

(1986) 10 OHC CK 0014
In the Orissa High Court
Case No : Misc. Appeal No. 244 of 1986

Tatanagar Transport Corporation and Others	APPELLANT
Vs	
Ajanta Enterprisers and Another	RESPONDENT

Date of Decision : 01-10-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5
Evidence Act, 1872 — Section 114

Citation : AIR 1987 Ori 107 : (1987) 63 CLT 5

Hon'ble Judges : S.C. Mohapatra, J

Bench : Single Bench

Advocate : Anang Patnaik, N.C. Patnaik and L. Pangari, for the Appellant; Ashok Mukherjee, for the Respondent

Final Decision : Allowed

Judgement

S.C. Mohapatra, J.—Defendants are the appellants in this appeal under Order 43, Rule 1(u), Civil P.C. against an order under Order 38, Rule 5, C.P.C., directing them to furnish security.

2. Money Suit No. 324 of 1986 was filed in the Court of the Subordinate Judge, First "Court, Cuttack, for recovery of Rs. 2,84,852.89 paise alleged to have been taken by the appellants as loan from the plaintiff-respondent 1. In the said suit plaintiff filed an application for attachment of some aluminium ingots which were alleged to have been intended to be taken out of the jurisdiction of the Court for the purpose of defrauding the plaintiff. Alternatively it was prayed that the security should be directed to be furnished by the defendants. The trial Court attached the aluminium ingots by an ex parte order. After appearance, the appellants raised objection on the ground that they were only carriers. The attachment was vacated by the trial Court which was challenged in this Court in Misc. Appeal No. 210 of 1986. While confirming the order this Court directed the trial Court to consider the question of furnishing security as prayed for by the plaintiff. In this background the present order has been passed.

3. The allegations of the plaintiff, as revealed from the petition and affidavit, are that defendant 1 and its partners are deep in debt they have not discharged their statutory liabilities and they have been closing down their offices at different places wherefrom they carry on the business of transporting and their business is in the decline.

4. In order to examine the contention of the plaintiff Order 38, Rule 5, C.P.C., is to be kept in view. It reads as follows : "

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

(1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that 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 or 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, within 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."

As the language of the provision discloses, the power can be exercised on satisfaction of the pre-conditions.

Order for attachment before adjudication of a claim or calling for security is not a common feature in a litigation. In exceptional circumstances only the drastic action can be taken to safeguard the interest of the plaintiff. Therefore, the first legislative guideline is that the intention of the defendant must be to obstruct or delay the execution of any decree. Where the effect of some circumstances would lead to delay in execution of a decree or obstruction to it without the intention for the same the power is not available to be exercised. Therefore, the actions of the defendant are to be of voluntary nature from which legitimate inference of the intention to obstruct or delay the execution can be drawn. The second legislative guideline is that with the said intention the defendant is about to dispose of or remove from the jurisdiction of the Court whole or part of his

property. Thus, it is clear that both the pre-conditions must be satisfied. For the purpose of exercise of power under Order 38, Rule 5, C.P.C., Court is to examine :

- (i) what property is about to be disposed of or removed?
- (ii) whether the same is the property of the defendant?
- (iii) Whether it is the whole or part of the property? And
- (iv) What is the intention of the defendant?

Even if all the points are answered in favour of the plaintiff, the Court is not bound to exercise the power if it finds that the same may not factually have the effect of obstructing or delaying the execution of the decree.

5. Mr. A. Mukherjee, the learned counsel appearing for plaintiff-respondent 1, submitted that in respect of other creditors decrees have already been passed which have not yet been paid and that will lead to the inference of the intention to delay the execution. As regards disposal of the property, it has been stated that the trucks of defendants obtained by hire purchase have been seized , by the manufacturers on account of nonpayment of his charges and business offices have been closed and business of the defendants is in the decline. Essentially these are the broad aspects on which scrutiny was sought for, which was accepted by the trial Court.

6. Heavy liability of a person and previous undischarged decrees may have the effect of delay in execution or obstruction to the same. Mere existence of the same cannot lead to the inference that the intention of the defendants was to obstruct or delay the execution. To draw such inference further facts and circumstances would be necessary.

Expression of the intention by-the defendants would be the best evidence. In absence of such expression, Court is required to examine the period when the liability was incurred, the requirement of such liability, the conduct of the defendants leading to the decree in respect of the liability and other relevant factors. Without such materials, drawing of inference of intention to obstruct or delay the execution merely from the existence of liabilities and the decrees would not be reasonable.

7. Closure of offices of business at different places or decline in the business would also not be a circumstance to lead to the inference of the intention to obstruct or delay execution.

8. The heavy liability, existence of decrees, closure of business offices and decline in business do not amount to disposal of property or removal of the property. Therefore, the same would not be a circumstance to attract the provision.

9. Defendant 1 is a partnership business in this case. Partners of defendant 1 are personally liable for the liability of the firm as distinguished from a company

where shareholders are not personally liable for the liability of the company. Therefore, intention of the defendants who have got liability is to be specifically inferred by a Court while directing the defendants to furnish security. The trial Court has not gone into this aspect of the matter.

10. Mr. Mukherjee submitted that several documents called for from the defendants were not produced which would lead to the adverse inference that if produced they would have disclosed the intention of the defendants and disposal or removal of properties to delay or obstruct the execution of the plaintiffs decree.

11. In view of the amount involved in the suit and non-consideration of some of the material aspects as submitted by Mr. Mukherjee, interest of justice demands that the matter should be examined by the trial Court afresh. I set aside the order and direct the trial Court to examine the matter afresh giving both parties reasonable opportunity of adducing evidence and being heard.

12. In the result, the appeal is allowed. There shall, however, be no order as to costs.