

CASE NO.:
Appeal (civil) 5893-5894 of 2005

PETITIONER:
TCI Finance Ltd.

RESPONDENT:
Calcutta Medical Centre Ltd. and Anr.

DATE OF JUDGMENT: 26/09/2005

BENCH:
Arijit Pasayat & G.P. Mathur

JUDGMENT:
JUDGMENT

ARIJIT PASAYAT, J.

Leave granted.

Challenge in these appeals is to the judgment rendered by a Division Bench of the Calcutta High Court setting aside the order passed by a learned Single Judge and directing the parties to place their respective stands before the Execution court as regards the claim made by respondent No. 1 in respect of the properties where it claimed to be the tenant.

Background facts in a nutshell are as follows:

Appellant filed a suit in the court of IV Additional Chief Judge, City Civil Court, Hyderabad for recovery of Rs. 20,91,319 from respondent No. 2 a proprietary concern represented by its proprietor Dr. Ashok Kumar Gupta under Order 37 Rules 1 and 2 of the Code of Civil Procedure, 1908 (in short the 'CPC') inter alia with the following prayers:

- (a) a decree for Rs. 20,91,319;
- (b) and future interest at the agreed rate of 36% p.a. on the said amount from the date of the suit till the date of payment.

The claim of the plaintiff-appellant, according to it, arose on account of non payment of the aforesaid sum which was covered by a demand promissory note dated 20.3.1995 executed by aforesaid Dr. Ashok Kumar Gupta in favour of the plaintiff and thereby acknowledging the liability against the value received. The said demand promissory note indicated the aggregate amount of quarterly instalments agreed to be paid by Dr. Ashok Kumar Gupta. Post dated cheques were issued by him in respect of quarterly instalments which were dishonoured. Though summons were served, he did not enter appearance and also did not file any application for leave to defend the suit. The IV Additional chief Judge, City Civil Court, Hyderabad passed a judgment and decree in terms of the prayers as noted above. Cost of the suit was assessed at Rs. 45,491. The appellant-plaintiff moved for execution of the decree which was transmitted to the Calcutta High Court being Execution Case No. 15/1998. Dr. Ashok Kumar Gupta entered appearance in the said execution petition. On 11.1.1999 a learned Single Judge of the High Court passed an order of injunction restraining said Dr. Gupta from alienating, dealing with or disposing of any of the properties contained in Schedule A, B and C of tabular statement filed along with Execution Petition. An opportunity was given to the parties to-file affidavits. On 22.1.1999, Dr. Gupta filed a petition purportedly under Order 9 Rule 13 CPC before the trial Court to set aside the ex-parte decree and order dated 21.8.1996. It was claimed in the petition that Calcutta Medical Centre was a proprietary concern and Dr. Gupta was the proprietor and that he had no knowledge of the suit proceedings. The application was rejected by order dated 21.3.2000

on the ground that perusal of records revealed that suit summons were received and notice of attachment was also received. It was noted that the notice of attachment was personally served on Dr. Gupta.

Challenging the said order, a Civil Revision Petition No. 3041 of 2000 was filed before the Andhra Pradesh High Court which was disposed of on 29.9.2000. Dr. Gupta was directed to deposit half of the decretal amount and costs within 8 weeks. Application was filed for extension of time to deposit the amount. However, no deposit was made. On 4.3.2003, fresh tabular statement along with supporting affidavits was filed by the appellant with the leave of the Court and copies were served on respondent No. 2-Dr. Gupta. In the tabular statement certain flats were shown as immovable properties to be brought to sale for satisfaction of the decree. By order dated 5.3.2003, a learned Single Judge directed attachment of the properties mentioned in column 10 of the tabular statement filed with the affidavit dated 4.3.2003 with leave of the Court. It was however indicated in the order that if the judgment debtor pays the decretal amount to the receiver within four weeks from the date of order the receiver would not take any further steps in respect of the properties. Stand of the appellant is that pursuant to the said orders symbolic possession was taken by the receiver on 26.3.2003. G.A. No. 3156 of 2003 was filed by respondent No. 1 stating therein that it is a public limited company incorporated in 1995 with an authorized share capital of rupees two crores. The company has taken over the business of Calcutta Medical Centre which was the proprietary concern of Dr. Gupta. The company is a tenant under Mrs. Prema Gupta, mother of Dr. Gupta. Since the receiver was appointed without notice to the Company, the substantial rights and interest over the properties as tenants were being affected. The appellant filed affidavits in opposition to the intervention application highlighting several aspects. It was clearly stated that there was no tenancy as claimed and in any event Smt. Prema Gupta had at no point of time come to Court claiming that she was the landlady in respect of the properties which were claimed to be rented out to the company. Learned Single Judge by order dated 5.8.2003 held that the order appointing the receiver is one of the modes of the execution of decree under Order 21 Rule 58 CPC. The respondent No. 1 was not the owner of the flats and the owner of the flats had not come forward with any claim or objection to attachment of the property. The respondent No. 1, therefore, cannot have any independent right in respect of the properties. The High Court, therefore, dismissed the application being G.A. No. 1674/2003. It accepted the request of the appellant herein for police assistance to the receiver for obtaining vacant possession.

Against the said order, two appeals were filed before the Calcutta High Court and as noted above, the High Court set aside the order of learned Single Judge. It was of the view that on the basis of affidavits it was not possible to say that transfer if any made by Dr. Gupta to the company is a fraudulent transfer and the matter has assumed the proportion of a full blown suit. Accordingly, it inter alia gave the following directions:

''In these circumstances, it is not possible only on affidavits to say that the transfer, if any, made by Ashok to the company is of a fraudulent transfer which is voidable under Section 53 of the Transfer of Property Act and thereafter, the flats can be sold here and now even if these seem to be in the ostensible occupation, possession or tenancy of the incorporated company.

Our order and observations are made without prejudice. The matter has assumed the proportions of a full blown suit although a suit there shall not be put a trial on evidence in the execution Court itself on the basis of the 1976 amendments of the Code.''

In support of the appeals, learned counsel for the appellant submitted that a new dimension has been given by the Division Bench. Admittedly, respondent No. 1 does not claim any right of ownership over the attached properties. No claims of the nature set forth by the respondent No. 1 can

be examined in terms of Section 47 or Order 21 Rule 58 CPC. By the impugned judgment, the High Court has enlarged the scope of the execution proceedings and has treated it as a full blown suit without even recording any reason as to how the respondent No. 1 has any adjudicable interest in the proceedings. The question of tenancy cannot be decided by the execution Court.

In response, learned counsel for respondent No. 1 submitted that what they were interested is not determination of any ownership rights. The company only claimed to be a tenant. Even if it is held that they were trespassers, they cannot be evicted except with due process of law.

The High Court's order is clearly unsustainable on more grounds than one. Respondent No. 1 claimed its tenancy from Mrs. Prema Gupta. Her application to be impleaded as a party in the present proceedings was rejected. At no point of time she had pressed a claim of being the owner of the property. It is to be noted that the appellant has not accepted that the respondent No. 1 was a tenant in respect of the attached properties. In any event, the question of tenancy cannot be decided by the Execution Court.

The Executing Court cannot go beyond the decree. It is the settled position in law which flows from Section 38 of CPC; except when the decree is a nullity or is without jurisdiction. The crucial expression in Section 47 is "All questions arising between the parties to the suit" "or their representatives". Order 21 Rule 54 deals with attachment of immovable property, while Rule 58 deals with adjudication of claims to, or objections to attachment of property. Case of respondent No. 1 is not covered by Section 47 or Order 21 Rule 54 or Rule 58. The High Court misconceived the nature of claim set up by respondent No. 1. Learned Single Judge rightly noted that respondent No. 1 was not having independent right to the properties. It found that the right claimed was as assignee under the judgment debtor. The agreement, if any, in that regard was not produced before the Court and, therefore, learned Single Judge drew adverse inference. Before the Division Bench, the stand of respondent No. 1 was that it was a tenant. Without indicating any reason as to how reasoning of learned Single Judge was wrong the Division Bench enlarged the scope of the controversy and directed the Execution Court to decide question of tenancy which is legally impermissible.

The Division Bench unnecessarily enlarged the scope of the controversy observing that the matter has assumed the proportion of a full blown suit. It permitted the Execution Court to deal with the matters which are clearly beyond the scope of its adjudication. We, therefore, set aside the impugned order of the Division Bench and affirm that of the learned Single Judge of the High Court. However, it is made clear that if the question of dis-possession of respondent No. 1 arises, even if it is treated to be a trespasser the same can only be decided in accordance with law. With the aforesaid observations, the appeals are allowed but without any order as to costs.