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Vidya Singh Vs. Programme Support Unit Foundation and anr.

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Court : Allahabad

Decided On : Sep-12-2001

Reported in : 2001(4)AWC2916

Judge : Janardan Sahai, J.

Acts : Code of Civil Procedure (CPC), 1908 - Sections 46, 136 and 136(1) - Order 38, Rule 5, 5(1) and 7; Provincial Small Causes Courts Act, 1887 - Sections 15, 15(2) and 15(3); Uttar Pradesh Provincial Small Causes Courts (Amemdment) Act - Schedule - Article 4; ;Bengal, Agra and Assam Civil Courts Act, 1887 - Sections 25(2)

Appeal No. : Civil Revision Nos. 455 and 456 of 2001

Appellant : Vidya Singh

Respondent : Programme Support Unit Foundation and anr.

Advocate for Def. : Ajit Kumar, Adv.

Advocate for Pet/Ap. : S.N. Srivastava, Adv.

Disposition : Civil revisions dismissed

Judgement :

Janardan Sahal, J.

1. Theapplicant in these revisions Smt. Vidya Singh is the landlord of a premises in Varanasi, in the tenancy of opposite party M/s. Programme Support Unit Foundation, which is said to have been running a project for health and sanitation in rural areas sponsored and financed by the Dutch Government. A suit for recovery of rent and damages was filed by the applicant against the opposite party in the Court of District Judge. Varanasi exercising power of Small Cause Court alleging that the Dutch Government has cancelled the project on account of which the business ofthe opposite party has been closed and the opposite party is saddled with liability of paying the salary of its employees apart from rent, etc., due to the applicant. The plaintiff says that apart from moveable properties, which have been mentioned in the plaint in Varanasi and at the Head Office of the Opposite Party at Lucknow, there is no other property available with the opposite party to clear off its dues.

2. An application under Order XXXVIII, Rule 5, C.P.C., for attachment before judgment of certain movable properties belonging to the opposite party was filed by the plaintiff. Notice was issued to the opposite party but it did not appear to contest the application. However, the Judge, Small Cause Court rejected the application on the ground that all the properties in respect of which attachment had been sought were in the custody of the police of P.S. Lanka, Varanasi, being case property in a criminal case and as such, no order for their attachment could be passed. It is this order, which has been challenged in Civil Revision No. 455 of 2001. After the rejection of her application, a review application was filed by the applicant on the ground that in the application for attachment, certain movable properties (vehicles) belonging to the opposite party lying at the Head Office at Lucknow had also been specified but the Court has failed to consider these properties. The review application was dismissed and against this order, Civil Revision No. 456 of 2001, has been filed by the applicant. As both the revisions raised common questions, they are being disposed of by this common order.

3. I have heard Shri S.N. Srivastava, learned counsel for the applicant and Shri Ajeet Kumar, learned counsel for the opposite parties.

4. Shri S.N. Srivastava, has made a two-fold submission. One : The order of District Judge was liable to be set aside on-the ground that he has not considered that there were properties belonging to the oppositeparty other than those in police custody. Second : Even the properties in police custody could be released and an order of attachment could be passed in respect of them.

5. On the other hand, Shri Ajeet Kumar, learned counsel for respondent contends that the application itself was not maintainable, as it did not fulfil the necessary requirements of Order XXXVIII, Rule 5, C.P.C. It is also urged that the properties at the Head Office of the opposite party at Lucknow being outside the local limits of the jurisdiction of the Court could not be attached and further that these properties have not been specified. It is further submitted that the suit itself is not maintainable in the Court of Small Causes.

6. From the plaint averment and the application under Order XXXVIII, Rule 5, C.P.C., it is clear that there are two sets into which the movable properties alleged to be belonging to the opposite party liable for attachment can be divided. The first set comprises 3 Maruti Gypsies, 2 Rajdoot Motor Cycles and 3 Mopeds in all 8 items detailed at the foot of the application valued at Rs. 2 lakhs in possession of Police Station Lanka. The court below by the impugned orders has rejected the application in respect of this property on the ground that it is in the custody of Police and being case property could not be attached. I see no error of jurisdiction in the view taken.

7. The second set of movable properties are 2 Maruti Gypsies. 1 Mini Bus. Flat NE 118 and other moveable property lying in the office of the defendant at Raft Ahmad Kidwai Marg, Lucknow. The attachment of these property may now be considered.

8. The objection of Shri Ajeet Kumar is that these properties are outside the territorial jurisdiction of the Varanasi Court and as such, no order for their attachment can be passed. Before dealing with this submission, it is appropriate to refer to the provisions of Order XXXVIII, Rule 5 (1), which are quoted below :

'Rule 5. Where defendant may be called upon to furnish security for production of property.--(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.

9. Clauses (a) and (b) of Sub-rule (1) of Rule 5 of Order XXXVIII provide for two distinct contingencies in which attachment orders can be passed. While Clause (a) relates to the contingency where the defendant is about to dispose of his property. Clause (b) provides for the contingency where he is about to remove his property from the local limits of the jurisdiction of the Court. While it is implicit in Clause (b) that the property in respect of which an order of attachment is to be passed is situate within the local limits of the jurisdiction of the Court and the defendant wants to remove it outside such jurisdiction, there is in Clause (a) no such limit as regards the situation of the property. A contrast of the language employed in the two clauses suggests that in thecontingency where the defendant is about to dispose of its property, there is no bar to the Court passing an order in respect of properties situate beyond local limits of its jurisdiction. As to what would be the effect if the defendant removes property before attachment which was situate within the local limits of the jurisdiction of the Court on the date of application, does not fall for consideration in the present revision as that is not the case here.

10. I will now examine some of the other provisions of the Code. Section 136(1), C.P.C. specifically provides for attachment of property outside the local limits of the Court's jurisdiction. It reads thus :

'136. Procedure where person to be arrested or property to be attached is outside district.--Where an application is made that any person shall be arrested or that any property shall be attached under any provision of this Code not relating to the execution of decree, and such person resides or such property is situate outside the local limits of the jurisdiction of the Court to which the application is made, the Court may, in its discretion, issue a warrant of arrest or make an order of attachment, and send to the District Court within the local limits of whose jurisdiction such person or property resides or is situate a copy of the warrant or order, together with the probable amount of the costs of the arrest or attachment.'

11. This provision is applicable to all attachments under the Code other than those relating to the execution of decrees. The power under Order XXXVIII, Rule 5, C.P.C. is exercised at a stage before the decree is passed and as such, the attachment contemplated therein is not related to the execution of a decree. Section 136, C.P.C., must, therefore, govern such attachment. It is then plain that an order of attachment can be passed in respect of property situate outside the locallimits of the jurisdiction of the Court. However, it has to be conceded that the Court's power in the contingency provided in Clause (b) is limited to properties situate within the local limits of its jurisdiction on the date of the application.

12. The point cannot be settled without reference to two other provisions to clinch the applicability of Section 136, C.P.C., Order XXXVIII, Rule 7 provides that attachment before judgment shall be made in the manner provided for attachment of property in execution of a decree. Section 46, C.P.C., provides that the Court passing a decree may issue a precept to any other Court, which would be competent to execute the decree to attach the property belonging to the judgment debtor and specified in the precept. The question involved in the case of Firm Surajbali Ram Harakh v. Mohar Ali and Ors : AIR1941 All212 , upon which counsel for both parties relied was whether to attachments before judgment. Section 46 of C.P.C., was applicable in which case the precept could be issued to any Court or whether Section 136, C.P.C. was applicable in which case the order of attachment could be sent only to the District Court and not directly to any other Court. The Court held that Order XXXVIII, Rule 7, C.P.C. relates only to the manner of attachment and not to the authority competent to order attachment and Section

136, C.P.C., was, therefore, applicable and not Section 46, C.P.C. to attachments before judgment and the order of attachment could be sent only to the District Court where the property was situate. In Firm Surajbali Ram Harakh v. Mohar Ali and Ors. (supra), it was conceded that the Court did have jurisdiction to attach be1fore judgment property situate outside its jurisdiction.

13. I will now turn to the question whether the application filed by the applicant under Order XXXVIII, Rule 5, C.P.C. conforms to the requirement of that provision. There is no averment in the application or the affidavit accompanying thereto that the defendant opposite party wasabout to dispose of any of its property. Clause (a) of Order XXXVIII, Rule 5 has thus no application.

14. The applicability of Clause (b) to the facts may now be examined. It has been stated in paras 15 and 16 of the affidavit with reference to the property, which was in police custody that the defendant was trying to get them in his custody and to take them away from the jurisdiction of the Court so that the plaintiff may not be able to realise the ultimate decretal amount. A close reading of paras 15 and 16 as well as other paragraphs of the affidavit leads to the conclusion that there is no averment regarding plaintiffs apprehension that any property other than that in police custody may be removed out of the local limits of the jurisdiction of the Court. In para 15, there is of course a reference also to removal of records and effects but there is nothing therein to show that any of those items were about to be removed outside the Court's jurisdiction. Good grounds have been given by the trial court, which have been referred to above for refusing this prayer in respect of these items. The only averment made in respect of the property lying at the Head Office is contained in paragraph 21 of the affidavit wherein it has been stated that the motor vehicles at P.S. Lanka and any other properties of the defendants lying at the Head Office at Lucknow be attached to satisfy the ultimate decree and for due discharge of the ultimate decree of the present suit during the pendency of the present suit. The averments made in this paragraph are wholly vague. The provisions of Order XXXVIII, Rule 5, C.P.C. are of extraordinary nature and have to be sparingly invoked. Before exercise of these powers, the Court must be satisfied about the intention of the defendant to obstruct or delay the execution of the decree that may be passed against him and of his actions or intention to

remove his property as to dispose it of. Reference upon this point may be made to two decisions of this Court in New Shree Durga Vastra Bhandar v. Tarlok Natha and Company, 1990 (16) ALR 223 andKamal Kumar Verma v. Bhumiraj Sharma 1990 (16) ALR 524. The averments have to be specific and even source of information has to be disclosed vide Har Kishan Khosla v. Alembic Chemicals Works Company Ltd. and Anr : AIR1986 All87 . The affidavit filed by the plaintiff is vague and there is no specific averment regarding the Lucknow properties that they are about to be disposed of or removed. In view of the facts hereinbefore stated, even if the averments made in the application and affidavit are taken as correct, no case for an order of attachment before judgment is made out and no useful purpose would be served in setting aside the order of trial court and in directing it to reconsider the application.

15. This brings us to the question whether the properties in the application have been properly specified. In the application, details of 8 vehicles, which are in police custody have been given. However, in respect of the vehicles said to be lying at the Headquarter at Lucknow, only specification given is two motor cycles, one mini bus and one Fiat NE 1800 and other moveable properties. Whether this specification is sufficient or not cannot be decided in this revision. In any case, better specification can be called for from the applicant.

16. Turning now to the question whether the suit as framed is maintainable in the Court of Small Causes, we may refer at once to the relief clause. The plaintiff has sought a decree for rent and damages. No relief for ejectment has been sought nor is there any averment in the plaint that the tenancy of opposite party-defendant has been determined.

17. Shri S.N. Srivastava, learned counsel for the applicant refers to two supplementary affidavits--one dated 27.7.2001 annexing thereto two notices to quit dated 15.5.1998 and 10.5.2000 sent by the applicant-plaintiff to the defendant and the other supplementary affidavit filed on 3.8.2001 annexing thereto copy of an application for amendment of the plaint seeking incorporation of theplea of sending notices dated 15.5.1998. 10.5.2000 and 28.2.2001 and addition of relief of eviction,18. Shri S.N. Srivastava, first submits that in view of the amendment

application, there remains no controversy about the maintainability of the suit. Secondly, he submits that even on the plaint as it stands, the suit is maintainable in the Judge Small Causes Court. The amendment application was made after the impugned orders were passed and there is nothing to show on record that the amendment has been allowed. In the circumstances, it is not for the Court to anticipate whether the amendment would be allowed or not.

19. Admittedly on the date when the impugned order was passed there was no amendment. As such I am not expressing any opinion upon the effect of the amendment in case the same is allowed. It would be open to the applicant to make a fresh application for attachment at that stage. However, from the plaint averments as they stand, it is clear that the suit is not maintainable before the Judge Small Causes Court being beyond its pecuniary jurisdiction. The suit has been valued at Rs. 6,03.655.54. The relief for rent and damages amounting to Rs. 3.31,338.60 and interest at the rate of 18% per annum amounting to Rs. 59,640.94, electricity charges amounting to Rs. 60,050.00, repair charges Rs. 1,52,626.00--totalling in all Rs. 6,03,655.54 have been claimed. It is true that ordinarily a Court in revision against an order refusing attachment before judgment would not decide the question of jurisdiction and it ought to be left to the trial court to decide after framing a proper issue but as in the present case, maintainability of the suit before the Judge Small Causes has to be adjudged from the plaint allegations alone and as an order of attachment before judgment even if the suit is not maintainable before the Small Causes Court may amountto an abuse of process of Court I am entering into this question only for the purpose of decision of the application for attachment.

20. Section 15 of the Provincial Small Cause Courts Act, 1887, provides that Court of Small Causes shall not take cognizance of the suits specified in the second schedule as suits excepted from the cognizance of a Court of Small Causes. Article 4 of Schedule II has been amended in Uttar Pradesh.

21. The effect of the U.P. amendment is that a suit for possession of immovable property or for the recovery of interest in such property is not maintainable but a suit by the lessor for eviction of a lessee from a building after the determination of

his lease and for recovery of compensation for use and occupation of the building after such determination is maintainable. Section 15 of the Provincial Small Cause Courts Act, 1887, has also been amended and Sub-sections (2) and (3) of the Parent Act have been substituted by U.P. Amendment.

22. The effect of the U.P. Amendment of Section 15 is that general pecuniary jurisdiction of the Judge Small Causes is Rs. 5,000. However, in relation to suits by the lessor for eviction of lessee from a building after the determination of the lease or for recovery from him of rent for the period of occupation during the continuance of lease or for compensation for use and occupation after the determination of the lease, the pecuniary jurisdiction of the Court of Small Causes is Rs. 25,000.

23. Section 25(2) of the Bengal, Agra and Assam Civil Courts Act, 1887, as amended in U.P. reads as follows :

'(2) The State Government may, by notification in the Official Gazette, confer upon any District Judge or Additional District Judge the jurisdiction of a Judge of a Court of Small Causes under the Provincial Small Cause Courts Act, 1887, for the trial of all suits (irrespective of their value), by thelessor for the eviction of a lessee from a building after the determination of his lease, or for the recovery from him of rent in respect of the period of occupation thereof during the continuance of the lease or of compensation for the use and occupation thereof after such determination of lease, and may withdraw any jurisdiction so conferred.'

24. The contention of Shri S.N. Srivastava is that under Section 25(2) of the Provincial Small Cause Courts Act, the jurisdiction of the District Judge to try suits for recovery of rent in respect of period of occupation during the continuance of the lease or for use and occupation thereof after such determination is unlimited. Sub-section (2) of Section 25, he contends, is in three distinct parts--each part separated by word 'or' alluding to suits of three kinds' ; the first being a suit for eviction of a lessee from a building after determination of lease, second being a suit for recovery of rent in respect of the period of occupation during the continuance of lease and the third being a suit for compensation for use and occupation after determination of lease. He submits that the Legislature had made

its intention clear by the use of the expression 'or' at two places in the Sub-section demarcating the suits of different kind.

25. It is to be noted that the language of the proviso to Sub-section (3) of Section 15 as regards the class of suits covered thereunder except for the limits of pecuniary jurisdiction provided is the same as that of Section 25(2). The proviso to Sub-section (3) of Section 15 has een interpreted by this Court in Santosh Singh v. Anil Kumar, 1988 (2) ARC 32. This Court has held that the proviso refers to suits for eviction, rent and damages; rent for period prior to the determination of tenancy and damages and compensation subsequent to determination. It was held that suit for recovery of rent and for damages and for use andoccupation simpliciter was not maintainable in the Court of Small Causes. The said decision is clearly applicable to the present case. Shri S.N. Srivastava contended that the said decision is erroneous and that it did not consider Section 25(2) of the Bengal, Agra & Assam Civil Courts Act, 1887, which confers unlimited jurisdiction upon the District Judge. The proviso to Sub-section (3) of Section 15 on the one hand and Section 25(2) on the other hand are couched in similar language and cover the same class of suits and as such, this submission that Section 25(2) of the Bengal, Agra and Assam Civil Courts Act was not considered in the case of Santosh Singh v. Anil Kumar (supra) has not force.

26. Shri Srivastava has relied upon the decisions in-

(1) M. P. Mishra v. Sangam Lal Agarwal : AIR1975 All425 .

(2) Trilok Singh v. Jamuna Devi and Anr : AIR1978 All129 .

(3) Harish Chand Gupta and Anr. v. Habibulla, 1997 (2) ARC 556.

(4) Ram Saran Lal v. Devendra Bhushan Singhal, 1984 ARC 194.

(5) Santosh Singh v. Anil Kumar, 1988 (2) ARC 32,

all of which were given in a suit by a lessor for eviction of the lessee from the building after determination of lease. None of these decisions relates to a suit, simpliciter for recovery of rent and damages without seeking a decree for

ejectment after determination of lease. These decisions are therefore clearly distinguishable.

27. The present suit, which was merely a suit for recovery of rent and damages for Rs. 6,03,655.54 is, therefore, beyond the pecuniary jurisdiction of the Judge Small Causes.

28. For the foregoing reasons, both the revisions fall and are dismissed.

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