

A. No.190 of 2018
in IP. No.118 of 2009

Dr.ANITA SUMANTH,J.

This application is filed by the 31st defendant in the Insolvency Petition, being a creditor of the petitioning debtor. The first respondent was adjudicated as insolvent upon his own petition on 23.09.2010, such order of adjudication relating back to the date of presentation of the application, being 18.08.2009. The present application is filed by the 31st creditor seeking an annulment of the order of adjudication made on 23.09.2010.

2. Heard Ms.K.M.Vatsala, learned counsel for the applicant, Mr.J.Balagopal, learned counsel for the first respondent and the Official Assignee.

3. The annulment is sought on the ground that the insolvent is possessed of immovable properties not disclosed either in the Insolvency Petition or in the statement of affairs filed by him before the Official Assignee ('OA'). Moreover, the insolvent has, according to the applicant, acquired properties even after the order of adjudication and the circumstances in which the order of adjudication was passed have altered substantially. Thus, the insolvent has both failed to make a full disclosure of his properties at the time of filing of the statement as well as acquired

substantial property after adjudication and the adjudication is thus liable to be annulled.

4. The Applicant states that he had purchased a flat at Door No.17, 17/1 and 17/2, Diwan Bahadur Shanmugam Street, Kilpauk on 13.07.2009 from the power agent of the insolvent. However, the insolvent, disputing the sale, had filed O.S.No.11831 of 2009 before the II Assistant City Civil Court on 18.11.2009 seeking a permanent injunction restraining the applicant from interfering with his possession over the same.

5. Thereafter, C.S.No.224 of 2010 had been filed by the insolvent on 19.02.2010 seeking a declaration to set aside sale deed dated 13.07.09 executed in favour of the applicant as null and void. It is however relevant to note that though both the suits have been filed after presentation of the insolvency petition there is no mention in either about the insolvency proceedings.

6. In O.S.No.11831 of 2009, initially an ex parte order of interim injunction had been obtained by the insolvent. The injunction was vacated after contest, but, according to the applicant, the insolvent and his wife continue to be in illegal occupation of the property even thereafter.

7. Subsequent to the order of adjudication as insolvent on 23.09.2010, a release deed has been executed on 10.05.2018 by the brother of the insolvent, in favour of the insolvent with respect to the brothers' half share

in the flat on the second floor of the premises at No.17/2, Diwan Bahadur Shanmugam Street, Kilpauk. The insolvent has thereafter executed a settlement deed on 24.05.2018 settling the property in favour of his wife, Kumuthavalli, vide document registered under No.2993 of 2018 before the office of the Sub Registrar, Purasawalkam. The value of the property settled is shown at Rs.1.5 Crores. The aforesaid facts have been brought to the notice of the Official Assignee by the present applicant.

8. The Official Assignee has filed a Report dated 29.06.2018 substantially ratifying the aforesaid narration of facts and praying that the order of adjudication be annulled. According to the Report, the property at Door No.17, 17/1 and 17/2 was originally purchased by the mother of insolvent in 1972. After getting necessary approvals from the CMDA, she constructed a residential building comprising ground first and second floors consisting of six flats G1, G2, F1, F2, S1 and S2. The mother of the insolvent died interstate on 29.11.2000 and her husband pre-deceased her.

9. After her death, the aforesaid properties were succeeded to by the insolvent and his brother. On 22.2.2007, the brother of insolvent executed a release deed in favour of the insolvent thereby relinquishing his 1/4th undivided share of land together with flat bearing No.F2 to the insolvent. On 27.7.2009, the brother of the insolvent executed a release deed in favour of the insolvent thereby relinquishing his 1/4th undivided share of land along

with flat in the ground floor bearing No. G2. Thus, the insolvent had become the absolute owner of two flats bearing nos. G2 in the ground floor and F2 in the first floor. However, the insolvent did not disclose any of the aforesaid details including the deed of settlement executed in favour of his wife that is reflected in the Encumbrance Certificate from the Sub Registrars' Office.

10. The above is clear from the narration in the Release Deed dated 10.05.2018. The ownership of the apartments in the property at T.Nagar is, as at present, as follows:

(i) One flat on the second floor (S2) - the brother of the Insolvent has executed a release deed in favour of the insolvent vide Doc.No.2597 of 2018 Dt. 10.05.2018 and the same has been settled by the insolvent in favour of his wife Mrs. Kumuthavalli vide Doc.No. 2993/2018, dated 24.05.2018.

(ii) One flat on the first floor (F2) is mortgaged by the insolvent with HDFC Bank and sold to the applicant herein vide Doc.No.2488/09, dt.13.07.2009. Subsequently insolvent instituted a suit in CS.No.224/10 before the High Court for a declaration that the sale deed in Document No.2488/09 dated 13.07.2009 executed by the power agent of insolvent in favour of the applicant was null and void and not binding on the insolvent. The said suit is pending before the Master's Court at the stage of recording evidence.

(iii) One flat on the ground floor (G2) stands in the name of the insolvent and according to the OA, steps are being taken to bring the property for sale.

11. The Applicant points out that both suits have been filed by engaging the services of counsel and remitting Court fee thereupon, and not in the capacity of an indigent person. The applicant would also point out that though, according to the insolvency petition, the insolvent is stated to have been possessed of only a sum of Rs.18,500/- or thereabouts at the time of institution of the petition on 18.08.09, Court fee of Rs.42,600/- has been paid for filing C.S.No.224 of 2010 on 19.02.2010. Thus, various expenses have been incurred by the insolvent even after the institution of the Insolvency Petition and the insolvent was thus possessed of sufficient assets and had clearly suppressed the same in the insolvency petition as well as in the statement of affairs filed before the OA.

12. Though a counter has been filed, no effective defence has been raised by the insolvent in regard to the averments in the application. The insolvent merely reiterates the contents of the insolvency petition setting out his business as well as personal background. In summary, he reiterates the prayer that the property on the first floor in Dewan Bahadur Shanmugam Street, Kilpauk, Chennai be recovered from his creditor and sold in public auction to pay off the other creditors.

13. The averments in the petition in regard to the release of the brothers' half share in his favour in the second floor of the premises and the settlement of the same upon his wife are not even adverted to, much less disputed. In any event, as I have stated earlier, learned counsel appearing for the insolvent does not dispute these facts before me.

14. Having heard learned counsel, I am of the unambiguous view that the prayer in the application is liable to be granted and the order of adjudication annulled.

15. As rightly pointed by the applicant, though the insolvent has instituted two civil suits after the filing of the Insolvency Petition there is no reference to the Insolvency Petition in the same. Moreover, the insolvent does not dispute the averments in both the application as well as the Report of the OA in relation to the ownership of the properties and the suppression of the same in both the insolvency petition as well as the statement of affairs filed before the OA. सत्यमेव जयते

16. A preliminary defence is raised by the insolvent assailing the maintainability of the present application on the ground that Section 21 of the Act cannot be invoked by a creditor whose only recourse, according to the insolvent, is to file an application before the office of the Official Assignee.

17. As regards the aspect of maintainability, the answer lies in the language of the provision itself. Section 21 of the Act reads thus:

21. Power of Court to annul adjudication in certain cases.-

(1) Where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent are paid in full, {Subs. by Act 3 of 1950, s.3, for "the Court may, on the application of any person interested} [the Court shall, on the application of any person interested,] by order annul the adjudication {Ins. by Act 11 of 1927, s.3} [and the Court may, of its own motion or on application made by the official assignee or any creditor, annul any adjudication made on the petition of a debtor who was, by reason of the provisions of sub-section (2) of section 14, not entitled to present such petition].

18. Thus, the Court may, in its discretion, or at the instance of all or any other person, including a creditor such as in the case before me, annul the order of adjudication if it believes that there are sufficient reasons for it to do so. There is no bar in law for a creditor to approach this court in terms of section 21 of the Act seeking annulment. The petition is thus maintainable and the objection raised by the insolvent in this respect is rejected. I am also inclined to uphold maintainability of the application on the facts and circumstances of this case, dealt with in detail in the paragraphs to follow.

19. Coming to the merits, the applicant has circulated copies of the Release Deed dated 10.05.2018 in terms of which the brother of the insolvent releases to him his half share of one floor in the property at

T.Nagar and the Settlement Deed dated 24.05.2018 whereunder the insolvent settles the aforesaid property upon his wife. Both documents are admitted by the insolvent.

20. The relevant portions of the Release Deed are extracted below and it appears crystal clear to me from a perusal of the Release Deed that, even as on the date of filing of the Insolvency Petition, the Insolvent was the owner of the constructed portions on the second floor of the property that have not been revealed in either the Insolvency Petition or the Schedule of Affairs filed by him before the Official Assignee. To that extent, the Schedule is in itself incomplete and stands vitiated.

'WHEREAS Mrs. T. Sarasa Ammal died intestate on 29.11.2000 leaving behind her only legal heirs & Sons, Mr. T. Siva Selvam (RELEASEE) and Mr. T. Kumaran (RELEASOR) herein. Therefore both the RELEASOR & RELEASEE, being the legal heirs of Late T. Sarasa Ammal have inherited the property mentioned in the Schedule "A" hereunder and are enjoying the same jointly and in common, absolutely free from any encumbrance. (Legal Heirship certificate issued by the Ahsildar, Purasaiwakkam-Perambur Taluk, as per his R.D. is No.(E1)/026123/2001 dated 13.08.2001).

SUBSEQUENTLY the above said Mr.T.Kumaran (REALEASOR) had relinquished his half undivided share in the Land & Superstructure consisting Ground Floor and First Floor of the Western Wing of the property mentioned in Schedule A hereunder, in favour of his brother MR. T. Sivaselvam through Release Deed dated 22.02.2007 bearing Document No. 934 of 2007 in Book 1, at S.R.O. Purasaiwalkam.

WHEREAS the above said T.Siva Selvam (RELEASEE) had relinquished his half undivided share in the Land & Superstructure consisting Ground Floor and First Floor of the Eastern Wing of the property mentioned in Schedule A hereunder, in favour of his brother Mr. T. Kumaran through Release Deed dated 22.02.2007 bearing Document NO. 935 of 2007 in Book 1, at S.R.O. Purasaiwalkam.

WHEREAS the construction of small portions in the second floor on the Eastern & Western Wing were pending and hence the same could not be included in the above mentioned earlier Release Deeds. The final

state of the said Construction was completed only in the recent past and the entire land as morefully described in the Schedule A property had already been conveyed in the earlier Release Deeds, therefore, the Releasor has decided to release his half undivided share in the Second Floor- Western Wing Portion as morefully described in the Schedule C hereunder as full and final to the Release for no consideration now to complete balance of the property as described in Schedule C hereunder to and in favour of RELEASEE herein be enjoyed by him absolutely with all rights and power of alienation. This Will complete all that of release towards said property as mentioned in Schedule "A" '.

21. Mr.Balagopal places reliance on a decision of this Court in the case of *Megastuff Computers rep. by its Proprietor, Mr.Manoj Kumar Metha Vs. P.Chadrasekar, Proprietor of C.S. Infotech* (2010 (5) CTC 146) which, in turn cites the decision of a Division Bench of this Court in the case of *S.P.Ramakrishnan Vs. V.Bashyam Achari and another* ((1978) 2 MLJ 139) to hold a single creditor could not have approached the Court seeking an annulment of an order of adjudication. The Bench concludes that the proper course of action would have been for the creditor to have filed a claim before the OA for adjudication in accordance with law.

22. The aforesaid decisions are distinguishable on facts. In the case dealt with by the Division Bench, the Insolvent was alleged to have received certain amounts by way of gratuity and Provident fund. However, since an application filed by another Creditor seeking annulment of the order of adjudication had been dismissed, the Bench was not persuaded to entertain another application seeking the same relief.

23. It is in this context that the Division Bench holds that the expression of inability by a debtor to pay his debts should not be lightly recorded and that any investigation to be done in regard to *malafides* or suppression should be undertaken only by the Official Assignee. In that case, there is no reference to submissions by the Official Assignee that corroborated the submissions of the Creditor whereas, in the present case the report of the Official Assignee available on record supports the factual matrix in regard to suppression and serious attempts on the part of the Insolvent to withhold vital information from both the Court as well the Official Assignee.

24. In the present case, there is, admittedly, suppression of material particulars, both in the Insolvency Petition as well as in the statement of affairs filed before the Official Assignee in regard to the immovable assets owned by the Insolvent. I am also of the view that the subsequent events where under the Insolvent has been given the ownership of immovable property through his brother and settles the same in favour of his wife reveal material suppression and cannot be brushed aside. Moreover, the Official Assignee has investigated the matter and the report is unambiguous to the effect that the Insolvent has suppressed material information before the Court as well as before the OA itself.

25. In the narration of proceedings as above, it appears clear to me that the Insolvent has consciously suppressed material both from the Court as well as from the Official Assignee and his conduct is not such as to warrant the sanctuary or protection provided under the provisions of the Presidency Towns Insolvency Act.

26. Though I have earlier held that this application is maintainable, my conclusions on the merits as above will also support my conclusion on the aspect of maintainability. The provisions of Section 21 of the Act vest substantial discretion in the Court to annul an order of adjudication in circumstances where the Court is satisfied that a debtor ought not to have been adjudged as Insolvent. The circumstances and facts of the present case as above equally support my rejection of the challenge to maintainability put forth by the respondent.

27. Section 33 of the Act imposes certain duties upon a person after adjudication as insolvent with regard to his property and reads thus:

33. Duties of insolvent as to discovery and realisation of property

(1).....

(2).....

(e) generally do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors, as may be required by the official assignee or special manager or may be prescribed or be directed by the Court by any special order or orders made in reference to any particular case, or made on the occasion of any special application by the official assignee or special manager, or any creditor or person interested'

28. Though the general rule is that all property of the insolvent shall vest in the OA, there are a few exceptions to the same. These exceptions are described in section 52 of the Act extracted below:

52. Description of insolvent's property divisible amongst creditors.-

(1) The property of the insolvent divisible amongst his creditors, and in this Act referred to as the property of the insolvent, shall not comprise the following particulars, namely:--

(a) property held by the insolvent on trust for any other person;

(b) the tools (if any) of his trade and the necessary wearing apparel, bedding, cooking vessel, and furniture of himself, his wife and children, to a value, inclusive of tools and apparel and other necessities as aforesaid, not exceeding three hundred rupees in the whole.

(2) Subject as aforesaid, the property of the insolvent shall comprise the following particulars, namely:--

(a) all such property as may belong to or be vested in the insolvent at the commencement of the insolvency or may be acquired by or devolve on him before his discharge;

(b) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge; and

(c) all goods being at the commencement of the insolvency in the possession, order or disposition of the insolvent, in his trade or business by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof:

Provided that things in action other than debts due or growing due to the insolvent in the course of his trade or business shall not be deemed goods within the meaning of clause (c):

Provided also that the true owner of any goods which have become divisible among the creditors of the insolvent under the provisions of clause (c) may prove for the value of such goods.

29. On a careful examination of the above two provisions above and an application of the same to the facts of the present case it appears clear to me that the property that was owned by the insolvent in the present case at the time of adjudication, as well as all property acquired subsequently will stand vested in the OA to be utilised for distribution amongst the creditors.

30. The insolvent made a feeble attempt to argue that property acquired after adjudication will vest only in the insolvent and not in the OA. However, the position in regard to vesting of property acquired after adjudication is too well settled now, for me to be persuaded otherwise. This Court, in the case of *M. Abdul Rahim vs. The Official Assignee of Madras* (2 MLJ 656) has, had undertaken an exhaustive analysis of the provisions of sections 17, 33 and 52 of the Act with a comparison of the same with analogous provisions in English Law. The Bench held that the position in English law as settled in the case of *Cohen vs. Mitchell*, to the effect that property acquired after the date of adjudication shall remain the property of the insolvent till intervention by the trustee, would not apply in the Indian context. The law here, as of now, is thus that all property as may be acquired by or that devolved upon the insolvent after the date of adjudication as insolvent but prior to his discharge, shall vest with the

Official Assignee and be available for division among his creditors in accordance with the applicable statutory provisions.

31. There is no doubt in my mind that, on the facts of the present case, the property owned by the insolvent at the time of adjudication as insolvent and that transferred to him post adjudication but prior to discharge shall vest in the Official Assignee and shall be available for division among the creditors. Consequently, the settlement executed by the insolvent of the aforesaid properties in favour of his wife is held to be non-est and void in the eye of law. This order of adjudication dated 23.09.2010 passed by this court is annulled and this application is allowed.

32. The question of vesting of property post the annulment of an order of adjudication will be in terms of Section 23 of the Act that reads as follows:

'23 Proceedings on annulment

(1) Where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done, by the official assignee or other person acting under his authority, or by the Court, shall be valid, but the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such terms and subject to such conditions (if any) as the Court may declare by order.

2.....'

33. Section 23 provides that upon annulment of an order of adjudication, the property of the debtor who was adjudged insolvent shall vest in such person, as the Court may appoint. This court, in the case of *T.Ramaprasada Rao vs. Bashyam Achari and another* (1978 AIR (Madras) 387) has held it permissible for the court to make such appointment even subsequent to the order of annulment and not necessarily concurrent with such annulment.

34. In the present case, claims have been received by the Official Assignee from forty six (46) unsecured creditors and one (1) secured creditor. In the aforesaid circumstances and bearing in mind the conduct of the insolvent, the properties not disclosed in the schedule of affairs as well that acquired subsequently shall vest with the Official Assignee till such time proceedings initiated by the insolvents/his creditors in the Civil Courts reach a finality and subject thereto. A copy of this order be issued to the Sub-Registrar, Purasawalkam for appropriate endorsements in the Encumbrance Certificate.

WEB COPY

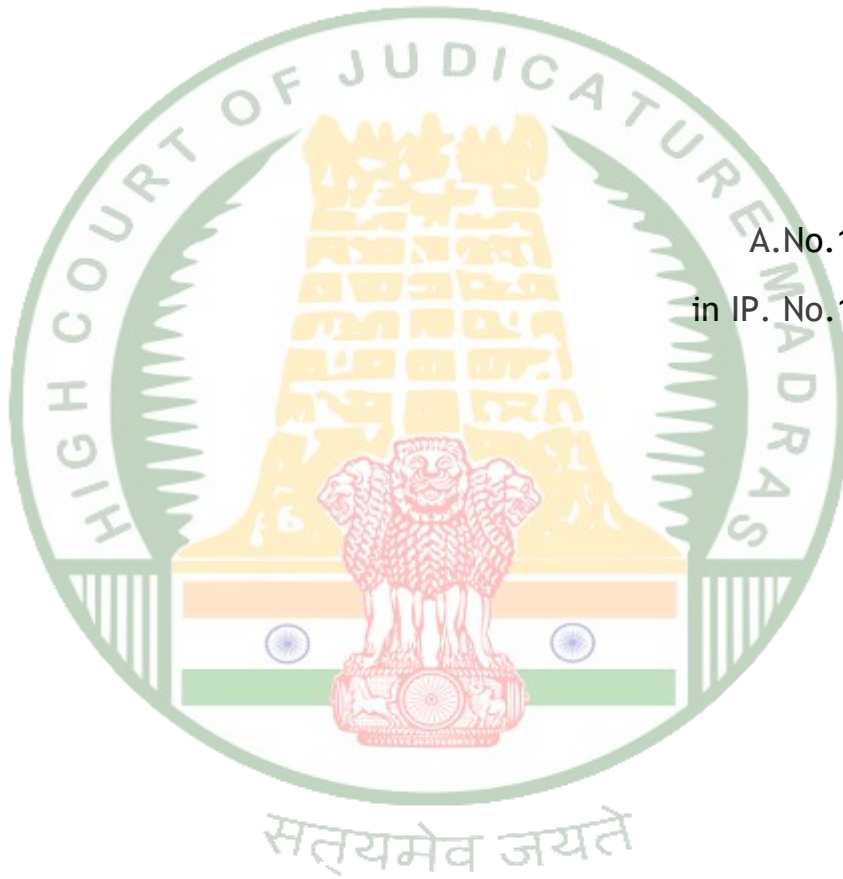
rkp/sl

19.09.2018

Copy to:

The Sub-Registrar, Purasawalkam.

Dr.ANITA SUMANTH,J.



A.No.190 of 2018
in IP. No.118 of 2009

WEB COPY

19.09.2018