

(2000) 09 OHC CK 0025
In the Orissa High Court
Case No : Misc. Appeal No. 524 of 2000

Sk. Sahid	Vs	APPELLANT
Smt. Tehera Husna		RESPONDENT

Date of Decision : 28-09-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5, Order 38 Rule 5(1), Order 38 Rule 5(3), Order 38 Rule 5(4), Order 38 Rule 6

Citation : AIR 2001 Ori 6 : (2001) 91 CLT 166 : (2000) 2 OLR 593

Hon'ble Judges : B.P. Das, J

Bench : Single Bench

Advocate : M/s D.P. Dhal, D.K. Das and B.B. Misra, for the Appellant; M/s S.P. Mishra, S.K. Misra, S. Mishra and S. Dutt, for the Respondent

Judgement

B.P. Das, J.—This Miscellaneous appeal is directed against an order dated 10-8-2000 passed by the learned Civil judge (Senior Division),

Balasore on an application filed under Order 39, Rule 6 of the CPC (herein after referred to as ""C. P. C.""), registered as Misc. Case No. 453 of

2000 arising out of Money Suit No 35 of 2000.

2 The brief fact leading to this appeal as stated by the learned counsel for the appellant was that an application under Order 38. Rule 5. C. P. C.

was filed by the present respondent who as plaintiff filed a suit in the court below for recovery of an amount of Rs. 6,50,000/- from the present

appellant who was the defendant in the said suit. According to the appellant the order of conditional attachment passed by the learned Civil Judge

is illegal and contrary to the provisions of Order 38, Rule 5, sub-Rule (4), C. P. C..

3. The case of the plaintiff-respondent, is that in pursuance of an agreement dated 17-12-1997 the defendant-appellant took a loan of Rs.

5,00,000/- from her promising to repay the same within two years. Further it was agreed that in the event the defendant-appellant would fail to repay the money within two years in terms of the agreement, the respondent would attach the trawler by the process of law, and at the same time the appellant also agreed to supply all the spoils from the sea to the respondent and the respondent would also be entitled to take 10% commission from the total sale amount of the fish. Accordingly, the money advanced by the present respondent was invested in the fishing business and the appellant procured fish by his trawler namely ""Sona Boat"". The allegation of the respondent is that the appellant violated the terms of the agreement and after repeated demands, he delivered two cheques drawn on the Union Bank of India, Balasore in favour of the plaintiff-respondent for an amount of Rs. 2,50,000/- each towards the loan amount but the said cheques were returned by the banker as there was no balance in the account of the present appellant. When the respondent failed to get back the money, after taking all possible steps, she had no other way out than to take legal course and accordingly filed the suit for recovery of the said amount as aforesaid. The respondent came to know from reliable source that the present appellant is going to sell away his trawler, the cost of which would be around Rs. 10,00,000/-, solely with a motive to obstruct or delay the execution of any decree that might be passed against him. In order to protect herself, the respondent filed an application under Order 38, Rule 5, C. P. C. of which notice was issued directing the present appellant to appear before the court on the date fixed and to furnish security to the tune of Rs. 6,50,000/-and to produce the trawler at the time, dated and place to be directed by the Court when required or to furnish security towards the value of the same or such portion thereof as may be sufficient to satisfy the decree. While issuing notice to show cause, the learned Civil Judge (Senior Division), Balasore also passed order of conditional attachment of the trawler in question. Accordingly, he directed attachment of the entire trawler with all its accessories if the present appellant fails to pay the amount of Rs. 6,50,000/-. Along with the conditional order of attachment, the learned Civil Judge also directed the police authorities to render all necessary police help to the bailiff and the Zimadar for attachment and custody of the trawler in question.

4. Learned counsel for the appellant submits that an application was filed by him to stay the order of attachment on 28-7-2000 and thereafter on

31-7-2000 another application was filed to vacate the order of attachment along with his show cause and counter. The learned Civil Judge (Senior

Division), Balasore after perusal of the same and on hearing both sides ultimately came to the conclusion that, prima facie, the defendant failed to

establish his objection to the order of attachment and accordingly rejected the application for vacation of the order of attachment. As the defendant

did not furnish security or deposit the said amount, the learned Civil Judge directed continuance of the order of attachment subject to the final

judgment that may be passed in the suit.

5. The appellant in this appeal challenges the order of attachment on the following grounds :

(i) The order passed by the learned Civil Judge (Sr. Division), Balasore is not maintainable in law because he could not have issued show cause

and passed an order of conditional attachment under Order 38, Rule 5(3), C. P. C. .

(ii) The course open for the court was to issue a notice under Order 28 Rule 5(1) and only when the defendant failed to show cause within the time

so fixed or failed to furnish security, "then only the recourse to Order 38, Rule 5, sub-Rule (3), C. P. C. could have been taken.

(iii) The order so passed is contrary to Order 38, Rule (5), Sub-Rule (4), C. P. C.,

In other words, the submission of the learned counsel for the appellant is that the conditional, order of attachment as passed under Order 38, Rule,

5, Sub-Rule (3), C. P. C. is void in view of the fact that Sub-Rule (4) of Rule 5 of Order 38 speaks that the attachment order made without

complying with Sub-Rule (1) of the said Rule is void. Hence, according to the appellant, the order has been passed by the learned Civil Judge

(Senior Division) in a mechanical manner and the same cannot be maintained. It is further submitted that the respondent has not disclosed from

which source she could know that the defendant is going to sell the property or to whom he has contacted to sell the property as alleged. As per

the appellant, the apprehension is totally baseless and Order 38, Rule, 5, C P. C. being a protective provision cannot be utilised in a punitive

manner as has been done in the present case. According to the learned counsel

for the appellant there was nothing before the learned Civil Judge to satisfy the conditions so laid down under Order 38, Rule 5, C. P. C. so as to issue show cause as well as simultaneous order of conditional attachment.

6. In this regard, the learned counsel for the appellant draws my attention to a decision of this Court reported in Smt. Kamala Panda Vs. Krishna

Cloth Stores and Another, . Relying upon the aforesaid decision, the learned counsel for the appellant strenuously argues that an order under

Order 38, Rules 5 and 6, C, P. C. is a grossly drastic one, interfering with the fundamental rights of a person to have control over his property to

deal with it in any manner he likes. Before such a stringent order is passed, it is to be seen that the same is not made merely for the asking of it by

the plaintiff. Hence, as it appears from the present fact and circumstances of the case and as submitted by the learned counsel for the appellant, the

learned Civil Judge should have discharged or vacated the order so passed at the first instance because the appellant has already appeared and

filed his show cause and there is no material before the trial court to come to a conclusion that the appellant with an intent to obstruct or delay the

execution of the decree that may be passed against him is about to dispose of the whole or any part of his property. In the aforesaid decision

reported in Smt. Kamala Panda Vs. Krishna Cloth Stores and Another, the fact was that a petition was filed under Order 38, Rule 5, C. P. C.

with a prayer to attach the house of the defendant and the learned Subordinate Judge passed order to issue notice against the defendant to show

cause as to why the scheduled property as shown in the petition should not be attached. The postal A. D. showing the notice to have been refused

by the defendant led the Subordinate Judge to accept the notice as sufficient and post the matter to a particular date for orders after hearing the

petition. But before the order pronounced, the defendant entered appearance in the case and filed a petition to rehear the case stating that she had

not received any notice in that case, which was rejected and thereafter an order was passed allowing the petition under Order 38, Rule 5, C. P. C.

and directing issue of order of attachment of the property. Subsequently defendant also filed an application under Order 38, Rule 5(4) read with

sections 114 and 151. C.P.C., praying therein to recall the order so passed as the

same was void, but that application was also rejected. Against that order, the defendant filed a civil revision. The facts of the above case so referred in Smt. Kamala Panda Vs. Krishna Cloth Stores and Another, are totally different from that of the present case, where a conditional order of attachment was passed while issuing notice under Order 38, Rule 5, C. P. C. .

7. For better appreciation, it is profitable to quote Order 38, Rule 5, C. P. C. .

Rule 5.--""Where defendant may be called to furnish security for production of property-

(1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, 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 for 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, it in 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.

(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.

8. The provision as indicated above would go to show that the Court after satisfying itself that an order under Order 38, Rule 5, C. P. C. is

necessary to protect the plaintiff under sub-rule (1), it shall either to call upon the defendant to furnish security in respect of specific sum to produce

and place at its disposal when required, the property specified by the plaintiff in his petition or such portion of it as may be sufficient to satisfy the

decree or to call upon him to show cause as to why he should not furnish such security and while passing such an order the Court may also pass

the conditional order of attachment as provided under sub-rule (3) of Rule 5 of Order 38. The amending provision of sub-rule (4) of Rule 5 came into force in the year 1976 which contemplates that unless the provision under sub-rule (1) of Rule 5 of Order 38, has been complied with the order of attachment is void. The learned counsel for appellant submits that as per the decision so cited, under sub-rule (3) of Rule 5 of Order 38, the conditional order of attachment can only be passed if the pre-condition as provided under sub-rule (1), calling upon the defendant either to furnish security or show cause why such security should not be furnished is complied with. The learned counsel further submits that Order 38, Rule 5 does not contemplate the passing of final order of attachment but leaves it to Rule 6 under which provides that where the defendant fails to show cause why he should not furnish security or fails to furnish the security as required by the Court, the Court may order that the property specified or such portion thereof as appears sufficient to satisfy any decree, which may be passed in the suit, be attached.

On perusal of the aforesaid decision of this Court, I find that the facts of this case are totally different wherein order was passed by the learned Civil Judge directing the defendant to show cause as to why the property should not be attached. But in that case no notice was issued calling upon the defendant either to furnish security so also no conditional order of attachment was passed by the court, but while issuing notice, the final order of attachment was passed. The facts and circumstances of the decision so cited are not applicable to the facts and circumstances of the present case where there was notice to show cause issued along with the order of conditional attachment. It was held by several judicial pronouncements that the sole object behind the attachment before the judgment is to give assurance to the plaintiff that if the decree is made, the same shall not become infructuous for want of property from which the decree can be satisfied. Before issuing a notice under Order 38, Rule 5(1), the Court should be satisfied by an affidavit or otherwise that the defendant has an intention to obstruct or delay the execution of the decree by disposing of the property to frustrate the decree which ultimately may be passed against him. The question now arises whether in the present facts and circumstances of the case the Civil Judge (Senior Division). Balasore is justified in issuing the show cause notice and passing a simultaneous order

of conditional attachment as contemplated under sub-rule (3) of Rule 5 of Order 38, C. P. C., more specifically in view of a rider under sub-rule

(4). In the decision of this Court reported in 64 1987 CLT 540 (Sri Bijay Kumar Agarwalla and another v. Ramakanta Das), it was held that the

lower court retains its jurisdiction to consider and pass orders in matters which are collateral or which may be protective. But according to Mr. S.

P. Mishra, learned counsel for the respondent, the question giving rise to this appeal was not before this Court while deciding the case of Bijaya

Kumar Agarwalla and another v. Ramakanta Das (supra). Hence, it needs to be examined.

9. Admittedly, the passing of final order of attachment is provided under Order 38, Rule 6, C. P. C. where the defendant fails to show cause or

fails to furnish security as required within the time so fixed by the Court. The provision under Order 38, Rule 5, C.P.C. is a protection to the

plaintiff against a recalcitrant defendant, who with an ill motive tries to dispose of the property to defraud the plaintiff and to defeat the decree of

the Court. Sub-rule (4) of Rule 5 of Order 38 C.P.C. is a provision to protect the defendant from the abuse of power of the Court by giving rider

on the Court not to pass order of attachment as contemplated under sub-rule (3) of the said Rule without complying with the mandate of sub-rule

(1).

10. Let me examine whether, in the facts and circumstances of the case and looking into the provisions of Order 38, Rules 5 and 6, simultaneous

order, i. e., issuance of show cause notice and issuance of conditional order of attachment as provided under sub-rule (3), can be passed.

My attention was drawn to a decision reported in AIR 1984 Mad 70 (N. Papammal v. L. Chidambaram), wherein the Madras High Court dealing

with a similar question held that if any attachment is effected with-out complying with the provisions of sub-rule (1) such attachment is void. A

question was raised before that court that there was no power of the Court to order a conditional attachment without giving notice to the defendant

and giving him an opportunity to furnish security or to produce and place at the disposal of the Court such property or portion thereof as may be

specified in the order and sufficient to satisfy the decree or to show cause why the defendant should not furnish the security.

11. In this case a similar question is also raised by Mr. Dhal, learned counsel appearing for the appellant and the argument advanced is that unless a notice under Order 38, Rule 5(1) is issued and unless a chance is given to the defendant to file his show cause, the conditional order of attachment cannot be passed. In my view, this argument is falacious because of the simple reason that the provision of Order 38, Rule 5 is a protective measure to protect the interest of the plaintiff and if the contention of Mr. Dhal is accepted, then only the order of conditional attachment under, sub-rule (3) can be passed after issuance of show cause. Hence, it may so happen that by the time the notice is served on the defendant and he comes upon the Court to appear, the defendant may have disposed of the property which would ultimately bring irreparable loss to the plaintiff and the plaintiff would be deprived of getting the fruits of the decree. This question was taken care of by the decision so rendered by the Madras High Court in N. Pappammal's case (supra) wherein it was held :

That is why the power to direct a conditional attachment of the whole or any portion of the property is also made available under Order 38, Rule 5(3), C. P. C. which can be exercised by the Court while passing an order under Order 38, Rule 5(1), C. P. C.. It is easy to perceive the spirit and the object behind Order 38, Rule 5(1) and Order 38, Rule 5(3), C. P. C. In an application for attachment before judgment the Court, if satisfied that the requirements of Order 38, Rule 5(1), C. P. C. have been made out, may issue a notice to the defendant in appropriate form conforming to the requirements of Order 38, Rule 5(1), C. P. C. for all or any of the purposes mentioned therein and at the same time direct a conditional attachment of the whole or any part of the property under Order 38, Rule 5(3), C. P. C.

Thus this is an arrangement made during the interregnum period between filing of the application for an order of attachment and service of notice on the defendant. So the conditional order of attachment is not an absolute attachment. This order of conditional attachment would be operative during the intervening time, i.e., between issuance of notice and appearance of the defendant. So the provision under Order 38, Rule 5, sub-rule (4), C. P. C. which was inserted in the C. P. C. with effect from 1-2-1977 by way of amendment, is intended for the protection of the person

whose property is sought to be attached before judgment, i e., a protection to the defendant against the order of attachment passed against him

denying any opportunity of preventing the attachment by offer of security. So there is nothing to disagree with the contention of Mr. S. P. Mishra,

learned counsel for the plaintiff-respondent, that the provision under Order 38, Rule 5, sub-rule (4), C. P. C. is to protect the interest of the

defendant, so that no order of attachment can be passed without complying with the provisions under Order 38. Rule 5, sub-rule (1), C. P. C., but

at the same time to proceed the interest of the plaintiff an order under Order 38, Rule 5, sub-rule (3) can be passed along with issuance of notice

under Order 38, Rule 5, sub-rule (1), C, P. C., other wise the intention and spirit of Order 38, Rule 5 would be defeated and thereby issuance of

simultaneous order of conditional attachment along with notice under Order 38, Rule 5, sub-rule (1) passed by the learned Civil Judge cannot be

faulted with.

12. Now the question arises as to whether there was material before the learned Civil Judge satisfying the preconditions of Order 38, Rule 5 so as

to issue a show cause and to issue a simultaneous order of attachment. According to the learned counsel for the appellant there was no material

before the learned Civil Judge to issue such a show cause far less an order of conditional attachment. It was stated that the appellant was served

with a copy of the order of attachment dated 26-7-2000 and it was not possible on the part of the appellant to peruse the document, more

specifically the agreement and the documents which were relied upon by the plaintiff, as the same were kept in a sealed cover by the civil court on

the prayer of the respondent, for which the appellant filed written statement without going through the same, According to the appellant, he was not

given opportunity to file a properly, constituted show cause as he had no access to the document so relied upon by the plaintiff-respondent. That

apart, the learned counsel for the appellant submits that the present appellant is the sole proprietor of M/s. G. P. Aqua Farm, the approximate

value of which would be Rs. 30,00,000/- and the respondent can very well in the extent of her success, realise the amount of the "A" Schedule

property of the plaintiff and the allegation of the respondent to the extent that the present appellant is trying to dispose of the "B" schedule property

(trawler) and shift the same from out of the jurisdiction of the trial court, to avoid execution of decree is based on no document. Statement on oath

could not have been accepted by the learned trial court basing on which the conditional order of attachment has been passed. The learned counsel

further submits that there is no plan to shift the trawler in question beyond the local limits of the Court and the averment is totally misleading, in view

of the fact that the appellant has immovable property worth Rs. 10,00,000/- in Balasore town. The learned counsel for the respondents states that

in an affidavit filed before the trial court, the respondent disclosed regarding the fact of return of the cheques due to want of cash in the account of

the appellant. In the affidavit the respondent also stated that the defendant is trying to dispose of the trawler and/or trying to take away the same

from the local limits of the jurisdiction of the Court in order to frustrate the execution of any decree that may be passed in the suit against him. The

provisions of Order 38, Rule 5, C. P. C. are very clear that the Court is to be satisfied by an affidavit or otherwise that the defendant with an

intention to obstruct or delay the execution of any decree that may be passed against him is about to dispose of the whole or any part of the

property or is about to remove the whole or any part of the property from the local limits of the jurisdiction of the Court. Therefore, according to

the learned counsel for the respondent the respondent has Sled certain documents in support of her case to make out a case which fulfils the

preconditions of Order 38 Rule 5, C. P. C. . In this regard reliance may be placed on a decision rendered by the Calcutta High Court, reported in

Premraj Mundra Vs. Md. Maneck Gazi and Others, wherein the said Court indicated fourteen guidelines to be applied to the facts and

circumstances of the case and to find out the case for attachment that has been made by the plaintiff. Guidelines 1 to 5 are quoted below for better

appreciation :

1 That an order under Order 38, Rules 5 & 6 can only be issued, if circumstances exist as are stated therein.

2. Whether such circumstances exist is a question of fact that must be proved to the satisfaction of the court.

3. That the court would not be justified in issuing an order for attachment before judgment, or for security, merely because it thinks that no harm

would be done thereby or that the defendants would not be prejudiced.

4. That the affidavits in support of the contention of the applicant, must be vague and must be properly verified. Where it is affirmed true to

knowledge or information or belief, it must be stated as to which portion is true to knowledge, the source of information should be disclosed and

the grounds for belief should be stated.

5. That a mere allegation that the defendant was selling off and his properties are not sufficient. Particular must be stated.

xx xx xx

The provision contained in Order 38, Rule 5 is an extraordinary power. It should be exercised sparingly and strictly in accordance with the

procedure prescribed in the C. P. C.. Here is a case where the appellant denies that there is absolutely no intention of removing the trawler from

the local limits of the jurisdiction of the Court. Paragraph 14 of the show cause which was filed before this Court along with the note of argument

on behalf of the appellant specifically shows that the appellant has denied the allegation of the plaintiff - respondent that there was any attempt to

sell the trawler or to take away the same from the local limits of the jurisdiction of the Court but in his written argument the transaction between the

appellant and the respondent has been denied by the respondent. It further discloses that he is having property worth Rs.30,00,000/-in Balasore

town and having immovable property worth Rs.10,00,000/-also at Balasore town. On a bare reading of the finding of the learned Civil Judge, it

appears that though the affidavit and the documents have been filed by the plaintiff-responent to disclose an apprehension in the mind of the

plaintiff that the defendant has an intention to dispose of the trawler, yet there is no cogent material to indicate that the defendant is intending to

dispose of the property with a view to obstruct or delay the execution of the decree that may be passed against him. At the same time the conduct

of the appellant in issuance of the cheques without having sufficient amount in his Bank account casts a cloud of doubt which cannot be

overlooked. In my considered opinion, the allegation that the impugned order of attachment has been passed without reaching primary satisfaction

is not acceptable at present, but considering the submission of the learned counsel for the appellant that the appellant was not given an opportunity

to go through the documents so relied upon by the plaintiff. I direct that if the appellant files an application before the learned court below to that

effect, he shall be allowed to take out copies of those documents under the supervision of an officer of the Court and if a fresh show cause is filed

the learned Civil Judge shall rehear the matter and pass a fresh order in accordance with law.

In the aforesaid premises, it is directed that the order of attachment shall continue till a fresh order is passed after rehearing the parties.

The Miscellaneous Appeal is disposed of accordingly.

13. Misc. Appeal disposed of.