

**(1959) 12 MP CK 0025**

**In the Madhya Pradesh High Court**

**Case No : Miscellaneous Appeal No. 60 of 1957**

Firm Dattulal Badrinarayan and Others

APPELLANT

Vs

Siddheshwar Jagannath and Others

RESPONDENT

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**Date of Decision : 21-12-1959**

**Acts Referred:**

Provincial Insolvency Act, 1920 — Section 41(2), 42(1)

**Citation : AIR 1960 MP 204 : (1960) JLJ 546 : (1960) 5 MPLJ 662**

**Hon'ble Judges : V.R. Newaskar, J;H.R. Krishnan, J**

**Bench : Division Bench**

**Advocate : M.R. Deo, for the Appellant; Chaphekar, Waghmare, S.L. Dubey and Chitale, for the Respondent**

**Final Decision : Allowed**

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## **Judgement**

Newaskar, J.

This appeal is directed against an order passed by the Insolvency Court rejecting the application of the appellant for an absolute discharge.

The circumstances leading to the order may briefly be stated as follows:--

The appellant is a firm whose partners are Dattulal and Badrinarayan. This firm carried on business in silver and gold and ultimately came to grief. The debts due from the Firm got swollen to Rs. 80,155-15-9 and they were unable to discharge their obligations. An application for their adjudication was submitted by the appellants. They were accordingly adjudicated insolvents. The appellants then submitted an application for their discharge after their assets had been made over to the Official Receiver. The property, which was found with the insolvents, was an immovable property subject to mortgage and after the disposal of the property and the payments of dues of the secured creditor only Rs. 2358-9-6 were lying in the hands of the Receiver. The creditors opposed the application for grant of absolute discharge. The matter was thereupon enquired into.

Dattulal, one of the owners of the firm, admitted in his statement that they had incurred a debt of Rs. 80,000/- within a course of three or four years. In the forward transactions which they indulged in there were profits to begin with but later on losses were sustained so as to wipe out the profits earned. They continued the transactions in spite of the losses and ultimately found that they were not in a position to pay their debts. To begin with they had a shop for the purchase and sale of silver and gold in species. The losses which occurred were as a result of speculative transactions.

When the losses were initially sustained they knew that they were not in a position to bear the burden of their losses and still continued the transactions hoping that they would be in a position to make them up. The statement of the other owner of the appellant firm Badrinarayan is almost on the same lines. He also stated that when the debts went on increasing they were fully aware that "their personal property was not enough to pay the burden of those debts and still they continued their business in dealing in speculative transaction. The object, in thus continuing this sort of business was that they hoped that they would be (sic) position to discharge their debts by such (sic)

In view of the statements of the appellants the learned Insolvency Court held that the appellants were not entitled to the grant of absolute discharge and refused the same.

The present appeal is directed against that decision. It is contended by Mr. Deo for the appellants that although the appellants might not be entitled to an order of absolute discharge forthwith it was open for the Court to grant conditional discharge or suspend the order of absolute discharge for a specified time which in this case could be 2, 4 or 5 years. It was not open for the insolvency Court to refuse discharge absolutely.

Two questions arise for consideration:--

Having regard to the terms of Section 41 and Section 42 of the Provincial Insolvency Act whether, it is within the jurisdiction of the Insolvency Court to refuse discharge absolutely?

Assuming that the Court has such a power whether under the circumstances of the present case it would not have been better exercise of discretion had the lower Court granted a discharge subject to some condition or would have suspended the operation of the order of discharge for a specified period?

Now as regards the first it is clear from the statement of both the proprietors of the firm that their case falls both u/s 42(1)(c) as well as Section 42(1)(f) of the Provincial Insolvency Act. Section 42(1)(c) deals with the case where the insolvent continues to trade after knowing himself to be an insolvent. Section 42(1)(f) deals with the case where the insolvent has brought on himself insolvency by rash and hazardous speculations. The appellants were no doubt dealing in a speculative business. They knew that they were not in a position to

bear the burden of the losses and yet went on with the transaction hoping that some miracle would happen and there would be a windfall. A mentality such as this denotes rashness as well as great hazard. It is clear that they were fully aware of their position of financial embarrassment and continued the trade. The Court was therefore right in refusing to grant an absolute order of discharge.

The next question is whether even if an order of absolute discharge could not have been granted could there have been refusal of the discharge absolutely. In *Bhag Mal v. Parshottam Singh* AIR 1935 Lah 919, Abdul Rashid J., expressed an opinion that an application by an insolvent for an order of discharge should not ordinarily, be entirely rejected, and that if the Court is of the opinion that the insolvent should not be granted an absolute order of discharge, it should consider whether a conditional order should not be passed, or whether an order of discharge, with a provision that its operation be suspended for a specified time, should not be made. This view of the learned Judge was based upon the decision in *Devi Dayal v. Sarmukh Singh* AIR 1929 Lah 281 and *Mul Chand and Another Vs. Official Receiver and Others* .

In the last mentioned case Mukerji J., in his judgment referred to the observations of Vaughan Williams. L.J. in *Re Gaskell* 1904 2 KB 478 to the following effect:--

"After all, the overriding intention of the Legislature in all Bankruptcy Acts is that the debtor on giving up the whole of his property shall be free man again, able to earn his livelihood and having the ordinary inducement to industry. Sometimes, it is not right that the bankrupt should be free immediately; he must pass through a period of probation; and theoretically there may be cases in which he ought not to be free at all, but prima facie, he is to give up everything he has and on doing that he is to be made a free man."

7a. He seems to be of the view that an order refusing discharge absolutely, though not outside the pale of Section 42 of the Provincial Insolvency Act, ought to be passed only in extreme cases of dishonest behaviour of the insolvent so as to justify his continuance as an undischarged insolvent for the rest of the days of his life.

In a case reported in *Badri Nath v. Ram Chandra* AIR 1939 Oudh 129, Ziaul Hasan and Hamilton JJ., while dealing with this question expressed the opinion that, if the Court be of the opinion that the insolvent should not be granted an absolute order of discharge, it should consider whether a conditional order of discharge or an order of discharge with a provision that its operation be suspended for a specified time should or should not be passed. They seem to have expressed rather widely when they stated that an absolute refusal to grant an order of discharge is not justified by Section 41 of the Act. They relied upon the decision in AIR 1935 Lah 919 for this which has already been referred to.

It is clear from the decision in AIR 1935 Lah 919 that what is held in that case is that an order of refusing discharge absolutely should not ordinarily be passed

and the Court should consider as to whether the other two kinds of orders contemplated u/s 41 of the Act ought or ought not to be passed.

It is therefore clear from these decisions that, although it is competent in extreme cases for the Court to refuse discharge absolutely when the insolvent is guilty of some misconduct or dishonesty either before filing the petition for insolvency or during the proceedings of insolvency in the rest of the cases the Court ought to consider as to whether it would be appropriate to pass an order of the nature indicated in Clauses (b) and (c) of Section 41(2) of the Provincial Insolvency Act.

Now as regards the grant of conditional discharge it appears clear that imposition of a condition for a man who has given up all his property for the benefit of the creditors and nothing is left with him there should be reasonable prospects of his coming into possession of property either by reason of his own earnings which should be more than sufficient to meet his ordinary expenses of life or from some other source.

In the present case it appears from the statement of the insolvent that what they earn is barely sufficient for the maintenance of their family and practically nothing would be left with them for payment to the creditors. There also does not appear to be any reasonable prospect of their coming by any property from any other source. Under these circumstances it is futile to impose a condition while passing an order of discharge. The only third alternative which remains to be considered is whether we should suspend the order of discharge by a specified period.

I consider this sort of order to be reasonable in this case because according to the report of the receiver it appears that the insolvents have placed all their property before the insolvency court and the whole of it has been disposed of. There is no allegation or proof of any dishonest conduct. What is alleged is rash and hazardous business. If we bear in mind the object of Bankruptcy Laws as stated by Vaughan Williams, L. J. 1904 2 KB 478 to be that the debtor on giving up whole of his property should be a free man again able to earn his livelihood then I think this is pre-eminently a case where we should direct suspension of the order of discharge.

The insolvents no doubt have not paid eight annas in a rupee. It is also clear that they are not able to pay eight annas in a rupee and this circumstance has arisen for which they can be held justly responsible. Yet with all this since they have given up everything they had and are making their living either by resorting to service or some mode they should have an ordinary incentive to industry after a reasonable period. I therefore hold that the lower Court was not justified in refusing the discharge absolutely.

I would therefore set aside the order and direct that the order of discharge shall remain suspended for a period of five years after which it shall take its effect.

The appeal is allowed in these terms.

Under the circumstances of the case the parties shall bear their own costs of this appeal.

Krishnan, J.

I agree.