

CASE NO.:
Appeal (civil) 6790 of 2003

PETITIONER:
Mrs. Janki Vashdeo Bhojwani & Another

RESPONDENT:
The Indusind Bank Limited & Others

DATE OF JUDGMENT: 10/02/2004

BENCH:
S.N. Variava & H.K. Sema.

JUDGMENT:
J U D G M E N T

Variava, J.

This Appeal is against the judgment of the Debt Recovery Appellate Tribunal dated 23rd April, 2003.

Briefly stated the facts are as follows:

The 1st Appellant is the wife of the 5th Respondent. The 2nd Appellant is the wife of 2nd Respondent. The 1st Respondent Bank had given loan facilities to the 6th and 7th Respondents which are concerns run by Respondents 2 to 5. The loans were to the extent of approximately Rs.22 crores in one case and Rs.3.75 crores in the other. Respondents 2 to 5 were also guarantors of the loan facilities. Some of the properties belonging to these parties had been mortgaged to the Bank.

It is claimed that by an Indenture of Sale dated 5th September, 1991, the Appellants and Respondents 2 to 5 had purchased Plot No. 38, Koregaon Park, Pune - 411 00. It is claimed that on 12th December, 1991, an Agreement of Co-ownership was executed whereunder a HUF (of these parties) was also made a co-owner in respect of the said plot of land. It is claimed that after purchase of the plot of land, a building was got constructed on the plot of land and that Appellants and Respondents 2 to 5 resided in that building.

On 3rd October, 2000 the 1st Respondent-Bank filed, against the 7th Respondent and the 2nd Respondent, OA No. 159-P/2001 before the Debt Recovery Tribunal for recovery of a sum of approximately Rs.3.86 crores. On 25th October, the 1st Respondent-Bank filed, against the Respondents 2 to 6 and one M/s. Progressive Land Development Corporation, OA No. 160-P/2001 for recovery of a sum of approximately Rs.27.5 crores. It must be mentioned that M/s. Progressive Land Development Corporation is a partnership firm of which the Appellants are, along with others, partners.

On 11th December, 2000, the Debt Recovery Tribunal passed an order of injunction in an application made in OA No.160-P/2001. One of the properties of which the Respondents and the aforesaid partnership firm were restrained from alienating was the 38, Koregaon Park property.

On 13th September, 2001, in OA No. 159-P/2001, a decree was passed in favour of the 1st Respondent-Bank by the Debt Recovery Tribunal, Pune. In the decree the property at 38, Koregaon Park, Pune was shown as one of the mortgaged properties.

On the same day a Recovery Certificate was also issued by the Debt Recovery Tribunal. In pursuance of that Recovery Certificate all the mortgaged properties were attached on 8th November, 2001. The property at 38, Koregaon Park, Pune was one of the properties which was attached. Pursuant to the attachments, a public notice was published in the Times of India of 25th January, 2002 intimating that properties of the 2nd Respondent had been attached. The Appellants claim that they came to know of this attachment only because of this advertisement. This averment is impossible to believe. It is clear that they were aware of the proceedings against their husbands and family concerned.

The Appellants filed objections before the Recovery Officer against the attachment of the residential property. On 16th April, 2002, the Recovery Officer rejected the objections of the Appellants on the ground that he could not go beyond the decree.

On 17th April, 2002 the Debt Recovery Tribunal also passed a decree and issued a Recovery Certificate in OA No. 160-P/2001.

On 30th April, 2002, the Appellants filed Appeal No. 2 of 2002 before the Presiding Officer, Debt Recovery Tribunal challenging the attachment and proposed sale of property at 38, Koregaon Park, Pune on the ground that they were co-owners in the property and that they were not debtors of the 1st Respondent-Bank. They also claimed that they had never stood as guarantors and that this property was not mortgaged to the 1st Respondent-Bank.

On 7th May, 2002 a public notice was published intimating auction sale of the 38, Koregaon Park, Pune property. The public notice proceeded on the footing that this property belonged to the 2nd Respondent only.

On 22nd May, 2002, the 1st Respondent-Bank made an application in OA No. 160-P/2001 for attachment of this property on the ground that this was also mortgaged to them. This was allowed without hearing the Appellants.

The Appellants moved the Recovery Officer on 24th May, 2002 contending that the property could not have been attached in execution of the decree in OA No.160-P/2001 as the property had never been mortgaged to the 1st Respondent-Bank. The Appellant also claimed that they were not debtors of this Bank and had not given any guarantee. The Recovery Officer rejected this application on the same day.

The property at 38, Koregaon Park, Pune was put up for sale on 7th June, 2002 with a reserve price of Rs.6.85 crores. No bids were received and the property could not be sold.

On 14th June, 2002, the Debt Recovery Tribunal dismissed Appeal No. 2 of 2002 inter alia on the ground that after the passing of the injunction the Appellants were well aware of the proceedings and that they had not objected to one of the co-sharers dealing with the property. The Debt Recovery Tribunal therefore proceeded on the footing that the property stood mortgaged to the 1st Respondent-Bank.

On 21st June, 2002, Appeal No. 245 of 2002 was filed by the Appellant before the Debt Recovery Appellate Tribunal.

On 2nd July, 2002, the undivided share of Respondents 2,3,4 and 5 in 38, Koregaon Park, Pune was attached in pursuance of the Recovery Certificate in OA No.160-P/2001.

In spite of the attachment in OA No.160-P/2001 being only in respect of shares in respect of Respondents 2, 3, 4 and 5 a proclamation for sale and a public notice was issued in respect of the entire property at 38, Koregaon Park, Pune. The property was auctioned on 22nd January, 2003. On this occasion the only bidder was the 1st Respondent-Bank who purchased the property at a price of Rs.3.33 crores.

On 24th February, 2003 the Debt Recovery Appellate Tribunal dismissed the Appeal filed by the Appellants. The Order proceeds on the footing that the property has been mortgaged to the 1st Respondent-Bank. The order also proceeds on the footing that this property belonged to 2nd Respondent only. It is also held that even if the Appellants were co-owners by virtue of Rule 68 of the IInd Schedule to the Income Tax Act, the co-owners could bid at the auction and the sale proceeds could be apportioned among the co-owners. The Appeal was accordingly dismissed.

The Appellants filed a Writ Petition which has also been dismissed by the impugned order.

It is now admitted that the property at 38, Koregaon Park, Pune was never mortgaged to the 1st Respondent-Bank. It is admitted that Appellants are not debtors and that they had not given any guarantees. Of course the Respondents 2 to 5 have stood as guarantors. Respondent Nos. 2 to 5 are also debtors. To the extent that they are owners of the property their share in the property could be sold in execution of the decree.

It is also admitted that the Appellants were neither debtors nor guarantors. It was however claimed that they were partners in the firm of M/s. Progressive Land Development Corporation who had mortgaged some property to the Bank. However it was admitted that the property which was mortgaged by this firm was not the property at 38, Koregaon Park, Pune.

As it is admitted that the Appellants were neither debtors nor guarantors and that the property at 38, Koregaon Park, Pune was not mortgaged in favour of the 1st Respondent-Bank, the authorities below and the High Court were wrong in not first deciding whether or not the Appellants have any share in the property at 38, Koregaon Park, Pune. If the Appellants have a share then their share could not have been attached and sold in execution of the decree against the other parties. Further if this was a residential premises, as claimed, then the provision of Section 44 of the Transfer of Property Act would apply. The 1st Respondent-Bank could not have taken possession without first applying for partition.

In our view, it is essential, before any further orders, can be passed to first decide whether or not the Appellants have a share in this property. We therefore remit the matter back to the Debt Recovery Tribunal to record a finding whether or not on the date the decrees were passed, the Appellants were co-owners of the property at 38, Koregaon Park, Pune and if so, to what extent. In so deciding the Debt Recovery Tribunal will undoubtedly ascertain whether the Appellants had any independent source of income and whether they had contributed for purchase of this property from their own independent income. The Debt Recovery Tribunal will also decide whether this property was the residence of the Appellants at the time possession was taken. The Debt Recovery Tribunal shall permit the parties to lead evidence, both oral and documentary. It must be

clarified that the burden of proving that the Appellants have a share in the property will be on the Appellants. The Debt Recovery Tribunal shall then forward its decision to this Court within a period of six months from today.

The Appeal is adjourned for a period of six months. Part Heard.
In the meantime this property to be kept locked by the 1st Respondent- Bank.

JUDIS