
(1994) 02 BOM CK 0041

In the Bombay High Court

Case No : Chamber Summons No. 563 of 1991 in Summary Suit No. 1975 of 1988

Union Bank of India

APPELLANT

Vs

Mittersain Rupchand and Others

RESPONDENT

Date of Decision : 08-02-1994

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 15
Civil Procedure Code, 1908 (CPC) — Section 60

Citation : (1995) 1 BomCR 29 : (1994) 96 BOMLR 557

Hon'ble Judges : N.D. Vyas, J

Bench : Single Bench

Judgement

N.D. Vyas, J.—By the present Chamber Summons, which is taken out by the defendants, the defendants have prayed that the Notice of Attachment dated 27th September, 1989 in Execution Application No. 229 of 1989 issued in the above suit and attachment levied pursuant thereto be set aside and/or raised; that the ex parte order dated 9th March, 1990 passed by this Court in Notice No. 119 of 1990 in the above Summary Suit be set aside and the Garnishee Notice No. 119 of 1990 be restored to file for hearing on merits.

2. Briefly stated, the facts giving rise to the present Chamber Summons are as follows :

The present Suit was filed by the plaintiffs on 7th June, 1988 for recovery of a sum of Rs. 5,43,810/- due and payable by the defendants. Prior to the filing of the suit in a suit filed by National Textile Mill against the defendants in Coimbatore Court, a decree was passed against the defendants herein on 12th March, 1986. On 20th May, 1988 attachment was levied in the said decree passed in favour of the National Textile Mill. As far as the present suit is concerned, the same was decreed against defendant Nos. 1 to 4 on 20th March, 1989. On 17th April, 1989, Sale Warrant was issued in consequence of the decree in the said Coimbatore Suit. On 26th July, 1989 the defendants made an

application in Coimbatore Court to set aside the said decree passed by Coimbatore Court. In September, 1989, Execution Application was made in the present Suit. On 27th September 1989, attachment was levied in the present suit. In the Execution Application, in reply to Column "J" thereof, the plaintiffs have mentioned as to what they want to be sold in execution. The Schedule annexed thereto, as far as it relates to immovable properties, mentions as follows:

Goodwill and tenancy rights of the defendants in their aforesaid concern and business premises.

Notice under Order 21, Rule 52 of the CPC (hereinafter referred to as "the Code") dated 27th September 1989 also mentions-

The movable and immovable properties belonging to the defendants but in the custody of the Sheriff, having been already attached on 20th May, 1988 and being still under attachment in execution of the decree dated...and transferred for execution to the Bombay City Civil Court at Bombay.... Warrant for sale of immovable property under Order 21, Rule 64 of the Code was issued on 6th August, 1990 describing therein the immovable properties required to be sold and it states as under :

the following movable and immovable properties, viz., the goodwill as a going concern and the tenancy rights of the business of the Defendants abovenamed known as M/s. Mittersain Rupchand, situated at 336-A, 3rd floor, Kalbadevi Road, Bombay 400 002.

First Garnishee Notice bearing No. 1269 of 1989 covering cash only lying with the Sheriff was issued on 29th November, 1989. The said Notice was made absolute on 30th January, 1990. Second Garnishee Notice bearing No. 119 of 1990 covering properties other than cash was issued on 5th February, 1990 and the same was made absolute on 9th March, 1990. However, in the meantime, on 1st March, 1990, the decree passed in favour of National Textile Mill by the Coimbatore Court was set aside and the Sale Warrants in the present Suit were issued thereafter. Chamber Summons No. 1265 of 1990 was taken out on 6th December, 1990 by the defendants praying, inter alia, for setting aside of order dated 9th March, 1990 in the Garnishee Notice No. 119 of 1990. The same was dismissed on 16th February, 1991 from which an Appeal was preferred being Appeal No. 507 of 1991 which was withdrawn on 12th June, 1991. The present Chamber Summons was taken out on 28th June, 1991 and was dismissed on 13th September, 1991, Appeal No. 1092 of 1991 was preferred by the defendants on 18th November, 1991 from the order dismissing the present Chamber Summons. After the said appeal was admitted on 16th December, 1991, an order was passed in the said appeal on 7th December, 1993 setting aside the order dated 13th September, 1991 and remanding back for hearing the present Chamber Summons and directing this Court to give reasons inasmuch as the dismissal of the present Chamber Summons earlier was without giving any

reasons.

3. The defendants have, in support of their challenge to the Notice of Attachment dated 27th September, 1989, while praying that the same be set aside and/or raised, submitted that the same was not served on the defendants and orders were passed thereon without notice. As far as the order dated 9th March, 1990 in Garnishee Notice No. 119 of 1990 is concerned, it was submitted that although the said order said the defendants were "served", in fact they were not served. On behalf of the plaintiffs, it was submitted that neither the Notice of Attachment nor the Garnishee Notice are required to be served and although the said order dated 9th March, 1990 mentions the words "served", no such service was effected nor it is required to be served. Mr. Shah, the learned Counsel for the plaintiffs, took me through various provisions of the Code and satisfied me that no such notice to the defendants is required. In view thereof, I am not impressed by the submissions advanced on behalf of the defendants.

4. However, the defendants' challenge to the attachment of the properties in respect of which the attachment has been levied requires consideration. As mentioned earlier, the attachment is in respect of, as can be seen from the Execution Application, "goodwill and tenancy rights of the defendants in their aforesaid concern and business premises". The plain reading of this would mean that what is attached and what is sought to be sold is goodwill on the one hand and tenancy rights of the defendants in their said concern and business premises on the other hand. To divide it into two parts : "goodwill in the defendants' concern" and "tenancy rights in the business premises". The question which requires consideration is whether these two, viz., "goodwill" and "tenancy rights", could be attached and sold in execution. An effort was made by Mr. Shah on behalf of the plaintiffs to submit that these two words are not meant to be read in isolation but must be read in conjunction with the words "the business of the firm". However, I do not agree at all with Mr. Shah. Not only the Execution Application but the Warrant of Attachment and the Warrant for Sale specifically mention that what is sought to be ultimately sold are "the goodwill" and "the tenancy rights" in isolation. Mr. Shah tried to justify that the same could be done in law inasmuch as for as the tenancy rights are concerned, Section 60 of the Code, in its Proviso (kc), specifically excludes "the interest of a lessee of a residential building to which the provisions of law for the time being in force relating to control of rents and accommodation apply". The said provision contained in Proviso (kc) has been added by the Amending Act of 1976. The argument of Mr. Shah is that had the Legislature intended that tenancy rights in respect of business premises be also excluded, nothing prevented the Legislature from doing so. Having not provided, it is his submission, there is no legal bar to attachment and sale of tenancy rights. On the other hand, Mr. Bansal, the learned Counsel for the defendants, submitted that Section 60 of the Code speaks of property which is liable to attachment and sale in execution of a decree which property is "saleable", whether moveable or immovable, and belonging to the judgment-debtor or over which or the profits of which he has a disposing

power which he may exercise for his own-benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf. It is Mr. Bansal's submission, therefore, that the moveable and Immovable properties should firstly be belonging to the judgment-debtor and, secondly, he should have disposing power over the same and, more importantly, it should be "saleable" property. It is his submission that in view of the fact that Section 15 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as "the Rent Act") prohibits, inter alia, transfer of tenancy rights in the absence of a contract to the contrary with the landlord, attachment cannot be levied on the tenancy rights. It is the admitted position that the tenancy rights are in respect of the business premises of the defendants. It was further submitted that in respect of business premises, irrespective of whether there is a contract to the contrary as contained in Section 15(1) of the Rent Act or not, tenancy, under the Proviso, can be transferred only in the circumstances permitted for in the Proviso, which means that the transfer or assignment is permissible only if the same is incidental to the sale of a business as a going concern together with the stock-in-trade and the goodwill thereof; otherwise not. In brief, it was his submission that the tenancy rights cannot be attached or sold in isolation, A tenant of a business premises qua the tenancy rights may have a "saleable" interest provided the running business as a whole along with stock-in-trade, goodwill and transfer of tenancy rights being incidental thereto, are being transferred. Mr, Bansal relied on several decisions of this Court. In the case of Zarina Umer Chamdewala v. Sati Lalchand Verumal Lalwani 71 BLR. a Division Bench of this Court, inter alia, held in a case where a tenant was adjudicated insolvent, that tenancy of a monthly tenant who has been adjudicated an insolvent and which is not alienable u/s 15(1) of the Rent Act, cannot be regarded as property of the insolvent and, therefore, the same cannot vest in the Official Assignee u/s 17 of the Presidency Towns Insolvency Act, 1909. It was also observed by the Division Bench:

...we find it impossible to hold that such a tenancy disassociated from a going business can be regarded as property which must vest in the Official Assignee.

In the case of Atlas Trading Co. Vs. Official Assignee of Bombay and Others, a Division Bench of this Court, inter alia, held that the whole bundle of rights in the running business including tenancy rights would vest in the Official Assignee though inalienable u/s 15(1) of the Rent Act by reason of being incidental to the running business. In this decision, the earlier decision reported in 71 B.L.R. 809 is referred to and relied upon. In a subsequent decision, in the case of D. Vasantrai and Co. Vs. The Official Assignee, High Court of Judicature at Bombay and Others, , it was, inter alia, held by a Division Bench of this Court that tenancy of premises being inalienable under Rent Act and incapable of being disposed of by the insolvent could not vest in the Official Assignee. However, a decision more near to the question on hand is the decision in Belrex India Ltd. Vs. Singhal Electric Co. and Others, wherein it was, inter alia, held that where the shop possessed by the judgment-debtor was subject to the provisions of the

Rent Control Act prohibiting transfer of tenancy rights by a tenant except with written consent of the landlord, the judgment-debtor had no disposing power or any "saleable" interest in the tenancy rights and, therefore, there was no question of sale thereof. It was further held that the non-inclusion of non-residential building in the Proviso to Section 60(1) of the Code does not mean that it is attachable. All these decisions go to support Mr. Bansal's argument that tenancy rights in isolation, although in respect of a business premises, cannot be attached.

5. Section 60 of the Code provides as follows:

60(1) The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, banknotes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, movable or immovable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf:

Provided that the following particulars shall not be liable to such attachment or sale, namely :-

(a) to (kb)...

(kc) the interest of a lessee of a residential building to which the provision of law for the time being in force relating to control of rents and accommodation apply.

The above provisions thus, provides as to what property is liable to attachment and sale in execution of a decree. However, the "property" which is so liable to be attached and sold has to be a "saleable property" and capable of being transferred. Both these requirements have to be satisfied. Thus, property which is not capable of being transferred cannot be attached. If transfer of property is prohibited by law, it cannot be attached. The Proviso to Section 60(1) of the Code provides what properties are exempt from attachment. Clause (kc) of the Proviso, as set out above, exempts from attachment the interest of a tenant in residential building to which the Rent Control Act is applicable. Mr. Shah for the plaintiffs submitted that the premises in question being admittedly used for business is thus not included in Clause (kc) and is, therefore, liable to be attached. It is true that Clause (kb) exempts only residential premises, however, in my opinion, non- mention of a property in the proviso does not mean that it is attachable inasmuch as that the property in question has to satisfy the two tests. This is because the proviso cannot be interpreted so as to nullify the main provision. Let us see whether tenancy rights are a "saleable property" capable of being transferred.

6. Admittedly, the premises which are used for business purposes are governed

by the provisions .of the Rent Act. Section 15 of the Rent Act provides as follows:

15(1) Notwithstanding anything contained in law (but subject to any contract to the contrary), it shall not be lawful after the coming into operation of this Act for any tenant to sub-let the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein (and after the date of commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Act, 1973, for any tenant to give on, licence the whole or part of such premises):

Provided that the (State) Government may be by notification in the Official Gazette, permit in any area the transfer of interest in the premises held under such (lease or class of leases (of the giving on licence any premises or class of premises) and to such extent as may be specified in the notification).

A notification has been issued by the State Government in exercise of the powers conferred under the above section which permits transfers and assignments of lease-hold premises in the following cases:-

Transfer or assignment incidental to the sale of a business as a going concern together with the stock-in-trade and the goodwill thereof, provided that the transfer or assignment is of the entire interest of the transferor or assignor in such lease-hold premises together with the business and the stock-in-trade and goodwill thereof.

By Section 15, as it originally stood, it made it unlawful for any tenant to sub-let the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein, with a proviso that the State may, by notification in the Official Gazette, permit in any area the transfer of interest in premises held under such leases and to such extent as may be specified in the notification. This section was amended in 1959 and was made subject to any contract to the contrary. The clear effect of this section is that until the Act was amended, no tenant was entitled in any manner to transfer or sub-let his interest in the tenancy, and after the amendment unless permitted by the contract. In these circumstances, the "tenancy rights" cannot be attached or sold inasmuch as that they do not satisfy both tests, viz., "saleability" and "being capable of being transferred".

7. As far as "goodwill" is concerned, as discussed earlier, the Execution application, Warrant of Attachment and the Warrant for Sale all speak of "goodwill" and only in describing the "goodwill" there is a reference made to the running business of the defendants, A plain reading of these documents makes it clear that just as in the case of "tenancy rights", the plaintiffs have sought sale of the "goodwill" alone. In *Inland Revenue Commissioners v. Muller and Co. etc.* 1901 A. C. 217. Lord Macnaghten, referring to the term "goodwill", observed:

It is a thing very easy to describe, but very difficult to define.

In *Trego v. Hunt*, 1896 AC 7 , "goodwill" is described as the advantage which is

acquired by a business, beyond the mere value of the capital, stock, fund or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers. What goodwill means must depend on the character and nature of the business to which it is attached. It is composed of a variety of elements and is bound to differ in its composition in different trades and in different businesses in the same trade. One element may preponderate in one business and another in another business. Generally speaking, it means much more than the mere probability that the old customers will resort to the old place. Often, goodwill is the very sap and life of a business, without which the business will yield little or no fruit. It is the whole advantage, whatever it maybe, of the reputation and connection of the firm, which may have been built up by years of honest work. Now, "goodwill" has been defined in Jowitt's Dictionary of English Law as "the benefit which arises from its having been carried on for some time in a particular house or by a particular person or firm or from the use of a particular trade mark or trade name". The Supreme Court has, in the case of S.C. Cambatta and Co. Private Ltd. Vs. Commissioner of Excess Profits Tax, Bombay, inter alia, held as follows:

the goodwill of a business depends upon a variety of circumstances or a combination of them. The location, the service, the standing of the business, the honesty of those who run it, and the lack of competition and other factors go individually or together to make up the goodwill, though locality always plays a considerable part. Shift the locality, and the goodwill may be lost. At the same time, locality is not everything. The power to attract custom depends on one or more of the other factors as well.

(Emphasis supplied)

In view of the above, when goodwill is the very sap and life of a business, how can the same alone be attached and sold in execution? Mr. Shah sought to again argue that the Execution Application and the Warrant of Attachment, when they speak of "goodwill as going concern", mean the trade name only. I cannot frankly appreciate this argument. It is clear from plaintiffs' above Execution Application and the Warrant of Attachment that "goodwill" alone is sought to be attached. In my opinion, this cannot be permitted in law. Thus, qua "goodwill" also, the required tests u/s 60 of the Code are not satisfied as the goodwill alone is not saleable.

8. The question which requires to be considered is whether "goodwill" alone could be attached and sold. In a business, "goodwill" is an important asset. It is a property and it could be very valuable depending on facts and circumstances of each case. However, in the case before me, the defendants have, on affidavit, stated that their business is closed down and that the business has incurred heavy losses. It is, therefore, doubtful whether there would be any "goodwill" worth its name in which event one cannot say that the "goodwill" is "saleable". Moreover, benefit of the running business and the tenancy rights, it is doubtful

whether "goodwill" is at all saleable assuming there is any "goodwill". In view of this, I am of the opinion that qua "goodwill" also, the Chamber Summons must succeed,

9. In view of my holding as above, the Chamber Summons is made absolute in terms of prayers (a) and (b). No order as to costs.

10. On the request of Mr. Shah, the learned Counsel for the plaintiffs, the above order is stayed for a period of four weeks from today.