
(1991) 1 GLJ 52

Gauhati High Court

Case No: Civil Revision No. 367 of 1990

Akhilesh Chandra Balo

APPELLANT

Vs

Prova Das Roy

RESPONDENT

Date of Decision: Dec. 19, 1990

Acts Referred:

- Civil Procedure Code, 1908 - Order 38 Rule 5, Order 38 Rule 6, Order 40 Rule 1, 151
- Civil Procedure Code, 1908 (CPC) - Order 38 Rule 5, Order 38 Rule 6, Order 40 Rule 1, 151

Citation: (1991) 1 GLJ 52

Hon'ble Judges: S.N.Phukan, J

Bench: Single Bench

Advocate: S.Medhi, P.K.Goswami, P.G.Barua, A.C.Dutta, Advocates appearing for Parties

Judgement

1. The present petition under section 115, Civil Procedure Code is by the defendants.

2. The plaintiffs opposite parties filed a Title Suit before the learned Assistant District Judge, Lakhimpur, North Lakhimpur praying for a decree for declaration of title and khas possession over the land described in the Schedule B to the plaint and also for mesne profit. In the plaint attachment before judgment of the paddy cultivated on the said land for this year was prayed for and it was also prayed that a receiver be appointed. Only one petition was filed alongwith the plaint under Order 38 Rule 5 and Order 40 Rule 1, Civil Procedure Code and the said petition is available at Annexure I to the present petition. In this petition, in para 7, it was stated that the defendants illegally raised paddy in the above land in spite of objection by the plaintiffs and accordingly, it was prayed that a receiver may be appointed for the purpose of reaping and harvesting the paddy and also for future cultivation. A joint prayer was also made for conditional attachment of the land pending final orders.

3. By order dated 5.11.90, the learned trial Court after hearing the learned counsel for the plaintiffs and after directing issuance of summons in respect of the main Title Suit ordered attachment of Schedule B land and appointed one Abis Ali as receiver for harvesting the standing crops. The receiver was directed to dispose of the standing crops and to deposit the sale proceeds in the Court.

4. By order dated 8.11.90, vide Annexure II to the present petition, the above order was stayed as the defendants objected on the ground, inter alia, that the standing crops cannot be attached under Order 38 Rule 12. On the prayer of the plaintiffs the order was reviewed on 15.11.90 and the stay order was vacated. The Court further appointed another receiver in place of earlier receiver and the subsequent receiver was allowed to take steps with the help of police. Hence, the present petition.

5. I have heard Mr. P. G. Baruah learned counsel for the petitioners and Mr. S. Medhi, learned counsel appearing for the opposite parties.

6. Rule 5 of Order 38 provides for attachment before judgment and Rule 6 of the said Order provides for final order to be passed by the Court in respect of attachment where no cause is shown or security not furnished. On plain reading of Rule 5, it is clear that an order can be passed at any stage if the Court is satisfied with intent to obstruct or delay the execution of any decree that may be passed against the defendant, he is trying to dispose of the whole or any part of his property, or is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court. This rule further provides that the Court has to 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 or value of the same or to appear and show cause as to why he should not furnish security. Subrule (3) of the said Rule 5 empowers the Court to direct conditional attachment of the whole or any portion of the property. Subrule (4), which was introduced by amendment in 1976 provides that if an order of attachment is made without complying with the provisions of subrule (1) of this Rule, such attachment shall be void. Rule 6 of the said Order 38, inter alia, provides that if the defendant fails to show cause, the Court may order attachment of the property specified or portion thereof as would appear efficient to satisfy the decree which may be passed. This rule further provides that where defendant shows cause or furnishes required security and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn or make such other order as it thinks fit.

7. The intention of Rule 5 Order 38 is clear and this provision has been made by the legislature to prevent a decree that may be passed being rendered infructuous. The jurisdiction under Order 38, Rules 5 and 6 is of extraordinary nature and has to be exercised sparingly and with utmost caution otherwise it may be used as an instrument of harassment and oppression. This Rule 5 is very clear and the Court must be satisfied not only that defendant is really about to dispose of the property or about to remove it from its jurisdiction, but also that his object is to obstruct or delay the execution of any decree that may be passed. This is settled position of law.

8. In the petition for attachment and appointment of receiver there is not even whisper that the defendants are about to dispose of the property in order to avoid the execution of decree that may be passed in the present suit. On the other hand, it is an admitted fact that the defendants are in possession of the land in question and have also cultivated the same and raised crops. In the initial order passed by the learned Court below on 5.11.90 no satisfaction was recorded by the learned Court on the above points. That apart Rule 5 of Order 38 requires that before any property is attached, the defendant has to be given a chance to furnish security in such sum as may be specified in the order. This was also not followed by the learned trial Court of course, subrule (3) of Rule 5 empowers the Court to direct conditional attachment. But reading the above order, it is absolutely clear that it was not an order of conditional attachment. Thus, the initial order of attachment is void abinitio.

9. Drawing my attention to clause (q) of Order 43, Rule I, Mr. Medhi has urged that the order is appealable and, as such, the present revision petition is not maintainable. From the said clause (q), I find that the order passed under Rule 6 of Order 38 is appealable. But the defendants have approached this Court in respect of the order passed under Order 38 Rule 5. I may also add here that in view of subrule (4) inserted by the amendment of 1976, the initial order of attachment dated 5.11.90 is void abinitio and, as such, it is liable to be quashed and consequently all the subsequent orders passed by the learned trial Court regarding attachment of the suit land. The contention of Mr. Medhi that the order is appealable has no force as from all the orders passed by the learned trial Court I find that no final order has been passed under Rule 6 of Order 38. On the top of that, I may add here that if an order is void abinitio, this Court by exercising powers under section 151, Civil Procedure Code and Article 227 of the Constitution of India can quash such order.

10. Regarding appointment of receiver, provision is contained in Order 40. Rule 1 of the said Order provides that before passing an order appointing receiver, the Court must form its opinion that it is just and convenient to do so. In my opinion, the words, "just and convenient" would mean that Court must be satisfied that such an order of appointment of receiver is necessary for protection of property or prevention of injury to the plaintiff and this discretionary power has to be exercised by the Court judicially. Though the Court has been empowered with wide discretion, the plaintiff must satisfy that he has a very good chance of success in the suit in addition to what has been stated above. The Court must also bear in mind while passing an order appointing receiver that ordinarily the defendant should not be deprived of his possession over the property.

11. I have perused the petition for appointment of receiver and attachment. I do not, *prima facie*, find any essential elements as stated above in the said petition. It is true that any order passed under Order 41, Rules 1 and 4 is an appealable order and against such order the defendant must go to the appellate Court. From the petition dated 5.11.90 praying for appointment of receiver, the prayer made was to appoint a receiver to reap and harvest the paddy grown or future cultivation. Reading the order dated 5.11.90

passed exparte and the order dated 15.11. 90 it appears to me that the receiver was appointed only for harvesting the paddy and to deposit the amount in Court after sale of the paddy for this year. Mr. Medhi has stated at the bar that the receiver has already taken steps and has harvested the paddy and taking steps to deposit the amount. According to Mr. Baruah, the entire crop on the disputed land has not been harvested. Be that as it may, as the receiver has taken steps and started harvesting, I do not want to interfere with the order but I direct that the learned trial Court after hearing both the parties shall consider whether the appointment order of receiver shall continue for future years or not. It may be mentioned that in the plaint, the prayer is only for mense profit amounting to Rs. 9,000/. While disposing of the petition for receiver, the learned trial Court shall take into consideration the law on the subject of appointment of receiver and also the amount claimed as mesne profit. As I have passed this interim order, I do not deem it fit and proper to direct the defendants to approach the appellate Court inasmuch as it would cause unnecessary delay and that apart, the learned trial Court has passed final order regarding receiver which is an appealable order.

12. Situated thus, I allow the present petition by setting aside the impugned orders regarding attachment of the property. Further, I modify the appointment order of receiver with direction that the learned trial Court shall rehear the matter on this point and pass appropriate orders in accordance with law.

Considering the facts and circumstances of the case, I leave the parties to bear their own cost.