
(2016) 05 CAL CK 0056
In the Calcutta High Court

Case No : Writ Petition No. 493 of 2011 with G.A. No. 2776 of 2012

Angel Distribution Co. Pvt. Ltd.

APPELLANT

Vs

Kotak Mahindra Bank Ltd.

RESPONDENT

Date of Decision : 20-05-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2016) 165 AIC 288

Hon'ble Judges : Sudip Ahluwalia, J.

Bench : Single Bench

Advocate : Mr. Sakya Sen, Mr. Sukrit Mukherjee and Reshmi Ghosh, Advocates, for the Petitioners; Mr. Sudeb Deb, Mr. A.K. Gandhi and Mr. B. Ghosh, Advocates, for the Respondents

Final Decision : Dismissed

Judgement

Sudip Ahluwalia, J.—The writ petition was originally filed seeking the following principal relief:-

"(a) A writ of or in the nature of Mandamus do issued commanding the respondents to forthwith take steps for release of and/or handing over the Flat No. A-1 belonging to the petitioners to them without any undue delay."

2. It was dismissed by the Hon'ble Justice Jayanta Kumar Biswas (as His Lordship then was) originally on 5th May, 2011. An appeal was thereafter preferred by the writ petitioner which was allowed by a Division Bench of this Court vide a judgement passed on 8th June, 2011. It was directed therein-

"His Lordship (that is the Trial Court) shall take decision independently. This Court only has settled the issue on consent of the parties in this matter on the question of alternative remedy and not otherwise."

It is agreed by the parties that the observations recorded in our order on the question of alternative remedy are acceptable in this case only."

3. It is therefore clear that the above observations by the learned Appellate Court were made in the context of the fact that the writ petition was originally dismissed without even the affidavit-in-opposition having been filed by the respondents simply on the ground of existence of the alternative remedy. Therefore, in essence the direction of the Ld. Appellate Court was to allow the respondents to file their affidavit-in-opposition and to decide the matter on merits after completion of the pleadings. Subsequently, the respondents have also filed this application praying for dismissal of the writ petition on the ground of its alleged non-maintainability.

4. It is submitted on behalf of the writ petitioners that the disputed part of the properties described as "Secured Asset" the respondent bank happens to be a Ground Floor Flat for which the title is of the Company itself and not that of its Director in his personal capacity. As such there cannot be any scope of conveying the property in question lawfully by the Petitioner no. 2, if done in his private capacity. The back ground of the matter as narrated/summarised by the Writ Petitioners in their written notes of arguments is as follows:-

"1. The petitioner no. 1 company obtained a sub-lease for a term of 99 years in respect of flat no. A1 located in the ground floor of AB Block in the building known as Gopal Bhavan situated at 43, Kailash Bose Street, Kolkata-700 006 from one Mahesh Properties Limited by a registered deed dated October 11, 1999. [Annexure P1 to the writ petition at pages 25 to 64]

2. In or about April 2007 M/s. Mitra Brothers, the respondent No. 3 herein, entered into talks with Kotak Mahindra Bank, the respondent no. 1, for the purpose of obtaining financial assistance.

3. Initially the petitioner no. 2 had offered to stand as surety against the loan to be sanctioned by the respondent no. 3 bank and the petitioner no. 1 had offered to secure the loan by way of an equitable mortgage of the leasehold rights in respect of the above mentioned flat. At the time, in or about June-July, 2007 a few documents including a deed of personal guarantee dated July 19, 2007 executed by the petitioner no. 2 had been signed and made over to the respondent no. 3.

4. However, since the respondent bank was delaying disbursement of the loan, the respondent no. 3 firm decided not to transfer the loan account from UTI Bank. In the above backdrop, most of the original documents that had previously been executed for the purpose of having the loan account transferred including inter alia the deed of personal guarantee dated July 19, 2007 were returned by the respondent bank to the petitioners. The original registered deed of sub-lease dated October 11, 2007 and the original deed of personal guarantee signed by the petitioner no. 2 on July 19, 2007 are lying and have at all material times been in the custody of the petitioners. [Photocopy of the original deed of personal guarantee dated July 19, 2007 is Annexure B to the affidavit in reply at pages 19 to 27]

5. By way of a notice dated May 20, 2009 addressed only to the respondent no. 3 firm and its partners, with a copy marked to the petitioner no. 2, the respondent bank purported to invoke the provisions of Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. [Annexure P-2 to the writ petition at pages 65 to 72 thereof]

6. On January 24, 2011 the respondent bank illegally and forcibly took possession of the flat in question from the petitioner no. 1 with the assistance of police force.

7. The instant application was thereafter filed challenging the arbitrary, illegal and wrongful manner in which the respondent bank had purported to invoke the provisions of the Act of 2002."

5. It is therefore the contention that no action lies in relation to that particular property since it could not have been conveyed by the Director in his private capacity. It may be mentioned here that the writ petitioner no. 1 is the company itself while the writ petitioner no. 2 is Mr. Ahim Mitra, its Director who according to the bank had placed the disputed premises as a "Secured Asset" ostensibly as Guarantor for the respondent No. 3 namely "M/s. Mitra Brothers", a Partnership firm of which his own two sons are the partners. It is also the contention that in any case no such original deed sub-lease was delivered by the petitioner no. 1 to the bank authorities, and so, any document in that regard relied upon or in possession of the authorities would be forged and fictitious.

6. On the other hand it has been asserted on behalf of the respondent bank that -

"?(a) The original registered deed of sub-lease dated October 11, 1999 is in its custody;

(b) the petitioner no. 2 had executed several documents in relation to the loan in question including a deed of personal guarantee dated July 31, 2007 [Annexure B at pages 27 to 34 of the Affidavit in Opposition];

(c) the partners of the respondent no. 3 firm had created an equitable mortgage in respect of the flat in question by depositing an original registered deed of gift dated June 5, 2002 executed by the petitioner no. 2 in favour of the two partners of the respondent no. 3 firm [Annexure C at pages 38 to 44 of the Affidavit in Opposition] and further by executing a memorandum of deposit of title deeds on September 15, 2007 [Annexure D appearing at pages 109 to 113 of the Affidavit in Opposition]?"

7. It is the assertion of the writ petitioners that the writ petitioner no. 1 namely the Company is not bound by the private act of its director in relation to the disputed property and that even assuming that any such mortgage was created, the bank itself should not have accepted the same without satisfying itself about the Director's title and authority to do so in terms of Section 41 of the Transfer of Property Act. In support of these contentions the writ petitioners have also referred to some citations.

8. In "V.E.R.M.A.R Chettyar Firm v. Ma Joo Teen and Ors." (AIR 1933 Rangoon 299) the Division Bench considered the question of whether tax receipts could be regarded as documents of title or title deeds and arrived at the conclusion that it was only documents which emphatically established prima facie or apparent Title to the property in the depositor that could be regarded as documents of Title deeds and none other.

9. In "Bank of India v. Abhay D. Narottam and Ors." reported at (2005) 11 SCC 520, the Supreme Court, considering the question of whether a charge in respect of a property could be created by deposit of an agreement for sale by the agreement holder, had referred to the definition of the expression "mortgage" as contained in section 58(a), and held that without a transfer of interest there arose no question of there being a mortgage. It was observed therein-

"No interest was created in favour of Respondent 2 by virtue of this agreement for sale which could have been transferred by way of security to the appellant Bank. There is as such no question of the appellant Bank having any charge over such non-existent interest."

10. Thus according to the petitioners, "???The qualification aforesaid is implicit in section 58(f) of the said Act and any construction otherwise would lead to anomalous consequences. For instance, a person could, by resorting to wrongful and illegal means or by practising fraud and/or deceit, obtain the original title documents in respect of an immovable property belonging to another over which such person has no right, title or interest whatsoever and could thereafter proceed to deliver the same to one of his creditors for the purpose of creating an equitable mortgage. In such a case it would be absurd to suggest that by dint of Section 58(f) of the Act of 1882, an equitable mortgage in respect of such immovable property has been created??"

11. On the other hand the assertion of the respondent is that undoubtedly the property in question was mortgaged by none other than the petitioner no. 2 himself and there is no forgery in any of the documents. It is also asserted that the representation made by the petitioner no. 2 who had chosen to stand guarantor for the partnership firms of his own two sons was to the effect that he was competent to pledge the disputed flat which has been treated as the "Secured Asset" and he can now not retract from his own conduct/representation of being the ostensible owner of the disputed premises, since in any case even according to the cause title of the writ petition, he alone is the Director of the petitioner Company, and therefore fully liable to face consequence of his action. In addition the respondent bank has also made reference to certain decisions regarding the liability of borrowers and/or guarantors in relation to banking transaction or to be loans.

12. In "State of Madhya Pradesh and Ors. v. M.V. Vyavsaaya and Company" [(1997) 1 SCC 156] it was held -

"15. - It has been repeatedly held by this Court that the power of the High Court

Under Article 226 of the Constitution is not akin to appellate power. It is a supervisory power. While exercising this power, the Court does not go into the merits of the decision taken by the authorities concerned but only ensures that the decision is arrived at in accordance with the procedure prescribed by law and in accordance with the principles of natural justice wherever applicable. Further, where there are disputed questions of fact, the High Court does not normally go into or adjudicate upon the disputed questions of fact. Yet another principle which has been repeatedly affirmed by this Court is that a person who solemnly enters into a contract cannot be allowed to wriggle out of it by resorting to Article 226 of the Constitution. This Court has also repeatedly emphasised the inadvisability of making interim orders which have the effect of depriving the State (the people of the State) of the revenues legitimately due to it. The Court should not take upon itself the responsibility of staying the recovery of amounts due to State unless a clear case of illegality is made out and the balance of convenience is duly considered. Otherwise, the odium of unlawfully depriving the State/the people of the monies lawfully due to it/them would lie upon the Court.

"17. A Constitution Bench of this Court held in *Har Shankar v. Deputy Excise and Taxation Commr.* (1975) 1 SCC 737 : AIR 1975 SC 1121, that "the writ jurisdiction of High Courts Under Article 226 of the Constitution is not intended to facilitate avoidance of obligations voluntarily incurred." Of course, where there is a statutory violation, interference would be permissible even in the case of a contract but not where the relevant facts are disputed and which dispute calls for an elaborate enquiry which cannot be conveniently done by the High Court in a writ petition."

13. In "*United Bank of India v. Satyawati Tondon and Ors.*" (2010) 8 SCC 110, it was observed -

"45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.

46. It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizen. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out in *Baburam Prakash Chandra Maheshwari v.*

Antarim Zila Parishad (AIR 1969 SC 556), Whirlpool Corpn. v. Registrar of Trade Marks ((1998) 8 SCC 1) and Harbanslal Sahnia v. Indian Oil Corpn Ltd ((2003) 2 SCC 107) and some other judgments, then the High Court may, after considering all the relevant parameters and public interest pass an appropriate interim order?.

55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continuing to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."

14. In "Kanaiyalal Lalchand Sachdev and Ors. v. State of Maharashtra and Ors." [(2011) 2 SCC 782] it was held -

"22. We are in respectful agreement with the above enunciation of law on the point. It is manifest that an action under Section 14 of the Act constitutes an action taken after the stage of Section 13(4), and therefore, the same would fall within the ambit of Section 17(1) of the Act. Thus, the Act itself contemplates an efficacious remedy for the borrower or any person affected by an action under Section 13(4) of the Act, by providing for an appeal before the DRT. "

"23. In our opinion, therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the Appellants under Section 17 of the Act. It is well-settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person. (See: Sadhana Lodh v. National Insurance Co. Ltd. and anr., (2003) 3 SCC 524; Surya Dev Rai v. Ram Chander Rai and Ors., (2003) 6 SCC 675; State Bank of India v. Allied Chemical Laboratories and anr. (2006) 9 SCC 252). "

15. In "Juggi Lal Kamalapat v. Commissioner of Income Tax, U.P." [AIR 1969 SC 932] the Apex Court had gone on to observe -

"7. ??It is true that from juristic point of view the company is a legal personality entirely distinct from its members and the company is capable of enjoying rights and being subjected to duties which are not the same as those enjoyed or borne by its members. But in certain exceptional cases the Court is entitled to lift the veil of corporate entity and to pay regard to the economic realities behind the legal facade. For example, the Court has power to disregard the corporate entity if it is used for tax evasion or to circumvent tax obligation or to perpetrate fraud.

16. Similarly in "Dalip Singh v. State of U.P. and Ors." (2010) 2 SCC 114, the Supreme Court made these scathing comments -

"2. In last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the

challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final. "

17. In "S. Chatterjee v. Dr. K.L. Bhawe and Ors." [AIR 1960 MP 323], it was observed -

"6. The principles on which damages for the form of tort known as "deceit" are awarded, are thus stated by Lord Herschell L.C. in *Derry v. Peek* (1889) AC 337:

"I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And, this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

"7. The principle, thus stated, applied to "actual" fraud as opposed to constructive fraud, and, in the instant case, we are concerned with actual fraud, a conscious misrepresentation, as understood in (1889) AC 337 (supra), as we shall presently show."

18. In "R.N. Gosain v. Yashpal Dhir" [(1992) 4 SCC 683], the Apex Court held -

"10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage".

19. The assertion of the writ petitioner is that firstly the original deed of sub-lease was never delivered to the respondent bank and any such document in its possession is forged or fabricated. The petitioners have however not placed on record any document or cogent material/report to prove such alleged fraud even though it was mentioned from their side that the Police had investigated the matter and had apparently reported that the documents relied upon by the bank are forged or fraudulent. On the contrary, the Respondent/Bank has placed on record an Online Search Report of the records of the Petitioner Company in relation to its immovable properties, which is Annexure ?L? to its Affidavit-in-

opposition. The same reveals that the Balance Sheet Filed by the petitioner company with the Ministry of Corporate Affairs did not show any immovable property as the fixed assets for 3 consecutive financial years been 2007-08 to 2009-10. In the given circumstances this factual assertion raised on behalf of the petitioners is found to be untenable.

20. The alternative contention raised on their behalf to the effect that any document executed by the petitioner no. 2 (Director) in his personal capacity does not bind the Company is also unconvincing in view of the highlighted observations of the Supreme Court in "Juggi Lal Kamalapat v. Commissioner of Income Tax, U.P." and "Dalip Singh v. State of U.P." (supra). In essence, the petitioner no. 2 is trying to both approbate and reprobate by on the one hand purporting to stand as Guarantor for the loan of his sons? Partnership Firm, and then denying any liability by contending that the property mortgaged does not belong to him but to the Company, of which he appears to be the sole Director according to the Cause Title of the Writ petition.

21. Such conduct of the petitioners is not appreciable. They have clearly not come before this Court with clean hands and are therefore not entitled to the relief prayed for.

22. For the aforesaid reasons the writ petition is dismissed.