
(2008) 08 CAL CK 0028

In the Calcutta High Court

Case No : A.P.O. No. 178 of 2008, G.A. No. 1917 of 2008, C.S. No. 144 of 2002

Satyendra Nath Ghosh and Another

APPELLANT

Vs

Gulf Oil Corporation Ltd.

RESPONDENT

Date of Decision : 29-08-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151, 39(1), 39(4)

Citation : (2008) 08 CAL CK 0028

Hon'ble Judges : Surinder Singh Nijjar, C.J.; Dipankar Datta, J

Bench : Division Bench

Advocate : S.N. Mitra, S.C. Pal, Kallol Bose, Debasis Sarkar, for the Appellant;
Hirak Mitra, Soumen Sen, Pooja Daschowdhury, for the Respondent

Judgement

Surinder Singh Nijjar, C.J.

The Judgment of the Court was delivered by:

1. This appeal has been filed by the judgment debtors challenging the order passed by the Trial Court on 13th June, 2008.
2. We have heard the learned counsel for the parties at length. Very elaborate submissions have been made by the learned counsel for the parties. It would appear that a decree was passed against the first judgment-debtor in the sum of Rs. 1.03 crore and for a sum of about Rs. 63 lacs against the second judgment-debtor Company. The decree holder has clubbed the two to claim an amount of Rs. 1.80 crore as combined sum from the judgment debtors jointly. The matter has been dealt with by different Benches of this Court at various stages. We may notice some of the orders passed.
3. An order of injunction was passed by the executing Court on 30th September, 2003 granting an ad interim order of injunction restraining the appellants in any manner from transferring, alienating, disposing of, encumbering and/or dealing with any of the assets and properties including those stated in Schedule "A" or from parting with the possession thereof. Thereafter, on 1st April, 2004, the

Court was pleased to appoint a receiver in execution. The receiver was directed to take symbolic possession of the property mentioned under item (i) of Schedule "A". The aforesaid property was an Automobile Service Centre belonging to the judgment debtors situated in Jamshedpur.

4. Another order was passed on 29th April, 2004 directing the receiver to take vacant possession of the Automobile Service Centre. The direction was also issued to take symbolic possession of the property mentioned under Item 5 of Schedule A to the Tabular Statement. That was the residential flat belonging to judgment debtors which is also situated in Jamshedpur. Since both the appellants as well as the decree holder have relied on the directions issued in the aforesaid order, it would be appropriate to reproduce the same at this stage :-

For the above reasons I hereby direct the receiver to take actual physical possession of the properties which are already in his symbolic possession. He shall take symbolic possession of the property mentioned under Item-5 of Schedule-A to the Tabular Statement. If the judgment debtor is residing in the flat in question, the receiver will permit the judgment debtor to reside therein. The receiver shall take the step forthwith to enforce this order and if necessary he shall approach the local and district police authorities and such authorities shall render all help that may be necessary for implementing this order by the receiver. The receiver shall hold the properties until further order to be passed in the matter. The receiver will also be free to appoint security guard, use padlock and take all other steps for securing his possession over the properties.

5. Pursuant to the aforesaid order, the receiver took symbolic possession of the flat in question on 29th April, 2004 itself. A report to this effect was also made by the receiver in which the following observations have been made:-

Thereafter I went to the said flat at Bistupur on 18th May, 2004 at 5.30 P.M. when the security guard informed me that the said flat is locked and no one is in the said flat. I was also informed that the said flat belongs to Mr. Satyendra Nath Ghosh. Accordingly, I took symbolic possession of the said flat and left the premises.

6. The co-operative society in which the flat is situated was duly notified by the receiver with regard to the taking of symbolic possession of the flat. Relevant information was also published in the two local newspapers. On 26th June, 2004 the receiver again visited the premises for the purpose of taking possession but the receiver was not able to take vacant possession. In the meantime, the two properties were sold to third parties, namely, (1) Navtoj Kumar Shangari (2) Gaurav Kumar Shangari, by two separate sale deeds dated 12th January, 2004.

7. Thereafter the purchasers moved G.A. No. 2121 of 2004 seeking appropriate orders from this Court for protection of their right, title and interest in the aforesaid properties. By a detailed order, the learned Single Judge of this Court by an order dated 8th of March, 2005 set aside the sale deeds. It was held that the sale transactions had been conducted in deliberate violation of the orders of

this Court. Therefore, the same cannot be held to be valid and lawful. Judgment debtors were directed to return a sum of Rs. 42.82 lacs received from the purchasers with interest at the rate of Rs. 10 per cent per annum to be calculated from the date of making payment and up to the date of repayment. Against the aforesaid order, judgment debtors filed appeal before the Division Bench. It appears that at that stage the parties entered into a settlement. The appeal was disposed of by the Division Bench by judgment and order dated 28th of August, 2007 in terms of the settlement.

8. Thereafter, the decree holder moved G.A. No. 3662 of 2007 seeking, inter alia, directions to the receiver to take all steps to vacate the flat and put the property to sale on such terms and conditions as the Court may deem fit and proper. This application came up for hearing before the learned Single Judge on 19th December, 2007. The Court was pleased to pass an ad interim order of injunction which was to remain alive till 18th of January, 2008. In the meantime, parties were directed to file affidavits. This order was extended by a further order of the Court dated 16th January, 2008. The application came up for hearing before the learned Single Judge on 13th June, 2008. After noticing the entire fact situation and after hearing the learned counsel for the parties, the Trial Court has been pleased to issue the directions which are impugned in the present appeal.

9. We have heard the learned counsel for the parties at length.

10. It is vehemently urged by Mr. S.N. Mitra, learned counsel for the appellants, that the entire execution proceedings as also the previous orders are vitiated in view of the specific bar contained u/s 39(4) of Code of Civil Procedure. According to the learned counsel, the power of the Court to transfer a decree u/s 39(1) is controlled by Section 39(4). Learned counsel also submitted that Section 39(4) has been inserted in the CPC by an amendment with effect from 01.07.2002. This amendment, according to the learned counsel, has been necessitated to remove the confusion which had resulted as divergent views had been taken by different High Courts in construing the word "may" in Section 39(1) of Civil Procedure Code. Learned counsel further submitted that appellants are in occupation of the flat and, therefore, ought not to have been evicted there from till final outcome of the execution proceedings. It is also submitted that substantial part of the decree has already been satisfied on the basis of a settlement reached between the parties in an earlier proceeding. The entire sale consideration which was to be paid by the purchaser to the appellants for the sale of the Automobile Service Centre has, in fact, been paid to the decree holder. Learned counsel also submitted that the proceedings are also vitiated as the two decrees could not have been clubbed together for execution.

11. In support of his submissions, learned counsel relied on the judgment of the Supreme Court in the case of Mohit Bhargava Vs. Bharat Bhushan Bhargava and Others, . Learned counsel also relied on the recommendations of the Law Commission made in the 154th report, in support of the submission that permitting the execution of a decree against a person or property outside the

local limits of the jurisdiction would totally upset the entire scheme of the CPC as to jurisdiction.

12. In reply, Mr. HIRAK MITRA, learned counsel for the respondents, submitted that the directions that have been issued to the receiver are only for the protection of the property. This course has been held to be permissible by the Supreme Court in the case of Mohit Bhargava (*supra*), relied upon by the learned counsel for the appellants.

13. Learned counsel also relied on a judgment of the Court of Appeal in the case of [1975] 2 LLR, 509. According to learned senior counsel, the Trial Court has rightly issued the direction to remove any one in occupation to undo the wrong done. This Court has power to issue the necessary directions in view of the conduct of the judgment debtors, under Order XXXIX Rule 2A and Order XL Rule 1 of Civil Procedure Code. Even otherwise, this Court has inherent powers u/s 151 of CPC to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of Court. Learned counsel has relied on a Full Bench judgment of the Madras High Court in the case of Century Flour Mills Ltd. & Anr. vs. S. Suppiah & Anr., 45 Comp Cases, 444. Learned counsel also relied on judgments of the Supreme Court in the cases of Delhi Development Authority Vs. Skipper Construction Company (P) Ltd. and another, and Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI), . On the basis of these judgments, he submitted that order XXXIX Rule 4 of CPC would not have the effect of diluting other provisions of the Code. Learned counsel also relied on a Single Bench judgment of this Court in the case of Birla Corporation Ltd. Vs. Prasad Trading Company and Another, .

14. We have considered the submissions made by the learned counsel for the parties. By order dated 30th September, 2003 the judgment debtors had been restrained from transferring, alienating, disposing of, encumbering and/or dealing with, in any manner, in respect of both the properties. In total disregard of the aforesaid order, the judgment debtors executed two sale deeds. Thereafter, the decree holder moved G.A No. 2849 of 2003 seeking an order for realization of a sum of Rs. 1,83,61,252.76 paise, being the decretal amount. It was submitted that since the decree holder is not making any efforts to satisfy the decree, it was necessary to adopt an equitable mode of execution of the decree. Therefore, it would be necessary to put to sale the properties belonging to the judgment debtors. A prayer was, therefore, made for appointment of receiver. Upon considering the submissions, the executing Court appointed an advocate of this Court as the receiver in execution in this case. The receiver was directed to take symbolic possession of the property under Item 1A to the Tabular Statement. That was the Automobile Service Centre at Jamshedpur. It was directed that the property shall remain under the symbolic possession of the receiver till further order. Thereafter, on further consideration of the application on 29th April, 2004 the executing Court was pleased to pass the direction noticed in the earlier part of the order.

15. A bare perusal of the order passed by the executing Court on 29th April, 2004 clearly shows that number of directions have been issued therein:-

- (1) the receiver was directed to take physical possession of the properties;
- (2) the receiver was also directed to take symbolic possession of the flat in question;
- (3) if the judgment-debtor is residing in the flat in question, the receiver was to permit the judgment-debtor to reside therein;
- (4) the receiver was permitted to approach the local and District police authorities and other authorities to enforce the orders of this Court. Such authorities were directed to render help that may be necessary for implementation of the order by the receiver;
- (5) the receiver was directed to hold the properties until further orders to be passed in the matter.
- (6) the receiver was to take all necessary steps for securing his possession over the properties.

16. The receiver took symbolic possession of the flat in question on 29th April, 2004. The relevant extract of the report made by the receiver has been reproduced in the earlier part of the order. After appointment of the receiver, an application was moved by the purchasers seeking protection of their right, title and interest in the property. In this application it was stated that the aforesaid properties had been sold by the judgment debtors to the purchasers without disclosing that there was an order of injunction in relation to the aforesaid properties. It was also pleaded that the judgment debtors had given an impression that no proceeding except the proceeding before the Debts Recovery Tribunal was pending in favour of the Automobile Service Centre. This application was dismissed by the learned Single Judge by an order dated 8th of March, 2005. It has been specifically observed that the purchasers have taken the benefit of breach of prohibitory order of injunction.

17. Therefore, the conveyances executed by the judgment debtors cannot be held to be valid and lawful. Consequently, the conveyances were set aside. It has been held that no right, title or interest has been conveyed to the purchasers in respect of the two properties. However, to do justice to the purchasers, the judgment debtors have been directed to return the sum of Rs. 42.80 lacs together with interest at the rate of Rs. 10 per cent per annum, to be calculated from the date of making payment and up to the date of repayment. The purchasers challenged the aforesaid order before the Division Bench. However, as noticed earlier, the appeal was disposed of by order dated 28th of August, 2007 in view of the settlement arrived at between the parties. By virtue of this settlement a sum of Rs. 90 lacs have been paid to the decree holder, for which the decree holder has given due credit to the judgment debtors. As a consequence of the settlement, the injunction order as well as the appointment

of receiver with regard to the Automobile Service Centre stood vacated.

18. However, the symbolic possession of the receiver with regard to the flat in question continues. In view of the conduct of the judgment debtors, the decree holder moved G.A. No. 3662 of 2007 seeking a direction to the receiver to take vacant possession of the flat in question. As noticed above, a part of the decree stands satisfied by payment under the settlement reached at the appellate stage. The Trial Court has rejected the objections with regard to jurisdiction of this Court to entertain the execution proceedings on the ground that it is too late in the day for the proceedings to be dismissed on this technical ground. The Trial Court also noticed the efforts that have been made by the judgment debtors to defeat the injunction order as also the obstacles placed in the way of the receiver for taking possession of the flat in question. The Trial Court has taken notice of the shifting stand taken by the judgment debtors at different stage of the proceedings. It is, thereafter, noticed that :-

If there were no exceptional circumstances to start with, the subsequent conduct of the judgment-debtors in course of execution, would permit the execution proceedings to continue in this Court....

19. Thereafter, the Trial Court has directed as under :-

Pending the sale of the flat and other orders that may be made, it is necessary that the receiver who has been appointed over the Jamshedpur flat immediately proceeds to remove all the movable at the flat and to keep all the movable at a place to be provided by the decree-holder after making an inventory thereof.

20. In passing the aforesaid directions, the Trial Court took into consideration the conduct of the judgment debtors. We are also of the opinion that the conduct of the judgment debtors leaves much to be desired. It certainly cannot be said to be bona fide.

21. The judgment debtors in the face of the order of injunction had actually sold the Automobile Service Centre. It was only upon the sale being set aside by the learned Single Judge that the matter was settled in appeal. In such circumstances, the possibility cannot be ruled out that the appellants will resort to a similar strategy, in the future, and put the property out of reach of the decree holder either by alienating or creating encumbrances in the flat in question. In such circumstances, it is the bounden duty of the Court to protect the property in the custody of the receiver. We find support for this view from the observations of the Supreme Court in the case of Mohit Bhargava (supra). Considering a similar situation therein, the Supreme Court has held as follows :-

10. Now coming to the challenge of the judgment-debtor to the refusal of the High Court to interfere with the orders dated 19.3.2003 and 7.7.2003, we find no merit in it. First of all, the judgment-debtor had not challenged those orders at the appropriate time and had allowed them to operate until he chose to challenge them while challenging the rejection of his objection to jurisdiction raised later.

Of course, his argument is that once it is found that the court has no jurisdiction to proceed, the orders passed by it earlier should also automatically fall to the ground. We cannot agree. By order dated 19-3-2003 what the executing court did was, to direct a third party, who had subsequently acceded to the jurisdiction of the executing court, not to hand over possession of the building in question and the documents concerned, to the judgment-debtor. It is seen that the third person submitted to the jurisdiction of the court and surrendered the documents in his possession to the executing court and prayed to that court that he be relieved from the responsibility of managing the property in the circumstances stated by him in his application. It was in that context that the executing court passed another order dated 7.7.2003 that the documents produced by the third party be kept in safe custody of the court. These two orders are certainly within the jurisdiction of the court which passed the decree since they are only orders of restraint being issued to a person from handing over a property in his possession to the judgment-debtor along with the documents concerned and keeping the documents in safe custody. They are in the nature of a "freezing order" or a "Mareva injunction" and an order akin to an Anton Piller order, orders that can be issued even if the property or the person concerned is outside the jurisdiction of the court. In the circumstances, especially since the judgment-debtor never bothered to question those orders as and when they were passed, we are of the view that the High Court was not in error in refusing to interfere with those orders. "

(Emphasis supplied)

22. It is to be noticed that all the earlier orders passed by this Court have been acted upon by the parties. Therefore, we find it a little difficult to accept at this stage that the proceedings in execution ought to be brought to a premature halt. The order under appeal is interim in nature. It has been passed purely for the protection of the property for satisfaction of the decree in execution.

23. We may, however, observe that in the order dated 29th April, 2004, the executing Court while directing the receiver to take symbolic possession of the flat in question had directed that the judgment debtors be permitted to continue to reside in the flat. We are of the opinion that there is no necessity at this stage to direct the removal of the appellants from the flat in question. It is also not necessary to direct the receiver to remove all the movables at the flat. This part of the direction which has been reproduced in the earlier part of the judgment is, therefore, set aside. The receiver will continue to be in symbolic possession of the property and the appellants/judgment debtors shall be permitted to continue to reside in the aforesaid flat in question. With these observations, the appeal is disposed of.

24. Urgent xerox certified copy of this judgment, if applied for, be supplied to the learned counsel for both parties, expeditiously after compliance with due formalities.

Dipankar Datta, J.