

**(2015) 01 KAR CK 0349**

**Karnataka High Court (Dharwad Bench)**

**Case No:** Miscellaneous First Appeal No. 101952 of 2014

Tiffin's Barytes, Asbestos and  
Paints Limited

APPELLANT

Vs

JSW Steels Limited and Others

RESPONDENT

**Date of Decision:** Jan. 6, 2015

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 12 Rule 6, Order 38 Rule 5
- Contract Act, 1872 - Section 27, 70

**Hon'ble Judges:** Anand Byrareddy, J.

**Bench:** Single Bench

**Advocate:** Jayakumar S. Patil, Senior Advocate for Vijay Malali, for the Appellant; Udaya Holla, Senior Advocate for V.M. Sheelavant, Advocates for the Respondent

**Final Decision:** Partly Allowed

### **Judgement**

Anand Byrareddy, J.

This appeal is filed by the defendant No. 2 in a pending suit, challenging an interlocutory order of attachment before judgment, passed by the trial court, under Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 (Hereinafter referred to as "the CPC", for brevity).

2. The brief facts of the case are said to be as follows.

The plaintiff, M/s JSW Steels Limited, (Hereinafter referred to as "JSW", for brevity) is a company incorporated under the Companies Act, 1956, with its Registered office at Mumbai. It is said to be engaged in manufacturing steel products. It has its works at Vidyanagar, Sandur Taluk, Bellary district.

The first defendant, M/s DP Exports, (Hereinafter referred to as "DP", for brevity) is said to be a partnership firm having its registered office at Bangalore, carrying on mining activities at Haraginadoni, Bellary District.

The second defendant, M/s Tiffin's Barytes, Asbestos and Paints Limited, (Hereinafter referred to as "Tiffins", for brevity) is said to be a company incorporated under the Companies Act, 1956, with its registered office at Chennai and is said to be carrying on mining activities at Haraginadoni, Bellary District.

Tiffins is said to be holding a mining lease to mine iron ore in an area of 472.32 acres of land bearing Survey No. 311 of Haraginadona, Bellary District. It is said to be valid for a period of 20 years from 26.5.1998.

It is the case of JSW that there is an agreement between DP and Tiffins, dated 6.2.2011, under which, DP has been engaged to provide assistance in management of operations and in respect of the sale of iron ore. The term of the agreement was said to be for a period of seven years. The agreement, inter-alia, provided that on production of iron ore, of any grade, the same would be stocked in three piles, numbered as Pile Nos. 1, 2 and 3, respectively, consisting of 70% and 30% of the iron ore produced in Pile Nos. 1 and 2, respectively and 100% of the red oxide in Pile No. 3.

DP was nominated as the sole agent to sell the ore in Pile No. 1. DP was however, to obtain confirmation of the sale and approval from Tiffins, as regards the price, before completing the sale. This arrangement was acknowledged as being in consideration of certain amounts expended by DP to assist Tiffins in its operations.

On the strength of the above agreement, DP is said to have entered into an agreement with JSW, dated 10.2.2011, to supply iron ore on a long term basis and is said to have agreed to supply an estimated quantity of 1.50 lakh MT with an Fe content of 58%, at the rate of Rs. 1200/- per MT. A purchase order dated 15.2.2011, is said to have been issued for the value of Rs. 20 crore. The said amount is claimed to have been paid in advance, in favour of DP by the plaintiff.

At the instance of DP, a further advance of Rs. 5 crore is said to have been made by the plaintiff to DP, and this had been acknowledged by DP vide letter dated 24.6.2011, with an assurance that a monthly supply of iron ore to the extent of 60000 to 70000 MT would be maintained.

JSW is said to have made a further advance payment of Rs. 8 crore in anticipation of supplies. A total advance payment of Rs. 33 crore is said to have been made by JSW in favour of DP. However, there was no supply of iron ore till the date of filing of the suit.

An independent development was that the Supreme Court of India, which was seized of irregularities concerning mining operations in the State of Karnataka, had by its Order dated 29.7.2011, suspended mining and transportation of iron ore in Bellary District and also extended to Tumkur and Chitradurga Districts later.

It further transpires that in order to enable the sale of iron ore that had already been extracted, acting on the recommendations of the Central Empowered

Committee, a special body constituted by the Supreme Court to assist it in addressing the irregularities on the ground, a Monitoring Committee was said to have been set up to bring the iron ore to sale by recourse to an "E-auction" in the aforesaid three districts. This process is said to be continuing even as on date.

It is the case of JSW that Tiffins is bringing the iron ore stocked by it to sale from time to time through the said Monitoring Committee and is likely to deplete the entire stocks lying with it and which was to be supplied to JSW in terms of the agreement of sale. It is the further case of JSW that on repeated demands being made on DP to comply with the terms of the agreement, the only response was to refund a part of the advance amounts paid, without abiding by the contract to supply the ore.

As on the date of suit, the defendants were said to be liable to repay a sum of Rs. 24.22 crore. The suit is filed for recovery of the same with interest.

An application under Order XXXVIII Rule 5 of the CPC was said to have been filed. Tiffins, on receipt of summons and notice of the suit, is said to have filed objections to the application and is said to have contested the same. The trial court having allowed the application and having attached the suit schedule property, if the appellant failed to furnish security, the present appeal is filed.

3. Shri Jayakumar S. Patil, Senior Advocate, appearing for the counsel for the appellant, would contend that the impugned order is passed without addressing a primary circumstance of the non-existence of a privity of contract, as between the present appellant and JSW, the plaintiff. And secondly, it is contended that the court below was duty bound to ascertain the existence of circumstances to attract the rigour of attachment of the properties of the appellant, during the pendency of the suit.

It is sought to be emphasized that there is no agreement in writing between the plaintiff and the appellant and hence there is no *prima facie* evidence of any contractual obligation on the part of the appellant which could be said to be in breach in giving a cause of action for the plaintiff. And therefore there was no scope for entertaining an application seeking the extreme relief of attachment before judgment.

It is contended that an agreement dated 6.2.2011 between JSW and DP under which certain payments are alleged to have been made to DP by itself did not establish a privity of contract as between Tiffins, the appellant and JSW. It is overlooked by the court below that under the garb of the suit, JSW in collusion with DP has succeeded in converting an unsecured debt into a secured debt. There is a clear abuse of process of the court in invoking Order XXXVIII Rule 5, CPC. It is significant that JSW which is said to have paid monies to DP has not sought to take any measures to recover the same from DP but has sought to proceed only against the appellant.

It is urged that the application for attachment before judgment of the appellant's property, was not supported by material particulars which are required to be placed before the court for the grant of any relief under the said provision. Notwithstanding this lack of material the impugned order having been passed results in grave injury to the appellant. In that, it is the settled legal position that the legal requirements for a plaintiff to seek an order of attachment before judgment, would have to satisfy the court on at least two circumstances:

- i. that there is likelihood of a decree being passed against the defendant; and
- ii. that the defendant is removing his assets from the jurisdiction of the court, with an intention to delay and deny the fruits of the likely decree that may be passed in favour of the plaintiff.

Even the existence of one of the above circumstances, without the other would not satisfy the requirement of law to be eligible for the relief of an order of attachment before judgment. In the instant case on hand, it is sought to be pointed out that, the court below has failed to record that above legal requirements have been demonstrated to the satisfaction of the court below.

In the light of the above contentions, it is urged that the impugned order be set aside.

4. On the other hand, Shri Udaya Holla, Senior Advocate, appearing for the counsel for JSW and the learned counsel appearing for DP, respectively, seek to justify the impugned order.

5. From a reading of the impugned order, the court below has assigned the following reasons in granting the prayer for attachment before judgment. That the payment of an advance amount of Rs. 33 crore to defendant No. 1 was not in serious dispute. And though there was apparently no written agreement between JSW and Tiffins in respect of the alleged transaction, a letter written by one, Philip Van Haltren, Chief Operations Officer of Tiffins, dated 6.3.2012, addressed to the Senior Vice President, Finance Department, JSW, has been cited as a *prima facie* admission of receipt of monies against which supplies were to be made, consistent with the transaction claimed by JSW, and the temporary inability of Tiffins to comply with the obligation. Though the said letter was sought to be disowned on the footing that the author of the document had no authority to issue such a letter, the trial court has referred to other circumstances disclosing that the said author of the letter was indeed an authorized representative of the appellant. And therefore there was *prima facie* material available acknowledging the privity of contract.

It is further held by the court below that having regard to an agreement dated 6.2.2011 as between DP and Tiffins, whereby DP was authorized to act as a mercantile agent of Tiffins, DP would be clothed with the authority to sell the goods or consign goods for the purposes of sale and all such acts would be valid as if DP

was expressly authorized in that regard. Provided that the buyer acts in good faith and has no notice of any want of authority on the part of the agent to act as such. This being the legal position in terms of Sections 27 and 70 of the Indian Contract Act, 1872.

It is then observed by the court below that there is a ban imposed on Tiffins to deal with the iron ore stocks that were the subject matter of contract. In the meanwhile, the repayment of the amounts were to be secured. And in the further circumstance that Tiffins was apparently prohibited, by virtue of an order of suspension of mining activities over a substantial extent of the leased area over which its mining activities could be carried on, by the competent authority, if the stock of iron ore available was to be disposed of - the plaintiff was left with no remedy to realize its dues. It is also noticed by the court below that differences had arisen between Tiffins and DP and that they were embroiled in arbitration proceedings in that regard. And that this may further hamper the recovery of the monies paid by JSW.

The court below has thus opined that on a overall consideration of the circumstances of the case, the case of the plaintiff was adequately established, *prima facie*, in conformity with the settled principles for the grant of the relief of attachment before judgment.

In considering whether the above reasons assigned by the court below can be sustained, it is significant to note the letter dated 6.3.2012, written by the Chief Operations Officer of the appellant, is concerned, the text of the same has been reproduced by the trial court, in its order to emphasize the importance that it assumes in coming to a conclusion that there is a likelihood of a decree being passed against Tiffins on the strength of the said document alone. It is also relevant to note as to how Tiffins has addressed the effect of the letter in its written statement. The same is dealt with at paragraph 26 of its Written Statement, as follows:

"26. As regards the averments made in para-20 of the plaint are concerned, this defendant submits that (a) The said individual Mr. Philip Van Haltren, the Chief Operations Officer of the 2nd defendant company is not authorized by the company to make such statements; (b) The said individual Mr. Philip Van Haltren shall file a separate affidavit narrating the circumstances under which he signed the alleged letter dated 06.03.2012; (c) It could be noted that the said alleged letter dated 06.03.2012 stated to have been written during March 2012 long after the agreement dated 06.02.2011 frustrated during July 2011 with the intervention of the Monitoring Committee and does not have any legal efficacy; (d) Assuming such letter being written, the contents of which states the 2nd defendant's commitment of iron ore supply with M/s D.P. Exports, the 1st defendant herein and M/s DandD Enterprises could not be kept up due to the ban on mining imposed by the Hon'ble Supreme Court, expressing the intervening frustration of the agreement; A plain reading of the letter dated 06.03.2012 would reveal that there are other commitments by the

2nd defendant to M/s D and D Enterprises who are not parties to the suit. In the absence of M/s D and D Enterprises, the contention of the plaintiff that the 1st defendant received advances on behalf of 2nd defendant cannot be accepted as correct statement of fact. Therefore, the letter dated 06.03.2012 extracted in para-20 of the plaint does not in any manner improve the case of the plaintiff to confer cause of action for the plaintiff to file the suit against the 2nd defendant. (illegible). As such the suit has been filed without impleading a necessary party M/s D and D Enterprises, in whose presence alone, could the issues be resolved. The nonjoinder of necessary party to the suit is fatal. The suit is hit for want of "non-joinder of necessary parties" and hence has to be dismissed on this score alone. In view of the circumstances above stated, on the basis of the said letter dated 06.03.2012 no relief could be granted to the plaintiff as falsely stated in para-21 of the plaint."

It is pertinent to note that there is no affidavit of Haltren brought on record contrary to the assurance held out above, even at the hearing of this appeal, narrating the circumstances under which the letter is claimed to have been issued. The reference to one DD Enterprises also does not dilute the categorical admission of the liability to supply ore against receipt of Rs. 33 crore. The strong possibility of the plaintiff being entitled to a decree on the basis of such an admission, by virtue of Order XII Rule 6 of the CPC, cannot be ruled out. Therefore, the reasoning of the court below that the plaintiff had established the likelihood of a decree in its favour cannot be faulted.

The further reasoning of the court below as regards the second circumstance of the appellant being likely to deprive the plaintiff of the fruits of a decree that may be passed in its favour - with reference to the various legal impediments to its mining activity, and the only substantial assets available with the appellant was the iron ore lying in stock and that notwithstanding that the sale of the same was through the medium of the Monitoring Committee appointed by the Supreme court is not in dispute. However, the trial court has opined that there was no impediment to an order of attachment being passed in respect of the iron ore, notwithstanding, that the sale of the ore in stock is not in the hands of the appellant but is effected in terms of the modalities approved by the Supreme Court through the competent Committees nominated for the said purpose. This may not be tenable. The Order of attachment would not bind the said authorities from bringing the ore lying in stock to sale. The appellant is however entitled to the proceeds thereof. The order of attachment would thus require to be modified to that extent and it would bind the appellant in respect of all such proceeds accruing to its credit by virtue of any sales affected through E-auctions, as is the present practice. The second part of the Order concluding that the likelihood of the plaintiff being deprived of the fruits of a possible decree in its favour cannot be faulted.

A contention on behalf of the appellant to the effect that the value of the ore available and which is the subject matter of the proceedings being far in excess of

the suit claim, cannot be ruled out. The same being indefinitely encumbered, in terms as above, would result in a miscarriage of justice. It would thus require the court below to expedite the adjudication of the suit. Hence the court below is directed to dispose of the suit within a period of three months, if not earlier.

The appeal is allowed in part, in terms as stated above.