IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2374 OF 2014

Central Bank of India ... Petitioner
versus
M/s.Chesire Plastics and others ... Respondents

Mr.Prathamesh Kamat with Mr.T.N.Tripathi and Ms.Sapna Rachure i/by M/s.T.N.Tripathi & Co. for Petitioner.
Mr.Jay Choksi with Mr.L.R.Castelino i/by M/s.Law Frame for Respondent no.6.

CORAM : S.C.DHARMADHIKARI AND
PRAKASH D. NAIK, JJ.

DATE : 29th March 2017

PC :

1. Rule. Mr.Choksi waives service for Respondent no.6. Mr.Kamat, on instructions, seeks to delete Respondent nos.1 to 5 only for the purposes of this petition. Deletion granted. Taken up forthwith for final disposal.

2. To avoid any technicality and unnecessary frivolous objections being raised, we grant leave to the Petitioner to amend and incorporate specific grounds and pleadings forthwith.

3. This petition under Article 226 of the Constitution of India challenges an order passed by Debts Recovery Appellate Tribunal, Mumbai (`DRAT') on 18th June 2014, Annexure-I to the writ petition, in Miscellaneous Appeal No.154 of 2010. That order and a

copy of which is annexed to the paper book at page 197, reads as under :

> " The present Appellant has filed Suit No.2657/1988 in the Hon'ble High Court of Bombay for recovery of a sum of Rs.10,17,806/-. Ultimately, the suit was decreed on 13.09.1991. Thereafter, Recovery Certificate was also issued on 16.09.2004. The property has been auctioned by the Recovery Officer. The respondent has filed an application, Recovery Proceedings No.334/2004 in which states that Demand Notice dated 28.10.2004 was issued prior to the alleged Agreement for Sale dated 28.03.2007, whereas the property has been attached on 13.07.2007. Therefore, the counsel prayed that the action taken by the Recovery Officer has to be set aside. After hearing this matter, the Recovery Officer himself dismissed the application against which he has appeared before the Recovery Officer in R.P.No.334/2004 and Appeal No.02/2009 dated 13.11.2009 is also dismissed, against which the appeal is filed.
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> 2. The contention of the learned counsel for the Appellant is that even though the property (flat) is purchased from respondent no.4 and demand notice was served on the Defendants on 28.10.2004, hence, the attachment will relate back to the date of the demand notice, as per Rule 51 of the Second Schedule of the Income Tax Act. The Recovery Certificate was also issued on 16.09.2004. Therefore, he prayed that he is entitled to the charge over the property under the Rule. On several occasions, from 21.03.2011 onwards till date, the respondent did not appear in the matter, hence called absent and set exparte.
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> 3. From perusal of the application date there is no dispute on this. The Suit was filed in the year 1988 and it has been decided subsequently and thereafter recovery certificate was issued on 16.09.2004. The property was attached on 13.07.2007, the Registered

Agreement executed between both the parties was on 28.03.2007 and the amount due is also not in dispute. The only short point as per Income Tax Rules is whether the attachment made relates back to the sale notice alone has to be an issue. Here in this case, the Appellant has specifically mentioned it in its affidavit of assets dated 25.09.2006. He is the first charge holder. The present Appellant is not entitled for any relief. This aspect is duly considered. Hence, there is no interference and the Miscellaneous Appeal is dismissed with no order as to costs.

ORDER

The Misc. Appeal is dismissed with no order as to costs."

4. Mr.Kamat appearing in support of this petition would submit that this is a cryptic and virtually unreasoned order of DRAT. He would submit that the case of the present Petitioner-Appellant in that appeal was that Central Bank of India had filed a suit in this Court and before establishment of Debts Recovery Tribunal (`DRT'). That suit was filed against Respondent no.1. The Respondent no.1 had borrowed certain monies but defaulted in repayment thereof. It is a partnership firm of which Respondent nos.2 to 5 to this writ petition were, at the relevant time, partners. The sixth Respondent before this Court claims to be a bona fide purchaser for value without notice.

5. Mr.Kamat would submit that Suit No.2657 of 1998 for recovery of Rs.10,17,806/- was decreed on 13th September 1991. In view of the establishment of DRT and in terms of Section 17 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993

(Recovery of Debts and Bankruptcy Act, 1993) (`the Act of 1993'), an application for execution styled as Miscellaneous Application No.103 of 2003 under Section 31-A of the Act of 1993 was filed for issuance of recovery certificate. On this application of the Petitioner, a certificate was issued on 16th September 2004. It is in execution of this certificate that the Recovery Officer attached to DRT, Mumbai addressed a notice to the judgment debtors under Rule 2 of the Second Schedule to the Income Tax Act, 1961. The argument was that such a notice could not have been issued on the strength of Sections 28 and 29 of the Act of 1993. By Section 29, the provisions of Second and Third Schedules of Income Tax Act, 1961 and Income Tax (Certificate Proceedings) Rules, 1962, as in force from time to time shall, as far as possible, apply with necessary modifications, as if the said provisions and the Rules referred to the amount of debt due under this Act instead of to the Income Tax Act, 1961. Thus, by reference to these Rules, a decree as above can be enforced and executed.

6. After service of the demand notice, the Petitioner filed an affidavit disclosing assets for attachment. One of the assets of the defaulter/judgment debtor firm was a flat bearing No.A-1/2, Sonal Apartments, Satya Sonal Co-operative Housing Society Limited, Jay Prakash Road, Goregaon (East), Mumbai-400 063. Upon such an affidavit dated 25th September 2006 being filed, a warrant of attachment was issued on 13th July 2007. It was served on the judgment debtors as also co-operative housing society. The warrant was also pasted on the conspicuous part of the flat on 31st July 2007. Once report was filed of this act as also publication of the

warrant, what the bank noticed was that it was the judgment debtors who were in possession of the flat. The bank visited this property with valuer. However, later on it was sixth Respondent to this writ petition who filed an application Exhibit-23 dated 20th June 2008 before the Recovery Officer objecting to this attachment. This application was contested. On 28th November 2008, the Recovery Officer allowed this application Exhibit-23 and raised the attachment.

7. Feeling aggrieved and dissatisfied with this order dated 28th November 2008 that the Petitioner filed an appeal. Thereafter what the Petitioner did was to make an application for maintaining status-quo. That application was heard and later on status-quo was vacated. The status-quo was vacated by the Presiding Officer of DRT by rendering a finding that sixth Respondent was bona fide purchaser of the said property. In substance, Mr.Kamat would urge that the order of Recovery Officer was erroneously confirmed by the Presiding Officer of DRT on 13th November 2009. Further aggrieved, the Petitioner approached the DRAT by filing an appeal being Miscellaneous Appeal No.154 of 2010 under Section 20 of the Act of 1993 and which appeal is dismissed by above reproduced order.

8. Mr.Kamat would urge that the point, inter alia, arising for consideration is whether Respondent no.6 is indeed a bona fide purchaser for value without notice. That argument of sixth Respondent is premised on the fact that the bank was aware that the property which has been attached, was earlier mortgaged to some

other bank. In the teeth of such prior mortgage, this property could not have been attached in the execution of a money decree/recovery certificate. The affidavit which is stated to have been filed by the bank, does not admit existence of any prior mortgage. The words "purported mortgage" or "listed mortgage" having been employed in the affidavit would mean that the bank does not admit legality and validity of this mortgage. Whether that mortgage affects the attachment and therefore the attachment must be raised is a question which was required to be addressed and decided specifically. That having not been done, the impugned order must be set aside and the appeal must be restored to the file of DRAT.

9. On the other hand, it is argued that this contention of the Petitioner bank raised before us was noted and considered by the Chairperson of DRAT. In that regard, a specific portion of the above reproduced order, particularly paragraph no.3, is highlighted. Further, it is argued that once prior mortgage takes precedence and sixth Respondent having nothing to do with the debt or the recovery of Petitioner bank, there being no privity between sixth Respondent and the Petitioner before us, this writ petition deserves to be dismissed.

10. After hearing both sides, we are unable to agree with the Respondents' advocate. We do not think that the argument as raised before us, was noted muchless considered and decided. Learned Chairperson of DRAT was aware that there is an appeal provided against the order of DRT in matters of execution of recovery certificate. The Petitioner-Appellant was aggrieved and dissatisfied

with the order of Recovery Officer as confirmed by Presiding Officer of DRT. The argument was that the flat could have been proceeded against in execution of this recovery certificate. The position in law that was highlighted and particularly is that there is a recovery certificate already issued. There is a money decree already passed. Money decree can be executed and enforced by attachment of immovable and movable property of the judgment debtors. That is how the attachment has been levied by invocation of Section 29 read with Rules to the Second Schedule of Income Tax Act, 1961. That attachment has been erroneously raised or lifted. There is no admission of any valid and legal transaction as between any other bank and the defaulter-judgment debtors. The Respondents-judgment debtors have put forward sixth Respondent and defeated the recovery certificate by pleading that the flat which is attached, stands as a security for the dues with some other bank. That other bank was not before any of the Tribunals. No documents much less any registered deed of mortgage was produced. In such circumstances, by a sweeping observation and in one line, an admission cannot be culled out from the affidavit of assets filed by the Petitioner bank and the letter which is forming part of the same.

11. We see much substance in the argument of Mr.Kamat. From paragraph 3 of the above reproduced order, it is not clear as to whether such an argument though stated to have been canvassed, was ever considered and decided. How the Appellant lost the appeal only on the strength of the affidavit of assets has not been indicated and with sufficient clarity much less precision. Beyond the claim of Respondent no.6 before us being first charge holder being upheld,

there is no discussion or any elaboration. The property which was attached on 13th July 2007 is stated to have been purchased. If it was purchased by a registered agreement dated 28th March 2007, then whether that constitutes a transfer of title or ownership is not clear at all. The contents of that document have not been discussed. If the short point is whether the attachment dates back to the sale notice, then, which is the sale notice in this case also needs to be verified. Thus, this is not a satisfactory and lawful manner of dealing with an appeal. An appeal is a valuable right and when that is entertained, the order under challenge is open for scrutiny. It is not as if the Appellate Tribunal's poweers are restricted either in entertaining the appeal or in deciding it. We have not been shown any provision which restricts the appeal either to a question of law or otherwise. Once an appeal to the Appellate Tribunal lies against all orders, save and except an order made by consent, then that order is open for scrutiny both on facts and law. In such circumstances, when the appeal not being decided in accordance with law by proper and adequate reasoning, the appellate order cannot be upheld.

12. On this short ground alone and without expressing any opinion on rival contentions, but clarifying that they can be raised all over again, we set aside the impugned order. We restore Petitioner's appeal to the file of DRAT. That should be decided on its own merits and uninfluenced by the earlier order and in accordance with law. It should be decided by a fresh order. We clarify that we have not expressed any opinion on the rival contentions. The writ petition is allowed in these terms. There would be no order as to costs.

13. The injunction against transfer or alienation or parting with possession of the subject immovable property/flat granted by this Court, shall operate and continue during pendency of the Miscellaneous Appeal No.154 of 2010, but without prejudice to the rights and contentions of the parties.

(PRAKASH D. NAIK, J.) (S.C.DHARMADHIKARI, J.)

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