Champalal Balasa Vs Pyaribai Mangilal and Others

Court: Madhya Pradesh High Court (Indore Bench)

Date of Decision: Sept. 16, 1960

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 33 Rule 5

Citation: (1961) MPLJ 219

Hon'ble Judges: H.R. Krishnan, J

Bench: Single Bench

Advocate: R.C. Gangrade, for the Appellant; K. Goyal, for the Respondent

Final Decision: Dismissed

Judgement

H.R. Krishnan, J.

This is an application by the defendant in a money suit based on two pro-notes which have been admitted, from the order of the Civil Judge

affirming the interim attachment before judgment under Order 33, rule 5, Civil Procedure Code. The suit itself had been filed in 1953 and seems to

have reached the stage at which the judgment is to be delivered, which would have been delivered, but for the fact that the record has been sent

for in course of this miscellaneous appeal. The questions for decision are, firstly, whether it is merely a case of the plaintiff"s bare apprehension that

the defendant is going to dispose of his properties with the purpose of frustrating the execution of the decree that the plaintiff might obtain;

secondly, whatever the finding on merits of the intention to dispose of the property and the purpose of frustrating the decree, the plaintiff might

obtain, whether the attachment before judgment was justified in view of the undertaking the defendant had given when he borrowed the money:-

I will not sell any immovable property till repayment of the loan and if I do, you may stop me from thus transferring it.

The facts of the case are simple and at this stage practically common ground. As long ago as 1946, the defendant borrowed money by three pro-

notes from the plaintiff, out of which, the debt on two of the pro-notes is still outstanding. At that time, he executed another agreement stating that

so long as the money was not repaid, he would not transfer any of his immovable properties and if he did, the plaintiff could take steps to stop him

from doing so. What exactly would be the legal shape in which the plaintiff could, if at all, enforce the agreement is a question with which we are

not directly concerned here. But it shows the intention of both the parties that all the immovable properties of the defendant should be available to

the plaintiff if it became necessary for him to realise the debt by process in a law Court. Anyway, the matter went on with some acknowledgments

and satisfaction of one of the pro-notes, till ultimately the suit was filed in 1953 for Rs. 7,200 and interest on the two pro-notes. Immediately

before the filing of the suit, the defendant had actually sold out three out of the seven houses, which was all the immovable property that he had. He

states that he applied the money for the satisfaction of one of the pro-notes; but there is no evidence that the entirety was so applied and in any

event, this was without the knowledge and permission of the plaintiff-creditor. Simultaneously with the plaint, the plaintiff prayed that the four

remaining houses of the defendant might be attached under Order 38, rule 5, because the defendant was trying to dispose them of with a view to

frustrating the execution of the decree that the plaintiff might obtain in the suit, and he had no other property from which he could satisfy the decree,

and these in spite of his earlier agreement. There was an ad interim attachment, but after notice to show cause, the attachment was made final.

During the show cause proceedings, the trial Court had expressly invited the defendant to give security for the claim in the suit which is only a

fraction of what he asserts is the value of the houses. He declined to do so.

The defendant"s case here is that the conditions requisite for an order of attachment had not been fulfilled and the trial Court was in error.

Strangely enough, the memorandum does not refer to the defendant"s own undertaking that all the houses should be available to this creditor in

case he has to go to a law Court or that the defendant himself had disposed of three of the houses against the agreement.

On behalf of the defendant-appellant, case-law has been cited, viz., the rulings reported in Premraj Mundra Vs. Md. Maneck Gazi and Others, ,

Dr. B.R. Choudhary v. P.V. Bhagwat AIR 1953 M.B. 247, Messrs. Gagrat & Co. v. Ismail 1957 M.P. Cases 120. The first case is of particular

interest because it sets out, as it were, a list of 14 principles for the guidance of the Court in applying Order 38, rule 5. In all cases, the general

principle is that this provision should be invoked only exceptionally. Further, it is not the mare apprehension of the plaintiff even a justifiable

apprehension- that the defendant might dispose of his property and thereby make it difficult or even impossible for him to execute the decree if and

when it is obtained, that would call for an order under this provision; but there should be on the part of the defendant an attempt to dispose of his

property-either the entirety or a substantial portion and not merely a microscopic or insignificant part. Further, such disposal or attempted disposal

should be with a view to frustrate or obstruct the execution of the decree that might be passed in favour of the plaintiff. In view of the extreme

difficulty, decree-holders experience in our country in realizing the fruits of litigation, it might be better that the attachment before judgment had not

been hedged in with so many conditions; but one has to apply the law as it stands and as it has been interpreted by the High Courts of this country.

The provision is exceptional and one has to establish a course of conduct on the part of the defendant realized in part and likely to be realized in

another part. It has also to be established that this course of conduct is motivated by a desire to prevent the decree-holder or at least to obstruct

him from realizing the money by executing the decree if and when passed in his favour. However difficult this might make things to the plaintiff, this

is the law as interpreted by the Courts and has to be applied as such.

Here, both the conditions regarding the course of conduct and the purpose have been satisfied. The suit was brought in 1953 but the debt was

going on from 1946 onward. Between 1950 and 1952, the defendant sold away three out of seven of his houses which is not an inconsiderable

share. The plaintiff does concede that the defendant has got some movable property and a small business, but strangely enough, the defendant

asserts that he has got next to nothing other than the four houses attached. But it is common ground that there is nothing by way of immovable

property outside the four house''s now attached under Order 38, rule 5. Originally, the immovable property consisted of seven houses and the

defendant has himself mentioned in his agreement that he would not sell them till the plaintiff''s claim had been satisfied, and the plaintiff might take

steps to stop him from doing so. The sale was just before the suit; but not so long before as to be unconnected. In fact, the defendant was aware

of the utter dependence of the plaintiff on these houses for the realization of his money. One can say that the defendant had persuaded the plaintiff

to give him the loan by promising to keep the houses with himself and not to transfer them.

This takes us to the purpose of the transfer. The agreement referred to is not one creating a charge or mortgage on the houses. It might even be

that the agreement as agreement may not be enforceable or only enforceable in a round about manner by bringing a suit for injunction. Be that as it

may, the defendant had solemnly promised to keep the houses with himself so that it might be possible or, at any rate, easy for the plaintiff to

realize his claim. But he sells them one after the other; the only inference possible is that the sales were with a view to making things difficult for the

plaintiff. Having found three houses go out of the hands of the borrower, the plaintiff comes with the suit. The course of conduct shows that unless

some brake is applied the defendant might dispose of one or more of the remaining houses making it altogether impossible for the plaintiff to realise

his dues. Attaching of movable properties is very difficult and in fact, movable properties might disappear far more quickly from the hands of a

judgment-debtor. Whatever might have been the position in the absence of an agreement such as the one quoted, the fact of the agreement shows

that the disposals of the houses were on a system and with a purpose. The defendant has absolutely nothing to explain in regard to this agreement

except the very general suggestion that the plaintiff might bring a suit for injunction; but that is not the real question. The real question is a course of

conduct and of the purpose.

In the result, I find that the appeal is without substance and dismiss it with costs and pleader''s fee payable by the appellant to the respondent

according to rules.