



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
INSOLVENCY JURISDICTION

NOTICE OF MOTION NO. 12 OF 2021

IN

NOTICE OF MOTION NO. 17 OF 2017

IN

INSOLVENCY PETITION NO. 40 OF 1999

WITH

OFFICIAL ASSIGNEE REPORT NO. 1 OF 2022

IN

INSOLVENCY PETITION NO. 40 OF 1999

Prime Securities Ltd.]
A Company incorporated under the]
Companies Act, 1956 and having its]
Office at 1109/1110, Maker Chamber V,]
Nariman Point, Mumbai - 400 021] ...Applicant

Versus

Mrs. Arti Anil Shah]
Wife of Late Anil Mithalal Shah]
residing at]
176, Mehta Mansion,]
First Floor, Flat No. 1/C,]
Girgaon, Mumbai - 400 004] ...Respondent

IN THE MATTER BETWEEN:-

RE: Anil Mithalal Shah]
an adult Indian Inhabitant, having Office]
at 801, Stock Exchange Tower, Eight]
Floor, Dalal Street, Fort, Mumbai - 400]
023] ...Insolvent

EX-PARTE:

Century Consultants Ltd.]

A Company incorporated under the]
Companies Act, 1956 having its]
Corporate Office at 102, 103, Ground]
Floor, 24-B, Raja Bahadur Compound,]
Ambalal Doshi Marg, Mumbai - 400 023]

AND

1. The Official Assignee]
High Court, Mumbai]
Having it's office at G.T. Hospital]
Compound,]
Building No. 5, 4th Floor, L.T. Marg,]
South Wing, Mumbai - 400 002]

2. Jaldarshan Co-operative]
Housing Society Ltd.]
Having its office at jaldarshan Building,]
51 Napean Sea Road, Mumbai -]
400 036]

...Respondents

.....

Mr. J. P. Sen, Sr. Counsel a/w. Mr. Darshit Jain, Ms. Prachi Garg,
Mr. Anuj Savla i/b. DSK Legal for the Applicant.
Ms. Kavita Shah for Official Assignee.
Ms. C. J. Bhatt, O.A. a/w. Mr. Arun Kesarkar, Dy. O.A. present.
Ms. M. R. Parkar, I. R. Present.

.....

CORAM : KAMAL KHATA, J.
RESERVED ON : 27TH JULY 2023.
PRONOUNCED ON : 5TH OCTOBER 2023.

JUDGMENT:

1 There are two applications. A Notice of Motion (**NM**) taken out by the Applicant and the other is an Official Assignee's (**OA**) Report (**OAR**).

- 2 The relief sought in the NM is as follows:
- a. That Respondent No. 1 be directed to handover to the Applicant the exclusive, vacant and peaceful possession of Flat No. 47, "A" Wing, 4th Floor, Jaldarshan, Jaldarshan Co-operative Housing Society Ltd. 51 Napean Sea Road, Mumbai - 400 036 ("**said Flat**" for short); and to do all such other acts as may be necessary inter alia, to confer upon the Applicant disposable rights in connection with the said Flat;

AND on the other hand:

- 3 The directions sought in the OAR is as follows:
- a. Whether the parties/Creditors may be directed to bring offers for purchase of Flat No. 47, "A" Wing, 4th Floor, Jaldarshan, Jaldarshan Co-operative Housing Society Ltd. 51 Napean Sea Road, Mumbai - 400 036, before the Official Assignee, to meet the expenses with regard to liabilities of the Insolvent;

AND

- b. If prayer (a) above is granted whether Mr. Pradeepkumar R. Dhruva and other Claimants be directed to accept ₹. 52,50,000/- from the well-wisher of the insolvent being the full and final settlement towards their Claim.
- c. Whether the Official Assignee should pay an amount of ₹.3,42,98,1127.24 ps. To the 9 creditors, more particularly mentioned in Exhibit "H" from sale proceeds of the flat.

AND

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Whether the Official Assignee should make a provision as per Hon'ble Insolvency Court's Order dated 3rd September 2019 for the interest amount as calculated on admitted amount of Affidavit of Claims of the Claimants.

4 The Applicant's case is that it is the owner of the said Flat and the same does not form part of the estate of the late insolvent.

5 This assertion is principally based on an Arbitral Award dated 21st December 1992, a Deed of Pledge dated 31st December 1992 executed in its favour securing payment of the decretal dues of ₹ 4,29,44,000/- by the Insolvent that was followed by a Decree on 23rd April 1993 by this Hon'ble Court.

6 The relevant part of the Decree states thus:

“ ...
AND THIS COURT DOTH FURTHER ORDER AND DECREE that the due payment of the aggregate amount of ₹.429.44 lakhs (Rupees Four Hundred Twenty Nine Lakhs and Forty Four Thousand Only) and further interest on the principal sum of ₹. 289.73 lakhs (Rupees Two Hundred Eighty Seven Lakhs and Seventy Three Thousand Only) is secured by a pledge/mortgage by deposit of the title deeds of the Respondent's (ownership basis) flat no. 47 on 4th Floor of wing no. 1 in Jal Darshan Co-operative Housing Society. Ltd, Napean Sea Road, Bombay and shares nos. 356 to 360 represented by share certificate no.7.

...
AND THIS COURT DOTH FURTHER ORDER AND DECREE that the security by way of pledge/mortgage by deposit of title deeds of the Respondent's aforesaid flat and shares shall not be enforced by the Claimant (notwithstanding any failure or neglect on the part of the Respondent to

pay to the Claimant any of the instalments specified in annexure to the Award which is annexed hereto as Schedule A) until 30th December 1975...

...”

7 Having realised their inability to pay off the decretal amount¹ by 30th December 1995 as contemplated under the Decree, the Insolvent and his wife entered into an Memorandum Of Understanding dated 24th February 1995² (**MoU**). On the same day both the insolvent and the Applicant addressed letters to the society for its approval for transfer of shares to the applicant by placing on record the said MOU.

8 The Applicant contends that on 15th May 1995 the Income Tax Department issued its NOC under Section 269UL of the Income Tax Act recording its ‘No objection’ to transfer the said Flat in favour of the Applicant for a consideration of ₹. 3.42 crores as stated in the MOU dated 24th February 1995³

9 Thereafter the Insolvent and his wife on the one hand and the Applicant on the other by an Agreement for Sale dated 27th July 1995⁴ (**AoS**) transferred the said Flat in favour of the Applicant for a sum of ₹.3.42 crores. The consideration was an adjustment towards decretal dues. It is stated that after adjustment also an amount of ₹ 35,00,000/- remained due and payable under the decree. Pertinently, requisite stamp duty of ₹. 99,950/- was paid on the said document by franking.

¹ Affidavit in Rejoinder in N/M 17/2017, Pg.162

² Exhibit “B” Pg. 21 of N/M 17/2017

³ Exhibit “F” Pg 34 of N/M 17/2017

⁴ Exhibit “G” Pg 36 of N/M 17/2017

10 Apart from the above as a natural corollary to the execution of the AoS, the Insolvent and his wife addressed a letter dated 27th July 1995 to the society informing them about the transfer. It also submitted a duly signed transfer form for transfer of the said shares. The possession of the said Flat was handed over along with a possession letter also dated 27th July 1995.

11 It is the case of the Applicant that on 28th July 1995 it forwarded various documents including the original share certificate in respect of the said Flat for effecting the transfer in its name. The Original was with the Applicant as it was handed over to it under the Deed of Pledge.

12 The Applicant contends that these events happened more than four years prior to the Act of insolvency that was committed on 4th May 1999 or the Order of adjudication passed on 14th December 1999.

13 There is no dispute that no one has challenged either the decree or the MOU or the AoS till date and hence are final and binding on all concerned.

14 It is the case of the Applicant that the late Insolvent broke open the lock of the said Flat and took forcible possession in 1997 and for recovering the possession the Applicant filed a suit under section 6 of the Specific Relief Act, 1963 being Suit No. 1418 of 1997 in this Court. It was by an order dated 30th April 1997 that a Court Receiver was appointed. The late Insolvent submitted to a Decree on Admission and also agreed to pay ₹. 1 Crore in default of

which he would hand over possession of the said Flat to the Applicant. Since the Insolvent failed to pay the said Flat was once again handed over to the Applicant. This event is recorded in the Court Receiver's report⁵ which it sent to the society along with a covering letter⁶ as well as the Applicant's letter to the society.⁷

15 By an order of this Court dated 19th January 2004 the attachment obtained by one Nagarjuna Securities Ltd. ("**Nagarjuna**"), in Execution Application No.111 of 1996 for enforcement of an Award against the late Insolvent⁸ was raised on the Applicant's application.

16 The order of 19th January 2004 was challenged by the OA which led to the recall of the order and direction to the OA to take physical possession of the said Flat was passed by an Order of 30th August 2006. By an Order of the Division Bench of this Court dated 7th December 2006⁹ both orders dated 19th January 2004 raising the attachment and the order dated 30th August 2006 recalling the order were set aside by consent of parties with liberty to the Applicant to challenge the order of attachment afresh.

17 The Applicant thus filed a fresh Chamber Summons No. 326 of 2007 in the said Execution Application No.111 of 1996 taken out by Nagarjuna Securities Ltd. seeking to raise the attachment.

⁵ Exhibit "K" Pg 72 of N/M 17/2017

⁶ Exhibit "L" Pg 74 of N/M 17/2017

⁷ Exhibit "K" Pg 71 of N/M 17/2017

⁸ Exhibit "M" Pg 75 of N/M 17/2017

⁹ Exhibit "P" Pg 90 of N/M 17/2017

On 7th March 2007 by an order¹⁰ the statement of OA was recorded whereby a status quo of the said Flat would be maintained and he would not induct any third party. Besides this, the Applicant was permitted to pay the maintenance charges of the said Flat. This position continued and only in 2017 the Applicant discovered that on 26th March 2012 the Execution Application No. 111 of 1996 was dismissed for want of prosecution.¹¹ In such circumstances this NM came to be filed by the Applicant on 31st March 2017. After more than four years i.e. on 31st December 2021 the OA filed its report seeking directions as stated hereinabove.

18 After stating the above facts the Learned Senior Counsel Mr Sen relied upon the following judgements:

- a. White v Simmons¹²
- b. Can Fin Homes Ltd v A Vittal Murthy & Ors.¹³
- c. Sharfurzzaman & Ors. v H Hunter, Liquidator, Bank of Upper India Ltd.¹⁴
- d. Chokkalinga Mudali v Manickka Mudali¹⁵
- e. New Citizen Bank of India Ltd v K B Burnel & Co¹⁶
- f. Jugal Kishore v Bankim Chandra¹⁷
- g. In re Pearce¹⁸
- h. Hill Properties Ltd v Union Bank of India & Ors¹⁹

10 Exhibit "C" Pg 150 of Reply to the OAR

11 Exhibit "R" Pg 94 of N/M 17/2017

12 (1871) 6 Ch.App 555 at Pages 557, 558

13 AIR 2003 Karnataka 440, paras 7 and 16

14 AIR 1930 Oudh 20 Pages 28, 29

15 AIR (29) 1942 Madras 273 at Page 743

16 AIR 1954 Punjab 180 (Vol 41, C.N.93) paras 834, 835

17 AIR 1919 All 255 (1) Page 482

18 (1909) 2 Ch. 492

19 (2014) 1 SCC 635 paras 11, 13, 16

19 In this backdrop, the OA's challenge in reply to the NM is as under:

- a. That the Applicant was not entitled to enforce the security till 30th December 1995 as per Line 10 Page 5 of the Decree dated 23rd April 1993.
- b. The OA relied upon the Order of 6th September 1996 where it observed that the Applicant had obtained documents in the face of Prohibitory orders with an intention to defeat the claims of other creditors.
- c. That in view of Execution Application No. 111 of 1996 being dismissed for prosecution, the Chamber Summons taken out by the Applicant becomes infructuous.
- d. That the Applicant has not lodged any claim with the OA.

Since the Flat is in the name of the Insolvent and his wife and the OA is appointed as assignee of the estate and effects of the properties of the Insolvent pursuant to the order of adjudication dated 14th December 1999 the OA becomes entitled to 50% share of the insolvent in the said Flat.

20 In addition to the aforesaid grounds Ms Shah for the OA submitted that by virtue of Section 17 of the Presidency Towns Insolvency Act, 1909 (**PTIA**) the said Flat vested with the OA. She contended that the onus is on the Applicant to show that it is a secured creditor to obtain the possession of the said Flat.

21 She submitted that this Court whilst exercising powers under Section 7 of PTIA will have to go behind the decree to see that as on the date of the Consent Terms and Award dated 18th December 1992 the debt was not secured by the Award. The decree was passed under the old Arbitration Act 1940 in terms of the Consent Award. Thus she submits that the conduct of the parties leads to an inescapable conclusion that the acts were done to keep the said Flat out of the reach of the other creditors of the Insolvent.

22 She then draws my attention to the events that transpired between 18th December 1992 and 14th December 1999, more particularly the letter dated 7th September 1995 submitted by Jaldarshan CHS Ltd. to the Insolvent stating that there were prohibitory orders and unless claims were settled and attachment raised the said Flat could not be transferred. This she submitted would certainly cast a doubt on the consent award and subsequently the decree.

23 Moreover, interestingly, the Applicant entered into a Deed of Pledge on 31st December 1992 ('DoP' for short) instead of Mortgage by deposit of title deeds. Even otherwise, the Pledge did not expressly refer to the deposit of the share certificate by the late Insolvent with the Applicant.

24 She then referred to Section 172 of the Indian Contract Act, 1872 to submit that the Pledge could only be in respect of moveables. She submitted that as per clause 2 of the Deed, only rights to sell or dispose of the said shares and as incidental

thereto, the right to hold, use and occupy the flat was given to the Applicant. She further submitted that under clause 3, if the share certificate was to be treated as creating rights in favour of the Applicant to deal with the said Flat which is immovable property then the Deed of Pledge would have to be registered under section 17 of the Registration Act, 1908. Since it is not registered the effect of non-registration follows as provided in Section 49 (a) of the Registration Act.

25 That the DoP has not been referred to or relied upon by the Applicant in the present proceedings; This document too was only produced on 21st July 2023 along with the written submissions. What raises a doubt in her view is that inspite of clause in the Decree which contemplated enforcement of the decree by 30th December 1995, the Applicant and Insolvent entered into an MOU whereby the Insolvent agreed to sell the said Flat to the Applicant by an AoS dated 27th July 1995. Pertinently, no NOC from the Society was obtained nor was the AoS registered. She submitted that the said AoS was also void for want of consideration. Moreover, in view of Order dated 6th September 1996 which attained finality the Applicant was not entitled to recover possession of the said Flat.

26 She then submits that the Applicant has not claimed to be a secured creditor in the NM. She submitted that the Applicant has to show that the Share Certificate is a title deed and even if the argument is accepted there was no deposit of share certificate by the Insolvent as mandatorily required under Section 58(f) of the Transfer of Property Act, 1882. It is submitted that the Deed is

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silent on delivery of the share certificate and infact the share certificate was delivered by the insolvent only on 27th July 1995 pursuant to the sale of the flat which is evident from the letter dated 27th July 1995 sent by the Insolvent to the Society. According to her, the share certificate in respect of the said Flat was not deposited with the Applicant by the late Insolvent and his wife at the time of execution of Deed of Pledge and thus there was no mortgage by deposit of title deed as contended by the Applicant.

27 She submitted that the Applicant cannot claim possession under the Decree on Admission dated 3rd March 1998 as the Decree confirmed the AoS (Agreement dated 27th July 1995) despite the Order dated 6th September 1996 and while the said Flat was still under attachment. Thus the transfer of said Flat is void against the OA in view of Section 55 of the PTIA as it is within 2 years from the date of Order of Adjudication i.e. 14th December 1999.

28 She then relies on the Schedule of Assets and Liabilities filed in February 2001 whereunder the name of the Applicant is not mentioned as the creditor secured or unsecured. She submitted that the Applicant never executed the Decree till 14th December 1999 i.e. till the order of adjudication of insolvent or made any application for possession of the said Flat allegedly being a secured creditor till the year 2017. In fact by filing minutes dated 15th October 2019 the Applicant agreed that the said Flat has to be sold through the OA. Thus she submitted that the NM be dismissed with costs.

29 In rejoinder the Learned Senior Counsel Mr. Sen relied upon the judgement in the case of *Usha Arvind Dongre vs Suresh Ragunath Kotwal*²⁰ and in particular paragraph 12 which reads thus:

“12. It was submitted by Mr. Desai that “an interest in immovable property” in section 17 (1) (b) is wide enough to cover a right which arises by virtue of the ownership of shares in the Co-operative Society, to occupy a flat. In my view section 17 of the Registration Act which requires compulsory registration of certain documents, failing which documents cannot be looked at, requires to be strictly construed. Looking to section 41 of the Maharashtra Co-operative Societies Act, 1960 the intention was clearly to exclude transfer of shares in a Co-operative Society from the provisions of section 17 of the Registration Act. In the case of a tenant co-partnership housing society the title to the flat remains in the society and is not affected by the transfer of shares in the society. only the right to occupy a flat flows from the ownership of share in such a Co-operative Society. The shares, thereby do not become immovable property. A transfer of such shares does not require registration under section 17(1)(b). Even if the transfer of shares is considered as a transfer of interest in an immovable property, section 41 of the Maharashtra Co-operative Societies Act exempts the document effecting transfer of such shares from the ambit of section 17(1)(b) of the Registration Act.”

30 The Learned Senior Counsel also drew my attention to the Registration and other related laws (Amendment) Act 2001 which introduced the amendment inter alia to section 17 of the Registration Act, -- which reads thus

²⁰ (1990) 3 Bom CR 389; 1990 Mah LJ 306; (1989) 91 Bom LR 233; 1989 SCC OnLine Bom 284

*“3. In section 17 of the Registration Act, -
(a) after sub-section (1), the following sub-section shall be inserted, namely:-
“(1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882 shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A.”;
(b) in sub-section (2), in clause (v) for the opening words “any document”, the words, brackets, figure and letter “any document other than the documents specified in sub-section (1A)” shall be substituted.”*

31 The Learned Senior Counsel thus urged that the amendment of 2001 clearly substantiates that such agreements for transfer of flats in the co-operative society thus did not require registration at the given time and it was made compulsory only post the amendment in 2001. He submitted that the Applicant had also taken opinion of a law firm at the relevant time i.e. on 31st May 1993. This apart he drew my attention to a news article in Mid Day dated 24th February 1995 of a Justice K C Vajifdar (Retd) to substantiate his contention.

32 He lastly, submitted that the concessions sought to be agreed upon in the past since not acted upon are withdrawn as the OA was demanding a higher percentage of the sale price than was agreed upon by the Applicant. He submitted that the dues as on 30th June 2023 would anyways amount to ₹.25,35,62,360/- as against the value of the said Flat being around ₹.10,00,00,000/-.

33 I have heard both Counsel at length. Having examined all the papers and considered all arguments, I am unable to agree with the OA and am inclined to grant relief to the Applicant for the reasons that follow, I shall deal with the arguments of OA based on the reply and then the submissions on law

Conclusion

34 THE APPLICANT WAS NOT ENTITLED TO ENFORCE THE SECURITY TILL 30TH DECEMBER 1995 AS PER LINE 10 PAGE 5 OF THE DECREE DATED 23RD APRIL 1993

This argument is misconceived. The relevant portion extracted herein above makes it clear that the Claimant shall not enforce the mortgage until 30th December 1995. What is conveniently overlooked are the words *“unless there is any failure or neglect on the part of the Respondent to pay the Claimant any of the instalments specified in Schedule A annexed with the Award.”* Thus it appears that on account of inability to pay the judgement debtor agreed to hand over the mortgaged property to the Applicant (Judgement Creditor) prior to the date when the Applicant was entitled to enforce its claim. This Court cannot on the basis of conjectures and surmises come to a conclusion that the conduct of the insolvent was malafide. This plea by the OA in my view is ex facie unsustainable and thus rejected.

35 THE APPLICANT OBTAINED DOCUMENTS IN THE FACE OF PROHIBITORY ORDERS WITH AN INTENTION TO DEFEAT THE CLAIMS OF OTHER CREDITORS This argument though appears convincing has to be rejected as the OA has failed to produce any prohibitory orders save and except the order of this Court dated 6th September 1996 where

these statements were recorded and accepted. None of the claimants who are alleged to have taken prohibitory orders have challenged the decree or agreements entered into by the judgement debtor/Insolvent with the Applicant. Apart from a spacious plea, there is no documentary evidence before this court about the finality of the prohibitory orders purportedly obtained by parties and recorded in the order of 6th September 1996. Thus based on an interlocutory order without any final adjudication on the assertions and in the absence of the production of prohibitory orders merely on spacious pleas I cannot conclude that the AoS executed on failure of insolvent to pay the Applicant has to be ignored or treated to be void.

36 UPON DISMISSAL OF THE EXECUTION APPLICATION NO. 111 OF 1996 FOR WANT OF PROSECUTION THE CHAMBER SUMMONS BECAME INFRUCTUOUS

This submission is correct and it would mean that the attachment obtained by 'Nagarjuna' in the execution application has lapsed and thus the said Flat was free from attachment. It certainly does not favour the OA by any stretch of imagination. The Applicant's right and interest in the said Flat remains unaffected by the dismissal of the Execution Application.

37 THE APPLICANT HAS NOT LODGED ANY CLAIM WITH THE OA.

This contention too is misconceived since it is the case of the Applicant that he is a decree holder and a secured creditor. Besides he had in his favour an Agreement for sale of the said Flat. Hence he would be entitled to stand outside the insolvency

proceedings. Besides his claim stood satisfied by virtue of the execution of AoS in consequence to the Decree. He thus had no reason to lodge any claim before the OA who had been appointed much later on 14th December 1999 pursuant to the order of adjudication.

38 OA IS ENTITLED TO 50% OF THE SAID FLAT BEING THE SHARE OF THE INSOLVENT IN AS MUCH AS THE OTHER 50% IS ADMITTEDLY BELONGING TO THE WIFE.

In view of the reasons stated herein above this contention is misconceived. Pertinently, the wife has also granted her no objection to transfer the said Flat in the name of the Applicant. Hence her share also stands transferred to the Applicant.

39 BY VIRTUE OF SECTION 17 OF THE PTIA THE FLAT HAS VESTED WITH THE OA.

Section 17 reads thus:

“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 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.”

In the present case, this section will not be attracted for the simple reason that the Applicant had obtained a Decree prior to the OA being appointed and by virtue of the AoS and deposit of title deed had satisfied its decree. Thus it stood outside the bankruptcy proceedings wherein the judgement debtor was adjudicated insolvent only in December 1999.

40 THE APPLICANT CANNOT CLAIM POSSESSION UNDER THE DECREE ON ADMISSION DATED 3RD MARCH 1998.

This argument is based on Section 55 of the PTIA which reads thus:

“Any transfer of property, not being a transfer made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, shall, if the transferor is adjudged Insolvent within two years after the date of transfer, be void against the official assignee.”

It deserves to be rejected because the Decree on Admission was passed in a suit under Section 6 of the Specific Relief Act, 1963. It just vindicated the contention of the Applicant that it was in possession and the possession taken by the Insolvent was wrongful and deserved to be returned.

41 THE AGREEMENT FOR SALE DATED 27TH JULY 1995 IS INVALID OR VOID:

- a. FOR WANT OF NOC FROM THE SOCIETY.
- b. FOR WANT OF REGISTRATION

c. FOR WANT OF CONSIDERATION

d. THE ORDER DATED 6TH SEPTEMBER 1996 ATTAINED FINALITY

This Court at this stage certainly cannot go behind the decree as sought to be contended by the OA. This is not a proceeding for setting aside the Decree in favour of the Applicant. The OA has not brought on record any proceeding filed to set aside the Award or the Decree till date. It is thus impossible for the Court to ignore or dilute the effect or authenticity of such a Decree merely on conjectures and surmises. The Decree confirms the Award and thus the dues the debtor (insolvent) owed to the Applicant. These dues were the consideration for the AoS. The AoS was executed as the payments contemplated by the Decree were not or could not be complied with by the judgement debtor followed by a deposit of Share Certificate. Thus by virtue of the AoS the Decree stood satisfied for the Applicant. The contention of the OA is thus baseless; as non-granting of NOC by the Society does not vitiate the agreement itself between parties. A society is not entitled to withhold the NOC for any unjustifiable reasons. In my view the Applicant a decree holder had the 'right', 'title' and 'interest' in the said Flat. For the purpose of perfecting its title it is entitled to get the Agreement registered which it did not for several reasons as apparent above. It is inconceivable that the 'right', 'title' and 'interest' vested with the Applicant under the decree would become a nullity on account of the AoS not being registered. Besides registration of the Agreement even subsequently would have a retrospective effect. Thus the transfer of the said Flat by execution of AoS based on the

decree of this Court cannot stand nullified on account of want of NOC, registration or consideration as alleged. The Judgement Debtor/insolvent thus had no vesting right, title or interest in the suit flat for it to be considered his asset. Consequently the OA cannot withhold the possession of the said flat. With regard to the order attaining finality in my view this contention is baseless as it fails to take into account that it was a prima facie and interlocutory order. Presently, there are no prohibitory orders against the said Flat which have been brought to my attention by the OA.

42 I did raise a query before Ms Shah as well as Mr Sen that *“Whether anyone has produced the original Agreement for Sale of the said Flat to claim ownership rights of the Flat”*

the response was negative. In the past twenty eight years i.e. since 27th July 1995 neither the owners nor the society nor any creditor has produced the original Agreement for purchase of the said Flat. It is not the case of the OA that the Society’s other members have had an Agreement which copies are available with the Society. The only document which proves the ownership rights to the said Flat is the Share certificate. Though the share certificate was not handed over to the Applicant upon execution of the Pledge, the same was handed over at the time of execution of the Agreement for Sale (AoS) on 27th July 1995. There is nothing on record to disprove that the Share Certificate was submitted by the Applicant for transfer of the said Flat to the Society with its covering letter and all necessary documents. Thus, the OA would not have any locus to challenge the handing over of the Share Certificate to disprove the Pledge. It can at the highest caste a doubt.

43 It would be profitable to refer to the decision of the Apex Court in case of *Hill Properties Ltd. v Union Bank of India & Ors.*²¹ more particularly paragraphs 11, 13 and 16 where the Court observed that a flat on which equitable mortgage is created by deposit of share certificate can be transferred without permission of the society.

44 I agree with the contention that a secured creditor the Applicant would stand outside the Bankruptcy which contention is substantiated by an old English Judgement in the case of *White v Simmons*²² at pages 557 and 558. The Applicant would require to prove his debt only if the security held was insufficient. This is substantiated by the judgement in the case of *Chokkalinga Mudali v Manickka Mudali*²³ at page 743 which held thus:

“By reasons of the provisions of s. 47 the debt of a secured creditor is not provable until he has realised his security or has abandoned it or valued it. Until one of these events has happened there is no debt provable in the insolvency proceedings..”

“... If it has and there is a deficiency the balance of the debt constitutes a debt provable in the insolvency and s. 44 (2) will operate to cancel it....”

45 Further as a secured creditor the Applicant was entitled to sit upon his security for realisation of his dues which proposition is substantiated by the case of *Can Fin Homes Ltd. v A. Vittal Murthy & Ors.*²⁴

²¹ (2014) 1 SCC 635

²² (1871) 6 Ch. App. 555

²³ AIR (29) 1942 Mad 273

²⁴ AIR 2003 Karnataka 440 paragraphs 7 and 16

46 Thus the Applicant would perfect its title as an owner of the said Flat after registration. It is apparent from the decree followed by the AoS that it was certainly the intention of the judgment debtor/insolvent to clear its debt by transferring the ownership, right, title and interest in the said flat by handing over the Share Certificate(the only document of title available with the Judgement Debtor/insolvent in this case) to the Applicant around four years prior to the judgement debtor being adjudicated insolvent and the appointment of the OA. Thus the Applicant was a secured creditor holding a decree followed by an AoS satisfying the decree in terms of the debt. The Court cannot ignore the decree, nor the intention of parties in satisfaction of the decree by execution of the AoS and handing over the Share Certificate (being the only title document in possession of the judgement debtor/insolvent) along with the possession of the said Flat. It is not a case where the Applicant has partially paid, or the consideration adjusted towards the flat is insufficient (the Applicant had obtained the certificate from the Income tax as stated above) or is in adverse possession or is not in possession of title deeds in respect of the said flat or that there is any reciprocal obligation that is not complied with by the Applicant.

47 In view of the above, Mr Sen is right in contending and I am satisfied that the OA was not entitled to withhold the possession of the said Flat and was duty bound to hand over the same to the Applicant.

48 For the aforesaid reasons, I pass the following order-

- a. The Notice of Motion is made absolute in terms of prayer clause (a);
- b. The Official Assignee's report is rejected.
- c. The Official Assignee shall hand over vacant and peaceful possession of the said Flat within a period of two weeks from the date of this Order;
- d. No order as to costs.
- e. Notice of Motion No. 12 of 2021 is disposed of as infructuous in view of the order in Notice of Motion No. 17 of 2017.

49 All concerned to act on the authenticated copy of this order.

[KAMAL KHATA, J]

At this stage, Ms. Shah learned counsel for the OA prays for stay of this order for a period of eight weeks. The same is rejected since the Applicant has been waiting for fruits of his decree since 1995.

[KAMAL KHATA, J]