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Court No. - 7

Case :- MATTERS UNDER ARTICLE 227 No. - 2694 of 2022

Petitioner :- Gazal Srivastava And 2 Others

Respondent :- Dhajaram Charitable Trust, New Delhi Thru. Its
Chairman Captain Dilavar Singh Sanghwan(Rtd.)And Anr.

Counsel for Petitioner :- Ashok Kumar Singh, Jitendra Saxena

Counsel for Respondent :- Nisha Verma, Deviyani Dwivedi, In Person

A N D

Case :- MATTERS UNDER ARTICLE 227 No. - 6346 of 2024

Petitioner :- Gazal Srivastava And 3 Others

Respondent :- Dhajaram Charitable Trust Thru. Chairman Captain
Dilavar Singh And 2 Others

Counsel for Petitioner :- Sridhar Awasthi, Jitendra Saxena

Counsel for Respondent :- Pranav Agarwal

Hon'ble Pankaj Bhatia, J.

1. Since both the writ petitions are related, they are being decided by this common judgment.

2. Writ Petition being Matters Under Art. 227 No.2694 of 2022 has been filed challenging the orders dated 23.05.2022 and 02.07.2022 passed by Additional Civil Judge, (Senior Division), FTC, Lucknow in Execution Case No.43 of 2019 as contained in Annexures – 1 & 2.

3. Writ Petition being Matters Under Art. 227 No.6346 of 2024 has been filed challenging the orders dated 07.12.2024, 12.12.2024, 11.09.2024 & 30.11.2019 passed in the Execution Case No.43 of 2019 as well as setting aside the entire execution proceeding in Execution Case No.43 of 2019.

A further prayer is made to set aside the auction sale dated 24.04.2024.

4. The facts, in brief, are that a suit was filed being Suit No.720 of 2017 (Dhaja Ram Charitable Trust v. Lavanaya Ayurvedic Pvt. Ltd.) before the Court of Additional District Judge, South District, Saket Court, New Delhi for recovery of arrears of profit share, rent and damages against Lavanaya Ayurvedic Pvt. Ltd.,(defendant no 1 in the suit) and Defendant No.2 in the said suit was Smt. Sangeeta Srivastava. The said suit was decreed ex-parte on 19.02.2019 in favour of the plaintiff trust, however, it was specifically provided that the suit is being decreed only against Defendant No.1 i.e. the company Lavanaya Ayurvedic Pvt. Ltd. The suit in respect of Defendant No.2 was not decreed. Operative portion of the decree is quoted herein below

“Vide separate judgment of even date the suit is decreed In favour of plaintiff and against the defendant no. 1 in the sum of Rs. 17.99,366/ with pre suit interest effective from 01.12.2014 @ 9% per annum, pendente lite Interest @9% per annum and future Interest @6% per annum.

Costs of the suit are also awarded in favour of plaintiff and against the defendant no. 1.

Defendant no.2 is the chairman of defendant no. 1 company. The agreement Ex.PW1/2 was executed between the plaintiff and defendant no. 1. The defendant no. 1 is a separate entity in the eyes of law and defendant no. 2 cannot be made personally liable for the dues of defendant no. 1. Relief against defendant no. 2 is therefore declined.

Decree sheet be prepared accordingly.”

5. In pursuance to the ex-parte decree, an Execution Case No.43 of 2019 was filed in the District Court, Lucknow for execution of the decree against the company only seeking attachment of the movable and immovable property of the judgment debtor company. On 13.05.2019, an application was filed by the trust under Order 21 Rule 43 of CPC seeking attachment of the bank account and the house building situate at Plot No.128C, Dhawan Estate, Dewa Road, Chinhat, Lucknow.

6. In the said application with regards to the property sought to be attached and auctioned following was pleaded:

"That there is only one immovable property i.e., a commercial plot measuring 0.228 Hectare, Gatta No. 128C in the name of Late Sh. Ashok Kuma Srivastav, former Chairman / Director of Lavanya Ayurvedi Pvt. Ltd., located in Dhawan Estate, Dewa Road, Chinhath, Lucknow, on which the building of Lavanya Ayurvedic Hospital was built and the hospital is currently in operation. Value of this property is approx. Rs. 2,50,000,00/- (Rupees Two Crore and fifty lakh only). A copy of revenue records is attached as Annexure-C."

7. The said application was allowed vide order dated 30.11.2019 and 16.11.2021. On 23.05.2022, the Execution Court put the property on auction.

8. The petitioners herein claiming to be owner of the property in their independent rights moved an application under Order 21 Rule 29 of CPC on 30.05.22 stating that the property was owned by them and not by the judgment debtor company. The said application came to be rejected on 02.07.2022 mainly on the ground that the independent claims can be seen after the property which was charged becomes free from encumbrances.

9. It also can be perused from records that against an order of attachment passed by the executing Court on 16.11.2021, a Civil Revision No.47 of 2021 was preferred on behalf of the company through one of the petitioners namely Smt. Sangeeta Srivastava, Managing Director of the Company. The said revision came to be dismissed on 07.12.2022.

10. It further bears from record that on 05.04.2024, an auction notice was issued by the Court (Annexure No 18). In the said auction notice the description of property put for auction was:

"Lavanya Ayurvedic Hospital, Gata No.128-Sa, Dhawa, Chinhath, Lucknow with two building and four floors each, measuring total build up area 33810 sq. ft. and total plot area measuring .228 hectare."

The property as described above was auctioned on 29.04.2024.

11. Petitioner Nos.1, 2 & 3 moved an application on 01.07.2024 under Order 21 Rule 90 of CPC for setting aside the auction sale held on 29.04.2024. The said application came to be rejected by means of

the order dated 11.09.2024. The petitioners thereafter moved a recall application seeking recall of the order dated 11.09.2024. Thereafter, an application was filed under Order 21 Rule 95 of CPC on 06.11.2024 by the auction purchaser for delivery of the physical possession of the property and on 26.11.2024 the trust filed an application for release of the auction money which was deposited by the auction purchaser in pursuance to the auction. On 04.12.2024, objections were filed to the application filed by the decree holder for release of money and also against the application filed by the auction purchaser for physical possession of the property. On 07.12.2024, the executing Court directed the Amin to submit a report by 10.12.2024 with respect of handing over of property of the auction purchaser. The petitioners approached this Court by filing Writ Petition being Matters Under Art. 227 No.6346 of 2024 in which an interim order was passed on 19.12.2024. On 12.12.2024, objections filed were rejected.

12. In the backdrop of the said facts, Shri Sudeep Seth, learned Senior Counsel appearing for the petitioners argues, that in the application filed for execution the property sought to be sold did not belong to the judgment debtor company and this fact was not verified by the executing Court prior to attachment, the mandatory provisions of Order 21 Rule 14 of CPC was not observed; no report was called from the revenue authorities with regard to the ownership of the property. It is further argued that the property which is subject matter of dispute being situate at Khasra No.128C was purchased by Shri Ashok Kuma Srivastava – father of Petitioner Nos.1, 2 & 3 and husband of Petitioner No.4. In the year 2008, the said Shri Ashok Kumar Srivastava constructed a building to run Cancer Institutes in the name of Lavanaya Ayurvedic Schools of Nursing and Pharmacy, Lavanaya Ayurvedic Hospital and Research Centre and Lavanaya Ayurvedic Pvt. Ltd. The said three institutes were being run by a society namely Lavayanaya Ayurvedic Charitable Cancer Shodh

Sansthan. In the year 2013, Shri Ashok Kumar Srivastava took financial assistance from the bank and mortgaged property owned by him with the Capital First Bank and was also a personal guarantor in the said loan. Subsequently, Shri Ashok Kumar Srivastava died and thereafter, the bank started recovery proceedings, however, it is informed that the said loan has been settled and the property mortgaged with the bank was released. It also bears from record that after the death of Shri Ashok Kumar Srivastava, all the petitioners being the legal heirs, became the owners of the said property by virtue of succession. It was specifically argued that during this lifetime, Shri Ashok Kumar Srivastava never executed any deed of assignment assigning the land in favour of either the company or to anyone else and remained the recorded owner of the property and the constructions standing thereupon. After his death also, no deed of transfer has been executed by the legal heirs of Shri Ashok Kumar Srivastava.

13. In the backdrop of the said, it is argued that it is well settled that only the property of the judgment debtor company could be attached and sold for execution of a decree which was only against the company and the executing Court by various orders, which are impugned herein, has erred in attaching and selling the land owned by the petitioners in their individual capacity for satisfying the decree which was only against the company. It is further argued that the mandatory provisions specifically Order 21 Rule 14 of CPC, if were, complied with by the executing Court, it would not have led to the property being sold despite not being owned by the company. He, thus, argues that all the orders impugned in the writ petitions are liable to be quashed.

14. It is also re-emphasized that petitioner nos.1, 2 & 3 were not a party to the suit nor were they ever made party in the execution case and thus, the property owned by them could not have been sold in

auction as has been done. It is further argued that petitioner no.4, although was made a party in her capacity as a Director of the company, however, no decree existed against her. It is lastly argued that the decree has been executed against strangers to the decree passed in the suit and against the land which is owned by the petitioners.

15. It is also argued after drawing my attention to the attachment application filed by the decree holder, that even in the said application it was stated that land was owned by Shri Ashok Kumar Srivastava on which constructions were raised and the hospital is running, however, in the auction notice the entire property including the Land and building was put up for sale and was also sold.

16. It is also argued that the reasoning given by the executing court that company had raised constructions on the land owned and thus the entire property was that of the company is contrary to settled position in law and without there being any pleadings to that effect.

17. The decree holder Capt. Dilavar Singh Sanghwan argued in person. He extensively argued that Civil Revision No.47 of 2021 was filed by petitioner no.4 as the Chairman of the company and all the issues as are being raised were specifically raised and decided in Civil Revision No.47 of 2021 vide judgment dated 07.12.2022 and as such, the second petition on the same grounds was not maintainable. He further argues, on the strength of an affidavit filed in Writ Petition being Matters Under Art. 227 No.2694 of 2022, that in the balance sheets of Lavanya Ayurvedic Pvt. Ltd., the petitioner no.1 was also a Director apart from petitioner no.4. He further argues that in the balance sheet of the company, fixed assets were shown which cannot be other than the hospital and the auctioned property, and once all these issues were considered and decided vide judgment dated 07.12.2022 passed in Civil Revision No.47 of 2021, the same cannot

be agitated once again and the writ petitions on that ground are liable to be dismissed.

18. He further argues with regard to maintainability of the petitions under Art. 227 of the Constitution that a judicial order of a competent Court of law cannot be said to be violating any fundamental rights of an individual and cannot be challenged through a Writ Petition under Art. 227 of Constitution.

19. Shri Pranav Agarwal, learned counsel appearing for auction purchaser in his oral argument submitted that the judgment passed by Revisional Court in Civil Revision No.47 of 2021 decided the issue with regard to ownership of the property and the same would operate in ‘rem’ and would be binding on all. In his written arguments however he relies upon a judgment in the case of **Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.**¹ which was also noticed in subsequent judgment in **Vidya Drolia v. Durga Trading Corpn**². Relevant paragraphs are quoted herein below:

“48. A judgment in rem determines the status of a person or thing as distinct from the particular interest in it of a party to the litigation; and such a judgment is conclusive evidence for and against all persons whether parties, privies or strangers of the matter actually decided. Such a judgment “settles the destiny of the res itself” and binds all persons claiming an interest in the property inconsistent with the judgment even though pronounced in their absence. [G.C. Cheshire & P.M. North, Private International Law, 12th Edn. by North & Fawcett (Eds.) (London : Butterworths, 1992), p. 362.] By contrast, a judgment in personam, “although it may concern a res, merely determines the rights of the litigants inter se to the res”. [G.C. Cheshire & P.M. North, Private International Law, 12th Edn. by North & Fawcett (Eds.) (London : Butterworths, 1992), p. 362.] Distinction between judgments in rem and judgments in personam turns on their power as res judicata, [G.C. Cheshire & P.M. North, Private International Law, 12th Edn. by North & Fawcett (Eds.) (London : Butterworths, 1992).] i.e. judgment in rem would operate as res judicata against the world, and judgment in personam would operate as res judicata only against the parties in dispute. Use of expressions “rights in rem” and “rights in personam” may not be correct for determining non-arbitrability because of the interplay between rights in rem and rights in personam. Many a times, a right in rem results in an enforceable right in personam. Booz Allen & Hamilton Inc. [Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.,

¹ (2011) 5 SCC 532

² (2021) 2 SCC 1

(2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] refers to the statement by Mustill and Boyd that the subordinate rights in personam derived from rights in rem can be ruled upon by the arbitrators, which is apposite. Therefore, a claim for infringement of copyright against a particular person is arbitrable, though in some manner the arbitrator would examine the right to copyright, a right in rem. Arbitration by necessary implication excludes actions in rem.

75. In *Deccan Paper Mills Co. Ltd. v. Regency Mahavir Properties* [*Deccan Paper Mills Co. Ltd. v. Regency Mahavir Properties*, (2021) 4 SCC 786 : 2020 SCC OnLine SC 655], legal proceedings for cancellation of documents under Section 31 of the Specific Relief Act, 1963 were held to be actions in personam and not actions in rem. Significantly, the judgment refers (at SCC para 24) to the definition of action in rem by R.H. Graveson (*Conflict of Laws* 98, 7th Edn. 1974), which reads as under:

“An action in rem is one in which the judgment of the court determines the title to property and the rights of the parties, not merely as between themselves, but also as against all persons at any time dealing with them or with the property upon which the court had adjudicated.”

76. In view of the above discussion, we would like to propound a fourfold test for determining when the subject-matter of a dispute in an arbitration agreement is not arbitrable:

76.1. (1) When cause of action and subject-matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.

76.2. (2) When cause of action and subject-matter of the dispute affects third-party rights; have erga omnes effect; require centralised adjudication, and mutual adjudication would not be appropriate and enforceable.

76.3. (3) When cause of action and subject-matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable.

76.4. (4) When the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

76.5. These tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject-matter is non-arbitrable. Only when the answer is affirmative that the subject-matter of the dispute would be non-arbitrable.

76.6. However, the aforesaid principles have to be applied with care and caution as observed in *Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan*, (1999) 5 SCC 651 : (SCC p. 669, para 35)

“35. ... Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, which cannot be referred to arbitration. It has, however, been held that if in respect of facts relating to a criminal matter, say, physical injury, if there is a right to damages for personal injury, then such

a dispute can be referred to arbitration (Keir v. Leeman [Keir v. Leeman, (1846) 9 QB 371 : 115 ER 1315]). Similarly, it has been held that a husband and a wife may refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter (Soilleux v. Herbst [Soilleux v. Herbst, (1801) 2 Bos & P 444 : 126 ER 1376], Wilson v. Wilson [Wilson v. Wilson, (1848) 1 HL Cas 538] and Cahill v. Cahill [Cahill v. Cahill, (1883) LR 8 AC 420 (HL)]).”

20. In rejoinder, learned counsel for the petitioners argues that Civil Revision No.47 of 2021 would not bind the petitioner nos.1, 2 & 3, and even the petitioner no.4 who had filed the said revision as a Chairman of the company and not in her individual capacity. It is further argued that revision decided would not be binding on petitioner nos.1, 2 & 3 and thus, they had all the rights to protect their rights and raise their argument to the effect that the orders passed by the Court below are bad in law. It is further argued that the reference to the provisions of Section 80, 81, 83 & 93 of the U.P. Revenue Code which is foundation for passing the order in Civil Revision No.47 of 2021 would have no application to the facts of the present case, as admittedly the property in question was not an agricultural property and thus, the U.P. Revenue Code would have no applicability. It is further argued that even if for the sake of arguments, it is admitted that the U.P. Revenue Code would apply, the tests as prescribed under Section 93 of U.P. Revenue Code were not existing and as such, reliance on Section 93 of the U.P. Revenue Code to hold that the property had devolved on the company is misplaced.

21. In the light of the arguments as raised and recorded above, it is essential to notice the statutory provisions contained in the CPC with regard to execution of a decree; Order 21 of the CPC prescribes for the manner of execution of a decrees and orders. Order 21 Rule 13 prescribes for the application for attachment of immovable property to contain certain particulars; Order 21 Rule 14 confers the power to get the fact with regard to ownership clarified from the Collector’s

register; Order 21 Rule 13 and Order 21 Rule 14 are quoted herein below:

“13. Application for attachment of immovable property to contain certain particulars. - Where an application is made for the attachment of any immovable property belonging to a judgment-debtor, it shall contain at the foot -

(a) a description such property sufficient to identify the same and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers; and

(b) a specification of the judgment-debtor's share or interest in such property to the best of the belief of the applicant, and so far as he has been able to ascertain the same.

14. Power to require certified extract from Collector's register in certain cases. - Where an application is made for the attachment of any land which is registered in the office of the Collector, the Court may require the applicant to produce a certified extract from the register of such office, specifying the persons registered as proprietors of, or as possessing any transferable interest in, the land or its revenue, or as liable to pay revenue for the land, and the shares of the registered proprietors.

22. Order 21 Rule 54 of CPC prescribes for mode of attachment of immovable property; Order 21 Rule 58 confers the power on executing Court to adjudicate the claim to, or objections to attachment, of property; Order 21 Rule 82 onward prescribes for manner of sale of immovable property by the executing Court and Order 21 Rule 90 prescribes for filing of an application for setting aside the sale on ground of irregularity and fraud.

23. It is also essential to notice the provisions of U.P. Revenue Code, specifically Section 80, 81, 83 & 93, which are quoted herein below:

80. Use of holding for Industrial, Commercial or Residential purposes.-(1) Where a bhumidhar with transferable rights uses his holding or part thereof, for industrial, commercial or residential purposes, the Sub-Divisional Officer may, suomotu or on an application moved by such bhumidhar, after making such enquiry as may be prescribed, either make a declaration that the land is being used for the purpose not connected with agriculture or reject the application. The Sub-Divisional Officer shall take a decision on the application within forty five working days from the date of receipt of the application. In case the application is rejected, the Sub-Divisional Officer shall state the reasons in writing for such rejection and inform the applicant of his decision.

Provided that if the application for declaration is accompanied with the prescribed fee and in case of joint holding, no objection of co-tenure holders is attached in case of co-tenure holder and if the declaration is not made by the Sub-Divisional Officer with forty-five days as aforesaid, then the declaration shall be deemed to have been made. Tehsildar will make a record of it in the revenue records, with the comment " subject to the order of the Sub-Divisional Officer."

If any affected party wants to file an objection in relation to the said declaration, it may file an objection in the competent court.

(2) Where a bhumidhar with transferable rights proposes to use in future his holding or part thereof, for industrial, commercial or residential purposes, the Sub-Divisional Officer may on an application moved by such bhumidhar, after making such enquiry as may be prescribed, either make a declaration that the land may be used for the purpose not connected with agriculture or reject the application, within forty five working days from the date of receipt of the application. In case the application is rejected, the Sub-Divisional officer shall state the reasons in writing of such rejection and inform the applicant of his decision:

Provided further that if the bhumidhar fails to start the proposed non agricultural activity within a period of five years from the date of declaration under this sub-section, then the declaration under sub-section (2) for the holding or part thereof shall lapse:

Provided also that a declaration under this sub-section shall not amount to change of land use and the land shall continue to be treated as agricultural land only. However, the bhumidhar shall be entitled to obtain loan and other necessary permissions, clearances etc. for the activity or project, proposed on the holding or part thereof, for which declaration under this sub-section has been obtained.

(3) A bhumidhar possessing declaration under sub-section (2) for his holding or part thereof, may apply to Sub-Divisional officer for converting declaration under sub-section (2) to a declaration under sub-section (1), after completion of construction activity or start of the proposed non-agricultural activity, within a period of five years from declaration under sub-section (2). On receipt of such an application, the Sub-Divisional officer, after making such enquiry as necessary, shall approve or reject the application within a period of 15 days from the receipt of the application. In case of rejection, he shall record in writing the reasons for such rejection:

Provided that for conversion of declaration under sub-section (2) to a declaration under sub-section (1), the bhumidhar shall be liable to pay only the balance amount of fee payable, calculated at prevailing circle rate, after adjusting the amount already paid by him for declaration under sub-section (2) earlier.

(4) No application for a declaration under sub-section (1) or (2), moved by any co-bhumidhar having undivided interest in bhumidhari land shall be maintainable, unless application is moved by all the co-bhumidhars of such bhumidhari land. In case only one of the co-bhumidhar wants to get a declaration for his share in the land with joint interest, then such an application shall be entertained only after the respective shares of the co-bhumidhars in the land have been divided in accordance with the provisions of law.

(5) *The application for declaration under sub-section (1) or sub-section (2) shall contain such particulars and shall be made in such manner as may be prescribed.*

(6) *Where the application under sub-section (1) or sub-section (2) is made in respect of a part of the holding, the sub-divisional officer may, in the manner prescribed, demarcate such part for purposes of such declaration.*

(7) *No declaration under this section shall be made by the sub-divisional officer, if he is satisfied that the land or part thereof is being used or is proposed to be used for a purpose which is likely to cause a public nuisance or to affect adversely public order, public health, safety or convenience or which is against the uses proposed in the master plan.*

(8) *In case the land or part thereof for which a declaration under this section is being sought falls within the area notified under any Urban or Industrial Development Authority, then prior permission of the concerned Development Authority shall be mandatory.*

(9) *The State Government may fix the scale of fees for declaration under this section and different fees may be fixed for different purposes:*

Provided that if the applicant uses the holding or part thereof, for his own residential purpose, no fee shall be charged for the declaration under this section.

81. Consequences of declaration.—*Where a declaration has been made under sub-section (1) of Section 80, the following consequences shall, in respect of such holding or part to which it relates ensue:*

(a) *all restrictions imposed by or under this chapter, in respect of transfer of land shall cease to apply to the bhumidhar with transferable rights;*

(b) *notwithstanding anything contained in Chapter XI, the land shall, with effect from the commencement of the agricultural year following the date of declaration, be exempted from payment of land revenue;*

(c) *the bhumidhar shall, in the matter of devolution be governed by the personal law to which he is subject.*

83. Recording of declaration or cancellation.—*Every declaration under Section 80 or cancellation under Section 82 shall be recorded in record of rights in the manner as may be prescribed and, even after declaration under Section 80, the mutation order on the basis of transfer or succession shall be passed in the manner prescribed.*

93. Transfer of possession for securing money shall be deemed to be a sale.—*If any bhumidhar transfers possession of any holding or part thereof for the purpose of securing any money advanced by way of loan or in lieu of interest on such loan, then, notwithstanding anything contained in any law or contract or document of transfer, the transaction shall be deemed at all times and for the purposes of this Code, to be a sale to the transferee, and to every such sale, the provisions of Section 89 shall apply.*

24. It is essential to notice the judgments cited by the parties. The judgments cited by auction purchaser Shri Pranav Agarwal has already been noticed above.

25. Capt. Dilavar Singh Sanghvan relies upon the judgment in the case of ***Ram Pratap v. Deputy Director of Consolidation, Bahraich and Ors.***³ wherein the High Court had the occasion to hold that the judgment inter se the parties, even if erroneous, is binding as *res judicata* unless the same is set aside by a superior Court of competent jurisdiction. He also relies upon a judgment of the Supreme Court in the case of ***S. Ramchandra Rao v. S. Nagabhushana Rao and Ors.***⁴ for the same purpose that a binding decision is binding inter se the parties.

26. It has also been argued that in the Writ Petition being Matters Under Art. 227 No.6346 of 2024, the petitioner no.4 was aware of the decision in the Civil Revision No.47 of 2021, however, the same was not disclosed, as such, the writ petition was liable to be dismissed on account of suppression of material facts for which reliance is placed on the judgment of the Supreme Court in the case of ***K. Jayaram and Ors. v. Bangalore Development Authority and Ors.***⁵

27. To argue on the scope of Art. 227 of Constitution, reliance is placed upon the judgment in the case of ***Radhey Shyam & Anr. v. Chhabi Nath & Ors.***⁶ wherein the Supreme Court after considering the mandate of Art. 227 of Constitution had held that the powers under Art. 227 can be exercised only in rare circumstances where it can be shown that there was any infraction of statute.

28. Shri Sudeep Seth, learned Senior Advocate appearing for the petitioners has placed reliance on the judgment in the case of ***S.J.S. Business Enterprises (P) Limited v. State of Bihar & Ors.***⁷ to argue that the suppression should be of material facts and in the absence of there being any suppression of material facts, writ petition cannot be dismissed. He further relies upon a judgment in the case of ***Shiv***

3 2014 (32) LCD 1795

4 2023 (41) LCD 1

5 (2022) 12 SCC 815

6 (2015) 5 SCC 423

7 (2004) 7 SCC 166

Kumar Tiwari (Dead) By Lrs. vs. Jagat Narain Rai and Others⁸ to argue that the judgment inter se the parties would only bind the parties to it and would not apply to a third person.

29. To appreciate the arguments in the light of the judgments and the statutory provisions, the first question to be decided is whether, the property attached and sold was owned by the company or was owned by Shri Ashok Kumar Srivastava and after his death by the petitioner nos.1 to 4 being the legal heirs of Shri Ashok Kumar Srivastava?

30. The admitted position is that, on records, Shri Ashok Kumar Srivastava was the owner of the property by virtue of a registered sale deed in his favour. Subsequently, at his insistence the nature of the property was converted from agricultural to non-agricultural. After the said conversion, the Late Shri Ashok Kumar Srivastava had taken loan by mortgaging the property with the bank; no sale deeds or any other deed has ever been executed by Shri Ashok Kumar Srivastava either in favour of the company or in anybody else's favour. Thus, in the absence of any sale deed, the property would continue to belong to Shri Ashok Kumar Srivastava and after his death, to his legal heirs.

31. The manner of transfer of property as prescribed under the Transfer of Property Act was considered by the Supreme Court extensively in the case of ***Suraj Lamp and Industries Private Limited vs. State of Haryana and Anr.***⁹ wherein the Supreme Court had the occasion to deal with the manner of transfer of an immovable property and had indicated that transfer of an immovable property is only permissible by virtue of a sale deed which is compulsorily registrable. The Court also noticed that all other modes of transfer such as sale agreement/general power of attorney/will transfer, do not convey any title nor create any interest in an immovable property. It also observed that a will is a testament of the testator and is a posthumous

8 (2001) 10 SCC 11

9 (2012) 1 SCC 656

disposition of the estate of a testator and cannot be termed as a transfer and also comes into the effect only after death.

32. In the light of the said coupled with the sale as prescribed under the Transfer of Property Act and in view of the restrictions placed under the Registration Act, a property owned by a person cannot be held to be transferred except by a registered sale deed which is clearly absent in the present case—the common exception to the property of a person being treated to be that of any other person is known only through the concept of ‘*blending*’ when the property of a coparcener can be held to be that of a HUF. Even the said concept is limited to claim of partition amongst the coparceners and in any case, does not treat the HUF as the owner in *rem* as against the third party. It is also well settled that doctrine of blending is alien for deeming of ownership of property by a company which cannot happen except by a registered conveyance deed as prescribed under the Transfer of Property Act.

33. The claim that the company was the owner by virtue of mandate of Section 93 of the U.P Revenue Code also cannot be accepted for two reasons: firstly, that the property not being an agricultural property after its conversion would be out of the rigour of Chapter IX of U.P. Revenue Code by virtue of Section 81 of the Code and secondly, even otherwise, in terms of Section 93 of the U.P. Revenue Code, it is essential that the:

- i. Bhumidhar transfers the possession of any holding
- ii. for the purpose of securing any money advanced by way of loan to call the transaction a sale to the transferee.

34. In this case, the owner Shri Ashok Kumar Srivastava never took a loan from the company which is the judgment debtor, as such, Section 93 of U.P. Revenue Code would have no applicability. This aspect of the land not being an agricultural land was neither raised nor

considered in the judgment dated 07.12.2022 in Civil Revision No.47 of 2021. In view of the said, I have no hesitation in holding that the Land in question was owned by Shri Ashok Kumar Srivastava as non agriculture property and after his death devolved on the petitioner nos.1, 2 & 3 who are the daughters and petitioner no.4 who is the wife of Late Ashok Kumar Srivastava. It never was under the ownership of the company which was the judgment debtor.

35. The next question to be decided is whether the property could be attached and sold in an auction for satisfying the decree against the company? The answer is clearly 'NO' in as much as, the judgment debtor i.e. the company was never the owner of the land property, as held above. In terms of provisions of Order XXI Rule 13, it was incumbent to clarify that the property was owned by the judgment debtor. The Decree holder, in fact, himself described Shri Ashok Kumar Srivastava as the owner of land on which constructions were standing. This fact was never got verified by the executing Court which could be done in terms of the provisions of Order 21 Rule 14 of CPC, as such, I have no hesitation in holding that the entire proceeding of executing the decree against the property owned by the petitioners for satisfying the decree only against by the company was clearly illegal and contrary to the statutory provisions of Order XXI.

36. The next question that arises for consideration is whether the rejection of an application seeking quashing of the auction sale was an error by the executing Court? The answer is clearly 'YES', as the rejection of the objection to the auction sale is premised on the findings recorded by this Court in the judgment dated 07.12.2022 passed in Civil Revision No.47 of 2021 with which this Court had already expressed reservations as the main issues were neither considered nor decided, the order impugned cannot be sustained.

37. The next submission to be considered is whether in view of the balance sheets, the property can be said to be that of the company?

The said argument merits rejection firstly because in the balance sheets the Land property sold has not been described as being owned by the company and secondly because merely by the property being shown in the balance sheets as that of the company, the company cannot become the owner of the immovable property which can devolve on the company only by way of a registered sale deed as has been held by me in the foregoing paragraphs. There being no material to suggest that there was any registered sale deed in favour of the company, only on account of the property being presumed to be shown in the balance sheets, the company would not be the owner of the property.

38. The other submission as raised by the decree holder that petitioner no.1 was also the Director of a company and thus, would be estopped from approaching this Court in view of the judgment in the civil revision, the same also needs to be repelled as the petitioner nos.1 and 4 have twin capacities, first being the Director of the company and second being the owner of the property in their individual capacity. Merely because they are the Directors of the company, it does not deprive them of their right to protect the interest in a property which is owned by them in their personal capacity.

39. The other submission that the writ petitions were not maintainable at the instance of the petitioners under Art. 227 of the Constitution also needs to be repelled, as a remedy under Art. 227 of the Constitution is available to the petitioners on account of serious infractions in the attachment and sale of the property owned by them, as noticed in the foregoing paragraphs.

40. Submission of Shri Pranav Agarwal, learned counsel appearing for the auction purchaser premised on judgments in the cases of **Vidya Drolia** and **Booz Allen & Hamilton Inc. (supra)** needs to be rejected inasmuch as, the Supreme Court never held in any of the two

judgments that a judgment declaring ownership of a property in between the parties to the lis can be treated to be a judgment in 'rem'.

41. It is also essential to notice the conduct of petitioner no.4 who had filed the writ petition before this Court as the Chairman of the company and having failed to disclose the said material fact in Writ Petition being under Art. 227 No. 6346 of 2024 needs severe deprecation. Generally, the writ petition at her instance would have to be dismissed on account of concealment of material facts, however, the said dismissal at his instance would not change the factual and legal scenario wherein this Court had held that the property was never owned by the company and could not be sold in execution of a decree against the company alone. As the result would still remain the same, I deem it appropriate to impose a cost of Rs.50,000/- on petitioner no.4 in having failed to disclose the material facts. The costs shall be deposited with the Oudh Bar Association within one month failing which the District Magistrate Lucknow shall recover the same as arrears of land revenue and shall remit the same to Oudh Bar Association.

42. In view of the foregoing discussion, both the writ petitions are *allowed* in above terms.

43. All the orders impugned in both the writ petitions including the attachment and auction of the property, are quashed.

44. The amount deposited by the auction purchaser shall be returned to the auction purchaser by the executing Court where the amount is said to have been deposited.

45. The decree holder would be at liberty to pursue his execution only against the company and/or the properties owned by the company.

Date: 10.02.2025

Nishant

[Pankaj Bhatia, J.]