
(1961) 03 GAU CK 0011
In the Gauhati High Court
Case No : M.A. (F) No. 29 of 1956

Union of India

APPELLANT

Vs

Chauthi Prosad Gupta and others

RESPONDENT

Date of Decision : 24-03-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 145, 47

Citation : AIR 1961 Guw 121

Hon'ble Judges : S.K. Dutta, J;G. Mehrotra, J

Bench : Division Bench

Advocate : D.N. Medhi, S.C. Das and Wazed Ali, for the Appellant; B.M. Goswami, for the Respondent

Final Decision : Allowed

Judgement

G. Mehrotra, J.—This is an appeal by the Union of India against an order passed by the Subordinate Judge, Lower Assam Districts at Gauhati in an execution proceeding. The order under appeal does not set out the facts in detail and in order to appreciate the point, it will be necessary to give certain facts.

2. The respondent Chauthi Prosad Gupta obtained a decree against one Thakur Prasad Joyaswal and others sometimes in the year 1947. The decree remained unsatisfied and it was transferred from Calcutta to Gauhati for execution. An application was then made on the 25th of May 1953 for execution of the decree against the judgment-debtors. In the execution petition Thakur Prasad Joyaswal Triloki Prasad Joyaswal and Siva Prasad Joyaswal, Co-partners of M/s. National Iron and Trading Corporation, Calcutta, were shown as judgment-debtors.

In column No. 11 of the execution petition it was prayed that the property of the judgment-debtors now in possession of the Sub-divisional Officer, M.E.S., Pandu, should be attached under O. 21, R. 46 of the CPC by issue of prohibitory order to the judgment-debtor and the Sub-divisional Officer, M.E.S. Pandu by registered post. The property was described in the schedule.

3. It appears that an order of attachment was passed by the execution court under O. 21, R. 46 of the CPC and a prohibitory order was served on the Garrison Engineer in whose custody the goods were said to have been lying at Pandu. An objection was filed by the Union of India represented by the Garrison Engineer to the order of attachment on the ground that the property had already been, auctioned on 22nd of November, 1951 and that there was no property in possession of the Garrison Engineer which could be attached by that order. The execution court considered that objection and by an order dated 25th September, 1954 rejected that application.

Thereafter a curious procedure was adopted by the execution court inasmuch as it declared the Union of India as the principal judgment-debtor and issued an order against the Garrison Engineer calling upon him to produce the properties which were attached. Then another application was filed on behalf of the Union of India and the Garrison Engineer to the effect that they could not be held liable u/s 145 of the Code of Civil Procedure, as there was no surety bond executed by them. The execution court by its impugned order directed as follows:

That Union of India be treated as a Principal judgment-debtor and be made liable to the extent of the sale proceeds of the attached joists which were 41 in number and described in the execution petition and which were sold in contravention of this court's order.

4. The contention raised by Mr. Medhi appearing for the Union of India is that the Garrison Engineer and the Union of India were not sureties under Sec. 145 of the CPC and thus no execution proceedings could be taken against them. Section 145 of the CPC provides:

Where any person has become liable as surety?

(a) for the performance of any decree or any part thereof, or

(b) for the restitution of any property taken in execution of a decree, or

(c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon,

the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of Sec. 47:

Provided that such notice as the Court in each case thinks sufficient has been given to the surety.

It is not denied that no surety bond was ever executed by the Garrison Engineer for himself or on behalf of the Union of India. It cannot, therefore, be said that the Union of India or the Garrison Engineer was the surety within the meaning of Sec. 145 Civil Procedure Code. The only ground urged by the learned Counsel For

the decree-holder in support of the order of the execution court is that there was a prohibitory order passed against the Garrison Engineer and the Union of India under O. 21 R. 46 of the CPC and as against that prohibitory order the property was disposed of, they were liable to be proceeded against under the provisions of Sec. 145 Civil Procedure Code.

It is further contended that they were custodians of the property and as such were sureties within the meaning of Sec. 145. We do not think that merely because a prohibitory order has been passed against a third party, who is alleged to be in possession of the property which is sought to be attached, he becomes a surety within the meaning of Sec. 145 of the Code of Civil Procedure. He has violated the order whatever else may be the remedy against him, it cannot be said that is a surety within the meaning of Sec. 145 in the absence of any bond executed by him under which he undertakes to produce the goods when asked the decree being sought to be executed by sale of those goods.

Reliance has been placed on the case *Genda Mal Vs. L. Sukhdarshan Lal*, . That case is entirely distinguishable from the facts of the present case. What happened in that case was that an ex parte decree had been obtained against the judgment-debtor. Certain goods were attached by the decree-holder and they were put in the custody of a certain supardar suggested by the court and the parties. Afterwards the ex parte decree was set aside and thereafter an application for attachment before judgment was made.

The supardar was asked to produce the goods and an order was passed by the execution court to that effect. An appeal was filed against the order and the matter ultimately came up in a letter patent appeal before a Bench of that High Court. The only point which was raised there was whether, an order directing the supardar to produce the properties could or could not have been passed by the execution court.

There was no question as to whether in the circumstances as in the present case where a prohibitory order was only issued under O. 21, R. 48 of the Code of Civil Procedure, a person against whom such an order was made becomes automatically a surety and is liable to produce the goods. There is one thing more which is clear from the order that the supardar was appointed under O. 21, R. 117, a rule which was added by the Allahabad High Court. Moreover, it will also be clear from the facts of that case that there was a surety bond executed.

In cases where the property is ordered to be seized from the possession of the judgment-debtor, it is open to the officer of the court to go and take actual possession of the goods and remove the same to the court precincts, and, if it is not found convenient, then a supardar may be appointed as a custodian of the said property and he may be ordered to return the property. Such an order may be executable against him under Sec. 145. But the case of a third party in whose possession the property was at the time of attachment, is entirely a different one.

The only fact is that a prohibitory order was issued against the appellant and he was restrained from disposing of the property, but he does not thereby become a surety for the purpose of Sec. 145 Civil Procedure Code. In our opinion, therefore, the Garrison Engineer or the Union of India could not be regarded as surety within the meaning of Sec. 145 even though a wider meaning may be given to the word surety under this section.

Apart from that it cannot be said that the Union of India or the Garrison Engineer rendered personally liable under the prohibitory order, therefore, the Garrison Engineer or the Union of India could not in any circumstance be made personally liable for the amount of the decree. It is difficult to appreciate how it can be said that the Garrison Engineer became the custodian for and on half of the Union of India.

Even if he was an employee of the Defence Department and can be said to have undertaken any liability to produce the goods, the Union of India cannot be held liable for any action of his servants and it cannot be said that the Garrison Engineer became a surety for or on behalf of the Union of India. Besides, Sec. 145 only gives a (sic) to a decree-holder to execute the decree against the surety or to execute any undertaking even by the surety by means of an execution petition under Sec. 145.

But it does not give any right to the decree-holder to execute his original decree as against a third party who had been served with a prohibitory order and has disposed of the property in reach of that prohibitory order. In any view of the matter, the order is palpably erroneous and (sic) accordingly set aside the order of the court below with costs. The appeal is accordingly allowed.

Dutta, J.

6. I agree.