

Jagmohan Kothari Vs. Smt. Jamuna Devi Kothari

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Court : Kolkata

Decided On : Sep-21-2011

Appellant : Jagmohan Kothari

Respondent : Smt. Jamuna Devi Kothari

Judgement :

APO No. 749 of 1992

GA No. 2918 of 2006

CS No. 1224 of 1950

IN THE HIGH COURT AT CALCUTTA

Civil Appellate Jurisdiction

ORIGINAL SIDE

JAGMOHAN KOTHARI

Versus

SMT. JAMUNA DEVI KOTHARI

Appearance:

Mr. S. Pal, Advocate

Mr. Dipankar Dhar

Mr. R.K. Yadav, Advocate

Mr. S. Dutta

BEFORE:

The Hon'ble JUSTICE BHATTACHARYA

The Hon'ble JUSTICE DR. SAMBUDDHA CHAKRABARTI Date : 21st September, 2011.

Re : Attaching Creditor No.2

Seen the affidavit affirmed by the attaching creditor no.2, namely M/s. Nemchand Bansilal.

It appears that the said attaching creditor obtained a decree in Suit No. 104 of 1953 and in execution of that decree a sum of Rs.5,500/- lying in the hands of the then Receiver in Suit No. 1224 of 1950 was attached. 2

There is, however, no material to show whether the alleged decree passed in Suit No. 104 of 1953 has attained finality or not, nor is there any material indicated whether any execution case has at all been levied for execution of the said decree and whether such execution case was still pending till the date of making payment by the then Receiver.

We, therefore, give further liberty to the attaching creditor no.2 to affirm affidavit disclosing the ultimate effect of the alleged decree passed in Suit No. 104 of 1953 specifying in details whether any appeal was preferred against such decree and if any appeal was preferred what is the fate of the appeal. The said attaching creditor no.2 will also disclose whether any execution case has been levied indicating its number and whether such execution case was pending till the date of payment. Let such affidavit be given within four weeks after reopening. Let the matter appear four weeks after reopening. Sri Mangilal Baheti, one of the partners of the attaching creditor no.2 is personally present in Court today. Until further

order his personal appearance is dispensed subject to his undertaking that he will appear before this Court if he is asked to appear in future. After taking into consideration the aforesaid fact, we direct the attaching creditor no.2 to deposit the sum, which he earlier received, with the Registrar, Original Side of this Court till the final disposal of this application by way of security within 30th September, 2011. 3

The Registrar, Original Side will keep the amount in a short- term fixed deposit in any nationalized bank and will go on renewing the same until further order of this Court.

Let a signed copy of this order counter-signed by the Assistant Registrar of this Court be handed over to the learned Advocate for the purpose of compliance of our order.

Registrar, Original Side and all parties are to act on a signed xerox copy of this order on the usual undertakings. Re : Attaching Creditor No.4

It appears from the affidavit affirmed on behalf of Smt. Sunder Bai Bhaiya, the attaching creditor no.4, that the said attaching creditor obtained a decree in respect of Rs.40,955/- against the predecessor-in- interest of the defendant which was decreed in the year 1954. There is no material indicating whether against the said decree any appeal was preferred and if any appeal was preferred what was the fate of that appeal. Similarly, no material has been placed indicating that at any point of time any execution case has at all been levied for execution of the said decree. In such circumstances, in our opinion, the money was paid in gross violation of the order of the Division Bench dated 7th May, 2008. We, however, give a further liberty to the aforesaid attaching creditor no.4 to disclose by way of an affidavit the aforesaid information pointed out above 4

with specific statement that an execution case filed by the said attaching creditor was pending on the date of making payment by giving in details the case number of the execution case.

Let such affidavit be given within four weeks after reopening. Let the matter appear four weeks after reopening. In the meantime, the attaching creditor no.4 should return the money she received from the Receiver to the extent of Rs.42,000/- before the Registrar, Original Side of this Court by 30th September, 2011.] The Registrar, Original Side will invest the amount in a short- term fixed deposit in any nationalized bank and will go on renewing the same until further order of this Court.

This deposit should be made by way of security subject to final order in this proceeding.

Re : Attaching Creditor No.5

From the affidavit affirmed on behalf of Smt. Kusum Lata Mundhra, the attaching creditor no.5, it appears that the said attaching creditor obtained a decree to the extent of Rs.17,495/- with interest and costs against the predecessor-in-interest of the defendant on 24th April, 1954. From the affidavit it does not appear whether any appeal has been preferred against such decree and, if filed, what is the fate of that appeal. There is also no indication as to whether the alleged decree has already been 5

executed or not, or whether any execution case has been levied within the period of limitation fixed by the then law.

Thus, it is apparent that the Joint Receivers paid the money to the aforesaid attaching creditor no.5 by violating the directions given by the Division Bench of this Court dated 7th May, 2008. We, however, give a chance to the aforesaid attaching creditor no.5 to disclose by way of an affidavit the aforesaid information indicated above and to specify whether on the date of making payment to her by the Joint Receivers any execution case was pending by giving the number of such execution case.

Let such affidavit be given within four weeks after reopening. Let the matter appear four weeks after reopening. In the meantime, the attaching creditor no.5 is directed to refund the amount of Rs.18,000/- that she has received from the Joint

Receivers to the Registrar, Original Side of this Court by 30th September, 2011.

The Registrar, Original Side will invest the amount in a short- term fixed deposit in any nationalized bank and will go on renewing the same until further order of this Court.

This deposit should be made by way of security subject to final order in this proceeding.

Re : Attaching Creditor No.3

6

It appears from the affidavit affirmed on behalf of the firm Ganesh Export and; Import Company, the attaching creditor no.3, that the said attaching creditor no.3 obtained a decree in Suit No.1177 of 1950 for Rs.76,918 and annas 12 with interest and costs dated 5th August, 1953. There is no material indicating whether against the said decree any appeal was preferred and if any appeal was preferred, what was the fate of that appeal. Similarly, no material has been placed indicating that at any point of time any execution case has at all been levied for execution of the said decree. In such circumstances, in our opinion, the money was paid in gross violation of the order of the Division Bench dated 7th May, 2008. We, however, give a further liberty to the aforesaid attaching creditor no.3 to disclose by way of an affidavit the aforesaid information pointed out above with specific statement that an execution case filed by the said attaching creditor was pending on the date of making payment by giving in details the case number of the execution case.

Let such affidavit be given within four weeks after reopening. Let the matter appear four weeks after reopening. In the meantime, the attaching creditor no.3 should return the money she received from the Receiver to the extent of Rs.56,000/- before the Registrar, Original Side of this Court by 30th September, 2011. 7

The Registrar, Original Side will invest the amount in a short- term fixed deposit in any nationalized bank and will go on renewing the same until further order of this

Court.

This deposit should be made by way of security subject to final order in this proceeding.

Re : Attaching Creditor No.6

It appears from the affidavit affirmed on behalf of Maheshwari Sabha, the attaching creditor no.6, that the said attaching creditor obtained a decree in Suit No. 465 of 1955 for a sum of Rs.50,382 and 5 annas and 9 paise with interest at the rate of 6 per cent per annum from 1st March, 1954 till realisation along with costs. There is no material indicating whether against the said decree any appeal was preferred and if any appeal was preferred, what was the fate of that appeal. The said attaching creditor has not disclosed the number of any execution case alleged to have been filed by it for execution of the said decree. Therefore, this court is not in a position to arrive at any conclusion as to whether any execution case was pending on the date of making payment by the Joint Receivers and thus, the Joint Receivers apparently paid a sum of Rs.51,000/- in violation of the order of the Division Bench dated 7th May, 2008.

We, however, give a further liberty to the aforesaid attaching creditor no.6 to file affidavit within four weeks after reopening indicating the aforesaid information and with further assertion that execution case was 8

pending on the date of making payment by giving in details the case number of the execution case.

Let the matter appear four weeks after reopening. In the meantime, the attaching creditor no.6 should return the money she received from the Receiver to the extent of Rs.51,000/- before the Registrar, Original Side of this Court by 30th September, 2011. The Registrar, Original Side will invest the amount in a short- term fixed deposit in any nationalized bank and will go on renewing the same until further order of this Court.

This deposit should be made by way of security subject to final order in this proceeding.

Re : Attaching Creditor No.1, Kanhaiyalal Lohariwala The aforesaid attaching creditor no.4 in its affidavit has not disclosed any particulars of decree alleged to have been obtained. It is only stated that by a cheque dated 1st July, 2008 the Joint Receivers has paid a sum of Rs.26,400/- to Ganpatrai Sagarmull being one of the attaching creditors.

In the absence of any particular of the decree and any material to indicate that such decree had attained finality or that any execution case was ever levied and was still pending on the date of making 9

payment, in our opinion, the Joint Receivers illegally made such payment in violation of the order of the Division Bench dated 7th May, 2008. In such circumstances, we, direct the said attaching creditor to return the amount of Rs.26,400/- to the Registrar, Original Side of this Court by 30th September, 2011.

The Registrar, Original Side will invest the amount in a short- term fixed deposit in any nationalized bank and will go on renewing the same until further order of this Court. This deposit should be made by way of security subject to final order that may be passed in this matter. We, however, give further liberty to the aforesaid attaching creditor no.1 to file further affidavit disclosing the number of the suit in which it obtained decree against the defendant with further intimation as to whether any appeal was preferred against such decree and whether the said decree had attained finality. It will also disclose the number of the execution case, if at all filed, and will also intimate whether such execution case was pending on the date of making payment.

Let such affidavit be given within four weeks after reopening. Let the matter appear four weeks after reopening. Re : Attaching Creditor No.7

It appears from the affidavit affirmed on behalf of Maheshwari Bhawan Trust Board, the attaching creditor no.7, that in suit No.464 of 1953, the said attaching creditor obtained a decree, though 10

particulars of the decree has not been disclosed in the affidavit. It, however, appears that the Joint Receivers paid a sum of Rs.69,000/- in full satisfaction of

the decree passed in the suit no.464 of 1953, though we are not in a position to know the actual decretal amount and whether any appeal was preferred against such decree and that the decree had attained finality. Even there is no material indicated in the affidavit as to whether any execution case was ever levied and that it was pending.

In such circumstances, in our opinion, the money was paid in gross violation of the order of the Division Bench dated 7th May, 2008. We, accordingly, direct the aforesaid attaching creditor no.7 to return the amount of Rs.69,000/- to the Registrar, Original Side of this Court by 30th September, 2011.

The Registrar, Original Side will invest the amount in a short- term fixed deposit in any nationalized bank and will go on renewing the same until further order of this Court.

This deposit should be made by way of security subject to final order in this proceeding.

We, however, give a further liberty to the aforesaid attaching creditor no.7 to give further affidavit disclosing the date of decree, the amount of decree obtained, whether any appeal has been preferred and if so, what is the fate of the appeal. The attaching creditor no.7 will also disclose the 11

number of the execution case, which was pending on the date of making payment.

Let such affidavit be given within four weeks after reopening. Let the matter appear four weeks after reopening. The Joint Receivers appointed in this matter are directed to communicate this directions for filing affidavits as well as order for deposit of money to all the attaching creditors by day after tomorrow and/or or their learned advocates of record.

Urgent xerox certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities. (BHATTACHARYA, J.)

(DR. SAMBUDDHA CHAKRABARTI, J.)

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