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

APPEAL NO.552 OF 2016
IN
NOTICE OF MOTION NO.49 OF 2016
IN
NOTICE OF MOTION NO.35 OF 2011
IN
PETITION NO.36 OF 2000

1. Hemchandra Chhabildas Shah,

2. Smt. Dina Hemchandra Shah,
   both adult Indian inhabitants,
   residing at S/2-708, Udyog
   Nagar, Kamala Vihar, Mahavir
   Nagar, Kandivali (West),
   Mumbai – 400 067.

3. Smt. Sulsa Sanjay Shah, nee
   Ms. Sulsa Hemchandra Shah,
   an adult Indian inhabitant,
   residing at G-201, Kamala Vihar
   Mahavir Nagar, Kandivali (West)
   Mumbai – 400 067.

4. Shalibhadra Hemchandra Shah,
   an adult Indian inhabitant,
   residing at 1701, Chauram CHS
   Ltd., Sector 16, Sanpada,
   New Bombay – 400 705. … Appellants/Org.
   Creditors/Applicants.

V/s.

1. SIMPLEX ENTERPRISES
   a partnership firm carrying on
   business at Shant Shree, Dr.S.S.
   Rao Road, Parel,
   Mumbai – 400 012.

2. Kerman Kaikhushroo Mistry

3. Smt. Geeta Kerman Mistry, nee Patel
nee Munimi both Respondent nos.2
and 3 are adult Indian Inhabitants,
both residing at Flat No.111, 11th
Floor, Landmark, 175, Carter Road,
Bandra (West), Mumbai – 400 050

4. Punjab National Bank
a Banking Company constituted and
incorporated under The Banking
Companies (Acquisition and Transfer
of Undertakings) Act, 1970, having
its Head Office at 7, Bhikaji Cama
Place, Africa Avenue, New Delhi -
110 066 and Asset Recovery
Management Branch at 11th Floor,
Dalamal House, Nariman Point,
Mumbai – 400 021

5. The Kohinoor Co-operative Housing
Society Ltd.,
a co-op housing society, registered
under The Maharashtra Co-op.
Societies Act, 1960, having its office
at Landmark, 175, Carter Road,
Bandra (West), Mumbai- 400 050.

6. The Official Assignee,
High Court, Bombay, being the
Assignee of the estate and effects of
the Insolvents abovenamed. … Respondents/
Org. Respondents

7. Rasiklal D. Shah
of Mumbai, Indian Inhabitant,
carrying on business as the sole
proprietor in the firm name and
style of Rasiklal & Co. at 216,
Office Gali, M.J. Market,

Mumbai – 400 002. … Respondent /
Org. Substituted
Petitioning Creditor

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Mr. P.V. Shah for Appellants.
Mr.Chetan Kapadia a/w Amit Sheth for Respondent No.2.
Mr. Yogesh Deshpande for Respondent No.3.
Mr. S.B.Rao i/b. India Law for Respondent No.4.
Mr.Milind Narvekar, Official Assignee a/w Mr.E.B. Shivakumar, Dy. Official Assignee present.

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CORAM: DR. MANJULA CHELLUR, C. J. &
M.S. SONAK, J.

DATE : 21st SEPTEMBER, 2016.

P. C.:

1. Heard the learned counsel for the parties.

2. ***Admit.*** With the consent of and at the request of the learned counsel for the parties, we proceed to dispose of this appeal finally.

3. The Challenge in this appeal is to the order dated 19th July, 2016 whereby the learned Single Judge has dismissed the Appellants Notice of Motion No. 49 of 2016. In the said Notice of Motion, the Appellants had applied for the following reliefs;

> *"a. that the delay, if any, in taking out the present Notice of Motion, may be condoned.*

> b. *this Hon'ble Court be pleased to review, reconsider,rescind, set aside and /or vary the Order dated 15th March 2016, passed by this Hon'ble Court, adjourning sine die, the above Notice of Motion No.35/2011 and expeditiously here the same on merits and investigate the fraud and fabrication of documents pleaded in the affidavits filed in the said Motion by the Creditors herein and dispose of the same on merits as an Application on behalf of all the Creditors of the Insolvents*
>
> c. *the costs of this Notice of Motion may be provided for and*
>
> d. *such other and further reliefs may be granted, as this Hon'ble court may deem fit and proper, in the facts and circumstances of the case."*

4. The order dated 15th March, 2016, referred to above, had adjourned the hearing in Notice of Motion No.35 of 2011 *sine die* with liberty to the parties to apply immediately after the decision of the Hon'ble Supreme Court in Special Leave Petition (Civil) No.22267 of 2013 and Special Leave Petition (Civil) No.22268 of 2013 or if there is any change of law.

5. In Notice of Motion No.35 of 2011, the Appellant, who is one of the creditors qua the adjudged insolvent (Respondent no.2) seeks restoration of Flat No.111, 11th Floor, Landmark Apartment, Carter Road, 175, Bandra(West) (said premises) to the

Official Assignee of this Court, so that, the same can be auctioned and proceeds appropriated towards the settlement of dues of creditors like the Appellant.

6. Mr.P.V.Shah, learned counsel for the Appellants submitted that the said premises infact belongs to Respondent no.2 (insolvent). On the basis of fraudulent, collusive, sham and bogus documents, Respondent no.3, who is incidentally the wife of Respondent no.2 (insolvent) claims tenancy in respect of said premises. Respondent no.3, in the alternate also claims that she is in possession of the said premises, in pursuance of Agreement for Sale executed by Respondent no.2 (insolvent). Mr.Shah submitted that fraud and collusion vitiate even the most solemn of transactions. Therefore, on the basis of fraud and collusion, Respondent nos.2 and 3 cannot be permitted to retain the possession of the said premises to the detriment of the interest of various creditors, including the Appellants. In any case, Mr.Shah submitted that Respondent nos.2 and 3 cannot resist or postpone unduly, the investigation into allegations of fraud and collusion upon the spacious plea that some unconnected matter is pending before the Hon'ble Supreme Court. For all these reasons, Mr.Shah

submitted that the impugned order may be set-aside and the Appellants Notice of Motion No.35 of 2011 be directed to be taken up for consideration.

7. Mr.Chetan Kapadia, learned counsel for Respondent no.2 (insolvent) and Mr.Yogesh Deshpande, learned counsel for Respondent no.3 (insolvent's wife) submitted that an appeal is not maintainable in order to question an order postponing the hearing of Notice of Motion *sine die*. In any case, they submitted that Respondent no.3 is a bonafide tenant in respect of said premises and the question as to whether the tenancy subsists or not can never be examined in proceedings under the Presidency Towns Insolvency Act, 1909 (Insolvency Act). They submitted that this is the categorical view taken by the learned Single Judge of this Court in the case of **Kishore Mehta vs. Sushila Choksi and others** **(**Coram : S.C.Dharmadhikari, J.) decided on 21st November, 2011. They submitted that, even though the order dated 21st November, 2011 made by the learned Single Judge was set aside by the Division Bench in Appeal No.89 of 2012 decided on 20th June, 2013 (Coram : Dr. D.Y.Chandrachud and A.A. Sayed, JJ.), the matter is now pending before the Hon'ble Supreme Court in the

two Special Leave Petition's referred to earlier and the Hon'ble Supreme Court, by its order dated 29th July, 2013 has stayed the operation of the judgment and order dated 20th June, 2013. They pointed out that, on previous occasions the Appellants themselves had agreed for adjournment of the hearing of Notice of Motion No.35 of 2011, until, the Special Leave Petitions' instituted in *Choksi case* (supra) are disposed of. For all these reasons, the learned counsel submitted that there is no case made out to interfere with the order impugned in this appeal.

8. In this case, there is no dispute that Respondent no.2 has been adjudged as insolvent. There is also no dispute that Respondent no.3 is the wife of Respondent no.2. There is also no dispute that the said premises were owned by Respondent no.2 (insolvent) and the same are presently occupied by Respondent no.3 (insolvent's wife) on the basis of her claim of alleged tenancy or in pursuance of alleged Agreement for Sale executed by Respondent no.2 (insolvent). The case of the Appellants is that the documents on the basis of which Respondent no.3 claims tenancy to the said premises or for that matter the Agreement for Sale executed by Respondent no.2 (insolvent) in favour of Respondent

no.3 (insolvent's wife) are all fraudulent, collusive, fabricated, sham and bogus documents, on the basis of which, there is no reason to deprive the Official Assignee the possession to the said premises, so that the same can be auctioned and proceeds appropriated to the satisfaction of the claims of the creditors qua the adjudged insolvent (Respondent no.2).

9. In this appeal, we are not concerned with the issue as to whether the documents which form the basis of the claim of Respondent no.3 to continue in possession of the said premises are indeed fraudulent, collusive, fabricated, sham or bogus documents. We are only concerned with the issue as to whether, in the facts and circumstances of the present case, the very consideration of such allegations needs to be postponed *sine die*.

10. Admittedly, the order dated 21st November, 2011 made by the learned Single Judge of this Court, the order dated 20th June, 2013 made by the Division Bench of this Court and the order dated 29th July, 2013 made by the Hon'ble Supreme Court are not orders made in the present insolvency proceedings with which we are concerned. The said orders related to proceedings in case of

Nishit Mehta Vs. Sushila Choksi[1] (Choksi case). The facts in no two cases can invariably be said to be identical in all aspects. In any case, in order to arrive at such a conclusion, it is necessary to examine the facts in two cases. The effect of the impugned orders is to postpone the very consideration of such matters *sine die*.

11. Learned counsel Mr.Kapadia and Mr.Deshspande, however, submitted that the issue of law as to whether the insolvency Court can at all look to into the question as to whether there is tenancy or not was squarely decided in the *Choksi case* (supra) by the learned Single Judge of this Court on 21st November, 2011, holding that such jurisdiction did not vests in the insolvency Court. The Division Bench, in appeal, no doubt reversed the order of the learned Single Judge by order dated 20th June, 2013. However, the Hon'ble Supreme Court in the two Special Leave Petition's (referred to earlier), by its order 29th July, 2013 has stayed the operation of the judgment and order dated 20th June, 2013 and therefore, according to the learned counsel, the legal position as it stands is that the insolvency Court will have no jurisdiction to go into such issue.

1 Appeal No.89 of 2012, decided on 20th June, 2013

12. In this case, the allegations made by the Appellants is that the documents, on which, the alleged transfers are based are said to be effected by Respondent no.2 (insolvent) in favour of his wife (Respondent no.3) are not just illegal or voidable transactions, but rather, such transactions being a product of fraud and collusion, are void right from their very inception. In similar circumstances, the Full Bench of this Court, in case of **Padamsi Premchand vs. Laxman Vishnu Deshpande**[2]**,** has taken the view that the insolvency Court has the jurisdiction to entertain challenge that deeds of transfer by which the insolvent may have purported transfer of property were nominal and fictitious and that they were not intended to transfer the real interest of the insolvent in the properties. In paragraph 6 and 9 the Full Bench has observed thus;

> "6. *In this particular case the Receiver challenged these three deeds of transfer on the ground that they were nominal and fictitious transactions and that they were not intended to transfer the real interest of the insolvent in the properties. Therefore, on the allegation of the Receiver no title passed under these deeds of transfer to the transferee. These transactions were not voidable but they were void. These transactions were not valid in their inception and at no time did they transfer any title to the transferee. In our opinion transactions which are challenged on the ground of their being fictitious or nominal do not fall within the ambit of S.53. If they do*

2 (1949) AIR Bombay-129.

not fall within the ambit of S.53, then S.4 is wide enough to confer upon the insolvency Court jurisdiction to decide whether these transactions were in fact nominal or fictitious. Unfortunately the trial Court did not raise the issue in the proper form. The issue it raised was : Has the Court jurisdiction on its insolvency side to set aside the trusts created? If the transaction is fictitious or nominal, it is not necessary to set it aside. It is not necessary to avoid it. It was void ab initio and all that the Receiver in insolvency might want is a mere declaration that in fact those transactions were void and of no effect. Therefore the issue that the trial Court should have considered and should have tried was whether these three transactions challenged by the Receiver were nominal and fictitious as alleged by him. If they were nominal and fictitious, then they did not fall within the ambit of S.53 and and could be declared to be void under S.4, Insolvency Act. If they were not fictitious and not nominal and they were real transactions although voluntary, then they would fall within the ambit of S.53 and not having been challenged within the period required by that section could not be avoided by the Receiver in insolvency. The learned District Judge took the right view of the case and held that the trial Court had yet to find whether these transfers were real or fictitious, and it also took the view that if ultimately thay were found to be fictitious, then the trial Court had jurisdiction beyond all question.

7. …..

8. …..

9. Mr.Desai has impressed upon us the point of view that a stranger should not be compelled to submit to the jurisdiction of the insolvency Court unless he consents so to do. Section 4 merely confers power upon the Court to decide questions of title affecting strangers. It is felt to the discretion of the Court whether it should be done or not. In this case both the lower Courts have exercised the discretion in favour of deciding this question of title in which strangers to the insolvency are interested, and we see no reason why we should interfere with the discretion

> *exercised by the lower Courts, the more so when the allegation of the Receiver is that all these three transfer deeds were intended by the insolvent as a screen against his creditors and nominally he was benefiting not any outsider but his own relations, being his son, wife and daughter. We therefore agree with the learned Assistant Judge that the trial Court should try the issue whether the transfers are real or fictitious. If the trial Court comes to the conclusion that they are nominal and fictitious as alleged by the Receiver, then it should proceed to give the declaration that the Receiver asked the Court to do. If, on the other hand, the Court comes to the conclusion that the transfers are not nominal or fictitious but they were real transactions although voluntary in their nature then it would be the duty of the Court to decide that they fall under S.53, and not having been challenged within two years of the date of the presentation of the insolvency petition, the application of the Receiver would fail."*

13. The Division Bench of this Court, in its judgment and order dated 20th June, 2013 (Choksi case) has also made reference to the decision of the Full Bench in the case of *Padamsi Premchand* (supra). The circumstance that, Hon'ble Supreme Court, in its order dated 29th July, 2013 has stayed the judgment and order dated 20th June, 2013 cannot be construed to mean that the law laid down in case of *Padamsi Premchand* (supra) can be said to have been upset or reversed. Even the learned Single Judge, has not said so. The grant of stay only means that the order which has been stayed would not be operative from the date of the stay order

and it does not mean that the order has been wiped out from existence. In fact, that would be the distinction between quashing of an order and stay the operation of an order[3].

14. In this case, we are concerned with the allegations of fraud and collusion. In the case of ***A.V.Papayya Sastry and Others vs. Government of A.P. and Others***[4]*,* the Hon'ble Supreme Court has held that even the most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. Even judicial orders made and confirmed right upto the Hon'ble Supreme Court, if found to be vitiated by fraud and collusion, cannot be held legal, valid or in consonance with law. Such orders have to be held as non-existent and non est and cannot be allowed to stand. This is the fundamental principle of law.

15. As indicated earlier, we are not at the stage required to go into the allegations of fraud and collusion. We are, however, satisfied that such allegations have to be investigated by the insolvency Court and such investigation need not be postponed

3 Shree Chamundi Mopeds Ltd vs. Church of South India Trust Association CSI Cinod Secretariat, Madras, 1992, 3 SCC, page-1.

4 (2007) 4 SCC 221.

sine die relying solely upon the stay granted in *Choksi case* (supra). If upon investigation, the insolvency Court comes to the conclusion that there is no fraud or collusion involved, the insolvency Court may then perhaps cease to have jurisdiction to decide upon the claim of Respondent no.3 (insolvent's wife). However, for this purpose, it is necessary that the insolvency Court at-least proceeds to investigate into the allegations of fraud and collusion.

16. The circumstance that, the Appellants may have in the past consented for adjournment of proceedings, does not mean that the Appellants have waived their contentions in the matter of consideration of their Notice of Motion No.35 of 2011 on merits and in accordance with law. Mr.Shah, learned counsel for the Appellants submitted that considerable time has already elapsed and it would be inequitable to permit Respondent nos.2 and 3 to enjoy the said premises even though, the said premises ought to be made available to satisfy the claims of the creditors, if it is established that the alleged interest claimed by Respondent no.3 (insolvent's wife) to the said premises is a product of collusion and fraud.

17. The impugned order virtually has the effect staying further proceedings in the Notice of Motion No.35 of 2011. In such circumstance, we are satisfied that the present appeal is maintainable. In any case, the impugned order in the present appeal is the order made in Notice of Motion No.49 of 2016 by which, the learned Single Judge has declined to recall or reconsider its earlier order dated 15th March, 2016. Accordingly, we see no force in the objection with regard to maintainability of the appeal.

18. Upon cumulative consideration of the aforesaid facts and circumstances, we set aside the impugned order dated 19th July, 2016 and request the learned Single Judge to dispose of Notice of Motion No.35 of 2011 in accordance with law and on its own merits. We make it clear that we have not adverted to the merits of the allegations relating to fraud or otherwise and therefore, we leave it to the learned Single Judge to examine the same.

19. We also grant liberty to the Appellants to apply to the learned Single Judge for expeditious disposal of Notice of Motion No.35 of 2011.

20. The appeal is allowed to the extent indicated above. There shall no order as to costs.

CHIEF JUSTICE

(M.S. SONAK, J.)