

(2004) 06 CAL CK 0024

In the Calcutta High Court

Case No : A.P.O.T. No. 175 of 2002, G.A. No. 1021 of 2002, T. No. 60 of 2002
and E.C. No. 1 of 1998

Magma Leasing Limited

APPELLANT

Vs

Ajoy Kumar Sen

RESPONDENT

Date of Decision : 16-06-2004

Acts Referred:

Arbitration Act, 1940 — Section 8
Civil Procedure Code, 1908 (CPC) — Section 73

Citation : (2004) 3 CALLT 341 : (2005) 4 CHN 48

Hon'ble Judges : Asok Kumar Ganguly, J

Bench : Single Bench

Advocate : Ajoy Krishna Chatterjee, S. Singhvi and Moumita Chatterjee, for the Appellant; P.P. Banerjee and Tapas Saha for the Respondent No. 1 and Pradip Kumar Dutta, P. Sinha and Tapan Roychowdhury for the Tirupati Developers Pvt. Ltd, for the Respondent

Final Decision : Allowed

Judgement

A.K. Ganguly, J.—This appeal is from an order dated 19.12.2001 passed by a learned Judge on an Execution Application filed by the appellant for appointment of a Receiver in respect of premises No. 40, Gariahat Road (South), Calcutta and 11 Girish Ghosh Road, Calcutta. A further direction was prayed for taking possession of the premises and to make an inventory of all Immovable and assets lying thereat and with a further direction on the Receiver to sell the said premises either by public auction or by private treaty and out of the sale proceeds the Receiver was also to be directed to pay the sum to the decree-holder in protanto satisfaction of the decree after meeting the costs, charges and expenses.

2. The learned Judge by the order under appeal refused to pass any order on the said application (G.A. 3227 of 2001) being Execution Application No. 1 of 1998, inter alia, on the ground that in respect of the property in question namely 40, Gariahat Road (South), Calcutta (hereinafter referred to as the "said property")

there is a mortgage prior to the award by the arbitrator and that the said mortgage was put into execution before 1997.

3. The material facts of the case out of which the present dispute arises are as follows:

On or about 19th May, 1993, there was a hire-purchase agreement between the appellant and the respondent for purchase of a Honda Car. The appellant paid a sum of Rupees 6 lakhs which the respondent agree to pay along with interest. Accordingly, post-dated cheques were given to the appellant by the respondent towards payment. Thereafter on or about 2nd December, 1993, the respondent purchased the said premises with a building standing thereon and the purchase was made in the name of one Tirupati Developers Pvt. Ltd. (hereinafter referred to as the "said Company") and in the said company the only other share-holder was respondent's wife. As the cheques issued by the respondent were dishonoured and despite repeated requests payments were not made the appellant filed a suit and also obtained an order for appointment of Receiver and the Receiver was directed by an order dated 26.9.96 passed by the learned single Judge to take, possession of the said car and keep the same in a secure godown to be provided by the appellant at its own cost.

4. It subsequently transpired from the order for a learned single Judge dated 14th October, 1996 that the Honda car had been sold by the Judgment debtor without paying the dues by the appellant and without obtaining any discharge letter in respect of the hire-purchase agreement. Thereafter an order was made by the learned Judge restraining the judgment-debtor owns any such properties until further orders of the Court. It was also made clear that in case the judgment-debtor does not own any such property, he shall not deal with any of this property until further order of the Court.

5. Ultimately by an order dated 23rd June, 1997 the dispute between the parties was referred to Arbitration by a learned Judge of this Court and Ms. Mukherjee and Biswas were directed to nominate an Arbitrator subject to statutory rules for such appointment. Thereafter the Hon'ble Mr. Justice Anil Kumar Sen, a former Chief Justice of this Court, was appointed Arbitrator and Chief Justice Sen, made and published an award dated 7th October 1997 directing Ajoy Kumar Sen, the judgment-debtor, to pay a sum of Rs. 8,93,572/- to the decree holder. The said award was not challenged by the judgment-debtor but as the payments were not made in terms of the award, the appellant decree-holder filed the Execution Application being E.C. No. 1 of 1998 and out of the said execution proceeding the order under appeal was passed. It may be noted that after the award was passed on 7th October, 1997, the judgment-debtor resigned as the Director of the said Company.

6. In the Execution Proceeding the judgment-debtor was examined and in the course of examination the judgment-debtor admitted that the property at 40, Gariahat Road (South), Calcutta allegedly belongs to his wife and she purchased

the same, but when the judgment-debtor was asked about the income of his wife he answered in the negative and could not indicate any independent source of income of his wife and it was also stated that the property was purchased in the name of the said company. The judgment-debtor also admitted that he was previously the Director of the said Company and the other Director is his wife and the same is a family company. It was also admitted by the judgment-debtor that after his resignation the present Directors are his wife and his son who is a student in the first year. The judgment-debtor also admitted that he ceased to be the Director of the said company after he suffered an award worth about Rs. 10 lakhs which was due and payable. It was also admitted by the judgment-debtor that he resides in the said property along with his son.

7. In so far as the mortgage is concerned, no document was disclosed of the said mortgage in favour of Peerless General Finance and Investment Limited (hereinafter referred to as "Peerless"). It was also on record that Peerless did not enforce the said mortgage and no suit was filed by the Peerless. Peerless on the other hand chose to file a Winding Up petition for realization of its dues from the said company and for the said purpose Peerless issued notice u/s 434 of the Companies Act claiming its dues under the compromise decree dated 26th March, 1999. It appears that the said winding up petition was also compromised and consequently an order dated 9th June, 2000 was passed. Peerless thereafter filed an execution proceeding dated 28th September 2000 for recovery of its dues against Tirupati. These are the facts alleged by the learned counsel for the appellants.

8. The learned counsel for the respondent on the other hand submitted that the said company is not a party either to the hire-purchase agreement or to the Arbitration Agreement. So in the execution proceeding the decree-holder cannot attach the properties of the said company, namely 40, Gariahat Road (South), Calcutta. In the execution application the said company intervened and opposed the sale or attachment of the said premises and the judgment-debtor, is not the owner of the property not was the property acquired out of the money of the judgment-debtor. The learned counsel for the respondent relied on various documents to show that the said property belongs to the said company, first of all the registered Deed of Conveyance between the said company and its vendor was showed. The Balance-sheet and the Profit and Loss Account of the said company. Annual Return and Balance-sheet of the said Company filed with the Registrar of the Companies were also relied upon. It was also stated that the Peerless is the creditor of the Company and the title deed of the property was deposited with Peerless as security by way of an equitable mortgage. It was also stated by the respondent that in the execution proceeding no case has been made out by the decree-holder appellant as regard fraud and no particulars if fraud have been pleaded. It was stated that the property in question was purchased on 2nd December, 1993 and the award was passed on 7th December, 1997. Therefore, it cannot be said that the property was acquired to defraud the decree-holder, inasmuch as, the property was acquired by the Company four

years before the award and the property was not acquired out of the money from the appellant. It was a case of outright purchase of the property. These are basically the rival contentions of the parties.

9. From the aforesaid facts the question which falls for decision in this appeal is whether the decree arising out of the award can be satisfied by selling the said property namely 40, Gariahat Road (South) which was allegedly been purchased in the name of the said company, Tirupati Developers Pvt. Ltd.

10. It is clear from the facts stated herein above, that the said company is nothing but a closely held company of the family of the judgment debtor and his wife and it is only after the award was passed, the judgment debtor resigned from the same and inducted his son as a director of the said company. It has been admitted by the judgment debtor that the other director of the said company has no income. Nothing has been indicated to show that his son, a first year student, has any independent income. From the balance sheet and the annual report nothing has been suggested to show that the company purchased the property out of its fund. In fact the judgment debtor admitted in his examination before the Executing Court that he himself purchased the property and could not produce any document to show that the company had the requisite fund to purchase the property. In the balance sheet of the company as on 31st March 1994 the advance of Rs. 9 lakh which was shown does not show any confirmation available from the party who is supposed to have given such advance. Nor any interest has been provided for such advance. The auditors have also recorded that the company has neither any stock nor any sale. The learned Judge of the first Court failed to appreciate this aspect of the case made out by the appellant in its correct perspective.

11. From the facts which are on record in this case it is clear that the property was purchased out of the funds of the judgment debtor and the introduction of the corporate veil is a facade.

12. In this connection some judgments have been cited by the learned counsel for the parties. The learned counsel for the respondent cited the judgment of the Tata Engineering and Locomotive Co. Ltd. Vs. State of Bihar and Others, . In that case certain companies filed petition under Article 32 challenging the demand of Sales Tax made against the companies by restrictive Sales Tax Officer of different areas. The Constitution Bench of the Supreme Court dismissed the petition on the preliminary objection that the petitioners are incompetent under Article 32 of the Constitution as rights under Article 19 of the Constitution are confined to citizens and a company is not a citizen. This decision of the Supreme Court was however, subsequently distinguished by a larger bench of two Judges of the Supreme Court in Rustom Cavasjee Cooper Vs. Union of India (UOI), . However, in the case of Tate Engineering, the decision of the House of Lords in Solomon v. Solomon 1897 AC 22 was considered and the Supreme Court indicated in paragraphs 26 and 27 of the Tate Locomotive that in view of subsequent complex economic situation the ration of Solomon v. Solomon has been slightly departed

from. And in doing so the Supreme Court relied on the principle summarized by Gower on Company Law.

13. One of the situations where the principles in *Solomon v. Solomon* have been departed is where in the facts of the case Court has to prevent the introduction of a fraudulent transaction. Subsequently in *Delhi Development Authority Vs. Skipper Construction Company (P) Ltd.* and another, the ratio in *Solomon v. Solomon* suffered further dilution and this has been recorded by the learned Judges in paragraph 28. The learned Judges have laid down where the corporate character is introduced for the purpose of committing illegality or defrauding others the Court will ignore the corporate character and took at the reality to enable it to pass appropriate order to do justice between the parties.

14. Same principles have been followed subsequently by the Supreme Court in the case of *Subhra Mukherjee and Another Vs. Bharat Coking Coal Ltd. and Others*, . In *Subhra Mukherjee*, it was held that Court would be justified in piercing the veil to ascertain the nature of the transaction, the identities of the parties and Court may ascertain whether the transaction was genuine and bona fide.

15. Following the aforesaid ratio this case, it is difficult for this Court to hold that the said property has been acquired by the said company out of its funds. This Court is of the opinion that the said property has been acquired by the judgment debtor and the corporate veil is a facade.

16. On behalf of the respondent it was sought to be argued that even if it is held that the said company is not an independent corporate personality to hold the property, the said company should be treated as a partnership firm and the judgment debtor being a partner, only his share in the partnership may be liable for satisfaction of the decretal dues.

17. But from the facts discussed above, it is clear that the judgment debtor is the owner of the property. Apart from that u/s 22 of the Partnership Act, an act of the partner binds the partnership firm.

18. The learned counsel for the respondent also argued that unless it is conclusively held that the property belongs to the judgment debtor and that the said company has no title over it, the said property could not be sold in satisfaction of the decree against the judgment debtor.

19. In the instant case the learned Executing Court has virtually come to the conclusion that the property has been acquired by the judgment debtor and noting remains to be decided in view of the following conclusions of the learned Judge which are extracted below:

"After considering the facts and circumstances of this case it is clear from the affidavits that the submission has made before me that the judgment debtor has admitted that the properties were purchased by him and in fact the said fact has not ever been disputed by the son who has filed the affidavit on behalf of the

Tirupati, a private limited company and directors were the father, mother and the shareholders are father, mother and son. From the facts it appears that the father resigned from the directorship after the award was put into execution. It further appears that he resigned from the directorship after the said award/decree."

20. The learned Judge by referring to the decision of the Supreme Court in Delhi Development Authority further held as follows:

".....if it is found that someone has acquired properties by defrauding the people and if it is found that the persons defrauded should be restored to the position in which they would have been but for the said fraud, the Court can make all necessary orders. It has also been held by the Hon'ble Supreme Court that the corporate veil and the change of directorship are of mere device to screen the said property and its income from their creditors including the purchasers. A transfer of the shareholding, if any, between the father and son and the son must also be treated as sham transaction. It is further observed by the Hon'ble Apex Court that in the interest of justice which call for the lifting of the corporate veil and if the said property is in truth and effect the property and father and member of his family and must be available to satisfy the claims of the persons defrauded by him."

21. The aforesaid conclusions of the learned Judge have not been challenged by the judgment debtor.

22. After recording the aforesaid finding the learned Judge came to a contrary conclusion only on the basis that the property has been mortgaged with Peerless.

23. Therefore, the only question which remains is whether the said property cannot be the subject matter of this execution proceeding in view of the fact that it has been mortgaged with Peerless. In fact there is no mortgage decree and Peerless instead of proceeding with mortgage has filed a winding up proceeding. Peerless has also not filed any mortgage suit under Order 34 of the Civil Procedure Code.

24. The Executing Court should have proceeded on the basis of section 73 of the Code which assimilates the principles of rateable distribution of assets among decree holders, and by not proceeding on that basis, the Executing Court committed an error by rejecting the Execution Application (G.A. 3227 of 2001).

25. For the reasons aforesaid this appeal succeeds, the order of the learned Executing Court dated 19.12.2001 is set aside. The Executing Court is to proceed with the execution application for satisfaction of the decree by taking appropriate steps for the sale of 40 Gariahat Road (South), Calcutta in accordance with law and in the light of the observations made in this judgment.

There will be no order as to costs.

Urgent xerox certified copy of this Judgment, if applied for, be given to the

parties expeditiously.

S. Sen, J.

26. I agree.

Later:

Prayer for stay is considered and rejected.