

BDPPS

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL (L) NO.797 OF 2015
IN
CHAMBER SUMMONS (LD) NO.444 OF 2015
IN
JUDGES ORDER NO.212 OF 2014
IN
CHAMBER SUMMONS (L) NO.1995 OF 2014
IN
EXECUTION APPLICATION NO.240 OF 2011
IN
FOREIGN AWARD DATED 17 JANUARY 2011
WITH
NOTICE OF MOTION (L) NO.2992 OF 2015
IN
APPEAL (L) NO.797 OF 2015

Bhatia Global Trading Limited, having)
 its office at BCC House, 8/5,)
 Manoramaganj, Navratanbagh Main)
 Road, Indore 452 001, Madhya Pradesh) Appellant.

V/s

(1) Asian Natural Resources (India))
 Limited (formerly Bhatia International)
 Limited), a company incorporated under)
 the Companies Act, 1956 and having its)
 registered office at "BCC HOUSE" 8/5,)
 Manoramaganj, Navratan Bagh Main)
 Road, Indore – 452001 (M.P.) INDIA)

(2) Vitol S.A a company incorporated)
 under the laws of Switzerland having its)
 registered office at Boulevard du)
 Pont d'Arve 28 CH 1205 Geneva, 1211)
 Geneva4, Switzerland.) Respondents.

Dr. Milind Sathe, Senior Counsel a/w Mr. Kezer Kharawala, Mr. Pradosh Patil, Ms. Priyanka Ruparel i/b Lex Juris for the Appellant.

Mr. Zal Andhyarujina a/w Ms. Naira Jeejeebhoy, Mr. Aditya Krishnamurthy, Mr. Abraham Varughese, Ms. Damayanti Sen, Ms. Pabitra Dutta, Ms. Zeena Golwalla i/b M/s. Bose Mitra & Co. for Respondent No.2.

**CORAM: V.M. KANADE &
REVATI MOHITE DERE, JJ.**

**RESERVED ON : 19/09/2016
PRONOUNCED ON : 29/09/2016**

ORAL JUDGMENT : (Per V.M. Kanade, J.)

1. Appellant being aggrieved by the Judgment and Order passed by the learned Single Judge dated 05/10/2015 in Chamber Summons (L) No.444 of 2015 in Judges Order No.212 of 2014 in Chamber Summons (L) No. 1995 of 2014 in Execution Application No.240 of 2011 in Foreign Award dated 17/01/2011, has preferred this appeal.
2. It is necessary to mention brief facts for the purpose of deciding the issue involved in this appeal.
3. Respondent No.2 – Vitol S.A. had obtained a Foreign Award against one Bhatia International Limited (“BIL”) now known as Asian Natural Resources (India) Limited. This Award was passed on 17/01/2011. This Award was confirmed right up to the Supreme

Court. Thereafter, an execution application was filed by Respondent No.2 in this Court. Despite several efforts being made by them, the Award could not be executed against BIL and almost for a period of five years, not a farthing could be recovered from the judgment-debtor. After the inquiry was made by the judgment-creditor, they realized that the funds belonging to BIL were systematically being transferred to its sister concerns in a meticulous manner and this process, in fact, has started immediately after the matter was referred to the Arbitral Tribunal. It is the case of Respondent No.2 – Vitol S.A. that by using all possible methods for defeating the claim of the judgment-creditor, monies were transferred, siphoned off, fraudulent documents were prepared and liabilities were transferred. After obtaining this information and making in-depth study of the financial statements of BIL and the Appellant – Bhatia Global Trading Limited (“BGTL”), Respondent No.2 – Vitol S.A. came to know that 40,600 MT of coal was purchased in the name of BGTL and it was lying at Navlaki Port, Morbi District, Gujarat and it was, in fact, the coal which was belonging to the judgment-debtor BIL i.e. Bhatia International Limited. Similarly, they also noticed that the coal which was purchased and imported and was lying at Tuticorin Port, Tamil Nadu, though was standing in the name of Bhatia Industries & Infrastructure Limited (“BIIL”), it was belonged to BIL. Since this coal was lying outside the territory of Mumbai viz. at Navalaki Port, Morbi District, Gujarat and at Tuticorin Port, Tamil Nadu, a precept under section 46 of CPC had to be filed in this Court for attaching the property lying in

these Ports. So far as Navalaki Port is concerned, there was another consignment standing in the name of Sharp Corporation Limited (“Sharp”) and, initially, a precept was filed also for attachment of the said coal at Navalaki Port.

4. The learned Single Judge issued a precept and an order of attachment in respect of the coal which was purportedly standing in the name of Sharp. They challenged the order of issuance of precept and attachment by filing Chamber Summons. The said Chamber Summons was dismissed and against this order, the Sharp filed an appeal in this Court. This Court, after going through the order passed by the learned Single Judge, came to the conclusion that the Single Judge had held that the Bhatia Group was one single entity and this was done by piercing the corporate veil without giving notices to the two Companies viz. BGTL and BIL which were the Companies registered under the Companies Act, 1956. It was also held that before issuing the precept, inquiry had to be made by the Court to find out whether the Company against whom the precept order and the order of attachment was issued was, in fact, the owner of the property or not. Division Bench of this Court in para 10 of its order has observed as under:-

“10. Perusal of the said provision clearly reveals that before issuing the precept under Section 46 of the Civil Procedure Code, Executing Court has to be fully satisfied that the goods in question are owned by the

Judgment Debtor. However, if there is any manner of doubt about ownership of the said goods by the judgment-debtor, an order under Section 46 cannot be passed. In the present case, the learned Single Judge has proceeded to pass the impugned order without holding an inquiry about ownership of the said goods or without being fully satisfied that the goods were owned by the judgment debtor and not by anyone else and has arrived at a finding that Bhatia Global Limited and Bhatia International Limited (Asian Natural Resources (India) Limited) is one and the same party by allegedly piercing the veil. While doing so, admittedly, no notice has been issued to Bhatia Global Limited which is a Company incorporated under the provisions of the Companies At. It is also quite well settled that exercise of piercing the veil has to be done only under certain circumstances as laid down by the Apex Court in series of judgments. Even assuming that the learned Single Judge was of the view that it was necessary to pierce the veil then notice ought to have been given to Bhatia Global Limited and only thereafter such a finding could have been given. The impugned order, therefore, is liable to be set aside on this ground alone.”

In view of the directions given by this Court, the learned Single Judge examined the material on record and came to the conclusion that the Sharp was the owner in respect of 20,000 MT of coal and rest of the coal belonged to BIIL. Against said judgment and order of the learned

Single Judge, BIIL filed an appeal in this Court vide Appeal (L) No. 794 of 2015.

5. Thereafter, an application was made for extending the precept in respect of BIIL as also in respect of the Appellant herein viz BGTL and the precept was extended by further period of two months. Appellant was restrained from disposing of the coal. The Court Receiver was also appointed for the purpose of selling the coal.

6. In other connected matter, the learned Single Judge, while extending the precept, by a detailed order came to the conclusion that BIIL and BIL were, in fact a single economic entity and lifted the corporate veil. The learned Single Judge gave detailed reasons as to why she came to the conclusion that BIIL and BIL were a single entity and observed that the Bhatia Group was, in fact, controlled by Surinder Singh Bhatia who was the main person controlling all the Companies. The learned Single Judge therefore held that though the coal lying at Tuticorin Port, Tamil Nadu was standing in the name of BIIL, it actually belonged to BIL and extended the precept. In an appeal filed by BIIL against the said order, this Court firstly held that even in execution proceedings, the Court was entitled to lift the corporate veil if it came to the conclusion that the judgment-debtor was trying to siphon off the money to other entities for the purpose of defeating the Award passed in favour of the judgment-creditor. Secondly, this Court came to the conclusion that the learned Single

Judge was justified in lifting the corporate veil and giving finding that BIIL and BIL were one single entity. The appeal which was filed by BIIL was therefore dismissed.

7. This matter was also heard thereafter and both the learned Senior Counsel have argued at great length on 26/08/2016, 28/08/2016, 29/8/2016, 06/09/2016 and the arguments were concluded on 19/09/2016. Though, initially, the matter was heard on 04/02/2016, 10/02/2016, 12/02/2016 and 25/02/2016 and reserved for judgment, written submissions were given almost after one month and the matter was also heard in a piecemeal manner and therefore we thought it fit to again hear both the parties in view of the decision of the Apex Court in *Anil Rai vs. State of Bihar*¹

8. We have thereafter heard Dr. Milind Sathe, the learned Senior Counsel appearing on behalf of the Appellant and Mr. Zal Andhyarujina, the learned Counsel appearing on behalf of Respondent No.2 at length.

9. The learned Senior Counsel appearing on behalf of the Appellant submitted that the learned Single Judge has erred in carrying out the exercise of making an investigation at the stage of issuance of precept under Section 46 of the CPC. He submitted that the Appellant had a remedy of filing an application under Order 21 Rule 58 and if such an application was filed the Court was duty bound to give an opportunity

1 (2001) 7 SCC 318

to the third party to establish its case. He submitted that it was not open for the learned Single Judge to have given finding in her order by relying on the transfer agreement dated 28/11/2009. He then submitted that though the learned Single Judge has, in para 4 of her judgment, mentioned that the objection taken by the Appellant ought to have been taken in an application under Order 21 Rule 58 and though she has observed that the application filed by the Appellant was not an application under Order 21 Rule 58, she has still given a finding that the goods belonged to BIL. Thirdly, it was submitted that even without going into the material on record, a finding was given by the learned Single Judge in para 30 of her order that the Appellant – BGTL and the judgment-debtor were single entity. He submitted that the learned Single Judge has not given proper reasons for arriving at the said finding. He further submitted that further finding has been given that the award debtor is seen to be the owner of the entire cargo including 28100 MTs of coal shown under the Bills of Lading of the applicant and 12500 MTs shown to be covered by the Bills of Entry and not Bills of Lading in favour of third parties. He then submitted that the learned Single Judge has erred in relying on transfer agreement dated 28/11/2009 for the purpose of coming to the conclusion that by this agreement monies were siphoned off. He then placing reliance on the balance sheet, invited our attention to the column of sundry debtors and sundry creditors in the said balance-sheet and submitted that the figure mentioned in the column of sundry debtors did not reflect the amount which was due and payable to the

Vitol S.A. He therefore submitted that this could not have been considered as the material in support of the judgment-creditor's case. He submitted that this was clear from the chart of current liability. He submitted that the figures mentioned therein also did not match with the claim made by Vitol S.A. He submitted that several other aspects have been considered by the learned Single Judge and the learned Single Judge has given finding regarding the maintaining of Minute Books. He submitted that the learned Single Judge without giving any opportunity to the Appellant came to the conclusion that the said Minute Books were fabricated and were not maintained as per the provisions of the Companies Act, 1956. He then submitted that the finding recorded by the learned Single Judge regarding transfer of assets and liabilities also was uncalled for. He submitted that these findings virtually precluded the Appellant from making an application under Order 21 Rule 58 and the remedy which was available to the Appellant under law was foreclosed by virtue of the said findings which were given by the learned Single Judge. He submitted that though on the one hand, the learned Single Judge in para 4 has observed that these objections raised by the Appellant could have been raised in an application under Order 21 Rule 58 and that this was not the application under Order 21 Rule 58 and at the same time on the other hand the learned Single Judge has proceeded to decide the application as if it was an application under Order 21 Rule 58 and decided title of the goods which were lying at the said Ports under Order 21 Rule 58.

10. The learned Senior Counsel appearing on behalf of Respondent No.2, however, rightly pointed out that in the Memo of Appeal a specific ground which was taken was that the application was filed in the form of an objection made under Order 21 Rule 58 of the CPC and the entire arguments was advanced before the learned Single Judge on that basis, whereas here in the Appeal Court a contrary stand has been taken for the first time by the Appellant.

11. We must note here that it does appear from the grounds which are taken by the Appellant that before the learned Single Judge, an application was argued as if it was an application under Order 21 Rule 58. Ground No.10 of the Memo of Appeal reads as under:-

“x) The Ld Judge ought to have appreciated that present Chamber Summons is preferred in a form of an objection made under Order 21 Rule 58 of the CPC for recalling the order of issuance of precept.”

In spite of this, the learned Single Judge was very clear in her mind about the scope of the inquiry which is to be made while issuing the precept under Section 46 and, therefore, in para 4 of her order the learned Single Judge has observed as under:-

“4. Under the said section the Court has to think fit to issue the precept upon such

other Court to attach the property. Upon the issue of such precept that Court would attach the property. Upon the property being attached the applicant or any other party who claims ownership of the goods in the place and stead of the award debtor would be entitled to make a claim or an objection to the attachment. The objection would have to be made under Order 21 Rule 58 of the CPC. This is not an application under Order 21 Rule 58 of the CPC.”

12. The learned Single Judge was constrained to give the said finding since all these points were urged before her by the Appellant herein and she had therefore to deal with those submissions which were made and give her opinion on the said arguments. It is therefore not not open for the Appellant to make a grievance that the learned Single Judge exceeded her jurisdiction while deciding the Chamber Summons filed by the Appellant herein.

13 The learned Counsel appearing on behalf of Respondent No.2 has taken us through the judgment and order of the learned Single Judge and submitted that the learned Single Judge has considered all the circumstances before coming to the conclusion that the transfer agreement was sham and bogus document which was executed only for the purpose of defeating the claim of Respondent No.2. He submitted that though the agreement was executed on 28/11/2009, the date for completion of agreement was extended till

30/01/2011 i.e. after the Award was passed in favour of Respondent No.2 i.e. on 17/01/2011. He submitted that there was no reason for extending the time for completion of the contract till 30/01/2011 and this was done only for the purpose of allowing BIL to transfer its assets to BGTL. He submitted that the shares of non-functional company viz. BGTL were purchased by BIL at a premium of Rs 24990/- and they were sold to another company in the same group viz Bhatia Sons (India) Ltd at Rs 10/- per share without any premium. He submitted that this clearly demonstrated that the said transaction was bogus, illusory and created for the purpose of benefit of BIL. This argument has been accepted by the learned Single Judge after analyzing all the record which was put before her.

14. We concur with the view taken by the learned Single Judge that the instances and circumstances which have been discussed by her after examining the transfer agreement showed that the said transfer agreement was sham and bogus and which was executed only for the purpose of defeating the claim of Respondent No.2.

15. We are therefore of the view that no case is made out by the Appellant for interfering with the findings given by the learned Single Judge. The learned Single Judge was aware of the settled position in law and therefore in para 4 of her judgment which is reproduced hereinabove, she has clearly mentioned that this is not an application under Order 21 Rule 58 of the CPC. It would be profitable

to have a look at Order 21 Rule 58 of the CPC, which reads as under:-

“ORDER XXI
EXECUTION OF DECREES AND ORDERS
Payment under decree”

“Adjudication of claims and objections

58. Adjudication of claims to, or objections to attachment of, property.-
(1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained:

Provided that no such claim or objection shall be entertained -

(a) where, before the claim is preferred or objection is made, the property attached has already been sold; or

(b) where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) All questions (including questions relating to right, title or interest in the property attached) arising between the parties to a proceeding or their representatives under this rule and relevant to the adjudication of the claim or objection, shall be determined by the Court dealing with the claim or objection and not by a separate suit.

(3) Upon the determination of the questions referred to in sub-rule (2), the Court shall, in accordance with such determination, -

(a) allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit; or

(b) disallow the claim or objection;
or

(c) continue the attachment subject to any mortgage, charge or other interest in favour of any person; or

(d) pass such order as in the circumstances of the case it deems fit.

(4) Where any claim or objection has been adjudicated upon under this rule, the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(5) Where a claim or an objection is preferred and the Court, under the proviso to sub-rule (1), refuses to entertain it, the party against whom such order is made may institute a suit to establish the right which he claims to the property in dispute; but, subject to the result of such suit, if any, an order so refusing to entertain the claim or objection shall be conclusive.”

Perusal of Order 21 Rule 58 clearly reveals that legislature in its

wisdom has ensured that if a claim is made by third party, claiming to be the owner of the property which is attached, he can, instead of filing separate suit, file his objection under Order 21 Rule 58 and such an objection has to be considered by the Court. It will be necessary here to point out that sufficient power has been given to the Executing Court to decide the application and it has been clearly mentioned in the proviso to Rule 58(1) of order 21 that no such claim or objection shall be entertained – (a) where, before the claim is preferred or objection is made, the property attached has already been sold; or (b) where the Court considers that the claim or objection was designedly or unnecessarily delayed. Therefore, the Executing Court has power to regulate the procedure before deciding the claims or objections which are filed by the third parties. Keeping that in mind, the learned Single Judge has made those observations in para 4 of the said order.

16. The learned Senior Counsel appearing on behalf of the Appellant expressed an apprehension that the Executing Court being a District Court would be influenced by the observations made by this Court. He submitted that the said findings ought not to have been given by the learned Single Judge.

17. We disagree with the said submission made by the learned Senior Counsel appearing on behalf of the Appellant because the learned Single Judge in her order has clearly mentioned that the application was not an application under Order 21 Rule 58, though

the Appellant themselves had treated that application as an application under Order 21 Rule 58. In para 5 of her order the learned Single Judge has observed as under:-

“5. The applicant would claim that it must be heard before the precept is issued. For the issue of the precept only the judgment creditor would be before the Court. An application under Section 46 would be made. The Court would have no means of knowing who is any other party in the world which would claim title to the property sought to be attached within the jurisdiction of another Court for an application to be made before the executing Court for the issue of precept. The Court would issue the precept if it thought fit. It would think fit to issue the precept when it is prima facie shown that the property to be attached belonged to the award debtor. The application to be made may be correct or incorrect. The Court would consider the application made. The Court would inquire about the entitlement of the award creditor which may be by way of right, title and interest of the award debtor which is sought to be attached. The Court would then issue the precept.”

18. The learned Single Judge was therefore conscious of the procedure which is to be followed in such cases. The application for issuance of precept under section 46 is taken out firstly in cases where the property is situated outside the jurisdiction of the Court and,

secondly, if the property which is to be attached is a movable property then order of attachment is passed, so that the execution does not become infructuous. The learned Single Judge therefore, in our view, has correctly followed the procedure laid down under CPC. It is therefore clarified that if such a remedy is available to the Appellant under Order 21 Rule 58, Appellant can also exhaust that remedy and the learned Judge before whom such an application is made shall accordingly decide it in accordance with law. With this clarification, appeal is dismissed and disposed of. Since appeal itself is disposed of, Notice of Motion taken out therein does not survive and it is accordingly disposed of.

(REVATI MOHITE DERE, J.)

(V.M. KANADE, J.)