
(2014) 06 BOM CK 0023

In the Bombay High Court

Case No : Writ Petition No. 1081 of 2011

Rohan M. Kapoor

APPELLANT

Vs

Abhyudaya Co-Operative Bank Ltd.

RESPONDENT

Date of Decision : 24-06-2014

Acts Referred:

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

Multi-State Cooperative Societies Act, 2002 — Section 101, 39, 40, 83, 84

Citation : (2015) 3 ALLMR 743 : (2015) 1 BomCR 686 : (2014) 4 MhLj 640

Hon'ble Judges : S.J. Vazifdar, J;A.K. Menon, J

Bench : Division Bench

Advocate : Rajeev Narula i/b Jhangiani Narula and Associates, Advocate for the Appellant; Vishal Ghosalkar, Merlyn Monteiro and Shashank Thatte, Advocate for the Respondent

Final Decision : Dismissed

Judgement

S.J. Vazifdar, J.—The petitioners have challenged an order dated 10.01.2011 passed by the arbitrator appointed by the Central Registrar, Co-operative Societies u/s 84 of the Multi-State Co-operative Societies Act, 2002 (hereafter referred to as the said "Act") conditionally attaching a flat originally owned by one Mahendra Kapoor. The impugned order provided that the attachment would stand automatically vacated if the petitioners deposited Rs. 1,50,00,000/- with the first respondent bank within a period of eight weeks. The five petitioners are the legal heirs of the said Mahendra Kapoor. The petitioners among others, are opponents in the proceedings.

2. Respondent No. 1 is the disputant in the arbitration case. Respondent No. 1 had granted respondent No. 2-M/s. Jai Shanti Dye Prints Pvt. Ltd., a cash credit facility. Respondent No. 3-M/s. Monitex Dye Prints is a partnership firm in which the deceased Mahendra Kapoor was a partner. Respondent Nos. 4 to 9 are the partners of respondent No. 3. Respondent Nos. 3 to 9 had guaranteed repayment of the amounts due to respondent No. 1 by respondent No. 2 under the cash

credit facility. Respondent No. 3 is therefore, liable as a guarantor of the dues of respondent No. 2 and the deceased Mahendra Kapoor as a partner was liable for the dues of respondent No. 3. The petitioners as heirs of the deceased would be liable to the extent of the estate of the deceased coming to their hands.

3. The first respondent filed an application inter-alia for attachment before the award of a flat that was owned by the deceased and now claims to have been inherited by the petitioners. By the impugned order, the arbitrator attached the flat as aforesaid. This flat had not been mortgaged or secured in any manner in respect of the dues of respondent No. 2. It was therefore, not a part of the original arbitration proceedings. It appears that the liability was secured by the mortgage of two other flats.

4. Mr. Narula's main contention on behalf of the petitioners is that there is no power under the said Act to attach a property which has not been secured in favour of a disputant and is not the subject matter of the arbitration proceedings. The impugned order, he submitted, is therefore without jurisdiction as the said flat was not secured towards the repayment of the dues of respondent No. 1 and was not the subject matter of the arbitration proceedings. In support of this submission, Mr. Narula relied upon a judgment of a learned single Judge of this Court.

5. Before referring to the judgment, it is necessary to set out the following provisions of the said Act.

96. Attachment before award.-(1) Where the arbitrator is satisfied that a party to any reference made to him u/s 84 with intent to defeat or delay the execution of any decision that may be passed thereon is about to-

(a) dispose of the whole or any part of the property; or

(b) remove the whole or any part of the property from its existing precincts, the arbitrator may, unless adequate security is furnished, direct conditional attachment of the said property or such part thereof as it deems necessary.

(2) The attachment under sub-section (1) shall be executed by a civil court having jurisdiction in the same way as an attachment order passed by itself and shall have the same effect as such order.

97. Central Registrar or arbitrator or person authorised to be civil court for certain purposes.-The Central Registrar or the arbitrator or any person authorised by him in writing in this behalf shall be deemed, when exercising any powers under this Act for the recovery of any amount by the attachment and sale or by sale without attachment of any property, or when passing any orders on any application made to him for such recovery or for taking a step-in-aid of such recovery, to be a civil court for the purposes of Article 136 of the Schedule to the Limitation Act, 1963 (36 of 1963).

(emphasis supplied)

6. Mr. Narula relied upon the judgment of a learned single Judge of this Court in *Saraswat Co-op. Bank Ltd. Vs. Jayant Industrial Packaging Ltd.*, . It was submitted in that case that the power of attachment before an award u/s 96 of the said Act was very limited and can be invoked only in respect of the property, which is amenable or ascribable to the reference proceedings pending before the arbitrator. In other words an order of attachment before an award is made can be issued only in respect of property which has been mortgaged or otherwise secured in favour of the disputant and in respect of which the recovery proceedings have been instituted. The learned Judge held as under:-

9. As mentioned earlier, there is nothing in the Act of 2002 to suggest that the Arbitrator can exercise similar powers as can be exercised by the Civil Court to pass order of attachment before passing of the decree even in relation to property outside the scope of reference pending before it. To get over this position, Counsel for the Petitioners relied on Section 97 of the Act of 2002. Section 97 of the Act, however, is a provision which creates legal fiction by providing that the Central Registrar or Arbitrator or any person authorised by him in writing in this behalf be deemed to be a Civil Court for the purposes of Article 136 of the Schedule to the Limitation Act, 1963. The legal fiction is for this limited purpose. No more and no less. In other words, Section 97 of the Act of 2002 cannot be construed to mean vesting of the powers similar to that of the Civil Court in the Arbitrator, who is to exercise powers under the Act of 2002 albeit for the recovery of any amount by attachment or by sale without attachment of any property, etc. Similarly, the provision such as Section 96 of the Act also does not empower the Arbitrator to exercise similar powers as that of the Civil Court. Sub-section (2) only provides that the attachment order passed under sub-section (1) by the Arbitrator shall be executed by a Civil Court having jurisdiction in the same way as an attachment order passed by itself and shall have the same effect as such order. That does not mean that the Arbitrator can exercise similar powers of the Civil Court of attachment before decree so as to cover property beyond the scope of reference before it.

10. Viewed in this perspective, I find substance in the stand taken on behalf of the Applicant that the order of attachment passed in respect of subject property being Kanchan Bungalow of the ownership of the Applicant which is admittedly not the mortgage property and not referable to the scope of proceedings pending before the Arbitrator u/s 84 of the Act, was not amenable to order of attachment before passing of the Award. Accordingly, this Chamber Summons ought to succeed in terms of prayer clauses (a) and (b).

(emphasis supplied)

7. We are, with respect, unable to agree with the learned Judge. Section 97 is indeed irrelevant to this issue. Section 96 however, does not limit the power of the arbitrator to direct conditional attachment only of a property secured in favour of a disputant and which is the subject matter of the arbitration proceedings. We are unable to find any such limitation in section 96, either in

relation to an order of attachment before an award is made or to an order of attachment after an award is made.

Section 96 itself does not limit the power of the arbitrator to direct attachment only of the secured assets, which are the subject matter of the arbitration proceedings. There is no reference in section 96 to secured assets or assets which are the subject matter of the arbitration proceedings in respect whereof the reliefs are claimed. If the intention of the Legislature was to restrict the power of the arbitrator to direct attachment only of such properties, it would have provided for the same expressly. Absent a clear provision to this effect, we are not inclined to read such a restriction into section 96.

8. The words "the property" emphasised by Mr. Narula do not curtail the ambit of section 96 to the properties of the party secured in favour of the disputant and which are the subject matter of the proceedings u/s 84. Section 84 does not contain the phrase "the property". The words "the property" in our view refer to any of the properties of the opponent.

9. There is nothing in the plain language of section 96 that supports Mr. Narula's submission. On the other hand, there is an indication in the Act that supports our view. It is in Chapter XI of the Act. Chapter XI includes Sections 94 to 98. Section 94 reads as under:-

94. Section 94-Execution of decisions, etc. Every decision or order made u/s 39 or section 40 or section 83 or section 99 or section 101 shall, if not carried out,--

(a) on a certificate signed by the Central Registrar or any person authorised by him in writing in this behalf, be deemed to be a decree of a civil court and shall be executed in the same manner as if it were a decree of such court and such decree shall be executed by the Central Registrar or any person authorised by him in writing in this behalf, by attachment and sale or sale without attachment of any property of the person or a multi-State co-operative society against whom the decision or order has been made; or

(b) where the decision or order provides for the recovery of money, be executed according to law for the time being in force for the recovery of arrears of land revenue:

Provided that any application for the recovery of any sum shall be made in such manner-

(i) to the Collector and shall be accompanied by a certificate signed by the Central Registrar or by any person authorised by him in writing in this behalf;

(ii) within twelve years from the date fixed in the decision or order and if no such date is fixed, from the date of decision or order, as the case may be; or

(c) be executed by the Central Registrar or any person authorised by him in writing in this behalf, by attachment and sale or sale without attachment of any property of the person or a multi-State co-operative society against whom the

decision or order has been made.

10. If the words "the property" in section 96 are relatable to any provision of the Act it would be to Section 94. We realize that section 94 does not relate to section 84. However, it is not the operation of section 94 in respect of section 84 that is relevant. We refer to section 94 to ascertain the scope of the words "the property" in section 96. Sections 94 and 96 fall under Chapter XI. Absent any indication to the contrary, it is reasonable to presume, therefore, that the words "the property" in section 96 relate to the property referred to in section 94.

11. If that be so, the power u/s 96 would extend to any properties of an opponent/debtor and not merely to the secured properties in respect whereof the proceedings have been initiated. This is clearer from section 94. u/s 94, the execution can be levied "by attachment and sale or sale without attachment of any property of the person or a Multi State Co-operative Society against whom the decision or order has been made". The words "of any property", puts the matter beyond doubt. The execution of any decision or order can be levied therefore, against any property of a person and not merely against the properties of the person secured in favour of the disputant and secured assets, which are the subject matter of the arbitration proceedings. It is axiomatic then that the power of attachment u/s 96 must also extend to any property and not merely to the secured assets, which are the subject matter of the proceedings.

12. Secondly, the power to attach is not limited to cases where an award has been passed. It extends to the stage even before the award. That power of the arbitrator to direct attachment is applicable even before the award is made, is clear from the words in section 96 "with intent to defeat or delay the execution of any decision that may be passed". In fact the words "may be passed" in this phrase indicate beyond doubt that the power u/s 96 is not restricted to a post award situation. Had it been otherwise the Legislature would not have used the words "may be passed" in the phrase "with intent to defeat or delay the execution of decision that may be passed". The Legislature would have used in the phrase the words "any award made" instead of the words "any decision that may be passed".

13. Such an interpretation in fact advances the cause of justice for otherwise a debtor could easily render a decree infructuous by disposing of all his properties in contemplation of an award that may be passed. The object of section 96 is to ensure that a debtor/disputant does not render a decision or an award infructuous by disposing of the property to the detriment of the claimant/disputant.

14. In the circumstances, the judgment is over-ruled. We hold that power of the arbitrator appointed in a reference u/s 84 to direct attachment exists both before and after an award is made. We further hold that an arbitrator is entitled u/s 96 to direct the attachment of any property of a party to the reference made u/s 84 of the said Act, including a property which is not secured in favour of the

disputant and which is not the subject matter of the original proceedings u/s 84.

15. It was also contended that section 96 does not provide for powers similar to those of the Civil Courts under Order 38 rule 5 of the Code of Civil Procedure. The learned Judge held that on a plain reading of sections 96 and 97, it is not possible to accept the argument that powers under order 38 rule 5 of the CPC inhere in a arbitrator appointed u/s 84 of the Act. It is not necessary to consider this aspect in view of what we have held regarding the scope of sections 94, 96 and 97 of the said Act.

16. We are not inclined in exercise of our extra-ordinary jurisdiction to interfere with the impugned order, which merely attaches the property. The petitioners' rights to enjoy the property in the meantime is not affected. The petitioners' claim to have inherited the property from the said Mahendra Kapoor. The deceased was liable as a partner of respondent No. 3. Respondent No. 3 in turn was liable as a guarantor of the dues of respondent No. 2.

17. The petitioners however, shall be entitled to give the premises out on leave and license basis for a period not more than two years at a time. The licensee however, shall file an undertaking before this Court agreeing to be bound by the award and/or any subsequent orders passed in respect thereof. A clause to this effect shall be incorporated in the leave and licence agreement. The petitioners shall also be at liberty to apply to the arbitrator for permission to sell the property after notice to the other side. A copy of the leave and licence agreement shall be forwarded to the respondent bank at least two weeks before the sale is finalized and executed. Liberty to the respondent bank to raise any objections to the same before the arbitrator.

18. The writ petition is therefore, dismissed. Mr. Narula contended that the first respondent bank ought to have proceeded in the first instance against the secured assets. We leave it open to the petitioners to raise the contention in this regard or any other disputes in regard to their rights in appropriate proceedings/applications. This order, obviously would not affect the petitioners' rights in that regard in any manner whatsoever. There shall be no order as to costs.