

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(IN INSOLVENCY)

MONDAY THE 29TH DAY OF OCTOBER 2018

THE HON'BLE DR.JUSTICE ANITA SUMANTH

APPLN.NOS. 193 OF 2010

IN

IP. NO. 99 OF 1997

In the matter of Presidency
Town Insolvency Act, III of
1909 in the matter of

1. Titus Eapen
2. Sheela Eapen

...Debtors

IP No. 99 of 1997

1. M/s. Cathedral Chits (P) Ltd
by its Director K.V. Thomas
Carrying on business in finance having
its registered office at NO. 6A,
"Majestic Cottage", NO.48, Arcot Road,
Saligramam, Madras - 600 093.
2. M/s. M.B.F. Chits (P) Ltd
by its Director K.V. Thomas
Carrying business in finance having
its registered office at 19,
Majestic Garden, 48, Arcot Road,
Saligramam, Chennai - 600 093.

... Petitioners

-Vs-

1. Titus Eapen
S/o. P. Titus
2. Sheela Eapen
W/o. Titus Eapen
Both are residing at NO.3A,
Parkland Apartments, NO.2,
Kamalabai Street, T.Nagar,
Madras.

... Respondents

Appln. No.193 of 2010

Vijayakumar
S/o. Francis,
35, Thirumalaipillai Street,
T.Nagar, Madras - 17.

... 3rd Party / Applicant

-VS-

1. M/s. Cathedral Chits (P) Ltd
by its Director K.V. Thomas
Having Office at NO. 6A,
"Rajestic Cottage", NO.48, Arcot Road,
Saligramam, Chennai - 600 093.
2. M/s. M.B.F. Chits (P) Ltd
by its Director K.V. Thomas
Having Office at 19,
Rajestic Garden, 48, Arcot Road,
Saligramam, Chennai - 600 093.
3. Titus Eapen
4. Sheela Eapen
Both are residing at No.5,
Jalan Tukkas, 18/34, Shah Alam 40200
Selangor, Malaysia.
... Petitioners / Respondents 1 & 2
5. The Official Assignee
High Court, Madras.
... Respondents / Respondents
3 & 4 / Insolvents
6. Arihant Bardia,
7. Alpana Bardia
Both residing at Flat No.3,
Second Floor, Swati Court,
No.43, Vijayaraghava Road,
T.Nagar, Chennai 600 017. ... Respondents 6 & 7
(Respondents 6 & 7 impleaded as per order of
this Hon'ble Court dated 11.07.2011 made in
Appln.No.62/2011 in I.P.No.99/1997)
8. C.Paraslal Bardia,
Residing at Flat No.3,
No.43, Vijayaraghava Road,
T.Nagar, Chennai 600 017. ... 8th Respondent
(8th Respondent impleaded as per order of this
Hon'ble Court dated 25.07.2011 made in Appln.
No.375/2010 in I.P.No.99/1997)

Application No.193/2010 praying that this Hon'ble
Court be pleased to direct the official assignee to release
the subject property.

This Application coming on this day before this court for hearing in the presence of Mr.V.Raghavachari, advocate for the applicant/3rd party herein and Mr.C.Ramesh, advocate for the Official Assignee, the 5th respondent, Mr.J.Balagopal, advocate for the respondents 6 to 8 herein; and the respondents 1 to 4 not appearing in person or by advocate; and the Order of this Court herein dated 23.10.2017 made in Appln.No.193 of 2010

THE COURT MADE THE FOLLOWING ORDER :-

This Application is filed by a third party praying for a direction to the Official Assignee to release the property at Flat No.3A, III Floor, Parkland Apartments, No.2 Kamalabai Street, T.Nagar, Madras - 17.

2. The brief trajectory of events involved in the matter are as follows:

(i) I.P.No.99 of 1997 has been filed by two petitioning creditors seeking an order of adjudication in respect of respondents 3 and 4 (R3 and R4) in the present application, as insolvents.

(ii) The insolvency petition was ordered on 27.04.1998 and R3 and R4 were adjudged insolvents. Consequently, all properties standing in the name of the insolvents stood transferred and vested in the Official Assignee (in short 'OA') for equal distribution among the creditors being (i) Flat No.3-A, III Floor, Parkland

Apartment, No.2, Kamalabai Street, T.Nagar, Madras-17,

(ii) Vacant land bearing S.No.63/Part of an extent of about 4800 sq.feet at Ramapuram Village, Saidapet Taluk and (iii) Four Vacant Sites bearing Plot Nos.122, 123, 124, 125 comprised in Survey Nos.291/1B & 1C, 291/1B, 1C & 2, 291/2 and 291/1C and 2/1 measuring 2400 sq.feet respectively situate at Sree Bhuvaneswari Nagar Layout, Sriperumbudhur Taluk.

(iii) Thereafter, proceedings for adjudication were commenced by the OA. Since the present applicant claimed to have purchased the apartment at T.Nagar in 1982 from the insolvents, he caused appearance before the Official Assignee on 05.02.1999, undertaking to produce the documents pertaining to his purchase.

(iv) According to the present applicant he had filed a suit for specific performance of sale agreement dated 28.01.1992 relating to the flat at T.Nagar and the same had been decreed by the 3rd Additional City Civil Court, Chennai. It is to be noted however that though the suit, O.S.No 4732 of 2003, has been filed only subsequent to the order of adjudication dated 27.04.1998 and the applicant was fully aware of such order having been passed, he has not impleaded the Official Assignee as a party.

(v) The applicant would aver that agreements of sale have been entered into between by him with the insolvents in respect of several of the properties owned by the insolvents. I however refrain from referring to the details or veracity of such transactions as I am, in the present

application concerned with the apartment at T.Nagar alone.

(vi) The Official Assignee has filed a report dated 08.09.2017 stating that efforts were taken to serve the order of adjudication passed on 27.04.1998 upon the Insolvents at their residential address at Door No.3/A, Third Floor, Parkland Apartments, Kamalabai Street, T.Nagar, Chennai -17. The applicant, claiming to be in possession of the property, however, resisted all the efforts.

(vii) The earlier report of the Official Assignee dated 27.11.2010 annexes the record of proceedings before it. Several adjournments have been sought for by the counsel for the applicant to produce documents to establish the title of the applicant to the T.Nagar property. The proceedings reveal that the applicant last appeared on 14.09.1999 undertaking to produce the documents in support of his stand that the property at T.Nagar belonged to him. There was no further hearing of the matter before the OA and matters appear to have slipped into a state of hibernation thereafter.

(viii) The matter was revived in 2006 unilaterally at the instance of the applicant it would seem, (since there is no mention of a notice of hearing issued by the OA at that juncture), when, after a hiatus of seven years, the applicant appears before the Official Assignee and hands over a copy of sale deed 19.12.2005 registered as Document No.3174 of 2005 in his favour, Power of Attorney dated

07.11.2006 and sale deed executed by the insolvent in favour of the wife of the applicant dated 27.12.2006 and registered as Document No.2684 of 2006. No proceedings are noted thereafter to indicate action taken by the OA in this regard.

(ix) As per Report of the OA dated 04.11.2011, secured and unsecured claims were received in respect of the estate of the insolvent and the OA swung into action and moved to bring the properties to sale by public auction on 26.05.2010.

(x) Hence, two applications, viz., A.No.193 and 194 of 2010 were filed on 07.04.2010 seeking a direction to release the T.Nagar Property and for stay of all further proceedings before the Official Assignee respectively. This Court has dismissed A.No.194 of 2010 as infructuous by order dated 27.11.2017 noting that the auction has already taken place. The creditors have been impleaded as respondents 6 to 8 in the present application.

3. The first argument advanced by the insolvent is a challenge to the maintainability of the insolvency petition itself. According to the applicant, the insolvents were outside the jurisdiction of this Court as on date of institution of the petition and thus the petition is itself not maintainable. Reference is made to section 11 of the Act and the insolvency petition itself at paragraph no. 8,

extracted below:

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'The 1st respondent was Managing

Director of M/s.Cochin Credit Investment Co. (P)Ltd., and Guardian Janopakara Permanent Fund Ltd., carrying on business at "Vairan Complex" No.112, Theagaraya Road, T.Nagar, Madras-17, The businesses have now been closed down. The respondents are not available at their residence and their present whereabouts are not known.'

4. The application was returned by the Registry and has been re-presented with the addition of the last sentence reading thus:

'The respondents have been residing and carrying on business especially within one year prior to the filing of this petition at Madras.'

5. Section 11 of the Presidency Towns Insolvency Act is extracted below:

'11.Restrictions on jurisdiction

The Court shall not have jurisdiction to make an order of adjudication, unless—

(a) the debtor is, at the time of the presentation of the insolvency petition, imprisoned in execution of the decree of a

Court for the payment of money in any prison to which debtors are ordinarily committed by the Court in the exercise of its ordinary original jurisdiction; or

(b) the debtor, within a year before the date of the presentation of the insolvency petition, has ordinarily resided or had a dwelling-house or has carried on business either in person or through an agent within the limits of the ordinary original civil jurisdiction of the Court; or

(c) the debtor personally works for gain within those limits; or

(d) in the case of a petition by or against a firm of debtors the firm has carried on business within a year before the date of the presentation of the insolvency petition within those limits.

6. A perusal of Section 11 would indicate that persons resident and carrying on business in Madras during the year prior to the date of presentation of the insolvency petition would be covered under the ambit of the Act. In the light of the specific averment in the Insolvency Petition to the effect that the insolvents are both resident as well as carrying on business in Madras in the last year, such statement not having been disproved by the applicant herein, I find no reason to hold that the petition is not maintainable on this ground. Hence, this objection is rejected.

7. On the other hand, it is the specific argument of the Official Assignee that the present application is not maintainable and that the remedy available to a creditor is only by way of filing a claim before it. Additionally, the Official Assignee would canvass the point that it ought to have been arrayed as a proper and necessary party in the suit filed by the creditor before the City Civil Court.

8. The creditor, who is a party to the Insolvency Petition itself, is certainly entitled to approach the Court setting out the circumstances in which the Court may be persuaded to examine the application and adjudicate upon it and no bar in law has been pointed out by the OA. In the present case, the prayer is for a direction to the Official Assignee to release the property at T.Nagar. It is for the court to exercise its discretion and adjudicate upon the veracity of the prayer or otherwise.

9. The prayer in the Original Suit was for a direction to the defendant, the first insolvent, to execute a sale deed in favour of the plaintiff conveying the property at T.Nagar to him as well as other prayers and costs. The title to the property has thus to be determined after due enquiry. The defendant in suit, R3 herein was set exparte.

10. The applicant relies upon letter dated 18.01.1992 from the insolvents requesting the applicant to discharge the loan payable by them. The letter is extracted below:

"You know that I am in a very bad financial position. In fact I also borrowed money from you and others. I have put you incharge of my Flat (3.A, 3rd floor, T. Nagar, Madras: 600 017) as a security of the amount drawn by me from you. Apart from you, there are several creditors who are all pressing for repayments of the loan as I have no money to discharge their loans. May I request you to adjust and pay money to my creditors at least who are pressurising for the loan amount we shall adjust at the time of sale of the flat either to you or someone else. I will be very grateful to you, if you could help me during this sinking position."

The above letter does not, in my view, establish that the property in question has been sold to the applicant. In fact, the underlined portion above clearly establishes the contrary.

11. Agreement of sale dated 28.01.1992 is also referred to wherein at Clause 4 (a), the vendor therein, the insolvent, agrees to execute the sale deed in respect of the T.Nagar property soon after his return from abroad.

Letter dated 27.04.1992 has been issued by one of the insolvents to the applicant. In the second half of the same, the insolvent requests the applicant to purchase the flat from him after deducting the amounts due from the insolvents to the applicant as follows:

'My flat (3A, Parkland Apartments, 2, Kamalabai Street, T.Nagar, Chennai -17) when I handed over to you comes to an approximate value of Rs. To 9 lakhs. I have not sold my flat Not given the sale deed to anyone. I am prepared to sell the property to you considering your help and courtesy show to me. I would be very kind of you if you can yourself purchase my flat for the above mentioned price after deducting the Amounts to be paid by me. Please be kind enough to settle the decreed amount of Col.Benjamin and Cathedral Chit (P) Ltd., M.B.F. Chit Pvt. Ltd. - Director Mr.P.T.John and Mr.K.V.Thomas as per the documents amount and balance may be sent to me. I shall execute the sale deed on my return to India.'

12. The aforesaid documents do not advance the case of the applicant. On the other hand, the narration at paragraph No.3 of letter dated 27.04.1992 makes it clear that Clause No.4(a) in agreement of sale dated 28.01.1992 has not been acted upon till the end of April 1992.

13. The applicant has also produced a Deed of Agreement dated Nil April, 1999 executed between the director of the petitioning creditor company and the present applicant recording a part payment made by the

applicant on behalf of the insolvent to the creditor and stipulating that the insolvency petition would be withdrawn if the balance was paid by the applicant on behalf of the insolvent. This deed of agreement makes no reference to the sale agreement though the same is said to have been executed in January 1992.

14. Further, the applicant refers to letter dated 08.05.1999 said to have been issued by the first insolvent to the Official Assignee extracted below:

'Sir,

Sub:Application No.13/98 in I.P.No.99/1997 in the matter of Mr.Titus Eapen & Mrs.Sheela Eapen - Insolvents/Debtors.

With reference to the above I.P.No.99/97, I wish to inform you that one Mr.F.C.Vijayakumar, S/o, Francis, who is also one of the creditors of the aforesaid persons and who has been occupying our debtors property at 3-A, 3rd Floor, Parkland Apartment, No.2, Kamalabai St., T.Nagar, Chennai 17, has paid our dues on behalf of Mr.Titus Eapen and settled the matters with me.

Hence I request you to withdraw the present proceedings against the above said insolvents.

Thanking you,

8th May 1999
Chennai

Yours truly,
sd/-

For Cathedral Chits Pvt. Ltd.
(K.V.Thomas)
Director

Sd/-
For MBF Chit Pvt. Ltd.
Director'

15. There is no acknowledgement produced for the receipt of the above letter by the Official Assignee and it has been placed on record only by the applicant in support of the application. In any event, these are matters of fact that are to be enquired into by the Official Assignee in the course of adjudication.

16. The applicant places considerable emphasis upon the decree obtained by him before the civil court. The question that arises is whether the OA would be precluded from undertaking an independent investigation into the matter by virtue of the decree passed by the civil court. My answer, in the present circumstances, when the OA was deliberately kept out of the proceedings and not made a party to the suit despite the applicant being well aware of the order of adjudication of R3 and R4 as insolvent, is that the OA can and should undertake an independent enquiry into the facts and come to a reasoned conclusion after hearing the parties. सत्यमेव जयते

17. The following decisions are relied upon by the Official Assignee in this regard:

- i) *Ganpatrao Ramji Patil V. Jehangir Navroji and others* (AIR 1938 Bom 469)
- ii) *Davood Mohideen Rowther V. Sahabdeen Sahib* (Volume 45, Law Weekly page 709)
- iii) *Subbaiah Goundan V. Ramasami Goundan and others* (AIR 1954 Madras 604)
- iv) *B.C.Munirathnam Naidu V. M/s.Meena Financiers and another* (Vol.90 L.W.539)
- v) *Ex parte Girdharlal Shankar Dave, Debtor* (AIR 1971 Bombay 362)
- vi) *Harshad Ratilal Shah V. Ishardas Sudarshanlal* (1985 SCC Online Bom 309)
- vii) *Bharat Chandulal Nanavati and another V. UCO*

Bank and another (AIR 1992 Bombay 170)

18. The line of judgments relied on and cited above do support the proposition that the Official Assignee ought to have, in the present case, been impleaded in the suit as a proper and necessary party. The applicant has filed the suit in 2003 subsequent to the order of adjudication passed in 1998. The applicant also attended the office of the Official Assignee on several occasions during the process of enquiry and it cannot thus be said that he was unaware of the insolvency proceedings. The Official Assignee is thus a necessary and proper party to the Suit, decreed *exparte* on 31.03.2004.

19. The judgment and decree have attained finality as on date. The defendant therein, one of the insolvents, has not challenged the decree. The Official Assignee was not aware of the same since it was not arrayed as a defendant, despite being a proper and necessary party. It would thus, in the aforesaid circumstances, be appropriate for the OA to undertake enquiry afresh and come to an independent conclusion after hearing all parties concerned *dehors* the decree obtained.

20. This matter has been hanging fire since 2011 and efforts for settlement have been mooted and pursued unsuccessfully by the parties. Suffice it to say that the prayer in the application is too wide to be considered, particularly in the absence of any evidence whatsoever

produced by the applicant in support of his alleged ownership of the property at T.Nagar except the exparte decree dated 31.03 2004. The question of ownership or title is one of fact to be established by the party making such claim. The documents filed by the applicant before me do not establish this position in the least.

21. This application is dismissed. However, the applicant is at liberty to file his claim before the Official Assignee who shall consider and adjudicate upon the same in accordance with the applicable provisions.

22. Upon pronouncement of this order, a request is made for remuneration to be ordered to Mr.C.Ramesh, learned counsel who has been engaged by the office of the Official Assignee in this matter. The Official Assignee will take out a separate application in this regard for appropriate orders thereupon.

WITNESS, THE HON'BLE SHRIMATI, VIJAYA KAMLESH TAHILRAMANI, CHIEF JUSTICE, HIGH COURT AT MADRAS, AFORESAID THIS THE 29TH DAY OF OCTOBER 2018.

SD/-

ASSISTANT REGISTRAR

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DATED THIS THE DAY OF 2018

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HIGH COURT, MADRAS

Appln. No.193 of 2010

in

IP.No.99 of 1997

ORDER DATED : 29.10.2018

THE HON'BLE DR. JUSTICE

ANITA SUMANTH

FOR APPROVAL : 19.12.2018

APPROVED ON : 19.12.2018

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THE OFFICIAL ASSIGNEE
HIGH COURT, MADRAS.

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3 & 4 / Insolvents

5. The Official Assignee
High Court, Madras.

6. Arihant Bardia,
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Both residing at Flat No.3,
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This Application coming on this day before this court for hearing in the presence of Mr.V.Raghavachari, advocate for the applicant/3rd party herein and Mr.C.Ramesh, advocate for the Official Assignee, the 5th respondent, Mr.J.Balagopal, advocate for the respondents 6 to 8 herein; and the respondents 1 to 4 not appearing in person or by advocate; and the Order of this Court herein dated 23.10.2017 made in Appln.No.193 of 2010, the Official Assignee requested for remuneration to be ordered to Mr.C.Ramesh, learned counsel who has been engaged by the Office of the Official Assignee in this matter and this Court having observed that the prayer in the application is too wide to be considered, particularly in the absence of any evidence whatsoever produced by the applicant in support of his alleged ownership of the property at T.Nagar except the exparte decree dated 31.03 2004 and the question of ownership or title is one of fact to be established by the party making such claim and the documents filed by the applicant before this Court do not establish this position in the least and

IT IS ORDERED AS FOLLOWS :-

(1) That the Appln. No. 193 of 2010 in IP.No.99 of 1997 be and is hereby dismissed.

(2) That however, the applicant is at liberty to file his claim before the Official Assignee who shall consider

and adjudicate upon the same in accordance with the applicable provisions.

(3) That the Official Assignee shall take out a separate application for remuneration to Mr.C.Ramesh, learned counsel who has engaged by the Office of the Official Assignee in this matter for appropriate orders thereupon.

WITNESS, THE HON'BLE SHRIMATI, VIJAYA KAMLESH TAHILRAMANI, CHIEF JUSTICE, HIGH COURT AT MADRAS, AFORESAID
THIS THE 29TH DAY OF OCTOBER 2018.

SD/-

ASSISTANT REGISTRAR

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DATED THIS THE DAY OF 2018

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INSOLVENCY OFFICE

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HIGH COURT, MADRAS

Appln. No.193 of 2010

in

IP.No.99 of 1997

ORDER DATED : 29.10.2018

THE HON'BLE DR. JUSTICE

ANITA SUMANTH

FOR APPROVAL : 19.12.2018

APPROVED ON : 19.12.2018

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