

(2011) 10 BOM CK 0111
In the Bombay High Court
Case No : Writ Petition No. 277 of 2011

Central Bank of India

APPELLANT

Vs

Cirilo Vales and Vijay Kumar Mehta

RESPONDENT

Date of Decision : 20-10-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, Order 21 Rule 59, Order 38 Rule 5

Citation : (2012) 2 BomCR 145 : (2012) 1 MhLj 367

Hon'ble Judges : F.M. Reis, J

Bench : Single Bench

Advocate : Sudin M.S. Usgaonkar, for the Appellant; C.A. Coutinho, Advocate, for the Respondent

Judgement

F.M. Reis, J.—Learned Counsel for the petitioner seeks leave to delete respondent no.2. Leave granted, at the risk of the petitioner. Amendment to be carried out forthwith.

2. Heard Shri Sudin M.S. Usgaonkar, Learned Counsel appearing for the petitioner and Shri C.A. Coutinho, Learned Counsel appearing for respondent no.1.

3. Rule. Heard forthwith with the consent of the Learned Counsel. Learned Counsel appearing for the respondent waives service on rule.

4. The above petition challenges the order dated 18/03/2011 passed by the learned Civil Judge, Senior Division Margao whereby an application filed by the petitioner under Order 21 Rule 58 of the CPC came to be rejected.

5. Shri Usgaonkar, Learned Counsel appearing for the petitioner has assailed the impugned order and pointed out that the learned Judge has proceeded on a wrong assumption that the suit flat was attached pursuant to an order passed in Special Civil Suit No.34/04 dated 21/04/2005. The Learned Counsel has taken me through the said order and pointed that no such document was referred to by

the learned Judge while passing the impugned order. The Learned Counsel further pointed out that the attachment carried out in the execution proceedings was after the mortgage executed in favour of the petitioner and, as such, in any event such attachment cannot affect the right of the petitioner over the suit flat. Learned Counsel further pointed out that the learned Judge ought to have held an inquiry with regard to the claim put forward by the petitioner before deciding the application filed by the petitioner under Order 21 Rule 58 of C.P.C. Learned Counsel has taken me through the impugned order and pointed out that the learned Judge has totally misdirected itself in refusing the application filed by the petitioner and as such the impugned order deserves to be quashed and set aside.

6. On the other hand, Shri C.A. Coutinho, Learned Counsel appearing for the respondent has supported the impugned order. Learned Counsel pointed out that the original vendor to the mortgagor of the suit flat has purchased the property despite of an order restraining the judgment debtor from alienating or transferring the suit flat. Learned Counsel further pointed out that as such the petitioners have no interest at all over the suit flat, in view of the fact that there was a restrained order passed against the judgment debtor in the said suit. Learned Counsel further pointed out that considering the said aspect there is no infirmity committed by the learned Judge while passing the impugned order.

7. Having heard the Learned Counsel and on perusal of the record, I find that the application filed by the petitioner was under Order 21 Rule 58 of the CPC. Order 21 Rule 58 of the CPC contemplates an adjudication when an objection to the attachment is raised by a party in the execution proceedings.

8. In the present case, considering the objections raised by the petitioner, it was incumbent upon the learned Judge to decide the application only after holding an inquiry with regard to the respective claim put forward by the parties herein. The learned Judge while passing the impugned order has wrongly assumed that the order passed in the suit dated 21/04/2005 was an order of attachment. On perusal of the said order, I find no order to that effect was passed on the said date. In fact, the application filed by the respondent for attachment before the judgment was still pending adjudication and, as such, the question of granting any such attachment before disposing the application would not arise at all. Besides, the C.P.C. expressly contemplates the manner in which the property has to be attached. In the present case, admittedly there is no material on record to come to the conclusion that any such attachment was carried out in respect of the suit flat. Apart from that Order 38 Rule 5 of the CPC also provides a specific procedure to be followed for attachment before the judgment or otherwise such attachment is void. Shri Coutinho Learned Counsel appearing for the respondent fairly accepted the position that no such procedure or attachment was carried out by the learned Judge during the pendency of the suit filed by the respondents.

9. Considering the said aspect, I find that the learned Judge has erred in dismissing the application filed by the petitioner on untenanted grounds. The application filed by the petitioner cannot be said to be not maintainable in law or

that it was filed after the attachment was carried out in the execution proceedings. In fact, objection to the attachment can be filed after such attachment is carried out. As such, the impugned order cannot be sustained and deserves to be set aside. The learned Judge will have to consider the application filed by the petitioner afresh after holding an inquiry and allowing the parties to lead evidence, if they so desire and dispose of the application in accordance with law.

10. In view of the above, I pass the following order:

ORDER

- (i) The impugned order dated 18/03/2011 is quashed and set aside.
- (ii) The learned Civil Judge Senior Division, Margo is directed to decide the application under Order 21 Rule 58 and 59 of the CPC filed by the petitioner dated 7/08/2010, afresh after hearing both the parties and holding an inquiry in accordance with law.
- (iii) All the contentions of both the parties on merits of the said application are left open.
- (iv) The learned Judge shall proceed to dispose of the execution proceedings after the above application is decided.
- (iii) Rule in the above terms.
- (iv) Petition stands disposed of accordingly with no order as to costs.