(2014) 10 BOM CK 0155

In the Bombay High Court

Case No : Chamber Summons No. 769 of 2014 in Execution Application No. 561 of 2014 in Arbitration Petition No. 44 of 2013

Twin Earth Securities P. Ltd. APPELLANT

Vs

Rajiv Om Prakash Bhargava RESPONDENT

Date of Decision : 13-10-2014

Acts Referred:
Transfer of Property Act, 1882 — Section 53

Citation : (2015) 3 ALLMR 645

Hon'ble Judges : R.S. Dalvi, J.

Bench : Single Bench

Advocate : Nimay Dave, Sonam Mhatre, Sahil Memon, Advs. VND and Associates, for the Appellant

Judgement

R.S. Dalvi, J.?The applicants have sought to raise the attachment levied on the immoveable property being flat No. C-2101, Whispering Palm Bldg. No. 1, Akxuli Road, Lokhandwala Township, Kandivali (E), Mumbai 400 101 and to cancel the warrant of attachment levied by the plaintiff/award holder/award creditor. This application is made under Order 21 Rule 58 of the CPC upon the applicants claiming title in respect of the suit property. The claim would have to be adjudicated in this Chamber Summons itself.

2. The applicants claim title under a registered agreement of sale dated 1st November, 2012.

3. This was pending the arbitration proceedings. Monies came to be due from the award debtor to the award creditor since the award has been passed on 28th August, 2013.

4. The award creditor has sought to avoid the transfer in favour of the applicants between the applicant and the award debtor claiming that it is a fraudulent transfer under Section 53 of the Transfer of Property Act, 1882, the relevant part of which runs thus :

"53. Fraudulent transfer. - (1) Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration."

5. The applicants have sought to show their title by documentary evidence.

6. The chronology of events and dates of how and when the applicant sought title is required to be seen.

7. The 1st applicant retired in July - August, 2012. The 1st applicant claims that he wanted to purchase an immoveable property from his savings and generate income therefrom for his post retirement life. The 1st applicant sold certain shares which he held in a Demat account of HDFC bank to generate funds to purchase the flat in his neighbourhood. The applicants have produced the original demat account showing the shares held by the 1st applicant, the shares sold and the closing balance as ''0'' in respect of shares of Mahindra & Mahindra where he had served and other companies being Reliance Power Ltd., State Bank of India and Tata Motors Ltd. The statement of the depository participant HDFC Bank which has been downloaded from the Internet is seen to be prima facie a genuine copy. It is the statement printed on 11th July, 2013 which shows that it was with the 1st applicant since that time.

8. The 1st applicant has produced the original statement of his savings bank account issued by his banker HDFC bank showing the amount of the sale price of the shares credited to his account. His account shows Rs. 58,66,952.18, Rs. 8,38,620.18, Rs. 4,30,980.38 and then Rs. 25,78,790.04 as the amounts received upon the sale of his shares shown in his demat account from time to time between 14th August, 2012 to 30th October, 2012. These are reflected in the statement issued upon his sale of shares which are also the printouts produced by the applicants. The amount on the sale of shares is a little more than the purchase price of the flat which has been attached.

9. The agreement for sale between the applicants and the award debtor is dated 1st November, 2012. The printout shows an earlier date, 30th October, 2012, which is corrected to read 1st November, 2012. This is after the receipt of the consideration amount which would have to be paid by the applicants for the purchase of the flat which was of the award debtor. The applicants have, therefore, adequately shown genuine consideration paid by the 1st applicant for the purchase of the flat in the joint names of himself and his wife.

10. Incidentally the applicants have entered into leave and license agreement also with the award debtor himself on 30th October, 2012 itself. That is on same day on which the agreement of sale was also to be entered into. The date in the leave and license agreement is not altered.

11. However, the leave and license agreement as also the agreement for sale

have been registered on the same day by the parties i.e. on 2nd November, 2012.

12. The applicants obtained the NOC of the society before the execution of the agreement on 28th October, 2012 which has been annexed to the original agreement for sale of the attached flat.

13. The applicants have obtained the share certificate of the society transferred to their names from the name of the award debtor on 16th December, 2012. The original agreement as also original share certificate duly signed by the Chairman, the Secretary and the committee member are produced by the applicants.

14. The applicants have produced the original agreement dated 15th March, 1999 between Lokhandwala Construction Industries Ltd. and one M/s. Sewasons Enterprises Ltd. as also the agreement of sale between M/s. Sewasons Enterprises Ltd. and the award debtor/defendant herein. The second original document is accompanied by the original registration receipt. Hence the original documents of the award debtor are produced by the applicants. Similarly the applicants have produced the various letters and forms executed by the applicants and or the award debtor as the transferor and transferee as required under the Maharashtra Co-Operative Societies Act, 1960 in various forms for the transfer of the attached flat. The applicants have also produced several maintenance bills and receipts of the society showing the maintenance paid by then after the purchase of the attached flat.

15. The applicants have also produced the printout of an email sent by the applicants to the CA of the 1st applicant dated 12th July, 2013 sending the statement of demat transactions showing that the entire shareholding of the 1st applicant has been sold in various transactions in 2012 - 2013 for the purchase of the flat as per money received in the bank account of the 1st applicant and detailed in his Income Tax returns. Consequently in the income tax returns for the assessment year 2013-2014 dated 25th March, 2011 of the 1st applicant shows the statement of share transactions of the aforesaid three companies are showing the sale of various shares to show the net profits/loss incurred by the applicant upon its sale. The total sale value is shown to be Rs. 99,25,587.45.

16. It is argued on behalf of the judgment creditor that the flat is shown to be purchased for Rs. 70 lacs and the sale of shares is for Rs. 99 lacs. This Court, however, cannot go into why the 1st applicant has sold more shares than required for the purchase of his flat in this application.

17. The applicants have also relied upon the monthly rents received by them from the suit flat which would be the monthly income of applicant No. 1 after his retirement. The license fee under the registered leave and license agreement with the award debtor is Rs. 25,000/-. The license fee from the licensee Ms. Seema Dasgupta is also Rs. 25,000/-. The applicant has shown these amounts credited to his bank account from month to month.

18. The applicant has also produced the bank statement of HDFC bank showing

the amount of Rs. 2,445/- and later certain other larger amount paid by the applicants to the society from 4th December, 2012 onwards.

19. The applicants have also shown debit and credit entries of Rs. 2 lacs being the deposit received and repaid from and to the award debtor / defendant and later from the other licensee from whom also similar amounts of rent / compensation are received by the applicants and credited to the same bank account.

20. It does so happen that the transaction of the parties is of selling the attached flat by the award debtor and licensing it again by the award debtor from the purchaser which made counsel on behalf of the award creditor contend that it must raise eyebrows. Indeed such a transfer raised the Court''s eyebrows. It has been seen and it would stand to reason, as contended by the award creditor, that the award debtor wanted to dispose off his property which would otherwise be attached in execution of the award. What the court would be required to see is whether the purchase by the applicants was in good faith or nor and whether it was for consideration. If that it is so, the creditor who is defeated by such transfer cannot have the option to avoid the transfer.

21. This is not a case in which some amount of consideration has been inexplicably credited to the account of a party who has sought to purchase a property. The applicants have shown the precise amount obtained by them from the sale of various shares of various companies held by the 1st applicant made only after his retirement. The case of the applicants that they wanted to liquidate their shareholding into real estate and obtain a regular income from real estate in their neighbourhood is seen to be substantiated. The time of retirement of the 1st applicant and liquidation of the assets of the applicants has been sufficiently explained. Whatever be the fraudulent object of the award debtor / defendant, the applicants cannot be imputed malafides. Whatever be the malafides of the award debtor, the applicants have shown their bonafides.

22. The applicants have contended that they did not know the award debtor though he lives in the neighbourhood. They, therefore, took the services of an estate broker. They have paid brokerage to the broker from the bank account of the 1st applicant. The applicant has shown the debit entry of Rs. 87,400/- dated 23rd March, 2013 from the bank account of the 1st applicant in the name of the broker. It would stand to reason that the applicants would require an immoveable property for their investment purpose in their neighbourhood.

23. The applicants, therefore, purchased the flat of the award debtor from the award debtor upon payment of consideration to the award debtor and licensed the flat to the award debtor himself to obtain monthly income.

24. It is argued on behalf of the award creditor / plaintiff that the fraudulent nature of the relationship between parties and the transaction that was entered into can be seen from the fact that the payment is made before the registration of the agreement. The contention is incorrect. The payment would have to be

made to enter into the agreement which would then be registered. The registration is a day after the execution of the agreement.

25. It is also argued that leave and license agreement is shown to be executed a day after the agreement for sale. That contention is also incorrect. Both the documents are shown to be printed on 30th October, 2012. A correction is made in the agreement for sale but not in the leave and license agreement. Both the agreements are registered on 2nd November, 2012 by both the parties.

26. It is also argued that the fact that possession was been taken and the judgment debtor continued in possession for a year, which is indeed surprising and shows the lack of bonafides, has not been brought out in the application itself and was shown in the affidavit in reply. The applicants had produced only their documents of title in the application. The applicants would otherwise be required to produce only their documents of title. It is because of the peculiar transaction in which a property is purchased and licensed to the seller, which fact has been stated in the affidavit in reply, that the applicants have produced the original registered leave and license agreement also. It appears that the judgment debtor has later called it a day and hence the applicants have licensed the same flat to a third party, one Seema Dasgupta from 12th December, 2013. The applicants have produced further documents as called upon by the Court to see their bonafides. The applicants have been put through the test of fire.

27. Consequently it is satisfactorily shown by the applicants that the award debtor would have nothing to do with the attached property.

28. Consequently, the attached premises is seen to belong to the applicants. The transfer between the award debtor and applicants, though after the commencement arbitration proceedings, is not seen to be a fraudulent transfer, it being entered into in good faith by the applicants and for consideration (which is not alleged to be inadequate also.)

29. Consequently, the applicants are entitled to be granted the reliefs sought. The attachment on flat No. C-2101, Whispering Palm Bldg. No. 1, Akruli Road, Lokhandwala Township, Kandivali (E), Mumbai 400 101 is raised. The warrant of attachment levied upon the suit property is cancelled. The award creditor shall be entitled to execute the award upon the other properties of the award debtor/ defendant.

30. Chamber summons is disposed off accordingly. Application for stay of this order is refused.

