(1995) 03 BOM CK 0030

In the Bombay High Court

Case No : Appeal No. 143 of 1994 in Chamber Summons No. 563 of 1991 in Summary Suit No. 1975 of 1988

Union Bank of India APPELLANT

Vs

M/s. Mittersain Rupchand and others RESPONDENT

Date of Decision : 20-03-1995

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 15(1)
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 54, 60
Maharashtra Co-operative Societies Act, 1960 — Section 29, 31, 47
Presidency Towns Insolvency Act, 1909 — Section 17, 52

Citation : AIR 1995 Bom 371 : (1995) 4 BomCR 256 : (1995) 2 MhLj 481

Hon'ble Judges : M.L. Pendse, Acting C.J.;S.M. Jhunjhunuwala, J

Bench : Division Bench

Advocate : P.V. Shah and Ms. Mamta Doshi, for the Appellant; M.L. Bansal and Ms. Sunita Poddar, for the Respondent

Judgement

M. L. Pendse, Actg. C.J.

1. An interesting question as to whether the tenancy rights and the goodwill of the running concern can be attached in execution under Order 21, Rule 54 of the CPC falls for determination in this appeal preferred by decree-holder to challenge the order dated February 8, 1994 passed by executing Court on Chamber Summons No. 563 of 1991. To appreciate the question only few facts are required to be set out.

The appellants/decree-holder instituted Suit No. 1975 of 1988 on June 7, 1988 for recovery of Rs. 5,83,828.50 inclusive of interest. The suit was instituted as a summary suit and the defendants/respondents were granted conditional leave to defend on deposit of certain amount. The defendants failed to deposit the amount consequently decree came to be passed on March 20, 1989. As the amount was not paid, except the sum of Rs. 54,391.29, the appellants preferred execution application No. 229 of 1989 on September 14, 1989. The appellants sought to attach goodwill and tenancy rights in the property situated at 336-A, 3rd Floor, Kalbadevi Road, Bombay. The premises admeasuring about 2,000 sq. ft. was secured by the respondents on lease. The executing Court by order dated September 27, 1989 levied attachment in accordance with the provisions of Order 21, Rule 54 of the Code of Civil Procedure.

2. On June 28, 1991 the respondents took out Chamber Summons No. 536 of 1991 for raising attachment. The gravamen of the claim of the respondents was that the goodwill and tenancy rights are not saleable property and over which the respondents have no disposing power and consequently the execution levied by the appellants was invalid. It was also claimed that Section 15(1) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 prevents creation of any sub-tenancy or assignment or transfer in any manner of the interest of a tenant. It was claimed that this provision of the Rent Act prohibits the respondents from sub-letting and assigning the tenancy rights and consequently the attachment levied by this Court was invalid. The respondents pleaded by affidavit dated January 29, 1990 sworn by respondent No. 2 that the respondents had closed the business for more than 3 years before the date of the affidavit. It was further claimed that the respondents have inducted number of sub-tenants and licensees in the premises and the respondents are in occupation of a small portion admeasuring about 150 sq. ft. The Chamber Summons for raising the attachment was resisted by the appellants pointing out that the goodwill and the tenancy rights are saleable property and the respondents have disposing power over the same. It was pointed out that Section 15 of the Rent Act does not prescribe for a total prohibition of creation of sub-tenancy or assignment of interest but on the other hand prescribes that such sub-tenancy or assignment is permissible by contract between the lessor and lessee and in respect of business premises, the running business along with the stock-in-trade and tenancy rights can be assigned. The appellants pointed out that the respondents have created illegal sub-tenancies and licences only with a view to defeat the claim of the appellants.

3. The trial Judge by impugned judgment came to the conclusion that the respondents did not have the disposing power over the tenancy rights and therefore the property was not liable for attachment as prescribed by Section 60 of the Code of Civil Procedure. The learned trial Judge further held that as the transfer of tenancy rights are prohibited by law the same cannot be attached. The learned trial Judge felt that as respondents are claiming that the business was closed and the stock-in-trade was not available it was not open to transfer or assign the tenancy rights as incidental to the sale of business. The learned Judge further held that the goodwill being the very sap and life of the business the same cannot be attached and sold in execution. On these findings the learned Judge made the Chamber Summons absolute and attachment was raised. The appellants feeling aggrieved have preferred the present appeal.

Mr. Shah, learned Counsel appearing on behalf of the appellants, submitted that the learned Judge was in error in concluding that the respondents did not have saleable interest and which could be disposed of by sale of goodwill and tenancy rights of premises in their occupation. Mr. Shah further submitted that the learned Judge was not right in the construction placed on provision of Sec. 15 of the Rent Act. Reliance on two decisions of this Court in Zarina Umer Chamdewala Vs. Sati Lalchand Verumal Lalwani, and D. Vasantrai and Co. Vs. The Official Assignee, High Court of Judicature at Bombay and Others, , and that of Delhi High Court in Belrex India Ltd. Vs. Singhal Electric Co. and Others, was not accurate. Mr. Bansal, learned Counsel appearing on behalf of the respondents, on the other hand submits that the decision of the learned trial Judge does not suffer from any infirmity and is not required to be disturbed in this appeal. Mr. Bansal did not dispute that the decretal amount is due and that the respondents have parted with substantial portion of the leased premises.

4. The learned Judge referred to the execution application and the attachment sought in respect of the goodwill and tenancy rights of the defendants in the business premises. The learned Judge felt that the attachment was sought in respect of the goodwill and tenancy rights and these two terms are separate and distinct. Mr. Shah is right in his contention that it is not permissible to split up the two terms ''goodwill'' and ''tenancy rights'' and what is sought to be attached was both the goodwill and tenancy rights in respect of the business premises. Section 60 of the Code of Civil Procedure, inter alia, provides that the land, house or other buildings and all other saleable property, movable or immovable, which is not specifically excluded is liable to attachment in execution of a decree. The section further prescribes that the saleable property must belong to the judgment-debtor and over which or the profits of which the judgment-debtor has a disposing power. Section then sets out the properties which are not liable to attachment and sale and one of the category of such property is found in clause (kc). The clause prescribes that the interest of the 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. It is therefore clear that the interest of a lessee in a residential premises and to which the provisions of Bombay Rent Act apply is not liable to attachment and sale in execution. Mr. Shah submits, and in our judgment with considerable merits, that the exclusion of properties liable for attachment and sale refers specifically to residential premises and do not take into its sweep the premises used for non-residential purposes. It is not in dispute that the premises secured on lease by the respondents were leased out for non-residential purpose and used for commercial purposes. The exclusion, therefore, clearly is not attracted. Mr. Bansal submitted that even if the exclusion is not attracted still it is incumbent upon the decree-holder to establish that the respondents have saleable interest in the tenancy rights and a disposing power over said interest. It was urged that provisions of Sec. 15 of the Bombay Rent Act sets out that lessee of property cannot claim saleable interest and a disposing power in such leasehold interest. To examine the contention it is necessary to set out the relevant provision of Section 15(1) of Rent Act.

"15(1). Notwithstanding anything contained in any 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 by notification in the Official Gazette, permit in any area the transfer of interest in premises held under such leases or class of leases or the giving on licence any premises or class of premises and to such extent as may be specified in the notification."

In accordance with the powers conferred by the proviso to sub-sec. (1) of Section 15, the State Government has issued notification permitting transfer and assignment of leasehold interest in business premises, in cases where the stock-in-trade of the running business is transferred or assigned. Relying on this provision it was urged on behalf of the respondents that the leasehold interest and premises leased for non-residential purposes cannot be termed as saleable property in which the lessee has disposing power. It is not possible to accede to the submission.

5. The Supreme Court examined the ambit of Section 60 of CPC in its judgment in the case of Ramesh Himmatlal Shah Vs. Harsukh Jadhavji Joshi, . In the case before the Supreme Court, the decree-holder obtained a money decree and took out a warrant of attachment of flat No. 9 of Paresh Co-operative Housing Society Ltd. at Santacruz, Bombay. The attachment was not raised by the City Civil Court but in appeal the learned single Judge of this Court raised the attachment on the ground that the sale of flat being illegal. Letters Patent appeal preferred by the decree-holder ended in dismissal and the question which fell for determination before the Supreme Court was attach ability and sale ability of the flat. It was contended before the Supreme Court that the provisions of Maharashtra Co-operative Societies Act, 1960 and the Rules framed thereunder and the Bye-laws of the Society prohibits transfer of a flat by the member and consequently the flat was not liable to attachment and sale. The Supreme Court noticed provisions of Sec. 29 of Co-operative Act which inter alia provides that a member shall not transfer any share held or interest in the capital of property of the society unless the transfer is made to a member of the society or to a person whose application for membership has been accepted. Section 31 of the Act then provides that the share or interest of the member in the capital of the society or in the loan-stock issued by housing society or the funds raised by the society from its member by way of savings shall not be liable for attachment or sale under any decree or order of the Court. Section 47 then provides that the society shall have first charge upon the interest of the member in the immovable property for any outstanding dues or dues payable by the society. Sub-section (2) of Section 47 provides that no property or interest in the property which is subject to a charge

shall be transferred in any manner without the previous permission of the society. Sub-section (3) of Sec. 47 then provides that any transfer made in contravention of sub-sec. (2) shall be void. On consideration of these provisions, the Supreme Court observed that the right or interest to occupy is a species of property and this right is attachable and saleable in execution of the decree against the judgment-debtor. It was held that there is nothing in the language of Section 31 to indicate that the right to occupation, which is the right to be sold in auction, is not attachable in execution of the decree. It was further observed that there is nothing in Section 31 to even remotely include the prohibition against attachment or sale of the right to occupation of the flat. The Supreme Court noticed that as there was no impediment in assignment of the flat, it is obvious that the judgment-debtor had saleable interest and a disposing power while holding possession of flat as a member of the co-operative society. The Supreme Court then observed (at p. 1476):

"We, therefore, unhesitatingly come to the conclusion that this species of property namely the right to occupy a flat of this type, assumes significant importance and acquires under the law a stamp of transferability in furtherance of the interest of commerce. We have seen no fetter under any of the legal provisions against such a conclusion. The attachment and the sale of the property in this case in execution of the decree are valid under the law."

The Supreme Court further observed that in the absence of clear and unambiguous legal provisions to the contrary, it will not be in the public interest nor in the interest of the commerce to impose a ban on sale ability of flats by a tortuous process of reasoning. The prohibition intended by the legislature must be in express terms and the Supreme Court failed to find one. The Supreme Court therefore held that the right to occupation of a flat is property both attachable and saleable. The judgment of the Supreme Court, to which attention of the learned single Judge was not invited, is a clear answer to the contention of the respondents that the goodwill and tenancy rights in the office premises are not liable to attachment and sale.

6. Sub-section (1) of Section 15 of the Bombay Rent Act, which is set out hereinabove, inter alia, provides that it shall not be lawful for any tenant to sub-let the whole or any part of the premises or to assign or transfer in any other manner his interest therein. The plain reading of sub-section makes it clear that the prohibition is not absolute because it is always open to the parties to contract to the contrary as provided by the section. It is always open for the lessor and the lessee to contract that the lessee can sub-let the premises or assign or transfer in any other manner his interest therein. In other words the prohibition contained in sub-s. (1) is not absolute. The section nowhere provides that the transfer shall be void. The proviso of the sub-section confers power on the State Government to issue notification permitting the transfer of interest and such notification has been issued permitting transfer of interest of the lessee in the business premises, provided what is transferred is the running business with

tenancy rights. It is, therefore, clear that even the legislature never contemplated that the lessee of a non-residential premises cannot transfer or assign the interest in the leasehold rights. The learned Judge was, therefore, not right in observing that the transfer of leasehold interest in non-residential premises is totally prohibited and therefore not liable for attachment. It was also overlooked that the grievance on account of breach of sub-sec. (1) of Section 15 of the Bombay Rent Act can only be at the behest of the lessor and the lessee whose interest in the leasehold rights is attached cannot complain about the same. Indeed, in the present case, the respondents have admitted on affidavit that out of about 2,000 sq. ft. of the leased area, 1850 sq. ft. have already been parted with either under the cover of sub-leases or licenses. The conduct of the respondents speak for itself and requires no further comment. The lessee has not created the alleged sub-leases and licenses for no consideration. In the absence of total prohibition of transfer of leasehold interest in respect of non-residential premises, it is not correct to suggest that the lessee of such premises does not hold saleable property or does not hold disposing power in respect of such interest.

7. Mr. Bansal relied heavily on the decision of the Division Bench of this Court in Zarina Chamdewala''s case (supra). In the case before the Division Bench the property in dispute was a residential flat and agreement of lease did not confer power on the lessee to transfer the leasehold interest. The Division Bench of this Court found that u/s 15 of the Bombay Rent Act transfer of interest in residential premises was unlawful. In that case the lessee was adjudicated as insolvent and the issue arose as to whether the Official Assignee can recover possession in accordance with the provisions of Sections 17 and 52 of the Presidency Towns Insolvency Act which inter alia provides that the property of insolvent vests in the Official Assignee. The Division Bench held that the tenancy of monthly tenant of a residential premises who has been adjudicated insolvent is not attachable u/s 15 of the Bombay Rent Act and therefore it cannot be regarded as property of the insolvent and which must vest in the Official Assignee. The decision of the Division Bench clearly deals with the residential premises and the interests in such premises are not attachable u/s 60(kc) of Code of Civil Procedure. The proviso to sub-sec. (1) of Section 15 of the Bombay Rent Act confers power on the State Government to issue notification and such notification has been issued only in respect of non-residential premises and obviously with a view not to put fetters on the commerce which is practised on a large scale in this metropolis. The restrictions or limitations imposed upon the lessee while conferring the protection under the provisions of the Rent Act were not required to be strictly applied in respect of the premises leased out for business and the wisdom of the legislature is reflected by conferring power on executive to issue notification. In our judgment, the decision of the Division Bench has no application to premises let out for non-residential purposes. Mr. Bansal then submitted that the decision of the Division Bench in respect of residential flat was followed with approval by another Division Bench in the judgment in the case of D. Vasantrai and Co. Vs.

The Official Assignee, High Court of Judicature at Bombay and Others, where the premises leased out were for the purpose of carrying on business. The submission is not accurate because the decision proceeds on the basis that the agreement between the parties while effecting transfer was only for the purpose of creation of sub tenancy of the premises and nothing more. As mentioned hereinabove it is not permissible to merely transfer or assign interest in the leasehold property but it must be accompanied by transfer of running business and stock-in-trade. The decision therefore proceeds on the peculiar facts and that case nowhere holds that the leasehold interests of a lessee of non-residential premises are not liable to attachment and sale. Reliance on the decision of the single Judge of Delhi High Court in the case of Belrex India Ltd. Vs. Singhal Electric Co. and Others, is also not accurate. Section 14 of Delhi Rent Control Act, inter alia provided that no order or decree for recovery of possession of any premises shall be made by any Court in favour of landlord against the tenant unless the tenant has on and after June 9, 1952 sub-let, assigned or otherwise parted with possession of the premises without obtaining the consent of the landlord in writing. As the tenant in the case before the Delhi High Court had transferred the interest without obtaining consent of the landlord in writing, it was held that the tenant had no disposing power over the premises under tenancy and consequently no saleable interest. The decision has no application to the facts of the case or the provisions of Section 15 of the Bombay Rent Act. In our judgment, there is no bar whatsoever under sub-sec. (1) of Section 15 to attach and sale the leasehold interest of a lessee in a premises leased out for non-residential purpose.

8. Mr. Bansal then submitted that the transfer or assignment of tenancy rights in the premises leased out for non-residential purposes is permitted provided what is transferred is the running business with stock-in-trade. Relying on the assertion made in the affidavit of respondent No. 2 and to which reference is made hereinabove, it was claimed that the business carried on by respondents was closed three years before the date of attachment and the respondents did not possess any stock-in-trade. It is not possible to accept the uncorroborated claim made by the respondents and only with the object of seeking raising of attachment. Affidavit of respondent No. 2 clearly sets out that at least an area of 150 sq. ft. out of the leased premises of 2,000 sq. ft. is still in possession of the respondents and the respondents are obviously making huge profits out of the remaining area of 1,850 sq. ft. in an extremely busy and prestigious business locality situated at Kalbadevi. We are not prepared to blindly accept the claim of the respondents that the business is closed or stock-in-trade is not available. It also could not be overlooked that even if the assertion is correct, still the leasehold interest of respondents could be attached and sold, in case the lessor has no objection. The lessor has not come forward to seek raising of attachment and we are not prepared to raise the attachment on mere assertion of the respondents that the business is not carried on or the stock-in-trade is not available. In our judgment, the learned trial Judge was not accurate in treating

the goodwill and tenancy interest in the business premises as separate and distinct, and therefore it is not necessary to examine the finding of the learned trial Judge that the goodwill independently of the tenancy rights cannot be attached u/s 60 of the Code of Civil Procedure, 1908, the goodwill not being a saleable interest. We wish to make it clear that we are not accepting the proposition that the goodwill alone is not saleable in all cases but the determination of the question is not required in the present case and therefore we refrain from examining the same. In our judgment, the impugned order passed by the learned Judge raising attachment is not correct and is required to be set aside.

9. Accordingly appeal is allowed and judgment dated February 8, 1994 on Chamber Summons No. 563 of 1991 is set aside and the Chamber Summons stands dismissed. Respondents shall pay the costs of the appellants throughout.

10. Appeal allowed.

