
(2007) 02 BOM CK 0060

In the Bombay High Court

Case No : Judges Order No. 494 of 2006 in Arbitration Petition No's. 66 and 242 of 2005 and Chamber Summons No. 530 of 2005 and Chamber Summons No. 124 of 2007 in Execution Application No. 425 of 2005 in Arbitration Petition No. 162 of 2002

Angerlehner Michel Construction Pvt. Ltd. and The Ambajogai Peoples Co-operative bank Ltd. APPELLANT

Vs

Shrimouli Builders and Bangalore Water Supply And Sewerage Board
 L and T Finance Ltd. Vs Shrimouli Builders Proprietor Mr. K.P. Reddy, Krishna Valley Development Corpn. and Angerlehner Michel Construction Pvt. Ltd. RESPONDENT

Date of Decision : 15-02-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 46, Order 38 Rule 10, Order 38 Rule 5
Maharashtra Co-operative Societies Act, 1960 — Section 156, 156(1)
Maharashtra Co-operative Societies Rules, 1961 — Rule 107, 107, 107(4)

Citation : (2007) 2 ARBLR 553 : (2007) 2 BomCR 815

Hon'ble Judges : Roshan Dalvi, J

Bench : Single Bench

Advocate : Virag Tulzapurkar and F. Dubash, instructed by Munir Merchant, in Judges Order No. 494 of 2006 in Arbitration Petition Nos. 66 and 242 of 2005, Navin Parekh and Sheetal Shah, instructed by Mehta and Girdharlal, in Judges Order No. 494 of 2006 and Shakuntala Joshi, for Decree Holder in SCN 830 of 2006 and in Chamber Summons No. 830 of 2005 and Chamber Summons No. 124 of 2007, for the Appellant; Kishore Jain and Shweta Shetty Advs., instructed by Tushar Goradia, in Judges Order No. 494 of 2006 in Arbitration Petition Nos. 66 and 242 of 2005, Virag Tulzapurkar and F. Dubash Advs., instructed by Munir Merchant, in Chamber Summons No. 530 of 2005 and Chamber Summons No. 124 of 2007 in Execution Application No. 425 of 2005 in Arbitration Petition No. 162 of 2002, Amit Kharkhanis in Chamber Summons No. 530 of 2005 and Chamber Summons No. 124 of 2007 in Execution Application No. 425 of 2005 in Arbitration Petition No. 162 of 2002 and Prashant Kadam Advocate, instructed by Vijay Patil, in Chamber Summons No. 530 of 2005 and Chamber Summons No. 124 of 2007 in Execution Application No. 425 of 2005 in Arbitration Petition No. 162 of 2002, for the Respondent

Judgement

Roshan Dalvi, J.—The Applicant in the aforesaid Judges Order has obtained a Recovery Certificate for Rs. 40979406 against the first Respondents in the Arbitration Petitions in which the Judges Order is taken out against the Respondents therein. The claimants in the aforesaid Chamber Summons have obtained an Arbitration Award for Rs. 9161727.42ps. In Arbitration Petition in which the Chamber Summons is taken out against the Respondents therein. The first Respondents in both of the aforesaid Arbitration Petitions are one Shreemauli Builders represented by their Proprietor Mr. K.P. Reddy. Arbitration Petition Nos. 242 of 2005 and 66 of 2005 are pending. By an interim order passed in this Arbitration Petition Nos. 242 and 66 of 2005 one Bangalore Water Supply has been directed to deposit Rs. 2.12 Crores. That amount is stated to have been deposited in this Court to the credit of those Arbitration Petitions. The Applicant in the Judges Order desires to attach and take the amount so deposited in satisfaction of the Recovery Certificate issued by the Recovery Officer of the Co-operative Court. Similarly the claimants in the Chamber Summons who are the plaintiffs/Petitioners in the Arbitration Petition No. 162 of 2002 who have obtained an Award seek to attach and take the amounts for which the Award is obtained by them from the amount so deposited. The Petitioners in Arbitration Petitions 242 of 2005 and 66 of 2005, who are the 3rd Respondents in Chamber Summons Nos.530 of 2005 and 124 of 2007, have shown cause against the applications of both of these parties for satisfying their respective claims under the Recovery Certificate or the Arbitration Award.

2. Each party claims priority in the payments of the amount under the Arbitral Award, Recovery Certificate or the amounts deposited in the Arbitration Petitions 242 of 2005 and 66 of 2005. Each party also claims to exclude all other parties entirely from any ratable distribution of the said amount. It will, therefore, have to be seen as to whether all the aforesaid parties or some or one of them are/is entitled to the said sum of Rs. 2.12 Crores.

3. Mr. Tulzapurkar on behalf of the Petitioners in Arbitration Petitions 242 of 2005 and 66 of 2005 contended that upon an application made u/s 9(b) of the Arbitration and Conciliation Act, 1996 read with Order 38 Rule 5 of the CPC for attachment before judgment of the dues payable to the Defendant/Respondent Shreemauli Builders in their Petition Bangalore Water Supply (now made Garnishee in the aforesaid Chamber Summons) was directed to deposit Rs. 2.12 Crores to the credit of those Petitions. The amount deposited by the Garnishee was therefore, an attachment made by the Petitioners in those Petitions before an Award in those Petitions came to be filed. At the highest, therefore, this was the movable property which was attached before judgment under Order 38 Rule 5 of the CPC. Mr. Tulzapurkar contends that this amount is earmarked for the Petitioners' benefit. It is made to secure the claim of the Petitioners unless no Award came to be passed in favour of the Petitioners. The Petitioners in those Petitions would therefore have priority over the other creditors for whom such

amount was not secured. What is missed in this argument is that the amount secured even as an attachment before judgment under Order 38 Rule 5 of the CPC is subject to the rights of other Decree Holders under Order 38 Rule 10 of the CPC. The said Rule runs thus:

10. Attachment before Judgment not to affect rights of strangers, nor bar decree-holder from applying for sale - Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.

4. Consequently it will not affect the rights such as those of the Petitioners in Arbitration Petition No. 162 of 2002 or the Applicant Bank in Judges Order No. 494 of 2006 merely by such deposit, unless of course, due to certain other legal requirements they would be otherwise barred from claiming that amount.

5. There is lot of substance in the contention of Ms. Joshi that the amount deposited to the credit of the suit was not saved for the Petitioners in that Arbitration Petition alone because they were not the secured creditors and had no charge upon such an amount. It was only secured as against the Respondents in that Petition. Consequently the Respondents in that Petition could not otherwise deal with it or appropriate it. However, all the amounts of the Respondents who are the Judgment Debtors can be recovered by the Decree Holder/Award Holder in execution of the decree or the award obtained by them. They are subject to the rights of other creditors. Hence, the purpose of passing an interim order by the Court u/s 9 of the Arbitration and Conciliation Act, 1996 is inter alia for "Securing the amount in dispute in the Arbitration" under Sub Rule (b) of the aforesaid Section. This security is in the Arbitration dispute. This security is therefore, for the parties to that dispute. It does not offer security as against any other decree holders seeking to execute their decrees/awards. Such security of amount u/s 9(b) of the aforesaid Act would also, therefore, at best be on par with an attachment before judgment as against other decree holders as per the provisions of Order 38 Rule 10 of the CPC.

6. Mr. Tulzapurkar drew my attention to the judgment in the case of Roshanlal Kuthalia and Others Vs. R.B. Mohan Singh Oberoi, in which a decree obtained by an Indian National in Pakistan could not be treated as evacuee property upon partition and was held to be lying in trust for payment to him and no other person. Mr. Tulzapurkar specifically referred to para 33 of that judgment in which the amount was held to be specifically earmarked for the discharge of decree entitling him to claim that amount to be transferred to India. In para 37 of that judgment it has been observed that mere security deposit does not become an automatic satisfaction of the decree when the appeal fails, but when the judgment debtor has paid into court cash by way of security conditioned by its being made available to discharge the decree on disposal of the appeal and the Judgment Debtor had no objection to it being paid to the Decree Holder upon succeeding in the Appeal, the Decree Holder came to be entitled to that sum as

the Court held the deposit in that for the decree holder who is at liberty to realise it. This Judgment specifically observed that such a view was warranted for upholding the equity set up by the Appellant/Decree Holder. Consequently the consequences of partition was held not to disadvantage the Judgment Debtor since in India such equity was implicit in the law relating to satisfaction of decrees. It must be remembered that the judgment upheld the claim of the Appellant who was the Decree Holder. It was not only a claim of monies lying credited to the Petition whilst it was pending. Besides the contest was only between the Indian Decree Holder and an evacuee. It was further observed that the withdraw ability of only the Decree holder upon the amount being transferred from Pakistan to India was on principles of justice and good conscience. It was not so given to the Decree Holder to the exclusion of another Decree Holder. It was also not security against the claims of another Decree Holder. The principle enunciated in that judgment is, therefore, entirely on a different pedestal and cannot be made applicable to the case hit by Order 38 Rule 10 of the CPC.

7. Mr. Tulzapurkar also referred to the case of Chowthmull Maganmull v. The Calcutta Wheat and Seeds Association LI ILR, Cal 1010 which was the case of stay of the execution obtained by the Judgment Debtor on depositing to the credit of the suit the decretal amount. The Judgment Debtor was adjudicated insolvent. The appeal was dismissed. The Decree Holder was held entitled to be paid the entire amount to the exclusion of the Official Assignee. Even this case assumes a completely different colour. Since the amount was lying to the credit of the Suit in appeal, the amount can be simplicitor appropriated by the Respondent in the appeal upon the appeal being dismissed. That was only when the appeal came to an end. Had any other Decree Holder obtained the decree pending that appeal, he could have claimed the amount which was deposited to the credit of that suit prorata with the Decree Holder in that case. The Official Assignee merely represented the estate of the insolvent. He would gather the claims of the creditors who would then be paid prorata. At the time of the dismissal of the Appeal no such creditor's claims of any liquidated amount were brought before that Court. Hence, the claim of the Decree Holder, who was the only Decree Holder at the relevant time, had to be paid off and not kept in abeyance for the Official Assignee to distribute it in future. The case of the Petitioners in Arbitration Petition Nos. 242 and 66 of 2005 is the reverse. Whereas the Petitioners in Arbitration Petition No. 162 of 2002 have obtained an Award, the Petitioners in Arbitration Petitions 242 and 66 of 2005 have not. That amount is, therefore, open to the Decree Holder to attach in execution of that Decree.

8. Another judgment which is also based on entirely different facts is the case of Rango Ramchandra Kulkarni v. Gurlingappa Chinnappa muthal (28) AIR 1941 Bombay, 198. It considers the claims of the Decree Holder who has attached the immovable property vis a vis the Judgment Debtor who agreed to sell the property before attachment was levied and sold it by conveyance after the attachment. Since the attachment does not confer any title in or create a charge

over the properties but merely keeps it in custodia legis and prevents its alienation in certain cases, it is subject to pre-existing rights. It has to be seen what are the pre-existing rights in this case. The right created in favour of the Petitioners in Petitions 242 and 66 of 2005 are for securing the amount in the dispute in the Arbitration. The pre-existing right is not a charge on the property. The decree Holder being the Petitioner in Arbitration Petition No. 162 of 2002 can therefore, claim it along with the Petitioners in Arbitration Petitions 242 and 66 of 2005, pursuant to the decree obtained by them. The Respondents in this Petitions being Shreemauli Builders would have no right to claim it unless the Arbitration Petition is dismissed. If the Petition is dismissed, in the absence of other valid claim, the Petitioners in Arbitration Petition No. 162 of 2002 would be entitled to it along with the Respondents in that Petition. If the Arbitration Petition succeeds the amount so secured would be available to the Petitioners in those Petitions prorata along with the claims of the other Decree Holders. It is therefore, merely an amount which represents the assets of the Judgment Debtor just as any other assets. It would be used for the satisfaction of the claims of a single Decree Holder or prorate the claims of a number of Decree Holders. Since at present the Petitioners in Arbitration Petitions Nos. 242 and 66 of 2005 have not obtained the Award they cannot claim that amount prorata. Since the Petitioners in Arbitration Petition No. 162 of 2002 have already obtained the Award, the Award must be satisfied from the assets of the Judgment Debtor. One such asset is the amount lying to the credit of the Arbitration Petitions pending against them.

9. The claim of the Applicant in the Judges Order No. 494 of 2006 which is a Co-operative bank is rather different. The Bank has obtained a Recovery Certificate issued by the Assistant Registrar, Co-operative Societies, Taluka: Ambejogai, Dist: Bheed in, what is shown to be, a Recovery Certification application without number. The Judgment Debtors shown as Respondents in the Recovery Certificate who are also Respondents in the aforesaid two Arbitration Petitions agree to the amount being paid to the Bank in full and final settlement of the loan account of the sole proprietor of the Respondents as well as his wife. Though the Recovery Certificate is indeed final and binding as against the Respondents in the Co-operative Court proceedings who are the Judgment Debtors therein, it is not binding qua strangers and other Decree Holders if it is obtained by fraud or collusion, thus nullifying the Recovery Certificate. The Petitioners in Arbitration Petition No. s242 and 66 of 2005 have challenged the Recovery Certificate. Consequently the Bank has filed an affidavit showing the loan account of the Proprietor of the Judgment Debtor, Shreemauli Builders, the proceedings resulting in the Recovery Certificate, the membership Certificate of the Judgment Debtor in the Cooperative Bank, the applications made for loan account, the Guarantee given for its repayment, the disbursement of the loan and the execution of various documents thereupon as well as the loan account of the Proprietor of the Judgment Debtors.

10. Mr. Tulzapurkar argued that these documents themselves show that the

Recovery Certificate is obtained fraudulently and collusively and, therefore, is nullified and cannot be executed. The Membership Certificate of the Proprietor of the Judgment Debtor shows his address C/o. one of the Directors of the Bank Mr. R.K. Modi. The Guarantor is shown to be the brother of one of the Directors of the bank, one B.K.Modi. The application for loan is yet un-numbered. The Applicants particulars are all left blank. The Guarantee is for Rs. 40 Lakhs. The yearly income of the Guarantor B.K.Modi is only Rs. 1.25 Lakhs. The yearly income of the other guarantor is only Rs. 25 thousand. Yet the loan granted is of Rs. 35 Lakhs as per the opinion of the Bank Loan Committee arrived at in the Managing Committee Meeting of the Bank. 3 Promissory Notes are seen to be executed by the Judgment Debtor one for Rs. 35 Lakhs which is towards the initial loan sanctioned to him and the other 2 promissory notes for Rs. 1 Crore and yet another for Rs. 1,15,00,000/- (one crore fifteen lakhs) in both of which there is no provision for the interest payable. Mr. Tulzapurkar laboriously showed various entries in the loan account which shows it to be continuously heavily overdrawn after providing the limits of Rs. 35 Lakhs of credit. The dates of the execution of the Promissory Notes for Rs. 1 Crore and 1.15 Crores do not fit into the said account. The Promissory Note of Rs. 1 Crore was executed on 26th June, 2001. There is a credit entry of Rs. 55.67 Lakhs on that date in the Loan Account of the Judgment Debtor bringing down the overdrawn balance of Rs. 79.96 Lakhs to Rs. 24.29 Lakhs. This has no bearing upon the execution of the Promissory Note for the amount of Rs. 1 Crore. Similarly the Promissory Note of 1.15 Crores is dated 20th July, 2001. There is no entry in the loan account of that date. The overdrawn balance on the next date is Rs. 1.31 Crores. A cash credit of Rs. 45 Lakhs has been made into the account on 31 st March, 2004 which is the largest single cash entry hitherto unexplained. The Recovery Certificate is atleast prima-facie shown to be obtained fraudulently and in collusion with the Judgment Debtor.

11. Mr. Parekh on behalf of the bank argued that the Recovery Certificate represents the amount granted by the Registrar u/s 156(1)(c) of the Maharashtra Cooperative Societies Act. Consequently the procedure for attachment and sale of the property u/s 156 has to be followed by the Bank. Rule 107 of the Maharashtra Co-operative Societies Rules, 1967 lays down the procedure for attachment and sale of the property u/s 156. It contemplates an application to be made before the Registry followed by the execution to be taken against the movable and the immovable properties of the defaulter/Judgment Debtor. No such application has been made. Ms. Joshi contends that an application in execution for attaching the amount standing to the credit of the Arbitration Petitions being movable property cannot be made by a Judges Order. It has to be made by an Execution Application following the procedure laid down in Rule 107 of the Maharashtra Cooperative Societies Rules, 1961. She contends that the practice of signing the Judges Order are for ministerial acts in furtherance of orders passed and not for determining the rights of contesting parties. In fact the practice of signing the Judges Order, for which there no provision in the High

Court Rules, has been frowned upon by this Court in the case of Maritime Association of Ship owners, Ship Managers v. Mackinnon Mackenzie & Co. Ltd, 2002 (5) BCR 14, though the practice of signing the Judges Orders has continued under Rule 988 of the High Court Rules as the practice always followed. The Rules do not lay down that for determination of the final rights of the parties who are claimants against the single Judgment Debtor also a Judges Order would suffice.

12. Mr. Parekh on behalf of the Bank contended that no Execution Application is required to be taken out for attachment or sale of the amount claimed by the Bank under the proviso to Rule 107. That proviso is applicable only for special cases and is inapplicable for the present case. Rule 107 (4) of the Maharashtra Co-operative Societies Rules, 1961 provides for the procedure for execution which has not been followed. Consequently the provisions of Section 156 of the Co-operative Societies Act, 1960 requiring the satisfaction of the Certificate by attachment and sale of the property of the person against whom the certificate is obtained has also not been followed.

13. Mr. Parekh relied upon the judgment in the case of Allahabad Bank Vs. Canara Bank and Another, which is a case under Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDB Act). The tribunal under the RDB Act issued a Certificate to the Recovery Officer for recovery of the debt specified in the Certificate. It is held that the jurisdiction of the Recovery Officer under the RDB Act is exclusive. There is no dual jurisdiction at different stages contemplated for execution. The Recovery Certificate is within the exclusive jurisdiction of the Tribunal and the Civil Court cannot go into the questions relating to the liability and the recovery except as provided in the RDB Act. In our case the Recovery Certificate is of the Assistant Registrar under the Co-operative Societies Act. The procedure laid down under the rules framed under the Co operative Societies Act would have to be followed. Those Rules are not followed in Execution. The Rules do not contemplate taking out a Judges Order simplicitor. Hence, the Judges Order cannot be signed.

14. I may mention that both, the aforesaid Bank being Ambajogai Peoples Co-op. Bank Limited the Applicant in the Judges Order as well as the Petitioner in Petition No. 162 of 2002 who has obtained the Arbitral Award whose applications have been resisted by the Petitioners in Arbitration Petition No. 242 and 66 of 2005 have been heard together in the interest of justice and to determine all the claims with regard to a single debtor together.

15. The Petitioner in Arbitration Petition No. 162 of 2002 who is seeking to execute the arbitral award in the Execution Application No. 425 of 2005 deserves to be paid the amount lying to the credit of the Arbitration Petition Nos.242 and 66 of 2005 which is a debit attached under Order 21 Rule 46 and paid by the Garnishee, Bangalore Water Supply and Sewerage Board.

16. Consequently Chamber Summons No. 530 of 2005 is made absolute in terms

of prayer (a).

17. The Judges Order No. 494 of 2006 is not signed.

18. The Chamber Summons No. 124 of 2007 is made absolute in terms of prayer Clauses (a) and (b).

19. The Petitioners in Arbitration Petition No. 162 of 2002 shall be entitled to withdraw Rs. 9161727.42 as shown in their Execution Application No. 425 of 2005.

20. The remaining amount shall remain credited to Petition Nos. 242 and 66 of 2005 until those Petitions are disposed of and until further orders in the Arbitral Proceedings.

21. The Judgment Debtor being the Respondent in both the aforesaid Arbitration Petitions have sought to provide particulars of their assets as per prayer (b) to Chamber Summons No. 530 of 2005. The Applicant's Advocate contends that the particulars are not sufficient. The Judgment Debtors have provided the balance sheets but not the Income Tax returns despite assurance by the Advocate appearing for them in Chamber Summons No. 530 of 2005. The Judgment Debtors, Shreemauli Construction shall provide copies of their income tax returns certified by their Advocates as true to the Petitioners in Arbitration Petition No. 162 of 2002 within 2 weeks from today failing which Chamber Summons No. 530 of 2005 is made absolute in terms of prayer Clause (c).

22. No order as to costs.

23. This order is stayed for 2 weeks.