(2011) 07 CAL CK 0074

In the Calcutta High Court

Case No : G.A. No. 1254 of 2011, A.P.O.T. No. 180 of 2011 and E.C. No. 114 of 2011

Mechano Paper Machines Ltd. APPELLANT

Vs

NEPC Papers and Boards Ltd. and Others RESPONDENT

Date of Decision : 15-07-2011

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 3, Order 21 Rule 48, Order 45 Rule 7, 38, 39
Companies Act, 1956 — Section 617
Constitution of India, 1950 — Article 225

Citation : AIR 2012 Cal 26 : (2011) 4 CHN 213

Hon'ble Judges : Sambuddha Chakrabarti, J;Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Jayanta Mitra, Suman Dutta, K. Banerjee, Debjani Chatterjee and R. Munshi, for the Appellant;P.C. Sen, R.R. Sen, P.K. Saraogi and D. Adhikari for Respondent No. 1, Sumit Talukdar, Sabyasachi Chowdhury, Lopita Banerjee and Varun Garg, for the Respondent

Final Decision : Allowed

Judgement

Bhaskar Bhattacharya, J.—This appeal is at the instance of a judgment-debtor and is directed against order dated April 06, 2011 passed by a learned Single Judge of this Court by which His Lordship appointed a Receiver in respect of a property described in paragraph 12 of the affidavit in support of the tabular statement of the application for execution which is undisputedly situated beyond the territorial limit of this Court.

2. The decree was one for payment of money and in execution of the decree, the decree-holder sought to attach and sell an immoveable property belonging to the Appellant situated beyond the territorial limits of this Court.

3. The only question raised by the Appellant in this appeal is that in view of Section 39(4) of the Code of Civil Procedure, the learned executing Court acted

without jurisdiction inasmuch as, this Court has no jurisdiction to attach or sell an immoveable property situated beyond its territorial limit as an Executing Court.

4. Mr. Mitra, the learned Senior Advocate appearing on behalf of the Appellant, contended with assiduity before us that in view of insertion of Sub-section (4) in Section 39 of the CPC by the amendment of the year 2002, at present, there is no scope of contending that this Court has power to touch any property in execution of a money decree when such property is situated beyond the territorial limits of the Court. In support of such contention, Mr. Mitra has relied upon the decisions of the Supreme Court in the case of Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI), and Mohit Bhargava Vs. Bharat Bhushan Bhargava and Others, .

5. Mr. Mitra, therefore, prays for setting aside the order passed by the learned Single Judge on the ground of want of jurisdiction.

6. Mr. Talukdar, the learned Senior Counsel appearing on behalf of the decree-holder, has, on the other hand, opposed the aforesaid contention of Mr. Mitra and has contended that this Court has jurisdiction under the Rules framed by this Court under the Letters Patent as well as the CPC to take step for attachment and sale of a property situated even beyond the territorial limits of this Court. According to Mr. Talukdar, if there is any conflict between the provisions contained in the CPC and those of the Rules framed by this Court, the latter should prevail over the former. Mr. Talukdar, in this connection, relies upon a decision of a learned Single Judge of this Court in the case of Birla Corporation Ltd. Vs. Prasad Trading Company and Another, which has been relied upon by the same learned Single Judge who passed the order impugned in a subsequent decision in the case of Srei Equipment Finance Ltd. v. Khyoda Apik and Anr. disposed of on May 12, 2011 in EC No. 142 of 2009 while disposing of GA No. 20 of 2011. Mr. Talukdar, therefore, prays for dismissing the appeal.

7. Therefore, the only question that arises for determination in this appeal is whether in view of insertion of Sub-section (4) to Section 39 of the Code of Civil Procedure, this Court has jurisdiction to appoint a Receiver for the purpose of taking possession of the property for sale of the same notwithstanding the fact that such property is situated beyond the territorial limit of this Court.

8. In order to appreciate the aforesaid question, the provisions contained in Sections 38 and 39 of the CPC are relevant and quoted below:

38. Court by which decree may be executed.-A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution.

39. Transfer of decree. - (1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court of competent jurisdiction, -

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

(b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(d) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

(3) For the purposes of this section, a Court shall be deemed to be a Court of competent jurisdiction if, at the time of making the application for the transfer of decree to it, such Court would have jurisdiction to try the suit in which such decree was passed.

(4) Nothing in this section shall be deemed to authorize the Court which passed a decree to execute such decree against any person or property outside the local limits of its jurisdiction.

9. A conjoint reading of the aforesaid provisions makes it clear that a decree can be executed either by the Court which passed the decree or the one to which it is sent for execution. The Court which passed the decree on an application of the decree holder may transfer the decree to another Court having pecuniary jurisdiction to entertain the suit in any of the circumstances mentioned in subsections (a) to (d) of Section 39(1) of the Code. Apart from the application of the decree holder for transfer, the original executing court can also of its own motion send it to any subordinate court of competent jurisdiction for execution. Thus, if the pecuniary limit of the original Court which passed the decree is enhanced by law at the time of filing the application for execution from the original pecuniary limit, the Court which passed the decree of its own can send the decree to a subordinate Court which is then capable of entertaining the suit if filed at that time. Similarly, in a situation where the territorial jurisdiction of the Court has been changed by virtue of any law for the time being in force since the passing of the decree, the original Court which passed the decree can also send the decree for transfer to a Court which would have been the competent Court at a point of time when the original Court proposes to transfer the decree.

10. The Sub-section (4) of Section 39 which has been incorporated by way of an amendment is couched in the negative form and thus, is mandatory which debars the Court which passed the decree to execute the decree against any person residing or carrying on business or the property situated beyond the territorial limits of the same.

11. Thus, after the amendment of the said provision of Section 39 there is no scope of exercising the jurisdiction for execution at the instance of the original Court which passed the decree if the person or the property, as the case may be, against which the decree is sought to be enforced is not available within the territorial limit of the original Court at the time execution subject to only two exceptions as provided in Order 21 Rules 3 and 48 of the Code. According to the provisions contained in Rule 3 of Order 21, where immovable property forms one estate or tenure situated within the local limits of the jurisdiction of two or more Courts, any one of such Courts can attach and sell such estate or tenure. Similarly, according to Rule 48 of the Order 21, where the property to be attached is the salary or allowances of a servant of the Government or of a servant of a railway company or local authority which is established by a Central, Provincial or State Act or a Government Company as defined in Section 617 of the Companies Act, 1956, whether the judgment debtor or the disbursing officer is or not within the local limits of the Court''s jurisdiction, the court is vested with authority subject to Section 60 of the Code under the said provisions to pass necessary order as provided therein.

12. Although the said provisions are inconsistent with Sub-section (4) of Section 39 of the Code, the Supreme Court in the case of Salem Bar Association v. Union of India (supra), has made the following observations in that connection:

Section 39 does not authorise the Court to execute the decree outside its jurisdiction but it does not dilute the other provisions giving such power on compliance of conditions stipulated in those provisions. Thus, the provisions, such as, Order XXI Rule 3 or Order XXI Rule 48 which provide differently, would not be effected by Section 39(4) of the Code.

13. Thus, the restriction imposed by Section 39(4) of the Code is relax able only to the extent indicated above which is provided in the Code itself.

14. In the subsequent case of Mohit Bhargava (supra), the Supreme Court has reiterated the same view as would appear from the following observations:

There cannot be any dispute over the proposition that the court which passed the decree is entitled to execute the decree. This is clear from Section 38 of the Code which provides that a decree may be executed either by the court which passed it or by the court to which it is sent for execution. Section 42 of the Code indicates that the transferee court to which the decree is transferred for execution will have the same powers in executing that decree as if it had been passed by itself. A decree could be executed by the court which passed the decree so long as it is confined to the assets within its own jurisdiction or as authorised by Order XXI Rule 3 or Order XXI Rule 48 of the Code or the judgment debtor is within its jurisdiction, if it is a decree for personal obedience by the judgment debtor. But when the property sought to be proceeded against, is outside the jurisdiction of the court which passed the decree acting as the executing court, there was a conflict of views earlier, some courts taking the view that the court which passed the decree and which is approached for execution cannot proceed with execution but could only transmit the decree to the court having jurisdiction over the property and some other courts taking the view that it is a matter of discretion for the executing court and it could either proceed with the execution or send the decree for execution to another court. But this conflict was set at rest by Amendment Act 22 of 2002 with effect from 1.7.2002, by adopting the position that if the execution is sought to be proceeded against any person or property outside the local limits of the jurisdiction of the executing court, nothing in Section 39 of the Code shall be deemed to authorise the court to proceed with the execution. In the light of this, it may not be possible to accept the contention that it is a matter of discretion for the court either to proceed with the execution of the decree or to transfer it for execution to the court within the jurisdiction of which the property is situate.

15. Thus, there is no scope of any submission that a Court has power to execute a decree in respect of immovable property situated beyond the territorial limits of the Court except under the circumstances provided in Order 21 Rule 3 of the Code.

16. We now propose to deal with the case of Birla Corporation Ltd v. Prasad Trading Company (supra), relied upon by Mr. Talukdar.

17. In the said case, a learned Single Judge of this Court held that the Original Side Rules framed under Clause 37 of the Letters Patent read with S. 108 of the Government of India Act, 1915 and Article 225 of Constitution of India has the effect of supreme legislation and it being a special law, will obviously override the general law of procedure viz. CPC Code. According to His Lordship, the practice and procedure followed by High Court on its Original Side Court for a long time also partakes of the character of law by virtue of Rule 3 of Chapter XL of the Original Side Rules and various decisions have clearly recognized and accepted such long standing procedure and practice and also the practice of appointing Receiver over a property situated outside the territorial jurisdiction as an equitable mode of execution. This practice and procedure adopted by the said Rules, His Lordship proceeded, cannot be taken away and/or curtailed by Sub-section (4) of the Section 39 of Civil P. C., by Parliament and can only be done by the Full Court of High Court. Moreover, according to His Lordship, Sub-section (4) has to be read in the context of the parent provision of Section 39 as the power of execution of a decree is primarily derived from the provision of S. 38. Therefore, Sections 38 and 39 have to be read conjointly and to be given the objective meaning. The duty of the Court, according to His Lordship, while interpreting any portion of the stature or any Section of the statute, would be to give harmonious meaning so that the primary object of the Section is not rendered nugatory and by the amended provision the word ''shall'' mentioned in Sub-section (4) of Section 39 is not intended to mean as being mandatory for it cannot be read inconsistently with the Sub-section (1) of Section 39. It is the discretion of the Court, His Lordship continued, either to execute by itself or to

send it to another court. But the legislature has advisedly provided in case of the situation as mentioned under Sub-section (4) that the Court which has passed the decree will not ordinarily execute by itself, if it is found that the execution is possible legally and conveniently on the decree being sent to the appropriate Court within whose jurisdiction the property is situated and/or the person resides. This does not mean that the Court''s discretionary power in a fit and proper case is curtailed to execute by itself even in a case as mentioned in Sub-section (4) of Section 39 of the said code. The Court will not ordinarily execute it but rather send it for execution to the Court within whose jurisdiction property situates, or the judgment debtor or the person against whom execution would be levied, resides, but in exceptional case the Court which passed decree can execute, provided such case has to be made out in the application. In that situation, His Lordship was of the view, the Court which has passed decree, itself would execute it by appointing Receiver or by any other method as the situation will permit.

18. Therefore, the long and short of the reasons assigned by His Lordship was that by virtue of Chapter XL Rule 3 of the Original Side Rules framed, the long standing practice adopted by the court becomes a law and such law has the overriding effect upon the general law of the land as the Rules have been framed by Clause 37 of the Letters Patent and such law cannot be changed by the Parliament but only can be altered by the full court. According to His Lordship, the power to appoint Receiver to execute a decree in respect of the property or persons stationed beyond the territorial limits is a long standing practice recognized by various decisions.

19. To appreciate the above reason, we first propose to consider the Rule 3 of Chapter XL of the Original Side Rules which is quoted below:

Present practice. - Where no other provision is made by the Code or by these rules, the present procedure and practice shall remain in force.

20. Thus, according to the aforesaid Rule, in the absence of any provision either in the CPC or in the Original Side Rules, the procedure and practice prevailing at the time of enacting the Rules should remain in force. There is no dispute that in the Original Side Rules, there is no provision either authorizing or prohibiting execution in respect of property situated outside its limits or person residing or carrying on business outside such limit and there was no specific restriction in the Code authorizing execution beyond the territorial limit of the Court although there was implied indications in the Code to that effect and at that stage, there was practice of issuing execution even beyond the territorial limits. But the moment Parliament by law has specifically prohibited issue of execution beyond the territorial limits of the court by insertion of Sub-section (4) of Section 39, even by virtue of Rule 3 quoted above, such old procedure and practice has ceased to operate because from the moment of insertion of Sub-section (4), it cannot be said that there is no provision in the Code prohibiting execution beyond the territorial limits. It is, however, absurd to contend that once in the

absence of any provision in the Code or Rules, a practice has grown in the Original Side, Parliament even by enacting law cannot do away with such practice and it is the Full Court which alone can. We should not lose sight of the fact that the body of the Code confers substantive right whereas the Schedule to the Code provides for procedures for implementation of the rights conferred by the body of the Code. Thus, the procedural part of the Code is subject to amendment by rule making power and there may be inconsistency between the Rules framed by this Court and the provisions contained in the Schedule of the Code; but when by substantive provision a bar has been created in the body of the Code, by exercising rule making power that bar cannot be avoided. The Full Bench decision of Manickchand Durgaprasad Vs. Pratabmull Rameswar and Another, , relied upon in the case of Birla Corporation Ltd. (supra), dealt with a situation where the Original Side Rules were in conflict with Order 45 Rule 7, a procedural provision, but not a substantive provision like Section 39 of the Code and that too, in a mandatory form.

21. In our opinion, the moment Sub-section (4) of Section 39 has been incorporated which is couched in a negative form, there is no trace of doubt that the said provision is mandatory in nature subject to Order 21 Rules 3 and 48 as pointed out by the Supreme Court in the case of Salem Bar Association (supra). With great respect to His Lordship we do not approve the view taken in the case of Birla Corporation Ltd. (supra).

22. On consideration of the entire materials on record, we find that the learned Single Judge acted without jurisdiction in appointing a Receiver over a property situated beyond the territorial limits of the Court for the purpose of execution of a money decree and as such, we set aside the order impugned.

23. The decree holder should apply for transfer of the decree for execution before the appropriate court. Before we part with, we record the contention of Mr. Sen, appearing for a group of persons, not parties to this appeal, that his clients are really entitled to represent the judgment debtor. Since we have set aside the order impugned on the ground of want of territorial jurisdiction of the executing court, we have not entered into such a question in this appeal. Mr. Sen''s clients would be entitled to the take such plea before appropriate forum.

24. Appeal is, thus, allowed.

25. In the facts and circumstances, there will be, however, no order as to costs.

Sambuddha Chakrabarti, J.-

I agree.

