament.

18. In **C.D. Desikachari vs. The Official Receiver, Chingleput, and Another,** AIR (30) 1943 Mad.26 (DB), wherein it was held as under:-

> " .... The whole purpose of the Insolvency Act is that proceedings in insolvency shall be dealt with as expeditiously as possible, that the creditors shall be satisfied as expeditiously as possible from the property of the insolvent, and that the insolvent shall then be free to start life again unburdened by his debts.".
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> "........... There is nothing to prevent the Court granting an absolute order of discharge when it has been satisfied, for instance, that the insolvent had placed all his property within the control of the Official Receiver so that from his—insolvent's—point of view nothing more remains to be done".

19. In **T.P. Kunhiraman, Proprietor, International Typewriter Emporium, vs. The Official Assignee, Madras,** AIR 1983 Mad 148,

the Court observed refuse an order of absolute discharge. In that case, it was observed as under :-

> "**5.**As regards the complaint that the insolvent has not provided 0.25 ps. in a rupee, by way of dividend, I am to state that it is one among several circumstances, the court has to take into consideration while dealing with an application for discharge. I have already pointed out that the debtor should not remain an undischarged insolvent for ever. In a case where there is a fair probability of the debtor providing in a reasonable period the minimum of 0.25 ps in the rupee as dividend the court shall hesitate in granting discharge. In the instant case, he will have to remain an undischarged insolvent almost till his lifetime if this condition were to be imposed as a general rule, for, it would take 161 months to make up Rs 32,300 at Rs. 200 per month. The above illustration gives a clue that that was not the intent of the Legislature in making that provision.
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> **6.** Though an insolvent, every man is entitled to make his living or to earn out his livelihood at least to pay the monthly allocation in the interest of creditors. In this matter the insolvent had the permission of this Court in carrying out his job. He is admittedly a technician and by using his skill he was able to eke out his livelihood. No doubt while so doing, he had to purchase rotten and abandoned typewriters and the like, make them fit for use on account of his

> skill and thereafter dispose of such machines and in the process what he obtained for his skilled labour was the margin that was left out This naturally necessitated the insolvent to either purchase machines on credit or on borrowing, then discharge the said liabilities after the sale of the machines. It cannot therefore be contended that the insolvent is dealing actually in typewriter machines. It is also complained that the insolvent has under his employment several others. In my opinion that will not stand in the way of the insolvent obtaining a discharge. White carrying out his manual as also skilled work, if it was necessary that he should have the assistance of others, certainly he must have such assistance and that is solely for eking out his livelihood. As a matter of fact, in this case, the insolvent has paid Rs. 200 on an average per month. I therefore, find no substance in the above objection".

The Court also held that the age of the applicant there was 60 years and therefore granted an order of discharge.

20. In N.M.***Rajesh v. Official Assignee, High Court,***(2014) 6 CTC 423, this Court summarised the position as follows :-

> **"6.**The principles laid down by our High Court in the

judgments referred to above are that —

(i) The proceedings in insolvency shall be dealt with as expeditiously as possible and the Creditors shall be satisfied as expeditiously as possible form the property of the insovlent and that the insolvent shall then be free to start life again unburdened by his debts.

(ii) 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 Presidency Towns Insolvency Act.

(iii) It is the discretion of the Court to refuse discharge or suspend discharge for a specified time or grant conditional discharge, having regard to totality of all the factors enumerated in Section 39(2).

(iv) The absolute Order of Discharge does not put an end of the administration of the insolvent's property.

(v) It is for the Court to decide whether the property should, even after annulment of adjudication, continue to vest with the Official Receiver or not. Whether the administration of the particular insolvency is brought to an end by the Court's Order of granting the absolute Order of Discharge and is depending upon the nature of the Order made.

(vi) Once there is an unconditional absolute

> Order of Discharge, the Official Receiver has no longer power to bring any of the properties of the ex-insolvent to sale and any dealing of the property by the Official Receiver in a given situation is against law and is liable to be set aside".

21. Considering the above, the decisions of the Court cited by the learned counsel for the applicant, the above application is allowed.

22. This order dated 05.01.2024 is recalled and this Application stands allowed.

02.02.2024

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C.SARAVANAN, J.
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