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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**NOTICE OF MOTION NO. 5 OF 2014
IN
INSOLVENCY PETITION NO. 28 OF 2001**

Mrs Renu Prakash Jaisingh	...Applicant
In the matter between	
Uttamchand Devichand Shah	...Petitioning Creditor
Vs	
Bansi Jairamdas Jaising & Anr.	...Insolvents
And	
The Official Assignee, High Court, Bombay	...Respondent.

**WITH
NOTICE OF MOTION NO. 43 OF 2014
IN
INSOLVENCY PETITION NO. 28 OF 2001**

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Mr K.R. Bulchandani i/b Kamal & Co. for the Applicants/ in support of NIMS.
 Mr Sailesh Thakkar i/b Sailesh Thakkar & Co. for Avinash B. Jaisingh.
 Mr D.H.Mehta with Jayesh Vyas for Bansi J Jaisingh and Ravi Bansi Jaisingh.
 Ms Soniya Pulta and Shanay Shah i/b M/s Soloman & Co. for Monisha Jaisingh
 Mr M.D.Narvekar, Official Assignee and Ms Uma Srivastav Dy. Official Assignee
 present.

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CORAM : S.C. GUPTE, J.

SEPTEMBER 02, 2015

Oral Judgment :

These two Notices of Motion, Notice of Motion No.5 of 2014 and Notice of Motion No.43 of 2014, seek deletion of subject properties from the list of assets of the insolvent and directions to the Official Assignee not to seek possession or auction of the properties. Notice of Motion No.5 of 2014 is in respect of Flat No. B-295, Sarita Vihar situated in Delhi Development Authorities ("DDA"), New Delhi - 110 044, whereas Notice of Motion No.43 of 2014 is in respect of Flat No. C-624, Sarita Vihar situated in Delhi Development Authorities, New Delhi 110 - 044. Directors were originally sought on behalf of the insolvents to the Official Assignee to take all necessary and immediate steps with a view to

seek custody/ charge and possession of the assets and properties of the insolvents, which purportedly include two properties described above. The case of the Applicants is that the title in respect of these properties vests in the Applicant; that the Applicant is in possession of these properties, and that the Applicant being a stranger to the insolvency, the Insolvency Court has no jurisdiction to decide the title of these properties or take possession thereof from the Applicant.

2 The facts of the case may be stated as follows:

On 17 December 2003, this Court by orders separately passed in two insolvency petitions (Insolvency Petition Nos.82 of 2002 and 28 of 2001) declared one Banshi Jaising and his two sons, namely, Ravi Jaising and Avinash Jaising as insolvents. On 29 June 2013, Avinash Jaising took out a Notice of Motion (Notice of Motion No.25 of 2013), claiming various reliefs and directions against the Official Assignee. In the first place, a direction was sought against the Official Assignee to file a report *inter alia* explaining inaction for more than 10 years in commencing adjudication proceedings concerning the insolvent Ravi Jaising (Insolvent No.1) and his estate. Directions were also sought regarding the assets of Ravi Jaising (insolvent No.2). Along with these directions, orders were sought for taking custody/ charge and possession of the assets and properties of Banshi Jaising and Ravi Jaising. In the list of assets purportedly owed by Banshi Jaising which was annexed to the Notice of Motion, the residential flat described above, namely, Flat No. B-295 was disclosed by the Applicant Avinash. As far as the other flat, namely, Flat No. C-624 is concerned, it was said to form part of assets owed by late Ratna Jaising, wife of Banshi Jaising. It was submitted that this flat was willed away by late Ratna to her daughter-in-law, Ms Monisha, wife of Ravi Jaising, and a testamentary petition was filed by Ms Monisha Jaising for probate of the will. By an order dated 22 July 2014, after hearing Counsel for Ms Monisha Jaising. Applicant Avinash and Official Assignee, this Court noted the statement of Counsel for Ms Monisha that flat No. C – 624 was bequeathed to her by the deceased Ratna Jaising under a will and last testament dated 12 May 2010 and that Monisha, as a well wisher of the

insolvents, offered to handover the flat to the Official Assignee for satisfying claims against the insolvents. On this statement, which was accepted by this Court, the Official Assignee was directed to take necessary steps in the matter. It appears that various orders were passed from time to time in the Notice of Motion of Avinash. Finally, by an order dated 3 February 2015, the Notice of Motion was disposed of as infructuous, since the reliefs prayed for therein had already been granted in earlier orders passed by this Court. It appears that in pursuance of the orders passed by this Court, whilst symbolic possession of Flat No. C-624 was taken over by the Official Assignee, no steps were taken in respect of Flat No. B-295.

3 After she came to know about these orders and steps sought to be taken by the Official Assignee in respect of the two flats described above, the Applicant has taken out the present Notice of Motion seeking directions against the Official Assignee not to proceed further in respect of these properties as they belong to and are possessed by the Applicant. The case of the Applicant insofar as Flat No. B-295 is concerned is that this flat was initially allotted by Delhi Development Authority ("DDA") to Banshi Jaising on 13 March 1987. Pursuant to this allotment, Banshi Jaising was put in possession of the flat. On 12 September 1990, an agreement for sale was executed between Banshi and the predecessor-in-title of the Applicant, Mr O.P.Komar (father of the Applicant for sale of the flat to the latter). A general power of attorney executed by Banshi on the same date in favour of O.P.Komar. DDA, thereafter, issued a show cause notice to Banshi for cancellation of his allotment and even issued a letter dated 21 May 1991 cancelling the allotment. Subsequent to this cancellation, proceedings were initiated by DDA against Banshi under the provisions of the Public Properties (Eviction of Unauthorized Occupants) Act, 1971. The proceedings appear to have been dropped by DDA subsequently. In the meantime, however, on or about 9 April 1997, a deed of conveyance was executed by DDA in respect of the flat in favour of O. P. Komar. It is claimed that O. P. Komar was put in possession of the subject flat. O. P. Komar, thereafter, executed a will on 11 August 1997 bequeathing the subject flat to the Applicant. A suit was filed by O. P. Komar against Banshi before the High Court of Delhi seeking a permanent injunction

against Banshi restraining him from disturbing the possession of the Plaintiff and his family members. This suit was transferred to the Court of Additional District Judge, Delhi. By an order dated 16 December 2004, learned Additional District Judge, Delhi directed Banshi not to interfere with the possession of the Applicant in respect of the subject flat. In the meantime, the present Insolvency Petition was filed against Banshi Jaising and others and the orders of adjudication were passed. On these facts, it is claimed that the Applicant not only has a title to the subject flat through DDA, but also has been in possession of the flat. As far as flat No. C- 624 is concerned, the case of the Applicant is that the owner of this flat, Ms Ratna Jaising, had in or around early 1982 applied to DDA for allotment of the flat. Ms Ratna was, however, unable to make the required payment for the flat. Ms Ratna thereupon approached the Applicant for making the payment to DDA for and on her behalf. The Applicant accepted the request and made payment of Rs.2.89 lacs to DDA for the subject flat. As Ms Ratna could not make any arrangements to return the payments made by the Applicant and her family members for purchase of flat, Ms Ratna offered the possession of the flat to the Applicant on assurance that she would execute all necessary documents for transfer of the flat to the Applicant or any of his family members in the records of DDA. It is submitted that on this assurance, most of the original documents relating to allotment of the subject flat were deposited by Ms Ratna and her husband Banshi with the Applicant. The Applicant has, accordingly been in possession of the flat through himself and his family members since 1990. Particularly, it is the Applicant's son Kumar with his wife and children who is said to be residing in the subject flat. The Applicant relies upon several documents including a letter addressed by Ratna as far back as on 1 August 1991 to DDA authorizing Kumar (Applicant's son) to go ahead and get electrical work done and documents pertaining to the gas connection installed by Kumar along with statements of refilling of gas cylinder between 1994 and 2014. The Applicant also relies upon a letter issued by Ratna giving her NOC for issuance of ration card and the ration card issued to Kumar at the address of the subject flat. The Applicant also relies upon further documentary evidence including voter identity card issued in favour of Kumar at the address of the subject flat, the mobile connection availed of by Kumar on the address of the subject flat, as also water

and electricity bills, property tax bills issued by statutory authorities in respect of subject flat, the bank statement and other material in support of the Applicant's case that these bills have been paid from time to time by Kumar. On these facts, it is claimed that the Applicant and her family members are entitled to claim documents of conveyance in respect of the subject flat from the successor-in-title of Ms Ratna and at any rate, are in possession of the subject flat ever since 1991.

4 The record of the case, which has partly been referred to above, clearly indicates that there is adequate material before the Court to show that the Applicant has documents of title in respect of Flat No. B-295 and also to show the settled possession of the Applicant and his family members in respect of Flat No. C-624. As against this position, it is claimed on behalf of the insolvents that Flat No. B-295 belongs to the insolvent Bansi and Flat No. C – 624 belongs to Ms Monisha, wife of insolvent Ravi, who has made the same available to the Official Assignee for disposal in accordance with law with a view to discharge the insolvents' debts. It is suggested that on the basis of the application of the insolvent Avinash, this Court is expected to enter upon a trial with respect to the title of the insolvents / their well wishers to the subject properties. No doubt under Section 7 of the Presidency Towns Insolvency Act, 1909, the Insolvency Court has full powers to decide all questions whatsoever, whether of law or fact, which arise in the course of the insolvency within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of the property of the insolvent. Section 7, however, read with Section 36 of the Presidency Township Insolvency Act, does not envisage any trial of contested questions of title as between the Official Assignee and a stranger to insolvency. In fact, the proviso to Section 7 read with Section 36(1) of the Insolvency Act indicates that though the Court has power to decide a question of title and order delivery of the property of the insolvent in a fundamental sense, the Court can do so if the property is in possession of a third party only after such third party admits that he is in possession of the property belonging to the insolvent. In the absence of such admission, the Insolvency Court cannot enter upon a controversy concerning either the title or possession of the property as between the insolvent, who is

represented by the Official Assignee, and the third party stranger.

5 This Court in the case of **Nurmahomed & Bros Vs. Inmail Karim**¹ has clearly held that no summary method exists now for getting held of the insolvent's property claimed by the Official Assignee unless and until the person in possession admits that the property belongs to the insolvent and in all other cases, wherever the claim is contested, the Official Assignee is driven to a suit. Reasons for this are not far to seek. Jurisdiction of the Insolvency Court insofar as recovery of insolvent's property is concerned is a summary jurisdiction and such jurisdiction cannot be exercised against a third party, who is a stranger to the insolvency when the Official Assignee claims only the same right as the insolvent would have held and not a higher title. The Official Assignee in such a case is only in the position of the insolvent in so far as the property is concerned and can do only what the insolvent himself would have done. This has always been the law in England. The English court of Bankruptcy has consistently refused to exercise jurisdiction as against a stranger to the insolvency, unless he submitted to its jurisdiction, when the Official Assignee claimed the same right as the insolvent, and has only exercised jurisdiction, without reference to such submission of a stranger, when the Official Assignee claimed by a higher title. Though there was some divergence in Indian Courts on this point initially, our High Court had always followed the English view. In 1927, the Presidency Towns Insolvency Act was amended by adding a provision to Section 7 of the Act. This proviso is to the following effect:

“Provided that, unless all the parties otherwise agree, the power hereby given shall, for the purpose of deciding any matter arising under section 36, be exercised only in the manner and to the extent provided in that section.”

Simultaneously with this, even Section 36 was amended. Prior to the amendment of Section 36 in 1927, under sub-section (5) thereof, if on the examination of any person the Court was satisfied that the property belonging to the insolvent was in the possession of the person examined, an order could be

1 AIR 1929 Bombay 230 (2).

made by the Court resting that property in the Official Assignee, without further litigation. Section 36(5), as amended in 1927, now provides as follows:

“1 ...

2. ...

3. ...

4.

5. If on his examination any such person admits that he has in his possession any property belonging to the insolvent, the Court may, on the application of the official assignee, order him to deliver to the official assignee that property, or any part thereof, at such time, in such manner and on such terms as to the Court may deem just.”

This is why Justice Davar in his judgment in **Nurmahomed & Bros.** Case (supra) said that no summary methods exist *now* (i.e. after the amendment of 1927) of getting hold of the property by the Official Assignee unless and until the deponent admits that the property belongs to the insolvent.

6 The position would be different in a case where the Official Assignee claims a higher title or right. For example, in cases provides for in Sections 54, 55 and 56 of the Act, the Official Assignee can claim delivery of possession of the insolvent's property put to sale in execution by a creditor but before such sale, or avoid voluntary transfers effected within two years prior to adjudication, or avoid transfers effected in preference within three months prior to presentation of the insolvency petition. These are questions to be decided by the insolvency court and not by the ordinary civil court. These are cases where the Official Assignee claims rights by virtue of the provisions of the insolvency law, which rights are not available to the insolvent himself. Such is not the case here. Hence, the properties are sought to be recovered from the Applicant, who is in settled possession thereof, and who does not admit the insolvent's title and also contests the jurisdiction of the Insolvency Court to decide the question. If that be the case, as much as the insolvent would have to do, the Official Assignee would have to approach a Civil Court for recovery of possession.

7 This law need not be restricted to cases where there has been

examination of the person found to be in possession of the insolvent's asset under Section 36. Chagla J (as the learned Judge then was) **In Balubhai Kalliachand**² held as follows:

“But, as will be seen, the new proviso only applies where there is an examination under S. 36. Mr Munshi in the course of his arguments has relied on this proviso. But in this case there has been no examination of the minor under S. 36 and the proviso therefore clearly cannot apply. There being no such examination, my discretion is entirely unfettered by the provisions of the new amendment. But, as pointed out by Sir Dinshah Mulla in his learned treatise on the law of insolvency, it could not have been intended by the Legislature that if there was an examination under S. 36, questions of title should not be decided by the Insolvency Court against strangers unless they submit to its jurisdiction but that such questions could be decided if the Official Assignee came to the Court under S. 7 without first going through the procedure laid down by S.36.”

8 This has always been our law and it has been so affirmed in a recent judgment of a Division Bench of our Court in the case of **Nirav Choksi Vs The Official Assignee, High Court, Bombay & Ors.**³ In case of **Nirav Choksi** (supra) our Court revisited the provisions of Section 7 together with its proviso and Section 36 of the Act and reaffirmed the above position. Whilst reaffirming this law, the Division Bench, however, considered the question as to whether the jurisdiction of the Insolvency Court can be said to be ousted merely upon a third party asserting a claim to be in lawful possession of property said to be belonging to the insolvent adversely to the latter. The Division Bench held that the proviso to Section 7 along with Section 36 must be read in a purposive manner. The Division Bench held that neither provision could be construed to exclude the jurisdiction of the Insolvency Court to decide, in the first instance, as to whether the transaction or document under which a third party claims adversely to the insolvent is sham or bogus. The Court held that the law distinguishes between a document or transaction which is genuine and one which is one nominal and fictitious. A transaction which is bogus or sham has no existence in law and is void at its very origin. Such transaction has no efficacy in the eyes of law and no

2 AIR (29) 1942 Bombay 118.

3 Appeal No.89 of 2012 in Official Assignee's Report No. 8 of 2011 decided on 20 June 2013.

right or liability can be said to flow from such transaction. In that event, the Insolvency Court will retain jurisdiction to declare a particular transaction or document as valid and of no effect even if such issue arises as between the insolvent and a third party stranger. But that is not to say that on a seemingly genuine document and on the basis of settled possession, claimed in pursuance of such document, the disputed questions of title or possession as between the insolvent (i.e. the Official Assignee who represents the insolvent) and a third party stranger can be gone into by the Insolvency Court under its jurisdiction under Section 7 of the Act.

7 In that view of the matter, there is no case for the Official Assignee to proceed against any of these two assets. The Notices of Motion of the Applicant are, accordingly, allowed in terms of prayer clause (b) thereof. The order of 22 July 2014 insofar as it requires the Official Assignee to take steps in respect of flat No. C-624 is recalled and the Official Assignee is directed not to proceed in respect of the two subject properties.

8 The Official Assignee, however, in the face of the facts, which are noted above, is directed to investigate the matter of both title and possession of the two properties described above and make a report to this Court. On such report, this Court will consider whether or not to direct the Official Assignee to take any steps in respect of these properties before an appropriate Civil Court to seek any order against the Applicant or any other third party. The Official Assignee's report, namely, Report No.20 of 2015, where the Official Assignee seeks directions for joinder to, and further prosecution of, civil proceedings between the Applicant herein and Monisha, shall be considered later when the Official Assignee makes a report to the Court as directed above. Any report made by the Official Assignee in this behalf shall be served on the Applicant herein. As and when such report is made, a notice of such report shall be served on the Applicant before any order is sought on the report.

9 The Motions are disposed of accordingly. Symbolic possession of the Official Assignee is disposed of.

10 On the application of Insolvent No.1 – Bansi Jaising, this order, insofar as it discharges symbolic possession of the Official Assignee, is stayed for a period of four weeks from today.

(S.C.GUPTE J.)

CERTIFICATE

Certified to be true and correct copy of the original signed
Judgment/ Order.