

**(1968) 01 OHC CK 0003**

**In the Orissa High Court**

**Case No :** Civil Revision No's. 84 and 86 of 1965

Sundaram Finance Ltd.

APPELLANT

Vs

Shankar Chit Fund

RESPONDENT

**Date of Decision :** 17-01-1968

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, Order 21 Rule 59, Order 21 Rule 60, Order 21 Rule 61, Order 21 Rule 62

**Citation :** AIR 1968 Ori 128 : (1968) 34 CLT 373

**Hon'ble Judges :** S. Barman, C.J

**Bench :** Single Bench

**Advocate :** B.P. Patnaik, for the Appellant; B.K. Pal, B. Pal and A. Mohanty, for the Respondent

**Final Decision :** Allowed

## Judgement

S. Barman, C.J.—Sundaram Finance Ltd. a claimant in respect of a motor truck which had been attached before judgment under Order 38, Rule 5 CPC is the petitioner herein. Civil Revision No. 86 of 1965 arises out of an order dated December 12, 1964 passed in M.J.C. No. 23 of 1964 arising out of Money Suit No. 144 of 1963 in the court of Munsif, Berhampur, by which the trial court released the attached truck claimed by the petitioner Sundaram Finance Ltd. subject to the condition that the claimant either deposits the suit amount in cash or furnishes property security of the suit amount by a certain date. A similar order was also passed by the learned Munsif for release of the truck in question on the same terms in M. J. C. No. 32 of 1964 arising out of Money Suit No. 145 of 1963 out of which the other Civil Revision No. 84 of 1965 arises. The said two civil revisions have been heard together. The case of the petitioner claimant Sundaram Finance Ltd. is stated as follows.

2. On May 29, 1962, there was a hire purchase agreement in respect of the truck in question of which J. Kamaraju Prusti was the hirer and the claimant Sudaram Finance Ltd. was the owner; under the terms of the agreement the price of the

truck Rs. 25,960/- was to be paid in 24 monthly instalments the first 23 monthly instalments of Rs. 1,085/- each and the last instalment of Rs. 1005/- The claimant's case is that there is still due to him a sum of Rs. 9,307. 44 P, being the balance due under agreement and incidental charges. On Shankar Chit Fund, a creditor of the hirer J. Kamaraju Prusti, is stated to have filed two suits against the hirer J. Kamaraju Prusti being Money Suit No. 144 of 1963 for recovery of Rs. 1,652.85 P. and Money Suit No. 145 of 1963 for Rs. 1,648.25 P. the total amount claimed against the defendant hirer in the aid two suits being Rs. 3,301.10 nP.

3. On December 15, 1963 the truck in dispute is stated to have been attached before judgment under Order 38. Rule 5 Civil P. C. in the said Money Suits. The claimant Sundaram Finance Ltd. (Petitioner herein) opposed the attachment of the truck on the ground that the truck was the subject-matter of the subsisting hire purchase agreement and therefore it could not be attached. This claim became the subject matter of investigation under Order 38, Rule 8 CPC which provides that where any claim is preferred to property attached before judgment, such claim shall be investigated in the manner provided under Order 21, Rules 58 to 63 for investigation of claims to property attached in execution of a decree for payment of money. The learned trial court by his order dated December 12, 1964 released the truck from attachment subject to the condition that the claimant Sundaram Finance Ltd. either deposits in cash or furnishes property security of the suit amount by a certain date, and the attachment was accordingly raised in respect of the said truck subject to the said condition

4. The petitioner claimant's point, challenging the validity of the impugned order of the learned Munsif, is that under the Hire Purchase agreement the defendant J. Kamaraju Prusti was not possessing the truck either on his own account or as his own property. In support of his contention the petitioner relies on the provisions of Rule 60 of Order 21. CPC which is this:

"Where upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit from attachment."

5. In course of hearing of these civil revision the petitioner produced a document dated May 29, 1962 described as Hire Purchase Agreement between Sundaram Finance Ltd. and J. Kamaraju Prusti. In the document J. Kamaraju Prusti has been described as the hirer and the claimant Sundaram Finance Ltd. as the owner. The provisions so far as material for the purpose of this case are, inter alia, these:

"Clause I: The owner, being the owner of the Motor Vehicle with fittings, tools, accessories and additions more particularly described in the First Schedule hereto and hereinafter called "the Vehicle" agree to let and the Hirer agrees to take on hire the vehicle from the date hereof subject to the terms and conditions herein contained which shall be taken and read as part of this Agreement.

Clause II: On the execution of this agreement the Hirer shall pay to the owner a sum of Re. 1 in consideration of the option to purchase given to the Hirer by Clause IV hereof and the said sum shall become the absolute property of the owner.

Clause IV: xx xx xx the vehicle shall at the option of the Hirer become his property and the owner will assign and make over all their right, title and interest in the same to the Hirer but until such payments as aforesaid been made, the vehicle shall remain the absolute property of the owner".

6. There are as many as 17 conditions in the agreement including conditions 4, 8 and 8(d) which so far as material are quoted below:

"(4} The Hirer shall not sell, assign, transfer pledge or mortgage let, or otherwise deal with or part with the possession of the said vehicle or any interest in the same or in the option to purchase or in this Agreement or attempt, to do so or create or allow to be created any lien upon the said vehicle whether for repair or otherwise or commit or otherwise suffer any act of bankruptcy (or enter into any voluntary or compulsory liquidation) or enter into any compromise or arrangement with his creditors.

(8) In case the Hirer shall during the continuance of this Agreement do or suffer any of the following acts or things, viz.. either.

xx xx xx (d) do or suffer any act or thing whereby or in consequence of which the said vehicle may be distrained, seized or taken in execution under legal process;

XX XX XX then and on the occurrence of any such event, the rights of the hirer under this Agreement shall forthwith stand determined ipso facto without any notice to the Hirer and all the instalments previously paid by the Hirer shall be absolutely forfeited to the Owner who shall thereupon be entitled to enter any house or place where the said vehicle may then be and seize, remove and retake possession of the same and to sue for all the instalments due and for damages for breach of the Agreement and for all the costs of retaking possession of the said vehicle and all costs occasioned by the Hirer's default".

7. In the present case, it is indisputable that the plaintiff-creditor Shankar Chit Fund had got attached before judgment the goods of the claimant, namely the truck; whatever interest J. Kamaraju Prusti the apparent possessor had in the truck attached, he had by the terms of the hire-purchase agreement between him as hirer and the claimant Sundaram Finance Ltd. as owner: It was an interest terminable ipso facto on the occurrence of such an attachment as

actually took place; in other words, the claimant-owner Sundaram Finance Ltd. became entitled to the possession of the truck without notice immediately upon the act of attachment before judgment at the instance of the plaintiff creditor. In the present case, there is no question that the truck attached was the property of Sundaram Finance Ltd. as owner under the hire-purchase agreement. The question is: Had Sundaram Finance Ltd. also a right to its possession at the time of the attachment? In my opinion it had, because the act of attachment before judgment entitled it to take possession of the truck immediately upon the attachment; Sundaram Finance Ltd., the owner, had not only property in the truck but also the right to possession at the time of the attachment. The fact that there had been no notice or an act of re-taking cannot avail the plaintiff-creditor in the money suits when the person who had the right to retake is unaware that a state of circumstances has arisen which gives him that right. This view is supported by the underlying principles in the decision in *Jelks v. Hayward* (Hackney Furnishing Co) (1905) 2 KB 460.

8. It appears from the impugned order that the learned trial court, apart from merely mentioning the Hire Purchase Agreement, has not dealt with the effect and implications of the document in connection with the investigation of claim as required of him under Order 38, Rule 8 read with Order 21, Rules 58 to 63 Civil Procedure Code. It is an apparent material irregularity. The learned Munsif should have considered, *inter alia*, whether the defendant Prusti had paid his dues under the agreement or whether the hirer defendant Prusti exercised his option to purchase the truck in terms of the agreement or whether the said agreement was still subsisting or whether on the facts and circumstances of the case the truck could be attached. The result of the investigation would depend on his finding on those and other material aspects of the question according to law. The impugned order is clearly illegal.

9. In conclusion, therefore, Civil Revisions 86 of 1965 and 84 of 1965 are allowed and the two orders of the learned Munsif dated December 12, 1964 made in M. J. C. No. 38 of 1964 and M. J. C. No. 32 of 1964 are set aside. The learned Munsif is directed to dispose of the said two M. J. C.s within three months in the light of the observations made above -- all according to law. It is clarified by this order that the truck in question will remain in the custody of the court until the disposal of the said M J. Cs. There will be no order for costs.