

(2008) 09 CAL CK 0029

Calcutta High Court

Case No: C.O. No. 298 of 2008

Devendra Kumar Chaudhury

APPELLANT

Vs

Himanshu Ray Parekh and
Another

RESPONDENT

Date of Decision: Sept. 22, 2008

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 151
- Constitution of India, 1950 - Article 227

Hon'ble Judges: Tapan Mukherjee, J

Bench: Single Bench

Advocate: Saurabh Guhathakurata, for the Appellant; S.S. Mukherjee, Siddheswar Chanda, R. Dutta for the O.P. No. 2, for the Respondent

Final Decision: Dismissed

Judgement

Tapan Mukherjee, J.

The Judgment of the Court was delivered by:

1. This application under Article 227 of the Constitution of India is directed against the order dated 20.12.2007 passed by Learned Additional District Judge, 7th Court, Alipore in Insolvency Case No. 314 of 2005.
2. The petitioner-creditor filed an Insolvency Case 314 of 2005 u/s 13(2) of the Provisional Insolvency Act on 11.5.2005. In that proceedings the petitioner filed an application under Order 38 Rule 5 C.P.C. for attachment of the property of the debtor before judgment and obtained an order of attachment on 12.1.2006 and writ of attachment was issued on 31.1.06.
3. O.P. 2, the wife of O.P. No. 1, the debtor filed an application before the learned court as third party claiming herself as an owner of the property in respect of which writ of attachment was issued by the learned court.

4. O.P. No. 1 filed written objection stating that his wife O.P. No. 2 Manju Parekh was absolute owner of the property in question by virtue of deed of gift executed in her favour by him on 12.7.05. The O.P. No. 2 filed an application u/s 151 of C.P.C. on 27.2.06 for setting aside or vacating the order of attachment. The said petition was contested by the petitioner-creditor. But the petition was allowed on 20.12.07 by the impugned order and order of attachment passed by the Learned Additional District Judge on 12.1.2006 was recalled.

5. Being aggrieved by the said order the petitioner-creditor has filed the instant application under Article 227 of the Constitution of India.

6. It has been contended by the learned lawyer for the petitioner that the O.P. No. 2 is a stranger to the Insolvency Case and has no locus standi to file such application for setting aside the order of attachment without being added party to the proceedings. Learned lawyer further contended that the transaction between the debtor and his wife- O.P. No. 2 is a sham transaction made with the sole object to frustrate the Insolvency Case. Learned Judge has failed to exercise jurisdiction properly causing miscarriage of justice.

7. It has been further contended by the learned lawyer for the petitioner that the application u/s 151 C.P.C. is not maintainable as alternative remedy under Order 38 Rule 8 C.P.C. is available and Learned Judge should not have allowed the application and the impugned order cannot stand.

8. Learned lawyer for the petitioner has placed his reliance upon the decisions reported in (2008) 2 WBLR (S C) 290.

9. Learned counsel for the O.P. No. 2 has contended that both the O.P. No. 1 and 2 were joint owners of the suit property in respect of which the order of attachment has been passed on the basis of deed of purchase dated 5.10.1999 and subsequently, O.P. No. 1 gifted his one half share in the suit property to the O.P. No. 2 on 12.7.05 by way of registered deed of gift and consequently O.P. No. 2 got her name mutated in the office of Kolkata Municipal Corporation. Previously the petitioner filed an application for appointment of Receiver and attachment of property of the debtor and the court refused to pass interim order and the matter was fixed for final hearing on 6.2.2006. When such application was pending the petitioner filed an application under Order 38 Rule 5 C.P.C. on 10.1.2006 and got an ex parte order of attachment on 12.1.2006 without complying with the provisions of Order 38 Rule 5 sub-rule 1 and the said order of attachment is void in terms of sub-Rule 4 of Rule 5, Order 38 C.P.C.

10. Learned counsel for the O.P. has further contended that even if it is assumed that there was no transfer by way of gift to O.P. No. 2 by O.P. No. 1 then also it is undisputed that the property is a joint one and no order of attachment can be passed in respect of joint property. Learned counsel has further contended that existence of alternative relief does not stand on the way of invoking power u/s 151

C.P.C. for the ends of justice to prevent abuse of process of the Court. O.P. No. 1 is not the owner of the suit property and O.P. No. 2 is the owner of the suit property. Issue of order of attachment in respect of such property is certainly abuse of process of law. The order of attachment is void in terms of sub-rule 4 of Rule 5 Order 38 C.P.C. and consequently, the petition u/s 151 C.P.C. is maintainable.

11. Learned counsel for the O.P. No. 2 has placed his reliance upon the ruling reported in [Firm Govind Hanumanprasad of Ujjain Vs. Sham Singh and Others](#), and contended that even third party claimant can question attachment even prior to adjudication of the case.

12. Relying upon the decision reported in [Dharamnath Prasad and Others Vs. Surji Devi and Others](#), learned lawyer for the O.P. No. 2 has further contended that in Insolvency proceedings the Court has no power to direct an interim receiver to take possession of the joint family property. Learned counsel has referred to the ruling reported in [A.P. Ismail Rowther Vs. Mynoon Bivi and Others](#), in support of his contention as to applicability of provision of Section 151 C.P.C.

13. Relying on a decision reported in [Benoy Krishna Mukerjee Vs. Mohanlal Goenka and Others](#), learned Counsel for the O.P. No. 2 has contended that Court has inherent power to correct his own proceedings.

14. The fact remains that the application for attachment before judgment under Order 38 Rule 5 C.P.C. was filed on 10.1.2006 and the order of attachment was passed ex parte on 12.1.2006.

15. It also appears that both the O.P. No. 1 and 2 jointly purchased the suit property on 5.10.1999. It further appears that on 12.7.2005 the O.P. No. 1 gifted his share in the suit property to his wife Manju Parekh. So it is clear that before passing of the order of attachment on 12.1.2006 the O.P. No. 2 Manju Parekh acquired absolute interest in the property in question and in view of the provision of Order 38 Rule 10 C.P.C. such attachment shall not affect her rights.

16. As already observed it has been contended by the learned lawyer for the O.P. No. 2 that such order of attachment being in violation of the provision of Order 38 Rule 5 sub-rule 1 C.P.C. is void ab initio in view of the provision of Order 38 Rule 5 sub-rule 4 C.P.C.

17. Order 38 Rule 5 sub-rule 1 C.P.C. is reproduced below:-

(1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,-

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

18. Thus it appears that for passing the order of attachment under Order 38 Rule 5 sub-rule 1 C.P.C. the court must be satisfied by affidavit or otherwise that the defendant with intent to obstruct or delay the execution of a decree that may be passed against him is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his property from the local limits of its jurisdiction. Then the court will pass order either to furnish security in such sum as may be specified in the order and to produce and place at the disposal of the court when required the said property or the value of the same or such portion thereof as may be sufficient to satisfy the decree or to appear or show cause why he should not furnish security.

19. In this case, the order of attachment was passed ex parte without directing the defendant O.P. No. 1 to furnish security in such sum as may be specified in the order to produce and place at the disposal of the court when required the said property or the value of the same or such portion thereof as may be sufficient to satisfy the decree or to appear or show cause why he should furnish security. The order is in clear violation of the provisions of Order 38 Rule 5 sub-rule 1 and the said order is void in terms of Order 38 Rule 5 sub-rule 4 and the said order cannot stand in law. Moreover, the provision of Order 38 Rule 5 C.P.C. does not apply when the third party acquired interest in the property before attachment and the share of the defendant-O.P. No. 1 has been transferred to the O.P. No. 2.

20. In this regard reliance may be placed upon a decision reported in [Hamda Ammal Vs. Avadiappa Pathar and Others](#), where it has been held that the Rule 5 Order 38 C.P.C. would not apply where the sale deed has been executed by the defendant in favour of the third person.

21. It appears that the learned Judge in his impugned order found gross illegality in the order of attachment which was in violation of mandatory provision of sub-rule 1 Rule 5 Order 38 and void as per sub-Rule 4 Rule 5 Order 38 C.P.C.

22. It further appears that Learned Judge found that Court was misled as real facts relating transfer of half of the property to O.P. No. 2 by O.P. No. 1 was suppressed.

23. Thus the Learned Judge decided to correct its own error and invoked inherent power u/s 151 C.P.C.

24. In the ruling reported in [Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal](#), it has been held by the Apex Court that Section 151 itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the

Court to make orders necessary for the ends of justice. In the face of such a clear statement, it is not possible to hold that the provisions of the Code control the inherent power by limiting it or otherwise affecting it. The inherent power has not been conferred upon the Court; it is a power inherent in the Court by virtue of its duty to do justice between the parties before it. Further, when the Code itself recognizes the existence of the inherent power of the Court, there is no question of implying any powers outside the limits of the Code.

25. The Apex Court also further held in a case reported in [Ram Chand and Sons Sugar Mills Pvt. Ltd. Vs. Kanhaya Lal Bhargava and Others](#), that the inherent power of a Court is in addition to and complementary to the powers expressly conferred under the Civil Procedure Code. But that power will not be exercised if it is exercise is inconsistent with, or comes into conflict with, any of the powers expressly or by necessary implication conferred by the other provisions of the Code. If there are express provisions exhaustively covering a particular topic, they give rise to a necessary implication that no power shall be exercised in respect of the said topic otherwise than in the manner prescribed by the said provisions. Whatever limitations are imposed by construction on the provisions of S. 151 of the Code, they do not control the undoubted power of the Court conferred under S. 151 of the Code to make a suitable order to prevent the abuse of the process of the Court.

26. In the case reported in AIR 2005 Gauhati at page 154 it was held that the condition precedent for invoking the provisions of Section 151, CPC is that recourse is necessary for the ends of justice or to prevent abuse of the process of the Court or it is violative of any express or specific provision of the CPC or any other law applicable to the case.

27. So, in this case, it is clear that there was flagrant violation of the provision of sub-rule 1 Rule 5 Order 38 CPC and for the said violation the entire order of attachment passed under Rule 1 becomes void in view of the provision of sub-rule 4 Rule 5 Order 38 C.P.C. The Court has got inherent power to correct such error of law which runs counter to the clear provision of CPC and the said order allowing the attachment or property before judgment is not only void but the same amounts to abuse of the process of Court and the Court has inherent power to invoke the provision of Section 151 C.P.C. in order to prevent abuse of the process of law and to serve the interest of justice for which the court stands. The party aggrieved may have alternative remedy available under Order 38 Rule 8 C.P.C. but for the Court the only remedy for correction of its illegal order is the inherent power conferred u/s 151 C.P.C.

28. Considering the circumstances and reasons for which the Learned Judge invoked his inherent power the decision relied by the Learned Counsel for the petitioner reported in 2008(2) WBLR (SC) 290 does not help Id. Lawyer for the petitioner to contend that Id. Judge was not justified in invoking the inherent power u/s 151 C.P.C for correcting its own error.

29. Under the circumstances, I have nothing to interfere with the impugned order of Learned Additional District Judge and the same must be sustained. The impugned order thus stands affirmed.

30. The instant C.O. being No. 298 of 2008 stands dismissed. I make no order as to costs.

31. Urgent xerox certified copy, if applied for, be given to the parties as expeditiously as possible.