
(1992) 11 BOM CK 0072

In the Bombay High Court

Case No : Civil Revision Application No. 414 of 1989

Jugalkishore Rampratapji Rathi

APPELLANT

Vs

Brijmohan Rathi and Another

RESPONDENT

Date of Decision : 10-11-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5, Order 39 Rule 1, Order 39 Rule 2, 151, 94

Contract Act, 1872 — Section 140

Citation : (1994) 2 BomCR 537

Hon'ble Judges : S.G. Mutalik, J

Bench : Single Bench

Advocate : B.M. Kasat, for the Appellant;

Judgement

S.G. Mutalik, J.—The present applicant is the original defendant No.3 in Special Civil Suit No. 77 of 1988 and he challenged the impugned order passed by the learned Joint Civil Judge (Senior Division), Amravati, below Exhibit 12, rejecting the application filed by him for the attachment of the immovable property of non-applicant No.1 (original defendant No.1) before the judgment, under the provisions of Order 38, Rule 5, Civil Procedure Code.

2. The defendant No.1 is the principal debtor who obtained loan from the plaintiff-bank, for which the defendant Nos. 2 and 3 stood sureties. The defendant No.1 did not repay the amount of loan and, ultimately, the plaintiff-bank filed Special Civil Suit No. 77 of 1988 for the recovery of the amount of Rs. 2,53,820.75 from defendant No. 1. As defendant Nos. 2 and 3 stood sureties, they are also impleaded as necessary parties.

3. Before filing the Special Civil Suit, the plaintiff-Bank gave notices to defendants 1 to 3 and called upon to repay the amount of loan. After received the notice, the defendant No. 3 informed the plaintiff-Bank that the defendant No. 1 was trying to dispose of his immovable properties and that necessary steps should be taken by the Bank to protect the amount of loan advanced to him.

However, the Bank did not take any steps. Even after filing of the Special Civil Suit No. 77 of 1988, the Bank did not pursue with the remedy under the provisions of Order 38, Rule 5, of the Code of Civil Procedure, for attaching the property of the defendant No. 1. Ultimately, the present applicant filed the application (Exhibit 12) and contended that defendant No. 1 was trying to dispose of his immovable properties and also the residential house which is mortgaged to the plaintiff-Bank for the loan incurred by him. The defendant No. 1, by his objections (Exhibit 17), opposed the application and contended that the defendant No. 3 has no locus standi to file the application. Such application can be filed by the person claiming decree in his favour and who apprehends that the defendant No. 1 is intending to dispose of the property in order to defeat his claim. He further denied that he was intending to dispose of his properties, as contended by the applicant-original defendant No. 3. The learned trial Judge, after considering the rival contentions and also the provisions of section 151 of the Code of Civil Procedure, rejected the application on 1-11-1988. The said impugned order is challenged in the present Civil Revision Application.

4. Though non-applicant Nos. 1 and 2 are served, they remained absent.

5. It is submitted by Shri B.M. Kasat, learned Counsel for the applicant, that under the provisions of Order 38, Rule 5, of the Code of Civil Procedure, it is nowhere laid down that it is the exclusive right of the plaintiff to attach the property of defendant No. 1 before judgment, or that other defendants, under these peculiar circumstances, are debarred from applying under the aforesaid provisions of Order 38, Rule 5 of the Code of Civil Procedure. The learned Counsel further submitted that even in case if a decree is passed against all the defendants and if the whole amount under the decree is recovered from only defendant No. 3 i.e., the present applicant, he would be in a position of the creditor and as such he has got every right to file the application under the provisions of Order 38, Rule 5 of the CPC to protect his interest. The learned Counsel further submitted that in view of the provisions of section 140 of the Indian Contract Act, where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor. In short, according to the learned Counsel, perhaps the present applicant would be in a position of a prospective creditor and even in that case also, in case if the whole amount under the decree is recovered from him, he will have to file a civil suit against defendant No.1 for recovery of the said amount. Shri B.M. Kasat placed reliance on the ruling reported in *Amrit Lal Goverdhan Lalan Vs. State Bank of Travancore and Others*, , in which following observations are made:

"The language of section 140 of Contract Act makes a plain that even without the necessity of a transfer, the law vests in the surety all the rights which the creditor has against the principal debtor.

The expression "security" in section 141 of Contract Act, is not used in any

technical sense, it includes all rights which the creditor has against the property at the date of the contract. The surety is entitled on payment of the debt or performance of all that he is liable for to the benefit of the rights of the creditor against the principal debtor which arise out of the transactions which gives rise to the right or liability. If, therefore, the creditor has lost or parted with the security without the consent of the surety, the latter is, by express provisions contained in section 141, discharged to the extent of the value of security lost or parties with."

6. The learned Counsel for the applicant further referred to the provisions of section 94 of the CPC and submitted that in order to prevent the ends of justice from being defeated, the Court may, (1) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property; and (2) make any such other interlocutory orders as may appear to the Court to be just and convenient (section 94(b) & (e) of the Code of Civil Procedure). According to the learned Counsel, even suo motu action can be taken by the Court to protect the ends of justice u/s 94(b) & (e) read with section 151 of the Code of Civil Procedure. Even if the Court of its own accord did not take any steps as contemplated under the aforesaid sections, the present applicant, who is one of the sureties and who is apprehending that perhaps the defendant No. 1 - the principal debtor would dispose of his properties in order to defeat the decree that would be obtained by the plaintiff-Bank, the learned trial Judge ought to have granted the application under Order 38, Rule 5 Civil Procedure Code, filed by him. The learned Counsel further submitted that the guarantor, i.e., the present applicant in the Civil Revision Application, by invoking the doctrine of subrogation, can apply for temporary injunction even before payment of debt by guarantor to creditor. The learned Counsel placed reliance on the ruling reported in *Mamata Ghosh Vs. United Industrial Bank Ltd. and Others*, . It is observed in para 16 as follows :-

"..... even before payment of debt by the guarantor to the creditor, doctrine of subrogation can apply for temporary injunction as has been done in the instant suit."

Similarly, in the ruling reported in *State Bank of India Vs. Fravina Dyes Intermediates and Another*, , it is observed as follows :-

"When a Government Bank institutes suit for recovery of large amount of loan advanced and seeks injunction under Order 39 of CPC to restrain the party from alienating or transferring the property mortgaged as security, the interest of bank must be protected. The fact that the money advanced by the Bank is the property belonging to its depositors cannot be lost sight of. Even assuming that the injunction sought for under Order 39 was not available to the Bank, the undeniable fact is that having regard to the recovery of large amount sought as against the party there are ample provisions on which relief could be granted for e.g. section 94 of C.P.C gives ample powers to grant injections or to make such other interlocutory orders which may appear to be just and necessary even if

Order 39 is not applicable. Section 151 of C.P.C. can also be applied when the circumstances of the case justify an order to protect the interest of a party."

In view of the aforesaid observations, and especially in view of the provisions of Order 38, Rule 5 read with sections 94(b) & (e) and 151 of the Code of Civil Procedure, in order to protect the interest of the surety and in view of the peculiar circumstances of the facts in the present matter, I am of the opinion that the present applicant, who is the surety, is entitled to apply under Order 38, Rule 5 of the CPC for attachment of the property of the principal debtor, i.e., the present non-applicant No. 1 before judgment, or even he can apply under Order 39, Rules 1 and 2 read with sections 94 and 151 of the Code of Civil Procedure, to protect his interest and in the ends of justice.

7. In the circumstances, the impugned order passed by the trial Court below Exhibit-12, dismissing the application filed by the applicant - original defendant No.3, is hereby set aside. The learned trial Judge is directed to consider the application (Exhibit 12) afresh. Even the present applicant is entitled to apply under the provision of Order 39, Rules 1 and 2 read with sections 94 and 151 of Code of Civil Procedure. Similarly, in order to protect the interest of the present applicant and until the said applications are decided, the non-applicant No. 1 is hereby restrained from alienating, transferring, disposing of or creating any encumbrance on the assets mortgaged by him in favour of the non-applicant No. 2 - Bank and his other immovable property. Non-applicant Nos. 1 and 2 shall pay the costs of this Civil Revision Application to the applicant. Rule is made absolute, accordingly.