(1927) 01 CAL CK 0026

Calcutta High Court

Case No: None

Sourendra Nath Mitra and Another		APPELLANT
	Vs	
Sreemati Tarubala Dasi		RESPONDENT

Date of Decision: Jan. 7, 1927

Citation: AIR 1927 Cal 354 : 101 Ind. Cas. 9

Hon'ble Judges: Mukerji, J; Graham, J

Bench: Full Bench

Judgement

Mukerji, J.

Miscellaneous Appeal No. 318 of 1926 has been preferred from an order passed by the Subordinate Judge, Second Court, Hughli, on the 28th July 1926, and Rule No. 851(m) has been issued by this Court in connexion with the said appeal. The petition upon which the said rule has been issued only prayed for stay of execution of the aforesaid order pending the hearing of the appeal, but the rule purports to call in question the validity of the order and directs a stay of its execution, pending the disposal of the rule, on certain terms as to furnishing of security. Evidently the rule is misconceived, or at any rate its terms are inapposite, but the matter is of no importance now as, in point of fact, the execution of the order was stayed on the requisite security being furnished, and the appeal and the rule are both pending and have come up for hearing together.

2. The facts which led up to these proceedings are these: The plaintiff-respondent Tarubala Dasi instituted a suit for recovery of Rs. 15,000 together with Rs. 1,000 more as damages against the two appellants Sourendra Nath Mitra and Khoka Lal Mitra and one Parul Sundari Dasi in the Court of the Subordinate Judge, Hughli, on the 23rd,March 1926. On the 30th June 1926 she applied for attachment of certain immovable properties of the appellants mentioned in the schedule to the application. The Subordinate Judge on the same day ordered the appellants to furnish security to the extent of the amount claimed in the suit or to show cause

why the same should not be furnished on or before the 17th July 1926, and also passed an interim order for conditional attachment in respect of the said properties. The matter eventually came on for hearing on the 28th July 1926 when on hearing both the parties, the Subordinate Judge passed the order which is complained of in this appeal.

3. The Subordinate Judge appears to have been of opinion that the exigencies of the case demanded an order for security and on failure to furnish the same an order for attachment before judgment, and as the appellants'' attorney suggested that if there was to be any attachment at all a certain property, which for the sake of brevity he called the Kalachera property, might be attached, the learned Judge discharged the order by which the properties named by the plaintiff in the schedule to her application had been attached on the 30th June 1926 as stated above, and passed an order, the operative portion of which ran in these words:

The mehal mentioned above, namely, Kalachera, shall be attached until further orders unless the defendants shall furnish security, i.e., Sourendra Nath Mitra shall furnish security to the extent of Rs. 10,000 and Khoka Lal Mitra to the extent of Bs, 500 within a week from to-day. The plaintiff shall take necessary steps for attachment of the mehal in the meanwhile.

4. Before dealing with the appellants'' contention in the appeal it is necessary to refer to a preliminary objection that has been taken as to its competency. The objection is twofold. It is contended in the first place that the order in question is not one made either under Rule 2 or Rule 3 or Rule 6 of Order 38 which are the only orders in that Order from which appeals lie under Order 43, Rule 1, Clause (q) of the Code. It is also contended that the appellants have already furnished security to the extent of Rs. 16,000 in pursuance of the direction which was laid down as the condition precedent to the interim stay that was ordered by the rule. As regards the first branch of this preliminary objection I may say at once that it has a good deal of substance in it. It is not pretended that Order 38, Rules 2 and 3 have any application here. The only rule that we need consider is Rule 6. A plain reading of this rule shows that the order contemplated therein is one that can be passed only in the event of the defendant''s failure to show cause why he should not furnish security or on his failure to furnish the security required. No such thing had happened on the 28th July 1926 on which date the order -in question was passed. The proper order to pass on that date would have been one calling for security, and fixing a time for furnishing the same, and on the failure of the defendant to comply with that order, a further order of the Court would have been necessary for attachment of any property before judgment. I am unable to agree in the view which the appellants have contended for, namely that having regard to the terms of the order, as they are, no further order of the Court would be necessary in the present case in order to issue a writ of attachment.

5. The form of the writ is to be found in specimen form No. 7 of Appendix T to the Code. It shows that the writ is to issue on proof of failure on the part of the defendant to furnish the security. This failure then has to be proved before the writ can issue, and if that be the position, as I find it is, then, in my opinion, it is only the Court that can determine whether there has been failure or not. It was urged on behalf of the appellants that on the strength of the order, such as was passed in the present; case, the ministerial officers of the Court, on finding that no security was furnished, could, on the expiry of the seven days, proceed to draw up a writ, and therefore the order should be treated as one contemplated by Rule 6. But could they? It is true that in the present case no security was furnished, but to test the correctness of the proposition we may think of other cases, e.g., cases in which an extension of time is asked for by the defendant, or some security-is furnished which may not be sufficient, or, again, security is furnished but the sufficiency of it may have to be determined. In all such cases the Court will have to determine, and that judicially, as to whether there has been failure or not. A further order by the Court therefore would be necessary before the ministerial part of the work, namely, the drawing up of the writ may be taken in hand. I am therefore of opinion that the order that was passed on the 28th July 1926 is not the final and operative order of attachment that is contemplated by Rule 6.

6. On the other hand, I am not so sure, that the learned Subordinate Judge did not intend that it was to be regarded as such an order. The grounds which weigh with me in entertaining this suspicion are the following : In the first place we have been credibly informed that a writ of attachment was in fact drawn up on the basis of this order, and it was cancelled only at the request of the appellants attorney. Nextly, it appears that there is no direction given in the order to the effect that the records should be put up before the learned Judge on any subsequent date for another order being passed. Then again we have the fact that, as a matter of fact, no further orders were passed on the expiry of the period mentioned in the order. Added to these is the fact that it is not altogether uncommon for Courts to pass one order, in anticipation as it were, combining together what really should be two separate and successive orders, namely, one for security and the other for attachment.

7. An order on very similar lines appears to have been passed in the case which came up on appeal before the appellate Bench dealing with appeals from the Original Side of this Court : vide Haji Mahammaddin & Co. v. The Eastern Japan Trading & Co. AIR 1923 Cal. 639. By thus combining two orders in one, the procedure is sometimes shortened but only for the time being, for this shortening leads, more often then not, to endless complications. If on a question which relates to the competency of an appeal on a ground such as this a reasonable doubt arises, the benefit of that doubt should go to the appellant. I am accordingly of opinion that this branch of the preliminary objection should be overruled. I take this view the more readily because if we dismiss the appeal as being premature the only result would be that a further order will be passed by the Subordinate Judge and the

appellants will have to undergo the trouble and expense of a fresh appeal to this Court, and that appeal, it may also be mentioned, will have to be dealt with on the very materials that are now before us. In a case in which the Court, and not the appellants, is to blame for what has happened, that would hardly be the right course to adopt. As regards the other branch of the preliminary objection the position appears to be this: The appellants have furnished security to the extent of Rs. 16,000 in order to avail of the interim order of stay provided for in the rule issued by this Court. They do not mean to allow that security to continue for the purpose of the order from which this appeal has arisen, and accordingly it cannot be said that the order for security as made by the Subordinate Judge has been complied with. There is therefore no force in this objection.

8. To turn now to the merits. The findings of the Subordinate Judge upon which the order is based are, to quote his own, words, these:

Therefore the defendants have got vast properties no doubt. As they have run and are running into debts (this is apparent from the affidavits filed on either side), and without prejudicing the merits of the case I am of opinion that some sort of restriction shall be imposed upon some of the defendants'' properties.

9. That these findings are wholly inadequate to form the basis of an order under Order 38, Rule 6 cannot possibly be, and indeed has not been, controverted. Rule 5 lays down that the Court has to be satisfied that the defendant has acted as mentioned in Clause (a) or Clause (b) of that rule with intent to obstruct or delay the execution of any decree that may be passed against him. There is no question of Clause (b) in this case, and what we have to see is whether Clause (a) has been satisfied and the requisite intent made. out. We have then to examine the materials on the record, and this I propose to do now. The relevant facts disclosed in the affidavit that was filed in support of the plaintiff''s application upon which the order has been passed are that there are several claims against the appellants in respect of which suits are pending, a claim of the plaintiff herself to the extent of Rs. 50,000, another by one Siris Kumar Ghose for Rs. 40,000, that the Receivers appointed in connexion with the partition suit that is pendiug between the parties have borrowed on mortgage a sum of Rs. 40,000 and a sum of Rs. 10,000 on promissory notes, that one of the Calcutta properties has been attached for Rs. 50,000, that the defendants have refused to consolidate the debts due by the estate, meaning thereby to join with the plaintiff in acknowledging the debts now standing against her alone as the debts due by the estate, that they have borrowed Rs. 1,10,000 on promissory notes on which interest to the amount of Rs. 40,000 has accumulated and they are about to execute a mortgage in respect of this total amount of Rs. 1,50,000 and of a further loan of Rs. 2,50,000.

10. In the affidavits that were filed on behalf of the appellants before the learned Judge an explanation was given as to why Rs. 2,50,000 was required and in the petition upon which the rule was issued by this Court verified by the appellants

there is a statement that the proposal for the loan of Bs. 2,50,000 has fallen through. The net result of all these then is that there are the aforesaid claims on the appellant''s estate, an attachment in respect of Rs. 50,000 on one of. the Calcutta properties, and that the appellants are about to mortgage their properties for Rs. 1,50,000 which, it is said, is due to one of the creditors.

11. These facts taken together and in view of the value of the appellants'' properties, in my opinion, fall far short of establishing that the defendants are about to dispose of their properties with intent to obstruct or delay the execution of any decree that the plaintiff may obtain. An attempt to secure debts already incurred by executing a mortgage in respect of them does not necessarily indicate an intention to obstruct or delay the execution of a decree which has not yet been passed and such a mortgage will not, in a case when the value of the properties far ''exceeds the amount of said debts as well as the claim in the suit, necessarily obstruct or delay the execution, for the plaintiff will be able to put up the properties to sale subject to the mortgage that may be executed and realize her decretal dues.

12. I am accordingly of opinion that the order passed by Sub. Judge cannot be supported. The appeal therefore succeeds and the order of Sub. Judge is set aside. As regards costs I am not disposed to make any order in favour of the appellants in these proceedings either in this Court or in the Court below as in my opinion having regard to the relation between them and the plaintiff a more reasonable attitude for them to take up would have been to offer the security and thus allay any apprehension which she may entertain as regards difficulties in reaping the fruits of the decree that she is expecting in her favour. Each party will therefore bear his or her own costs an these proceedings.

Graham, J.

13. I agree.