

13/9/2022

ORDERS ON PRELIMINARY ISSUE

As issue No.3 pertains to question of law, it was taken up as preliminary issue for hearing. Said issue is as follows:

“Whether the suit is hit by the provisions of SARFAECI Act as alleged?

Perused the pleadings and the materials on record. The findings on the above issue is kept open for consideration along with merits of the suit, for the reasons below.

REASONS

The learned counsel for the plaintiff filed a memo with following decisions.

1. Civil Appeal No.164/1994 (Canbank Financial Services Ltd., Vs. The Custodian and others), wherein it is observed as follows:

The interest of a 3rd party in the attached property cannot be sold or distributed to discharge the liabilities of the notified person. This would also be the position when the property is already mortgaged or pledged on the date of attachment to a bank or to any third party. This, however, is subject to the right of the Custodian under Section 4 to set aside the transaction of mortgage or pledge. Unless the custodian exercises his power under Section 4, the right acquired by a third party in the attached property prior to attachment does not get extinguished nor does the property vest in the Custodian whether free from encumbrances or otherwise. The ownership of the property remains as it was.

2. He has relied upon the decision reported in 2009(111) BOMLR 4550 (Hill Properties Ltd. Vs. Union of India), wherein it is held as follows:

30. In our opinion, therefore, on a construction of the various contentions raised and even after considering the expression “as far as possible” it is not possible to hold that the jurisdiction of the Civil Court is totally ousted, in matters pertaining to third party claims regarding attachment or sale of property, execution. Thus it will be open to a party to take recourse to the remedy available under Section 30 if it has made its claim before the Recovery

Officer and that is rejected. This is because the title to the property as explained by the Supreme Court in Gangadhar v. Ranade (supra) cannot be decided by the Recovery Officer under the Second Schedule of the I.T. Act and that has been left open for consideration by a Civil Court. The judgment in Allahabad Bank (Supra) in para 25, which we have referred to earlier, has also made this expressly clear when it uses the expression "except as provided under the Act".

31. It will, therefore, not be possible to hold that inspite of the specific provision of Rule 11(6) of the Second Schedule to the Income Tax Act, the jurisdiction of the Civil Court is expressly or impliedly barred. That would be rendering the Rule 11 otiose. Such a construction is not possible. When the Act itself has provided a remedy, that remedy cannot be defeated by an interpretative process that renders the statutory remedy otiose.

3. He also relied upon the decision reported in 2005 Bom 165 (Subhas Bhimashankar Kalase Vs. State Bank of India), wherein it is observed as follows:

17. In short, the claimant to the property attached before judgment has to show that on the date of attachment, he had some interest or was possessed of the property attached. The appellant herein is claiming interest in the property in dispute and it is required to be adjudicated upon as provided by Order 21 Rule 58 of C.P.C. The property in question, admittedly, belonged to the appellant. He is in possession of the property in question. He purchased this property on 4.10.2001. The defendant No. 2 has no interest in the property as on the date of attachment. Appellant has a direct interest in the property. He being in possession of the property, he has a right to object to the order of attachment before judgment passed under Order 38 Rule 5 of C.P.C. His property could not have been attached under this provision. Firstly; because, he is not a party to the suit secondly, because he has become owner of the property much before filing of the suit as such order of attachment is bad and illegal.

From the above decisions and from the plaint averments, it appears that the plaintiff is claiming that he had entered into an agreement for sale in respect of the suit property with defendants 2 and 3 who are the owners of the suit property vide sale deed dated 17/9/2007 and they offered the same as collateral security and equitable mortgage in favour of 4th defendant on 28/5/2008 and obtained the loan and later, the 4th defendant initiated the recovery proceedings under SARFAECI Act 2002 and the plaintiff came to know from defendant No.4 and he purchased the suit property on 14/8/2015 and the sale proceeds were paid over to defendant No.4 towards loan due. Later the plaintiff came to know that 1st

defendant is stating that there is outstanding due payable by defendants 2 and 3. The plaintiff is 3rd party obstructor in the proceedings in RP No.22/2014 and it came to be rejected on 25/1/2020 and property once attached under SARFAECI Act and sold to the plaintiff, cannot be reattached by defendant No.1 and any charge or attachment during the pendency of lien of defendant No.4, is void and ab-initio and hence the plaintiff is the absolute owner and action of the 1st defendant in attaching the suit property is not binding on the plaintiff and defendant No.1 claims that 4th defendant got equitable mortgage by deposit of title deeds on 28/5/2008, whereas 1st defendant granted loan on 30/8/2007 on hypothecation of 30 Tata trucks and it became NPA on 1/8/2022 and recovery proceedings before the Recovery Officer, Ahamadabad under RP No.22/2014 in OA No.92/2009 has issued show cause notice as to why the suit property should not be attached and sold. Warrant of attachment is issued by the Recovery Officer on 26/6/2015 with command to return the warrant on or before 17/8/2015. But during the said period, on 14/8/2015, the defendants 2 and 3 sold the property to the plaintiff and there is no agreement for sale mentioned in the recitals of the sale deed. The plaintiff is a 3rd party obstructor claiming the suit property under attachment before the Debt Recovery Tribunal-I, Ahamadabad vide order. The Second schedule of the Income Tax Act 1961 is applicable in view of Section 29 of the recovery of debt due to Banks and Financial Institutions Act 1993 and Rule 17 prohibits the private alienation and the defendants 2 and 3 colluding with plaintiff, created false story to execute the alleged sale deed to frustrate the recovery of legitimate of dues to defendant No.1 and one time settlement of defendant No.4 is already paid on 9/7/2014 as per the settlement certificate whereas the sale consideration is paid on 13/8/2015 vide cheque as per the sale deed and hence, the attachment of the suit property is, as per law and suit filed by the plaintiff is not maintainable.

From the above version of the plaintiff and defendants, it is to be noted that the dispute involved is a mixed question of fact and law and the preliminary issue cannot be answered without holding a trial. Hence,

issue must be tried along with other issues and decision on merits of the suit, requires to be made in the present set of facts. Hence, preliminary issue mentioned supra is kept open for consideration along with merits of the suit and therefore, the following order is passed.

ORDER

Preliminary issue supra is kept open for consideration along with the merits of the suit.

(Dictated to the stenographer, transcribed and computerized, script directly corrected on computer and then pronounced by me in the open court on this 13th day of September, 2022).

I ASCJ & JMFC, Hubballi.