
(1988) 04 OHC CK 0024
In the Orissa High Court
Case No : Misc. Appeal No. 90 of 1982

Laxmidhar Behera

APPELLANT

Vs

Bansidhar Khatei

RESPONDENT

Date of Decision : 05-04-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5
Transfer of Property Act, 1882 — Section 3

Citation : AIR 1989 Ori 182

Hon'ble Judges : P.C. Misra, J

Bench : Single Bench

Advocate : R.K. Mohapatra, A.N. Mishra, K.C. Panda and B. Rautray, for the Appellant; G.S. Rath, for the Respondent

Final Decision : Allowed

Judgement

P.C. Misra, J.—This appeal is directed against the order dated 31-10-1981 passed by the Subordinate Judge, Second Court, in Miscellaneous Case No. 108 of 1980 refusing attachment before judgment under Order 38, Rule 5 of Civil Procedure Code. The facts leading to the prayer for attachment before judgment as stated by the appellant are as follows : --

2. The suit (Title Suit No. 262 of 1978) in which the prayer for attachment before judgment was made was filed by the appellant-plaintiff for dissolution of partnership and settlement of accounts of the firm "M/s. Radhakrishna Enterprise" of which defendants 2 to 4 are partners. The said partnership is alleged to have been constituted to provide funds and to execute various contract works taken in the names of the individual partners. Defendant 3 was the Managing Partner, who was authorised by the terms of the partnership and by other contemporaneous documents to withdraw money from the Government departments receivable in respect of those contracts and he was also authorised to operate the bank account standing in the name of defendant 2 and in the name of the firm. It was alleged in the plaint that certain contract works were

taken in the names of defendant 2 and was financed and executed by the partnership firm. The plaintiffs case is that according to the terms agreed to between the parties, the benefits arising out of the said contract works should accrue to the partnership firm and not to any individual partner or to defendant 2 in whose name the work was taken. The aforesaid arrangement amongst the partners is said to have been accepted by the Government, Some disputes arose as to the finalisation of the claims arising out of the aforesaid contract works taken in the name of defendant 2 and executed by the partnership firm and the same was referred to arbitration. Awards for Rs. 2,27,458/- were passed by the Arbitrator in favour of defendant 2, who is a person in whose name the contract work was taken though the plaintiff claims the said amount as one of the assets of the partnership firm. A prayer was accordingly made in the suit for a declaration that the awards passed in those arbitration cases are due to the partnership firm and not to defendant 2 individually. The plaintiff-appellant filed a petition under Order 39, Rule 1, C.P.C. for restraining the present respondent-defendant" 2 and defendant 3 from receiving any money under the awards and directing defendant 5, to deposit the said amount in court. On 8-9-1978 the Court passed an order directing the parties to maintain the status quo till 12-9-1978. On 12-9-78 the status quo order was continued until further orders. Later on the court after hearing the parties vacated the status quo order on 29-11-78. Immediately thereafter defendant 2, in whose name the award stood, withdrew the awarded amount in order to deprive the partnership firm. The plaintiff thereafter filed an application under Order 38, Rule 5, C.P.C. for attachment of the money payable to the firm-defendant 1 in respect of works, mentioned in Schedule "B" appended to the said application alleging that defendant 2 is about to leave the jurisdiction of the court and may go to Calcutta to avoid execution of any decree that may be passed against him with the intention to defraud and delay the same. By order dated 28-3-1980 the Subordinate Judge, Cuttack after hearing both parties passed an order directing defendant 2 to furnish security to the extent of the claim amount i.e. Rs. 2,27,458/- by 7-4-1980 failing which the attachment order would become absolute. Defendant 2 challenged the said order in CR. No. 270/80 which stood dismissed for default on 14-4-1981. Thereafter defendant 2 filed a petition for restoration and the civil revision was restored. The said civil revision was again dismissed for default on 4-8-81 and a restoration petition was again filed (M.J.C, No. 92/81) which was withdrawn on 20-11-81. In Civil Revision No. 270/80 a consent order was passed on 12-12-80, restraining defendant 2 from making any further collection out of the works described in details in Schedule "B" until further orders. Since the Civil Revision was dismissed for default and the restoration application was withdrawn, the aforesaid interim order passed by this Court in Civil Revision No. 270/80 lapsed and it is alleged that by taking advantage of the position, defendant 2 made attempts to withdraw a sum of Rs. 47,181/-, the same being the award passed in respect of the work described in Item No. 1 of attachment prior to judgment to the respective Executive Engineers in pursuance of the order of the said court dt. 28-3-80 as no security

was furnished by defendant 2 as directed. The court thereafter heard both the parties and passed the impugned order dismissing the prayer for an order of attachment before judgment on the ground that the items in Schedule "B" are neither property nor actionable claim which can be attached. The learned court held that the same are merely disputes which have been raised and are pending before the arbitrators for decision. Learned Counsel appearing for the appellant has urged in this appeal that the order of the Subordinate Judge refusing to attach the properties described in Schedule "B" of the petition is based on misconception of law as the same are "properties" or "actionable claims" within the meaning of Order 38, Rule 5, C.P.C. and are, therefore, attachable.

3. Out of the five items described in Schedule "B", item 2 relates to the work "Nimapara Branch Canal Construction of ODR bridge over Nimapara Branch Canal at RD 11M 3499" and the learned counsel for both parties submit that the award in respect of the said item has already been passed by the Arbitrator and the amount has been already withdrawn by the managing partner of the firm in accordance with the order dt. 18-12-85 passed in Misc. Appeal No. 90/82. Therefore, the prayer for attachment of this item was not pressed. Similarly the prayer for attachment before judgment in respect of item 5 was not pressed as the amount awarded has already been withdrawn by defendant 2. The only items in respect of which the prayer for attachment before judgment is made in this appeal are items Nos. 1, 3 and 4 of Schedule "B" appended to the petition under Order 38, Rule 5, C.P.C.

4. Item No. 1 in Schedule "B" relates to the work "Nimapada Branch Canal 10 M to 14M" which was taken in the name of defendant 2 and the dispute arising out of the same was referred to an arbitrator, namely, Sri Bhagabat Sahoo, Superintending Engineer. The arbitrator has already passed an award of Rs. 47,118/- which after being made a rule of the court is said to be pending in this Court in M.A. No. 316/83 for enhancement of interest. Item Nos. 3 and 4 relate to "construction of drainage syphone at R.D. 11M 2079 of Nimapada Branch Canal and Excavation of Nimapada Branch Canal" respectively. The claims arising there from are pending before the Arbitration Tribunal, The main question for consideration in this appeal is whether the aforesaid items are "property" or "actionable claims" attachable under the provisions of Order 38, Rule 5, C.P.C.

4A. Order 38, Rule 5, C.P.C. provides that where, at any stage of a suit, the Court is satisfied that the defendant is about to dispose of the whole or any part of his property, or to remove the whole or any part of his property from 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 him, it may direct the defendant 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. As already stated, the court had by order dated 28-3-1980 directed

defendant 2 to furnish security to the extent of the claim amount by 7-4-1980 failing which the attachment order would become absolute, It is an admitted fact that no security was furnished by defendant 2, and therefore, the effect would be that the order of attachment in respect of the items mentioned in Schedule "B" of the petition became absolute. By the petition dated 10-8-1981 all that the plaintiff prayed was that the court should issue an order of attachment to the respective Executive Engineers so that the amount payable under different items in Schedule "B" shall not be paid to defendant 2. The court instead of taking the follow up action pursuant to order dated 28-3-1980 entered into a discussion whether the items shown in Schedule "B" are actionable claims or property which can be attached by the court and came to a conclusion that the same are not attachable as they are neither "actionable claims" nor "property". The impugned order in effect takes away the effect of the previous order which the Subordinate Judge was not called upon to do.

5. Coming to the merits of the matter, the impugned order is not supportable. "Actionable claim" has been defined in Section 3 of the T.P. Act to mean that a claim is any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant which the Civil Courts recognise as affording grounds for relief, whether such debt or beneficial interest is to be existent, accruing, conditional or contingent. The rights and benefit under a contract are beneficial interest in movable properties which can only be enforced by an action at law. It has been so held in well discussed judgment reported in AIR 1957 Nag 31 Shah Mulji Deoji, Firm v. Union of India. Justice B.K. Mukherjee (as he then was) in the decision reported in Purna Chandra Bhowmick Vs. Barna Kumari Devi and Another, held that the claim to a debt would come within the definition of "actionable claim" as given in Section 3 of the T.P. Act. Generally speaking "property" includes any interest in the property and the Supreme Court in a decision reported in Shivnarayan Laxminarayan Joshi and Others Vs. State of Maharashtra, observed that the word "property" is wide enough to include a chose in action which the T.P. Act calls it as an "actionable claim". In another decision of the Supreme Court reported in State of Madhya Pradesh Vs. Ranojirao Shinde and Another, , their Lordships observed that it is obvious that a right to a sum of money is "property". Merely because the claims pending before the arbitrator are liable to be reduced in the award to be passed by him, or that the court would not allow enhancement of the awarded amount for which it is pending in this Court, would make no difference in the aforesaid conclusion. I, therefore, hold that Items 1, 3 and 4 of Schedule "B" are actionable claims and are available to be attached.

6. Learned counsel appearing for the respondent has not cited any decision expressing a view different from what has been discussed above. He merely relied on a decision of this Court reported in Tatanagar Transport Corporation and Others Vs. Ajanta Enterprisers and Another, where the pre-conditions and the

legislative guidelines for exercise of the powers under Order 38. Rule 5 has been discussed. The conduct of defendant 2 in withdrawing the amount for the work mentioned in Item No. 5 of Schedule "B" and the facts leading to the litigation between the parties reveal a mala fide intention on his part to obstruct or delay the execution of the decree which may eventually be passed against him. As already stated the court had practically allowed the application under Order 38, Rule 5, C.P.C. by its order dt/- 28-3-1980 giving an option to defendant 2 to furnish security for the claim amount with which he did never comply. In the circumstances, I feel satisfied that the ingredients necessary for issue of an order of attachment before judgment do exist. For the aforesaid reasons. I do not feel the necessity of probing any further and deal with various other facts which have been placed during the course of argument by the learned counsel for the appellant to show the conduct of defendant 2 in various litigations including the proceedings which arose out of the arbitration cases.

7. In the result. I would allow this appeal and direct that the order of attachment be issued in respect of Items 1. 3 and 4 of Schedule "B" appended to the petition under Order 38. Rule 5. C.P.C. I do not however, feel inclined to pass any order as to costs of this Court.