IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 765 OF 2019

RAVI SHANKAR PANDEY ... Petitioner

Versus

FUN CREAM FOODS (INDIA) LTD., THR.
ITS DIRECTOR, VIKRAM KAPOOR ... Respondent

Adv. Jatin Ramaiya with Adv. A. C. Sardessai for the Petitioner.

Adv. Shashikant Narayan Joshi with Adv. Rawool S. Gurunath for the Respondent.

Coram:- DAMA SESHADRI NAIDU, J.
Date:- 12th February 2020.

Oral Order:

The petitioner, as the plaintiff, filed Summary Suit No.3386 of 2013 before the Bombay City Civil Judge, Borivali Division, at Dindhoshi, Goregaon, Mumbai. He filed that suit against the sole respondent, a company. The suit was decreed on 15.2.2014, ex parte. As it is a suit for recovery of money, the trial Court directed the Company to pay to the petitioner about Rs. 12.00 lakh, the decreetal amount.

2. To have the decree enforced, the petitioner got the decree transferred to the Court of Civil Judge, Senior Division, at Margao, Goa, for the petitioner claims that the Company has its assets within that jurisdiction. When the petitioner applied for attachment of the movable and immovable properties, the Executing Court, through its orders dated

16.2.2019 and 20.4.2019, rejected both the applications. Aggrieved, the petitioner has filed this writ petition.

3. In the above factual background, Shri Ramaiya, the learned counsel for the petitioner, has submitted that the trial Court has misdirected itself in dismissing the petitioner's application for attaching both the movable and the immovable properties. That said, he has fairly admitted that initially the petitioner wanted even the land on which the company's factory is situated to be attached. But later he realized that the land belonged to the Goa Industrial Development Corporation (GIDC). So the petitioner, according to him, gives up his claim over the land. But the Company still has immovable proprieties in the form of the factory shed having much value and also the entire equipment as immovable property or as movable property based on whether it has been embedded to the earth for its beneficial enjoyment.

4. Shri Ramaiya has also submitted that the alleged lease deed, that is the tripartite agreement, involving the Company, GIDC, and the third party, as well as the alleged agreement of sale with the third party was subsequent to the petitioner's filing the execution proceedings. Thus, he has urged this Court to set aside the impugned order and allow the petitioner to have the Company's movable and immovable properties attached and brought for sale.

5. In response, Shri S.N. Joshi, the learned counsel for the respondent-Company, has strenuously contended that the Company has been sustaining heavy losses for many years. According to him, initially, the Company’s

erstwhile Managing Director defrauded the Company and other directors, and later went untraced. Because of the fraud played by the then Managing Director, the Company suffered huge losses. Shri Joshi has also submitted that the Company owes dues to the workmen, the banks, the State Government, and several other creditors. In this context, he has brought to my attention Sections 326 and 327 of the Companies Act, 2013.

6. To elaborate, Shri Joshi has submitted that the property, either movable or immovable, now the petitioner seeks to attach, has already been transferred to a third party. According to him, through the agreement of sale, dated 5.9.2014, the Company transferred its entire assets to the third party and liquidated some of its debts, including the workmen's dues, from the consideration it received. In the absence of the third party, no execution proceedings are maintainable, he stresses.

7. As to the movable properties, Shri Joshi submits that the Company has no movable property worth the name, except nine cupboards, which are of no value. After further elaborating on the financial conditions of the Company, Shri Joshi stresses that to the tripartite agreement, dated 29.5.2015, even the GIDC has consented. And that has resulted in the legitimate transfer of assets. He has also pointed out that various other creditors have also initiated recovery proceedings, which are at different stages before different courts or forums. In the end, Shri Joshi urges this Court not to interfere with what is said to be the Executing Court's well-reasoned order. Shri Joshi, in this regard, asserted that at no stage has the

Executing Court restrained the Company through an interim order from alienating or transferring its assets.

8. Heard Shri Ramaiya, the learned counsel for the petitioner, and Shri Joshi, the learned counsel for the respondent-Company.

9. Indeed, the respondent Company suffered a decree, and that decree still remains unchallenged. In fact, the decree was exactly six years ago. True, the Company stresses that its erstwhile Managing Director defrauded the Company and pushed it into losses. According to the Company, even the petitioner has secured the decree ex parte and that the company has not been served with any notice. To answer this assertion, I may note that the Company's internal affairs, such as the Managing Director's acting adverse to the Company's interest, do not affect the decree holder's rights.

10. Indeed, the Company has also pleaded that it was served in the suit and that the decree was ex parte. In fact, even in the execution proceedings, the Company sought time to appeal against the decree. But that has not happened in these six years. Unchallenged, an ex parte decree, too, is as good as the one secured on contest. Even the Company's feeble plea that it has not been served with any notice in the suit does not stand legal scrutiny, for in execution, the Court cannot revisit the alleged flaws in the suit.

11. Now, I may address the Company's another contention: its owing money to various other entities and establishments. The Company pleads that it owes money to the workmen, the banks, the State Government, and

third party creditors. The Company itself has pleaded that it has cleared all the dues of the workmen out of the consideration it has received from the third party purchaser. As to the other debtors, it is well established that the judgment debtor cannot plead for a third party. A judgment debtor cannot even plead that he lacks the title to the property to be attached and sold. It is for the true owner, if any, to resist the execution. If there are other creditors, they may exercise their rights of recovery and seek ratable distribution of the assets. At any rate, the judgment debtor has no say in this. In these six years, none seems to have come forward. So this Court cannot ask the petitioner to wait in eternity in anticipation of some third-party creditor's coming.

12. Finally, I may come to the tripartite agreement and the lease deed. Indeed, the impugned order records that in the light of the tripartite agreement and the agreement of sale, the Company has already transferred the proprieties; there remains nothing further for the petitioner to attach. I am afraid this plea cannot be sustained. Chronologically speaking, the petitioner secured the decree on 15.2.2014 and applied for execution on 29.4.2014. But the agreement of sale was on 5.9.2014, and the lease deed was on 29.5.2015.

13. Earlier, the Company has applied for the closure of the execution proceedings. In response, the Executing Court passed a detailed order on 14.12.2015. The order, in fact, narrates the developments in the execution

proceedings and highlights the Company's conduct. It pays to extract a part of that order, and it reads:

> "It is pertinent to note that the when the execution application was filed and the matter was fixed for appearance on 30/7/2014 at the first instance the judgment debtor failed to appear despite of being served. This is clear from bailiffs report dated 22/7/2014. I have perused the summons and I have noted that the same has been accepted by one T. Pednekar and the same bears seals of Fun Cream Foods India Ltd. This therefore belies the contention of the judgment debtor that a on the date of filing of the suit or the execution application the factory premises were closed. Subsequently thereafter notice was issued to the judgment debtor in terms of O.21 Rule 54 of CPC asking the judgment debtor to disclose his assets which again have been served upon the judgment debtors an the notice has been accepted by one Adarsh Laad, as the manager of the judgment debtor. Despite of this no affidavit was filed disclosing the assets within the period as stipulated by law. As a result an application was made for attachment of the factory shed machinery, owned by judgment debtor. Court issued a Show cause notice to the judgment debtors. This show cause notice directed the judgment debtors to appear on 11/5/2015. This show cause notice was returned with an endorsement that the head office of the factory is situated in Mumbai an its chairman is Capt. Jamshed Appoo."

14. Thus, I do not doubt that the Company has executed the agreement of sale and the lease deed being fully aware of the execution proceedings. The Company did all it could to stultify the execution proceedings. At any rate, though the third party may have a semblance of interest in the properties allegedly in his possession, I reckon he need not be a party to these proceedings because he traces his right through the judgment debtor and the alleged transfer took place *lis pendens.*

15. Eventually, I may address the Company's contention that Sections 326 and 327 of the Companies Act set out the priority in the disbursement of the Company's assets. But, as rightly pointed out by the petitioner's counsel, so far there are no proceedings for winding up or liquidation of the

Company. In these circumstances, merely based on a provision in the Companies Act that may have relevance at some other stage, this Court cannot curtail the decree holder’s rights.

So I set aside the impugned orders and allow the petitioner's claim for attaching the Company's movable and immovable proprieties. The Company’s properties stand attached.

DAMA SESHADRI NAIDU, J.

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