IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.767 of 2010
IN
Civil Writ Jurisdiction Case No. 7184 of 2009

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Bihar Distillery Ltd. Having its Registered Office at 13, Commercial Complex, S.K. Puri Boring-Patliputra Road, Patna-800013 through its Director, Ila Rani Jhunjhunwala.

.... Objector-petitioner-Appellant

Versus

1. Central Bank Of India, H.Q Chandramukhi , Nariman Point ,Bombay through its Chairman.
2. Industrial Corporation Pvt. Ltd. through its Managing Director Mr. Viren Pande, 13 Poorvi Marg, Vasant Vihar, New Delhi Union of India through Ministry of Finance Banking Secretary.
3. Union of India through Ministry of Finance Banking Secretary
4. Recovery Officer, Debts Recovery Tribunal, Patna 396 East Boring Canal Road, Patna.
5. Branch Manager, Central Bank Of India, Siwan Branch, P.S.& District-Siwan.

.... Decree holders-Respondents-Respondents

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Appearance :

For the Appellant/s : Mr. Kamal Nayan Chaubey, Sr. Advocate &
Mr. Ambuj Nayan Chaubey, Advocate

For the Bank : Mr. Ajay Kumar Sinha &
Mrs. Manju Jha, Advocates

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CORAM: HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH
and
HONOURABLE JUSTICE SMT. NILU AGRAWAL

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH)

Date: 17-07-2015

The appellant-Bihar Distillery Limited was the unsuccessful writ petitioner. It had challenged before the writ Court the order dated 21.06.2006, passed in Recovery Proceeding No. 44 of 2001, by the Recovery Officer of the Debt Recovery Tribunal, Patna. By the said order the Recovery Officer rejecting the objections as filed by the writ petitioner-appellant, directed for auction sale of its properties holding that properties purchased by the writ petitioner-appellant from Industrial Corporation Private

Limited were properties which were mortgaged and charged from before.

The learned Single Judge by his judgment and order dated 04.03.2010, passed in C.W.J.C. No. 7184 of 2009, held that the properties were sold by I.C.P.L. to the writ petitioner-appellant after institution of the Money Suit for recovery of money based on substituting charge created on the properties. The learned Single Judge held that in such a situation sale of properties after the suit has been instituted would defeat the right of the creditor i.e. the plaintiff in the Money Suit, which is the Central Bank of India. The learned Single Judge further held that the order of the Recovery Officer was passed on 21.06.2006, rejecting the objections of the writ petitioner-appellants, but the writ petitioner-appellant did not challenge the same either in the statutory appeal that was available to it before the Presiding Officer of the Debt Recovery Tribunal. The order having been passed by the Recovery Officer not challenged in any other proceedings and it is only after three years when further orders were passed by the Recovery Officer including order of attachment that in 2009 the writ petition was filed once limitation for challenge in appeal had expired. On the aforesaid grounds the writ Court refused to interfere and come to the rescue of the writ petitioner in respect of sale of properties ostensibly purchased by petitioner for consideration.

We have heard parties at length and we are not inclined to interfere, though for slight different reasons. In fairness to Mr. Ambuj Nayan Chaubey, learned counsel appearing in support of the appellant, we must notice a plea raised by him. He submits that it is on 28.11.1987 that an agreement for sale of certain lands was entered into between I.C.P.L. and the Bihar Distillery Limited (B.D.L.) the writ petitioner-appellant. It is on 06.02.1988 that the Bank recalled the dues in toto and it is on 29.02.1988 Money Suit No. 09 of 1988 was instituted for recovery of about Rs. 23,00,000/-. The sale deeds as between I.C.P.L. and B.D.L. were executed, two in number, on 11.07.1988 and 14.07.1988 and were duly registered. On these facts, he submits that there being an agreement for sale long preceeding the Suit, the sale deed executed after the suit was instituted, sale would not be hit by the doctrine of lis pendis under Section 52 of the Transfer of Property Act.

He has placed reliance on the judgment of the Apex Court reported in case of 1990 (3) SCC page 291 (Vannarakkal Kallalathil Sreedharan Vrs. Chendramallth Belakrishnan & Another).

On the strength of the aforesaid decision, he submits that there being an obligation to sell by virtue of the agreement to sell aforesaid prior to the suit, subsequent execution of sale deed, cannot be avoided much less on the principles of lis pendis, We are unable to agree.

In order to decide this, there are certain other facts which have to be taken into account. I.C.P.L. is an old Private Limited Company incorporated under the Companies Act, 1956. It basically had a Sugar Mill and extensive lands for the said purpose. In due course of time, so as to utilize the molasses produced, it set up a Distillery as well. The Company I.P.C.L. thus had two units, one the Panchrukhi Sugar Mill and the other Bihar Distillery all located at the same place. It had taken substantial amount of financial assistance from the respondent Central Bank of India for which it had mortgaged its entire properties. There was substantial default and accordingly in the year 1977 a suit being Mortgage Suit No. 42 of 1977 was filed against the Company and its Directors including its Chairman-cum-Managing Director. This suit admittedly was for enforcement of the mortgage rights in the entire mortgage properties being entire properties of the Companies. In due course of time, this suit was decreed upon compromise, but soon thereafter there were substantial defaults by the Company. This compromise decree was dated 23.01.1982. It now appears that even though there was default in compliance of the compromise decree, the Central Bank of India further, advanced loan to I.C.P.L. For this advance charges were again created on the properties and on 20.08.1987 charges were duly registered in terms of the Company Act. As noted above, there were substantial defaults on all corners. It now appears that on 16.11.1987 Bihar Distillery Limited was incorporated and registered under the provisions of the Company Act, 1956. Its

Managing Director later was Mr. Viren Pandey, who was also the Managing Director-cum-Chairman, I.C.P.L. at that time. On 28.11.1987 an agreement was drawn up between I.C.P.L and B.D.L. for sale of the Distillery unit of I.C.P.L. There being substantial defaults on or about 06.02.1988, the Central Bank of India recalled all dues and liabilities from I.C.P.L. This defaulted their obligation under the compromise mortgage decree and ultimately on 29.02.1988 Execution Case No. 03 of 1988 was filed in the Court of learned Sub-Judge-III, Siwan for executing the compromise decree and on the same date Money Suit No. 09 of 1988 was also instituted for recovery of money advanced for which charges had already been created on the properties. Notwithstanding, this on 14.07.1988 I.C.P.L. vide two registered sale deeds as noticed earlier, sold 124 bighas lands and in due course B.D.L. got their name entered into the Revenue register. While the Money Suit No. 09 of 1988 was pending the Recovery of Debts due to Banks and Financial Institutions Act, 1993 came and thereafter the Debt Recovery Tribunal at Patna was established. Consequently, Money Suit No. 09 of 1988 stood transferred to the Debt Recovery Tribunal as P.T. Case No. 04 of 1999. It may be noted that similarly in the same year the execution case was also transferred to the Debt Recovery Tribunal. The two proceedings being at different stages, that is one in execution stage and the other in the stage of Money suit, they were separately registered and proceedings started wherein ultimately in the Money Suit, it was duly decreed and certificate issued and recovery proceeding registered. Similarly in the Execution Case, which was transferred, certificate was issued and recovery proceeding also started. It is at this stage objections were once again raised when enforcement of certificate was being sought to be made and that was rejected in the year 2006. The Recovery Officer clearly held that charge on the properties had been created much prior to the agreement for sale. The entire properties had already been mortgaged first and then additional charge was also created. All this was long before the agreement for sale. Thus the agreement for sale is of no consequence and the sale deed after the institution of Money Suit cannot in any way, affect or prejudicially affect the right of the Bank to recover the dues which were secured to the properties of I.C.P.L. as subsequently transferred to B.D.L. We are in agreement with the view. It is on these facts that we thinks that the Apex Court judgment as relied upon is not applicable. There was pre-existing charge on the properties prior to agreement for sale that makes all the difference. The properties as received by B.D.L. were mortgaged properties and charge had been created. Thus, the obligation to sell as created by the agreement between the I.C.P.L. and B.D.L. could not take precedent over pre-existing mortgage and charge. Thus, the steps taken by the Recovery Officer to realize the dues of I.C.P.L. from the properties which now stood transferred to Bihar Distillery Limited (B.D.L.) cannot be challenged.

We may also note that the learned single judge was correct in not interfering because the grave man error of charge as against the writ petitioner-appellant was the order of the year 2006 rejecting all objections as raised before the Recovery Officer of the Debt Recovery Tribunal. There was a statutory appeal provided to the Presiding Officer of the D.R.T. but none was preferred. This order dated 21.06.2006 was allowed to attain finality. It is only in 2009 when properties were being attached that the writ petition was filed. Having allowed the statutory remedy to become barred and having allowed the impugned order to attain finality, learned Single Judge was right in not interfering with the order impugned. We see no reason to take a different view in the matter.

In fairness of Mr. Choubey, we must note that he has raised an issue with regard to Rule 68B of Schedule-2 to the Recovery Rules under D.R.T. This is nothing but Rule 68 B of the Income Tax Recovery Rule. He states that the steps taken to sell the properties is now barred by limitation is provided under Rule 68B aforesaid. We are not impressed. As per the writ petitioner/appellant before us the attachment was made in the year 2009 when the writ petition was filed. The writ petition had been dismissed, there is an appeal pending. It is the attachment order that was challenged before this Court. If we read Rule 68B which was essentially made for recovery of tax assessment then sale had to take place within three years of attachment. This rule is applicable to proceeding before D.R.T. as far as possible. In 2009 the writ petition itself being filed and the attachment being of the year 2009, we see no ground how it could be submitted that the proceedings to sell the properties could be beyond time. It is next submitted that only there was the first attachment which was made on 23.08.2001 soon after the proceedings had been received from Civil Court and the objections were rejected. Again we could not agree. The proceedings would show that one after another objections of different natures were taken objecting to steps being taken for sale of the properties, naturally the Recovery Officer had to decide the issue. Validity of attachment was in question. That took the time and this objection was ultimately rejected in 2006 and ultimately fresh attachments were issued in 2009.

For the reasons aforesaid, we are not inclined to take a different view of the matter from what has been taken by the learned Single Judge or for that matter by the Recovery Officer D.R.T.

We are, therefore find no merit in the appeal and it is accordingly dismissed.

(Navaniti Prasad Singh, J)

(Nilu Agrawal, J)

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