

(2008) 12 KL CK 0028

In the High Court Of Kerala

Case No : Writ Petition (C) No. 21297 of 2008

Vasakumar Pillai S.P.

APPELLANT

Vs

The Motor Accidents Claims Tribunal and Others

RESPONDENT

Date of Decision : 02-12-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 13 Rule 1, Order 13 Rule 10, Order 13 Rule 3, Order 13 Rule 4, Order 21 Rule 41
Constitution of India, 1950 — Article 136, 371D, 371D(5)
Criminal Procedure Code, 1973 (CrPC) — Section 195
Income Tax Act, 1961 — Section 254
Kerala Motor Vehicles Rules, 1989 — Rule 394, 395
Motor Vehicles Act, 1988 — Section 110B, 165, 167, 169, 171

Citation : (2009) 1 ILR (Ker) 20 : (2008) 3 KLJ 802

Hon'ble Judges : Thomas P. Joseph, J

Bench : Single Bench

Advocate : P. Gopinath Menon, for the Appellant; R. Sudhish and M. Manju, for the Respondent

Final Decision : Dismissed

Judgement

Thomas P. Joseph, J.—The question raised for decision is whether the Motor Accidents Claims Tribunal (for short, "the Tribunal") constituted u/s 165 of the Motor Vehicles Act, 1988 for short, "the Act") is invested with the power to order attachment of property before passing the award.

Respondents 2 to 5 are the legal representatives of one Viswambharan who died in a motor vehicles accident on 11.4.2004. According to the respondents 2 to 5, the motor cycle which the petitioner was riding in a rash and negligent manner hit Viswambharan. Respondents 2 to 5 filed application before the Tribunal claiming Rs. 3 lakhs from the petitioner. Since the motor cycle was not having a valid policy of insurance, claim was lodged only against the petitioner. Along with the application, respondents 2 to 5 filed Ext.P1, I.A. No. 2957 of 2008 for attachment of the immovable property allegedly belonging to the petitioner. As per Ext.P2,

order dated 15.6.2008 learned Tribunal directed the petitioner to show cause why he should not furnish security for the amount claimed and placed the property under conditional attachment. That order is under challenge in this proceeding.

2. According to the learned Counsel for petitioner, power under Order 38 Rule 5 of the CPC (for short, "the Code") has not been extended to the Tribunal, exercise of power under Order 38 Rule 5 of the Code is not merely procedural, it affected the substantive right of the petitioner and hence, the Tribunal could not exercise that power. Learned Counsel placed reliance on the decision in *Cheru Ouseph v. Kunhipathumma* 1981 KLT 495. He also referred to me the meaning of the word "substantive" in the Law Lexicon by P. Ramanatha Aiyar. Learned Counsel for respondents 2 to 5 per contra, contended that all powers conferred on a civil court under the Code, required to be exercised to render justice to the parties before the Tribunal and the exercise of which is not expressly or by necessary implication excluded could be exercised by the Tribunal. Learned Counsel placed reliance on the decisions in *State of Haryana Vs. Smt. Darshana Devi and Others*, , *Mansingh Sajjusingh v. Sudhir Ganpatrao Girdhari* 1986 ACJ 828, *United India Insurance Co. Ltd. v. George* 1987 (2) KLT 776, *Velunni v. Vellakutty* 1989 (2) KLT 227, *Mathew Mathai v. General Manager, K.S.R.T.C.* 1989 (2) KLJ 251, *Krishna Reddy Vs. K. Ramulamma and others*, , *Rajan v. Sukumaran* 1997(1) KLT 686, *Laxman Singh Vs. Parmanand Damani and Others*, and *Duvvuru Siva Kumar Reddy Vs. Malli Srinivasulu*, .

3. It is by Section 165 of the Act that Tribunals are constituted for such area as specified in the notification for the purpose of adjudicating upon claims for compensation in respect of accidents involving death of, or bodily injury to, persons arising out of the use of motor vehicles or damage to any property of third parties so arising, or both. Section 169 of the Act deals with the Procedure and powers of Claims Tribunal and states:

(1) In holding any inquiry u/s 168, the Claims Tribunal may, subject to any rules that may be made in this behalf, follow such summary procedure as it thinks fit.

(2) The Claims Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed; and the Claims Tribunal shall be deemed to be a Civil Court for all the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

(3) Subject to any rules that may be made in this behalf, the Claims Tribunal may, for the purpose of adjudicating upon any claim for compensation, choose one or more persons possessing special knowledge of any matter relevant to the inquiry to assist it in holding the inquiry.

Section 175 of the Act deals with the bar on jurisdiction of Civil Courts and states:

Where any Claims Tribunal has been constituted for any area, no Civil Court shall have jurisdiction to entertain any question relating to any claim for compensation which may be adjudicated upon by the Claims Tribunal for that area, and no injunction in respect of any action taken or to be taken by or before the Claims Tribunal in respect of the claim for compensation shall be granted by the Civil Court.

4. Section 176 of the Act deals with the Power of State Government to make rules and states:

A State Government may make rules for the purpose of carrying into effect the provisions of Sections 165 to 174, and in particular, such rules may provide for all or any of the following matters, namely:

- (a) the form of application for claims for compensation and the particulars it may contain, and the fees, if any, to be paid in respect of such applications;
- (b) the procedure to be followed by a Claims Tribunal in holding an inquiry under this Chapter;
- (c) the powers vested in a Civil Court which may be exercised by a Claims Tribunal;
- (d) the form and the manner in which and the fees (if any) on payment of which an appeal may be preferred against an award of a Claim Tribunal; and
- (e) any other matter which is to be or may be, prescribed.

5. In exercise of the power u/s 176 of the Act, the State Government has, framed Kerala Motor Vehicles Rules, 1989 (for short, the Rules). Rule 395 of the Rules states:

The provisions of Rules 9 to 13 and 15 to 30 of Order V, Rules 16 to 18 of Order VI, Order IX, Rules 3 to 10 of Order XIII, Rules 1 to 21 of Order XVI, Rules 1 to 3 of Order XXIII and Order XXVI of the First Schedule to the Code of Civil Procedure, 1908, shall, so far as may be, apply to the proceedings before the Claims Tribunal.

Order 38 of the Code is not specifically rendered applicable to the Tribunal. Rule 394 of the Rules says:

Enforcement of an award of the Claims Tribunal-

(1) Without prejudice to its power u/s 174 of the Act, the Claims Tribunal shall for the purpose of enforcement of its award, have all the powers of a Civil Court in the execution of a decree under the Code of Civil Procedure, 1908 as if the award were a decree for payment of money passed by such Court in a Civil suit.

(2) The Claims Tribunal may institute suomotu execution proceedings if the amount of compensation awarded is not paid before the expiry of the period for payment stipulated in the award and the case shall be called on a date to be

fixed in the award for the purpose.

By virtue of Rule 394 quoted above, it is open to the Tribunal to apply the provisions of Order 21 of the Code in executing its award as if it were, a decree for payment of money passed by a civil court. Rules 41 to 49 of Order 21 of the Code deal with attachment of property of judgment debtor. While executing the award the Tribunal can attach and bring the property of the judgment debtor for sale notwithstanding that Rule 395 of the Rules does not specifically render Order 21 of the Code applicable to the Tribunal. Then the question is whether the power for attachment before judgment under Order 38 of the Code could be exercised by the Tribunal though the provision is not specifically rendered applicable to it.

7. Until the constitution of the Tribunal, suits claiming compensation on account of death or personal injury in motor accidents were being instituted in the Civil Courts. When suits were instituted before the Civil Courts, such courts had the power, in appropriate cases to order attachment of the property of the tortfeasor before judgment. The group of Sections in Chapter XII of the Act do not create any new right or remedy for the victim of accident. Constitution of the Tribunals only effected a change of forum from the Civil Courts to the Tribunals. The object of constitution of the Tribunals is to provide cheaper and speedy remedy for the accident victims. The responsibilities of the Tribunals are in general no less important than the courts of law. Though Tribunals are not Civil Courts, it has all the trappings of a Civil Court. By constitution of the Tribunals, a new system of dispensation of justice, cheaper and speedier is created which has grown up along with the Civil Courts. The Tribunal for all intents and purposes, is constituted to discharge the functions and duties which the Civil Courts were expected to do while dealing with a suit for recovery of compensation. It appears to me, considering the object of constitution of the Tribunals that the law makers wanted the new system to be as effective as the Civil Courts which till then were dealing with suits for compensation, in the matter of adjudication of claims for compensation arising from motor accidents and enabling the victims to realise the fruits of the award.

8. The decision of the Hon'ble the Supreme Court in *P. Sambamurthy v. State of Andhra Pradesh*, AIR 1987 SC 663 supports that line of thinking. In that case, constitutional validity of Article 371D(5) of the Constitution of India came under challenge. Clause (3) of Article 371 provided for constitution of Administrative Tribunals for the State of Andhra Pradesh to exercise jurisdiction, power and authority over certain specified service matters which was exercisable by courts other than the Supreme Court. Clause (5) which came under challenge stated that the order of the Administrative Tribunal finally disposing of any case was to be effective upon its confirmation by the State Government or on the expiry of three months from the date of order, whichever was earlier. Proviso to Clause (5) gave the State Government the power to modify or annul the order of the Administrative Tribunal before it became effective. The Hon'ble Supreme Court

observed:

The question of constitutional validity of the proviso to Article 371-D can also be looked at from another angle. Clause (3) of Article 371-D empowers the President by order to provide for the setting up of the Administrative Tribunals and vesting in the Administrative Tribunals the jurisdiction of the High Court in respect of specified service matters. This constitutional amendment authorising exclusion of the jurisdiction of the High Court and vesting of such jurisdiction in the Administrative Tribunals postulates for its validity that the Administrative Tribunals must be as effective an institutional mechanism or authority for judicial review as the High Court. If the Administrative Tribunals is less effective and efficacious than the High Court in the matter of judicial review in respect of the specified service matters, the constitutional amendment would fall foul of the basis structure doctrine....

(underline supplied)

In *Income Tax Officer v. Mohammad Hunhi* AIR 1969 SC 430 question arose whether in the absence of conferment of a specific power in that behalf, the Income Tax Appellate Tribunal has power to grant stay as incidental or ancillary to its appellate jurisdiction under the Income Tax Act, 1961. Hon"ble Supreme Court held:

When Section 254 confers appellate jurisdiction, it impliedly grants the power of doing all such acts, or employing such means as are essentially necessary to its execution and that the statutory power carries with it the duty in proper cases to make such orders for staying proceeding as will prevent the appeal if successful from being rendered nugatory.

The following statement from Doiriat"s Civil Law, Cushing Edition, Vol. 1 at page 88 was quoted:

It is the duty of the Judges to apply the laws, not only to what appears to be regulated by their express dispositions but to all the cases where a just application of them may be made, and which appear to be comprehended either within the consequences that may be gathered from it.

Hon"ble Supreme Court also quoted from Maxwell on interpretation of Statutes, Eleventh Edition, page 350 as under:

Where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution. Cui jurisdiction data est, ea quoque concessa esse videntur, sine quibus jurisdiction explicari non potuit. All instance is given based on *Ex Parte, Martin* 1879 4 QBD 212 at p.491 that "Where an inferior court is empowered to grant an injunction, foe power of pushing disobedience to it by commitment is impliedly conveyed by the enactment, for the power would be useless if it could not be enforced.

(underline supplied)

10. *Kanshi Ram v. Hindustan National Bank Ltd.* AIR 1928 Lah 376 considered whether a Liquidation Court under the provisions of the Companies Act could exercise the power under Order XXXVIII Rule 5 of the Code. Tek Chand, J. said:

In my opinion there is no force in point Nos. 1 and 2 taken by Mr. Mool Chand. u/s 141, Civil P.C., the procedure provided in the Civil PC, in regard to suits is to be followed as far as it can be made applicable, to all proceedings in all Courts of civil jurisdiction. Now it cannot be denied that proceedings under the Companies Act are proceedings in a Court of civil jurisdiction. A liquidation Court has, therefore, in a proper case, power to make an order of attachment before judgment in accordance with the provisions of Order 38 Rule 5, Civil P.C.

I shall refer to the decisions relied on by the learned Counsel for respondents 2 to 5. In *State of Haryana v. Darshana Devi* the Hon"ble Supreme Court held that though not specifically rendered applicable, Tribunals constituted under the Act could exercise the power under Order 33 of the Code.

United India Insurance Co. Ltd. v. George this Court held that the Tribunal constituted under the Act could exercise the power u/s 152 of the Code. In *Mathew Mathai v. General Manager, K.S.R.T.C.* it was found that the Tribunal could invoke the provisions of Order 32 of the Code. In *Krishan Reddy v. K. Ramulamma* a learned Single Judge of Andhra Pradesh High Court at Hyderabad considered the question whether the power under Order 1 Rule 10 of the Code could be exercised by the Tribunal constituted under the Act. It was held that the Tribunal could exercise that power since it is empowered to evolve its own procedure and it can resort to any provision of the Code on the principle of justice, equity and good conscience. In *Rajan v. Sukumaran* it was held that Tribunal has power to review its orders though, power for review is not specifically conferred on it. In *Velunni v. Vellakutty*, a Division Bench of this Court considered the power of the Tribunal u/s 110B (of the Act as it then stood) and held thus:

The tribunal is not a court though it performs functions similar to a court. The tribunal is free to follow any procedure which it considers expedient in the interest of justice so long as the procedure is not inconsistent with the rules of natural justice and does not contravene the provisions of the Act or the Rules. In order to do justice for which it has been constituted, the tribunal would have power to apply the principles underlining the provisions of the Code of Civil Procedure, even though not rendered specifically applicable.

(underline supplied)

12. According to the learned Counsel for petitioner, the Tribunal can exercise powers not specifically conferred on it only if it related to procedural matters and not affecting the substantive rights of the parties. A learned Single Judge of this Court (T.L. Viswanatha Iyyer. J.) considered the question whether the provisions

of Order IX Rule 9 of the Code would apply to proceedings before the Rent Control Court though that provision is not specifically rendered applicable to such proceeding. *Plus v. Albina Rozario* 1990 (1) KIT 104. It was held that though the procedural provisions of the Code can be applied to rent control proceedings in the absence of an express provision to the contrary, or in the absence of conflict between the provisions of the Code and provisions of Act 2 of 1965 or the Rules framed thereunder, the provisions of Order 9 Rule 9 of the Code are different in that, it deprived the plaintiff or petitioner as the case may be of a substantive right of suit by precluding a fresh suit or proceeding, the valuable right of a party is taken away by Order 9 Rule 9 of the Code and hence, such deprivation of right ought not to be lightly inferred or effected by analogy. It was therefore, held that the provisions of Order 9 Rule 9 in so far as it is not specifically rendered applicable, cannot be applied to the proceedings before the Rent Control Court. That decision is distinguishable on facts in that application of Order 9 Rule 9 of the Code would result in taking away the valuable right of the party to file a fresh application even when an earlier application was dismissed for default without adjudication of the claim.

In *Cheru Ouseph v. Kunhipathumma* 1981 KLT 495, M.P. Menon, J. considered the nature and ambit of the powers to be exercised by Tribunals in the matter of procedure. Question was whether the Rent Control Court has the power to restore an application dismissed for default though that power was not expressly conferred on it. It was observed thus:

...A tribunal, it is said, can exercise only those powers specifically conferred by statute; and when the legislature has addressed itself to the question as to what powers of a civil court could be conferred on a Tribunal and has chosen to confer only a few of them, the others cannot be found to exist....

In paragraph 6 of the judgment it was observed:

This is not to say that the difference between tribunals and courts could or should be ignored, but to suggest that the traditional approach to the question of the tribunals' powers requires reconsideration if their usefulness is not to be belittled. The Indian Constitution does not rest on a rigid separation of powers in the sense that the judicial power of the State is exclusively vested in courts. But even in countries where such separation is constitutionally sacrosanct special tribunals co-exist with the courts and perform similar adjudicatory functions; they are just called quasi-judicial authorities. Article 136 of our Constitution speaks of courts and tribunals and this is an indication that despite differences in procedure, both the bodies are exercising the same function. In *Associated Cement Companies Ltd. Vs. P.N. Sharma and Another*, the Supreme Court has categorically laid down that tribunals in India are also exercising like the courts, judicial powers which inherently vest in a sovereign state.

14. Reference was made to the decision in *N.K. Dharmadas Vs. State Transport Appellate Tribunal of Kerala and Others*, where the question considered was

whether the appellate authority constituted under the Act, while exercising appellate jurisdiction over the Regional Transport Authorities could order remand of the case in the absence of specific power to that effect conferred on the appellate authority. In that case it was held that when the Act conferred a jurisdiction, it also impliedly granted the power of doing all such things as are essentially necessary to its execution. It was held in Cheru Ouseph's case that:

I would therefore say, as indicated by the Supreme Court in Dhani Devi Vs. Sant Bihari and Others, , that in respect of procedural matters, all powers which are not specifically denied, by the statute or the statutory rules, should be vouchsafed to a tribunal so that it may effectively exercise its judicial function.

(underline supplied)

Could it, then be said that attachment of property before passing the award affected the substantive or valuable right of the petitioner? In the Law Lexicon by P. Ramanatha Aiyar, the word "substantive" is given the following meaning:

Of or relating to a matter of substance as opposed to form or procedure; affecting rights, duties or, causes of actions, existing in its own right, specifically of or relating to a substantive crime.

15. The object of attachment before judgment is to make the property of the defendant available for execution of the decree that may be passed in the case. Attachment before judgment prevents a decree from becoming infructuous. It is an effective check on any attempt on the part of the defendant to defeat the realisation of the decree that may be passed against him. The nature and character of an attachment before judgment came for consideration before this Court in *Ittaman Nair v. Andy* 1951 KLT 601. It was held:

An attachment prior to a decree is not an attachment for the enforcement of the decree but it is a step taken merely for the purpose of preventing the debtor from delaying or obstructing such enforcement when the decree subsequently passed shall be sought to be executed. An attachment after decree is, on the other hand, an attachment made for the immediate purpose of the carrying the decree into execution, and it presupposes an application on the part of the decree-holder to have his decree executed. Thus an attachment before judgment has not the same "effect as an attachment in execution, although it is not necessary to reattach the property in-execution when it has been attached, before judgment".

16. Attachment before judgment differs from an attachment in execution, the former being a step in aid of execution while the latter is a process in execution itself. Going by Section 64 of the Code, attachment does not take away any substantive right of the defendant over property nor, confer right on the attaching creditor. Attachment only prevents private alienation of the property. Even an alienation of the property in violation of an order of attachment is not void altogether. Private alienation after the attachment is made only makes such

alienation void ad against the claims of the attaching creditor under the decree that may be passed. The responsibility of the Tribunal is not merely to pass an award. It has also the responsibility to ensure successful execution of the award. The Tribunal must render assistance to the victim of the accident to reap the fruits of litigation by its process and not obtain a barren award. If under Rule 394 of the Rules it is within the power of the Tribunal to attach and sell the property of the person against whom award has been passed in realisation of the amount in execution of the award, then, notwithstanding that the provision of Order 38 of the Code regarding attachment before judgment is not specifically rendered applicable to the Tribunal under Rule 395, it must be deemed to have been invested with the ancillary power to preserve and make available the property for execution. The power to attach and sell the property in execution of the award carries with it by necessary implication the power to use all reasonable means to make that power effective.

17. When a victim of motor accident satisfies the Tribunal that the tortfeasor, with intent to defeat or obstruct the execution of the award that may be passed against him is about to dispose of or remove the whole or portion of his property from the local limits of its jurisdiction, the Tribunal cannot throw up its arms in despair and plead that the power to prevent such fraudulent disposition or removal of the property is not expressly conferred on it. The Tribunal should have the power to apply the provisions of the Code so far as it is not in conflict with any of the provisions of the Act or the Rules made there under, and so far the application of the provisions is not barred expressly or by implication, to render justice and to achieve the purpose for which it has been constituted. Rule 394 of the Rules enables the Tribunal, for enforcement of its award, to exercise the powers of a Civil Court in execution of a decree. Exercising the power of the Civil Court to order attachment of the property before passing the award is not prohibited either expressly or by implication, instead, it only aids and promotes the power conferred on the Tribunal under Rule 394. In *S.M. Banerji Vs. Sri Krishna Agarwal, Subba Rao, J.* (as his Lordship then was) observed:

Courts and Tribunals are constituted to do justice between the parties within the confines of statutory limitations and undue emphasis on technicalities or enlarging their scope would cramp their powers, diminish their effectiveness and defeat the very purpose for which they are constituted.

18. It is not as if for mere asking the Tribunal would or should exercise the power to order attachment. There are inbuilt safeguards in Order 38 Rule 5 of the Code itself as could be seen from the provision that it is only when,

...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.

(underline supplied)

that the Court would direct the defendant to furnish security or to appear and show cause why he should not furnish security and in the meantime direct conditional attachment of the whole or any portion of the property. Tribunals must zealously guard against the provision being misused by the parties before it. Judicial wisdom and circumspection must guide the Tribunals in the exercise of its powers. No party to the proceeding before the Tribunal can claim to have a valuable or substantive right to dispose of or remove the whole or any portion of his property from the local limits of the jurisdiction of the Tribunal with intent to defeat or delay the execution of the award that may be passed against him.

19. Viewed in the above perspective and in view of Rule 394 of the Rules it is within the power of the Tribunal in my view, to order attachment of the property before passing the award in appropriate cases. The view taken by the learned Single Judges of Bombay High Court in *Mansingh Sajjusingh v. Sudhir Gahpatrao Girdhari*, Andhra Pradesh High Court in *Duvvuru Siva Kumar Reddy v. Malli Srjnivasulu* and the of Madhya Pradesh High Court (Indore Bench) in *Laxman Singh v. Parmanand Damani* (referred supra) support that view.

Petitioner has a contention that the affidavit in support of I.A. No. 2957 of 2008 did not show sufficient reasons to direct the petitioner to furnish security or to place the property under conditional attachment. There is a further contention that the property placed under conditional attachment belonged to the mother of the petitioner. Since this Court is not required to sit in appeal over those disputed facts, it is not necessary for this Court to go into those questions. Those questions are left open for consideration of the learned Tribunal if properly raised before it.

20. I place on record my appreciation for the able assistance rendered by the learned Counsel on both sides, Shri P. Gopinatha Menon, Advocate and Shri R. Sudhish, Advocate.

Writ Petition is dismissed.