

K. Padma Vs. K. Ramachandra and Others

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Court : Karnataka

Decided On : Dec-18-2014

Judge : The Honourable Chief Justice Mr. D.H. Waghela & R.B. Budihal

Appeal No. : Writ Petition No. 14876 of 2008 (GM-DRT)

Appellant : K. Padma

Respondent : K. Ramachandra and Others

Judgement :

(Prayer: This writ petition is filed under Articles 226 and 227 of the Constitution of India praying to quash the order dated 30th June 2008 passed by the Debt Recovery Appellate Tribunal at Chennai in M.A. No. 167/07 (Ann-V) and etc.)

C.A.V. Order:

1. Petitioner has filed this writ petition under Articles 226 and 227 of the Constitution of India challenging order dated 30.6.2008 passed in M.A. No. 167/2007 by the Debt Recovery Appellate Tribunal at Chennai (Annexure-V). The petitioner claims that she is auction purchaser of the property in question in the auction sale conducted by the recovery officer.

2. Brief facts leading to filing of this petition and as averred in the petition are that the respondent No. 3 M/s. Tubeman Private Limited, a company having two persons as directors, viz., Shankarlal Agarwal and his wife Smt. Laxmi Agarwal,

i.e., the respondent No. 4 herein, sought and obtained, on 16.1.1999, certain credit facilities aggregating to Rs.70.00 lakh from respondent No.2-bank on the personal guarantee of the directors. As the said borrowers were in arrears in a sum of Rs.34,94,040.44ps., respondent No.2-bank initiated proceedings in O.A. No.256/2000 before the Debt Recovery Tribunal at Bengaluru (for short 'DRT') for recovery of the said amount, with interest and cost. In spite of notice from the DRT-defendants therein remained absent and they were placed ex-parte. Apprehending that respondent No. 4 and her husband would alienate the property and render recovery of decretal amount impossible, respondent No.2-bank made an application for injunction under Section 19(12) of the Recovery of Debts due to the Banks and Financial Institutions Act. 1993 (for short 'RDDBFI Act') which was granted by the DRT by order dated 21.9.2000 as per Annexure-A. The said order of injunction was given large publicity in the press and thereafter, the original application was allowed by DRT by order dated 8.1.2001 as per Annexure-B. When the proceedings initiated by respondent No.2-bank were in progress before the DRT, Bank of Baroda initiated recovery proceedings against the very same parties in O.A. No.6/2001 complaining that after availing huge credit facility in the name of respondent No. 3-M/s. Tubeman Private Limited along with Smt. Laxmi Agarwal and her husband Sri Shankarlal Agarwal as directors, the company had failed to repay dues to the bank and the directors of the company had diverted the bank finance and huge sums were due to the said bank. The DRT issued a certificate of recovery dated 25.2.2003 in favour of Bank of Baroda for an aggregate sum of Rs. 44,21,771/-. In respect of the said recovery certificate, on 10.7.2003, Bank of Baroda obtained an order of attachment of immovable properties including the property in question, as per Annexure-C. The said order of attachment was also given wide publicity.

3. Ultimately, certificate of recovery was issued in favour of respondent No.2-bank by the DRT in DCP No.2549 dated 16.1.2003 as per Annexure-D. The DRT had also issued an order of attachment in respect of the property in question on 28.5.2004 as per Annexure-E. After notice to parties, when respondent No, 4 and her husband Shankarlal Agarwal failed to satisfy the certificate, a notification was published by the DRT in the news paper fixing date of auction of the property as 9.12.2004. Even before the auction sale was fixed in respect of the property in

question, respondent No. 3 - company, respondent No.4 and her husband Shankarlal Agarwal filed objections as per Annexure-G to the attachment order dated 23.5.2004 contending that the property in question had already been attached by the DRT in respect of the claim of Bank of Baroda in DCP No.2583 in O.A. No.6/2001. The objections of respondent No.4 and her husband were rejected by the DRT and thereafter, auction sale was fixed and notified to be held on 9.12.2004. This order of DRT rejecting objections of respondent No. 4 and her husband against attachment and sale of property had become final and had not been challenged by anybody including Respondent No.1. In the auction sale conducted on 9.12.2004, petitioner was the successful auction purchaser for a valuable consideration of Rs.32,50,000/-. She had deposited 25% of the bid amount aggregating to Rs.8, 12,500/- and paid the balance amount of Rs.24,37,500/ on the very day of auction. It was averred that petitioner was a wage earner and she had invested in the property her life time savings apart from money borrowed from banks, friends and relatives. However, possession of the property was being denied to her by Respondent No. 4 by resorting to one or the other proceeding.

4. Respondent No.4-Laxmi Agarwal could not succeed before the DRT and hence, she set up K. Ramachandra, respondent No.1 herein, under the colour of a sale agreement dated 25.11.2003 alleged to have been executed by her in his favour for sale of the property in question for consideration of Rs. 14,00,000/-. On the day of the alleged sale agreement, Respondent No.4 had no authority to execute the same for the reasons stated in the writ petition. It was crystal clear that collusive nature of sale agreement and fraudulent intent behind it were apparent on the face of the record. Respondent No.1 filed objections dated 6.1.2005 (Annexure-L), before the Recovery Officer. After hearing the said objections and considering the record, the Recovery Officer, by his order dated 10.2.2005, rejected the objections vide Annexure-M.

5 Aggrieved by the said order of rejection, respondent No.1 approached this Court on 23.2.2006 in W.P, No.2992/2006. The petitioner herein appeared in the said writ petition and filed detailed statement of objections pointing out collusive nature of proceedings and the fraudulent intent thereof. In the meanwhile, i.e., on

24.11.2005, respondent No.4 approached this Court in W.P. No.25499/2005 questioning the direction issued by the Recovery Officer to deliver vacant possession of the property in question to the petitioner- auction purchaser. Ultimately, the said writ petition came to be dismissed on 20.1.2006 as per Annexure-Q and respondent No.4 filed an affidavit dated 27.1.2006 in the said writ petition, undertaking to deliver possession of the property within 24.2.2006. She filed one more writ petition in W.P. No.7767/2006 questioning Rule 9(4) of the Security Interest (Enforcement) Rules, 2002 to quash the confirmation of sale made in favour of petitioner-auction purchaser. This Court held that having regard to the earlier proceedings in W.P. Nos.48090/2004 and 25499/2005, nothing really survived in the writ petition and hence, it was dismissed as withdrawn on 3.8.2007

6. Respondent No.1 by then filed appeal No.342/2006 before the Debt Recovery Appellate Tribunal at Chennai (for short 'DRAT') from the order dated 10.2.2005 passed by the Recovery Officer in connection with confirmation of sale. He had contended that, the DRT had erroneously allowed the appeal without considering the legal aspects involved in the matter.

7. In furtherance of the sale agreement alleged to have been entered between respondent Nos. 4 and 1, the 1st respondent had also already filed a suit in O.S. No.9443/2004 on 18.12.2004 before the City Civil and Sessions Judge at Bengaluru seeking a decree for specific performance of the agreement for sale dated 25.11.2003. Respondent No.1, who was fully aware of the auction sale held on 9.12.2004, had deliberately kept out of array of parties the State Bank of India as also the petitioner, though both of them were the necessary parties to the suit.

8. Respondent No.4 has filed statement of objections to present petition contending that, the petitioner being auction purchaser, she has no right over the auctioned property. It is at the instance of decree holder, that the auction sale was held to have been conducted in the prescribed manner. It was contended by her that respondent No.2-bank had accepted the order of the DRAT and withdrew W.P. No. 12452/2008. It is also now contended that the bank had also received all the money due under the recovery certificate from the borrowers and hence, the present petition filed by the auction purchaser is wholly untenable and not

maintainable. It is contended that right of the auction purchaser is nebulous and she can have the right to request the court to confirm the same. Therefore, it is only the decree holder, who is the affected party and not the auction purchaser. She has further contended in the objections that though respondent No.2-bank had obtained mortgage of the properties owned by the managing director of respondent No.3, strangely, it had chosen to seek attachment of residential property. On 28.05.2004, her house property was attached. The recovery officer did not serve the copy of attachment on her and that was a serious and material irregularity, which vitiated the sale. Though the Rules require that a sale proclamation was to be drawn up after notice to the defaulter, the recovery officer had chosen not to notify the defaulter or respondent No.3 herein, and thereby, committed another serious illegality vitiating the entire civil proceedings. Notwithstanding the defective sale proclamation, the recovery officer proceeded to fix a date for the sale of immovable property without written consent of the defaulter which contravenes the Rules, according to the submission. The date of auction was fixed on 9.12.2004.

9. Respondent No. 4 has further stated in objections that respondent No.3-company submitted written offer dated 1.12.2004 proposing to pay Rs.38.00 lakh to the bank in full and final settlement. However, the bank, by their letter dated 1.12.2004, rejected the said offer and the property was strangely sold for the sum of Rs.32.50 lakh, a sum which was lesser by Rs.7.50 lakh when compared to the offer of the 3rd respondent for Rs.40.00 lakh. The property was sought to be sold and the sale was obviously for an ulterior motive and with a view to cause serious prejudice to respondent No.4. It is also stated by her that in order to raise money to repay outstanding dues, she was forced to enter into an agreement for sale - with respondent No.1. The auction sale was confirmed by the recovery officer on 10.2.2005, which was challenged by respondent No. 1 by way of an appeal to the DRT and after hearing the appeal, the DRAT dismissed the appeal of the 1st respondent and confirmed the sale. The order of the DRAT was unsustainable. When the DRAT came to the conclusion that the sale was misled in the light of offer of Rs.40.00 lakh made by the 3rd respondent as against the outstanding dues of Rs.38.32 lakh, it cannot be said that the view taken by the DRAT is erroneous and perverse. The 3rd respondent had, like many such others, availed

Scheme for One Time Settlement, 2012 and paid total sum of Rs.37.00 lakh and on receipt of the entire sum, the bank addressed letter dated 25.3.2013 informing the 3rd respondent that its loan account was closed and the title deeds of the mortgaged property were also returned. It is also contended that the sale proceedings were completely vitiated for the reasons mentioned in clauses (a) to (f) of para No.20 of the objection statement. It is contended that there is absolutely no infirmity in the order of DRAT warranting interference. The said order is just, equitable and proper inasmuch as the petitioner is directed to be refunded the amount deposited by her with interest at 9% p.a. Hence, the respondents have sought dismissal of the petition with exemplary cost.

10. Learned Senior Counsel appearing for the petitioner-auction purchaser submitted that in recovery proceeding No.DCP 2549 initiated by respondent No.2-bank to recover the amount due from respondent No. 3 company, the petitioner had participated in auction sale of the property in question. Since the petitioner was the successful bidder, her bid was accepted. He submitted that respondent Nos.4 and 1 alleged to have entered into an agreement to sell with an intention to defeat the claim of auction purchaser and to save the property in question. In order to defraud creditors and also to avoid the confirmation of sale in favour of the petitioner in respect of the property sold in the auction, such a fraudulent document i.e., agreement for sale, had been created by respondent Nos. 1 and 4. A certificate of recovery for the sum of Rs.44,21,771/- was issued by the DRT in favour of Bank of Baroda and in respect of the said recovery certificate, that bank had also obtained an order of attachment of the immovable properties including the property in question on 10.7.2003. The attachment order in favour of Bank of Baroda was subsisting till the subsequent attachment order in favour of respondent No.2 bank issued by DRT on 28.5.2004 in respect of recovery proceeding DCP No.2549.

11. It was also submitted for the petitioner herein that respondent No.2 bank, anticipating alienation of property by respondent No.4 in favour of the respondent No.1 or any other intending purchaser, filed necessary application before the DRT, and obtained on 21.09.2000 an order of temporary injunction restraining respondent No, 4 from alienating or dealing in any with the property in question.

Though there was an order of attachment and an order of injunction in respect of the said property, respondent No.4 was alleged to have sought to alienate the property by collusive agreement for sale. In view of these facts, the alleged transaction of agreement for sale between respondent Nos. 4 and 1 is hit by the principle of lis pendens as per Section 52 of the Transfer of Property Act (for short 'the TP Act') and also the alleged transaction was a fraudulent transfer as per Section 53 of the said Act. He further submitted that the DRAT, while passing the impugned order, had not at all looked into these legal as well as factual aspects and allowed the appeal of respondent No. 1 and set aside the order dated 14.9.2006 of DRT, though respondent No.1 had no locus standi to file such an appeal. The order impugned in the present petition is illegal and the same is liable to be set aside. In support of his contentions, learned Senior Counsel relied upon the following decisions:

1. AIR 1970 SC 1717 (Kedarnath Lai (dead) by his legal representatives and another (in all the appeals) Vs. Sheonarain and others)
2. AIR 1963 SC 1150 (C Abdul Shukoor Saheb Vs. Arji Papa Rao)
3. AIR 1982 SC 84 (Prasad and others Vs. Govindaswami Mudaliar and others)
4. (1996)11 SCC 632 (K. Basavarajappa Vs. Tax Recovery Commissioner, Bangalore and others)

12. Per contra, learned counsel appearing for respondent No.1, who is alleged to be the intending purchaser submitted that the order of attachment issued in favour of respondent No.2-bank is subsequent to the date of agreement for sale entered into between respondent Nos.4 and 1. With regard to the injunction order, it was the order passed in the recovery proceeding before the DRT and the rights in respect of immovable properties were not directly and substantially questioned in the said proceeding. He submitted that as the injunction order was not at all in operation on the date of the agreement for sale, question of violating the order of injunction did not arise. It is also his contention that respondent No.1 was not informed by respondent No.4 that, in respect of the very property, proceedings were pending before either of the tribunals. Respondent No 1 was a bona fide

purchaser for value and hence, bar under Section 52 of the TP Act i.e., lis pendens cannot be made applicable to the agreement for sale. It is his further contention that when respondent No. 1 has entered into the agreement for sale for purchase of the property in question by paying consideration amount, it cannot be said that it was a fraudulent agreement entered into to defeat the creditors. The amount borrowed by respondent No.3 by furnishing respondent No. 4 and her husband as guarantors as also on their personal guarantee, it is totally unconnected to respondent No.1 and hence, Section 53 of the TP Act was not attracted. Considering all these aspects in detail, the DRAT has rightly come to the conclusion in allowing the appeal in favour of respondent No.1 herein and setting aside the order of DRT. Therefore, he submitted that there is no merit in the writ petition and the same may be rejected. In support of his contentions, the learned Counsel relied upon the following decisions:

1. AIR 1970 MYSORE 152 (V.57C35)(1) (Byrappa (deed.) by L.Rs. Smt. Muni Sanjeevamma and others Vs. 3. Mani and others)
2. (1990)3 3CC 291 Vannarakkal Kallalathil Sreedharan Vs. Chandramaath Balakrishnan and another)
3. (1991)1 SCC 715 (Hamda Ammal Vs. Avadiappa Pathar and 3 others)
4. 2008 AIR SCW 2800 (Kancherla Lakshminarayana Vs. Mattaparthi S hyamala and Ors.)
5. AIR 2005 SC 2209(1) (Amit Kumar Shaw and another Vs. Farida Khatoon and another)
6. 2008(5) KCCR 3410 (Smt. Usha Gopirathnam and Others Vs. Shri P.S. Ranganathan and Others)

13. Learned Counsel appearing for respondent No.2- bank submitted that the loan amount of respondentNo.2-bank has been fully paid and the loan account is settled. No further submission was made on behalf of respondent No. 2-bank, even though the auctions ale was held pursuant to the recovery proceedings initiated by it.

14. Learned counsel appearing for respondent No.4 submitted that when respondent No. 4 entered into agreement for sale with respondent No.1, the order of injunction was not in operation. The order of attachment in favour of respondent No.2-bank was subsequent to entering into the agreement for sale. It is further submitted that the 1st respondent filed a suit in O.S. No.9443/2004 for specific performance of agreement for sale which would show that it was not a collusive agreement for sale between the parties. No lis was pending when the said agreement for sale was entered into. No material was produced by the petitioner to show that the transaction of agreement for sale was with fraudulent intention to defeat the creditors or to protect property from the auction purchaser. He submitted that the claim of the bank has been satisfied and even the order of the DRAT provided for refund of amount with interest @ 9% p.a. Hence, the auction purchaser will not be put into any sort of injury or hardship. The petitioner has no locus standi to file writ petition. There is no merit in the petition and the same may be dismissed. In support of his contentions, learned Counsel relied upon the following decisions:

1. (1994) 1 SCC 131 (Desh Bandhu Gupta Vs. N.L. Anand and Rajinder Singh)
2. AIR 1990 SC 1828 (Chinnamal and others Vs. P. Arumugham and another)
3. AIR 2008 SC 2069 (Kancherla Lakshminarayana Vs. Mattaparthi Syamala and Ors.)
4. AIR 2012 SC 206 (Suraj Lamp and Industries Pvt. Ltd. Vs. State of Haryana and Anr.)

15. Looking to the dispute among the parties as per their pleadings, the following points would arise for consideration of this Court:

1. Whether the agreement for sale dated 25.11.2003 said to have been entered into between respondents Nos.4 and 1 was a genuine transaction or it was set up with an intention to defeat the claim of creditors as also the auction purchaser, the petitioner herein ?

2. Whether the alleged agreement for sale was set up during the pendency of lis before the court and the transaction is hit by the principles of lis pendens as per Section 52 of the TP Act ?

3. Whether the order passed by the DRAT, which is. impugned in this petition, suffers from any infirmity ?

Re. point No.1:

16. Certain facts are admitted even according to both the parties. On 29.6.2000, respondent No.2-bank moved O.A. No.256/2000 before the DRT for recovery Rs.34,94,040.44ps. together with future interest at 15.5% interest and costs from respondent Nos. 3 and 4 and Mr. Shankarlal Agarwal, the husband of respondent No.4. On 21.9.2000, the DRT granted injunction against both the directors including respondent No.4 and her agents from transferring, alienating or otherwise dealing with or disposing of properties and assets belonging to them described in schedules-B, C and D annexed to the said order. On 8.1.2001, O.A. No.256/2000 was decreed. On 16.1.2003, recovery certificate was issued to respondent No.2-bank for the sum of Rs.38.32 lakh with future interest. During the pendency of the above proceedings, Bank of Baroda had also filed O.A. No.6/2001 before DRT which was allowed. On 10.7.2003, the DRT ordered attachment of property in question in respect of certificate of recovery dated 25.2.2003 in favour of Bank of Baroda. On 25.11.2003, more than three years after the order of injunction and two years after the decree,, there was the alleged agreement for sale between respondent Nos. 4 and 1 for consideration of Rs, 14.00 lakh. On 28.5.2004, the DRT ordered attachment of property in question in favour of respondent No. 2-bank, which was already attached on 10.7.2003 in favour of Bank of Baroda. On 9.12.2004, auction was held and concluded in favour of petitioner herein for the sum of Rs.32.50 lakh as against reserve-price of Rs. 18.00 lakh. On 6.1.2005, respondent No.1 filed objection before recovery officer contending that on 25.11.2003, he had entered into an agreement for sale with respondent No.4. The recovery officer, after hearing the parties, rejected objection of respondent No. 1 and confirmed the auction sale in favour of the petitioner herein.

17. For application of decisions relied upon by respective parties, cited supra, it was necessary to ascertain the above correct facts of the present case to decide whether the said decisions are applicable.

18. The first and foremost contention of respondent No.1 in this petition is that the alleged agreement for sale dated 25.11.2003 was earlier to the order of attachment dated 28.5.2004 in favour of respondent No.2-bank and hence, the order of attachment could not have come in the way of the agreement for sale. It is also his contention that the order of attachment dated 10.7.2003 in favour of Bank of Baroda had no application as the auction sale even according to the petitioner's case was in O.A. No.256/2000 initiated by respondent No. 2-bank. On the other hand, the contention of the petitioner-auction purchaser is that even prior to 25.11.2003 i.e., alleged agreement for sale, the property was subjected to order of attachment in favour of Bank of Baroda by order dated 10.7.2003 and there was also injunction order on 21.9.2000 passed by the DRT in O.A. 256/2000 initiated by respondent No.2- bank. Respondent No.1 had contended in his objection statement dated 6.1.2005 that pursuant to the sale agreement, he was put into possession of the property.

19. Actually, in the writ petition filed by respondent No. 4 before this Court in W.P. No.25499/2005 (GM-DRT), it was contended by respondent No. 4 that she had entered into registered agreement for sale dated 25.11.2003 with respondent No. 1 herein and even as the registered agreement holder claimed that he was in possession, he had authorized respondent No.4 herein to be in possession on his behalf. At para No.8, it was pleaded that the borrower company was not in possession of the property and respondent No.4 was in possession of the property. In para No. 10, it was pleaded as under:

"It is respectfully submitted that Section 64 of CPC provides that a sale shall not take effect in preference to alienation in pursuance of a registered agreement. In the present case, the registered agreement is earlier to the date of attachment and as such, the sale is not valid. In pursuance of such sale, the petitioner cannot be evicted. The decision reported in 1990(3) SCC 291 also states that agreement would prevail over the subsequent attachment."

That was obviously a false statement in the petition before this Court.

20. The aforesaid petition, W.P. No.25499/2005 was filed when the recovery officer had issued notice asking Respondent No.4 herein to vacate the property in question as it had been sold in the public auction and the sale had been confirmed. In that petition, respondent No. 4 herein also filed an affidavit of undertaking dated 27.1.2006. In para No.4 of the said affidavit, she undertook to voluntarily vacate the schedule premises on or before 24.2.2006 and hand over vacant possession of the said premises to respondent No.1 therein. On the basis of the said affidavit, this Court dismissed the writ petition by order dated 20.1.2006. The contentions of respondent No.4 herein, in the said writ petition, established that she was in possession of the property in question. But in the objection statement dated 06.01.2005 filed by K. Ramachandra, respondent No. 1 herein, he claimed that, under the agreement for sale, he was in possession of the suit property. He nowhere stated that under the agreement for sale, the property in question was delivered to him and he had authorized or permitted respondent No.4 herein to continue into possession of the said property.

21. Respondent No.1 herein filed the suit in (),S. No.9443/2004 on the file of the City Civil Court, Bengaluru seeking decree of specific performance of agreement for sale dated 25.11.2003. In the said suit, he claimed that he had been put into possession of the suit property in pursuance to the agreement for sale. Respondent No.4 herein filed written statement dated 19.11.2009 along with verifying affidavit to contend that she signed a document purported to be an agreement for sale dated 25.11.2003 and the same was registered. It was further contended that although there was registered agreement for sale, it was clearly understood between the parties that the plaintiff had to give money to respondent No.4 to overcome her extra ordinary urgent financial problems and in turn, she had to return the said amount along with interest @ 15% p.a. Respondent No.4 had also stated that petitioner/., she had no right over the property and respondent No. 1 had insisted for an agreement for sale to be executed to secure money advanced and it was not intended to be acted upon. It was also stated in para No.3 of the written statement that when the property was easily worth more than Rs.45.00 lakh, there could not have been agreement for sale for Rs. 14.00 lakh.

So the contentions in the written statement would show that transaction was not the agreement for sale in reality, but it was only an arrangement of furnishing the said property as security for the financial assistance by respondent No.1 to respondent No.4 herein. These contentions in the written statement are quite contrary to her contentions which she had pleaded in W.P. No.25499/2005.

22. In the grounds for interim relief at para No.22 of W.P. No.25499/2005, it was pleaded by respondent No.4 herein, that in the absence of interim relief, she being a lady would be dispossessed from the residential place and she would be on streets and would not be able to maintain herself with any dignity. These contentions raised in the writ petition and filing undertaking before the court that she will hand over possession of the property in question as also her contentions in the written statement to the suit filed by respondent No. 1 herein which are referred above, clearly indicate that in reality, there was no genuine agreement for sale between herself and respondent No. 1 herein. The contention of respondent No. 1 that he had purchased the property under the alleged agreement for sale is not supported by any reliable material. Thus, the alleged agreement for sale said to have been executed by respondent No.4 in favour of respondent No 1 was not a genuine or real transaction of sale but it was a sham transaction with oblique motive and with a clear intention to defraud the creditors.

23. The transaction of agreement for sale is not only a fraudulent transaction between respondent Nos.4 and 1, but even respondent No.2-bank has also joined hands and colluded with them with an intention to defeat the claim of the petitioner auction purchaser. In this regard, there is material on record which supports the contention of the petitioner herein. Though there was already an injunction order dated 21.9.2000 in favour of respondent No.2-bank as against respondent No.4 in O.A No.256/2000, and the alleged agreement for sale dated 25.11.2003 had taken place subsequent to injunction order passed by the DRT, even then, respondent No.2 bank has not initiated any action either for contempt or for disobedience of the order of the DRT.

24. Proclamation of sale dated 2.11.2004 issued by recovery officer, DRT, in DCP No.2549 in O.A. No.256/2000 was also challenged by respondent Nos.3, 4 and

Shankarlal Agarwal, husband of respondent No.4, before this Court in W.P. No.48090/2004 (GM-DRT) and this Court rejected the said petition by order dated 9.12.2004. The relevant paragraph in the said order reads as under:

" 3. It is not in dispute that the decree in O.A. No.256/2000 is not questioned in an appeal or other proceedings. Even otherwise, the sale proclamation is not shown to suffer from error of jurisdiction or legal infirmities calling for interference. On this ground alone, the writ petition deserve to be rejected."

Respondent No.2-bank had also rejected the offer of respondent No.4 to pay Rs.40.00 lakh for one time settlement. In the meanwhile, auction sale was conducted on 9.12.2004 and the petitioner herein was the highest bidder. Her bid was accepted and on 10.2.2005, auction sale was confirmed by recovery officer by rejecting the objection statement of respondent No.1 herein. Very strangely and surprisingly, respondent No.2-bank entered into settlement with respondent No.4 after lapse of 10 years and that too by accepting Rs.37.00 lakh towards settlement of dues in W.P. No.25499/2005. Respondent No.4 herein, who was petitioner in the said writ petition, gave an under taking to the court that she will vacate the property in question and hand over possession to respondent No. 2-bank. In spite of such undertaking, the bank had not taken any action.

25. On the application of respondent No.1 K. Ramachandra as objector in O.A. No.256/2000, the DRT considered his objection and passed a detailed order rejecting the said objection. The DRT held that the alleged agreement for sale was a fraud and it was in collusion between respondent Nos.4 and 1. Respondent No.1 herein also filed W.P. No.2992/2006 (GM) questioning order dated 10.2.2005, whereby recovery officer had confirmed the auction sale by rejecting the objections filed by Respondent No.1. In the said writ petition, as this Court declined to issue stay order, he rushed to the DRAT suppressing the fact of filing of the writ petition and after getting order from the DRAT, he submitted before this Court that the petition had become infructuous and accordingly, the writ petition was dismissed as having become infructuous on 27.8.2008. In spite of such order passed by the DRT as also this Court in the writ proceedings, which has attained finality, respondent No.2-bank has not taken any action in the matter. On the

contrary, it has accepted the amount of Rs.37.00 lakh from the other respondents after lapse of ten years and closed the loan account.

26, The petitioner herein-auction purchaser of property paid amount as ordered by the recovery officer. The sale proclamation, which was challenged by respondent Nos.3 and 4 and husband of respondent No.4 in the writ proceedings, was upheld holding that it was within the jurisdiction of the recovery officer and there were no grounds to entertain said writ petition. Subsequently, respondent No.1 herein who challenged auction proceedings made in favour of petitioner herein was also considered by the DRT in O.A No.256/2000 and a detailed order has been made by the DRT rejecting contention of respondent No.1 herein and also holding that the alleged transaction of sale agreement between respondent Nos,4 and 1 is collusive in nature and it was entered into mainly with the intention to defeat the claim of the creditors. Respondent No.1 herein who filed his objections before the DRT on 6.1.2005, had stated that "the objector had come to know that earlier to the agreement for sale, DRT had granted an order of injunction restraining respondent No.4 from alienating the schedule property. Thus, he knew that respondent No.4 had played fraud on the bank and had entered into the agreement for sale in violation of the orders passed by the DRT". Therefore, the validity of the sale proclamation as well as the confirmation of the auction sale were upheld by this court in the writ proceedings, which orders had also attained finality.

27. Learned counsel appearing for respondent No.1 referred to Section 64 of CPC and submitted that in view of Section 64(2), as the transfer or delivery of the property attached was before the order of attachment, the auction purchaser has no right and she cannot question the transaction of agreement for sale. In that context, Section 22 of RDDBFI Act is relevant to be mentioned here:

" Section 22:

(1) The Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules, the Tribunal and the Appellate Tribunal shall have powers to regulate

their own procedure including the places at which they shall have their sittings.

(2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act, the same powers as are vested in a civil court under the Code of Civil, Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely: -

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) issuing commissions for the examination of witnesses or documents;

(e) reviewing its decisions;

(f) dismissing an application for default or deciding it ex parte;

(g) setting aside any order of dismissal of any application for default or any order passed by it ex parte;

(h) any other matter which may be prescribed. "

28. Section 29 of the said Act also reads as under:

The provisions of the Second and Third Schedules to the Income-tax Act, 1961 (43 of 1961) and the Income tax (Certificate Proceedings) Rules, 1962, as in force from time to time shall, as far as possible, apply with necessary modifications as if the said provisions and the rules referred to the amount of debt due under this Act instead of to the Income-tax:

Provided that any reference under the said provisions and the rules to the "assessee" shall be construed as a reference to the defendant under this Act. "

29. The aforesaid provisions are under the special enactment which will prevail over the provisions of CPC.

30. In K. BASAVARAJAPPA Vs. TAX RECOVERY COMMISSIONER, BANGALORE AND OTHERS [(1996)11 SCC 632], Rule 16(2) of Schedule II to the Income Tax Act 1961 was interpreted by their Lordships as under:

"... If a party with open eyes bypasses the statutory requirement of Rule 16(1) and gets an agreement to sell executed by the defaulter, it cannot on the basis of such an agreement claim to get the auction-sale of defaulter's property set aside by depositing the amount after the property is put to auction for recovering the tax dues of the department. It would amount to circumventing statutory provisions of Rule 16(1) and (2) read with Rules 51 and 48 of the Rules. It must, therefore, be held as rightly submitted by Sri Salve, learned Senior Counsel for Respondent 3 that the appellant had no locus standi to move the application dated 12-4-1988 for getting the auction-sale set aside. It is also to be noted that he had no legal interest in the said property on the date of the application. It is axiomatic that a mere agreement to sell creates no legal interest or right in the property which is the subject-matter of the agreement."

31. If contention of learned counsel for respondent No. 1 is accepted for the purpose of appreciation of case and Section 64 of CPC is made applicable to this case, still, it will not come to the aid and assistance of case of respondent Nos. 1 and 4.

32. Section 64 of CPC reads as under:

Section 64. Private alienation of property after attachment to be void

(1) Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment.

(2) Nothing in this section shall apply to any private transfer or delivery of the property attached or of any interest therein, made in pursuance of any contract for such transfer or delivery entered into and registered before the attachment.

Explanation-For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets. "

33. The above provision clarifies that nothing in that section would apply to any private transfer or delivery of the property attached or of any interest therein, made in pursuance of any contract for such transfer or delivery entered into and registered before attachment.

34. In the case on hand, it is an admitted fact that even according to respondent Nos. 1, 3 and 4, property in question was attached in favour of Bank of Baroda on 10.7.2003 in O.A. No.6/2001 and this was earlier to the alleged agreement for sale dated 25.11.2003. The said order of attachment was subsisting on 28.5.2004 when order of attachment in respect of the same property was also made in favour of respondent No.2-Bank in O.A. No.256/2000. The contention was raised by respondent Nos. 1, 3 and 4 that the order of attachment in favour of Bank of Baroda cannot be taken into consideration and it will not enure to the benefit of order of attachment in favour of respondent No.2-bank dated 28.5.2004. However, according to Section 64 of CPC, respondent Nos, 1, 3 and 4 cannot contend that said provision is made applicable to them and their agreement for sale was earlier to the order of attachment in respect of the property in question.

Re point No.2

35. It is tire contention of the petitioner herein that the alleged transaction of agreement for sale took place during the pendency of lis and hence, it was hit by Section 52 of TP Act. Per contra, it is contention of respondent Nos. 1 and 4 that, as the proceedings before the DRT were recovery proceedings and the parties' rights were not at all directly and substantially in issue in respect of property in question, the principle of Us pendens cannot be made applicable to this case.

36. We have already made reference to Section 22 of the RDDBFI Act. In sub clause (2) of the said provision, it is stated that the tribunal and appellate tribunal shall have, for the purpose of discharging their function under this Act, the same powers as are vested in the civil court under the CPC, 1908 while trying a suit in respect of the matters shown at clause (a) to (h) as mentioned therein. So with

regard to recovery proceedings before the DRT as well as the DRAT, both the tribunals shall be considered to be civil court.

37. Explanation to Section 52 of the TP Act reads as under:

For the purpose of this Section, the pendency of a suit or proceeding shall be deemed to commence from the date of presentation of the plaint or institution of the proceeding in a court of competent jurisdiction and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."

38. On 29.6.2000, respondent No.2-bank filed O.A. No.256/2000 before the DRT. An application under Section 19(2) of RDDBF1 Act was also filed by the bank seeking temporary injunction against respondent No.4 restraining her from alienating the property during pendency of the said proceeding. On 21.9.2000, the DRT granted injunction order against respondent No.4 from alienating the property in question. On 16.1.2003, recovery certificate was issued by DRT in favour of respondent No.2-bank in the said O.A. in respect of the property in question and on 25.2.2003 recovery certificate was issued by DRT in O.A. No.6/2001 in favour of Bank of Baroda. The main contention of respondent Nos. 1 and 4 herein is that the order of attachment in favour of Bank of Baroda on 10.7.2003 will not enure to the benefit of order of attachment made in favour of respondent No 2-bank on 28.5.2004. It is also their contention that the alleged agreement for sale dated 25.11.2003 was earlier to the order of attachment granted subsequently on 28.5.2004 in favour of respondent No.2-bank as per DCP No.2549 in O.A No.256/2000. But the said contention is not sustainable. Rule 51 of Part-III regarding attachment and sale of immovable property in schedule-II laying the procedure for recovery of tax under the Income Tax Act, 1961 reads as under:

Where any immovable property is attached under this Schedule, the attachment shall relate back to, and take effect from, the date on which the notice to pay the arrears, issued under this Schedule, was served upon the defaulter. "

39. This shows that though the order of attachment in favour of respondent No.2-bank is subsequent, according to the contention of respondent Nos. 1 and 4, it shall relate back and take effect from the date on which notice to pay the arrears was issued under the schedule and was served upon the defaulter. Not only that, learned Counsel for respondent No.1 submitted that as per Section 64 of CPC, the petitioner herein cannot have any claim as the agreement for sale was earlier to the order of attachment. As against that contention, explanation to Section 64 of CPC says that, for the purpose of that section, claims enforceable under an attachment include claims for the rateable distribution of assets. Taking this aspect into consideration, even the order of attachment in favour of Bank of Baroda which was admittedly earlier to the alleged agreement for sale, would enure to the benefit of order of attachment granted subsequently in favour of respondent No.2-bank on 28.5.2004.

40. The object of section 52 of TP Act is that nothing new shall be introduced when the proceedings were pending before the court. Though it is the contention of respondent No. 1 that he has purchased property under the alleged agreement for sale without notice of pending proceedings before the DRT for recovery of loan amount, the principle of lis pendens as per section 52 of the TP Act is not based on doctrine of notice, but it is based on the principle of expediency. It is also based on public policy that the pending litigation between the parties in the court of law shall attain finality and if anything new is permitted to be introduced during the pendency of lis, then no litigation will attain finality. The principle on which the doctrine rests is explained in the leading case of BELLAMY VS. SABINE in Mulla's Transfer of Property Act (ninth edition). At page Nos.367 and 368,

Turner LJ said as below:

"It is, as I think, a doctrine common to the Courts both of Law and Equity, and rests, as I apprehend, upon this foundation - that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienation pendent lite were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to be

defeated by the same course of proceeding. "

41. Looking to the facts of this particular case, when there was injunction order against respondent No.4 not to alienate the property and when there was an order of attachment in two cases, one in favour of Bank of Baroda and another in favour of respondent No.2-bank, nevertheless, alienation of property was sought to be effected by respondent No.4 in favour of respondent No.1. It is also an admitted fact that on the basis of alleged agreement for sale, respondent No. 1 herein has already instituted the civil suit before the City Civil Court at Bengaluru seeking specific performance of the alleged agreement for sale, although injunction is stated to have been granted. This is how, new things were introduced during the pendency of lis before the DRT and before the recovery officer. Therefore, though section 52 of the TP Act may not apply, but the principles of said section are certainly made applicable to the alleged transaction of attempted sale and the said transaction is hit by those principles. Respondent No. 1 herein, in his objection statement dated 6.1.2005 at para No.5, stated that he came to know that respondent No.4 had played fraud on respondent No.2-bank and had entered into an agreement for sale in violation of the orders passed by the DRT. This makes it clear that respondent No.4, the alleged vendor of the property in question in favour of respondent No.1, had committed fraud on the respondent No.2-bank. The principles of Section 52 of the TP Act is also on the foundation that one party to the proceeding cannot commit fraud on the other party during the pendency of the proceedings before the court. The alleged transaction of agreement for sale between respondent Nos. 4 and 1 in respect of the very property, which was attached and purchased by the petitioner herein in auction sale, that was confirmed, makes it clear that it is only with intention to overcome the statutory provisions and to have the wrongful gain in the matter. When auction sale was confirmed and respondent No.2-bank realized its dues from the said sale, in the strict sense, the auction purchaser has stepped into the shoe of the creditor bank to enforce her rights in respect of the property purchased in the auction. Therefore, it cannot be said that the auction purchaser has no right to challenge the transaction of alleged agreement for sale between respondent Nos. 4 and 1.

42. We have perused decisions relied upon by learned Counsel for respondent Nos. 1 and 4 which are referred above. In the case on hand, the material produced clearly and satisfactorily established that the property which is the subject matter of alleged agreement for sale was attached before the said transaction between respondent Nos. 4 and 1 and then it was purchased by the petitioner in auction sale and the sale was confirmed, which was upheld by this Court in the writ proceedings. It is also established that respondents colluded with each other to defeat the claim of auction purchaser. In view of these facts and circumstances, the decisions relied upon by learned Counsel for respondent Nos. 1 and 4 are not applicable to the case.

Re. point No.3:

43. The DRAT has, without considering all the aspects of the matter, legal as well as factual, which are discussed above, vaguely discussing the relevant aspects wrongly come to the conclusions, thereby setting aside order of DRT in AOR 6/2006 in O.A. No.256/2000 dated 14.9.2006 and the order dated 10.2.2005 passed by the recovery officer with direction to the recovery officer and respondent No.2-bank to refund the amount paid by auction purchaser with interest at 9% p.a. till date of payment. When the material on record clearly goes to show that the alleged transaction between respondent Nos. 4 and 1 is fraudulent transaction mainly with intention to defraud the creditors and the said fraud has been established to the satisfaction of the court, and when the transaction between respondent Nos.4 and 1 is to circumvent the statutory provisions, such parties cannot be permitted to take benefit of their own wrongs. In this connection, we are referring to relevant paragraphs of some of the judgments of the Hon'ble Supreme Court.

1. K.D. SHARMA Vs. STEEL AUTHORITY OF INDIA LIMITED AND OTHERS - (2008) 12 SCC 481

26. It is well settled that "fraud avoids all judicial acts, ecclesiastical or temporal" proclaimed Chief Justice Edward Coke of England about three centuries before. Reference was made by the counsel to a leading decision of this Court in S.P. Chenqalvaraya Naidu v. Jagannath [(1994) 1 SCC I] wherein quoting the above

observations, this Court held that a judgment/decreed obtained by fraud has to be treated as a nullity by every court.

27. Reference was also made to a recent decision of this Court in A. V. Papayya Sastry v. Govt, of A.P. [(2007) 4 SCC 221] Considering English and Indian cases, one of us (C.K. Thakker, J.) stated: (SCC p. 231, para 22)

'22. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the court, tribunal or authority is a nullity and non est in the eye of the law. Such a judgment, decree or order-by the first court or by the final court-has to be treated as nullity by every court, superior or inferior. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings.'

The Court defined "fraud" as an act of deliberate deception with the design of securing something by taking unfair advantage of another. In fraud one gains at the loss and cost of another. Even the most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. "

2. A.V. PAPAYYA SASTRYAND OTHERS VS. GOVT. OF A.P. AND OTHERS - (2007) 4 SCC 221

21. Now, it is well-settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before three centuries, Chief Justice Edward Coke proclaimed:

'Fraud avoids all judicial acts, ecclesiastical or temporal.'

22. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the court, tribunal or authority is a nullity and non est in the eye of the law. Such a judgment, decree or order-by the first court or by the final court - has to be treated as nullity by every court, superior or inferior. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings.

23. In the leading case of *Lazarus Estates Ltd. v. Beasley* [(1956) 1 All ER 341 : (1956) 1 QR 702 : (1956) 2 WLR 502 (CA)] Lord Denning observed: (All ER p. 345 C)

'No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud.'

24. In *Duchess of Kingston*, Smith's Leading Cases, 13th Edn., p. 644, explaining the nature of fraud, de Grey, C.J. stated that though a judgment would be *res judicata* and not impeachable from within, it might be impeachable from without. In other words, though it is not permissible to show that the court was "mistaken", it might be shown that it was "misled". There is an essential distinction between mistake and trickery. The clear implication of the distinction is that an action to set aside a judgment cannot be brought on the ground that it has been decided wrongly, namely, that on the merits, the decision was one which should not have been rendered, but it can be set aside, if the court was imposed upon or tricked into giving the judgment.

25. It has been said: fraud and justice never dwell together (*fraus et jus nunquam cohabitant*); or fraud and deceit ought to benefit none (*fraus et dolus nemini patrocinari debent*).

26. Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one gains at the loss of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether *in rem* or *in personam*. The principle of 'finality of litigation' cannot be stretched to the extent of an absurdity that it can be utilised as an engine of oppression by dishonest and fraudulent litigants,

27. In *S.P. Chengalvaraya Naidu v. Jagannath* [(1994) 1 SCC 1] this Court had an occasion to consider the doctrine of fraud and the effect thereof on the judgment obtained by a party. In that case, one A by a registered deed, relinquished all his rights in the suit property in favour of C who sold the property to B. Without disclosing that fact, A filed a suit for possession against B and obtained

preliminary decree. During the pendency of an application for final decree, B came to know about the fact of release deed by A in favour of C. He, therefore, contended that the decree was obtained by playing fraud on the court and was a nullity. The trial court upheld the contention and dismissed the application. The High Court, however, set aside the order of the trial court, observing that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". B approached this Court.

28. Allowing the appeal, setting aside the judgment of the High Court and describing the observations of the High Court as "wholly perverse", Kuldip Singh, J. stated: (SCC p. 5, para 5)

"The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property grabbers, tax-evaders, bank-loan- dodgers and other unscrupulous persons from all walks of life find the court process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, whose case is based on, falsehood has no right to approach the court. He can be summarily thrown out at any stage of the litigation." (emphasis supplied)

44. The petitioner has contended that in order to purchase the property in question, she had to borrow loan from banks and from her friends and relatives. She has produced a certificate dated 16.6.2013 along with account statement issued from respondent No.2- bank, vide Annexure-Z, declaring that she had availed housing loan of Rs. 15.00 lakh on 23.12.2004 and her liability to pay interest was also mentioned in the certificate, which indicates that she had availed loan as contended by her for purchasing property in auction sale. The material on record shows that she is a bona fide purchaser for value and auction sale is also in accordance with provisions of the RDDBFI Act as held by DRT in detail in the order passed on the application filed by respondent No. 1 herein. So the conduct of the respondents clearly shows that agreement for sale took place by collusion among the respondents with intention to defeat the claim of auction purchaser. From the year 2004, i.e, the year of auction uptill now, petitioner has been dragged

to the courts of law, unnecessarily and with intention to cause harassment so that she may come to terms as desired by them. Therefore, the petition has to be allowed with exemplary cost. The court may take judicial notice of the costs of number of litigations and the loss of interest during the period of litigation. The award of cost is to be realistic, as observed by the Hon'ble Supreme Court in SALEM ADVOCATE BAR ASSOCIATION, T.N. VS. UNION OF INDIA reported in (2005) 6 SCC 344 and SANJEEV KUMAR JAIN VS. RAGHUBIR SARAN CHARITABLE TRUST AND OTHERS reported in (2012} 1 SCC 455.

45. Accordingly, the petition is allowed and the impugned order dated 30.6.2008 passed in M.A. No. 167/2007 of the Debt Recovery Appellate Tribunal at Chennai is hereby set aside. Respondents are directed to issue necessary documents in favour of the petitioner and hand over peaceful and vacant possession of the property, namely property No. 144, 10th A Cross, I Phase, J.P. Nagar, Bengaluru-78, measuring east to west 30 feet and north to south 40 feet, bounded on the east by house No. 145, west by house No. 143, north by house No.111 and south by road, to the petitioner within a period of two months from the date of this order. And respondent Nos. 1, 2 and 4 are directed to pay by way of cost, to the petitioner Rs. 1,50,000/- each within one month. Respondent No.1 shall also pay, by way of cost, the amount of Rs.83,196/- to the petitioner, within one month, which amount is stated to have been paid by the petitioner by way of interest on the loan taken by her for purchasing the property at the auction.

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