

(2008) 02 GUJ CK 0003

In the Gujarat High Court

Case No : Special Civil Application No. 2836 of 2008

Shah Bakuleshbhai Hasmukulal

APPELLANT

Vs

Kaushikkumar Kantilal Modi and Others

RESPONDENT

Date of Decision : 29-02-2008

Acts Referred:

Bombay Provincial Insolvency Rules, 1924 — Rule 24
Provincial Insolvency Act, 1920 — Section 14(1), 19, 19(1), 19(2), 30

Citation : AIR 2008 Guj 133 : (2008) 3 GLR 2352

Hon'ble Judges : Akil Kureshi, J

Bench : Single Bench

Advocate : Paurami B. Sheth, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

Akil Kureshi, J.—The petitioner has challenged an order dated 8.8.2007 below exh.6 in Insolvency petition No. 7/2007 passed by learned City Civil Court, Ahmedabad.

2. The petitioner had instituted the said Insolvency petition. The petitioner is the debtor. In his petition, he filed application exh.6 and stated that for issuance of public notice, substantial expenditure would be incurred. His financial condition is weak. No prejudice will be caused to anyone if such a notice is dispensed with and instead Court permits that such a notice be published only in official gazette. On this application, learned Judge passed his order on 18.8.2007 which is challenged in this petition.

3. Before me, learned advocate Ms. Paurami Seth contended that financial position of the petitioner would not permit him to incur the expenditure required for public notice. Public notice is not mandatory and in lieu thereof publication in official gazette can be permitted. My attention was drawn to the decision of learned Single Judge of this Court in case of Mohanlal Premjibhai Thakkar Vs. Shah Atulkumar Kantilal, in which relying on an earlier decision of the Division

Bench of this Court in case of Hasmukh Engineering Works and Anr. v. Babubhai Chhotalal Amin and Anr. reported in 19 GLR 172, it was held that the trial Court had exercised discretion vested in it not to issue public notice before hearing the debtor and that therefore, the Appellate Court was not justified in striking down such an order.

4. Section 19 of the Provincial Insolvency Act, 1920(here-in-after referred to as Sthe said Act) provides for procedure on admission of insolvency petition. Section 19 of the said Act reads as follows:

19. Procedure on admission of petition.-(1) Where an insolvency petition is admitted, the Court shall make an order fixing a date for hearing the petition.

(2) Notice of the order under Sub-section(1) shall be given to creditors in such manner as may be prescribed.

(3) Where the debtor is not the petitioner, notice of the order under Sub-section(1) shall be served on him in the manner provided for the service of summons.

5. It may be noted that Sub-section(2) of Section 19 does not distinguish between insolvency petitions filed by creditor or debtor. Such a notice is therefore, required to be given in an insolvency petition filed either by the creditor or debtor. Under Sub-section(3) of Section 19 an additional procedure is provided wherein the petition is filed by the creditor, notice of the order under Sub-section(1) is to be served on the debtor also. It may further be noticed that Sub-section(2) of Section 19 provides only for issuance of notice. But the manner in which it has to be issued is to be prescribed.

6. The Bombay Provincial Insolvency Rules (here-in-after referred to as Sthe said Rules) have been framed in exercise of powers u/s 79 of the said Act and are admittedly applicable in the present case. Rule 24 of the said rules pertain to notice. Rule 24 to the extent it is relevant reads as follows:

XXIV. Notice.-(1) The notices to be given under Secions. 30 and 37(2) of the Act shall be published in the Bombay Government Gazette in English, and, if the Court so directs, in any suitable English or regional language newspaper, and copies of the notices in English and in the language of the Court shall be affixed to the notice-board of the Court.

(2) The notices to be given under Secions. 19(2), 38(1) and 14(1) of the Act shall be published in any suitable English or regional language newspaper, and if the Court so directs, in the Bombay Government Gazette, and copies of the notices in English and in the language of the Court shall be affixed to the notice-board of the Court.

(3) Notice of the date fixed for the hearing of an insolvency petition under Section.19(1) of the Act shall be sent by the Court by registered post, if the petition is by the debtor, to all the creditors, mentioned in the petition, and if the

petition is by a creditor, to the debtor, not less than fourteen days before the said date.

(3A) When in a creditor's petition it is alleged that the debtor has committed one or more of the acts of insolvency mentioned in Clause (a),(b) or (c) of Section.6, notice of the date fixed for hearing of the insolvency petition u/s 19(1) of the Act shall also be served on the transferee or transferees or their successors in title by registered post or otherwise as directed by the Court to the address supplied by the petitioner....

7. Upon perusal of the said Rules, it can be seen that the notice to be given u/s 19(2) of the said Act is required to be published in any suitable English or Regional language newspaper and if the Court so directs, in the Government Gazette also.

8. It would thus appear that the Rules require that such notice shall be published in the Newspaper and at the discretion of the Court also in Government Gazette. The Rule thus would suggest that issuance of notice in newspaper is mandatory. What is directory or at the discretion of the Court is additional publication of such a notice in the official gazette.

9. In case of the The Punjab National Bank Ltd. and Others Vs. Jethmal Danmal and Others, Division Bench of the High Court held that Section 19(2) applies to petitions both by creditors and by debtors and notice has to be made in the manner prescribed in the Rules framed by the High Court of Rajasthan. It means that whether the petition is by creditor or by debtor, general notice as prescribed by that Rule must always be given. Specific notice to individual creditors will only be given where the names and addresses of the individual creditors are known from any part of the petition.

10. In case of Radheshyam Agrawal v. Hariom Trading Co. and Ors. reported in AIR 1992 M P 168 also, learned Single Judge of the Madhya Pradesh High Court opined that the notice of insolvency petition u/s 19(2) of the said Act applies to every petition whether by the creditor or by the debtor. High Court of Nagpur being the predecessor of High Court of Madhya Pradesh, Rules framed by it shall continue to hold good and personal notices to the creditors and publication of general notice also in local newspaper have been contemplated by Rules.

11. In case of Rampratap Marwari Vs. Lachman Mistri, learned Single Judge of the High Court was considering the provisions of Rules pertaining to service of notice which reads as follows:

Notice of an order fixing the date of the hearing of a petition u/s 19(2) shall be published in the local official Gazette and advertised in such newspapers as the Court may direct. A copy of the notice shall also be forwarded by registered letter to each creditor to the address given in the petition.

In view of the said Rule position, learned Judge opined that rules nowhere provide that mere publication in the official gazette will be enough. It distinctly

provides that a copy of the notice should also be forwarded by registered letter to each creditors.

12. It can thus be seen that by different High Courts also similar view has been taken namely that publication in newspaper when so directed is must.

13. It was contended that rule is only directory and not mandatory. Reliance in this regard was placed on the decision of Thakur Pratap Singh Vs. Shri Krishna Gupta and Others, In the said case, it is observed that some rules are vital and would go to the root of the matter and they cannot be broken whereas others are directory and breach thereof can be overlooked provided there is substantial compliance with the rules. As already discussed, I find that the rules require that notice shall be published in local newspaper and it is only publication in the official gazette which is a subsidiary requirement and therefore, discretionary. In Hasmukh Engineering Works and Anr. v. Babubhai Chhotalal Amin and Anr. (supra), the issue was wholly different. The Division Bench was considering whether it was obligatory on the Court to hear the debtor before issuing public notice in an Insolvency Petition filed by the creditor. In that background it was held that the same was not obligatory. Court could however, in its discretion issue notice to the debtor to find out whether application prima facie makes out a case of insolvency.

14. It is true that rule position understood as above does create some what piquant situation. Debtor claiming to be insolvent files a Insolvency Petition. Before such a petition can be heard further he is asked to bear cost of publication of notice in newspaper. In a given case insolvency petition may fail for want of publication of notice in the newspaper. However rule position being as it is, such a situation cannot be helped. It may be noted that the Act provides that Insolvency Petition cannot be brought unless debt is more than Rs. 500/-. Said figure was fixed way back in the year 1920. Situation has undergone substantial change in terms of purchasing power of rupee.

15. Under the circumstances, I find no reason to entertain the petition, since I do not find that order suffers from any illegality. The petition is dismissed.

16. Despite rejection of the petitioner, it will be open for the petitioner to approach the Court below and request for reduction of the pre-deposit amount on the ground that it is not possible for the petitioner to weigh such a burden. If such an application is filed, same shall be considered.