(1992) 04 KL CK 0022

In the High Court Of Kerala

Case No : E.F.A. No 18 of 1987

United Commercial Bonk — APPELLANT

Vs

K.F.C. and Others — RESPONDENT

Date of Decision : 07-04-1992

Acts Referred:
Transfer of Property Act, 1882 — Section 3

Citation : (1992) 2 KLJ 785

Hon'ble Judges : T.V. Ramakrishnan, J;K. John Mathew, J

Bench : Division Bench

Advocate : V. Sankara Menon and S. Sreekumar, for the Appellant; V.B. Unniraj and Sajan Manali, for the Respondent

Final Decision : Allowed

Judgement

Ramakrishnan, J.—The appeal is against an order allowing a claim application filed by the first respondent and releasing 4 items of properties from the attachment effected by the appellant in execution of the decree in O. S. No. 565 of 1981 on the file of the Sub Court, Ernakulam. Briefly the facts relevant and requisite for the disposal of the appeal can be summarised thus:

The first respondent in the appeal Kerala Financial Corporation (for short "the Corporation") obtained mortgage rights under Ext. A1 mortgage deed and Ext. A2 supplementary mortgage deed over the properties in consideration of certain loans advanced by it to a firm and its partners who joined in the documents as mortgagors. On the basis of Exts. A1 and A2, the first respondent obtained a decree for recovery of an amount of Rs. 16,87,859''98 in S.F.C.O.P. 409/80, District Court, Ernakulam on 8-4-1981 against the firm and its partners. The decree was charged on the properties shown in schedule 1 of Exts. Al and A2. On the basis of the decree obtained, the properties were brought to sale and was actually sold on 13-4-1984. The first respondent - decree holder purchased the properties. The sale was confirmed on 25-7-1984 and Ext A3 sale certificate dated 25-7-1984 was issued to the first respondent as the purchaser of the properties described in the certificate. In the meanwhile, the appellant - Bank obtained a decree in O.S. No. 565 of 1981 against the very same firm and its partners for an amount of Rs. 2 and odd lakhs on 19-1-1984. On the basis of the decree so obtained, the decree holder. Bank filed E. P. No. 245 of 1984 and attached certain machineries and movables on the basis that they belonged to the judgment debtors, namely, the firm and its partners who are the judgment debtors in S.F.C.O.P. also. The attachment was effected on 10-8-1984. On such attachment, the first respondent - Corporation filed E. A No. 590 of 1984 praying for lifting of the order of attachment regarding 4 items of properties and releasing them from attachment alleging that they were properties belonging to them as per the court sale and Ext. A3 sale certificate. The claim was opposed contending that the 4 items of properties in question were not in Ext. A3 sale certificate and as such the claimant cannot claim any right over them. On a consideration of the respective contentions and the recitals in

Exts. A1 to A3 documents, the learned Sub Judge found that the 4 items of properties belonged absolutely to the 1st respondent Corporation and has allowed the claim application.

2. The first respondent - Corporation is claiming absolute title to the 4 items of properties on the basis of Ext. A3 sale certificate. The Corporation has also relied upon the recitals and the description of the properties contained in Exts. Al and A2 mortgage deeds in support of its contention that the properties in question were also included in the mortgage deed and were later sold and purchased as per the auction sale which took place in execution of the decree in S.F.C.O.P.409/80. It was contended that though the 4 item of properties were not specifically mentioned in the two schedules of properties given in Ext. A3 sale certificate, they are to be deemed as permanent fixures attached to the land and/ or machineries and materials used for the proper functioning of the factory and other machineries located in the land mortgaged and as such immovable properties forming part of the land and buildings specifically mentioned in Ext. A3. The entire factory was sold and purchased in court auction and as such whatever is found in the premises as machineries or other materials used for the proper functioning of the factory must also be deemed to be part of the land, buildings and factory mortgaged and sold to the claimant-Corporation.

3. On behalf of the appellant, it was contended that the 4 items of properties in question are movable properties and cannot be considered as machineries or other materials permanently attached to earth. As such they cannot be considered as Items of immovable property coming within the description of the properties included in schedule 1 of Ext. A3. So long as they are not included in schedule II of Ext. A3, the claimant cannot also claim any right or title to them as movable properties in as much as the claimant has not become purchaser of them as per Ext. A3.

4. In this case a Commissioner was appointed to inspect the properties in question and to submit a report as to whether they are movable properties or

properties permanently attached to earth. Ext. C1 is the report of the Commissioner. In Ext C1 report, the Commissioner has categorically stated that all the 4 items of properties are movables and cannot be considered as machineries or things attached to earth on a permanent basis. Of course, the Commissioner has stated that item No. 1 transformer is having earth connection by means of iron rods connected to earth and cable wires going underneath the earth so as to connect the transformer to the machineries in the factory Both sides have relied upon the facts reported by the Commissioner to the extent they support their respective contentions.

5. The short question arising for consideration is whether the 4 items of properties sought to be released from attachment belonged to the claimant or to the judgment debtors in O.S. No. 585 of 1981, Sub Court, Ernakulam on the date of attachment.

6. Whatever may be the nature and extent of the rights which the Corporation was having as a mortgagee under Exts. A1 and A3 mortgage deeds, as purchasers in court auction in execution of its decree in S.F.C.O.P. 409/80, the Corporation can claim title and right only in respect of the properties specifically described in the two schedules attached to Ext. A3 sale certificate. The Corporation can be considered as purchasers only of those properties described in the two schedules to Ext. A3 the title deed relied upon by it. There is no case for the Corporation that the 4 items of properties in question are included as movable properties in schedule II of Ext. A3. The only case set up by the Corporation is that they are machineries or things attached to earth and as such immovable properties and as such liable to be treated as properties forming part of the land and buildings described in schedule 1 of Ext- A3 and transferred to in absolutely as per the court sale evidenced by Ext. A3.

7. From the details given in Ext. C1 report of the Commissioner, is absolutely clear that items 2 to 4 are all movable machineries kept in the premises without being attached to earth in any manner whatsoever. Regarding items 2 to 4, the Commissioner has reported thus;

.....Item No. 2, 3 and 4 are placed on the floor of the factory and the same were not seen fixed by nuts and bolts. These are all removable items of machineries.

The Commissioner is thus categoric that those items are not attached to earth or any building situated in the land. Hence the contention that items 2 to 4 should be treated as immovable properties forming part of the properties described in schedule I cannot be accepted in law.

8. Regarding item No. 1 transformer, the learned counsel for the Corporation has contended that it is an item of machinery attached to earth and as such that item should be treated as immovable property forming part of the land and buildings described in schedule I of Ext. A3, though not specifically mentioned therein. We find it difficult to accept the said contention of the learned counsel also, in view of the categoric opinion expressed by the Commissioner in his report Ext C1, the

correctness of which has not been seriously disputed by the counsel. With regard to item No. I. the Commissioner has the following observations to be made;

First of all I examined item No. 1 in E.A. 1225/84, that is about 35 to 40 ft. South to the Western end of the office building of the factory there erected a 315 K.V.A. Transformer; The makers of the same is Kerala Electrical and Allied Engineering Co. Ltd. Mamala.

The transformer is placed on a plat form, made of granite stone in cement mortar. The basement is having 8'' height and 6 ft. width and 7 ft. breadth. The transformer is simply placed on cement mortar base. Electric connection is cut of. Near the transformer two big iron rails are erected on the ground in order to give electric supply to the transformer from the main road. From the base of the transformer one iron bar is fixed and it leads to the bottom of the basement and it goes to the earth. On my examination it is found that the 3 iron bars are earth connection. Another rubber cable also goes to the under ground which I found that through that the supply is going to the factory building.

The transformer is placed on a base made of granite stone in-cement mortar. No nuts and bolts are seen under the transformer. But the 3 earth iron bars are fixed on the transformer body as well as on the basement and goes to the earth. The transformer was used for supplying electric current to the factory. The placing of the same is exactly as seen in public places placed by K.S.E. Board for regulating flow of electric current........

9. It is fairly clear from the above details noted by the Commissioner that the transformer in question cannot also be considered as attached to earth or to any structure imbedded to the earth. The Commissioner is categoric that the transformer is simply placed on a raised platform without being fixed to the platform with nuts and bolts or in any other manner. The fact that the transformer has got earth connection through 3 iron bars may not be sufficient reason to hold that the transformer should be treated as immovable property forming part of the properties included in schedule I of Ext. A3 and as such belonging to the Corporation as per Ext. A3 sale certificate. It is common knowledge that earth connection given to an electric equipment like the transformer is necessary only while it is being used and can be easily severed. The inclusive definition of the words "immovable property" contained in the General Clauses Act would only indicate that land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to earth "can be considered as immovable property, The words and phrases "attached to earth" has been defined in section 3 of the Transfer of Property Act to mean:

(a) rooted in the earth, as in the case of trees and shrubs;

(b) imbedded in the earth, as in the case of wall or buildings : or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached

All the three aspects indicated in clauses (a), (b) and (c) in the definition of the words "attached to earth" in section 3 of the Transfer of property Act would indicate that the attachment should be such as to partake of the character of the attachment of trees or shrubs rooted to the earth or walls or buildings imbedded in the earth. It is also necessary to ascertain whether such attachment is for the permanent beneficial enjoyment of the immovable property to which a movable is attached. Keeping in mind the meaning to be given to the term "attached to earth" as contained in the Transfer of property Act it is difficult to say that the transformer in this case is "attached to earth". Obviously it cannot be considered as coming within the classes of fixtures indicated in clauses (a) and (b). Even though it may be true that the transformer was being used for the beneficial enjoyment of the machineries in the factory and in a way connected to earth, there is no material in the case to hold that the transformer is attached to earth or to something which is imbedded in the earth for the permanent beneficial enjoyment of that to which it is so attached. On the other hand, the details given by the Commissioner is Ext. C1 report would indicate that the transformer was not attached to earth or to something which is imbedded in the earth on a permanent basis. The only connection which it is having with the earth is though the iron bars which acts as "earth connection" as has been found by the Commissioner. Such earth connection is needed only while the transformer is in use and can be severed easily at any time. Such a connection with the earth, according to us cannot be considered as sufficient to make the transformer, in the circumstances of the case, an immovable property forming part of the land and building which stood transferred to the Corporation at per the court sale evidenced by Ext. A3 sale certificate. We find sufficient support for the conclusion we have reached in a Division Bench decision of the Madras High Court reported in Perumal Naicker Vs. T. Ramaswami Kone and Another, wherein after an elaborate discussion of the relevant principles or tests to be applied in the matter of resolving the question whether a chattel is attached to the earth or something imbedded in the earth and has thus become immovable property or not: it has been observed thus:

For a chattel to become part of immovable property and to be regarded as such property, we should think, it must become attached to the immovable property as permanently as a building or a tree is attached to the earth. If, in the nature of things, the property is a movable property and for its beneficial use or enjoyment, if is necessary to imbed it or fix it on earth, though permanently, that is when it is use, it should not be regarded as immovable property for that reason

After observing so, the learned Judges have referred to various decisions taking the same view such as S.P.K.N. Subramanian Firm Vs. M. Chidambaram Servai, and Imam Saheb v. Ameer Sahib. AIR 1955 Madras. 620. In the same decision the learned Judges have also referred to a decision of the same Court reported in Md. Ibrahim v. N.G.F.T. Go., AIR 1944 Madras 492 which has taken a different view in the matter and have distinguished the same on facts. In fact that is the only decision which was relied upon by the learned Counsel for the Corporation in support of his submission that the transformer in this case should be considered as machinery attached to the earth permanently for the beneficial enjoyment of the machineries used in the factory.

10. Referring to Md. Ibrahim''s case, AIR 1944 :Mad 492, the learned Judge has stated thus;

..... Mohammed Ibrahim Vs. Northern Circars Fibre Trading Co., was decided by a Division Bench of this Court under the provisions of the Registration Act, that was a case of machinery of a mill fixed to a cement platform and attached to iron pillars fixed in the ground. It was held that the movable property so attached should be regarded as immovable property. It seems to us that this case turned on the special facts and the nature of the fixture; including the intention derived from the physical features of the fixture, that the mill was to be a permanent attachment to the earth.........

We are also of the view that the said decision is distinguishable on the special facts, and circumstances of that case as has been done by their Lordships of the Madras High Court in Perumal''s case. The reasoning of the learned Sub Judge contained in the impugned order to hold that 4 items of properties sought to be released from the attachment are immovable properties forming part of the land and building described in schedule I of Ext. A3 cannot be sustained in the light of the above discussion. The learned Judge has mainly relied upon the recitals in Exts. Al and A2 and the description of the property contained therein to arrive at the above conclusion. Whatever may be the legal effect of the recitals and description of the properties contained in Exts. Al and A2 that could not Have been legally relied upon to find title to the 4 items of properties in question when ownership was claimed on the basis of Ext. A3 said certificate unless it is found that they are included in the two schedules of properties given in Ext A3 sale certificate either expressly or by necessary implication. Reliance thus placed on the recitals and description of the properties contained in Exts. Al and A2 while construing the legal effect of Ext. A3 is neither proper nor legal. In the light of the facts and circumstances of the case and the legal principles indicated above, we are of the definite view that the learned Judge was not right in concluding that the 4 Items of properties are immovable properties coming within the description of the properties included in schedule 1 of Ext. A3 sale certificate and as such belonging to the claimant. Accordingly the order under appeal is set aside. The attachment in respect of the 4 items of properties is restored. E.A. No. 890 of 1984 will stand dismissed.

Appeal is accordingly allowed. No costs.

