
(1974) 01 SHI CK 0003

In the High Court Of Himachal Pradesh

Case No : First Appeal from Order No. 13 of 1973

Sohan Singh and Company

APPELLANT

Vs

Mohd. Ishak Tyagi

RESPONDENT

Date of Decision : 02-01-1974

Acts Referred:

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

Citation : (1974) 3 ILR HP 60

Hon'ble Judges : D.B. Lal, J

Bench : Single Bench

Advocate : Sushil Malhotra, for the Appellant; D. Gupta, for the Respondent

Judgement

D.B. Lal, J.—This is an appeal directed against the order of the Senior Sub-Judge Bilaspur, in an application under Order 38 Rule 5 of the Code of Civil Procedure, whereby the amount of Rs. 19,982.65 lying in deposit with the Public Works Department of Himachal Pradesh, is attached before judgment and a direction is issued to the Executive Engineer to deposit the said amount in Court within a period of seven days from the date of the receipt of the order. The facts attending to the case are, that a civil suit is pending before the learned senior Sub-Judge, which his money suit for recovery of Rs. 13,336/- along with interest. During the pendency of the suit, on 17-10-68, an application was submitted by the Plaintiff under Order 38 Rule 5, CPC for attachment before judgment of a sum of Rs. 15,500/- said to be due to the Defendant as a result of a decree obtained by him against the P.W.D., Himachal Pradesh. The learned Senior Sub-Judge made an order on 19-11-1968 and asked the Defendant to furnish surety in the sum of Rs. 15,500/- and further directed that the said amount will be attached before judgment, till further orders of the Court. It appears, that the proceedings of attachment were not continued there after. The reason was, that a certain appeal was filed against that decree under which the Defendant was entitled to receive the amount of Rs. 15,500/- or more from the P.W.D. The result was, that attachment of the amount could not be effected and the parties

naturally left the matter at that stage. After lapse of a few years on 16-12-1972, another application was preferred by the Plaintiff for similar relief under Order 38 Rule 5 and it was stated that a decree for Rs. 19,982/- was made final in favour of the Defendant against the P.W.D. and as such the entire amount can be attached before judgment. A reference was, however, made of the previous attachment of Rs. 15,500/- and the circumstances were shown under which the said amount could not be attached. The Plaintiffs specified that Rs. 13,390/- was the principal amount and the remaining sum of Rs. 4,482.65 was part of interest payable to them. In this manner, the total amount was made in conformity with the decretal amount stated to be lying in deposit in favour of the Defendant. The impugned order has been made by the learned Senior Sub-Judge on this second application of the Plaintiff under Order 38 Rule 5. It is significant to observe that no fresh notice was issued to the Defendant and the learned Senior Sub-Judge specifically held that in view of the previous order made by him on 19-11-1968, it was not necessary to issue fresh notice to show-cause. According to him previous, decision made on 19-11-1968 supplied him the reasons for asking for a fresh order of attachment before judgment. Saying so, the impugned order of attachment before judgment was passed by the learned Senior Sub-Judge. The Defendant has felt aggrieved of this order and he has preferred this appeal.

2. The learned Counsel contended in the foremost that the order of attachment before judgment, at any rate, for the sum of Rs. 4,482.65 was without jurisdiction inasmuch as the learned trial Judge has disregarded Rules 5 and 6 of Order 38. It has to be considered that under Rule 5, the Court has to be satisfied on the question mentioned in (a) or (b) of Sub-rule (1) and if so satisfied, the Court is bound to ask the Defendant, "within a time to be fixed by it, either to furnish security in such sum as may be specified in the order, or to appear and show cause why he should not furnish security". However, if the Court is further satisfied that, merely directing the Defendant to furnish security would not meet the end of justice and that it was further necessary in the meanwhile to attach the property, the Court may proceed under Sub-rule (3) of Rule 5 which would be a conditional attachment of the property specified. Two conditions are therefore, necessary before attachment before judgment can be asked for. In the first place [the Court is to issue an order directing security to be furnished for the sum specified and in the same order it may make an attachment of the property. The learned trial Judge, apparently thought that the notice to show-cause which he had issued previously in connection with the application dated 19-11-1968 was sufficient and no fresh notice need be issued for the subsequent. attachment of the sum of Rs. 4,482.65. This was clearly a mistake, and non-compliance of Rules 5 and 6 of Order 38 decidedly vitiated the entire proceeding. It is not difficult to hold in the circumstances, that the attachment before judgment of the amount of Rs. 4,482.65, was illegal and must be set aside.

3. The learned Counsel for the Plaintiff however submitted that the previous attachment continues in the eye of law and this would not be a fresh attachment

before judgment so that a compliance is required under Rules 5 and 6 of Order 38. I do not subscribe to this argument at all for the amount of Rs. 4,482.65 which were decidedly never attached in the first instance. As regards the remaining amount of Rs. 15,500/-, in my opinion, it is not even necessary to give any finding on merit as to whether the previous attachment in respect thereof continues or should be deemed to have terminated so that fresh proceedings under Rules 5 and 6 of Order 38 would be needed. The learned Counsel for the Appellant, indeed argued, that no attachment in fact took place of the said amount and, therefore, the proceedings have become infructuous and cannot be stated to be alive at the stage of the filing of the second application. While submitting his second application of attachment before judgment, the Plaintiff no doubt made averments, indicating that the previous order of attachment was made but could not be effected due to unforeseen circumstances. He meant thereby to say that the previous attachment should be considered to be continuing. As I have stated before, it is not necessary for me to give any finding as to this aspect of the matter. It will be open to the Defendant to raise such objection as he may be advised to take, so far as the attachment before judgment of the amount of Rs. 15,500/- is concerned. For the purpose of this appeal it is sufficient to hold that the composite order of attachment of the two sums could not be passed as the attachment of the subsequent amount of Rs. 4,482.65, is illegal and could not be sustained under Rules 5 or 6 of Order 38.

4. As I have held that the approach and the final decision of the learned Senior Sub-Judge, so far as the amount of Rs. 4,482.65 is concerned, are wrong, the appeal is allowed and the impugned order is set aside. However, the case is remanded to the learned Senior Sub-Judge for proceeding according to law for attachment before judgment under Order 38 Rules 5 and 6 so far the amount of Rs. 4,482.65. As to the other amount of Rs. 15,500/- I have left the question open for the learned Senior Sub-Judge to decide, as to whether this amount is validly attached under Rules 5 and 6 of Order 38 or fresh attachment thereof is needed.

5. The parties have been directed to be present before the learned Senior Sub Judge on 17th April, 1974 which I am told is the date already fixed.

6. The learned Counsel for the Respondent-Plaintiff submitted that the Appellant-Defendant may not withdraw the entire amount of decree from the office of the P.W.D. and, therefore, some interim order need be passed by this Court to safeguard his interest. Accepting this contention the Defendant is restrained from withdrawing the amount of decree from the office of the P.W.D. This interim order shall of course be available to the Plaintiff until an appropriate order in that regard is passed by the learned Senior Sub-Judge. In the circumstances of the case, the parties are directed to bear their own costs in the appeal.