

(2009) 04 GUJ CK 0009
In the Gujarat High Court
Case No : Appeal From Order No. 112 of 2007

Bharat Dyestuff Corporation and Others	APPELLANT
Vs	
Chandrakant Jaykishandas Kharvar (since dead) through his Heirs	RESPONDENT

Date of Decision : 02-04-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, Order 21 Rule 58(1), Order 21 Rule 90, Order 21 Rule 90(1), Order 23 Rule 3A
Partnership Act, 1932 — Section 19(2)

Citation : (2009) 3 GLR 2311

Hon'ble Judges : M.R. Shah, J

Bench : Single Bench

Advocate : J.B. Pardiwala, Nos. 1 to 6, for the Appellant; Prashant G. Desai, for Respondent Nos. 1, 1.2.1, 1.2.2, 1.2.3, 1.2.4, 1.2.5, 1.2.6, 1.2.7 and 2 to 4, for the Respondent

Final Decision : Allowed

Judgement

M.R. Shah, J.—Present Appeal From Order, under Order 43, Rule 1 of the Code of Civil Procedure, is preferred by the appellants herein-original decree holder and the original judgment debtors to quash and set aside the order passed by the learned 2nd Addl. Senior Civil Judge, Surat dated 1-11-2006 below Exh. 75 in Special Darkhast No. 33 of 2000 by which the learned Executing Court has accepted the objections submitted by the third party and set aside the sale/auction proceedings.

2. This case has a chequered history. Few facts necessary for the determination of the present Appeal From Order in nutshell are as under:

3. The appellant No. 1 herein-Bharat Dyestuff Corporation, through its sole proprietor Shri Ishwarlal L. Desai, resident of Valsad, instituted two civil suits in the Court of learned Civil Judge (S.D.), Valsad being Special Civil Suit No. 140 of 1999 and Special Civil Suit No. 141 of 1999 against the partnership firm, namely,

J.B. Kharvar & Sons and its partners for recovery of money. The appellant Nos. 2 to 6 are the partners of the said partnership firm, namely, J.B. Kharvar & Sons. Both the civil suits were compromised and a consent decree came to be passed for the amount of Rs. 47,02,272/- and Rs. 38,85,361/- respectively.

4. It appears that it is the case on behalf of the appellants that one Shri Chandrakant Jaykishandas Kharvar, who has expired and now the legal heirs are on record, being respondent No. 1 herein, was also one of the partners of the partnership firm, J.B. Kharvar & Sons. It appears that he was not desirous to continue as a partner in the said firm and the dispute was resolved by going for arbitration and the learned Arbitrators passed an award dated 31-12-1991. As per the said award, the said Chandrakant Jaykishandas Kharvar got himself separated from the partnership firm by getting his share so far as partnership property are concerned. That said Chandrakant Jaykishandas Kharvar accepted and took possessions of all the properties which went to his share (according to the appellants worth Rs. 1,36,00,037-21 only). It is the case on behalf of the appellants that in view of the above award declared by the learned Arbitrators and the said Chandrakant Jaykishandas Kharvar separated himself from the partnership firm, when the aforesaid two civil suits came to be filed by the appellant No. 1 herein against the aforesaid firm J.B. Kharvar & Sons for the recovery of the money, the said Chandrakant Jaykishandas Kharvar was not joined as a party defendant as one of the partners of the firm.

5. It appears that after the said consent decree, the original appellate No. 1 judgment creditor preferred two execution petitions being Special Execution Petition Nos. 33 and 34 of 2000. In the said execution proceedings, the respondent No. 1 herein filed objection on 6-10-2001 as a third party mainly on the ground that he is one of the partners of the partnership firm J.B. Kharvar & Sons, and that he was not joined in the two civil suits preferred by the Appellant No. 1 deliberately and behind his back a consent decree was obtained wherein, the firm admitted the liability and under such circumstances, the consent decree was not binding to him and the partnership properties could not be put to auction, as his interest is involved in the same.

6. It was also contended by him that the arbitration award has not become final. It was also further contended that the consent, which was given by the partners of the firm without he being joined as one of the partners, was violative of Section 19(2) of the Partnership Act. Therefore, as such, it was his contention that the decrees are nullity and a fraud has been played upon by the other partners of the firm as well as by Appellant No. 1 by not joining him in the suits.

7. The Executing Court i.e. 2nd Joint Civil Judge (S.D.), Surat adjudicated all the objections raised by respondent No. 1-the third party claiming to be a partner of the firm, and ultimately, vide order dated 3-1-2003 rejected the objections of respondent No. 1. The Executing Court directed to take further steps and issued process for selling Shop No. M-1278 which was at Surat and was one of the properties of the partnership firm.

8. That being aggrieved and dissatisfied by the said order passed by the 2nd Joint Civil Judge (S.D.), Surat, respondent No. 1 herein preferred two Special Civil Applications before this Court being Special Civil Application No. 6854 of 2006 and Special Civil Application No. 6855 of 2006. The learned Single Judge vide order dated 3-5-2006 disposed of both the petitions. However, as it was reported that some applications in the form of objections were stated to be still pending in the Executing Court, the learned Single Judge directed the Executing Court to decide and dispose of the same in accordance with law. At this stage, it is required to be noted that so far as the order passed by the Executing Court i.e. 2nd Joint Civil Judge (S.D.), Surat dated 3-1-2003 rejecting the objections of the respondent No. 1 in the aforesaid two executing petitions is concerned, the same came to be confirmed. That thereafter, two applications came to be preferred by the appellant No. 1 as judgment creditor and decree holder i.e. Exhs. 58 and 59 in Execution Petition Nos. 33 and 34 of 2000 respectively. It is the case on behalf of the appellants that the said two applications had to be preferred because having regard to the decretal amount which was more than Rs. 85 lacs, it was not possible to recover the entire amount by just putting one shop of the partnership firm to auction therefore, two more properties had to be added one is bungalow and another is an industrial shed. The learned 2nd Addl. Senior Civil Judge, Surat vide order dated 26-10-2005 allowed both the applications Exhs. 58 and 59 preferred by the appellant No. I and ordered that the properties shown in Paras 6A and 6B be attached to satisfy the recovery of the decretal amount due in both the Execution Petitions. That thereafter, the process to put all the three properties to auction commenced and all necessary legal procedure to auction commenced and after following all necessary legal procedure as required to be followed and carried out by the Executing Court, ultimately sale proclamation came to be issued on 29-3-2006 for all the properties. After the proclamation was issued as per Order 21 of the Civil Procedure Code, the auction sale was conducted on 7-4-2006. In the auction proceedings, respondent Nos. 2, 3 and 4 were the highest bidders, and therefore, their offers were accepted. After the sale and everything was completed, the respondent No. 1 as a third party preferred an application Exh. 76 on 19-4-2006 in Special Execution Petition No. 34 of 2000 again raising objections that he had a right in the properties in question for which the sale is confirmed and the learned Executing Court had not confirmed the sale and the auction proceedings and set aside the sale and auction proceedings by observing that the objectors i.e. respondent No. 1 herein have some right in the properties which are put to auction, and accordingly, the learned 2nd Addl. Senior Civil Judge & J.M.F.C, Surat vide order dated 1-11-2006 allowed the application Exh. 76 upholding the objections of the respondent No. 1 as third party and cancelled the sale. Being aggrieved and dissatisfied by the learned Executing Court application Exh. 76 dated 1-11-2006, the appellants herein original judgment creditor and the judgment debtors have jointly preferred the present Appeal From Order.

9. Shri J.B. Pardiwala, learned Advocate appearing on behalf of the appellants

has vehemently submitted that first of all there is no reference under which provision of CPC application Exh. 76 was submitted by the third party objectors. It is submitted that even the learned Judge has also not stated anything under which provision of law, he has entertained the application and passed the impugned order. It is submitted that, however, as the application was to set aside the sale and the Court has set aside the sale the provision which would be attracted prima facie is Order 21, Rule 90 of Civil Procedure Code. It is submitted that at earlier stage, respondent No. 1 has not taken any steps when the properties in question were attached and at the relevant time the objections were not raised and the respondent No. 1 permitted to proceed further the auction proceedings, and thereafter, then the sale has taken place, it is not open for the respondent No. 1 to raise objections subsequently. It is submitted that even Order 21, Rule 90 speaks about the application to set aside the sale only on the ground of irregularity or fraud in conducting the Auction only.

10. Shri Pardiwala, learned Advocate has further submitted that till date the respondent No. 1 has not challenged the original decrees which are passed in the two suits which were preferred by the appellant No. 1-firm for the recovery of the dues. It is further submitted that even the respondent No. 1 did not even deem fit to go before the same Court which passed the decree, in view of the provisions of Order 23, Rule 3A. It is therefore, submitted that, admittedly, as on today, the decrees stand as it is.

11. It is further submitted that Order 21, Rule 90 makes it very clear that no application to set aside the sale under the said Rule shall be entertained upon any ground which the applicant could have taken on or before the date on which proclamation of the suit was drawn up. It is further submitted that there is an amendment to the said Rule so far as State of Gujarat is concerned, which provides additional proviso to Sub-rule (1) of Rule 90 which provides that:

Provided also that no such application for setting aside the sale shall be entertained without the leave of the Court upon any ground which could have been, but was not put forward by the applicant before the commencement of the sale.

12. It is submitted that in the present case admittedly, sale proclamation was issued on 29th March, 2006 and the auction sale was conducted on 7-4-2006, and the application Exh. 76 came to be preferred on 19th April, 2006, after the proclamation and the auction sale. Therefore, the impugned order is absolutely illegal and contrary to the provisions of Order 21 of Rule 90 of CPC (C.P.C.).

13. Shri Pardiwala, learned Advocate appearing on behalf of the appellants has further submitted that it has been almost 10 years that the decree-holder is trying to reap the fruits of his decree, but till this date on account of respondent No. 1's frivolous applications has not been able to reap the fruits of the decree. It is submitted that on one hand respondent No. 1 has taken over all the properties which came to his share as per the Arbitration Award, sold them off,

pocketed the money and then subsequently turns around and say that even the arbitration award is not binding to him and he does not agree to the same. It is submitted that after having pocketed the properties worth more than 1 crore, and now wants share in the other properties of the partnership firm where he has no right in the same.

14. Shri Pardiwala, learned Advocate appearing on behalf of the appellants has heavily relied upon the decision of the Hon"ble Supreme Court in the case of *Desh Bandhu Gupta v. N.L. Anand and Anr.* reported in 1994 (1) GLH 215 (Paragraph Nos. 15 and 17).

15. By making above submissions, relying upon the aforesaid decision, Shri Pardiwala, learned Advocate appearing on behalf of the appellants herein original judgment-creditor has requested to allow the present Appeal From Order by quashing and setting aside the order passed by the learned Executing Court below Exh. 76 by further submitting that learned Executing Court has committed serious error by upholding the objections of the respondent No. 1 as third party because twice in the past, the predecessors in office has already rejected all their objections and the same were also confirmed by this Court by rejecting the aforesaid Special Civil Applications.

16. Appeal From Order is opposed by Shri Prashant G. Desai, learned Counsel appearing on behalf of the respondent No. 1-third party objector. Shri Desai, learned Counsel has submitted that the application Exh. 76 has been submitted by the respondent No. 1 objector under Order 21, Rule 58 and not under Order 21, Rule 90 of the C.P.C. It is further submitted that the property worth Rs. 10 crores has been sold at Rs. 55 lacs only. It is further submitted that as such, consent decrees, which are sought to be executed, are nullity and have been obtained by appellant No. 1 herein original judgment-creditor by fraud in connivance with other partners of the partnership firm by not joining respondent No. 1-Chandrakant Jaykishandas Kharvar as defendant in the aforesaid suit, and therefore, the said consent decree is not binding to respondent No. 1.

17. Shri Prashant G. Desai, learned Counsel appearing on behalf of respondent No. 1 has relied upon the decision of Calcutta High Court in the case of *Tilokram Ghosh and Others Vs. Smt. Gita Rani Sadhukhan and Others*, By making above submissions, it is submitted that considering the facts of the case when it is found that respondent No. 1 has some right in the properties in question, learned Executing Court has rightly allowed the application Exh. 76 and has rightly not confirmed the sale in the auction proceedings. Therefore, it is requested to dismiss the present Appeal From Order.

18. Heard the learned Advocates appearing for the respective parties.

19. At the outset, it is required to be noted that consent decrees have been passed in the year 1999-2000 which are sought to be executed and the original plaintiff-decree-holder is struggling for enjoying the fruits of the decree since last 9 years as the execution application have been filed in the year 2000. Because of

number of proceedings initiated by the respondent No. 1 -third party, one after another, the executions have been delayed. It is required to be noted at this stage that properties in question have been sold in auction sale by the Court in an execution proceedings, and thereafter, the application Exh. 76 has been submitted, after the completion of the auction sale proceedings. From the application Exh. 76, it does not appear under which provision of law, the said application has been submitted by the respondent No. 1-third party. However, it appears that the same can only be under Order 21, Rule 90 of the C.P.C., as the auction sale proceedings have been completed and it was at the stage of confirmation of the sale, and at that stage, the third party has submitted the objections therefore, it can only be under Order 21, Rule 90 of the C.P.C. Of course, it is the case on behalf of the respondent No. 1- third party objectors that the said application has been submitted under Order 21, Rule 58 of C.P.C. Therefore, first of all, it is to be considered under which provision of law, the third party could have submitted the objections. As per Order 21, Rule 58 where any claim is preferred or any objection is made to the attachment of any property attached in execution of a decree, on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objections in accordance with the said provisions. As per proviso to Sub-rule (1) of Rule 58 of Order 21, no such claim or objections shall be entertained:

(a) where, before the claim is preferred or objection is made, the property attached has already been sold; or

(b) where the Court considers that the claim or objection was designedly or unnecessarily delayed.

19.1. Therefore, objections under Order 21, Rule 58 can be at the stage of attachment of the property attached in execution of a decree and before the property attached has already been sold. In the present case, it appears that earlier the properties in question were ordered to be attached by the learned Executing Court by order dated 26-10-2005 passed below application Exhs. 58 and 59, and in-fact, before that the objections submitted by the respondent No. 1-third party were set aside vide order dated 3-1-2003 against which Special Civil Applications were filed before this Court which came to be disposed of by directing the Executing Court to decide and dispose of the some applications in the form of objections stand to be pending before the Executing Court. Therefore, it appears that at the time when the properties in question came to be attached vide order dated 26-10-2005 vide order below Applications Exhs. 58 and 59, respondent No. 1-third party had never raised any objections at that stage, therefore, the stage raising the objections to the attachment and by preferring any claim has gone. There was no claim by the petitioner in the properties attached and/or if there was any objections/claim by the respondent No. 1-third party, on the ground that such attached property is not liable to such attachment, the respondent No. 1-third party ought to have raised the objections and preferred the claim at that stage, as provided under Order 21, Rule 58 of the

C.P.C. It is to be noted, that thereafter, the process to sell the aforesaid properties or to auction the properties in question commenced and necessary legal procedure were carried out by the Executing Court, and ultimately, proclamation came to be issued on 29th March, 2006 for all the properties and after the proclamation, the auction sale was conducted on 7-4-2006 and in the auction proceedings respondent Nos. 2, 3 and 4 are the highest bidders, and only thereafter, the application Exh. 76 has been submitted by the respondent No. 1-third party. Therefore, as the said application Exh. 76 is after the conducting of the auction sale, the only provision which can have the application is Order 21, Rule 90 of the C.P.C. If at all, the submission of Shri Desai, learned Counsel appearing on behalf of respondent No. 1 to the effect that the application Exh. 76 was under Order 21, Rule 58 of the C.P.C, in that case as observed earlier the application Exh. 76 was not maintainable at all. Even considering the proviso of Order 21, Rule 58 reproduced hereinabove, the objections and the application Exh. 76 which was after conducting the auction sale was not maintainable at all. Under the circumstances, when the application Exh. 76 which according to the respondent No. 1-third party was under Order 21, Rule 58 of the C.P.C, it is found to be not maintainable, the impugned order passed below Exh. 76 cannot be sustained and the same deserves to be quashed and set aside.

20. However, assuming that the application Exh. 76 submitted by the respondent No. 1-third party can be said to be under Order 21, Rule 90 of the C.P.C. The said objection is after completion of the auction sale and in that case also even considering the Order 21, Rule 90 of the C.P.C, the impugned order passed by the learned Executing Court cannot be sustained. As per Order 21, Rule 90 of the C.P.C, the application to set aside the sale can be made only on the ground that the material irregularity or fraud in auctioning or conducting the sale. As per explanation Order 21, Rule 90, the mere absence of or defect in attachment of the property sold shall not, by itself, be a ground for setting aside a sale under Order 21, Rule 90.

21. Considering the order passed by the learned Executing Court below Exh. 76, it appears that learned Executing Court has not confirmed sale by merely observing that respondent No. 1-third party objector might have some right in property in question. It is to be noted that the claiming right in the property attached/sold and raising such an objection could only be prior to conducting of the auction sale as provided under Order 21, Rule 58 of the C.P.C. Even considering the objections in the application Exh. 76, it is on merits of the judgment and decree and claiming that in the suit, in which the consent decree passed by the competent Court, respondent No. 1-third party has not been joined as a party defendant. Apart from the fact that all those objections came to be considered by the Executing Court earlier, even such objections were not maintainable after proceedings of the auction sale has been completed and when no objections were raised at the time of attachment of the properties in question as required under Order 21, Rule 58 of the C.P.C.

22. Under the circumstances, even considering the application Exh. 76, such objections were not required to be considered at the time of confirmation of the sale and only objections which are required to be considered at that stage (as provided under Order 21, Rule 90 of the C.P.C.) is with respect to irregularity and fraud in conducting the sale proceedings and no other objections. It is also required to be noted, at this stage, that even the respondent No. 1-third party has never challenged the judgment and decree.

23. In view of the above, considering the application Exh. 76 either all under Order 21, Rule 58 or under Order 21, Rule 90 of the C.P.C., the impugned order passed by the learned Executing Court below Exh. 76 cannot be sustained and the same deserves to be quashed and set aside.

24. For the reasons stated above, Appeal From Order succeeds. The impugned order passed by the learned Executing Court in Special Execution Petition No. 33 of 2000 below Exh. 75 dated 1-11-2006 is hereby quashed and set aside. Learned Executing Court is directed to proceed further with the execution applications and pass further orders in accordance with law and on merits at the earliest as the judgment and decree sought to be executed is passed in the year 2000. Appeal From Order is allowed to aforesaid extent. No costs.

25. In view of allowing Appeal From Order, no further order in Civil Application.