

(2001) 01 BOM CK 0057

Bombay High Court

Case No: Appeal No. 708 of 2000 in Notice of Motion No. 908 of 2000 in Suit No. 687 of 2000

SBI Home Finance
Limited

APPELLANT

Vs

Credential Finance
Limited and Others

RESPONDENT

Date of Decision: Jan. 23, 2001

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 57, Order 21 Rule 58, Order 21 Rule 61, Order 21 Rule 63, Order 38 Rule 10
- Transfer of Property Act, 1882 - Section 53

Citation: AIR 2001 Bom 179 : (2001) 2 ALLMR 1

Hon'ble Judges: S.D. Gundewar, J; B.N. Srikrishna, J

Bench: Division Bench

Advocate: Mr. Virag Tulzapurkar and Mr. Sandeep Parekh, instructed by Amarchand Mangaldas and Suresh A. Shroff and CO, for the Appellant; Mr. S.C. Dharmadhikari, Mr. Rahul Chitnis, Mr. R.D. Soni, Mr. M. A. Sayyed, Mr. Venkatesh Dhond, Mr. Shailesh Shah and Mr. C.D"Souza, instructed by . V. Deshapande and CO., Ram and CO., Ms. Deepa Arora and Ms. Monika D"Souza, for the Respondent

Judgement

B. N. Srikrishna, J.

This Appeal is directed against an order of the learned Single Judge (Rebello, J.) dated 3rd August, 2000 made in Notice of Motion No. 908 of 2000 dismissing the Notice of Motion as against the second Respondent and vacating the ad-Interim injunction orders as against the third and the fourth Respondents. The learned Single Judge has narrated the facts in detail in the order and. therefore, it is not necessary to reproduce the facts in extenso. However, some of the salient facts required for decision of the Appeal may be recounted.

2. There is an agreement for bill discounting on certain terms and conditions between the Appellant-original Plaintiff and the first Respondent (original first Defendant) under which the Plaintiff had extended certain facilities to the first Respondent. These were guaranteed by the second Respondent (original second Defendant). The Appellant, therefore, brought a Money Suit for recovery of Rs. 13,42,00,023/- against the first and second Respondents. The Notice of Motion was taken out for attachment before Judgment of two tangible assets of the first Respondent being two office premises at Nariman Point, Mumbai. It was alleged in the affidavit-in-support of the Notice of Motion that the first Respondent owed a large sum of moneys to the Appellant and the claim of the Appellant was virtually admitted. It was pointed out that a Suit had been filed in the Calcutta High Court against the first Respondent wherein an attachment before judgment was ordered against the first Respondent. The first Respondent did not appear, but the attachment order was modified from time to time at the instance of the second Respondent. Finally, however, the Suit itself was dismissed as being beyond the territorial jurisdiction of the Calcutta High Court. Hence, the present Suit was brought in this Court against the first and second Respondents.

3. On the basis of the material presented before him, the learned Single Judge (Nijjar. J.) took the view that the first Respondent had only two tangible assets begin the office premises at Nariman Point, Mumbai. It was admitted that this had been sold off to the third and fourth Respondents whose registered office addresses were also shown to be situated at the office address of the first Respondent. It was, therefore, contended on behalf of the Appellant that the first Respondent was closely connected with the third and the fourth Respondents and that the transfer was intended to defraud the creditors, or at any rate, to delay or defeat the decree that might be made in the Suit. Certain circumstances, like the filing of a winding up Petition against the first Respondent and compromise entered into therein by the first Respondent, filing of an independent Suit by the Appellant against the first Respondent in which a Receiver had been appointed, were also pointed out to the learned Single Judge to indicate that there was acute financial stringency faced by the Appellant. On a conspectus of all facts presented to him, Nijjar, J. was of the view that though certain defences had been urged by the first and the second Respondents, their worth could have to be tested and adjudicated at the trial, but that pending hearing of the Notice of Motion, the interest of the Plaintiff had to be protected by an ad-Interim order. Consequently, the learned Single Judge (Nijjar, J:) made an ad-interim order on 6th April, 2000 directing the first and the second Respondents to furnish security towards the Appellant's suit claim In the amount of Rs. 13,42.00.23/- either by the first Respondent alone or by equal contributions by the first and the second Respondents, If so agreed upon between them. A period of six weeks was granted for furnishing the security. Till the security was furnished, the first Respondent was injected from alienating, encumbering, parting with possession of, disposing of or creating any third party rights or inducting anyone into the aforesaid office premises at Nariman Point. Mumbal.

4. The Appellant impleaded the present third and fourth Respondents as Respondents to the Notice of Motion and applied for attachment before judgment of the two office premises which were disclosed to have been sold even before the Suit was filed. The main premise on which the said relief was sought against the third and the fourth Respondents was that the transfer of the two office premises to the said Respondents was made with intent to defraud or delay the creditors of the transferor (first Respondent) and, therefore, it was hit by Section 53 of the Transfer of Property Act, 1882 and voidable at the option of the Appellant creditor. The Notice of Motion was dismissed as against the second Respondent and the relief of attachment of the office premises was declined by the learned Single Judge by the impugned order. Apart from dismissing the Notice of Motion as against the second Respondent, the learned Single Judge also vacated the ad-Interim injunction orders against the third and the fourth Respondents. Being aggrieved thereby, the Appellant is before this Court.

5. A perusal of the order of the learned Single Judge [Rebello, J.] shows that the only reason for which the learned Single Judge refused the reliefs is found in paragraph 11 of the impugned order. There was no dispute that concerned office premises had been sold to the third and the fourth Respondents even before the filing of the Suit. Consequently, taking cue from Rule 10 of Order XXXVIII of the Civil Procedure Code, the learned Single Judge was of the view that there could be no order of attachment before judgment passed against the third and the fourth Respondents as there was already an agreement for sale (as a matter of fact, even the conveyance had been completed before the institution of the Suit). The Appellant relied on Section 53 of the Transfer of Property Act, 1882, to contend that, though the sale of the properties had been completed prior to the date of the suit, the sale was hit by Section 53 and was voidable at the option of the Appellant creditor. The learned Judge, without even giving a prima facie finding as to the existence of the circumstances contemplated by Section 53 of the Transfer of Property Act, 1882, dismissed the argument by saying "..... Even if the argument of the Plaintiffs is accepted that at this stage such a direction can be passed considering that the transactions are collusive in nature and the creditors can avoid the same, Respondent Nos. 1 and 2 are also not parties to the Suit. They have merely been joined as Respondents. No relief in the case at hand can be given, if the Respondents are not made parties to the Suit. They can only be made parties, if they are necessary or proper parties. There can be no difficulty in accepting that at the stage of execution when property is sought to be attached both under the old Code and under the new Code, parties whose personal property is sought to be attached could raise objection. Similarly, Plaintiffs could have attached the property on the ground that the transaction was a nullity. In the Instant case Respondents are not Defendants to the Suit. They are prohibited from raising any defence that they may have. As such insofar as Respondent Nos. 1 and 2 are concerned in the absence of they being made Defendants in the Suit, no relief could be granted by merely describing them as Respondents. Plaintiff, if they seek to void the agreement must joint Respondents as Defendants to the suit whereupon they will be In a position to raise all pleas and point out that no order can be passed

without hearing the defence that may be available to such party. Reliefs against Respondent Nos. 1 and 2 must, therefore, be rejected."

6. Mr. Tulzapurkar, learned Counsel for the Appellant, urged that the reasoning of the learned Single Judge is erroneous in law. He contends that there is nothing in Section 53 of the Transfer of Property Act, 1882 which requires a creditor intending to take advantage of the Section to necessarily bring a Suit for avoiding the transaction by which his debtor has fraudulently, or with intent to defraud or delay, alienated valuable property. He contends that a transfer of property voidable at the option of the creditor u/s 53 of the Transfer of Property Act, 1882 would continue to be the property of the debtor and, therefore, be liable to attachment before judgment under Order XXXVIII Rule 5 of the Civil Procedure Code, notwithstanding the provisions of Rule 8, if the attaching creditor seeks to avoid the transaction between the creditor and the third party by invoking Section 53 of the Transfer of Property Act, 1882. He urged that the learned Single Judge was wrong in his assumption that the third and the fourth Respondents (transferees of the office premises) were necessary or proper parties to the money Suit brought by the Appellant against the first and the second Respondents. He also urged that the view of the learned Single Judge, that no order could be passed against the third and the fourth Respondents in the Notice of Motion without their being impleaded as party Defendants to the Suit, was wrong. He, therefore, contends that because of this misdirection in law the learned Single Judge has not gone into the issue as to whether there was a case made out u/s 53 of the Transfer of Property Act, 1882 and has dismissed the Notice of Motion on an assumption that even if such case was made out the Motion must fail as against third and fourth Respondents.

7. Normally, in a money Suit brought by a creditor against debtor, the only necessary party is the debtor and the only issue to be answered is whether the debt is proved. The provisions of Order XXXVIII Rules 5 and 13 of the CPC empower the Court to attach property belonging to the Defendant even before judgment is pronounced against him. This can be done if the Court is satisfied that with the intent to obstruct or delay the execution of any decree that may be passed against him, the Defendant is : (a) about to dispose of the whole or any part of his property; or (b) about to remove the whole or any part of his property beyond the local limits of the jurisdiction of the Court. When such conditions exist, the Court is empowered to direct the Defendant to produce security within the time fixed by it in such sum as may be specified by it or to show cause why the Defendant should not furnish such security. If the Defendant fails to show cause, or fails to furnish security, then the Court is empowered under Rule 5(3) of Order XXXVIII of the CPC to make an order attaching the property before judgment. Rule 7 provides that unless expressly so provided, the attachment before judgment is to be made in the same manner as attachment of property in execution of a decree. Even if the property is attached, it is open to any one who claims the property to be his, to put forth such a claim before the Court and Rule 8 of Order XXXVIII provides that such a claim shall be adjudicated upon in the manner provided for adjudication of the claim to property

attached in execution of a decree for the payment of money. Rule 10 provides that attachment before judgment shall not affect the rights existing prior to the attachment of persons who are not parties to the suit, nor bar any person holding a decree against the Defendant from applying for the sale of the property under attachment in execution of such decree.

8. Order XXI Rule 58 of the CPC deals with the procedure for adjudication of claims or objections to attachment of property. Whenever property is attached in execution of a decree, any person who has any claim in the property or objects to such attachment, can lodge his claim or objection before the executing Court and all questions including questions relating to right, title and interest of the property attached have to be adjudicated by such Court dealing with the claim for objection and not by a separate Suit. Such an adjudication order is given the same status as a decree under the Civil Procedure Code, subject to the same conditions as to Appeal or otherwise in a Suit for decree. Such a claim or objection may be summarily rejected by the Court if made after the property has been sold in execution or after an unreasonable delay. If the Court declines to adjudicate the claim/objection to the attached property under these circumstances, the person putting forth the claim or objection has a right to bring a substantive suit for determination of the right which he claims to the property in dispute.

9. Prior to the amendment of the CPC by Act 1976 (with effect from 1st February, 1977), the procedure for adjudication of such claim or objection was slightly different. Such a claim or objection had to be decided in a summary manner by the executing Court. Rule 63 of Order XXI, which was omitted by the Amendment Act of 1976, specifically kept open the right of the party aggrieved by the summary determination of the claim/objection to bring a substantive Suit for determining his right in the property. This position is now radically changed as a result of the Amending Act of 1976. As already pointed out, all claims or objections to the property under attachment in execution have to be adjudicated by the executing Court even if they involve questions of title to or interest in the property. Such adjudication order has the same status as a decree and subject to the same rule as to appeal. The procedure as to the investigation of claims and objections to attached property is the same whether the attachment is in execution of a decree under Rule 58 or an attachment before judgment, by virtue of Rule 57 of Order XXI of the Civil Procedure Code.

10. Undoubtedly, the properties in question were agreed to be and actually sold to the third and the fourth Respondents much before the date on which the Suit was brought by the Appellant. Normally, therefore, by reason of Rule 10 of Order XXXVIII, an attachment before Judgment could not be levied against the properties which had already been sold to the third and the fourth Respondents. Do the provisions of Section 53 of the Transfer of Property Act. 1882 make any change?, is the issue raised in the present Appeal.

11. Section 53 of the Transfer of Property Act. 1882 enables a creditor to avoid the transfer of immovable property which has been made with intent to defraud, defeat or

delay and such a transfer would be voidable at the option of any creditor so defrauded, defeated or delayed. In the instant case. If the Appellant can show that the transfer of the office premises at Nariman Point, Mumbai was made by the first Respondent to the third and the fourth Respondents under circumstances which would fall within the ambit of Section 53 of the Transfer of Property Act, 1882, the Appellant would be entitled to avoid the transfer. In such a situation, the said properties shall be treated as properties of the first Respondent itself, and the fact that a fraudulent attempt was made to put them beyond the reach of the Appellant creditor, would be good reason to make an order of attachment before judgment under Order 38 Rule 5 of the Civil Procedure Code. We would have, therefore, thought that the issue as to whether the circumstances contemplated by Section 53 of the Transfer of Property Act, 1882 existed would have been first determined. Unfortunately, the learned Single Judge proceeded only on an assumption. If it be assumed that the circumstances contemplated by Section 53 of the Transfer of Property Act, 1882 do exist, then is the Appellant entitled to raise the said issue and have it adjudicated in the present Notice of Motion or is the Appellant obliged to bring a substantive suit for having this issue adjudicated, is the next question for determination.

12. In *Abdul Kadir v. Ali Mia and Ors.*, the Calcutta High Court, in a case arising prior to the 1976 Amendment, had to consider the issue. The Defendant had obtained a decree in a money Suit and attached certain property In execution. A claim was made by the Plaintiff (a third party) with regard to his interest in the property which was summarily rejected by the Executing Court. The Plaintiff then brought a substantive suit for declaration of his right, title and interest in the property. The Defendant contended that the transfer to the Plaintiff was hit by Section 53 of the Transfer of Property Act, 1882. The Court had to consider whether the said issue could be brought before the Court by way of defence or whether it had to be raised by an Independent Suit by the Defendant. The Court pointed out that Section 53 gives the aggrieved creditor an option to avoid the transaction. The Intention to exercise this option may be said to have been evidenced when for the first time in execution the first Defendant insisted on the determination of the defence raised by him by saying that the title upon which the Plaintiff relied was obtained by fraud and, therefore, ineffectual as against him.

13. In *Velchand Sawaji Marwadi v. Sitaram Tukaram*,. our High Court reiterated this proposition.

14. The Patna High Court in *Mt. Bibi Kubra Begum and Anr. v. Jainandan Prasad and Ors.*, made it further clear by its observations in paragraph 24 of the judgment by saying "..... even then, the transfer can still be avoided at the option of the creditor as provided by para 1 of Section 53 of the T. P. Act, provided the transfer was made with intent to defeat or delay the creditors. It is true that this is not a suit by a creditor to avoid the transfer; but a creditor may manifest his intention to avoid the transaction otherwise than by filing a suit, as "for example, by attaching the property transferred; such an action had been taken by the defendant-first-party, the creditor." The observation of the House of

Lords in *Oakes v. Turquand and Harding*,. to the effect that "voidable transactions may be avoided by any open or unequivocal declaration of an intention to avoid them" was emphasised. The House of Lords had also pointed out that "..... it was open to an attaching decree-holder to plead in defence to a suit by the alienee whose claim has been rejected that the transfer to him was fraudulent u/s 53 of the T. P. Act....."

15. Any lingering doubts are put to rest by the judgment of the Supreme Court in *C. Abdul Shukoor Saheb v. Arji Papa Rao (deceased)* after him his heirs and legal representatives and Ors.,. This judgment, in terms, cites with approval and upholds all propositions laid down in the Full Bench judgment of the Madras High Court in *Ramaswami Chettiar v. Mallappa Reddiar*, which had held the field for more than forty years. This was a case arising much before the Amending Act of 1976 and, as such, the claims were to be investigated in summary proceedings under Order XXI Rules 58 to 61. The Supreme Court pointed out that in such summary proceedings, having regard to the terms of Rule 61, the Court was concerned only with the question as to whether the transferee is in possession of the property in his own right and not on behalf of the judgment-debtor. When a transfer is real, though it is liable to be impeached as a fraud on creditors, and the transferee has entered into possession, he would succeed in the summary proceedings, with the result that It is the defeated attaching creditor who would have to figure as a Plaintiff. In every case, therefore, when a transfer is real but is liable to be set aside u/s 53(1) of the Transfer of Property Act, 1882, In such summary proceedings the transferee was bound to succeed and the attaching decree-holder would have to figure as a Plaintiff in the substantive suit. From this, it was argued that in no case could an attaching creditor defend a Suit for attachment resisting it on the plea of fraud u/s 53(1) of the Transfer of Property Act, 1882. The Supreme Court rejected the argument by holding that it did not proceed on any construction of the terms of Section 53(1), nor on any legal theory as to the mode or procedure, by which the intention to avoid the transaction which the attaching creditor claims is voidable at his instance may be expressed or enforced. The Supreme Court reiterated the reasoning of the Full Bench of the Madras High Court to hold that a plea based on the transfer being voidable u/s 53(1) could not be raised in defence to a Suit to set aside a summary order would mean that the creditor decree-holder would be in a much worse position for his success in the summary claim proceedings than if he had lost in those proceedings. It is also pointed out that though Section 53(1) of the Transfer of Property Act, 1882 renders the transfer voidable at the instance of the creditors, if the transfer was effected under circumstances indicated in the Section, the Statute does not prescribe any particular method of avoidance. The Supreme Court agreed with the observations of the Full Bench of the Madras High Court. "If the creditor knowing of the transfer applies for attachment, the application is sufficient evidence of his intention to avoid it; if he only hears of the transfer when a claim petition is preferred under Order XXI Rule 58, and still maintains his right to attach, that again is a sufficient exercise of his option to avoid and entitles him to succeed in the subsequent Suit under Rule 63." The Supreme Court also pointed out that whether the Suit was instituted by an attaching decree-holder or the transferee claimant, it must be equally

decided in favour of the attaching decree-holder if the transfer is shown to have been fraudulent, because in consequence of the fraudulent character of the transfer and its avoidance by the judgment-creditor, the result is that the transferee has not the right which he claims, namely, to hold the property free from attachment in execution by the Judgment-creditor.

16. We have deliberately not dealt in extenso with the observations of the Full Bench of the Madras High Court as the said judgment has been considered and approved by the Supreme Court and it is held that in order to avoid the transaction by putting forth Section 53 of the Transfer of Property Act, 1882, the creditor need not bring forth a substantive Suit. Even in the erstwhile days, when the proceedings for determination of the claims/objections to property attached in execution of a decree were summary, the Supreme Court was of the view that the very attachment made at the instance of the creditor would be indicative of his intent to exercise the option of avoiding the transfer which falls within the ambit of Section 53 of the Transfer of Property Act, 1882.

17. In our view, the situation after 1977 has radically changed. Gone is the summary procedure for determination of claims or objections to properties under attachment. Every such claim or objection has now to be adjudicated and no substantive Suit can be brought for such adjudication. The order made on such adjudication would have the force of a decree subject to Appeal. There is nothing in the provisions of the Transfer of Property Act, 1882 which requires the issue to be raised by a substantive Suit as Section 53 does not prescribe the mode by which the issue is to be determined. Under the present procedure of determination of such claims to property attached in execution or before attachment, when a person makes a claim or objection to the property under attachment, the Court has to finally adjudicate such claim or objection. If upon such claim or objection being preferred, the creditor raises the issue that such claim or objection has no substance because the transfer to the claimant/objector is hit by Section 53, then the said issue also has to be adjudicated as it would involve adjudication of the title or right to or interest in the property. The Court deciding the claim would have to adjudicate all these issues and render a final decision which would have the force of a decree subject to Appeal. We are, therefore, of the view that the learned Single Judge was not right in declining to decide the issue on the ground that the third and the fourth Respondents (alienees) were not parties to the Suit. Nor was he right in taking the view that the issue had to be determined by a substantive Suit brought at the Instance of the Appellant. In our judgment, there was no need for the Appellant to bring a substantive Suit for determination of the issue raised by it, namely, that the transfer was void. The Appellant's unequivocal declaration, even in the Notice of Motion, and seeking of an attachment before judgment of the alienated property amounted to avoiding the alienation of the property. If the order for attachment before judgment had been made, and the third and the fourth Respondents had come forth with a claim to the property, the Court would then have to necessarily determine their title to or interest in the attached property. At that time, the contention of the Appellant that the transfer was hit by Section 53 would also

have to be adjudicated. If this can be done after attachment and notice to the third and the fourth Respondents, we see no reason why this could not be done before attachment by issuing notices to and hearing the third and the fourth Respondents, even if they were not parties to the Suit itself. We are not in agreement with the view of the learned Single Judge that the third and the fourth Respondents could or ought to have been made parties to the money Suit brought by the Appellant against the first and second Respondents. The money Suit had nothing to do with the property. Property would come in only at the stage of execution of a decree or attachment before judgment as in the instant case.

18. Two judgments of the Supreme Court were cited in support by the Respondents. In *Vannarakkal Kallalathil Sreedharan v. Chandramaath Balakrishnan and Anr.*,¹ there was an agreement of sale which had been entered into before attachment and a conveyance followed the attachment order. The Supreme Court took the view that the agreement for sale had created an obligation on the ownership of the property and since the attaching creditor is entitled to attach only the right, title and interest of the Judgment-debtor, the attachment cannot be free from obligations incurred under the contract for sale. There is nothing in this judgment which helps the Respondents. The Supreme Court was not concerned with the issues which have been presented to us for determination.

19. In *Hamda Ammal v. Avadiappa Pathar and Ors.*, also the Supreme Court emphasised that Order XXXVIII Rule 5 would not apply where a sale-deed had already been executed by the Defendant in favour of a third person. It was pointed out that a transaction of sale having already taken place even prior to the institution of a Suit, it could not be said to be made with intention to obstruct or delay the execution of any decree. Interestingly, the Supreme Court further observed. "It would be a different case altogether if a creditor wants to assail such transfer by sale u/s 53 of the Transfer of Property Act. 1882." The Supreme Court no doubt emphasised Order XXXVIII Rule 10 to show that an attachment before Judgment shall not affect the rights existing prior to the attachment of persons not parties to the Suit. We are unable to accept the contention of the Respondents that this case indicates that the Issue of alienation could not be raised in the proceedings for adjudication of the claim to the property or that it could be raised only in a substantive Suit. The Supreme Court has merely Indicated that Section 53 is a different cup of tea, without indicating the manner in which Section 53 had to be pressed forward.

20. For the aforementioned reasons, we are of the view that it was open to the Appellant to raise the issue as to whether the transfer of the office premises to the third and the fourth Respondents was hit by Section 53 in the Notice of Motion. The issue having been raised, it had to be adjudicated by the Trial Court as If it was brought in a substantive Suit. Since such opportunity was not given to the Appellant, we are of the view that the order of the learned Single Judge needs to be interfered with.

21. In the result, we set aside the impugned order of the learned Single Judge and restore the Notice of Motion. Mr. Tulzapurkar states that, as far as the second

Respondent is concerned, he does not press for any order against the second Respondent.

22. The Notice of Motion shall be heard on its merits in accordance with law and in the light of this judgment.

23. It is contended by the Respondents that the ad-interim order made by Nijjar. J., came to an end as a result of dismissal of the Notice of Motion on 3rd August, 2000 and that, though the Appeal was presented on 19th August, 2000, there was no ad-interim order sought in the Appeal. In our view, it makes no difference. It was considered necessary by the learned Single Judge that the ad-interim order should be made: we too consider it necessary. Hence, pending hearing and disposal of the Notice of Motion, there shall be an ad-interim order in terms of prayer clause (c) (ii) as made by Nijjar, J., on 6th April, 2000.

24. Appeal accordingly allowed. Costs of the Appeal to be the costs of the Suit.

25. Parties to act on an ordinary copy of order duly authenticated by the Associate of this Court.

26. Issuance of certified copy expedited.