

(1960) 01 CAL CK 0012

Calcutta High Court

Case No: Civil Rule No. 2655 of 1959

Heman Lal Gupta

APPELLANT

Vs

Narayan Shaw

RESPONDENT

Date of Decision: Jan. 1, 1960

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 38 Rule 5, Order 38 Rule 6, Order 43 Rule 1, 115

Citation: (1961) 1 ILR (Cal) 214

Hon'ble Judges: P.N. Mookherjee, J; Niyogi, J

Bench: Division Bench

Advocate: Rabindra Nath Chaudhuri, for the Appellant; Chandra Narayan Laik and Rajesh Chandra Ghosh, for the Respondent

Judgement

P.N. Mookerjee, J.

This Rule is directed against an appellate order refusing the Plaintiff Petitioner's prayer for attachment before judgment of certain properties of the opposite party, mentioned in the Plaintiff's application, filed for the purpose, under Order XXXVIII, Rule 5 of the Code of Civil Procedure. There were litigations between the parties who were landlord and tenant in respect of certain premises. The ejectment suit which was filed by the Petitioner-landlord succeeded up to this Court. Thereafter, when the ejectment decree was put into execution, there was a compromise between the parties. Under the terms of the compromise, the Defendant opposite party was to vacate the disputed premises within a certain date and he was also to pay mesne profits until his quitting of the premises. No payment, however, appears on the present state of records, to have been made by the opposite party and the Plaintiff, accordingly instituted the present suit for recovery of mesne profits, basing his claim for the same at a certain rate. In the suit, an application was made by the Plaintiff-Petitioner for attachment before judgment, as aforesaid. On the said application, the trial court passed an initial order obviously under Order XXXVIII,

Rule 5 of the Code, directing issue of notice upon the Defendant-opposite party ""to show cause, within 7 days from service, as to why he should not furnish security to the extent of Rs. 3,100 for the Plaintiff's claim and probable costs of the suit, or, in the alternative, why the properties, mentioned in the Plaintiff's petition, should not be attached before judgment", with a further direction that "mean "while, let the properties above mentioned be conditionally ""attached before judgment". This was obviously an order under Order XXXVIII, Rule 5 of the Code and it appears to have been made in strict compliance therewith.

2. Upon service of the notice, the Defendant opposite party appeared before the learned Subordinate Judge and showed cause against the Plaintiff's application for attachment before judgment. The learned Subordinate Judge, however, was of the opinion that in the circumstances the Defendant should either furnish security for the Plaintiff's dues, or the properties mentioned in the Plaintiff's application as aforesaid, should be attached before judgment and it passed an order in this form:

That the Plaintiff's prayer be allowed on contest. Cost will abide the result of the suit. Pleader's fee Rs. 10 only. The Defendant is directed to furnish security to the extent of the amount claimed in the suit together with costs so far incurred, within ten days from date. On proper security being furnished and accepted, the order of conditional attachment will be withdrawn and, failing it, the attachment will continue.

3. This order was passed on September 24, 1958. No security, however, was furnished by the Defendant opposite party in terms of the aforesaid order; but, on November 13, 1958, i.e., long after the expiry of the ten days, fixed for the furnishing of the security, an appeal was filed by him against the aforesaid order of the learned Subordinate Judge.

4. The learned Additional District Judge, who heard this appeal disagreed with the learned Subordinate Judge in his view, allowing the Plaintiff's application for attachment before judgment, and on reasons, given by him, amounting in substance, to a finding that, on the materials before the court, the Plaintiff's allegation that the Defendant was attempting to sell away his properties to defraud the Plaintiff or to defeat his claim had not been established, he allowed the Defendant's appeal and dismissed the Plaintiff's application under Order XXXVIII, Rule 5 of the Code of Civil Procedure.

5. Against this order, the instant Rule was taken by the Plaintiff-Petitioner and on his behalf, it was submitted first by Mr. Chaudhuri who appeared in support of the Rule, that the Defendant's appeal before the lower appellate court was incompetent as the learned Subordinate Judge's order, dated September 24, 1958, to which reference has been made above and against which the said appeal was filed, was not an order under Order XXXVIII, Rule 6 of the Code, but was one under Order XXXVIII, Rule 5 and, accordingly having regard to the specific terms of the relevant

appeal provision, namely Clause (9) of Order XLIII, Rule 1 of the Code of Civil Procedure, no appeal lay in the matter, an appeal being undeniably a creature of the statute and, without a statutory provision, no appeal being permitted in law. In the facts of this case, we are unable to give effect to this contention of Mr. Chaudhuri. The order of the learned Subordinate Judge, which was challenged in appeal before the lower appellate court, has been quoted above. It is clear from the said order, read with the earlier order, dated September 27, 1957, that it was an order under Order XXXVIII, Rule 6 of the Code. It may not have been very regular in its form, but there can be no doubt that it was, in substance, an order under the said Rule 6. Indeed, similar orders have been held to have the same effect in the two earlier decisions of this Court reported in *Haji Mohamuddin v. The Eastern Japan Trading Company I. L. R. (1922) Cal. 215*, and *Sourendranath Mitra and Anr. v. Sm. Tarubala Dasi (1927) 31 C. W. N. 432*. There are no doubt, certain observations in the latter case, that, on a strict interpretation, orders of this particular type may not satisfy all the requirements of Rule 6. But, in spite of that, the learned Judges, even in the very same case before them, eventually, came to the conclusion that the order should be treated as one under Rule 6 and the appeal should be entertained. In the earlier case, there was a clear observation that such an order would be an order under Order XXXVIII, Rule 6 and would be appealable as such under Order XLIII, Rule 1(q) of the Code. In our opinion, looking at the matter from the point of view of substance, the observations in the earlier Case (*Haji Mohiuddin (1)*) appear to be more accurate. We say this with the utmost respect. Moreover, even if a strict view may lead to a different conclusion, on the lines of reasonings, given by the learned Judges themselves in *Sourendra Nath Mitra's case (2)* the present order would become appealable as an order under Rule 6 of Order XXXVIII of the Code of Civil Procedure. That is enough for our present purpose. The more so, as, in this particular case, no objection to the competency of the appeal in the court of appeal below was taken on behalf of the present Petitioner and, apparently, both the parties treated the order as one under Rule 6 and appealable as such. That is important, as the matter is now before us in revision and, in the light of the circumstances, noted above, we do not think that this will be a fit case for interference on this particular ground.

6. As to the other points also, raised by Mr. Chaudhuri, we do not think that they are proper ground u/s 115 of the CPC or for invoking the revisional jurisdiction of this Court. Mr. Chaudhuri has drawn our attention to the fact that, while the learned Subordinate Judge's order was on a consideration of the affidavits of the parties, in the light of and in the context of the antecedent facts and surrounding circumstances, there is nothing in the order of learned Additional District Judge to indicate that he ever adverted to these antecedent facts and surrounding circumstances and Mr. Chaudhuri contends that consideration of these facts and circumstances is necessary for proper disposal of an application under Order XXXVIII, Rule 5 of the Code of Civil Procedure. It is true that there is nothing express

or expressly stated in the order of the learned Additional District Judge, from which consideration of the above facts and circumstances can be at once inferred, but we do not think that that, by itself, would go to show that he never applied his mind to the same. Moreover, the ground, on which the learned Additional District Judge had refused to place any reliance upon the Plaintiff's allegation and affidavit that there was an attempted negotiation for sale by the Defendant-opposite party to defraud the Plaintiff or to defeat his claim, appears to us to be cogent in the circumstances of this case and the conclusion, so arrived at, would not possibly have been different, even if the said antecedent facts and surrounding circumstances had been considered and expressly referred to.

7. In the above view, we hold that, on the merits too, the Plaintiff's application under Order XXXVIII, Rule 5 of the Code of Civil Procedure, could not have succeeded. It is not the law that, once an application for attachment before judgment is made by a Plaintiff, the Defendant must either furnish security or submit to such attachment. It is for the Plaintiff to make out conditions which will entitle him to have an order of attachment before judgment, under Order XXXVIII, Rules 5 and 6 of the Code. These conditions have not been fulfilled or established in the present case and the Plaintiff's application, accordingly, on the materials before the court, was rightly dismissed by the learned Additional District Judge. In the above view, we discharge this Rule. But, taking here into consideration the circumstances of the case and the antecedents and conduct of the Defendant, we would not make any order for costs in this Rule.

8. Let the Records go down as quickly as possible.

Niyogi, J.

9. I agree.