

INDUSTRIAL CREDIT & INVESTMENT CORPORATION OF INDIA A
LTD. AND ORS.

v

KARNATAKA BALL BEARINGS CORPN. LTD. AND ORS.

AUGUST 31, 1999 B

[G.B. PATTANAİK AND UMESH C. BANERJEE, JJ.]

Code of Civil Procedure, 1908:

*Order 40 Rule 1—Receiver—Appointment of—Prior to passing of C
decree—To effect sale of immovable property—Discretion of court—Scope—
Held: Court has discretion to appoint Receiver and direct sale of immovable
properties even prior to passing of decree provided court feels it is expedient
to do so in the circumstances of the case—However, such discretion should
be exercised prudently and cautiously with circumspection.* D

Words and Phrases:

*“Just and convenient”—Meaning of—In the context of 0.40 R.1 of the
Code of Civil Procedure, 1908.*

*“Or such of those powers as the Court thinks fit ”—Meaning of—In the E
context of 0.40 R 1(d) of the Code of Civil Procedure, 1908.*

The appellant filed a suit in the High Court for recovery of a certain sum from the respondent. In this suit the appellant filed an application under Order 40 Rule 1 of the Code of Civil Procedure, 1908 for appointment of Receiver for sale of immovable properties belonging to the respondent. The High Court dismissed the application and the appeal taken therefrom. Hence this appeal. F

The authority of Receivers to effect sale of immovable properties prior to the passing of the decree was the focal point for consideration in this appeal. G

Allowing the appeal, the Court

HELD : 1.1. Order 40 Rule 1(d) of the Code of Civil Procedure, 1908 specifically provides for realisation and the words ‘or such of those powers H

A as the Court thinks fit' appearing therein ought to be interpreted in a manner so as to give full effect to the legislative intent in the matter of conferment of powers by the Court to preserve and maintain the property through the appointment of a Receiver. [138-E-F]

B 1.2. The language of Order 40 being of widest possible import, any restriction as regards the power of the Court to direct a Receiver to effect a sale of immovable property prior to the decree does not and cannot arise. Order 40 Rule 1 and various sub-rules thereunder unmistakably depict that the court has unfettered powers in the event the court feels that the sale of property would be just and convenient having due regard to the situation of the matter. However, courts have imposed a self-imposed restriction to the use of discretion in a manner which is in consonance with the concept of justice and to meet the need of the situation-'unfettered' does not and cannot mean unbridled or unrestrictive powers and though exercise of discretion is of widest possible amplitude, but the same has to be exercised in a manner with care, caution and restraint so as to sub-serve the ends of justice. The courts are entrusted with this power under Order 40 Rule 1 so as to bring about a feeling of securedness and to do complete justice between the parties. [138-H; 139-A; 138-G]

C 1.3. The words 'just and convenient' have to be attributed a proper meaning and the intent of the legislature, as regards the extent of the empowerment by the Code, is rather categorical in nature. The discretion empowered cannot thus be said to be non-existing, having regard to the language of Order 40 Rule 1 though, however, the court shall have to be rather cautious in its approach and use proper circumspection. [141-H; 142-A]

D 2. The Court must consider whether special interference with the possession of the defendant is required or not and in case the court feels it expedient that in the event property is not sold, the initiator of the action would be subject to perpetration of a great fraud; the diminution in value of the assets, wastage and wrongful entrants or trespassers' attempt to make an in-road for their permanent settlement, there should not be any hesitation in directing the sale of immovable property. However, the instances noted above are only illustrative in nature and no hard and fast rule can be laid down in regard to the exercise of Court's powers under Order 40 Rule 1, the same being dependent on the facts and circumstance of each case as is available before the Court. A Court may appoint a Receiver not as a matter of course but as a matter of prudence having regard to the justice of the

situation. [142-B-C]

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Maharadhiraj Sir Rameshwar Singh Bahadur v. Hitendra Singh, (1924) PC 202; *Tarinikamal Pandit v. Prafulla Kumar Chatterjee (d) by Lrs.*, AIR (1979) SC 1165 and *Sadhuram Bansal v. Pulin Behari Sarkar*, [1984] 3 SCC 410, relied on.

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Bishnu Dayal v. Kesho Prasad, AIR (1940) PC 202, referred to.

3. In the above said premises it must be held that the question of there being any embargo in the matter of sale of immovable property by the Receiver before passing of the decree does not and cannot arise. The observation of the Full Bench in *State Bank of India's* case is too wide a proposition and as a matter of fact runs counter to the true intent of the legislature as appears from Order 40 Rule 1 of the CPC. The observations of the Full Bench pertaining to the above are to be treated as merely stated for the purposes of the facts of that particular case and cannot be treated as a precedent. [142-E-F]

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4853 of 1999.

From the Judgment and Order dated 11.6.1998 of the Bombay High Court in A. No. 433 of 1998

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R.F. Nariman, Virag Tulzapurkar, Sharad Mathkar, Sunil Dogra and Ms. Monica Sharma for the Appellants.

V.R. Reddy, (A.C.), Sunil Murarka and Anoop Nair for the Respondent.

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G.S. Vasisht and Sanjay Aggarwal for the Respondents No. 10.

The Judgment of the Court was delivered by

BANERJEE, J. Leave granted.

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Authority of Receivers to effect sale of immovable properties prior to the passing of the decree is the focal point for consideration in this appeal, by the grant of special leave being directed against the Bench decision of the Bombay High Court. The Bench in deciding the issue however did rely upon the decision of an earlier Full Bench judgment in the case of *State Bank of India v. Trade Aid Paper and Allied Products (India) Ltd. & Ors.*, (1995) 2

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A Mh. L.J. 81.

Mr. R.F. Nariman, Senior Advocate, appearing in support of the appeal very strongly contended that the Full Bench decision in State Bank of India's case (supra) cannot be said to have laid down the law in a correct perspective and as such it would be convenient at this juncture to note the observations of the Full Bench pertaining thereto. The Full Bench observed:

“10. As mentioned hereinabove, the decisions referred to in the judgment as regards the ambit of power of the court to appoint Receiver under Order 40 Rule 1 of the Code of Civil Procedure were recorded in suit filed by the individuals to recover the loans or to enforce the mortgages. The economic policy of the Government and the Nationalised Banks has opened new vistas and required the Banks and the financial institutions to advance loans in many areas which were earlier unknown. The benefit available to the citizens of securing loans from Banks and financial institutions cannot be misused by refusal to pay the amount and then indulge in time consuming litigation. Indeed, it is the duty and function of the Court entertaining the suits institutions to ensure that efforts are made to dispose of the suits as early as possible and even during the pendency of the suits, ensure that not only the properties are protected but the defendant is made to repay the amount, if desirous of enjoying the benefits secured by obtaining the loan. The powers of the Court under Order 40 Rule 1 of the Code of Civil Procedure are to be exercised to advance cause of justice and what is 'just and convenient' depends upon the nature of the claim and the surrounding circumstances. The court should not close eyes of the realities and blindly follow the principles laid down 50 years before when the suits by Banks and financial institutions were a novelty. The economic liberalisation and the policy of the Government to grant loans for various activities have increased the number of suits by Banks and financial institutions and in this Court every year more than 2,000 suits are instituted. It would not be difficult to imagine how much public money is involved in these suits and how long the Nationalised Banks and Financial Institutions are deprived of their dues. The Court should be conscious of these facts and should be more pragmatic in exercising powers under Order 40 Rule 1 of the Code of Procedure.

H 11. The Parliament is also conscious of the importance of the claims

of the Banks and financial institutions and Section 29 of the State Financial Corporation Act, 1951 entitles the Financial Corporation to take up possession of the concern when a default is committed and without resort to the suit. The Parliament had realised that taking advantage of the liberal economic policies and healthy approach of the Banks and the financial institutions to advance loan, there is a growing tendency to misuse the facility by taking advantage of delay in disposal of the cases in Court. The delay in disposal of the cases in the court is not due to the fault of the litigant and the Banks and financial institutions should not be hampered from recovering the amounts by denial of just relief admissible under Order 40 Rule 1 of the Code of Civil Procedure.

12. The Courts while appointing Receiver under Order 40 Rule 1 of the Code of Civil Procedure may not deprive the defendant of possession, in case of immovable properties provided that the defendant is ready and willing to continue in possession as agent of the Receiver on the terms and conditions to be settled. In case, the defendant is ready and willing to accept the agency, then the defendant will continue to hold 'de facto' possession. In case the defendant is not ready and willing to accept the agency or commits default in compliance with the terms of the agency, then it is open for the Court to invite bids from outsiders for use and enjoyment of immovable property. While inviting bids, the Court should ensure that reserve price is fixed after ascertaining the valuation from valuation expert. *In no case, immovable property should be sold by the Receiver before passing of the decree in favour of Bank or the financial institution.*" (Emphasis added).

Without going into the factual backdrop but briefly advertent thereto as is indispensable in the matter for proper and effective disposal of the appeal presented before us, it appears that the matter pertains to institution of a suit for recovery of Rs.76,72,00,000 as on the date of suit (in 1996) and approximately a sum of Rs. 14 crores per year is accruing by way of interest in favour of the appellant-petitioner. It is on this factual backdrop that an application was filed for appointment of Receiver with a prayer inter alia, for sale of immovable properties, before a learned Single Judge of the Bombay High Court and the learned Single Judge, however, relying upon the decision of the Full Bench as noticed above expressed his inability to pass any order in regard thereto and the appeal taken therefrom also did not yield any better result and was dismissed by reason of the specific finding and observations

A of the Full Bench as above.

Incidentally, the Full Bench, as a matter of fact has dealt with the matter in great detail and having due regard to the present economic policy of the government. The Full Bench, however, went on to record, its observation pertaining to the appointment of Receiver under Order 40 Rule 1 of the Code for 'just and convenient' reasons. The Bench has duly taken note of the present market tendencies and the grant of loan by the banks and other institutions for the purposes of industrial growth and development in the country. It is significant to note that though the Full Bench at the end of paragraph 10 of its judgment, has recorded that the Court should be conscious of these facts and should be more pragmatic in exercising powers under Order 40 Rule 1 of the Code of Civil Procedure, but in fact this pragmatism has been given a very restrictive meaning; otherwise the Full Bench could not have debarred the sale of immovable property prior to the decree in favour of the bank or financial institution more so by reason of incorporation of Section 29 in the Statute Books of various State Financial Corporation Acts.

D Order 40 Rule 1 of the Code of Civil Procedure expressly provides for the appointment of a Receiver over a property whether before or after the decree and the Court may by an order confer on to the Receiver all powers of realisation, management, protection, preservation and improvement of the property. Order 40 sub-rule (1)(d) specifically provides for realisation and the words 'or such of those powers as the Court thinks fit' appearing in Order 40 Rule 1 (d) ought to be interpreted in a manner so as to give full effect to the legislative intent in the matter of conferment of powers by the Court to preserve and maintain the property through the appointment of a Receiver. Needless to record here that there is existing a power which is totally unfettered in terms of the provisions of the Statute. Law courts, however, in the matter of appointment of a Receiver through a long catena of cases, imposed a self imposed restriction to the use of discretion in a manner which is in consonance with the concept of justice and to meet the need of the situation—'unfettered' does not and cannot mean unbridled or unrestrictive powers and though exercise of discretion is of widest possible amplitude, but the same has to be exercised in a manner with care, caution and restraint so as to subserve the ends of justice. The law courts are entrusted with this power under Order 40 Rule 1 so as to bring about a feeling of securedness and to do complete justice between the parties.

H The language of Order 40 thus being of widest possible import, any restriction as regards the power of the Court to direct a Receiver to effect a

sale of immovable property prior to the decree does not and cannot arise. Order 40 Rule 1 and various sub-rules thereunder unmistakably depict that the Court has unfettered powers in the event the Court feels that the sale of property would be just and convenient having due regard to the situation of the matter. The pronouncement of the Full Bench as regards creation of an embargo in regard thereto seems to be rather too wide. The Court must consider whether special interference with the possession of the defendant is required or not and in the event the Court comes to such a conclusion that there is likelihood of the immovable property, in question be dissipated or some such occurrences as is detailed more fully hereinafter or party initiating the action suffering irreparable loss, unless the Court gives appropriate protection, there should not be any hesitation in directing the sale of immovable property. The *Privy Council in Maharadhiraj Sir Rameshwar Singh Bahadur v. Hitendra Singh & Ors.*, (1924) PC 202 at page 204 observed:

“In particular, under the terms “realisation, management, protection,” etc., of the properties a power of sale is not taken away from but is still vested in the Receiver. And if, for instance, such a power of sale had been exercised in good faith and in the interests of the estate with the sanction of the Court, such a transaction could not have been challenged as ultra vires.”

This Court also in *Tarinikamal Pandit & Ors. v. Prafulla Kumar Chatterjee (d) by LRs.*, AIR (1979) SC 1165 recognised the power of sale of immovable property by a Receiver prior to the decree. In this context reference be made to paragraph 16 of the judgment and the same reads as below:

“16. The second question the learned counsel raised was that the suit is barred under Section 66 of the Civil Procedure Code. The trial court overruled the plea on the ground that although the sale in question is a court sale it is not according to the rules prescribed by the Civil Procedure Code but only according to the Rules of the Calcutta High Court on the Original Side. The learned counsel submitted that the purpose of Section 66, Civil Procedure Code, applies equally to court sales conducted under Rules of Civil Procedure Code as well as those conducted under the High Court Rules. Reliance was placed on a decision of the Privy Council in *Bishun Dayal v. Kesho Prasad*, AIR (1940) PC 202, where the only case pleaded by the plaintiff was that the person through whom he claimed derived his right to half of the village from the auction purchase having been made in part on his behalf by the auction purchase, it was held that the claim was barred

A by Section 66, Civil Procedure Code, inasmuch as no case independent of auction purchase and basing title upon subsequent possession was put forward in the plaint. Section 66 of the Civil Procedure Code runs as follows:-

B “66 (1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims.

C (2).*****

D Section 66 prohibits any person claiming that a purchase certified by the Court in such manner as may be prescribed in favour of a person was made on behalf of the plaintiff. In order to invoke the prohibition it is necessary to establish that the person against whom the suit cannot be maintained is a person claiming title under a purchase certified by the Court in such manner as may be prescribed. A certificate by the Court for the purchase in the manner prescribed is therefore, essential. The word “prescribed” is defined under Section 2(16) of the Civil Procedure Code as meaning prescribed by Rules. The provisions as to grant of a certificate by a Court under a purchase is prescribed in Order 21. Order 21 Rules 64 to 73 prescribe the procedure relating to sale generally while Rules 82 to 103 prescribe the procedure relating to sale of immovable property. When the Court makes an order confirming the sale under Order 21 Rule 92, the sale becomes absolute. After the sale becomes absolute under Rule 94 the Court shall grant a certificate specifying the properties sold and the name of the person who at the time of the sale is declared to be the purchaser. Such certificate is required to bear the day and the date on which the sale became absolute. The certificate by the Court referred to in Section 66 is a certificate under Order 21, Rule 94. The procedure envisaged for sale generally and sale of immovable property under Order 21 is sale by a public auction. Sale by a Court through the Receiver appointed by Court is not contemplated under these provisions. In a sale by a Receiver a certificate to the purchaser under Order 21 Rule 94, is not given by the Court. Therefore, the prohibition under Section 66 cannot be invoked in the case of a sale by the Receiver. A Receiver is appointed under Order 40 Rule 1 and a property can be sold by the Receiver on the directions of the Court even by private negotiations.

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The requirement of Section 66 of the CPC is a certificate by the Court as prescribed. In this case the conveyance Ex.5 was in accordance with the Original Side Rules of the High Court. In the view we have taken that Section 66 is not applicable to sales by Receiver it is not necessary to go into the question whether a sale by the Receiver under the Rules of the Calcutta High Court would come within the purview of Section 66. Section 66 refers to execution of sales only and is not applicable to a sale held by a Receiver. In this view the objection raised by the learned counsel for the defendant has to be rejected.”

Further in the case of *Sadhuram Bansal v. Pulin Behari Sarkar & Ors.*, [1984] 3 SCC 410, this Court also considered the question of sale by a Receiver as a custodia legis with court’s permission. While it is true the issue was not being directly considered by this Court as in the present case but the factum of the sale by the Receiver prior to the decree was not disputed neither any contra-opinion expressed in regard thereto.

At this juncture reference may be made to a passage from Kerr on Receivers and Administrators (7th Edn.) as below:

“A receiver acquires no power of sale by virtue of his appointment, but in most cases the court has power to direct a sale of the property over which the receivership extends; for instance, where the appointment is made in an action for foreclosure, redemption or sale, including, of course, debenture holders’ actions, or in the administration of the estate of a deceased person. The Court has power, under RSC, Ord. 29, R.4, on the application of any party, to make an order for the sale by any persons and in any manner, of any goods, wares or merchandise which may be of a perishable nature or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once. A sale may be ordered to enforce a charge over land under the Charging Orders Act 1979, even if a receiver has been appointed thereunder.”

In that view of the matter, question of having restriction imposed on the Court’s power to direct sale of immovable property prior to the passing of a decree does not and cannot arise. The words ‘just and convenient’ have to be attributed a proper meaning and the intent of the legislature as regards the extent of the empowerment by the Code, is rather categorical in nature. The discretion empowered cannot thus be said to be non-existing, having due regard to the language of Order 40 Rule 1 though, however, the Courts shall

A have to be rather cautious in its approach and use proper circumspection as stated herein before and it is only in the case, where the court feels it expedient that in the event property is not sold, the initiator of the action would be subject to perpetration of a great fraud: the diminution in value of the assets, wastage and wrongful entrants or trespassers' attempt to make an in-road for their permanent settlement, (the factum of which is not very uncommon in the country presently) - are some such instances which may be taken into consideration. We, however, hasten to add that the instances noted above are only illustrative in nature and no hard and fast rule can be laid down in regard to the exercise of Court's powers under Order 40 Rule 1, the same being dependent on the facts and circumstances of each case as is available before the Court. A Court may appoint a Receiver not as a matter of course but as a matter of prudence having regard to the justice of the situation.

D Mr. V.R. Reddy, learned Senior Counsel being appointed as an amicus curiae by this Court did render valuable assistance to this Court and we record our appreciation therefor.

E In the premises, we do hereby record and observe that the question of there being any embargo in the matter of sale of immovable property by the Receiver before passing of decree does not and cannot arise and we do feel it expedient to record that the observations of the Full Bench is too wide a proposition and as a matter of fact runs counter to the true intent of the legislature as appears from Order 40 Rule 1 of the Code of Civil Procedure. The observations of the Full Bench pertaining to the above is to be treated as merely stated for the purposes of the facts of the particular case of the *State Bank* (supra) and cannot be treated as a precedent. The instant matter is thus remitted back to the High Court for being dealt with in accordance with the merits. It is made clear that no part of the observations of this court would be treated as an expression of opinion in any particular matter, but the observations as above pertains to the general principles of law without any specific reference to any matter. We reiterate however that the High Court would be at liberty to deal with the issue in accordance with the factual details as is available in the matter under consideration. The order under appeal thus stands set aside. The appeal is allowed. The matter is remitted back to the High Court for being dealt with as above. No order as to costs.

V.S.S.

Appeal allowed.