Shephali

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**ORDINARY ORIGINAL CIVIL JURISDICTION**

**IN ITS INSOLVENCY JURISDICTION**

**NOTICE OF MOTION NO. 13 OF 2021**

**IN**

**INSOLVENCY PETITION NO. 18 OF 2018**

Ashok Mohansing Bajaj, SVC Coop Bank Ltd …Applicants
*Versus*
Devang B Mehta & Anr …Respondents

**WITH**

**OFFICIAL ASSIGNEE'S REPORT NO. 3 OF 2021**

Official Assignee ...Applicant
*Versus*
Devang B Mehta & Anr ...Respondents

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**Mr Rohan Savant**, *with Nikhil Rajani, i/b M/s. V Deshpande & Co., for the Applicants.*
**Ms Kavita S Lalwani**, *for the Petitioning Creditors.*
**Mr KK Trivedi**, *Official Assignee, with EB Sivakumar, Deputy Official Assignee, & Mr Subodh Patil, 1st Assistant to the Official Assignee, are present.*
**Ms MP Kunte**, *Insolvency Registrar, is present.*



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**CORAM: G.S. PATEL, J**
**DATED: 21st September 2021**

**PC:-**

**1.** The Notice of Motion seeks an order under Section 17 of the Presidency Towns Insolvency Act 1909. The two reliefs, prayers (a) and (b) reads thus:

> "(a) This Hon'ble Court be pleased to grant formal leave to the Applicant to act in furtherance of the measures taken under the provisions of SARFAESI Act in respect of property of Insolvents, being exclusively mortgaged in favour of Applicant, by putting up the immovable property viz: Flat No. 3, Raj Tower, W.E. Highway, Opp Gulfam Hotel, Dahisar (East), Mumbai 400 068 for sale in enforcement of its security interest under the provisions of SARFAESI Act and appropriate the proceeds realized therefrom towards outstanding dues of this Applicant due and payable by the Insolvents.
>
> (b) Pending the hearing and final disposal of the present application, the Official Assignee be restrained by an order of injunction of this Hon'ble Court from proceeding further and/or taking any steps in respect of the immovable property of Insolvents viz: Flat No. 3, Raj Tower, W.E. Highway, Opp Gulfam Hotel, Dahisar (East), Mumbai 400 068;"

**2.** Section 17 and its proviso read as follows:

> "**17. Effect of order of adjudication**.— On the making of an order of adjudication, the property of the insolvent wherever situate shall vest in the official assignee and shall become divisible among his creditors, and thereafter, except as directed by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt or shall commence any suit or other legal

> proceeding except with the leave of the Court and on such terms as the Court may impose:
>
> *Provided* that this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed."

**3.** This makes it clear that the vesting contemplated by Section 17 does not adversely affect the rights of a secured creditor to realise or otherwise deal with security given to him. Indeed, the proviso says that the secured creditor can proceed as if Section 17 does not exist. Thus, the rights of a secured creditor are wholly unaffected by the order of adjudication.

**4.** This is not a case where security was attempted to be created after the order of adjudication. The property in question is Flat No. 3, Raj Tower, Western Express Highway, Opposite Gulfam Hotel, Dahisar East, Mumbai 400 068. Defendant No. 2, Bhagwandas Mehta, has an undivided 50% share, right, title and interest in this flat. His wife has the remaining 50%. They created a mortgage in favour of the Applicant Bank on 5th August 2016 by depositing title deeds (page 107). This mortgage was registered in accordance with law on 3rd September 2016. The order of adjudication came three years later, on 4th June 2019. The security had, thus, been in existence for three years before the order of adjudication.

**5.** On 26th April 2018, i.e., that is to say also before the order of adjudication, the Applicant Bank initiated SARFAESI proceedings.

**6.** It seems to me inconceivable that the order of adjudication could operate to defeat the rights of a secured creditor. Not only is this specifically saved by the proviso to Section 17, as noted above, but even otherwise a secured creditor's security cannot be lost and a secured creditor cannot be reduced to the same status as an unsecured creditor by an order of adjudication. The law does not contemplate this.

**7.** The fact that the principal borrower is another business entity is immaterial and nothing turns on this fact.

**8.** Mr Trivedi is somewhat annoyed that his office was not informed. But that is a matter of form not substance and gives the Official Assignee no rights to stall the recovery proceedings by the Applicant Bank.

**9.** Mr Trivedi is correct to a limited extent. If the Applicant sells the property and there is a surplus after paying off the claim of the secured creditor / Applicant, 50% of the surplus will have to be remitted to the Official Assignee to the estate account since the insolvent has a 50% share, right, title and interest in the flat. Thus, 50% of the surplus is also to the credit of the insolvent.

**10.** The Notice of Motion succeeds and is made absolute in terms of prayer clauses (a) and (b) as clarified in regard to the surplus.

**11.** The Bank will keep the Official Assignee informed at all stages in regard to the sale of the flat.

**12.** The Official Assignee has a Report dated 18th August 2021. There are movables in the flat. These do not seem to me to be of any great value. The Official Assignee will need to take these movables and put them to sale and credit the proceeds to the estate accounts.

**13.** The Official Assignee has a warehousing problem. The Bank agrees that it will sell the movables as per the inventory given by the Official Assignee on an 'as-is-where-is' basis or as scrap for the best possible price. The entire sale proceeds of the movables are to be credited to the estate account.

**14.** All concerned will act on production of a digitally signed copy of this order.

**(G. S. PATEL, J)**