
(2005) 08 BOM CK 0023

In the Bombay High Court

Case No : Chamber Summons No. 1/27 of 2004, Excution Application No. 405 of 2004 and Arbitration Case No. ARB/SCB/0226 of 2004

Saraswat Co-op. Bank Ltd.

APPELLANT

Vs

Jayant Industrial Packaging Ltd.

RESPONDENT

Date of Decision : 24-08-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5, Order 38 Rule 5(1), 151, 94
Limitation Act, 1963 — Article 136
Multi-State Cooperative Societies Act, 2002 — Section 84, 96, 96(1), 96(2), 97

Citation : (2005) 4 ALLMR 761 : (2006) 66 SCL 289

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

Bench : Single Bench

Advocate : J.P. Shah, Manish Bohra, A.S. Khan and Prashant Naik, for the Appellant;

Judgement

A.M. Khanwilkar, J.—Heard counsel for the parties. Perused the pleadings.

2. This matter raises interesting question of law. The background in which the present Chamber Summons has been filed is that the petitioners have initiated reference proceedings before the Arbitrator u/s 84 of the Multi-State Co-operative Societies Act, 2002 (hereinafter referred to as the "Act") for recovery of sum of over Rs. 3.61 crores from the respondents and the applicant. During the pendency of the said reference proceedings, the petitioners took out application before the Arbitrator purported to be u/s 96 of the Act, for attachment of certain properties belonging to the applicant, before Award. It is common ground that the property sought to be attached in terms of the said Application taken out by the petitioners, is not mortgaged by the respondents or the Applicant in respect of the claim under reference for recovery of money u/s 84 of the Act. Nevertheless, the Arbitrator allowed the application preferred by the petitioners and passed order of attachment in respect of immovable property belonging to the Applicant known as Kanchan Bungalow situated at Plot No. 7, Road No. 5, Vallabh Nagar Co-operative Housing Society, Juhu Vile Parle

Development Scheme (JVDS), Vile Parle (West), Mumbai - 400 056 by order dated 5th November, 2004. This order is subject-matter of challenge in the present Chamber Summons.

3. The Applicant prays that the said order be set aside and it be declared that no proper, valid and effective attachment has been levied in accordance with the provisions of law in respect of the subject property being Kanchan Bungalow of the ownership of the Applicant. The substance of the argument advanced on behalf of the Applicant is that the power of attachment before Award postulated u/s 96 of the Act is very limited. It is submitted that the Arbitrator can invoke that power only in respect of property which is amenable or ascribable to reference proceedings pending before him. In other words, it is only such property which has been mortgaged by the respondents with the petitioners in respect of which recovery proceedings have been instituted, can be made subject-matter of attachment before award and no other property. It is also argued that Section 96 of the Act does not provide for same or similar powers bestowed on the Civil Court to pass order or attachment before decree.

4. To get over this argument, counsel for the petitioners contends that the language of Section 96 of the Act is more or less similar to the language of Order XXXVIII Rule 5 of the Code of Civil Procedure. On this basis, it is argued that the legal position as to the power of the Civil Court to pass an order of attachment in respect of the property other than the mortgage property before decree is no more *res integra*. To buttress this submission reliance is placed on two decisions of our High Court in the case of *Marine Container Services (I) Pvt. Ltd. Vs. Rajesh Dhirajlal Vora*, and another decision in the case of *Jugalkishore Rampratapji Rathi v. Brijmohan* [1993] (1) Mh.L.J. 148. Besides provisions of Order XXXVIII Rule 5 and Section 94 of the Code of Civil Procedure, counsel for the petitioners has pressed into service Section 97 of the Act to contend that the Arbitrator can exercise same powers as that of the Civil Court.

5. Having considered the rival submissions, I have no hesitation in taking the view that the powers of the Arbitrator u/s 96 of the Act are circumscribed and not unbridled as is the case of powers of the Civil Court to pass order of attachment before decree "in respect of any property" of the defendant before it.

6. Before I proceed to analyze the rival submissions, it will be apposite to advert to the provisions on which reliance was placed by the Counsel appearing for the parties. Section 96 of the Act reads thus :

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.

Section 97 of the Act reads thus :

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]

Order XXXVIII Rule 5 of CPC reads thus :

5. Where defendant may be called upon to furnish security for production of property.--(1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,--

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(4) If an order of attachment is made without complying with the provisions of Sub-rule (1) of this rule, such attachment shall be void.

Section 94 of the CPC reads thus :

94. Supplemental proceedings.--In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed,--

(a) issue a warrant to arrest the defendant and bring him before the Court to

show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison;

(b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property;

(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold;

(d) appoint a Receiver of any property and enforce the performance of his duties by attaching and selling his property;

(e) make such other interlocutory orders as may appear to the Court to be just and convenient.

7. On plain language of Section 96 of the Act, the argument canvassed on behalf of the petitioners, that the same is more or less similar to provisions of Order XXXVIII Rule 5 of the Code of Civil Procedure, seems to be attractive at the first blush. However, there is subtle distinction in the scope of the two provisions. Insofar as Order XXXVIII Rule 5 read with Section 94 of the Code is concerned, scope of that provision is wide enough not only to pass an order of attachment before decree in respect of properties which are referable to the proceedings pending before the Court, but also with regard to any other property of the defendant, in the event, the Court is satisfied that the defendant with intent to obstruct or delay the execution of any decree is in the process of disposing of the whole or any part of his property or is about to remove the whole or any part of his property from the local limits or the jurisdiction of the Court. That power is exercised by the Court read with provisions of Section 94 of the CPC and Section 151 of the Code. Section 94 of the Code makes provisions with regard to supplemental proceedings in order to prevent the ends of justice from being defeated. In an appropriate case, the Court may pass such orders, which may include defendants to furnish security to produce "any property" belonging to him and to place the same at the disposal of the Court or order the attachment of "any property" as also make such other interlocutory orders as may appear to the Court to be just and convenient. The scope of Section 151 of the CPC need not be elaborated, as it is well-established. It deals with inherent powers of the Court. Per contra, even on fair and conjoint reading of the relevant provisions of the Act of 2002, in particular, Sections 96 and 97 thereof, there is nothing in the Act to even remotely suggest that the Parliament had intended to vest all those powers available with the Civil Court to be exercised by the Arbitrator in proceedings u/s 84 of the Act. It cannot be doubted that proceedings u/s 84 of the Act are in the nature of arbitration proceedings. Unless an express provision authorising the Arbitrator to pass orders in respect of matters or properties which are outside the scope of the arbitration proceedings was provided for, such power cannot be assumed in favour of the Arbitrator even on liberal construction of the provisions of the Act. On plain reading of Section 96 or 97 of the Act, it is not

possible to accept the argument that such power of the Civil Court inheres in the Arbitrator. Accepting such argument would be rewriting the provisions of the Act of 2002, which will be impermissible.

8. The two decisions which are pressed into service on behalf of the petitioners deal with the provisions of the Code of Civil Procedure. There can be no doubt that the Civil Court has ample power not only to deal with the property which is within the scope of proceedings pending before it, but also in respect of properties which are not mortgaged but owned by the Defendant to the Suit and that Defendant is likely to dispose of the property with intent to obstruct or delay the execution of any decree. Viewed in this perspective, these decisions pressed into service on behalf of the petitioners will be of no avail.

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).

11. Chamber Summons is accordingly made absolute in terms of prayer Clauses (a) and (b) with costs.

12. At this stage, Counsel for the petitioners prays that the parties be directed to

maintain status quo with regard to the subject property to enable the petitioners to take up the matter in appeal if so advised.