

(1923) 05 PAT CK 0016

In the Patna High Court

Chandrika Prashad Singh and Others

APPELLANT

Vs

Hira Lal and Others

RESPONDENT

Date of Decision : 31-05-1923

Acts Referred:

Citation : AIR 1924 Patna 312

Hon'ble Judges : Dawson Miller, C.J.;Kulwant Sahay, J

Bench : Full Bench

Judgement

Dawson Miller, C.J.—This is an appeal on behalf of the defendants in the suit from an order of the Subordinate Judge of Shahabad ordering attachment before judgment of Immovable property belonging to the defendants. It appears that the plaintiffs sued for recovery back of a deposit of Rs. 1,32,000, or thereabouts, made by them in part performance of a contract to purchase some of the Immovable property of the defendants or in the alternative for specific performance and a conveyance of the property.

2. The allegations made in the plaint are that there are certain misrepresentations as to incumbrances on the property and that such incumbrances were not disclosed and, therefore, although the plaintiffs are seeking, as an alternative, specific performance, they are really claiming back; the deposit made with interest due thereon.

3. The defendant's case is that they are quite willing to transfer the property upon payment of the balance of the purchase price due and they deny the allegations as to the misrepresentations alleged in the plaint. The plaintiffs on the 9th of May of 1st year applied for attachment before judgment not only of the property in suit but apparently of all the Immovable property belonging to the defendants which is said to have been valued recently by a valuation of the Court at a sum of nearly eight lakhs of rupees.

4. The evidence necessary in support of an interlocutory application of this sort may be given by affidavit and the only evidence presented on behalf of the

plaintiffs on the present application for attachment was an affidavit signed by Har Kishen Das, the ammuhtear of one of the plaintiffs. The affidavit does not state in terms whether the facts deposed to therein are statements of facts within the deponent's knowledge or whether they are statements made from information and belief. It was contended, in the first place, on behalf of the appellants that an affidavit of this sort was not sufficient for the purposes for which it was required, because there was nothing to show whether the statements made are merely statements on information and belief or whether the deponent swears to the facts mentioned as being within his own knowledge. Order 19, Rule 3, provides that, "Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted: provided that the grounds thereof are stated." It follows, therefore, that in an application of this sort the affidavits may be confined to facts which the deponent is able to depose to of his own knowledge, or it may be one in which statements of his belief may also be admitted if the grounds of his belief are given. But if the affidavit swears to certain facts as true and does not state that the facts deposed to are merely those within the belief of the deponent, then, I apprehend, it must be taken that the statements, in so far as they are statements of fact, are matters within his own knowledge and not merely matters of belief only. It follows, therefore, that the present affidavit is not necessarily bad on the ground that it does not state in terms whether the facts deposed to are facts within the knowledge of the deponent or merely statements of his belief. The case of *Padmabati Dasi v. Rasik Lal Dhar* (1910) 37 Cal. 259 was referred to in support of the proposition put forward by the defendants. In that case Sir Lawrence Jenkins, C.J., and Woodroffe, J., stated: "We desire to impress upon those who propose to rely on affidavits that, in future, the provisions of Order 19, Rule 3 must be strictly observed and every affidavit should clearly express how much is a statement of the deponent's knowledge and how much is a statement of his belief, and the grounds of belief must be stated with sufficient particularity to enable the Court to Judge whether it would be safe to act on the deponent's belief." In that case, however, as appears from the report, the affidavit which was sworn was one which is in very common use in this country. After stating the facts it continued, "I the defendant-respondent, above named solemnly affirm and say that what is stated in the foregoing petition is true to the best of my knowledge, information and belief." It must be borne in mind that in making the observations which I have just quoted from their judgment, the learned Judges were dealing with a case where the affidavit states that the information deposed to is true to the best of the deponent's knowledge, information and belief without stating specifically which parts of it are true to his knowledge and which parts are merely stated as his belief from information obtained by him. In such a case it is clearly desirable and imperative that the deponent should state how much of the affidavit is sworn to from his own knowledge and how much is merely sworn to from information which he believes to be true; but if the affidavit contains no such statement as that to which I have referred but merely alleges certain facts and is signed by

the deponent who swears to them, it must, I think, be taken that the statements made by him are represented as statements true to his knowledge, I, therefore, think that in the present case no exception can be taken to the form of the affidavit on that ground. At the same time, I should like to issue a note of warning against litigants and those who swear affidavits on their behalf that, if they solemnly affirm, as this affidavit does, that certain facts are true without stating that those facts are true only to the best of their information and belief, it will be taken that they are swearing to facts deposed to as being facts within their own knowledge, and it will be no excuse if those facts should turn out untrue to say, "I did not intend it to be taken that I was swearing things within my own knowledge. I merely intended to state what had been stated to me."

5. The learned Subordinate Judge, when the application came before him, had the affidavit of Har Kishen Das before him on behalf of the plaintiffs and that was the only evidence he had in support of the application. He granted the application, and the defendants contend that the learned Subordinate Judge was not justified upon the evidence before him and in the view he took of the evidence in ordering an attachment of the property before judgment because, even if one accepts the findings, they are not in themselves sufficient to bring the case within the provisions of Order 38, Rule 5. That Rule provides that, "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 the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree or to appear and show cause why he should not furnish security."

6. I turn now to the evidence in support of the application which was before the learned Subordinate Judge. The affidavit in which that evidence was contained reads thus: "I solemnly affirm as follows:--That with a dishonest motive and with a view to deprive the plaintiffs of their dues as well as to obstruct the realization of the decree that may be passed in favour of the plaintiffs the defendants want to dispose of their properties specified in the petition. That in case the properties are disposed of there will be considerable difficulty in realizing the decretal amount, rather the realization would be impossible. An attachment before judgment of the defendants' properties is, therefore, necessary."

7. That was the whole of the evidence on behalf of the plaintiffs before the learned Subordinate Judge when he had to come to a conclusion whether he should grant an order for attachment before judgment or not. The defendants, on the other hand, put in a petition, verified by an affidavit, in which they stated that it was absolutely untrue that they had any intention of disposing of any

portion of their family property, that is to say, property which it was sought to attach, and that the statement to the contrary made in the affidavit of Har Kishen Das was absolutely malicious. Let us see how the learned Judge dealt with the matter. His judgment is short and it is to this effect. "The learned Counsel for the defendant in support of his petition objects to furnishing security" or to attachment of the properties mainly on the ground that there is no intention on the part of the defendant to alienate any portion of the property sought to remain under attachment. This explanation, however, is not sufficient. The main object of the Rule aforesaid is to enable the plaintiff to realise the amount of the decree in the event of his obtaining a decree in the suit. The plaintiffs took for a decree of about 14 lacs of rupees in the suit. It is to be a money-decree. On behalf of the defendants it is not made out how this decree can be realised if steps are not taken to keep the defendants property under attachment as contemplated by the above rule." The above Rule is Order 38, Rule 5, which is stated at the head of the order. "Nor is it attempted to be shown how the defendant will be prejudiced if his properties remain under attachment when there is no intention on his part to alienate the properties. In this view of the case the Rule issued on the defendant will be confirmed and the properties will remain under attachment pendente lite."

8. With great respect to the learned Subordinate Judge, it seems to me that he entirely misapprehended the scope and effect of Order 38, Rule 5. The power given to the Court to attach a defendant's property before judgment was never meant to be exercised lightly or without clear proof of the existence of the mischief aimed at in the rule. To attach a defendant's property before his liability has been established by a decree may have the effect of seriously embarrassing him in the conduct of his defence, as the properties could not be alienated even for the purpose of putting him in funds for defending the suit which may eventually prove to have been entirely devoid of merit. Such a power is only given when the Court is satisfied, not only that the defendant is only about to dispose of his property or to remove it from the jurisdiction of the Court, but also that his object in so doing is to obstruct or delay the execution of any decree that may be passed against him and so deprive the plaintiff, if successful, of the fruits of victory. In the present case the learned Subordinate Judge has not stated that he does not believe the defendants when they say that they have no intention of alienating any portion of their property under attachment. All he says is that this explanation is not sufficient. It seems to me that once you accept the view that the defendants have no intention of alienating their property there is no longer any power in the Court to grant an order for attachment before judgment, because in such a case it is quite obvious that the conditions of Order 38, Rule 5, which require the Court to be satisfied that the defendants are about to dispose of their property with intent to obstruct or delay the execution of any decree that may be passed against them have not been fulfilled. But the learned Judge goes on and gives as a reason for passing the order in question, that it is not made out by the defendants how the decree can be realised if steps are not taken to

keep the defendant's property under attachment and, further that no attempt has been made to show how the defendants will be prejudiced if their property did remain under attachment, when, as they say, there was no intention of parting with it. It was only in this view of the case that the learned Subordinate Judge passed the order. It is perfectly clear that the reasons given by the learned Subordinate Judge for ordering the attachment cannot stand. We might, if we thought fit, refer the case back to him again with certain directions as to the scope and meaning of Order 38, Rule 5; but the evidence is before us and we are competent as a Court of First Appeal to deal with the question raised. To my mind in a matter of this sort the affidavit put forward on behalf of the plaintiffs, contradicted as it is by the defendants, is entirely insufficient to satisfy any Court that the defendants are about to dispose of their property or remove it out; of the local limits of the jurisdiction of the Court with intent to obstruct or delay the execution of any decree that may be passed against them. The affidavit is couched in the most; vague and general terms. The deponent says that with a dishonest motive the defendants want to dispose of their property, and then says that in case the properties are disposed of there will be considerable difficulty in realising the decretal amount. That is all. No particulars of any sort are given as to the defendants having attempted to alienate their property on any occasion, and it is not suggested that anything took place which would lead one to suspect that the defendants had any intention of removing their property from the jurisdiction or putting it out of the power of the Court. Not a word is said as to how the deponent came by his knowledge of the facts which he affirms, and as evidence the affidavit when contradicted appears to me to be practically worthless. The property attached in this case is said to be valued at something like eight lakhs of rupees: in fact, it is the whole of the Immovable property of the defendants, whereas the plaintiff's claim is only for something under a lakh and-a-half of rupees. This in itself is to my mind a matter which raises some suspicion as to the bona fides of the plaintiffs in the matter, and is a consideration which ought to lead the Court to scrutinise somewhat carefully the evidence upon which the application is based. The defendants, on the other hand, have repudiated entirely any intention of alienating their property or removing it out of the jurisdiction of the Court. The learned Subordinate Judge does not appear to have disbelieved them; but even, assuming that they had no such intention, he has nevertheless ordered the property to be attached. The evidence in the present case entirely fails to satisfy me that any case has been made out for taking what after all is a very drastic step, namely, attaching the property before the plaintiffs have shown any right to succeed in the suit.

9. In my opinion this appeal should be allowed, the order of the learned Subordinate Judge set aside, and the property released from attachment.

10. The appellants are entitled to the costs of the petition before the learned Subordinate Judge and the appeal to this Court.

11. Let the record be sent down at once to the lower Court.

Kulwant Sahay, J.

12. I agree.