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Court : Madhya Pradesh

Decided On : Sep-14-1990

Reported in : AIR1991MP373

Judge : S.K. Dubey, J.

Acts : Arbitration Act, 1940 - Sections 14 and 41; Code of Civil Procedure (CPC) , 1908 - Order 38, Rule 5

Appeal No. : Case No. M.A. 64/88

Appellant : Manohar Singh and ors.

Respondent : Hind Kumar Kohli and ors.

Advocate for Def. : A.M. Naik, Adv.

Advocate for Pet/Ap. : R.D. Jain, Counsel

Disposition : Appeal dismissed

Judgement :

S.K. Dubey, J.

1. This is an appeal by the non-applicants Nos. 2 to 4 under Order 43, Rule 1, Civil Procedure Code, against an order dated 28-6-1988, passed in Misc. Civil Case No. 52/ 1987, by Fifth Additional Judge to the Court of District Judge, Gwalior,

whereby the trial Court under Order 38, Rule 5, CPC, directed the non-applicants Nos. 2 to 5 (appellants and respondent No. 5 herein) to furnish security for Rs. 2,00,000/- promising to pay the amount up to this extent jointly and severally to Jagdishchandra, non-applicant No. 1/respondent No. 4, in case the award is made the rule of the Court and to satisfy the decree which may ultimately be passed against them, within fifteen days from 28-6-1988, failing which a warrant of attachment of the two properties as mentioned in para 11 of non-applicant No. 1/respondent No.4's application dated 4-5-1987 was ordered to be issued.

2. The facts leading to this appeal are that the appellants and one Pravin Kaur, respondent No. 5, and Jagdishchandra, respondent No. 4, were carrying on business in partnership in the name and style of firm Moharsingh Manoharsingh. Differences and disputes arose between the partners about the business and accounts, hence, they entered into an agreement on 29-11-1986 for resolving their disputes by arbitration. The arbitrators so appointed by the agreement, after proceeding with the arbitration, gave an award on 24-12-1986, of which a notice was given to the parties. On 25-3-1987 an application under Section 14(2) of the Arbitration Act (for short, the 'Act') was filed by respondents Nos. 1 to 3 to make the award as the rule of the Court. After notice appellants Jagdishchandra, respondent No. 4, and Pravin Kaur, respondent, No. 5, preferred their several and various objections to the application and to the making the award as rule of the Court. On 4-5-1987 respondent No. 4 preferred an application under Order 38 Rule 5, CPC, Order 39, Rules 1 and 2 read with Section 94 and Section 141, CPC, making various allegations against the appellants and averring therein that an amount of Rs. 2,25,000/- is to be realised from non-applicants Nos. 2 to 5, but with an intent to obstruct or delay the execution of the decree, which may ultimately be passed against the appellants and Pravin Kaur, respondent No. 5 they have changed the name of the firm Moharsingh Manohar Singh and have started business in the name and style of Ravindra Singh and Company, whereby misusing and misappropriating all the assets of the firm of which the dispute arose between the Partners. It was alleged that all the properties of the said firm will be damaged, alienated or transferred, so that the respondent No. 4/non-applicant No. 1, in whose favour the award is passed, will not be able to get satisfaction of the decree which may ultimately be passed in terms of the award. It was also alleged

that non-applicants Nos. 2 to 5 intending to dispose of the two houses to defeat the claim of respondent No. 4. It was also alleged that the non-applicants Nos. 2 to 5 have started carrying on business in Punjab and for that they have transferred their assets to Sarhad in Patiala District, if the properties are not attached and/or a receiver is not appointed and/or the temporary injunction is not granted, respondent No. 4 will not be able to execute and realise the decretal amount.

3. All the allegations in this application were denied.

4. The trial Court by the impugned order, instead of granting temporary injunction, or appointing receiver, passed the order under Order 38 Rule 5, CPC, as aforesaid.

5. Shri R.D. Jain, learned counsel for the appellants, made various submissions about the jurisdiction of the arbitrators to pass the award, legality of the award and, placing reliance on a decision of the apex Court in Usamanali Khan v. Sagar Mal AIR 1965 SC 1798, wherein it was held that a proceeding under Section 14 read with Section 17 of the Arbitration Act 1940, for the passing of a judgment and decree on an award is not a suit and the parties to whom the notice of the filing of the award is given under Section 14(2) cannot be regarded as 'sued in any Court otherwise competent to try the suit,' within the meaning of Section 86(1) read with Section 87B, Code of Civil Procedure therefore, the Court was not competent to pass the order under Order 38, Rule 5, as the proceedings were not a suit. It was also contended that the provision contained under Clause (a) of Section 41 is a general provision about the applicability of the Code of Civil Procedure to all proceedings before the court, but the legislature in Clause (b) of Section 41 made a provision for certain specific powers of the Code as set out in the Second Schedule; those powers, which are exhaustive, are exercised by virtue of the said Clause and not by virtue of the application of the provisions of CPC by Clause (a) of Section 41 of the Act. Therefore, the Court was not competent to pass an order of attachment, as that power was not given to the Court. On merits of the order under Order 38, Rule 5, Shri Jain placing reliance on two Single Bench decisions of this Court, namely, Giri Garments v. State Bank of Indore 1979 MPLJ Notes 63 and Mehmooda Begum v. Wasimullah Khan, (1980) I MPWN 28, contended that

there is no averment in the application about any attempt of disposal by removal of the property by the appellants from the local limits of the jurisdiction of the Court with intent to obstruct or delay the execution of any decree that may be passed; therefore, for this reason also, the order could not have been passed. It was also submitted that the property does not belong to the appellants, and by a decree of the Court another person is the owner of the property, who is not a party to the proceedings, and, hence, no order for attachment could have been passed.

6. Before dealing with the legality or correctness of the order under Order 38, Rule 5, CPC, it is necessary to deal with the contention of Shri Jain, learned counsel for the appellants, about competency of the court to pass the order under Order 38, Rule 5 by invoking Section 41 of the Act. The power of the court to grant auxiliary relief; e.g., by appointment of a receiver or by granting an injunction or by attachment, is derived from Section 41 of the Act and the Second Sechedule of the section; therefore, it would be useful to quote the said two provisions in extenso :--

'41. Procedure and powers of Court.--Subject to the provisions of this Act and of rules made thereunder,

(a) the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings before the Court, and to all appeals, under this Act, and

(b) the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court.

Provided that nothing in Clause (b) shall be taken to prejudice any power which may is vested in an arbitrator or umpire for making orders with respect to any of such matters.

'The Second Schedule. (See Section 41) Powers of Court.

1. The preservation, interim custody or sale of any goods which are the subject-matter of the reference.

2. Securing the amount in difference in the reference.

3. The detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon or into any land or building in the possession of any party to the reference or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.

4. Interim injunctions or the appointment of a receiver.

5. The appointment of a guardian for a minor or person of unsound mind for the purposes of arbitration proceedings.'

The Court has power under Section 41(b) read with the Second Schedule to grant auxiliary relief on an application for such relief, if a case is made out for granting such relief, but such interim relief can only be for the purpose of and in relation to arbitration proceedings, as is the view taken by the apex Coun in the case of Ram Iron Foundry, AIR 1974 SC 1265. This Court in Daulatram v. Shriram, AIR 1964 MP 219 and Raj Builders, Indore v. Indore Development Authority, Indore, 1984 MPLJ 667 : (AIR 1985 MP 146) also took the same view. It is true that in any of the items of the Second Schedule there is not specific power given for passing an order under Order 38, Rule 5, but Clause (a) cf Section 41 makes the provisions of the Code of Civil Procedure applicable to all proceedings before the Court and to all appeals, except where such application is expressly excluded by the Act or by any enactment or rule. Section 41 starts with 'subject to the provisions of this Act.....' If we go through the provisions of Section 14 of the Act, with which we are concerned the section does not prohibit the applicability of the Code of Civil Procedure, and while dealing with an application under Section 14, in the absence of rules framed by the High Court, ordinary procedure under the Civil Procedure Code is to be followed. See Kawalsingh Akbar v. Baldeosingh Akbar, AIR 1957 Nag 57. The jurisdiction of the Court under the Act to entertain a proceeding for filing an award is accordingly governed by the provisions of the Code of Civil Procedure.

7. The question still remains whether the Court, when passing interim orders for granting interim relief, has been given power to pass orders of the nature as contained in paras 1 to 5 of the Second Schedule, and, therefore, by virtue of the power under Clauses (a) and (b) of Section 41, can a Court pass an order of attachment before judgment? This question came up for consideration before Delhi High Court in case of Union of india v. International Chemical Corporation (India), Amritsar, AIR 1977 Delhi 99, wherein the learned single Judge, while dealing with the two clauses of Section 41, in para 5 observed that plain reading of Section 41 (a) makes it clear that all the provisions of the Code of Civil Procedure are made applicable to proceedings under the Act. The Court will, therefore, have all the powers with respect to arbitration proceedings pending before it as it has under the said Code with respect to any other proceeding before it. It was further observed that Section 41(b) provides that the Courts shall have for the purpose of, and in relation to arbitration proceeding, the same power of making orders in respect of any of the matters set out in the 2nd Schedule as it has for the purpose of, and in relation to, any proceedings before the Court. The Second Schedule enumerates specific powers of the Court in relation to certain matters. Para 2 is for securing the amount of difference in the reference- Para 4 is for interim injunctions or the appointment of a receiver. The Court has the power and jurisdiction to secure the amount of difference in the reference or to make an order of interim injunction in appropriate cases. This power is to be exercised to the same extent and in the same manner as the Court does for purposes of and in relation to any other proceedings before it. The procedure to be followed in disposing of applications for interim injunctions under Section 41(b) read with Second Schedule is regulated by virtue of Section 41(a). It was held that this is the effect of combined reading of Section 41(a) and (b) of the Act. While dealing with the effect of Section 41, it was observed that the practice and procedure of the Court in issuing interim injunctions or attachment before judgment would be equally applicable in such cases, but the power under Section 41 is to be exercised subject to the proviso contained in Section 41.

Respectfully agreeing with the view, I am of opinion that an order under Order 38, Rule 5, C.P.C., can be under para 2 of the Second Schedule. The Case of Usmanali Khan, AIR 1965 SC 1798 (supra) relied by Shri Jain learned counsel for

the appellants, in my opinion, is inapplicable, as the apex Court has laid down that a proceeding under Section 14 of the Act is not a suit but for passing orders for interim relief the applicability of Section 41 of the Act was not considered therein.

8. Coming to the next contention of Shri Jain on the legality and propriety of the order under Order 38, Rule 5, C.P.C., it may be stated that various averments were made by non-applicant No. 1/respondent No. 4 in his application dated 4-5-1987. Order 38, Rule 5 speaks as to when defendant may be called upon to furnish security for production of property. 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, is about to dispose of the whole or any part of his property, or 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. For passing an order under Order 38, Rule 5, C.P.C., the intention of the defendant is sine qua non. But it must be mentioned that intention is an internal fact. Direct evidence can hardly be expected. The question of intent alleged by the plaintiff has to be determined having regard to the particular facts and circumstances of the case. See the view of this Court in Madhya Bharat Timber Stores v. Rameshlal Talwar, 1976 MPWN 325, and Murarilal v. Section K. Mandal, 1965 MPLJ N-126. As said in case of Kanchhedilal (1991 JLJ N-53) if the Court on the facts of the case comes to a conclusion that there are circumstances for exercising jurisdiction under Order 38, Rule 5, C.P.C., and in the circumstances any other inference is not possible, the Court would be right in passing the order under Order 38, Rule 5, C.P.C. The facts as stated in the application were supported by an affidavit; it was not disputed that the firm's name has been changed; the appellants for most of the time stay in Punjab, and during the pendency of the arbitration proceedings the house belonging to appellant No. 1 has been declared in the name of his wife by a decree of the Court. All these

circumstances clearly lead to the inference, which has been rightly drawn by the trial Court for passing the order under Order 38, Rule 5, C.P.C.

10. The wife of appellant No. 1, in whose favour the decree has been passed and whose house has been ordered to be attached in default of furnishing security, has neither approached the trial Court nor this Court challenging the order of attachment to be illegal. The stage of attachment of the house will come when the appellants and respondent No. 5 fail to furnish the security. Therefore, the order directing the furnishing of security for Rs. 2 lacs is legal and proper. In case the appellants fail to furnish security within 15 days from today, the warrant of attachment of the two properties shall be issued as ordered by the trial Court. The appellants cannot be heard to say that the properties cannot be attached, as according to them now the properties stand in the name of the wife of appellant No. 1 it is up to her to seek appropriate remedy, if so advised.

11. In the result, the appeal is dismissed with costs. Counsel's fee Rs. 300/- if already certified.

12. Let the record of the trial Court go down immediately to that Court so as to reach on or before 21-9-1990, on which date the parties shall appear before the Court. No fresh notice of appearance need be issued by the trial Court, as they have been noticed here. The trial Court shall proceed to dispose of the case expeditiously in accordance with law.

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