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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
IN INSOLVENCY
NOTICE OF MOTION NO. 27 OF 2018
IN
INSOLVENCY PETITION NO. 22 OF 2016

Prakash Ramji Thakkar	... Applicant
In the matter between	
Premji Narayanji Thakkar (HUF) through Karta Mr Premji Narayanji Thakkar	...Petitioning Creditor
Versus	
Prakash Ramji Thakkar	...Petitioning Debtor
And	
The Official Assignee, High Court of Bombay	...Respondent

WITH
INSOLVENCY RULE NISI NO. 9 OF 2018
IN
INSOLVENCY PETITION NO. 22 OF 2016

Mr SK Jain, *i/b SK Jain & Associates, for the Petitioning Creditor.*
Ms RC Nichani, *i/b KD Nichani, for the Petitioning Debtor/Applicant.*
Mr EB Shivkumar, *Deputy Official Assignee present.*
Mr MD Narvekar, *Official Assignee present.*

CORAM: G.S. PATEL, J
DATED: 15th January 2019

PC:-

1. Heard.

2. The application is by the adjudicated Insolvent seeking to set aside an order dated 6th September 2017 (AK Menon J) by which the Insolvency Petition was made absolute, the Official Assignee was appointed and there was an order of vesting of the Insolvent's assets in the Official Assignee. I believe it is best to first set out that order:

> 1. By this petition the petitioning creditor seeks an order of adjudication against the judgment debtor who is stated to be indebted in a sum of Rs.33,79,876.93 under a decree passed by this Court in Summary Suit No. 2128 of 2008.
>
> 2. Mr Agarwal, learned Counsel appearing for the petitioning creditor states that this petition has been duly served upon the judgment debtor inasmuch as, **<u>personal service was attempted by the bailiff of the Sheriff of Mumbai on 23rd January 2017 at 8.55 am at the residence of the judgment debtor. However, he refused to accept the same. Thereupon the bailiff of Sheriff Mumbai is stated to have affixed the notice upon the outer door of the premises of the residence of the judgment debtor</u>**.
>
> 3. The petitioners' Advocates have filed a joint affidavit of service of the bailiff of the Sheriff of Mumbai and the petitioner's representative dated 1st February 2017. The affidavit of service encloses thereto a report of the Sheriff of Mumbai which records that the respondent who was present at his residence refused to accept the Insolvency Petition along with decree notice and thereupon it was affixed on the outer door of the premises. The judgment

debtor was identified by the constituted attorney of the petitioner Mr Bharatkumar P Thakkar.

4. Mr Agarwal therefore submits that the petition be allowed. Mr Agarwal submits on instructions that the insolvency notice dated 19th September 2016 was duly served upon the judgment debtor on 25th October 2016 and therefore committed an act of Insolvency on 30th November 2016. Accordingly, he seeks relief in terms of the petition. He further submits on instructions that decree is still outstanding and no appeal has been filed. The said decree dated 28th February 2012 is passed by this court in the aforesaid Summary Suit. The judgment debtor is absent on call. There is nothing to show that the judgment debtor has satisfied the decree. There is no affidavit in reply. The averments in the petition are not controverted. In the circumstances, I pass the following order:

(i) Petition allowed in terms of prayer clause (a).

(ii) The Official Assignee is hereby appointed of the properties of the Insolvent wherever situated which shall vest in the Official Assignee and shall become divisible amongst the Insolvents creditors.

(iii) The Official Assignee also to take necessary steps in accordance with the Circular dated 14th October 2011 issued by Ministry of Finance, Department of Revenue (Central Board of Direct Taxes). New Delhi and to invest the amount so realised from the Insolvents with any of the Nationalised Banks.

(iv) Parties to act on an authenticated copy of this order.

(*Emphasis added*)

3. The application proceeds on the footing that the Insolvent was never there at this address and was not served. Paragraph 2 of the Affidavit in Support of the Notice of Motion at page 5 goes so far as to say that "it is matter of record and admitted position" that the Insolvent was served "for the first time" with a copy of a letter dated 29th January 2018 issued by the Official Assignee only on 31st January 2018 at the Court of the 27th Metropolitan Magistrate at Mulund in Mumbai. Indeed this is not an admitted position at all.

4. The order of AK Menon J records the attempts at personal service and the fact that service was personally effected at 8.55 am on 23rd June 2017 at "the residence of the Judgment Debtor". AK Menon J also noted the filing of an Affidavit. The Insolvent would have it that all of this is an utter falsehood and that AK Menon J was grossly misled into accepting what the Petitioning Creditor says. Perhaps the only thing left out of AK Menon J's order is the address at which the Insolvent was said to have been served and this now assumes some importance because I have understood Ms Nichani for the Insolvent to say that her client is something of a nomad. He has no fixed residence. He seems to flit from this place to that and it appears to me that he uses this peripatetic strategy to constantly take a plea of not having been properly served.

5. I have seen the Affidavits in Support of the Notice of Motion and Affidavit in Rejoinder and I have also with the assistance of Mr Jain for the Petitioning Creditor, considered his Compilation of Documents and Affidavit. It seems to me now that the Insolvent's Affidavits are significant not for what they say, but for what they do not. The compilation prepared by Mr Jain shows at page 145 that a first attempt at service was made by the Petitioning Creditor and the bailiff from the Sheriff's office on 20th January 2017. They went to this address: *Flat No. 1004, Silver Avenue, 10th floor, Devi Dayal Cross Road, Near BPS Plaza, BPS Complex, Mulund (West), Mumbai 400 080* ("**the Silver Avenue flat**"). The report indicates that the Insolvent was not found at that address on that date. Instead those persons met the Insolvent's wife, Preeti, who said that the Insolvent, as is evidently his self-professed wont, had gone out early in the morning and had no fixed time at which he was expected to return. Three days later, back went the representatives from the Petitioning Creditor and their Advocates and from the bailiff's office. At the same address at Silver Avenue on 23rd January 2017 at 8.55 am they did in fact find the Insolvent. He refused to accept service. On the same date, the Officer from the Deputy Sheirff's office affixed the Petition and the Advocate's Notice on the outer door of Silver Avenue premises in the presence of the Insolvent. This is what the hand-written report of 23rd January 2017 says at page 144 of Mr Jain's compilation. It is also noted that the premises and the Insolvent were pointed out to the bailiff by Bharat Premji Thakkar, one of the Petitioning Creditors.

6. The essential facts except for the address itself are compactly noted in AK Menon J's order. Then there is an Affidavit of Service to this effect, a copy of which is to be found at page 135. This is the Affidavit that AK Menon J has referenced in his order.

7. What is it therefore that the Insolvent must show to obtain an order on this Notice of Motion? He must show that he was not in the Silver Avenue premises and he must show this affirmatively. If it is his case, as seems to be indicated in the Affidavit in Rejoinder, that he was only temporarily residing there as a licensee, then he must show affirmatively when he quit those premises and he must also demonstrate that this date was prior to the date of reported service; and, further, must show that there is no available record showing that Silver Avenue flat as being his residence. Ms Nichani attempts an argument that the Silver Avenue flat belongs to the Insolvent's brother, but this confuses the question of ownership of an asset with residence for the purposes of service. There is no law that requires a noticee to own the premises at which he is served.

8. Far from establishing what the Insolvent says, the records both in the compilation and independently in the records of the Official Assignee and of this court, show that even to this date the Insolvent continues to give the Silver Avenue address as his. A single look at those records will suffice because there are four official documents, none of which can be denied. First, there is an Aadhaar Card which obviously is of relatively recent issue and it gives the Silver Avenue address. Then there is a statement from the Saraswat Bank, Mulund (West) Branch for the period 21st November 2017 i.e., several months after the date of service, which shows the Insolvent's address at the Silver Avenue premises. Then there is an official communication to the Official Assignee from the Superintendent, Policy Regional Passport Office, Mumbai of 16th April 2018 saying that the Insolvent was issued Passport No. P8510994 with the Silver Avenue address. But what is important is the date when this passport was issued. It was issued on 20th March 2017, a good three months after the service on 23rd January 2017. Finally there is also an MTNL bill on the records of the Official

Assignee. Reference to this is found in the minutes of the meeting held by Ms Chandan Bhatt, then the Deputy Official Assignee, on 31st October 2017 which notes that there is a MTNL bill no.2101946369 dated 5th January 2017 to 27th January 2017 in the name of the Insolvent at the Silver Avenue address. On 21st November 2017, Saraswat Bank wrote to the Official Assignee enclosing the statements of accounts and other documents, and these additional documents show the Silver Avenue address for the Insolvent.

9. There is no manner of doubt that the Insolvent has been using the Silver Avenue address and has been residing there. He has no explanation whatsoever. The documents to which I have referred, leaving aside the MTNL document, speak for themselves. No Aadhaar Card or Passport will be issued on a random address without those issuing authorities being satisfied as to the correctness of it for the purposes of the residence of the applicant before them. The only thing that the Insolvent is able to say through Ms Nichani is that at some previous point in 2014 and in some execution proceedings an executing court found that the Insolvent was not at the Silver Avenue address. But that does not mean that he was not at the Silver Avenue address ever thereafter and it most certainly does not explain the subsequent Aadhaar Card or how he came to even apply for a passport which was issued in March 2017 at that very address.

10. The Insolvent also says in his Rejoinder that proceedings under Section 138 of the Negotiable Instruments Act 1881 were served on him at an address at 501, Surya Jyoti Apartments, BP

Cross Road No.3, Mulund (West), Mumbai 400 080 and not at the Silver Avenue address. That is not enough. If the Insolvent has multiple addresses he can be served at any of these. If he chooses to lead this itinerant lifestyle, he will be served wherever he chooses to pitch his tent. For our purposes that is enough.

11. There is absolutely no substance to this Notice of Motion. I am satisfied that it is thoroughly dishonest.

12. The Notice of Motion is dismissed.

13. Mr Jain presses for costs. In my view, this is a fit case where costs should be awarded. There will be an order of costs against the Insolvent in the amount of Rs.1.5 lakhs. Obviously, he cannot be expected to make this payment, but this order means that the Petitioning Creditor will be entitled to recover this amount in accordance with law from a realization of his assets, though without interest.

14. Ms Nichani seeks a stay of this order. There is nothing to stay. It is the Insolvent's application for recall that has simply not been granted.

15. List the Insolvency Rule Nisi No. 9 of 2018 on 5th February 2019.

(G. S. PATEL, J)