

IN THE HIGH COURT OF BOMBAY

Insolvency Petition No. 10 of 2007

Decided On: 03.09.2010

Appellants: **In Re: Jayantilal Khandwala and Sons a partnership firm carrying on business, Jatin Ashok Khandwala, Ashok Jayantilal Khandwala and Paresh Jayantilal Khandwala**

AND

Appellants: **Neebha Kapoor**

Vs.

Respondent: **Kaushik Shah Share and Securities Private Limited, a Company incorporated under the Companies Act, 1956**

Hon'ble Judges:

S.J. Vazifdar, J.

Counsels:

For Appellant/Petitioner/Plaintiff: Kishore Jain, Adv., i/b., P.V. Shah, Adv.

For Respondents/Defendant: J.P. Sen and Vivek Kantawala, Advs., i/b., Vivek Sharma, Adv.

Subject: Arbitration

Catch Words

Mentioned IN

Acts/Rules/Orders:

Negotiable Instruments Act - Section 138; Arbitration and Conciliation Act, 1996; Presidency Towns Insolvency Act, 1909 - Sections 2, 9A, 9(2), 10, 13(2), 46 and 46(3)

Cases Referred:

Paramjeet Singh Patheja v. ICDS Limited (2006) 13 SCC 322; Mandvi Co-operative Bank Limited v. Anant V. Hegade MANU/MH/1047/2006 : 2007 2 LJSOFT 95 : AIR 2007 Bom. 50; Yenumula Malludora v. Peruri Seetharathnam and Ors. MANU/SC/0021/1965 : AIR 1966 SC 918; SICOM Limited (Petitioning Creditors) case 2009 (8) LJSOFT 138 : (2009) Mah. L.J. 901

JUDGMENT

S.J. Vazifdar, J.

1. The substituted petitioning creditor - Kaushik Shah Shares & Securities Private Limited - seeks an order adjudicating Debtor No. 2, an insolvent.

2. The substituted petitioning creditor's claim arises in the following manner.

(A) The substituted petitioning creditor, in the year 2001, filed a reference for arbitration with the Bombay Stock Exchange in connection with its claim against Debtor Nos. 2, 3 and 4, Nirjay Securities

Pvt. Ltd. and one Mayank. An award dated 29th July 2002 was made against Nirjay Securities Pvt. Ltd. for a sum of Rs. 2,19,75,396.70, interest and for costs. The claim against the others was rejected. The Appellate Bench of the Bombay Stock Exchange rejected the substituted petitioning creditor's appeal on 25th April, 2003. The substituted petitioning creditor challenged the award by filing Arbitration Petition No. 381 of 2003. By an order dated 4th April, 2005, for which the parties did not seek reasons, the award was set aside insofar as it rejected the claim against Debtor No. 2 to 4 and the said Mayank and the Arbitrators were directed to make a fresh award with respect to them.

(B) On 19th April, 2006, the arbitrator made and published an award against Nirjay Securities Private Limited and Debtor No. 2 in the sum of Rs. 2,19,75,396.70 with interest at eighteen per cent per annum on Rs. 2,04,71,815.70, but rejected the reference against Debtor Nos. 3, 4 and the said Mayank. The substituted petitioning creditor's appeal before the Appellate Bench of the Stock Exchange was dismissed on 26th September, 2006. The substituted petitioning creditor filed Arbitration Petition No. 167 of 2007, challenging the award of the Appellate Bench of the Stock Exchange insofar as it rejected the reference against Debtor Nos. 3, 4 and the said Mayank. The petition is pending.

(C) In the result, the award dated 19th April, 2006, as against Debtor No. 2 has become final. The substituted petitioning creditor is, therefore, a creditor qua Debtor No. 2 to the extent of the amounts awarded.

3. The facts leading to the original petitioning creditor filing the Insolvency Petition are as follows.

(A) On 31st July, 2006, one Mrs. Ritu Sethi obtained a decree against the debtors in Summary Suit No. 1595 of 2005. On 19th October, 2006, at the instance of Mrs. Ritu Sethi, Insolvency Notice No. N/268 of 2006 was served against the judgment debtors based on the decree dated 31st July, 2006. The insolvency notice was served upon the judgment debtors on 31st October, 2006.

(B) The act of insolvency was complete on 5th December, 2006.

(C) The original petitioning creditor Mrs. Neebha Kapoor, availing of the said act of insolvency referred to above, filed the above Insolvency Petition on 12th January, 2007, in connection with her claim against the debtors.

(D) By a letter dated 9th February, 2007, addressed to Mrs. Ritu Sethi, the debtor's advocate admitted that a sum of Rs. 32,780/- was still payable and, accordingly, enclosed a pay order for the said sum towards satisfaction of the decree.

(E) On 11th April, 2007, the judgment debtors filed Chamber Summons No. 583 of 2007 in the said Summary Suit No. 1595 of 2005 filed by the said Ritu Sethi seeking a declaration/order to the effect that the decree stands fully satisfied. In the affidavit-in-reply dated 1st June, 2007, it was contended that an amount of Rs. 8,046/- was still due and payable under the decree.

(F) This Chamber Summons was disposed of by an order dated 6.5.2009, the learned Judge recorded the statement on behalf of the Plaintiff that she has received certain amounts and that the decree in two suits stood satisfied. It was however, clarified that the order would not influence the Court in the proceedings filed under Section 138 of the Negotiable Instruments Act in any manner.

4. By an order dated 5th August, 2008, in Notice of Motion No. 13 of 2008 taken out by the original petitioning creditors for correcting the number of the Insolvency Notice from N/288 of 2006 to N/268 of 2006, the statement on behalf of the petitioning creditor and the debtors was recorded to the effect that the disputes between them had been settled and that the petitioning creditor, therefore, sought leave to withdraw the petition. The learned Judge directed the Insolvency Registrar to issue

the usual advertisement in the newspapers notifying the proposed withdrawal and inviting objections, if any, within a period of two weeks.

5. On 13th December, 2007, the substituted petitioning creditor filed an application in the Insolvency Petition for being substituted in place of the petitioning creditor, Mrs. Neebha Kapoor. This application was based on the said award dated 19th April, 2006. By an order dated 2nd September, 2008, the substituted petitioning creditor was allowed to be substituted in place and stead of the petitioning creditor in the above petition to the extent it concerns debtor No. 2. The petition was, accordingly, ordered to be amended and has been so amended. It was further ordered that the petition would be continued by the supporting creditor only against debtor No. 2.

6. It was submitted on behalf of judgment debtor No. 2 that the Insolvency Petition cannot be prosecuted by the substituted petitioning creditor as it is based on an award passed under the Arbitration & Conciliation Act, 1996. Relying upon the judgment of the Supreme Court in the case of Paramjeet Singh Patheja v. ICDS Limited (2006) 13 SCC 322, it was contended that the substituted petitioning creditor could not have taken out a notice under Section 9(2) of the Presidency Towns Insolvency Act, 1909 and it cannot, therefore, even be permitted to continue the petition as a substituted petitioning creditor.

7. The submission is not well founded for more than one reason.

Firstly, by the order dated 2nd September, 2008, the learned Judge permitted the substituted petitioning creditor to be substituted in place and stead of the petitioning creditor to the extent it concerns debtor No. 2 and expressly ordered the petition to continue by the substituted petitioning creditor against debtor No. 2. This order has not been challenged. It has, therefore, become final. It is binding on me.

8. Even otherwise, the submission is not well founded. Merely because the substituted petitioning creditor was not entitled to serve an insolvency notice based on the said award, does not lead to the conclusion that it cannot, relying upon an act of insolvency, proceed with the petition for adjudication in substitution of the petitioning creditor. The only bar against a creditor relying upon an arbitration award, is to serve a notice under Section 9(2) of the Presidency Towns Insolvency Act. There is no bar against such a creditor from proving its claim insolvency.

9. In *Mandvi Co-operative Bank Limited v. Anant V. Hegade* MANU/MH/1047/2006 : 2007 2 LJSOFT 95 : AIR 2007 Bom. 50, Mandvi Co-operative Bank Limited had taken out an insolvency notice under which the amount due was quantified at Rs. 94,07,000/- with further interest. The insolvency notice was served on 24th December, 2003. The debtor filed Notice of Motion No. 17 of 2004 for setting aside the insolvency notice which was dismissed for default on 20th July, 2004. The Notice of Motion was, however, restored to file. Thereafter in Notice of Motion No. 17 of 2004, consent terms were arrived at between the Mandvi Co-operative Bank Limited and the judgment debtor under which a sum of Rs. 1,07,00,000/- together with interest at 12.5% per annum on the principal sum of Rs. 69,21,000/- was payable. The judgment debtor defaulted in complying with the consent terms. In the meantime, Manipal Finance Corporation Limited was bought on the record as a substituted petitioning creditor. The claim of this substituted petitioning creditor was in respect of an amount payable under a hire purchase agreement. It was contended that under Section 9-A of the said Act, the claim of a creditor prosecuting an insolvency proceeding should be based on a decree or order of a competent court and that, therefore, a claim under a hire-purchase agreement did not amount to a valid claim. Rejecting the contention, the learned Judge held as follows:

2. An affidavit in reply has been filed on behalf of the Debtor to the Insolvency Petition. The first line of defence is that under Section 9A of the Presidency Towns Insolvency Act, 1909, the claim of a creditor who is prosecuting an insolvency proceeding should be based on a decree and order of the Competent Court. Hence, it has been submitted that the claim under a hire purchase agreement did not amount to a valid claim in the eyes of law. Now in the present case, the proceedings in insolvency

were initiated by the Bank, based on an award of the Co-operative Court. The act of insolvency was complete on 20th July 2004, on the expiry of the statutory period after the service of the Insolvency Notice. The substituted Petitioning Creditor is entitled in law to pursue the proceedings on the basis of the act of insolvency as originally committed by the Debtor since the consequence thereof would enure to the benefit of the general body of Creditors. The substituted Petitioning Creditor is required to meet the definition of the expression "creditor" in the Presidency Towns Insolvency Act, 1909 and it is to be noted that Section 2(a) defines the expression "creditor" to include a decree holder. Therefore, once an Insolvency Notice was validly issued by the original Petitioning Creditor and the act of insolvency was complete upon the failure of the Debtor to comply with the requisition contained therein, the consequence of the commission of an act of insolvency must enure to the benefit of the general body of Creditors.

The fact that the original Petitioning Creditor has lost interest in the proceedings would not make any difference to the position in law; for the substituted Petitioning Creditor steps into the shoes of the original Petitioning Creditor in pursuing the insolvency proceedings. The contention that there was no decree or order in favour of the substituted Petitioning Creditor is, as already noted above, without any merit since the expression "creditor" is defined to include a decree holder. Section 13(2) postulates that at the hearing of the Petition, the Court shall require proof of the debt of the Petitioning Creditor and of the act of insolvency or if more than one act of insolvency is alleged in the petition, some one of the alleged acts of insolvency. Apart from the claim of the Petitioning Creditor which is crystallised in an adjudication by the Co-operative Court, the claim of the substituted Petitioning Creditor has also been crystallised in an arbitral award.

It has, therefore, been held in the above judgment that a substituted petitioning creditor is required to meet the definition of the expression "creditor" as contained in Section 2(a) of the said Act. Apart from being bound by, I am in respectful agreement with the judgment in *Mandvi Co-operative Bank Limited v. Anant Hegade*. I would only add a few words in support of this view.

10. Section 2(a) and Section 10 of the said Act read as under:

2. Definitions. -In this Act, unless there is anything repugnant in the subject or context,-

(a) "creditor" includes a decree-holder;

....

10. Power to adjudicate.-Subject to the conditions specified in this Act, if a debtor commits an act of insolvency, an insolvency petition may be presented either by a creditor or by the debtor, and the Court may on such petition make an order (hereinafter called an order of adjudication) adjudging him an insolvent.

Explanation.-The presentation of a petition by the debtor shall be deemed an act of insolvency within the meaning of this section, and on such petition the Court may make an order of adjudication.

The inability of a creditor to serve an insolvency notice under Section 9(2) does not reflect upon such creditor's right to even present an insolvency petition. Section 10 of the said Act entitles an insolvency petition to be presented, inter-alia, by a creditor in the event of a debtor committing an act of insolvency. Section 10 is not restricted only to the creditors contemplated under Section 9(2). To be a creditor entitled to present an insolvency petition, a creditor must fall within the ambit of the expression in Section 2(a).

11. As held by the Supreme Court in *Yenumula Malludora v. Peruri Seetharathnam and Ors.* MANU/SC/0021/1965 : AIR 1966 SC 918, an act of insolvency is available to all the creditors of the debtor. The Supreme Court held as under:

6. An act of insolvency once committed cannot be explained or purged by subsequent events. The insolvent cannot claim to wipe it off by paying some of his creditors. This is because the same act of insolvency is available to all his creditors. By satisfying one of the creditors the act of insolvency is not erased unless all creditors are satisfied because till all creditors are paid the debtor must prove his ability to meet his liabilities. In this case the petitioning creditors had their own decrees. It was in the decree of another creditor that the payment was made but only after the act of insolvency was committed. Besides the petitioning creditors there were several other creditors to whom the appellant owed large sum of money and his total debts aggregated to Rs. two lakhs. It is plain that any of the remaining creditors, including the petitioning creditors, could rely upon the act of insolvency even though one or more creditors might have been paid in full. The act of insolvency which the appellant had committed thus remained and was not purged by payment of decretal amount after the sale in execution of the money decree.

12. The substituted petitioning creditor is, therefore, entitled to maintain and prosecute this petition. A view to the contrary would cause enormous confusion among and prejudice to the general body of creditors. They are, as I have held In Re: Ramavtar Kunjilal Gupta and Anr. (Judgment Debtors.) Ex-parte:- SICOM Limited (Petitioning Creditors) 2009 (8) LJSOFT 138 : (2009) Mah. L.J. 901, entitled to prove and claim insolvency. I observed:

12. There is nothing in Section 46 which provides that the debts provable in insolvency are only those where the creditor is entitled to avail of Section 9(2). Once an order of adjudication is validly passed, all debts and liabilities falling within the ambit of Section 46, to which the debtor is subject when he is adjudicated an insolvent or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, are provable in insolvency.

Section 2(b) defines a "debt" to include a "judgment debt" and a "debtor" to include a "judgment debtor". The definition is inclusive. Moreover, Section 46(3) permits not only all debts but even all liabilities to be provable in insolvency. Indeed, to be provable in insolvency, it is not even necessary for a debt or liability to be adjudicated.

Thus, keeping aside the aspect as to whether a secured creditor can prove its debts in insolvency, it must be held that the debts due to Canara Bank are provable in insolvency in view of the admitted position that the same have to date, not been paid.

If the submission on behalf of the Debtor is accepted, in cases where the original petitioning creditor and the judgment debtors settle their dispute, the claims of all creditors except of those entitled to serve a notice under Section 9(2) would be barred by limitation.

13. I must note that it is unfortunate that the parties have not been able to settle their disputes for it appears that the debtors have at least recently been trying sincerely to discharge their liabilities.

14. In the circumstances, the petition is made absolute as prayed. There shall be no order as to costs. However, in the event of this order becoming final, Debtor No. 2 shall pay costs of the publication. This judgment and order including the effect thereof is stayed upto 30th November, 2010.