

(2001) 08 CAL CK 0063

Calcutta High Court

Case No: C.O. No. 2014 of 2001

Dr. Pradip Kr. Biswas

APPELLANT

Vs

Sibaji Bhowmik

RESPONDENT

Date of Decision: Aug. 8, 2001**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 19 Rule 3, Order 38 Rule 5
- Constitution of India, 1950 - Article 12, 21, 300A

Citation: 107 CWN 509**Hon'ble Judges:** Pratap Kumar Roy, J**Bench:** Single Bench

Advocate: Sudhis Dasgupta, Debotosh Khan, Sayambhu Nath Roy, Arun Kumar Dutta and Sandip Roychowdhury, for the Appellant; Bikash Ranjan Bhattacharya, B.K. Banerjee, Suranjan Mondal and S. Chakroborty, for the Respondent

Final Decision: Allowed

Judgement

P.K. Roy, J.

The defendants in Money Suit No. 5 of 2001 in the Court of learned Civil Judge (Senior Division), 3rd Court at Alipore have assailed the order dated 16th July, 2001 passed by the said Court whereby and whereunder the application filed by the plaintiff under Order 38 Rule 5 of the CPC for attachment of the defendants' property before judgment was allowed upon directing attachment of Schedule "D" property before judgment and order restraining the defendants from selling, transferring or alienating of the properties mentioned in the schedule of the plaint was passed. The learned Advocate for the petitioners Mr. Sudhis Dasgupta, Senior Counsel submits that condition precedent of applicability of such provision on the facts situation of the matter is absent. It is further submitted that in the application there was no materials as would vest jurisdiction upon the learned Court below to decide the said issue inasmuch as the paragraph 38 being the only paragraph which dealt with the conditions under the said provision is vague as sources were not

disclosed and informations also were not properly made and in that view of the matter there was no material before the Court to exercise the power under the said provision of Order 38 Rule 5 of the Code of Civil Procedure. The learned Advocate for the petitioners further submits that the right to enjoy the property of the defendants has been restrained without any sufficient materials and mere filing of the suit in the nature of money suit ipso facto will not empower the Court to exercise such jurisdiction. Reliance has been placed to the judgment in the case of [Premraj Mundra Vs. Md. Maneck Gazi and Others,](#) and the judgment in the case of Palghar Rolling Mills Pvt. Ltd. vs. Visvesvamy Iron and Steel Ltd.. reported in AIR 1985 Kar 282. It is further submitted that in terms of the provision of Order 38 Rule 5 of the Code of Civil Procedure, particularly under sub-rule (4). non-compliance of any of the provision under sub-rule (1) would make the attachment as void and in view of incorporation of such provision after amendment of the CPC in the year 1976. the Court is required to consider the aspect strictly and to pass the order upon being satisfied with all the conditions as stipulated thereto in sub-rule (1) of Order 38 Rule 5 of the Code of Civil Procedure. The learned Advocate for the opposite party herein Mr. Bikash Ranjan Bhattacharya, Senior Advocate submits that the conduct of the defendants as stated not only the plaint but also in the application with proper affidavit in connection with the application under Order 38 Rule 5 of the CPC clearly created a situation before the learned Court below to exercise the power and jurisdiction under the said provision. It is contended further that since there were materials before the Court that the defendants would dispose of the property and by this process there was positive averment that the plaintiff would not be able to enjoy the fruit of the decree. The learned Court below was right in passing the order of attachment. The learned Advocate for the opposite party further submits that on the additional circumstances before the court namely. the conduct of the defendants as vividly described in the plaint and by affidavit as mentioned in the plaint, it was a fit case to exercise such power. The learned Advocate of the respondents further submits that contingency to realise the decretal amount is also a condition to be considered by the Court while adjudicating the matter and in that view of the matter the order impugned is justified. Reliance has been made to paragraphs 5 and 8 of the judgment in the case of [Premraj Mundra Vs. Md. Maneck Gazi and Others,](#) , and also relevant object and purpose of the provision in the statute. The judgment in the case of [Sardar Govindrao Mahadik and Another Vs. Devi Sahai and Others,](#) . has also been relied. It is further submitted by the learned Advocate for the opposite party herein that there was no necessity of making any submission in the application in verbatim to the language used in the statute namely the intention to obstruct and delay the execution of the decree, but mere submission that the plaintiff would have no alternative to realise his dues under the decree would be the sufficient averments to appreciate the intention of the defendants. It is further submitted that in paragraphs 37 and 38 of the application such materials were placed before the Court by affidavit and accordingly the order was justified. It is further submitted that in the event this Court considers that the

impugned order as passed was not legal and justified, opportunities to be further given by directing the defendants to file objection of this application so that after hearing the parties the learned Court below may pass such an order. Considering the rival contentions of the parties to adjudicate this matter, relevant statutory provision to be looked into. Order 38 Rule 5 reads thus :

"5. (Sections 483, 484) (1) Where, at any stage of a suit, 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.

the Court may 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, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimate value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule, such attachment shall be void."

From the statutory provision it is clear and explicit that under sub-rule (1) a subjective decision of the Court must be there before passing any order relating to the two ingredients namely. (1) intention of the defendants to obstruct or delay the execution of the decree and (2) with that intention the defendants were going/intending to dispose of the whole or any part of his property from the local limits of the jurisdiction of the Court. Hence, from the statute itself, without taking any help and/or aid of interpretation theory of statute, it is clear that before passing any order of attachment in the pre-decree stage the Court must be satisfied about the intention of the defendants to obstruct and/or to delay the execution of the decree and with that view of the matter disposal of the property was intended. Hence, the prime consideration in such type of application is to find out the intention of the defendants and also at the same time there would be sufficient materials before the Court by affidavit that the defendants were about to dispose of whole or any part of the property or to remove the property whole or any part thereof from the territorial jurisdiction of the Court. In a nutshell the object of the provision is to safeguard the interest of the plaintiff in very exceptional cases where the intention of the defendants from the very beginning of filing of the suit is such,

as would lead the learned Court below to a subjective satisfaction of the matter that the decree as would be passed would be made frustrated by the defendants. Hence, the action of the defendants and/or conduct of the defendants qua the plaintiff of the suit in the pre-suit stage is not at all the relevant consideration of the court, but the conduct and the circumstances on filing of the suit and /or after filing of the suit by the defendants is the sole relevant consideration as would attract the provision empowering the Court to exercise such power. Right to enjoy a property of a person even during the pendency of a suit, cannot be curtailed or encroached upon and such right of enjoyment to the property is otherwise a legal right only can be curtailed and contoured by the Court of law when there would be such positive case before the court that the defendants would avoid the decree. With that sole purpose this clause has been provided under the statute and such provision has been made. A mandator's" provision, by an amendment of the CPC in 1976. sub-rule (4) was incorporated, which provides the strict proof of the factual matrix that the defendants would avoid the decree and/or obstruct and delay the decree as would be passed. Sub-rule (4) provides that any order of attachment made with compliance of the provision of sub-rule (1) of the rule shall be void. Hence, sub-rule (1) of Order 38 Rule 5 is required to be strictly complied with by the court while passing such type of order as the order of attachment causes injury in enjoyment of the property by the defendants and accordingly the defendants will suffer a civil consequence and such civil consequence when has been allowed to be suffered even by ex parte order of the court, the court must be satisfied with materials applying "strict proof theory otherwise the court has no jurisdiction to exercise the power. The legislature with their wisdom accordingly has provided this special provision making it mandatory to follow the strict compliance of sub-rule (1) so that right of any defendant to enjoy this property during the pendency of a suit is not curtailed, save and except under the special circumstances and parameters as provided thereto in this provision. Judiciary is also a State in terms of Article 12 of the Constitution of India and judiciary also cannot go contrary to the mandatory provision of the statute and the constitutional mandate to that effect. Though right to property in view of deletion of such from the chapter of fundamental right of Constitution of India has been included under Article 300A making it only a legal right but still taking help and resort to different pronouncement of judgments by the Apex Court on interpretation of the word "life" of Article 21 of the Constitution of India, holding, inter alia, in the [Olga Tellis and Others Vs. Bombay Municipal Corporation and Others](#), . to the effect that "life" of Article 21 includes livelihood; and further holding that acquisition of property "makes liveable" as part of fundamental right in terms of Article 21 and considering other judgments of the Apex Court extending the meaning of word "life" appearing in that Article to the multiplicity. degree and width as to include everything that may be reasonably necessary to live with human dignity including such avenues of life as would be adequate for shelter, maintenance of life in the form of nutrition and clothing and even including the facilities of reading writing in terms of the judgment in *Francil Coralite Mullin vs.*

Administrator, Union Territory of Delhi & Ors., reported in AIR 1981 SC 746. The [Board of Trustees of the Port of Bombay Vs. Dilipkumar Raghavendranath Nadkarni and Others](#), and the other judgments including [O.P. Gupta Vs. Union of India \(UOI\) and Others](#), it is explicit not that without "property" life cannot be liveable. Hence, Article 21 will encompass even the right to properly since "right to liberty" also would be illusive in the event if there is no means of livelihood in terms of the property. Be that as it may about the broader aspect of the matter namely right to property whether still to be considered as fundamental right with the addition and aid of Article 21 of the Constitution of India which at this moment is not the focus point of decision herein and accordingly the Court is not deciding the same but only a reference on this point for future adjudication when such would be necessary. This present application can be decided, considering the enjoyment of property even as a legal right in terms of Article 300A which is also inclusive of right to enjoy the property being a valuable right. Be that as it may, hence it is clear that enjoyment of a property which is a valuable right to some one, can only be restrained by positive foundation under the special provision as stipulated in the statute. The statute being mandatory and in view of special provision, the non-compliance of sub-rule (1) in terms of sub-rule (4) the attachment order would be void. Now I have to deal with the matter with the aforesaid foundation of the statutory provision vis-a-vis right to property of the case in hand now. The exercise of such power under Order 38 Rule 5 of the CPC vested to the Court for being satisfied with the ingredients and materials thereto by considering the affidavit or otherwise. The affidavit has a special significance in this case. Normally in a suit, case is decided by trial on evidence but in the special case in the pretrial stage statute has allowed the Court to consider the matter only on the basis of the affidavit or otherwise which means on hearing the party. Accordingly, affidavit in such type of application has very vital effect and purpose to deal with the matter. In [The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others](#), a Constitution Bench, the purpose, effect, object and value of the affidavit has been explicitly explained by the Apex Court in paragraph 57 in the following terms:

The question then is : what were the materials placed by the appellants in support of this case which the respondents had to answer? According to paragraph 27 of the petition, the proximate cause for the issuance of the order was the discussion that the two friends of the 2nd respondent had with him. the petition which they filed at his instance and the direction which the 2nd respondent gave to respondent No. 7. But these allegations are not grounded on any knowledge but only on reasons to believe, the appellants do not disclose any information on which they were founded. No particulars as to the alleged discussion with the 2nd respondent, or of the petition which the said two friends were said to have made such as its contents, is forthcoming. It is true that in a case of this kind it would be difficult for a petitioner to have personal knowledge in regard to an averment of mala fides, but then where such knowledge is wanting he has to disclose his source of information

so that the other side gets a fair chance to verify it and make an effective answer. In such a situation, this Court had to observe in [The State of Bombay Vs. Purushottam Jog Naik](#), that as slipshod verifications of affidavits might lead to their rejection, they should be modeled on the lines of Order 19, Rule 3 of the CPC and that where an averment is not based on personal knowledge, the source of information should be clearly deposed. In making these observations this Court endorsed the remarks as regards verification made in the Calcutta decision in *Padmabati Dasi vs. Rasik Lal Dhar*. ILR (1910) Cal 259. Apart from this consideration it is clear that in the absence of tangible materials, the only answer which the respondents could array against the allegation as to mala fides could be one of general denial. The affidavits of the respondents, however, do not rest with a mere denial. They contain positive averments to the effect that the impugned order was passed in exercise of the power conferred on the Board, that the order was independently made by the Chairman on materials before him and that the 2nd respondent had nothing to do with the making of it. Putting it in a somewhat different way, what was it that the respondents were expected to explain in their answer? The answer which they were expected to make was against the allegation that the order was not independently made by the Board, that it was made at the instance of the 2nd respondent in consequence of the discussions he had with his said two friends who were made to file a petition and that the Board had mechanically issued it in obedience to the 2nd respondent's behest without applying its mind to any materials before it. It is obvious that in the absence of any particulars about the alleged discussion or the alleged petition or the alleged direction given by the 2nd respondent or the sources of information on which the appellants had reasons to believe these tailings, the only answer which the respondents could give was a general answer that these allegations were not true and that the order was independently made by the Board and as recited therein it was passed by the Board as in its opinion the conditions of Section 237(b) were existent."

2. In another case value and effect of the affidavit as well admissibility as evidence also has been considered namely in [A.K.K. Nambiar Vs. Union of India \(UOI\) and Another](#), a judgment of the Constitution Bench, in the following language in para 11 :

"The appellant made allegations against the Chief Minister of Andhra Pradesh and other persons some of whose names were disclosed and some of whose names were not disclosed. Neither the Chief Minister nor any other was made a party. The appellant filed an affidavit in support of the petition. Neither the petition nor the affidavit was verified. The affidavits which were filed in answer to the appellant's petition were also not verified. The reasons for verification of affidavits are to enable the court to find out which facts can be said to be proved on the affidavits evidence of rival parties. Allegations may be true to knowledge or allegations may be true to information received from persons or allegations may be based on records. The importance of verification is to test the genuineness and authenticity of allegations

and also to make the deponent responsible for allegations. In essence verification is required to enable the Court to find out as to whether it will be safe to act on such affidavit evidence. In the present case, the" affidavits of all the parties suffer from the mischief of lack of proper verification with the result that the affidavits should not be admissible in evidence."

3. In this case the value of the affidavit and the jurisdiction of the Court to pass any order on the basis of such an affidavit was considered holding that genuineness and authenticity of the allegation without any proper verification in the affidavit would make an application infructuous even if an application was well drafted and the affidavit thereto would be of without any value whatsoever. Relying upon the said judgment the Division Bench of this court also passed the same view in the case of Lee Yound Sung & Anr. vs. Board of Trustees for the Port of Calcutta. reported in 1998 (1) CHN 63. Hence the affidavit has a special value and significance on that issue in question. From the application as was filed by the affidavit by the plaintiff before the learned court below it appears that paragraph 38 which is the only paragraph incorporation one of the elements namely, that the defendants had proposed to sell the properties was affirmed as true to knowledge but in paragraph 38 the contention is as follows:

That it has come to the notice of your petitioner from different sources that the opposite parties has proposed to sell the properties and the different intending buyers are coming and negotiating with the opposite parties for sale and /or transfer of the Schedule "D" ♦ mentioned property."

4. Hence, from the aforesaid paragraph it is clear that the petitioners submitted before the Court that from source he came to know that the defendant was proposing to sell the properly. No disclosure has been made about source and no disclosure has been made giving the names of the parties namely, the intending purchasers or the particulars of the properties as was proposed to be sold and further without any information and in that view of the matter the affidavit itself is vague and which cannot be considered by a Court of law to exercise such extra-ordinary power by which the right to enjoy the property by a person would be curtailed. The affidavit since will empower the court to exercise the power. such affidavit must be with the positive particulars and not on vague averments and there must be a strict proof of the two factors namely, the intention of defendant to delay or obstruct the decree and with that intention attempt to dispose of the property whole or in part. Since it is a special mandatory provision and as I have held that strict proof is required, such element on satisfaction by court is absent even in the impugned order as it appears. Strict proof is necessary now has been settled by a judicial pronouncement and reliance is placed to the judgment in the case of Bedanand Rai & Ors. vs. Nabokumar Singh & Ors., reported in AIR 1938 Patna 161 and in the case of [Premraj Mundra Vs. Md. Maneck Gazi and Others](#), and in the case of [V.K. Nataraja Gounder Vs. S.A. Bangaru Reddiar](#), .

5. In the instant case, accordingly, nothing was proved before the court below even by affidavit which for this particular provision has been considered as "evidence through affidavit" which normally is called as "affidavit evidence". In that view of the matter there was no material before the court below to exercise the power. Furthermore, under the statute another condition which is the prime condition was required to be fulfilled namely, intention to obstruct or to delay the execution of the decree. From the application as filed by the plaintiff in the court below nowhere it appears that such contention was made and affidavit to that effect has been filed. There is no whisper that the defendants' conduct was such that the same led to the plaintiff to believe that the defendants had the intention to obstruct and delay the execution of any decree. The past conduct in the pre-suit stage will not suffice to satisfy this provision. But the conduct existed at the material time of the suit to be narrated and to that effect affidavit must be affirmed. This condition under the statute is a prime condition and taking into account of sub-rule (4) of Order 38 Rule 5 of the CPC since" there was no compliance with this particular provision of this statute namely, there was no sufficient materials before the court by filing an affidavit by the plaintiff that the defendants had the intention to obstruct or to delay the execution of the decree, the exercise of the power by the learned Court below was nothing but illegal exercise of the jurisdiction and under sub-rule (4), order of attachment accordingly has been void. By sub-rule (4) by the amendment of 1976 the safeguard has been introduced so that such type of order of attachment is not passed in the pre-judgment stage without any material fulfilling the condition under sub-rule (1). On careful perusal of the impugned order it appears that the learned court below also failed to exercise the jurisdiction and he assumed the jurisdiction without any material. Furthermore, in the impugned order there is no finding and observation of the court below that the court was satisfied about the two conditions namely, intention of the defendants to delay and obstruct the execution of the decree and with that intention the defendants intended to dispose of the whole or any part of the property. The learned court below simply has observed in one line that "it is a fit case for attachment". Since there is no finding of the learned court below about the subjective satisfaction in respect of the mandatory provision of sub-rule (1). in my view the learned court below had no jurisdiction to pass such an order and the impugned order as passed is illegal and without jurisdiction as not only there was no sufficient materials before the learned court below but has not considered the absence of such materials while exercising the power. In that view of the matter, the impugned order cannot stand. Accordingly, since the order is absolutely illegal and in violation of the mandatory statutory provision, the same is set aside and quashed. The revisional application accordingly succeeds. Let urgent xerox certified copy of this order, if applied for, be given to the learned Advocates for the parties expeditiously.