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

**OFFICIAL ASSIGNEE'S REPORT NO.19 OF 2016
IN
INSOLVENCY PETITION NO.95 OF 2001**

M/s. Lakhotia Udyog ... Judgment
Creditor

Vs.

Rajesh Manmohandas Shah & Ors. ... Judgment
Debtor

**WITH
NOTICE OF MOTION (L) NO.37 OF 2018
IN
INSOLVENCY PETITION NO.95 OF 2001**

Rajesh Manmohan Shah & Achal Gupta Applicant /
(Manglik) Intervener

In the matter between

M/s. Lakhotia Udyog ... Judgment
Creditor

Vs.

Rajesh Manmohandas Shah & Ors. ... Judgment
Debtor

**WITH
NOTICE OF MOTION (L) NO.38 OF 2018
IN
INSOLVENCY PETITION NO.95 OF 2001**

Sushila M. Shah & Anr and Achal Gupta Applicant /
(Manglik) Intervener

In the matter between

M/s. Lakhotia Udyog ... Judgment
Creditor

Vs.

Rajesh Manmohandas Shah & Ors. ... Judgment
Debtor

WITH

**NOTICE OF MOTION (L) NO.9 OF 2019
IN**

INSOLVENCY PETITION NO.95 OF 2001

Bharti Sheth / Kiran Trading Co.

Applicant /
Intervener

In the matter between

M/s. Lakhotia Udyog

... Judgment
Creditor

Vs.

Rajesh Manmohandas Shah & Ors.

... Judgment
Debtor

WITH

**NOTICE OF MOTION (L) NO.8 OF 2019
IN**

INSOLVENCY PETITION NO.95 OF 2001

Jimit Shah

Applicant /
Intervener

In the matter between

M/s. Lakhotia Udyog

... Judgment
Creditor

Vs.

Rajesh Manmohandas Shah & Ors.

... Judgment
Debtor

Mr. Ravi Gadagkar, Amicus Curiae present.

Mr. A.P. Bagwe, for the Petitioning Creditor.

Mr. Sharan Jagtiani with Mr. Atul Daga, Tinaz Kapadia I/b Pradhan & Rao for Jimit Shah in NM (L) No.8 of 2019.

Mr. Sanket Deshpande, for Achal Gupt in NM (L) No.37 & 38 of 2019.

Mr. Rushabh Seth with Mr. Pratik P. Amin I/b Mrs. B. Bahulayan for Mr. Divyash Shah and Mr. Kiranbhai Shah NM (L) No.9 of 2019.

Mr. E.B. Shivkumar, Deputy O.A.

Mrs. S.A. Pagedar, 1st Asstt. O.A.

CORAM:

R. I. CHAGLA, J.

DATE:

6TH AUGUST, 2019.

PC:-

1. These four Notices of Motion have been taken out by the respective Applicants seeking to be inducted as agents of the

Court Receiver and for the respective Applicants to be put in possession of the premises being commercial premises bearing No.18, J.K. Industrial Estate, Mahakali Caves Road, Andheri (East), Mumbai 400 093 admeasuring 2160 sq.ft. ("subject premises"). The Notices of Motion (L) Nos.37 and 38 of 2019 have been taken out by Mr. Achal Gupt Proprietor of M/s. Frizzon Services Pvt. Ltd. The Applicant now claims that under order dated 16th October, 2018, the learned Judge of this Court had accepted the offer of Mr. Achal Gupt for paying a sum of Rs.1 lakh per month to the Official Assignee and other charges and that pursuant to the said order a formal agreement has been entered into with the Official Assignee and that Mr. Achal Gupt as agent of the Official Assignee is paying the sum of Rs.1 lakh per month to the Official Assignee for possession of the subject premises. According to Mr. Achal Gupt the Notices of Motion have worked themselves out.

2. The third Notice of Motion (L) No.8 of 2019 has been taken out by one Mr. Jimit Shah who claims that under Leave and Licence Agreement entered into with one Mr. Diveysh M. Shah, Constituted Attorney of Kiranbhai D. Topiwala, Proprietor of Kiran Trading Company he has been made a licensee of the subject premises and which licence was in operation when the order

dated 16th October, 2018 was passed by the learned Judge of this Court accepting Mr. Achal Gupt's offer of payment of Rs.1 lakh per month to the Official Assignee as agent and pursuant to which formal tenancy agreement was entered into. Mr. Jimit Shah has deposited Rs.19,50,000/- with the Official Assignee which sum is stated to be the Licence Fees payable from February, 2016 till July, 2018 i.e. 30 months commencing from execution of the Leave and Licence Agreement. The learned Counsel appearing for Mr. Jimit Shah states the said sum had been deposited as per the statement made to this Court and on the understanding that Mr. Jimit Shah will continue to deposit further compensation / licence fees every month for the possession of the subject premises.

3. The fourth Notice of Motion (L) No.9 of 2019 has been taken by Kiran Trading Company contending that it had been granted a tenancy in 1997 by the owners of the subject premises M/s. Sigma Fashions, whose partners have been declared as insolvents in the Insolvency Proceedings in which these Notices of Motion have been taken out. There is a decree of the Small Causes Court declaring it to be the tenants of M/s. Sigma Fashions in respect of the subject premises. It is claimed by M/s. Kiran Trading Company that as tenants they have at all times

been in possession of the subject premises and that they are entitled to be granted physical possession of the subject premises and in the alternative to be inducted as an agent of the Official Assignee without payment of any costs, charges, security deposit and / or royalty.

4. The learned Single Judge of this Court (G.S. Patel, J.) by order dated 5th March, 2019 passed in the above Official Assignee's Report No.19 of 2016 in Insolvency Petition No.95 of 2001 has considered that claims have been made by M/s. Kiran Trading Company, Mr Jimit Shah and Mr. Achal Gupt to possession of the subject premises and has held in paragraphs 13 and 19 thus:-

13. The fact that there are rival claims does not mean that any of these parties have committed contempt of court let alone interfered with the administration of justice. It is the job of the Court to resolve all rival and competing claims in accordance with law. Nobody expects every person who has some sort of claim to possession to abandon that claim or to not make it. Jimit claiming possession is no contempt. He say so still. He disputes the Topiwala Duo's claim to have resumed possession (or never to have given him possession), and therefore, and logically, disputes Achal's possession. Achal maintains his is the most recent documentation with the Topiwala Duo and he is in actual physical and juridical possession. Is Achal's possession protected in law? Is it impaired by the Topiwala – Jimit transaction? Does Jimit have a continuing claim? Is Topiwala correct in saying he never gave possession to Jimit or resumed it from him? Did

Topiwala have the right to transact at all with Achal? Is Topiwala's own tenancy even legitimate, and has it been recognised or protected under the applicable rent law? These are questions on merits that require to be addressed, and not one of these constitutes any sort of 'contempt'. There may yet be a fraud waiting to be unearthed, but what that fraud is, and by whom, are matters to be decided, and certainly do not constitute contempt. Our contempt jurisdiction is best used sparingly, if at all, and kept in reserve for only the most egregious and flagrant disobedience. To be contempt, the conduct must be contumacious. Making an assertion that contradicts another party's assertion is never contempt.

19. Obviously, the Topiwala Duo, the Jimit Duo and Achal will all have to be heard on that OAR given the frame of its prayer seeking possession. Jimit has filed a substantive Notice of Motion (L) No.37 and 38 of 2018 in this OAR (I note that the OAR is common both the Insolvency Petitions). Topwala is the one person who has done everything at the gala and nothing in Court. Obviously, if Topiwala now seeks an order of possession or agency he will need to file a substantive Notice of Motion with appropriately worded relief because without that I can see no other way to make an order on his application.

5. It has been held that this Court will have to hear the three Applicants as to their possession of the subject premises. Hence, these Notices of Motion where rival claims are made as to possession of the subject premises are taken up for hearing. After hearing the learned Counsel appearing for the respective Applicants, the learned *Amicus Curiae*, who has been appointed by this Court in the matter has been heard. He has referred to an

order of the Division Bench of this Court dated 25th August, 2018 wherein this Court had considered a challenge by M/s. Kiran Trading Company to the order of the learned Single Judge dated 16th October, 2018 and had upheld the said order. It has been held by the Division Bench in the said order that the decree of the Court of Small Causes does not bind the Official Assignee in whom the assets of the partners of M/s. Sigma Fashions including of the subject premises vested on 17th June, 2003. Particularly since the decree being an ex-parte decree having been passed without notice to the Official Assignee. Hence, M/s. Kiran Trading Company has no right to claim tenancy of the subject premises in these Insolvency Proceedings.

6. The learned *Amicus Curiae* has in my view correctly pointed out that in view of the finding of the Division Bench of this Court, the subsequent agreements i.e. Agreement of Leave Licence entered into between Jimit Shah and M/s. Kiran Trading Company as well as the business arrangement / contract entered into between Mr. Achal Gupt and M/s. Kiran Trading Company are *non est* in these Insolvency Proceedings. Particularly since they have been entered into by M/s. Kiran Trading Company claiming to be a tenant, the tenancy having been decreed by the Small Causes Court without notice issued to

the Official Assignee in whom the subject premises vested. In view thereof, neither Mr. Jimit Shah nor Mr. Achal Gupt can claim any rights to possession of the subject property as the said Agreements were entered into without seeking permission of the Insolvency Court.

7. Thus, these agreements entered into by Kiran Trading Company with Jimit Shah and Achal Gupt cannot be relied upon by the Applicants to claim that they are in possession of the subject premises and these arrangements are certainly not binding on the Official Assignee behind whose back they were entered into. The order of learned Single Judge (K.R. Shriram,J.) dated 16th October, 2018 can only be considered to be a pro-temp arrangement as it had not gone into the rival claims as to possession of the subject premises in accepting the offer of Mr. Achal Gupt to pay a sum of Rs.1 lakh per month pursuant to which a formal agreement has been entered into between Mr. Achal Gupt and Official Assignee.

8. Hence, the formal tenancy agreement entered into between Mr. Achal Gupt and the Official Assignee is required to be cancelled. It would also be necessary to appoint a valuer from the High Court Valuers Panel who shall value the subject premises and fix the licence fee / rent which is payable in respect of the

subject premises. It would also be appropriate for the Applicants who have filed the above Notices of Motion to participate by way of private treaty after the licence fee / rent payable in respect of the subject premises has been fixed. This would be for the purpose of entering into a formal agreement with the Official Assignee as agent for possession of the subject premises.

9. The learned Counsel for M/s. Kiran Trading Company makes a statement that the decree of tenancy in its favour passed by the Court of Small Causes has been challenged by the Official Assignee in 2019 and that this order should not come in the way of these proceedings before the Court of Small Causes. This submission is noted.

10. Accordingly, the parties are agreeable to the following order being passed:-

- (i). The Official Assignee is directed to cancel the formal agreement entered into with Mr. Achal Gupt as agent in respect of possession of the subject premises;
- (ii) Mr. Achal Gupt, the Applicant in Notices of Motion (L) No.37 and 38 of 2019 shall furnish an undertaking that they will vacate and handover vacant possession of the subject premises to the Official Assignee on or before 30th October, 2019;

(iii). The undertaking shall be filed within a period of one week from the date of uploading of this Order. It is made clear that Mr. Achal Gupt shall pay a sum of Rs.1 lakh per month under the formal Agreement as agent of the Official Assignee for possession of the subject premises till 30th October, 2019;

(iv). The valuation of the subject premises shall be done by M/s. H. Mehta and Company from the panel of Valuers of this Court who is appointed as Valuer for determining the licence rent / fee payable in respect of the subject premises. The appointed valuer shall submit his report within a period of four weeks from the date of uploading of this order;

(v). The Applicants who have filed the above Notices of Motion are permitted to bid by way of private treaty for possession of the subject premises as agent of the Official Assignee under a formal agreement to be executed upon the valuation of the subject premises for fixation of the licence rent / fee being determined within the above stated period;

(vi). The Official Assignee shall fix the date for inviting the bids for the formal agency agreement. The

bid amount shall be in excess of the licence rent / fee of the subject of premises determined by the appointed valuer;

(vii). Liberty is granted to the Official Assignee to place a report before this Court and seek directions from this Court preferably before 15th October, 2019 for entertaining the bids of the Applicants by private treaty and declaring the successful bidder;

(viii). The Petitioning Creditor is directed to deposit costs and charges of the valuer which is initially for a sum of Rs.50,000/- within one week from the date of uploading of this Order and for further sums thereafter as and when the bill is raised by the appointed valuer;

(ix). Mr. Jimit Shah, the Applicant in Notice of Motion (L) No.8 of 2019 shall be refunded the sum of Rs.19,50,000/- which had been deposited by him with the Official Assignee and which had been invested along with accrued interest within a period of three weeks from the date of uploading of this Order after deducting from the said sum an amount @ 6.25% which comes to Rs.1,21,875/- which has been paid to the Government as per the Rules;

(x). It is made clear that the above order will not come in the way of the Applicants pursuing their independent remedies against each other under their respective agreements in respect of possession of the subject premises and their disputes arising therefrom;

(xi). The Notices of Motion are accordingly disposed of in the above terms. The Official Assignee's Report No.19 of 2016 is also disposed of.

(R I. CHAGLA, J.)