

(1954) 05 PAT CK 0002
In the Patna High Court
Case No : A.F.O.O. No. 5 of 1950

Mohammad Ali Ismail and Another	Vs	APPELLANT
Baldeo Singh		RESPONDENT

Date of Decision : 05-05-1954

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5, Order 38 Rule 6

Citation : AIR 1955 Patna 115 : (1954) 2 BLJR 441

Hon'ble Judges : Sinha, J;Banerji, J

Bench : Division Bench

Advocate : S. Sarwar Ali, for the Appellant; S.P. Srivastava, for the Respondent

Final Decision : Dismissed

Judgement

Sinha, J.—This appeal is by defendants to a suit for recovery of a certain sum of money on the basis of several handnotes. The handnotes were executed by defendant No. 1; defendant No. 2 is his brother and defendant No. 3 is his mother. After the institution of the suit, the plaintiff filed an application under Order 38, Rule 5, Order 39, Rule 1 and Section 151 Civil P. C., and the prayer was that

"a rule be issued against the defendants to show cause why they would not furnish security to the extent of the plaintiff's principal claim and costs in all approximating to Rs. 17,000/- and in the meantime they be restrained from disposing of the properties sought to be attached in any way and ad interim order for attachment before judgment be also passed and on the defendants' failure to show cause or to furnish sufficient securities, the order aforesaid be made absolute....."

This application was made on 14-11-1949. Notices were issued to these defendants, and the order-sheet of 14-11-1949, records the following order :

"Plaintiff files a petition supported by an affidavit under Order 38, Rule 5 and Order 39, Rule 1, C. P. C., and u/s 151, C.P.C., praying that a notice be issued

against the defendants to show cause why they would not furnish security to the extent of principal claims and costs in all approximately to Rs. 17000/- and in the meantime they may be restrained from disposing of the properties sought to be attached in any way and ad interim order for attachment before judgment be also passed and on failure to furnish sufficient "securities the order for attachment before judgment be made absolute as the defendants are negotiating with one Dhanulal of Mahalla Belwarganj P.S. Alamganj, Patna, to sell the properties with him.

Order : Issue notice to show cause in one week of its receipt as to why attachment should not be issued. Also issue ad interim attachment."

Defendant No. 1 did not show cause, but defendants 2 and 3 filed an application showing cause to the effect that they were not liable because it was defendant No. 1 alone who had executed the handnotes in question and if anybody was liable on the allegations made in the plaint it was defendant No. 1 and nobody else. Then a reference was made in paragraph 6 of the objection petition to the petition filed by the plaintiff under Order 38, Rule 5, and it was submitted that the property of these defendants should not be attached as there was no "prima facie" case against these defendants; and the prayer was that the property of these defendants to the extent of their specific shares, namely, nine annas, be released from attachment. This application was made on 15-12-1949. On 21-12-1949, the order of attachment was made absolute against all these defendants until the final disposal of the suit.

2. These defendants 2 and 3 are the appellants before us, and the point taken is that, as there was no compliance with the provisions of Order 38, Rule 5, the final order under Rule 6 is illegal and liable to be set aside. Order 38, Rule 5, enjoins upon the Court to direct the defendant, within a time 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".

Clause (3) of Rule 5 empowers the Court to direct conditional attachment of the whole or any portion of the property so specified. It is therefore, clear that, under Rule 5, when an application is made for attachment before judgment, the Court has (1) either to direct furnishing of security within the time fixed by it or (2) to ask the defendant to appear and show cause why he should not furnish security. Rule 6 refers back to Rule 5 and says that "if the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy the decree, be attached. The order under Rule 6, therefore, is conditioned upon non-fulfilment of the obligations imposed by the Court upon the defendant under Rule 5.

3. I have mentioned in sufficient detail the prayer made by the plaintiff in his

application, the reference of that prayer in the order-sheet itself and the contents of the show cause petition. The question is whether the non-fulfilment of the procedure prescribed under Rule 5 made the order of attachment illegal and invalid; In my opinion, though the conditions mentioned in Rule 5 were not, in letter, complied with by the Court, there was sufficient compliance in spirit by reference of the facts stated in the prayer portion of the application of the plaintiff in the order issuing notice. Non-fulfilment of Rule 5, therefore, was a mere irregularity. When the defendants appeared and showed cause, if they had been prejudiced by the Court not strictly following the conditions laid down in Rule 5, they could have drawn the attention of the Court to the omission made by it; but there is absolutely no reference to any prejudice caused to them or to the omission made by the Court in regard to the compliance with the provisions of Rule 5.

4. Mr. Sarwar Ali, on behalf of the appellants, has referred to the case of -- "Abdul Karim v. Nur Mohammad AIR 1920 Cal 526 . What happened there was that on the date the suit was brought an application for attachment before judgment, under Order 38, Rule 5, Civil P. C., was made. The Court directed notice to show cause on or before the date of hearing why the property mentioned in the petition should not be attached and, in the meantime, the property was attached conditionally. No cause was shown and no other order was passed during the pendency of the suit which was decreed on 22-9-1915. During the pendency of the application for execution of the decree, a prayer was made on behalf of the decree-holder that the order, of conditional attachment should be made final.

The only question raised was whether the attachment order passed on 7-4-1914, the date when the application for attachment before judgment was made, was still subsisting. There was a finding of fact in that case that no notice to show cause was issued when the order of attachment was made and, on the peculiar facts appearing in that case, it was held that the order was wrong in form because Rule 5 empowered the Court to ask the defendant either to furnish security or to appear and show cause why he should not furnish security. It was said that until the defendant had failed to furnish security, he should not be called upon to show cause against the order of attachment. It was further observed that

"no order of attachment under Rule 6 should have been passed because such an order cannot be passed until after the defendant has either failed to show cause why he should not furnish security or has failed to furnish security. This the defendant had no opportunity of doing".

That case, in my opinion, has no bearing on the facts of the present case.

Sourendra Nath Mitra and Another Vs. Sreemati Tarubala Dasi, also is not" of much use in the present case because the question at issue here was not at issue in that case and there was compliance with the provisions of Rule 5

inasmuch as when the application for attachment before judgment was made the Court ordered the defendants to furnish security to the extent of the amount claimed in the suit or to show cause why they should not furnish security on or before the date mentioned, and also passed an interim order for conditional attachment in respect of the said properties.

In the case of -- "Nathu Mal v. Kishori Lal AIR 1914 All 511 the question about the validity of the attachment came to be heard on appeal in the High Court after the suit had terminated, and it was conceded that it was not a matter of much importance to anyone whether the appeal succeeded or not. Their Lordships, however, went on to observe that the order passed under Order 38, Rule 6, was irregular inasmuch as the Court should have begun under Order 38, Rule 5

"by issuing the necessary notice to the defendant ,Nathumal, and the conditional attachment permissible under that rule is one to take effect only until the defendant, to whom notice has been issued, either furnishes the required security or appears to show cause. The order under appeal seems to have been really passed under Rule 6, Order 38; but the conditions necessary for the application of the rule were not fulfilled, as the attachment was made before Nathumal had been ordered to furnish security."

Their Lordships held that, in the circumstances, the order was irregular and objectionable and the order was set aside. This case, therefore, is an authority for the proposition that if the conditions necessary, as mentioned in Rule 5, are not fulfilled, the order under Rule 6 is an irregular order.

5. In the case of -- Badri Prasad Jhunhunwalla Vs. Babulal Jhunhunwalla and Others, it was held that an order for attachment passed without complying with Rule 5 and 6 is both irregular and objectionable, but such an order was not necessarily "ultra vires" or void "ab initio". In this case, though the order was set aside, their Lordships maintained the conditional order of attachment and sent back the case to the Court which levied the attachment to go into the question after issuing notice in accordance with the rules. The suit in which the attachment before judgment was made was till then pending. In the present case, the suit has been decreed and execution of the decree is proceeding. It is true that in this case the order was set aside, but their Lordships made it clear that the order was not "ab initio" void or "ultra vires", and they continued the conditional order of attachment as passed by the first Court following the authority in -- District Board Vs. Baijnath Prasad, . In the latter case also the provisions of R, 5 were not complied with and their Lordships held, following the authority of AIR 1914 All 511 already mentioned, that non-compliance with the provisions of that rule amounted to irregularity but their Lordships said that it did not follow that the order was wholly "ultra vires" or void "ab initio", although they set aside the order and continued the conditional attachment of the property and sent the case back for proceeding in accordance with law.

6. All these authorities show that orders under Rule 6 of Order 38, before

complying with the provisions of Rule 5, are irregular and objectionable and they are not necessarily "ultra vires" or "ab initio" void. The question, however, is, if there be non-compliance with the provisions of Rule 5, the order under Rule 6 should necessarily be set aside. It has been seen that the prayer of the plaintiff under Order 38, Rule 5, as mentioned in his application, was substantially complied in the order itself and, after having quoted that prayer in the order, the defendants were asked to show cause. The defendants, when they showed cause, took no objection to the attachment on the ground that the provisions of Rule 5 had not been fulfilled. If they felt prejudiced by non-compliance with the provisions of Rule 5, they could have very well told the Court to give them an opportunity, after necessary orders were passed under Rule 5, to be heard and to show cause. They did not do anything of the kind. In my opinion, the irregularity committed by the Court below in not complying with the provisions of Rule 5 must be taken to have been waived by the defendants.

In *Amulya Ratan Vs. Prosad Chandra Kar*, an application for attachment before judgment was made; the Court demanded and took from the defendants security not for the production of the things sought to be attached but for the prospective decretal amount, and it was held that the taking of such a security though irregular, was not a nullity, and his Lordships observed that, it could be said that the Court in demanding the security for the prospective decretal amount

"may have acted at most in an irregular manner in the exercise of its jurisdiction. In that view of the matter the remedy of the defendants was to point out to the Court the irregularity in the notice..... and if the Court still insisted on the said security, to proceed to a higher tribunal....."

It is often difficult to draw a line between "illegality" and "irregularity" but it must be held that, broadly speaking, the test is whether the party can waive the objection. If he can waive it, the failure to comply with the provision of law will be mere irregularity; if he cannot, it would be a nullity and illegal. So it was held in the case of -- "*Holmes v. Russell* (1841) 9 DPC 487 by Mr. Justice Coleridge. He said;

"It is difficult sometimes to distinguish between an irregularity and a nullity; but the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity: if he cannot, it is a nullity."

In the present case, there is no inherent want of jurisdiction; the only thing is that, in exercising the jurisdiction, the Court has acted in an irregular manner. *Mookerjee, J.*, in the Full Bench case of -- "*Ashutosh Sikdar v. Behari Lal* 35 Cal 61 has said:

"But these principles have no application where the Court possesses inherent jurisdiction over the subject-matter, and merely assumes or exercises that jurisdiction in an irregular or illegal manner; the objection in such a case may be waived & may, in general be assumed to be waived, when not taken at the time

the, exercise of jurisdiction is first claimed to the knowledge of the party affected."

To the similar effect is the observation of the Privy Council in -- "Pisani v. Att. Gen. Gibraltar (1874) LR 5 PC 516. It was pointed out by their Lordships that where there was jurisdiction over the subject-matter but non-compliance with the procedure prescribed as essential for the exercise of the jurisdiction, the defect might be waived. I am, therefore, of the opinion that the irregularity committed by the Court below must be assumed to have been waived by the the defendants and, therefore, the order passed under Rule 6 of Order 38, Civil P.C., should not be set aside on appeal.

7. It should, however, be borne in mind that the Courts must adhere to the provisions laid down in the statute, and the Court below, in the present case, should have looked at the provisions before passing the order that it did. It is always necessary and prudent to couch the language of an order in the same terms as are provided for in a particular statute.

8. In the result, the appeal fails and is dismissed with costs.

Banerji, J.

9. I agree.