
(2003) 01 BOM CK 0059
In the Bombay High Court
Case No : Criminal Appeal No. 1218 of 2002

Motilal Hastimal Bothara

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 31-01-2003

Acts Referred:

Maharashtra Protection of Interest of Depositors (Financial Establishment) Act, 1999 —
Section 11, 4, 7, 8

Citation : (2003) BomCR(Cri) 1123

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : Anil Agarwal, for the Appellant; S.R. Shinde, APP, for the Respondent

Judgement

A.M. Khanwilkar, J.—This Appeal is filed u/s 11 of the Maharashtra Protection of Interest of Depositors (In Financial Establishment) Act, 1999.

2. The Appellant has approached this Court complaining that extra ordinary procedure has been followed in dispossessing the Appellant from the premises which were lawfully occupied by him as tenant being Room No. 10, admeasuring 140 sq.ft. at Sudama Bhavan, 4th floor, 1st Panjaroole lane, Mumbai-400 004. The Designated Court by order dated October 23, 2002 directed the Investigating Officer to seal and seize the said room and report compliance on 25.10.2002. Incidentally, before passing such drastic order, the appellant was not heard nor put to notice that the court proposes to pass such an order against him. that order was passed by the Designated Court presumably on some representation made by the Depositors that a trespasser was living in the said room with his family, which was the property possessed by the Accused No. 2. On the basis of the said order, the Investigating Officer visited the said premises on 24.10.2002, but did not precipitate the matter as the Appellant requested to defer the action as he intended to move the Trial Court for appropriate orders. Accordingly, the Appellant, who was staying alongwith his wife in the said premises, filed application before the Designated Court being Misc. Application No. 597/2002 for

vacating the seal and seizure order. However, that application has been rejected by the Designated Court on the reasoning that the documents on which the Appellant has placed reliance are not genuine and the transaction in his favour was malafide one and hit by Section 8 of the Act. The Designated Court obviously proceeded on the premise that the Accused No. 2 had surrendered the tenancy in respect of the said premises in January, 2002, as can be discerned from the reasons at Page 56 of the paper book of the impugned Judgment. The basis on which the Designated Court has proceeded is completely falsified by the record produced by the Appellant which were also placed before the Designated Court.

3. On the other hand, the case of the Appellant was that the Appellant came to Bombay some time in the year 1989 and started residing with his father Hastimal Bothara at 28/30 Jaya Building, 1st floor, Room No. 17, 2nd Carpenter Street, Mumbai-400 004 in the same locality where the said premises are situated. It is relevant to note that, the said premises were admeasuring only about 250 sq.ft. The Appellant got married in 1994 and after his marriage, he started staying separately alongwith his wife in premises being Room No. 120, 3rd floor, 177/F, Old Amritwadi, V.P. Road, Sikka Nagar, Mumbai which is also in the same locality. This premises were admeasuring around 170 sq.ft. and was taken on rental basis. The landlord in respect of the said premises however, called upon the Appellant to hand over the possession of the premises on account of the fact that the same would be required to accommodate his relative who was to shortly shift to Bombay. This happened sometime in December, 1999. In view of the said demand made by the landlord, the Appellant started looking for some other premises and in the process came in contact with Mrs. Madhu Sharma who is undisputedly landlady in respect of the premises in question. The landlady in turn informed the Appellant that the person who was occupying the said premises was about to vacate the premises and surrender the premises very shortly. That person is none other than Accused No. 2. Further, it is stated that the said person eventually vacated the premises and surrendered the tenancy in January, 2000; and as the premises became vacant and available for letting out, Mrs. Madhu Sharma landlady inducted the Appellant as tenant in the said premises on monthly rent basis. The present premises, as mentioned earlier, is admeasuring only 140 sq.ft. The Appellant accordingly, took the said premises on rental basis in Jan. 2000 and started staying in the said premises alongwith his wife since then. It is the Appellant's case that a formal agreement was executed between the Appellant and the landlady on 15.1.2000 which has been placed on record at Page 23. As the Appellant started staying in the said premises, he naturally applied for telephone connection in Jan.2000 itself, as can be discerned from the copy of the telephone bill placed on record at Page 28. Besides the telephone connection, the Appellant also applied for separate electric meter in Jan.2000 itself and which was granted by the Bombay Electricity Supply and Transport Corporation undertaking, as can be discerned from the receipt at Page 29 dated 21.1.2000. The Appellant paid the necessary amount towards the deposit for supply of electricity, which receipt is also placed on record. Besides, the

Appellant took steps to delete his name from the ration card on the previous address and issuance of fresh ration card on the address of the suit premises. Even this was done in or about Jan.2000 as can be discerned from the documents placed on record at Page Nos. 32 to 35. Besides, the Appellant also filed his Income Tax returns under the Saral scheme in November, 2001 indicating the address of the suit premises as the place of his residence. That document is placed on record at Page 36. All these documents have been placed on record only to show that the Appellant was bonafide tenant of the suit premises and was occupying the same since Jan.2000, much prior to the period when the criminal case against the Accused No. 2 came to be instituted in the year 2002 being C.R.No. 86/2002.

4. On the other hand, the Court has proceeded on the assumption that the Appellant was inducted in the suit premises with a view to defeat the provisions of the Act and the transaction in favour of the Appellant is malafide and hit by Section 8 of the Act.

5. It also cannot be disputed that, the fact that the Appellant was occupying the suit premises was in the knowledge of the Investigating Officer, as can be seen from the correspondence between the son of the landlady i.e. Rajesh Sharma to the Sr. Inspector of Police of General Branch, C.I.D. Mumbai dated 22.7.2002 which is at Page 43 of the paper book. This letter clearly indicates that the Appellant was occupying the suit premises as tenant and documents in that behalf have been executed between the parties. It is also not in dispute that, the Police had already searched the suit premises occupied by the Appellant on 4.9.2002 in connection with the case registered against the Accused No. 2 and during the said search no recovery whatsoever was made from the premises which could even remotely suggest the association of the accused No. 2 with the suit premises at the relevant time or the Appellant as such. Besides, the police had also recorded the statement of the Appellant on that date. Even though, all these information was available with the concerned Investigating Officer on 23.10.2002, when the Designated Court proceeded to act upon some letters produced by the Investors, this was not brought to the notice of the Designated Court. Whereas, the Designated Court, as can be seen from the order dated 23.10.2002, the impressed by the letter produced by the investors which would indicate that the premises in question was occupied by a trespasser and he was staying alongwith his family. Acting upon that information, the Designated Court passed the impugned order without even considering whether the person in possession of the said premises should be given prior notice of such proposed order, which is the mandate of Section 8 of the Act. As a consequence of the impugned order, the Investigating Officer visited the suit premises on 24.10.2002 and apprised the Appellant of the proposed action which he intends to take in compliance of the order passed by the Designated Court. At that time, the Appellant requested the Investigating Officer to provide some time so as to approach the Designated Court for appropriate directions. Accordingly, the Appellant immediately rushed to the Designated Court by way of Misc.

Application No. 597 of 2002 for recalling of the order dated 23.10.2002. In support of the application, all the relevant materials, which are also placed on record before this court, were brought to the notice of the Designated Court. The Designated Court however, proceeded to discard the tenancy agreement between the Appellant and the landlady on the ground that, it was not a genuine transaction. The Designated Court on the other hand proceeded on the premise that, the tenancy was surrendered by accused No. 2 as late as "Jan.2002" and therefore, his surrender was malafide and was hit by Section 8 of the Act. All these conclusions arrived at by the Designated Court are on the basis of surmises and conjecture.

6. On the other hand, the material placed on record before the Designated Court; and also pressed into service before this Court, pertaining to period in or around Jan.2000 would unmistakably indicate that the Appellant was inducted as a bonafide tenant in the suit premises. The Designated Court has completely misdirected itself in drawing certain inferences which cannot be supported from the materials on record. On the other hand, the materials which are placed on record by the Appellant have gone unchallenged. Merely suggesting that those documents have been created to defeat the rights of the investors is obviously a far fetched argument. In the first place, premises admeasure only 140 sq.ft. Besides, there is not even a single documentary evidence placed on record that the transfer of the suit premises in favour of the Appellant was for any consideration received by the Accuse No. 2. Moreover, it is not in dispute that the suit premises have not been notified as the property which have been published in the official gazette for the purpose of attachment, as required u/s 4 of the Act. The Scheme of the Act, to my mind, is that, after recording reasons in writing, the Government shall issue an order by publishing it in the official Gazette, attaching the money or other property believed to have been acquired by such Financial Establishment either in its own name or in the name of any other person from out of the deposits, collected by the Financial Establishment, or if it transpires that such money or other property is not available for attachment or not sufficient for repayment of the deposits. It is fairly conceded by the learned A.P.P. that the property in question is not enlisted as the property notified for the purpose of Section 4 of the Act. The Act further requires that amongst the properties notified, the Designate Court can proceed to physically attach the property in exercise of the powers u/s 7 of the Act. On plain language of Section 7, it is seen that, the Designated Court can issue to the Financial Establishment or to any other person whose property is attached and vested in the Competent Authority, a notice accompanied by the application and affidavits and of the evidence, if any, recorded, calling upon the said Establishment or the said person to show cause on a date to be specified in the notice, why the order of attachment should not be made absolute. In other words, by virtue of notification u/s 4, the property is symbolically attached and would stand vested in the Government; and it is that property which is physically attached, sealed and seized by the order of the court u/s 7 of the Act. As the present property has

not been notified, the order as passed by the Designated Court cannot be ascribed to Section 7 of the Act. The learned A.P.P., however, to justify the order, placed reliance on Section 8 of the Act to contend that the Designated Court has ample powers to attach any other property which has not been notified u/s 4 of the Act. This argument, however, clearly overlooks that, Section 8 can be invoked when it is found that the properties already notified u/s 4, value thereof was less than the amount of value which the financial establishment is required to repay to the depositors. In the present case, there is no material on record to show that, the properties which are already attached by virtue of Notification u/s 4 are inadequate to repay the amount payable to the Depositors. Assuming that the Designated Court could have invoked Section 8 in respect of the suit property, it was necessary for the Designated Court to first record a finding that the properties already notified u/s 4 of the Act were inadequate to repay the amount payable to the depositors. Moreover, to invoke the latter part of Section 8 of the Act, there has to be a reasonable cause for believing that the financial establishment has transferred any of the property otherwise than in good faith and for consideration. In the present case, the record indicates that the Accused No. 2 had surrendered the tenancy in respect of the suit premises to the landlady,, who in turn inducted the Appellant as her tenant thereof. In that sense, it is not a case of transfer of property by the Accused No. 2 to the Appellant, much less for consideration, as such. Besides, the Appellant was inducted as tenant in January, 2000 when there was no link of any prosecution of the Accused No. 2 of offence under this Act. In any case, the Designated Court could not have straight way proceeded to pass an order of seizure and sealing of the premises without giving prior notice to the person who is in possession thereof. This requirement is not only by virtue of observing the principles of natural justice but also by virtue of the provisions of Section B(i) of the Act that the Designated Court may be notice require the transferee of such property to appear on the date to be specified in the notice and show cause why the transferee's property should not be attached. Even that requirement of Section 8 of the Act has not been observed by the Designated Court while passing the impugned order on 23.10.2002. However, what is further intriguing is that, the Appellant approached the Designated Court with documentary evidence and documents on record to suggest that, he was in possession of the suit premises since Jan.2000. Whereas, the Criminal Case against the Accused No. 2 who was stated to be in possession of the suit premises prior to Jan.2000 was instituted only on 17.5.2002; All these aspects, though relevant, and have material bearing on the adjudication of the claim of the Appellant, have not been carefully considered by the Designated Court. The impugned order therefore, cannot be sustained either on fact or in law. As observed earlier, the order of sealing and seizing is in total disregard of the provisions of Section 4 as well as Section 7 and 8 of the Act.

7. Accordingly, the impugned Judgment and order dated 30.10.2000 as well as the order passed on 23.10.2000 of sealing and seizing the suit premises is set

aside. The Investigating Officer is directed to remove the seal and restore the possession of the suit premises to the Appellant forthwith. This be done on 1st Feb.2003. The concerned Investigating Officer-P.S.I.Wagh is personally present in the court and this order is passed in his presence. He undertake to hand over the physical possession of the suit premises to the Appellant on 1.2.2003 at 11-a.m. The Appellant shall remain present at the suit premises at 11 a.m. on 1.2.2003. Appeal allowed in the above terms.

All the concerned to act on the copy of this order duly authenticated by the Sheristedar of this court.