IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 16.08.2021	Delivered on 25.08.2021

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THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

Application Nos.27, 28, 29 and 30 of 2021
in IP No.8 of 2019

Official Assignee,
High Court, Madras 104,
Rep. Estate of S.Shanmugam ... Applicant in all the Applications

Vs.

1. Mr. S.Shanmugam ... Respondent/ Insolvents in all the Applications

2. Dr. (Mrs.) Snehalatha Elangovan ... Respondent/ Petitioning Creditor in all the Applications

3. S.Kumutha

4. Motor Finance Corporation,
   Akshaya Plaza, 55, Harris Road,
   Opposite to Egmore Court,
   Chennai 600 002 ... Respondents / Subsequent Alienees in all the Applications

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Prayer: Petitions filed under Order IX and XIV (2) & (3) of Insolvency Rules read with Section 7, 55, 58 and 68 of the Presidency Towns Insolvency Act, 1909, praying to

in A.No.27/2021: an order to set aside the settlement deed dated 8.9.2016 executed by the insolvent in favour of his wife S.Kumutha and registered as Document No.9536 of 2016 before Joint-I, Sub Registrar, Saidapet, South Chennai and the subsequent mortgage by deposit of title deed dated 28.04.2017 and registered as Doc. No.4172 of 2017 before SRO Saidapet, in respect of the property at Plot No.543, Flat No.1, Temple Tree Apartment, 21st East Street, Kamarajar Nagar, Thiruvanmiyur, Chennai 600 041 morefully described in the schedule as null and void and will not bind the Official Assignee.

in A.No.28/2021: an order of ad interim injunction restraining the 3rd and 4th respondents, their men, agents, assignee executors or anyone else claiming through or on their behalf from alienating the property at plot No.543, Flat No.1, Temple Tree Apartment, 21st East Street, Kamarajar Nagar, Thiruvanmiyur, Chennai 600 041 morefully described in the schedule.

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<u>in A.No.29/2021</u>: an order to direct the 3rd and 4th respondents to hand over all the original documents / title deeds relating to the property at Plot No.543, Flat No.1, Temple Tree Apartment, 21st East Street, Kamarajar Nagar, Thiruvanmiyur, Chennai 600 041 morefully described in the schedule.

<u>in A.No.30/2021</u>: an order to permit the Official Assignee to bring the property at Plot No.543, Flat No.1, Temple Tree Apartment, 21st East Street, Kamarajar Nagar, Thiruvanmiyur, Chennai 600 041 morefully described in the schedule for sale and disburse the sale proceeds to the creditors.

For Applicant : Mr.K.V.Ananthakrushnan
(in all the Applications)

For Respondents : Mr.J.Balagopal, for R1
(in all the Applications)

Mr.S.Rajasekar, for R2

Mr.R.Thiagarajan, for R3

Mr.R.Subramanian, for R4

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COMMON ORDER

All these applications have been taken out by the Official Assignee to nullify the alienation made by the debtor on 08.09.2016, for consequential injunctive reliefs and to permit the sale of the property treating it as part of the insolvent's estate.

2. The fact that the debtor viz., the first respondent in all these applications was adjudicated as an insolvent on 18.03.2020 is not in dispute. The Original Insolvency Petition in IP No.8 of 2019 was filed by the petitioning creditor/the second respondent herein seeking adjudication of the first respondent as an insolvent claiming that he has committed an act of insolvency inasmuch as, he has not complied with the Insolvency Notice issued to him in I.N. No.24 of 2018. The petitioning creditor, who had obtained a decree against the insolvent in OS No.1074 of 2012, which was confirmed by this Court in AS No.399 of 2016 had filed execution proceedings in EP No.375 of 2018 for realisation of the decree amount of Rs.21,21,835.50.

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3. In the interregnum, the Special Leave Petition filed by the debtor in Special Leave Petition (Civil) No.2825 of 2017 also came to be dismissed by the Hon'ble Supreme Court on 25.04.2017. During the course of the execution proceedings, according to the petitioning creditor, she came to know about the alienation made by the judgment debtor in favour of his wife by way of a Settlement Deed on 08.09.2016. Claiming that the alienation itself was with an intention to deny the fruits of the decree, the petitioning creditor sought issuance of an Insolvency Notice in I.N. No.24 of 2018. By order dated 11.08.2018, this Court had ordered issuance of notice on the first respondent.

4. An Application in Application No.269 of 2018 filed by the debtor under Section 9(5) of the Presidency Towns Insolvency Act, 1909, seeking to set aside the Insolvency Notice was dismissed by this Court on 10.12.2018. The notice of the insolvency was served on the debtor on 27.08.2018. Upon dismissal of the application, to recall the insolvency

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notice the creditor filed the instant Insolvency Petition in IP No.8 of 2019 on 27.02.2019. Eventually, the debtor was adjudicated as an insolvent in IP No.8 of 2019 on 18.03.2020. After the adjudication, the Official Assignee had come up with the instant applications seeking the prayers stated supra. According to the Official Assignee, in view of the adjudication made on 18.03.2020 on the basis of the insolvency notice that was served on 27.08.2018, the alienation dated 08.09.2016 being a gratuitous transfer is invalid in view of Section 55 of the Presidency Towns Insolvency Act, 1909.

5. These applications are resisted by the insolvent and the alienee contending that the debtor was adjudicated as an insolvent on the basis of an act of insolvency, said to have been committed by him on 17.10.2018 in IP No.30 of 2018, filed by one V.K.Smeer Ahmed. The said adjudication having taken place on 20.01.2019, there cannot be a second adjudication of the same person as an insolvent in IP No.8 of 2019 on 18.03.2020. It is the further contention of the respondents 1 and 3, namely the insolvent and the

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alienee that, as per Section 9(2)(b) of the Presidency Towns Insolvency Act, an act of insolvency is deemed to have been committed by the debtor on the date of the rejection of the application filed under Section 9(5) or the expiry of the period specified in the Insolvency notice for its compliance whichever is later. Therefore, according to them the date of dismissal of the application to set aside the insolvency notice viz. 10.12.2018 is the date on which the debtor could be said to have committed an act of insolvency. The alienation having taken place on 08.09.2016 which is prior to the two year period contemplated under Section 55 of the Act, the same cannot be set aside by the Insolvency Court invoking Section 55 of the Act.

6. Mr.R.Thiagarajan, learned counsel appearing for the alienee would further contend that whether the alienation was with an intention to delay or defeat the creditors is a matter for evidence and therefore, he should be allowed to lead evidence on the said aspect.

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7. I have heard Mr.K.V.Ananthakrushnn, learned counsel appearing for the Official Assignee, Mr.Balagopal, learned counsel appearing for the first respondent/insolvent, Mr. S.Rajasekar, learned counsel appearing for the second respondent/Petitioning Creditor, Mr.R.Thiagarajan, learned counsel appearing for the third respondent/alienee, and Mr.R.Subramanian, learned counsel appearing for the fourth respondent/subsequent Mortgagee.

8. Mr.K.V.Ananthakrushnan, learned counsel appearing for the Official Assignee and Mr.S.Rajasekar, learned counsel appearing for the Petitioning Creditor would vehemently contend that in view of the specific findings recorded by this Court while adjudicating the debtor as an insolvent in the order dated 18.03.2020. The date of commission of act of nsolvency is not the date of dismissal of Application No.269 of 2018, but the date of the transfer viz. 08.09.2016. Therefore, there need not be any further enquiry regarding the validity of the transfer which is admittedly a gratuitous transfer by the debtor in favour of his wife. Drawing my attention

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to the specific findings recorded by this Court in the order of adjudication Mr.K.V.Ananthakrushnan, would submit that though the Insolvency Petition was filed after issuing an Insolvency Notice, this Court had concluded that the very transfer has been made only in order to defeat the right of the creditor.

9. Referring to the adjudication obtained in IP No.30 of 2018, this Court had held that the said order was also obtained fraudulently with a view to defeat the right of the creditor. Therefore, according to Mr.K.V.Ananthakrushnan and Mr. S.Rajasekar, those pleas relating to the validity of the adjudication order passed in IP No.8 of 2019 and the date of the commission of act of insolvency cannot be re-agitated either by the debtor or by the alienee in these applications.

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10. The learned counsel appearing for the Official Assignee would also draw my attention to the judgment of the Division Bench of this Court in ***Shah Sukraj v. The Official Assignee, Madras,*** reported in

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Vol 91 LW 118, wherein the Division Bench after referring to the judgment of the Hon'ble Supreme Court in ***Rm.NL. Ramaswami Chettiar and Others v. The Official Receiver, Ramanathapuram,*** reported in ***AIR 1960 SC 70,*** had held that once a debtor is found to have committed an act of insolvency under Section 9(1)(b) of the Act, the very transfer which constituted the act of insolvency need not be separately adjudicated upon as coming within the scope of Section 55 of the Act and the fact of adjudication itself would invalidate the transfer. While doing so, the Division Bench observed as follows:

> *"3. It is unnecessary for us to consider whether the reasoning of the learned Judge (Ramaprasada Rao J.) for allowing the application filed by the Official Assignee, namely Appln. No. 355 of 1977, was right or not, in view of the decision of the Supreme Court in Ramaswami Chettiar v. Official Receiver, Ramanathapuram. Before us, the Official Assignee*

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relied on the decision of the Privy Council in Md.Siddique Yousuf v. Official Assignee of Calcutta, 70 Ind App. 93 : AIR 1943 PC 130, which in turn followed the decision of the English Court in Ex parte Learoyd In re Foulds (1879) 10 Ch D 3. According to the Official Assignee, once a debtor is found to have committed an act of insolvency under Section 9(b) of the Act, the very transfer which constituted the act of insolvency need not be separately adjudicated upon as coming within the scope of Section 55 of the Act and that the fact of adjudication itself would invalidate the transfer. The Official Assignee contended that that was the reason why he filed originally an application merely for recovery of possession, that once the appellant had raised an objection that he should file an application under Section 55 of the Act, he filed the application in question and that it does not in any way

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affect or alter the legal position that for getting rid of the transfer which constituted the act of insolvency, he need not independently allege and prove that the transferee shared such 3 common intention with the transferor and it is enough if the transferee was adjudged insolvent on that particular act of insolvency. We are of the opinion that this contention appears to be sound, having regard to the decision of the Supreme Court in Ramaswami Chettiar v. Official Receiver, Ramanathapuram, referred to already. ....”

“... when the act of insolvency upon which an order of adjudication is founded is a transfer amounting to a fraudulent preference, the transferee cannot so long as the order of adjudication stands, question that finding, namely, that the transfer was a fraudulent preference and that, therefore, in an

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application by the Official Assignee to have that transfer annulled on the ground that it was a fraudulent preference, the order of adjudication is conclusive proof that the transfer was by way of a fraudulent preference and it was not open to the transferee to lead evidence to prove that the transfer was not a fraudulent preference. In such a case, therefore, the order of annulment had to be made as a matter of course on proof of the order of adjudication. The Judicial Committee did not hold that in such a case the order of adjudication itself annulled the transfer and no separate order of annulment was required for the purpose. In fact, it is obvious that they thought that a separate order annulling the transfer would be necessary even in such a case for otherwise they would not have stated that 'the decision of the High Court avoiding the transfer is plainly right' nor

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while setting aside the order annulling the transfer reserved the right of the Official Assignee, should the occasion arise, to make a further application to have the transfer declared void. The case, therefore does not support the proposition for which it has been cited. On the contrary, it clearly proceeds on the basis that even where the order of adjudication is based on an act of insolvency constituted by a transfer of property found to be a fraudulent preference, the transfer stands till it is set aside. In our view this is the correct position and nothing to the contrary has been brought to our notice."

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11. Contending contra Mr.R.Thiagarajan, and Mr.J.Balagopal, learned counsel appearing for the alienee and the insolvent respectively would submit that IP No.8 of 2019 was filed by the Petitioning Creditor on a particular act of insolvency viz., the inability to pay the decreed debt

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within 21 days of receipt of notice of insolvency. Therefore under Section 9(2)(b) of the Presidency Towns Insolvency Act, 1909, the act of insolvency is deemed to have been committed either on the date of the order dismissing an application for setting aside the insolvency notice under Section 9(5) of the Act or the date fixed in the Insolvency notice for payment of the decree amount whichever is later.

12. Drawing my attention to the insolvency notice dated 14.08.2018, Mr.R.Thiagarajan, learned counsel appearing for the alienee would submit that the 35 day period prescribed in the said notice would expire on 18.09.2018. He would also further point out that the application filed by the debtor in Application No.269 of 2018 was dismissed on 10.12.2018. Therefore, according to Mr.R.Thiagarajan, the date of commission of act of insolvency in terms of Section 9(2)(b) of the Act is 10.12.2018. The alienation in question having taken place on 08.09.2016, which is prior to the two year period prescribed under Section 55 cannot be said to be bad or cannot be avoided by the Official Assignee invoking the power of the

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Insolvency Court under Section 55 of the Act.

13. I have considered the rival submissions.

14. The only question that is to be decided in these applications is, as to what is the date of commission of the Act of insolvency. The adjudication is dated 18.03.2020. In view of Section 51 of the Presidency Towns Insolvency Act, 1909, the adjudication would relate back to the date of the commission of the act of insolvency, on which an order of adjudication is made against the debtor. No doubt the presentation of the petition in IP No.8 of 2019 was preceded by an Insolvency Notice in I.N. No.24 of 2018. The application to set aside the Insolvency Notice filed by the debtor under Section 9(5) of the Act, came to be dismissed by this Court on 10.12.2018. Therefore on a plain reading of the provisions of the Act, particularly Section 9(2)(b), the act of insolvency could be deemed to have been committed only on 10.12.2018 and not at any time earlier. However, yet another factor that should weigh in the mind of the Court is the findings of

https://www.mhc.tn.gov.in/judis/

the Insolvency Court while adjudicating the debtor as an insolvent.

15. The debtor was adjudicated as an insolvent by an order of adjudication dated 18.03.2020. A perusal of the order of adjudication would show that this Court had held that the order of adjudication dated 20.01.2019 made in IP No.30 of 2018 is fraudulent and has been obtained only with a view to defeat the rights of the creditor. In fact this Court had referred to the issuance of legal notice by Mr.V.K.Sameer Ahmed, the Petitioning Creditor in IP No.30 of 2018 on 17.09.2018, after the service of the insolvency notice in I.N. No.24 of 2018 and the initiation of IP No.30 of 2018 even during the pendency of Application No.269 of 2018 seeking to set aside the insolvency notice as factors that would show a fraudulent intention on the part of the debtor in attempting to screen away the property from the creditors. This Court had in fact held that the act of the transfer of property by the debtor on 08.09.2016 after having suffered a decree itself is an Act of insolvency. I do not think that I can go behind the findings in the order of adjudication which very clearly spell out that the act of insolvency

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based on which the adjudication was made was the transfer of the property on 08.09.2016.

16. Therefore, once an order of adjudication has been made on the basis of an act of insolvency viz., a transfer of property and it is found that the said transfer was made with an intention to delay the rights of the creditor, as pointed out by the Division Bench in ***Shah Sukraj***'s case, referred to supra, the alienation will have to go and there is no question of any further adjudication on the validity or otherwise of the alienation. The Division Bench had made it very clear that if an order of adjudication is based upon a transfer, it is unnecessary for the Official Assignee to prove that the transfer was with intent to delay or defeat the creditors.

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17. In the case on hand the transfer is a gratuitous transfer and therefore, the protection that is available to a *bona fide* purchaser for value without notice is not available to the alienee. Apart from contending that the order of adjudication in question is the second order of adjudication and

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that the alienation is two years prior to the act of insolvency, the learned counsel appearing for the alienee or the insolvent have not been able to show that the protection afforded to *bona fide* transactions under Section 57 would be available to the alienee. If at all the objections of the alienee or the insolvent ought to be upheld the Court must record a finding that the alienation is two years prior to the date of the commission of the act of insolvency.

18. The judgment of the Division Bench in ***Shah Sukraj***'s case, militates against the contentions of the learned counsel for the insolvent and the alienee. In fact the Division Bench had held that once an order of adjudication is based on the alienation itself as an act of insolvency, the Official Assignee need not independently allege and prove that whether the transferee shared an intention to delay or defeat the creditors in common with the transferor and it is enough if the assignee shows that the transferor was adjudged insolvent on the particular Act of Insolvency. In fact while adjudicating the debtor as an insolvent, this Court had held as follows:

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> *"The Suppression of the said fact also leads to an inference that the debtor manured to get himself (adjudged as) insolvent only in order to screen the property from the creditors, he conveniently transferred the property in his wife's name.* ***The act of insolvency is committed, when the transfer of property is effected with intent to defeat the rights of the creditor****."*

19. In view of the above categorical finding, I do not think the insolvent and the alienee could re-agitate the question, as to whether, the alienation was with intent to delay or defeat the creditors. Therefore, I am unable to sustain the claim of Mr.R.Thiagarajan, that the alienee should be allowed to lead evidence on the question of intention to delay or defeat the creditors.

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20. The only other contention that remains is that the order in IP No.8 of 2019 is a second order of adjudication and therefore it is invalid. Here again I must point out that this Court while passing the order of adjudication in IP No.8 of 2019 has very categorically held that the order of adjudication in IP No.30 of 2018 is a fraudulent one obtained in collusion with the creditor in order to defeat the rights of the decree holder when the Execution Petition was pending. I am therefore unable to sustain both the contentions of the learned counsel for the respondent.

21. Mr.R.Subramanian, learned counsel appearing for the fourth respondent mortgagee would contend that they are advanced monies on the strength of the security of the property in question. If the alienation made by the debtor in favour of the alienee is held to be bad any further alienation by the alienee is also bad. Therefore, the mortgage of the property created by the third respondent alienee in favour of the fourth respondent would also be invalid.

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22. In view of the above findings, Application Nos.27 to 30 will stand allowed. There will be a direction to the alinee and the fourth respondent to handover all the documents relating to the property to the Official Assignee within a period of 30 days from to-day. The Official Assignee is at liberty to take steps for sale of the property treating it as a part of the estate of the insolvent. In the circumstances, I make no order as to costs.

25.08.2021

Index: Yes
Internet: Yes
Speaking order
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R.SUBRAMANIAN,J.

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Pre Delivery Common Order in

Application Nos.27, 28, 29 and 30 of 2021
in IP No.8 of 2019

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25.08.2021

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