

Atul

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
IN INSOLVENCY
OFFICIAL ASSIGNEE'S REPORT NO. 19 OF 2016
IN
INSOLVENCY PETITION NO. 95 OF 2001**

Lakhotia Udyog ...Petitioning
Creditor

Versus

Rajesh Manmohandas Shah & Ors ...Insolvents

AND

SHOW CAUSE NOICE NO. 3 OF 2018

IN

INSOLVENCY PETITION NO. 95 OF 2001

Lakhotia Udyog ...Petitioning
Creditor

Versus

Rajesh Manmohandas Shah ...Insolvent

And

Achal Gupt (Manglik) ...Applicant

Mr AP Bagwe, for the Petitioning Creditor.

Mr Rushabh Seth, with Pratik P Amin, for the Noticees in SCN/3/2018, Divyesh Shah & Kiran Tooimwala.

Mr Sharan Jagtiani, with Atul Daga, Surabhi Agrawal & Shweta Sangtani, Tinaz Kapadia, i/b Pradhan & Rao for the Noticee.

Mr Sanket Deshpande, for the Applicant in NMISL/37 & 38/2018.

Mr Ravi Gagagkar, Amicus Curiae is present.

Mr MD Narvekar, Official Assignee is present.

Mr EB Shivkumar, Dy OA, is present.

Mrs SA Pagedar, 1st Assistant to the OA, is present.

CORAM: G.S. PATEL, J
DATED: 5th March 2019

PC:-

1. I have before me Official Assignee's Report No. 19 of 2016 with a Show Cause Notice No. 3 of 2018. I propose by today's order to dispose of and discharge the show cause notice, for reasons that follow. I also propose to issue directions in regard to the Official Assignee's Report itself and schedule that for a more complete hearing at a later date.

2. A brief factual background is necessary. The Petitioning Creditor, Lakhotiya Udyog, a partnership firm, obtained an arbitral award against one Sushila M Shah and one Meena L Shah, both partners of Debtor No. 3, a partnership firm called Sigma Fashions. Sushila Shah died on 5th January 2006. The three other partners of Sigma Fashions were Rajesh Manmohandas Shah, Bharti Jitendra Sheth and Vinodchandra R Sheth. I am told that Vinodchandra Sheth has also passed away but this will need to be verified. Meena Shah has been adjudicated insolvent in another Insolvency Petition No. 96 of 2001 on 3rd June 2003. Rajesh M Shah, Bharti Sheth and Vinodchandra Sheth were adjudicated insolvents in this Petition on 17th June 2003.

3. Insolvency proceedings commenced. There is an industrial Gala No. 18 at the JK Industrial Estate at Andheri that is said to

have been an asset of Sigma Fashions. Therefore, each of the partners would have had an interest in it. The contest is not about the ownership of the asset but about possession. The OAR No. 19 of 2016 that is before me seeks precisely this order, i.e. for physical possession of Gala No. 18/23, JK Industrial Estate, Mahakali Caves Road, Andheri (West), Mumbai 400 069. But it asks that the Official Assignee be authorized to take possession “from whomsoever is found in possession”.

4. That is the heart of the problem, for there are today rival claims to being in actual possession.

5. First, there is what I will call the Topiwala Duo. This is Kiran Topiwala and his constituted attorney Divyesh Shah. Kiran says that he has a registered or recognized tenancy agreement or something called a “leave and licence-cum-transfer” agreement of 1st April 1997 from Sigma Fashions. He claims that he has been in juridical possession as a tenant. He claims that he entered into a leave and license agreement with the next duo, one Jimit Shah whose father Rajesh H Shah (not to be confused with the original insolvent) is also present.

6. Topiwala says that he either never put Jimit in possession or resumed possession — at present, it is unclear what it is that he contends. Jimit, represented by Mr Jagtiani, says that he was put in possession and never dispossessed. He is and has always been in possession since the date of his leave and licence of early 2016. He says that even now he has the keys to the premises.

7. This then takes us to the third claim of one Achal Gupt. His claim is not in descent from Jimit, but from the Topiwala Duo, who say that having “recovered” possession from Jimit, Topiwala then entered into some sort of agreement dated 1st December 2017 with Achal. Topiwala calls this a ‘business arrangement’. Achal Gupt calls it something else. We shall see.

8. The Official Assignee, on an inspection of the premises on 10th August 2018, found Achal in actual physical possession of the gala (and presumably he must also have a set of keys to it). At that time an inventory was also made.

9. These are now all the claims to possession of this gala.

10. On 17th July 2018, a lawyer representing Jimit said that he has been in possession since February 2016. On 4th October 2018, the Court found that there was by then a contesting claim (obviously now from Achal). The Court, therefore, said that Jimit’s lawyer has made a false statement. An amount promised by Jimit in deposit to the Official Assignee had not been made. A show cause notice was directed to be issued to Jimit and Rajesh H Shah to show cause why they should not be held guilty of contempt. Simultaneously, a show cause notice was also directed towards the Topiwala Duo for suppressing the so-called arrangement with Achal.

11. The show cause notice itself pegs its origin to a statement made on 17th July 2018 on behalf of Jimit Shah that he was in possession. That is what Jimit Shah maintains even today. He has

not deviated an inch from that position. Even if Jimit accepts that Kiran has resumed possession, he certainly does not accept that Achal was or is entitled to be in possession of the gala. There is, therefore, no possibility of proceeding in contempt in a situation such as this.

12. It is difficult, on the basis of the narrative that I have set out, to say that anybody has made a false statement. As the matter stands today, the Topiwala Duo, Jimit and Achal all simultaneously claim to be in possession, or at least entitles to it. Their claims must be adjudicated. This does not make any of them guilty of contempt of Court. They have something to say, each of them, on their documents and the correctness of those documents and the wrongness of the rival documents.

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 says 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 recognized 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 disobediences. To be contempt, the conduct must be contumacious. Making an assertion that contradicts another party's assertion is never contempt.

14. I am discharging this show cause notice.

15. On 3rd October 2017, a learned single Judge made a general order of injunction in respect of this gala saying that any one in possession, control or occupation was not to create third party rights, part with possession or encumber without specific leave of the Court. This is noted.

16. On 26th October 2018 Achal entered into an agency agreement with the Official Assignee which is even now valid and subsisting. It was for 36 months and Achal is depositing an amount of Rs. 1 lakh per month. I am clarifying, perhaps by way of abandon caution, that Achal Gupt will not surrender possession nor induct any third party into this gala without specific leave of the Court. The previous order of 3rd October 2017 continues to operate. If that

possession is to be surrendered it will only be to the Official Assignee. I say this because at a future date if it is found that not Achal or somebody else is in possession then, on the strength of this order, I will, within 120 minutes, have that person forcibly ejected from the premises.

17. The show-cause notice is accordingly discharged with these observations.

18. The question is now what steps are to be taken for final disposal of the OAR No. 19 of 2016.

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. 8 of 2019 seeking *inter alia* to be made an agent of the Official Assignee. Achal has filed two Notices of Motion (L) Nos. 37 and 38 of 2018 in this OAR (I note that the OAR is common both the Insolvency Petitions). Topiwala 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.

20. I will presently list the matter on 7th March 2019 by which time I expect the Topiwala Duo to have prepared and lodged a Notice of Motion for appropriate relief with a supporting Affidavit.

On that date, I will pass further directions for filings of Affidavits in all those Notices of Motion by Jimit, Achal and Topiwala, making it clear that I will accept Affidavits in Reply; expect service to be made on the Official Assignee of all proceedings; will not immediately permit Affidavits in Rejoinder; and will issue further directions regard the segregation of the compilations and preparation of the list of dates.

21. In all this we should not forget the hapless Petitioning Creditor. At the very least his Advocate is entitled to receive copies of all these Notices of Motion and Affidavits and list of dates.

22. Mr Gadagkar has been appointed amicus and I will leave to him to coordinate with the Official Assignee's office. His task will be of course to summarize the competing claims and indicate the page numbers of the relevant documents in support of each claim as also to have appropriately segregated list of dates, so that each of these claims can be dealt with distinctly.

23. There is a separate issue regards the passports of Kiran Topiwala and Divyesh Shah. As regards Divyesh Shah, the order dated 12th February 21019 when the learned Additional Solicitor General appeared notes that no passport facilities have been extended to him. Kiran Topiwala has deposited his passport with the Official Assignee. This may now be returned to him since the show cause notice is discharged today.

24. For the present, list the matter on 8th March 2019 along with all Notices of Motion.

25. Of course, all contentions in regard to possession and documents are necessarily kept open.

(G. S. PATEL, J)