

(1987) 04 DEL CK 0034

In the Delhi High Court

Case No : Interim Application No. 6130 of 1985 and Suit No. 2012 of 1984

Bank of India

APPELLANT

Vs

National Tile Work Industries and Others

RESPONDENT

Date of Decision : 09-04-1987

Acts Referred:

Citation : AIR 1989 Delhi 60 : (1987) 32 DLT 225

Hon'ble Judges : Mahesh Chandra, J

Bench : Single Bench

Advocate : B. Mohan and P.P. Malhotra, for the Appellant;

Judgement

Mahesh Chandra, J.

(1) By this order I propose to dispose of this 1. A. which has been filed under Order xxxviii Rule 5 read with Section 151 of the CPC (hereinafter referred to as "the Code"), by the plaintiff against defendant No. 3 for attachment before judgment on the allegations that the plaintiff has filed a suit for recovery of, Rs. 3,97,161/12P against the defendants which has been registered as Suit No. 2013/84; that defendant No. 3 had, at all material times, been one of the partners of defendant No. 1 and had accordingly signed and executed in favor of the plaintiff various documents detailed in the plaint and as such is liable severally and jointly for the repayment of outstandings as claimed in the suit ; that the plaintiff has a good prima facie case against the defendants including defendant No. 3 : that defendant No. 3 ? holds a fixed deposit receipt No. DBD-23/307 dated 16th May, 1985 for Rs. 71,147/31P due on 21st March, 1987 with the plaintiff-Bank ; that in view of defendant No. 3 being liable for the suit amount, the plaintiff has a lien over the said fixed deposit receipt and the said fixed deposit being only security available against said defendant No. 3, it is liable to be attached so that decree when passed against the said defendant may be realised out of the said fixed deposit ; that the said defendant is threatening to seek premature encashment loan amount against the said fixed deposit and in that event the plaintiff/applicant will to left with no security and hence, it is

requested that an order to be passed for attachment of fixed deposit receipt above mentioned and defendant No. 3 should be restrained from taking any amount by encashment of the said fixed deposit receipt or by way of loan against such deposit until further orders.

(2) This application has been opposed on behalf of defendant No. 3, inter alia, on the ground that the plaintiff has already obtained attachment of entire property of National Tile Wk Industries-defendant No. 1 of which defendant No. 3 was previously a partner and the value of said assets is above Rs. 45,00,000/- and it is open to the plaintiff to get the said entire property attached; that the plaintiff has not shown that defendant No. 3 has acted or will act with intent to obstruct or delay execution of any decree to be passed subsequently and the application is misconceived ; that there is no prima facie case in favor of the plaintiff and against No. 3 ; that the plaintiff has not shown that there is any likelihood of defendant No. 3 disposing of the said property ; that defendant No. 3 was no longer a partner of defendant No. 1 and the liability of defendant No. 3 was discharged by virtue of her retirement from the partnership and by the plaintiff's subsequent conduct and express acquiescence to the said retirement ; that the answering defendant was not seeking premature encashment or loan amount against the said fixed deposit receipt and it is prayed that the application may be dismissed.

(3) I have heard the learned counsel for the parties and have gone through the file and after giving my considered thought to the matter before me, I have come to the following findings.

(4) It is not disputed on behalf of defendant No. 3 that Suit No. 2013184, is pending for recovery of Rs. 3,97,161/12P which suit is rather being contested by all the defendants. Similarly it is not denied that defendant No. 3 holds a fixed deposit receipt No. DBD-23[307 dated 16th May, 1985 for Rs. , due on 21st March, 1987 with the plaintiff-Bank. However, what is urged on behalf of defendant No. 3 is that ingredients of Order xxxviii Rule 5 of the Code are not satisfied even according to the allegations of the plaintiff in the application and as such the application should be dismissed. A perusal of order xxxviii Rule 5 of the Code shows that it reads as under :-

RULE 5 :- "(1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,- (a) is about to dispose of the whole or any part of "his property, or (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of 377 the Court, when required, the said property or the value of the same or such portion thereof as may be sufficient to satisfy me decree, or to appear and show cause why he should not furnish security.

(2)The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3)The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(4)If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule, such attachment shall be void."

(5) The object of entire Order xxxviii of the Code is to safeguard the interest of the plaintiff and thwart any possible attempt by the defendant to obstruct or delay the satisfaction of decree which might be passed against the defendant and to achieve this purpose, Rule 5 thereof enables the Court to issue attachment before judgment of the property of the defendant so that any attempt on the part of the defendant to delay or defeat the satisfaction of the decree is forestalled. In accordance with the provisions of Rule 5 of Order xxxviii of the Code, it is incumbent upon the plaintiff to satisfy the Court that the defendant has intention to obstruct or delay the execution of any decree that may be passed in this suit and for this purpose the defendant is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court. It is only on the satisfaction of all these conditions that the plaintiff can be said to be entitled to an order of attachment before judgment in terms of Order xxxviii Rule 5 of the Code. Thus, before this Rule 5 can be invoked it must, inter alia, be shown by the plaintiff that defendant has acted or is about to act with intent to obstruct or delay the execution of any decree that may be passed against him. The Court must be satisfied that all the ingredients of the rule exist. Mere fact that no harm would be caused to defendant or that defendant would not be prejudiced by such an order could be no ground to pass order under Order xxxviii Rule 5 of the Code for attachment before judgment. It is in its very nature an extraordinary jurisdiction and has to be exercised sparingly and strictly in accordance with procedure prescribed by the Code. There must be some definite evidence on these points and not mere vague allegations. The plaintiff must also prove a prima facie case in his favor. The approach of this Court has essentially to be very cautious and not casual or routine like.

(6) In the instant case, truly speaking there is no clear allegation even that the defendant No. 3 is about to dispose of the whole or any part of her property or is about to remove the whole or any part of her property from the local limits of the jurisdiction of the Court. There is nothing to suggest that defendant No. 3 intends to construct or delay the execution of the decree which might be passed against her. No doubt, the plaintiff has alleged in para 3 of the application that "the said defendant is threatening to seek premature encashment/loan amount against the said fixed deposit.....", but this does not meet the requirements of Order xxxviii Rule 5 of the Code. In view thereof, it cannot be said that the plaintiff has established the necessary ingredients. The learned counsel for the plaintiff has not been able to bring to the notice of this Court any

such instance where the defendant No. 3 has attempted to dispose of whole or any part of her property. Similarly the plaintiff has not been able to even prima facie show that defendant No. 3 has attempted to remove the whole or any part of her property from the local limits of the jurisdiction of the Court much less with intent to obstruct or delay the execution of the decree. In view thereof, it cannot be said that the plaintiff is entitled to the order prayed for.

(7) The matter may be looked from yet another angle. This suit was registered on 21st December, 1984 while the fixed deposit is stated to have been made on 16th May, 1985, i.e. after the institution of the suit. Not only that the deposit has been made after the institution of the suit, but this deposit has been made with the plaintiff-Bank itself and consequently no malafide intention can be attached to defendant No. 3 that she has any intention to obstruct or delay the execution of any decree. The object of provisions of Order xxxviii Rule 5 of the Code is to prevent any attempt on the part of the defendant to defeat the realisation of the decree that may be passed against him and consequently it must be shown that the defendant has acted or is about to act with the intent to obstruct or delay the execution of the decree that may be passed against him. Some definite instances or evidence must be produced by the plaintiff to show that the defendant has made any such attempt which is totally lacking in the present case. Mere allegations are not by themselves enough and in the instant case even clear allegations are lacking and wanting. In these circumstances I find there is no merit in this application.

(8) No other point has been urged before me.

(9) In view of my discussion and findings above, this application I. A. 6130185 is dismissed with costs which are fixed at Rs. 500.00