IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 4039 OF 2020

Shriram City Union Finance Ltd. … Petitioner
Versus
Pratibha Shesherao Kulkarni and another … Respondents

WITH

WRIT PETITION NO. 4491 OF 2020

Shriram City Union Finance Ltd. … Petitioner
Versus
Madhukar Manikrao Phad and another … Respondents

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Mr. V. Y. Bhide, Advocate for petitioner
Mr. D. M. Shinde, Advocate for respondents in W.P.No.4039/2020

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CORAM : R. G. AVACHAT, J.

RESERVED ON : 27th JANUARY, 2021
PRONOUNCED ON : 03rd FEBRUARY, 2021

PER COURT :-

. Both these writ petitions are decided by this common order since the common question of fact and law arise therein.

The petitioner in both the petitions is a finance company. It advanced a loan to the respondent No.1 in both the petitions. As there is an arbitration clause in loan agreements, the petitioner finance company resorted to the arbitral proceedings for recovery of amounts due on the respective loan accounts. The Arbitrator passed his awards. The petitioner finance company put both the awards for execution. It, therefore, moved the Court of Principal District Judge. In the execution proceedings, the petitioner company moved applications Exh.10 and Exh.9 for attachment and sale of immovable properties of the judgment debtors. Learned Principal District Judge, vide his order dated 04.04.2019 on application Exh.10 in R.D.No.382 of 2018, attached the immovable property in terms of order 21 Rule 54 of the Code of Civil Procedure (CPC). Similar order was passed below Exh.9 in R.D.No.390 of 2018 on 15.10.2018. Thereafter, the petitioner - finance company moved applications (Exh.12) in both the execution proceedings for sale of attached property under Order 21 Rule 66 CPC. The learned Principal District Judge, by his order dated 29.01.2020, rejected the applications and order of attachment of property under Order 21 Rule 54 CPC passed by his predecessor was quashed and called back. These two orders dated 29.01.2020 are under challenge in these writ petitions.

2. The immovable properties of the judgment debtors, which were attached under Order 21 Rule 54 CPC and sought to be sold, have been mortgaged in favour of the petitioner company as a security for repayment of loan amounts.

The reason behind passing of the impugned orders is that in view of Order 34 Rule 14 CPC, it was necessary to file a suit for sale of mortgaged property. For better appreciation, Order 34 Rule 14 is reproduced below:

> "***14. Suit for sale necessary for bringing mortgaged property to sale –*** *(1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, Rule 2.*
>
> *(2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882 (4 of 1882), has not been extended.*"

3. The learned Advocate for the petitioner did not dispute the legal proposition. He, therefore, came around to give up a challenge to the impugned orders so far as those relate to prayers for sale of mortgaged properties. The learned Advocate, however, would submit that there is no legal bar for passing order of attachment of property, which was already a subject of mortgage as security in respect of the same debt. He relied on Section 9 of the Arbitration Conciliation Act, 1996 (for short " the Act of 1996"). He has also placed reliance on the judgments of this Court in the case of ***Nimbus Communications Limited vs. Board of Control for Cricket in India***

and Ors. - MANU/MH/0247/2012 and ***Deccan Chronicle Holdings Limited vs. L & T Finance Limited – MANU/MH/1331/2013.***

4. According to the learned Advocate, the respondents – judgment debtors have defaulted on payment of the loan amounts under the awards. It has, therefore, become necessary to attach their immovable properties which have already been the subject matter of mortgage as security for repayment of the amounts due under the awards.

5. Learned Advocate for the respondents, would on the other hand, submit that the judgment debtors have repaid substantial amount under the award. It is the financial condition of the judgment debtors that come in their way to clear the dues at once. The learned Advocate supported the impugned order.

6. Admittedly, the immovable properties which were attached under the orders dated 04.04.2019 and 15.10.2018 passed by the learned Principal District Judge, have been mortgaged by its owners / judgment debtors in favour of the petitioner finance company towards repayment of the loan amounts under the awards. Since Order 34 Rule 14 comes in the way of the petitioner finance

company to urge for sale of mortgaged properties without there being a decree, in that regard, the petitioner finance company has filed the suits for sale of mortgaged properties.

In my view, the amounts due under the awards to the petitioner – finance company, have been duly secured by mortgage of the immovable properties. The very mortgaged properties need not be attached again since passing of such order would be redundant.

7. It is true that in view of Section 9 of the Act of 1996, a party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a Court for an interim measure of protection in respect of any of the following matters, namely :-

> "*(a) ………….*
> *(b) securing the amount in dispute in the arbitration;*
> *(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experience to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;*
> *……………..*
> *…………….."*

8. It is reiterated that by virtue of the mortgages, the amounts under the award stand secured. The petitioner – finance company has now filed the suits for sale of mortgage properties. Only for the sake of desire of the petitioner – finance company, no orders regarding attachment of the mortgaged properties could be passed.

9. True, in both the cases relied on (above) by the learned Advocate for the petitioner, immovable properties had been mortgaged. The facts thereof, however, indicate that no suits for sale of mortgaged properties had been filed by the creditors therein. In para 7 of the judgment in the case of ***Deccan Chronicle (supra)***, it has been observed thus:

> "***7.*** *The second submission proceeds on a logical fallacy. When a creditor, who has a mortgaged security in his favour, confines the claim in arbitration for the recovery of monies due and outstanding, he does not relinquish the mortgaged security or abandon his right to bring the mortgaged security to sale by subsequently instituting a suit as envisaged in Order XXXIV Rule 14. The creditor cannot enforce a right in rem in the course of arbitral proceedings. Hence, a claim for the enforcement of the mortgaged security cannot be entertained in arbitration. <u>But when the creditor asserts a money claim simpliciter in the course of arbitral proceedings, the law does not compel him to relinquish his mortgaged security as a condition for asserting the money claim in arbitration or to abandon his right as a secured creditor to bring the</u>*

> *<u>mortgaged property to sale by filing an independent suit in accordance with Order XXXIV Rule 14.</u> Consequently a secured creditor can invoke the provisions of Section 9 of the Arbitration and Conciliation Act, 1996 which is a provision incidental to or ancillary to the arbitration proceedings for seeking an interim measure of protection that would ensure that the fruits of the arbitral award are not destroyed or lost by dealings of the debtor with the properties in the meantime. That is exactly what has been done by the secured creditors and correctly accepted by the learned Single Judge.*"

10. In the case of ***Nimbus Communications Limited (supra)***, it has been held that power which was exercised by Court under Section 9 of the Act of 1996, was guided by underlying principles which govern exercise of an analogous power in CPC. Exercise of power under Section 9 of the Act of 1996, could not be totally independent of those principles.

11. It is therefore necessary to have a glance at provisions of Order 38 Rule 5 of CPC, which reads thus:

> ***"5. Where defendant may be called upon to furnish security for production of property -*** *(1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,-*
> *– (a) is about to dispose of the whole or any part of his property, or*
> *– (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the*

> *Court,*
> *– the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.*
> *– (2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.*
> *– (3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.*
> *– (4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule such attachment shall be void."*

12. In both the applications whereunder attachment of the mortgaged properties was sought, no case has been averred as is required to be pleaded in terms of Order 38 Rule 5 CPC. Order of attachment before judgment cannot be passed as it is. The Court may either direct the defendant to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree. Rule 9 of Order 38 CPC mandates the Court to withdraw the attachment when the defendant furnishes the security required by the Court. If we apply the aforesaid analogy of Order 38 Rule 5 CPC

to the given set of facts, the order of attachment of the immovable properties would be required to be passed calling upon the judgment debtors to furnish security for production or to place the property at the disposal of the Court. When the judgment debtors have already mortgaged their immovable properties as a security for the amount loaned to them by the petitioner – finance company, it can be stated that the loan amount has been very much secured and no order of attachment of the mortgaged properties could again be passed. The petitioner company although unsuccessful in these writ petitions, needless to state the amount due to it under the arbitral awards have been very much secured by mortgage of immovable properties.

13. The writ petitions therefore fail. The same are dismissed.

[R. G. AVACHAT, J.]

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