

(1915) 05 CAL CK 0009
In the Calcutta High Court

Harinath Chowdhury

APPELLANT

Vs

Hara Das Acharja Chowdhury and Others

RESPONDENT

Date of Decision : 21-05-1915

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 46, Order 38 Rule 5

Citation : 29 Ind. Cas. 580

Hon'ble Judges : Roe, J; Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. The problem which requires solution in this appeal may be concisely stated. On the 30th June 1909 A sued B for recovery of money. On the same day A obtained an order for "attachment before judgment under Rule 5 of Order XXXVIII, Civil Procedure Code. The property attached was a debt due obviously from C to D; but the debt was attached on the allegation that B, and not D, was the person beneficially interested in it. The result was that a prohibitory order was issued upon C. On the 13th August 1909 A obtained an ex parte decree in his suit against B. C was then called upon to pay into Court the money due from him ostensibly to D. On the 8th October G applied to the Court and intimated that he was willing to bring the money into Court, provided he was absolved from liability to pay a second time to D and provided also that interest ceased to run upon his debt from that date. The Court thereupon ordered that the money, if deposited, would be retained in Court till the adjudication of the question, whether It or D was beneficially interested therein. On the faith of this order the money was brought into Court on the 13th December 1909. Thereafter, without notice to C or D, the Court on the application of A paid out the money to him. D, who had no intimation of these proceedings, subsequently sued C and recovered judgment against him on the debt. G now sues A to recover the money which he had deposited in Court and which, without notice to him or to his creditor D, had been withdrawn by A, The Courts below have decreed the c]aim and A has appealed to this Court. The substantial question in controversy on the merits in tins litigation consequently, plainly, is whether B "or D was beneficially interested

in the debt. The Courts below have concurrently answered this against A, and have found that B had no interest in the money, in other words, that not B but T) was the real creditor of C. This is a finding of fact which cannot be successfully challenged in second appeal, indeed no attempt has been made to assail it before us; but the question has been mooted, has G any cause of action against A? On behalf of A it has been argued that there is no cause of action, first, because the money was recovered under compulsion of legal process, and cannot accordingly be recovered by any form of suit; and, secondly, because by virtue of Order XXI, Rule 46, of the Code of Civil Procedure, the money, as soon as deposited, ceased to be the money of the plaintiff; and that consequently, he is not entitled to recover it back. In our opinion there is no foundation for either of these contentions.

2. As regards the first ground, it is clear that the principle of the rule in *Marriot v. Hampton* 7 T.R. 269 : 2 SLC 421 : 2 E. 546 : 4 R.R. 439 : 101 E.R. 969 which has been the bulwark of the arguments for the appellant, is of no real assistance to his cause. The principle is that where money has been paid by the plaintiff to the defendant under compulsion of legal process, which is afterwards discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received. The foundation of this doctrine was thus stated by Lord Kenyon: "After a recovery by process of law, there must be an end of litigation, otherwise there would be no security for any person." To the same effect is the observation of Grose, J.: It would tend to encourage the greatest negligence if we were to open a door to parties to try their causes again, because they were not properly prepared the first time with their evidence." Lawrence, J., added that if the case alluded to, that is the decision of Lord Mansfield in *Moses v. Macferlan* 2 B. 1005 : 1. W. B1. 219 : 97 E.R. 676 be law, it would go the length of establishing this that every species of evidence which was omitted by accident to be brought forward at the trial might still be of avail in a new action to overrule the former judgment, which is too preposterous to be stated. The principle was strain formulated by Patterson, J., in *Cadaval v. Collins* 4 A.E. 858 : 111 E.R. 1006 : 6 N. M. 324 : 2 H.W. 54 : 5 L.J.K.B. 171 : 43 R. 499 " Money paid under compulsion of law cannot be recovered back as money had and received. And, further, where there is bona fide, and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back." Are refer to this statement in order to emphasize the qualification to the general rule formulated in the following terms by Kennedy, J., in *Ward and Co. v. Wallis* (1900) 1 Q.B. 675 : 69 L.J.Q.B. 423 : 82 L.T. R16 T.L.R. 193; "There must be bona fides on the part of the party who has got the benefit of his opponent's payment in order to bring the principle laid down in that case *Marriot v. Hampton* 7 T.R. 269 : 2 SLC 421 : 2 E. 546 : 4 R.R. 439 : 101 E.R. 969 into force; if the person enforcing a payment, under legal process has therein taken an unfair advantage or acted un-conscientiously, knowing that he had no right to the money, the principle laid down in *Marriot v. Hampton* 7 T.R. 269 : 2 SLC 421 : 2 Esp. 546 : 4 R.R. 439 : 101 E.R. 969 may not prevent the defendant from

recovering the money back."

3. Let us examine the application of this principle to the circumstances of the present case. Here money was deposited by the plaintiff G on the faith of an order which stated explicitly that the money would be retained in Court pending the determination of the question whether the money belonged to B, the then judgment-debtor of A, or to D, the alleged creditor of the depositor C. That inquiry was never made, but the Court, without notice to the depositor and his alleged creditor, paid out the money to the present defendant on his application. So that neither G nor I) was allowed an opportunity to defend his rights. We need not hold that this conduct of A was in any way designedly fraudulent, but this much is plain that he was able to appropriate the money by what constituted a grave abuse of the process of the Court. The principle of the decision in *Harriot v. Hampton* 7 T.R. 269 : 2 SLC 421 : 2 E. 546 : 4 R.R. 439 : 101 E.R. 969 has no application to these circumstances.

4. As regards the second ground it is contended that under Order XXT, Rule 46, the money, as soon as it was deposited, ceased to be the money of the depositor. Clause 4 A.E. 858 : 111 E.R. 1006 : 6 N.M. 324 : 2 H.W. 54 : 5 L.J.K.B. 171 : 43 R 499 of Rule 46 is in these terms: "A debtor prohibited under Clause (1) of Sub-rule (1) may pay the amount of his debt into Court and such payment shall discharge him as effectually as payment to the party entitled to receive the same." This clearly contemplates a case where there is no dispute that if the suit results into a decree against the defendant or if there is a pre-existing judgment against him, the money is recoverable thereunder from the depositor. In the present case, the deposit was clearly conditional. The order of the Court makes it plain beyond all controversy that the deposit was made pending the adjudication of the question whether B or D was beneficially interested in the money. But it has been contended on behalf of the appellant that this order was irregular, as the Code neither contemplates an inquiry, nor provides for the issue of notices upon parties affected by its order. This argument overlooks the elementary principle that no judicial order can be made to the detriment of a person till he has been afforded ample opportunity to defend his rights. Our attention has been drawn in this connection to Rule 5 of Order XLV of the Rules of the Supreme Court in England. An examination of that rule shows that there is no foundation whatever for the contention of the appellant. There the rule expressly provides for an inquiry in the events which have been happened here. Rule 5 is in these terms: Whenever in proceedings to obtain an attachment of debts, it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the Court or a Judge may order such third person to appear, and state the nature and particulars of his claim upon such debt." Rule 6 then provides that after the allegation of any third person under such order as in Rule 5 mentioned and of any other person who by the same or any subsequent order may be ordered to appear or in case of such third person not appearing when ordered, the Court may order execution to issue to levy the amount due from such garnishee.

Consequently the rules of the Supreme Court in England contemplate not an ex parte order to the prejudice of third persona who may be really interested in the debt due from the garnishee, but an inquiry in the presence of all the persons interested. Our Code does not contain any specific rule of the type of Rules 5 and 6 of Order XLV of the Rules of the Supreme Court in England. But the Court has inherent power to guard against an abuse of its process and to ensure that its orders do not operate to the prejudice of persons who have no notice of the proceedings. In the case before us the Court was competent, indeed it was incumbent upon the Court, to make a conditional order of this description and to provide that the money deposited was not paid to the decree-holder till adjudication of the question of title to that money. Reference may in this connection be usefully made to the instructive decision of the Court of Appeal in *Roberts v. Deane* 8 Q.B.D. 319 : 61 L.J.Q.B. 15 : 46 L.T. 246 : 30 W.R. 76. In that case the garnishee who was ordered to bring the money into Court contended that the money was due to the judgment-debtor, not in his personal capacity but in his capacity as a trustee. The question arose whether the money, if deposited, should be paid without inquiry. Lord Justices Brett, Colton and Lindley unanimously held that it would not be right to make the payment without an inquiry into the question, whether the money was trust money or not, and they directed that the money should be brought into Court to abide the event of an inquiry. In our opinion the money deposited in this case" did not cease to be the money of the plaintiff, merely because he had brought into Court on the faith of a conditional order which directed its retention in Court pending inquiry into the question raised.

5. We feel no doubt whatever that the justice of the case lies entirely with the respondent and that the Court has full authority to compel the appellant to bring back the money into Court to be re-paid to the plaintiff *Mrinalini Dasi v. Abinash Chunder Dutt* 6 Ind. Cas. 508 : 14 C.W.N. 1024 : 11 C.L.J. 533.

6. The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.