

CASE NO.:
Appeal (civil) 2770 2000

PETITIONER:
WESTERN PRESS PVT LTD., MUMBAI

Vs.

RESPONDENT:
THE CUSTODIAN & ORS.

DATE OF JUDGMENT: 06/12/2000

BENCH:
B.N.Kripal, Doraswamy Raju, Brijesh Kumar

JUDGMENT:

Raju, J.

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The appellant before us was the unsuccessful applicant in Miscellaneous Application No.2 of 1999 before the Special Court (Trial of offences relating to transactions in securities) at Bombay (called for convenience as the Special Court). The appeal has been filed under Section 10 of the Special Court (Trial of offences relating to transactions in securities) Act, 1992 (hereinafter referred to as the Act) against the order of the Special Court dated 16.2.2000, whereunder the relief sought to set aside the Minutes of the Order dated 5.7.1995 in Miscellaneous Petition No.30 of 1995 and the Order dated 24.9.1997 in Miscellaneous Application No. 280 of 1997 earlier passed by the Special Court insofar as it related to the appellant and the premises of the appellant situated at Regent Chambers, Nariman Point, Bombay-400 021, on 2nd floor bearing unit Nos. 3 & 4 admeasuring approximately 2030 sq. ft. came to be rejected.

The relevant facts insofar as they are necessary for a proper appreciation of the issues raised before us, need a brief mention before adverting to the grievance of the parties. M/s Dhanraj Mills Private Ltd., the 5th respondent in this appeal, is a notified party under the Act. On the information furnished by the Income Tax Department that public money belonging to Banks and Financial Institutions have been siphoned out into the accounts of the notified party and which, in turn, came to be successively siphoned to Kenilworth Investment Company Private Ltd., the 6th respondent herein, and from them to CIFCO Properties Private Ltd., CIFCO Finance Ltd. and M/s Champaklal Investments (Respondents 2, 3, 4 & 6), the Custodian filed Miscellaneous Petition No. 30 of 1995 against all those respondents. When the petition reached the stage of hearing by consent of parties, Minutes of the Order dated 5.7.1995 came to be filed and recorded as per which, among other things Kenilworth Investment Company submitted to a decree in favour of Dhanraj Mills Private Ltd., in a sum of Rs.11,82,81,316/- with interest @ 20% per annum from 24.4.92 till date of payment and CIFCO Group of Companies and

Champaklal Investment Company Private Ltd., submitted to a decree in favour of the 6th respondent and the decretal debts also stood charged in favour of Dhanraj Mills to receive payment from Kenilworth Investment.

Clause 7 of the Minutes of the Order dated 5.7.95 declared the ownership of the 3rd respondent herein, in the premises bearing unit Nos. 2, 5, 6, 7 and 8 at Regent Chambers, Nariman Point, Bombay, in 2nd floor admeasuring 4931 sq. ft and unit No.5 in ground floor admeasuring 451 sq. ft. as well as the residential flat bearing unit No.36 in 3rd floor of Anita Apartment in Mount Pleasant Road at Malabar Hills admeasuring 575 sq. ft. Clauses 8, 12 and 13 on which both parties fixed their hopes read as follows:

8. The Respondent No.2 declares that one Western Press Pvt. Ltd. (formerly known as Jayakrishna Pvt. Ltd.) is the owner of the premises admeasuring approximately 2030 sq. ft. and described in Schedule A-3 hereunder written. The said premises are used and occupied by the Respondent Nos. 2 and 3 along with the said Western Press Pvt. Ltd. The Respondent Nos. 2 and 3 declare and undertake to this Honble Court that they will not claim any right, title or interest in the said premises mentioned in Schedule A-3. The respondent Nos. 2, 3 and the said Western Press Pvt. Ltd. undertake to this Honble Court that pending satisfaction of the decree the Respondent Nos. 2, 3 and the said Western Press Pvt. Ltd. will not alienate, encumber or part with possession of or create third party right, title or interest in the said property described in Schedule A-3 hereto or any part thereof, till the decree herein is marked satisfied.

12. In the event of the decree herein becoming executable against the Respondent Nos.1 and 2 or 3, the Respondent No.2 and the Companies listed in Schedule C as well as the said Western Press Pvt. Ltd. and the said employee occupying the flat as per Schedule A-2, undertake to this Honble Court that on sale in execution being held and sanctioned by this Honble Court the Respondent No.2 and the said companies mentioned in the Schedule B hereto shall hand over the possession of the premises mentioned in Schedule A-1 to A-3 hereto to the purchaser.

13. The companies mentioned in the Schedules B and C and the said employee will within one week from today file separate affidavits declaring that they have no right, title or interest in the premises mentioned in Schedules A-1 to A-3, hereto as also giving the undertaking to this Honble Court to vacate the premises in their occupation in the event happening as stated above.

Pursuant to the above, the Chairman of the appellant-company Mr. Milan Dalal filed on 28.7.95 an affidavit of undertaking not to alienate, encumber or part with possession of or create third party right, title or interest in the aforesaid property of the appellant-company, till the decree is satisfied and in case of events happening as provided in Clauses 12 and/or 13 of the Minutes of the Order further undertaking to vacate the premises in the occupation of the appellant.

Since there was a default, the Custodian filed Miscellaneous Application No.280 of 1987 by way of execution

proceedings against the respondent-companies which suffered a decree (of course not including or specifically initiating against the appellant and their property) and the Special Court passed an order on 24.9.97 appointing a Receiver to take possession and to dispose of the properties by sale. At this stage, apparently apprehending similar course of proceedings for execution by the Custodian against the properties in question of the appellant, Miscellaneous Application No.2 of 1999 came to be filed for the reliefs noticed supra. The sum and substance of the claim in this application of the appellant was (a) that the appellant-company is the absolute owner of the properties in question, (b) that they have not created any interest in the properties in favour of the 3rd respondent herein, (c) that the undertaking given on behalf of the appellant was wrong and unauthorised, (d) that no such undertaking could have been given by any one else in respect of the property of the appellant unless duly authorised by the company (e) that at no point of time the appellant was a party to any of the proceedings or it was represented by any counsel or was ever been put on notice of the orders to be passed affecting its rights/interest, (f) that the appellant is neither a judgment debtor nor it claims through a judgment debtor, (g) that it neither agreed to give guarantee nor stand as surety for the payment of the debts of the judgment debtor and consequently the properties of the appellant cannot be attached or proceeded against in any manner for realisation of the dues under the decree in question.

The Special Court, after a careful consideration of the respective contentions of parties, held that the Minutes of the order dated 5.7.95 covered also units 3 & 4 belonging to the appellant and it would be open to the Custodian to prefer an appropriate application for execution, as was done in the case of units 2, 5 to 8 as and when required. The Special Court also held that the said two units of the appellant also constituted an integral part of the compromise. As regards the ground based upon want of registration, the Special Court was of the view that the minutes of the order stood excepted from compulsory registration and that in any event in view of Section 41 of the Maharashtra Co-operative Societies Act, 1960 it stood also exempted, having regard to the fact that the interests of the appellant in the properties being merely that of a tenant in co-partnership housing society and the right to occupy the flats flowing only from the ownership of shares, the same cannot be considered to be immovable property. Consequently, the application of the appellant came to be dismissed. Hence, this appeal.

Dr. Rajeev Dhavan, learned senior counsel appearing for the appellant, strenuously contended, while reiterating the stand taken before the Special Court, that the appellant is an utter third party to the proceedings before the Special Court it being neither a notified party nor claiming through any of the parties and, as a fact, also not having been arrayed as one such, its properties cannot be made liable for the recovery of the dues in question. It is also further contended that neither the appellant gave any undertaking nor it stood as surety for the realisation of the amount secured in the minutes of the order dated 5.7.95 and, therefore, cannot be said to have encumbered its property by any specific thing in writing and the undertaking, if any, given on its behalf is not only an unauthorised one not binding upon the appellant but that it

has been given also under a mistaken view of facts and, therefore, the same could not adversely affect the rights of the appellant. Argued the learned senior counsel further that in the absence of registration as envisaged under Section 17 (1) (b) of the Registration Act, it cannot in any manner affect the rights of the appellant in immovable property and that the appellants property cannot be proceeded against. Shri Shiraz Rustomjee, learned counsel for the Custodian, while drawing inspiration from the reasoning of the Special Court, endeavoured to sustain the conclusions arrived at by the Special Court. It is the contention of the learned counsel that the very object of the consent order passed on 5.7.95 was to effectively ensure the recovery of the dues and it is too late in the day to retrace steps to disown responsibility and liability in this regard. The case on hand is said to squarely fall under Section 17 (2) (vi) of the Registration Act and that the attempt of the appellant is to somehow delay indefinitely realisation of the dues. The learned counsel on either side also elaborately invited our attention to portions of the order under challenge to substantiate their respective stand.

We have carefully considered the submissions of the learned counsel appearing on either side. In our view, apart from the lack of merits in the challenge made to the well considered order of the Special Court, the appellants case does not merit countenance in our hands for another reason also. The parties before the Special Court having consented and invited the Court to pass the order dated 5.7.95 and obtained benefits by giving undertaking of their own and on behalf of the appellant-company, ought not to be allowed to take shelter under technicalities to overreach the Court, which believed the parties and counsel appearing on their behalf and acted in good faith by accepting the terms suggested by the parties themselves.

The questions, which loom large for consideration in this appeal, are as to what are the legal consequences flowing from the consent order of the Special Court dated 5.7.95 and the affidavit filed by Mr. Milan Dalal on 28.7.95 as the Chairman of the appellant-company? and do they suffer any legal infirmities such as want of registration, want of authority and mistake of fact so as to render them either non-est or unenforceable? If it is held that the consent order dated 5.7.95 and the affidavit dated 28.7.95 are binding upon not only the parties but upon the appellant, as one who has undertook to abide by certain consequences and such an undertaking was given to secure any or some benefit for any one or more of the parties from the Court, the facts such as the appellant not being itself a party in the proceedings before the Court and it was only a third party and that the property in question is of the appellant and that the appellant is neither a notified party nor one claiming through such notified party or the judgment debtor pale into insignificance and are rendered wholly irrelevant in determining the actual issues arising.

The Minutes of the order dated 5.7.95 came to be passed as a consent order, decreeing for the recovery of Rs.11,82,81,316/- with interest @ 20% and the manner in which such decree has to be satisfied as well as proportionate liabilities, inter se, of the parties thereto. The permission for payment in instalments sought for has been countenanced. Clauses 8, 12 and 13 make it abundantly

clear that Respondents 2 and 3 before the Special Court declared that they will not claim any right, title or interest in the premises in question (Schedule A3 properties) and Respondents 2 and 3 before the Special Court as well as the appellant undertook to the Special Court, not to alienate, encumber or part with possession of or create third party right, title or interest in or over the Schedule A3 properties or any part thereof pending satisfaction of the decree passed therein. The consent decretal order further stipulated that in the event of the decree becoming executable the Companies including the appellant undertook to hand over possession of the properties mentioned in Schedules A1 to A3 to the purchaser, on the sale being held and sanctioned by the Special Court. In carrying out the directions contained in the above consent decretal order, Mr. Milan B. Dalal, Chairman of the appellant-company, filed the required affidavit of undertaking dated 28.7.95. In the said affidavit of undertaking, while affirming the factum of ownership of Western Press Pvt. Ltd., to the property in question and noticing the factual position that the said property is being used and occupied by M/s CIFCO Ltd. and CIFCO Finance Ltd., it has been stated in unmistakable terms in paragraphs 2 and 3 as follows:-

2. In terms of the Minutes of the order dated 5th July, 1995, passed by the Honble Special Court, Western Press Pvt. Ltd., do hereby undertake that not to alienate, encumber or part with possession of or create third party right, title or interest in the aforesaid premises till the decree is marked satisfied.

3. On behalf of the Company, I hereby undertake to this Honble Court that in the events happening as provided in Clauses 12 and 13 of the said Minutes, the company undertake to vacate the premises in their occupation.

Though for fixing liability as such the mere fact that the judgment debtor companies and the appellant-company being part of the same group of companies completely controlled by Dalal family and its group concerns may not be sufficient as such, the said factual information indicating that the cluster of companies is a mere cloak for these groups will be a just and relevant piece of material in appreciating the foul play and attempts on the part of the Directors of the appellant and their opportunistic stands adopted, as it suits them, from time to time, not only before the Court below but even in this Court. Mr. Milan B. Dalal has been found to be and seems to have been openly allowed by others without demur to liberally play the multifarious roles he held in different companies of Dalal group families. Though the authority of Milan B. Dalal as Chairman of the appellant-company was seriously questioned by another Director of the appellant at a later stage, the rejoinder filed in this appeal by the very same Milan B. Dalal, in support of the stand of the appellant-company patently betrays the sinister motive of all those who are fighting under the shadow of the appellant-company harping upon some technicalities of law or otherwise unmindful of the fact realities starring at them, who cannot disown their own responsibilities too in the matter. We are constrained to observe that both the parties as well as their advisers who have been responsible for the respective roles they seem to have played in misguiding and misleading the Special Court to pass a particular order, assuring the existence of

certain obvious facts, ought not to be allowed to either retrace their steps or derive, retain or enjoy the fruits of their own machinations and manipulations by now assuming different postures and asserting facts which they deliberately withheld from the Court and were found to be giving a different picture altogether when such orders came to be passed. This condemnable conduct of the parties alone, in our view, is more than sufficient to reject their claims now made in desperateness under the cover of pretended and invented illegalities.

On a careful consideration of the events which occurred before the Special Court which made the said Court to believe the existence of certain facts on the representations made before it, the orders passed and the affidavits found and noticed to have been filed from time to time before the Special Court, the Special Court could not be either faulted for its conclusions or that the specific findings arrived at that the consent order dated 5.7.95 taken together with the affidavit of undertaking dated 28.7.95 covered within its fold the property of the appellant-company in question for being proceeded against in execution of the decree passed for recovering the amount due as declared in the consent order dated 5.7.95, could not be said to be vitiated in any manner warranting our interference. Consequently, it would be permissible for the Custodian to proceed against the property comprised in Units 3 and 4 belonging to the appellant-company also by means of an appropriate execution application as and when he choose to do so. The plea of lack of authority in Milan B. Dalal to bind the appellant needs mention only to be rejected even for the simple reason that the Directors of the appellant-company, who allowed Milan B. Dalal a free hand as Chairman of the appellant-company to deal with the matter, cannot be permitted to blow hot and cold as it suits them. Equally untenable is the pretended mistake of fact which, in our view, is nothing but a self-serving attempt found to be made as a pure afterthought to wriggle out of the lawful commitments made and retrace the position in which the Directors of the company have allowed themselves to be landed in. So far as the challenge based on the want of registration under Section 17(1) (b) of the Registration Act is concerned, we are of the view that the same is neither genuine nor has any merit whatsoever or capable of being countenanced at our hands. The reasons assigned by the Court below to reject the said plea cannot be considered to be either unjust or untenable. Even otherwise, a careful analysis and consideration of the consent order dated 5.7.95 as also the affidavit of undertaking dated 28.7.95 made in this case disclose no intention, per se, to purport or operate to create, declare, assign, limit or extinguish in present or in future any right, title or interest, whether vested or contingent in the immovable property of the value of Rs. 100 and upwards. On the other hand, the terms as well as the tenure of the above proceedings make clear the dominant intention and purpose of them to be merely an undertaking given by a third party to the proceedings to the Court to abide by a particular course of action if the judgment-debtor fails to satisfy the decree. Even in cases of such default by the judgment-debtor in this case, the undertaking as well as the consent decree only enables the Custodian to initiate execution proceedings against the properties in question of the appellant-company and it is only in the event of such sale, the question of coming into existence any document which would require compulsory

registration under Section 17 of the Act would arise and not at this stage. In substance and effect what has been undertaken to the Court is to preserve the properties intact for being proceeded against in a given eventuality and deliver peaceful possession of the property in the event of such action becoming necessary. Declaration or undertaking conceding such liberty of action cannot be construed to fall under clause (b) of Section 17 (1) of the Registration Act. It is important to note that both the consent decree as well as the undertaking do not, by itself, envisage the execution of any deed or document also to create, declare, assign, limit or extinguish, whether in present or in future any right, title or interest whether vested or contingent of the value of Rs.100 or upwards in immovable property. The consent order as also the undertaking given in this case would squarely fall within the exempted category of 'any decree or order of the Court envisaged under Section 17 (2) (vi) and take it outside the excepted category of cases for the simple reason that it does not deal with, as such, any immovable property envisaged in the manner of clause (b) of Section 17 (1) of the Registration Act. In the first instance, the decree/order in question does not comprise any immovable property as such. In any event, in a matter like the one before us where the consent order which came to be passed on agreement as well as the undertaking given in pursuance thereof, was an undertaking to the Court, the words subject-matter of the suit need not be confined to the subject-matter of the plaint or subject-matter of the dispute alone, but would include all that which is made to become part of the proceedings in order to finally and effectively settle all the disputes between the parties. Shorn of all these unnecessary controversies now raised, we are also of the view that in a case where an item of property is referred to in an undertaking given to the Court as one which can be proceeded against in the event of the judgment-debtor failing to pay the decretal amount within the stipulated time, the immovable property does not get ipso facto affected or suffer in anyone of the manner envisaged under Section 17 (1) so as to require compulsory registration.

That apart, the provisions contained in Section 145 CPC also would enure to the benefit of the Court as well as the Custodian to proceed against the appellant in enforcement of the undertaking given to the Court and there are no merits in the contentions sought to be urged to the contrary. For all the reasons stated above, we see no merit whatsoever in the above appeal. The appeal is dismissed with costs quantified at Rs.25,000/- to be paid to the Custodian.