**(2009) 02 BOM CK 0065**

**In the Bombay High Court**

**Case No :** Summary Suit No''s. 5936 and 3569 of 1999

Shri Ramchandra Ganpat Nimbalkar APPELLANT

Vs

Smt. Hirakani Sanatkumar Dixit and Others RESPONDENT

**Date of Decision :** 05-02-2009

**Acts Referred:**
High Court (Original Side) Rules — Rule 474, 475, 476

**Citation :** (2009) 02 BOM CK 0065

**Hon'ble Judges :** Roshan Dalvi, J

**Bench :** Single Bench

**Advocate :** Kunal Damle and Sanjay Gawade, for the Appellant; A.M. Kazi, Deputy Sheriff, for the Respondent

## Judgement

Roshan Dalvi, J.—An exparte decree was passed in the above Suits. The decree was sought to be executed. Two Execution Applications being Execution Application Nos. 53 of 2001 and 54 of 2001 came to be taken out at the instance of the Plaintiff. A warrant of attachment of movable and immovable properties of the Defendant has been issued on 1st February 2001 in the said Execution Applications. Pursuant to the warrant of attachment, certain movable properties have been seized on 10.4.2001. Together with the movables, the Sheriff of Mumbai has also attached "the right, title and interest of the Defendant in the goodwill of the business together with the tenancy rights of the said business premises." Thereafter there have been warrants for sale of movable as well as immovable properties separately taken out on 15th December 2004 in both the Suits.

2. It is the case of the Plaintiff that immovable property of the deceased was mortgaged with the Saraswat Bank. The Saraswat Bank had obtained an order of the Court Receiver before the Debts Recovery Tribunal (DRT). Hence the Plaintiff was directed by the Commissioner For Taking Accounts and thereafter by this Court, in two Chamber Summons taken out by the Plaintiff being Chamber Summons Nos. 748 of 2005 and 749 of 2005, to take leave of the DRT for

 

attachment and sale of the immovable property of the deceased. This is notwithstanding the fact that the goodwill of the business together with the tenancy rights of the business premises was attached since 10.4.2001.

3. The Plaintiff took out an Insolvency Notice. Dispute between the parties came to be settled therein. The Plaintiff recovered Rs. 1.80 Crores on 20th December 2007. Consent Terms were executed by and between the parties in the Insolvency Petition.

4. The Sheriff of Mumbai has claimed his poundage of 1% of Rs. 1.80 Crores which is the amount recovered by the Plaintiff.

5. It is the case of the Sheriff that the amount is payable under Rule 474 of the High Court (Original Side) Rules since the attachment was levied, the properties were attached and seized on 10.4.2001. It is the case of the Plaintiff that no poundage is payable because only the movable property and the goodwill of the business together with tenancy rights of the business premises have been attached but not the immovable property.

6. The warrant of sale of immovable properties has not been executed since the Plaintiff had to obtain leave of the DRT before which the dispute came to be settled in the Insolvency Petition taken out by the Plaintiff. It has to be seen whether after the warrant of attachment has been taken out and the properties are seized and attached by the Sheriff, poundage would be payable, if only movable properties are attached. Rules 474 to 476 of the High Court (O.S.) Rules run thus:

474. Liability for Sheriff''s poundage.

1) In cases where a person is arrested or property is attached, the party or the Advocate on record for the party at whose instance the arrest was made or the attachment levied shall be liable to the Sheriff for his fees or poundage, as the case may be.

(2) Any amount received by the judgment creditor from the judgment debtor in full or part satisfaction of a decree or order in respect of which a warrant of arrest or a warrant of attachment has been executed shall be presumed to have been realised under the warrant, if the warrant is merely suspended and not dead.

(3) Where the execution creditor or his Advocate on record receives directly any installment or other sum ordered to be paid by the Judgment debtor in full or part satisfaction of the decree or order, he shall file a precipe in the Sheriff''s office informing him of the payment made.

(4) The Advocate on record shall be responsible for filing this precipe, if the payment has been made through his office or he has been informed of it by the execution creditor.

Rule 475. Advocate to file in Sheriff''s Office copy of order releasing judgment debtor or raising attachment. When an order is passed releasing a judgment debtor or raising an attachment, the Advocate on record for the party at whose instance the order is made shall file a certified copy thereof in the Sheriff''s office and shall inform the Sheriff whether there has been any satisfaction, compromise or settlement and, if so, for what amount and also whether poundage has been paid in respect thereof.

Rule 476. Satisfaction not to be entered without Sheriff''s certificate. When warrants in execution have been lodged with the Sheriff, no satisfaction in full or in part of any decree or order in any suit or matter shall be entered thereon without the production of a certificate of the Sheriff that no poundage is due to him. Sub-Rule (1) of the aforesaid Rule 474 deals with the case where the "property" is attached. Sub-rule (2) thereof shows that where the amount is received in full or part satisfaction of the decree in respect of which the warrant of attachment is executed, it would be presumed to have been realized under that warrant. Under Sub-rule (3) the Sheriff is to be informed of any recovery. Under Rule 475 upon the attachment being raised, the Advocate on record of the decree holder has to inform the Sheriff of any satisfaction, compromise or settlement that is arrived at and whether the poundage has been paid. Under Rule 476, the certificate of the Sheriff that no poundage is due to him is a mandatory requirement where the warrants in execution are lodged in his office before any satisfaction of the decree is entered.

7. The aforesaid rules show that the Sheriff is entitled to his poundage so soon as the attachment is levied. That attachment may be levied on movable or immovable property. The levy of the attachment can be seen by the seizure of the property attached and the inventory made thereof in respect of the movables. This can be seen upon the report of the Sheriff with regard to the attachment of the immovable property. Any amount received after such attachment is presumed to be realized under warrant of such attachment. If any amount is received directly from the judgment debtor that information has to be given in the Sheriff''s office by the decree holder or his Advocate on record. Where attachment is raised, the certified copy of the order raising attachment is also required to be filed in the Sheriff''s office stating whether that is under any compromise or settlement, mentioning the amount of such settlement and whether poundage has been paid. No such satisfaction of the decree can be entered without the Sheriff''s certificate of the payment of poundage. Poundage is payable at the rate of 1% on the amount recovered or settled. There is no provision with regard to the payment of the Sheriff''s poundage separately for movable and immovable properties.

8. The aforesaid Rules 474 to 476 read together show that poundage is payable, whether decree is satisfied, settlement or adjudication and recovery proceedings. The fact that the judgment debtor settles the amount is not the reason that poundage is not payable. Such settlement may be with or without the judgment creditor having been constrained to take out other proceedings.

 

9. In this case, the warrant of attachment has been executed by actual seizure of the movables specified in the inventory made by the Sheriff of Mumbai. Even if no part of the immovable property is attached, the seizure of the movables would show that the joint warrant of attachment of movable and immovable properties has been executed. The subsequent compromise between the parties is, therefore, presumed to be under the warrant of attachment which remained valid and the properties remained sealed until that time. The Sheriff had to be informed of the recovery made.

10. The spirit and object of the rule is that when recourse is taken to the office of the Sheriff of Mumbai for execution by attachment and sale of the movable or immovable properties of the judgment debtor by the judgment creditor, the warrant of attachment and sale itself causes the judgment debtor to settle and compromise the claim of the judgment creditor. For various reasons, both parties may deem it sound and fit to compromise and settle rather than to go through the process of sale. Rules do not show that poundage is payable only upon the sale of the movable or immovable property. It is payable when attachment is levied. It is, therefore, payable so soon as the movable or immovable properties are seized and attached. It matters not that parties have compromised. It matters not that they have compromised in another proceeding also taken out by the judgment creditor pursuant to the same decree obtained by him.

11. My attention has been drawn to certain judgments of this Court with regard to payment of poundage. In the case of Malpani Brothers (Firm) v. Ramjidas Shyamlal Saboo and Anr. 1987 MHLJ 223, Justice Suresh (as he then was) held that poundage was not payable when the attachment was not levied. Before the attachment could be levied in that case, the judgment debtor settled the Plaintiffs'' claim. Hence the properties were not required to be seized and attached. This case is quite the reverse.

12. In Admiralty Suit No. 20 of 1992 (Seabird Marine Ltd., Bombay v. m.v. Kota Berani and Ors.) under order dated 8.10.1992, Justice I.G. Shah (as he then was) agreed with the order and reasoning of Justice Suresh. In that case, the 1st Defendant vessel was arrested and the order was vacated upon the parties having reached a compromise. It was seen that no money was realized as a result of the arrest of the ship. That case is also, therefore, on a different footing.

13. In Chamber Summons No. 399 of 2000 IN Suit No. 787 of 1997 (The Peerless General Finance & Investment Co. Ltd. v. Swan Mills Ltd. and Ors. AND Sheriff of Mumbai) under order dated 19th April 2000, Justice Gokhale (as he then was) came to consider the requirement of Sheriff''s poundage in the case where the property of the judgment debtor was attached. After considering the aforesaid judgments as well as Rule 474 of the High Court (O.S.) Rules, it was held that when the property is attached the poundage is payable. The contention of the Counsel on behalf of the judgment debtor that the word "executed" would mean sale of the property and not simply levying attachment by affixing the papers on the property was repelled. It was observed that Sheriff was required to

 

take step and the step in the nature of effecting the warrant of attachment on the property was in furtherance of the cause of the judgment creditor. That having been done, the Sheriff could not be denied his poundage. That is the true reasoning behind the requirement for payment of poundage. It is because the judgment creditor takes out the Execution Application and gets a warrant of attachment of movable and immovable properties issued, served and executed by seizure and attachment of the movable and immovable properties respectively that the Sheriff is required to be entitled his fee for such work done. That work may result in actual sale of the properties attached or it may result in the compromise of the dispute between the parties and the judgment creditor''s claim therein. Whatever be the result, the Sheriff is not entitled to his poundage upon the extent of the properties seized and attached. His poundage is payable upon the extent of the realization of the judgment creditor. That realization may be under a compromise or may be upon sale.

14. It is seen that, in this case, after the exertion of the Sheriff of Mumbai, the Plaintiff came to realize Rs. 1.80 Crores. It does not mater how he realized it. It has to be presumed, under the aforesaid Rules, that the realization was under the attachment got issued and levied. In fact, the realization of each judgment creditor is facilitated by the process of execution by attachment and sale of the properties. That process has been availed of by the judgment creditor. He cannot, therefore, throw up his hands and state that only because the movables were attached the Sheriff would not be entitled to his poundage of 1% on the realized amount. Even though the movables of a lesser amount were attached, the judgment creditor was able to secure for himself in execution of the decree albeit by compromise a much higher figure. 1% of that amount is due to the Sheriff. It shall, therefore, be paid by the judgment creditor. The Sheriff''s Report made to the Court is, therefore, disposed of as follows:

a) The Plaintiff in the aforesaid Suits, as the judgment creditor, shall pay 1% of Rs. 1.80 Crores to the Sheriff of Mumbai as and by way of his poundage within 4 weeks from today.

(b) If the aforesaid amount is not paid, the Sheriff of Mumbai shall be entitled to recover it by following the procedure established under the Maharashtra Land Revenue Code as arrears of land revenue.

c) This order is stayed for 4 weeks.

 