
(2002) 06 BOM CK 0107

In the Bombay High Court

Case No : Civil Revision Application No. 574 of 1995

Ashok Dattatraya Kumathekar

APPELLANT

Vs

Padmavati Ashok Kumathekar

RESPONDENT

Date of Decision : 21-06-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 48, 39, 60(1)
Hindu Marriage Act, 1955 — Section 24

Citation : (2002) 6 BomCR 749 : (2003) 1 RCR(Civil) 506

Hon'ble Judges : N.V. Dabholkar, J

Bench : Single Bench

Advocate : L.B. Pallod, for the Appellant; R.D. Bhalerao, (Abesent), for the Respondent

Judgement

N.V. Dhabholkar, J.—Heard Shri Pallod, Advocate for petitioner. None appeared for respondent.

2. The revision petition arises out of the order passed on 31-3-1995 by Civil Judge S.D. Sangamner in R.D. No. 1/1995. It appears that in H.M.P. No. 40/93 the said Court passed an order of interim maintenance/alimony in favour of respondent wife at the rate of Rs. 150/- per month. Regular Darkhast was filed for recovery of an amount of Rs. 3,000/- towards interim alimony for the period 27-4-1993 to 26-12-1994 and further for the amount of Rs. 218.15 ps. towards the costs of execution proceeding. By application dated 31-3-1995, the wife prayed for attachment from salary of petitioner serving with Maharashtra State Road Transport Corporation at Khed (Rajgurunagar), District Pune and the learned Judge has issued attachment by the impugned order, which reads as follows:

"Issue attachment warrant in respect of salary of the opponent as prayed for under Order 21, Rule 48 of C.P.C."

3. Advocate Shri Pallod has raised two objections against the said order.

Firstly, according to him, since defendant-judgment debtor is residing at Rajgurunagar, District Pune and also serving there, Court of Civil Judge S.D. Sangamner had no jurisdiction to execute the order. Secondly, according to Shri Pallod, attachment order indicates as if amount of Rs. 3218/- was ordered to be attached in lump sum, which is against provisions of section 60(1)(ia) of the Civil Procedure Code.

4. So far as objection to the jurisdiction is concerned, Advocate Shri Pallod has relied upon section 39 of CPC and relevant portion reads as follows:

"39. (1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court of competent jurisdiction,---

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

However, on reference to Order XXI, Rule 48 of C.P.C. the position appears to be otherwise. The relevant portion reads as follows:

"48. Attachment of salary or allowances of servant of the Government or railway company or local authority.

(1) Whether the property to be attached is the salary or allowance of a servant of a railway company or local authority or of a servant of a corporation engaged in any trade or industry Court whether judgment-debtor or the disbursing officer is or is not within the local limits of the Court's jurisdiction, may order that the amount shall, subject to the provisions of section 60, be withheld from such salary or allowances either in one payment or by monthly installments as the Court may direct;

From the portion of Rule 48 of Order 21 and more particularly, the portion underlined for the purpose of emphasis, it is evident that when it is a question of attachment of salary portion of the Government servants or servants of a Corporation, the territorial limits do not create an impediment in directing attachment of the same. On reference to section 39 as also Rule 48 of Order XXI, it is evident that none of the provisions beings with the non obstante Clause, such as "Notwithstanding anything contained in any other provision.....". Therefore, Advocate Shri Pallod is not in a position to advance the argument that section 39 will have superseding effect over Rule 48. Both the provisions are discretionary and state that "Court may send for execution" and "Court may direct".

Sub-section (3) of section 39 reads as follows:

"(3) For the purposes of this section, a Court shall be deemed to be a Court of competent jurisdiction if, at the time of making the application for the transfer of decree to it, such Court would have jurisdiction to try the suit in which such decree was passed."

Sub-section (3) thus, provides a deeming provision conferring jurisdiction upon the Court to execute the decree without transferring it to the Court within whose local limits, the judgment debtor/defendant resides or carries on business or personally works for gain. Admittedly, the marriage petition is pending before the Court of Civil Judge S.D. at Sangamner and there does not appear any objection raised to the competence of that Court to hear and adjudicate the said Hindu Marriage petition. Therefore, by legal fiction created in sub-section (3) of section 39, it can be said that the Court of Civil Judge S.D. Sangamner is also competent to execute the order regarding interim alimony, since that is the Court competent to try the Hindu Marriage Petition; even though defendant J.D. is residing beyond the territorial limit of that Court.

5. Second objection of Shri Pallod, Advocate, on reference to section 60(1)(ia) appears to bear considerable substance. Section 60 of the C.P.C. deals with the property liable to attachment and sale in execution of decree. The proviso to said sub-section carves out an exception by giving particulars which are not liable to such attachment. This proviso is sub-divided into Clauses (a) to (p) and Clause (ia) is pertaining to attachment of salary for the purpose of execution of decree for maintenance. The order regarding interim alimony is a decree for maintenance. Relevant part of section 60 along with Clause (ia) reads as follows:

"Provided that the following particulars shall not be liable to such attachment or sale, namely;

(a) to (i)

(ii) one third of the salary in execution of any decree for maintenance."

It is evident from the provision that 1/3rd of the salary of the judgment debtor is saved from attachment, probably aimed at keeping the amount sufficient for his subsistence. Shri Pallod was, therefore, justified in arguing that attachment in lump sum of Rs. 3218/- could not have been ordered, when, admittedly, wife had pleaded in the application that husband gets salary of Rs. 3000/- per month. According to Shri Pallod, amount excluding this 1/3rd only could have been attached and recovered, may be in installments from successive salaries payable to petitioner/judgment debtor.

6. The revision petition is therefore, partly allowed. The impugned order is modified and it is directed that the attachment ought to have been and shall be subject to provisions of section 60(1)(ia) of C.P.C. i.e. attachment shall be effected by excluding 1/3rd salary of the judgment debtor. Rule is made partly absolute, accordingly.

7. Advocate Shri Pallod has pointed out that the order was stayed by this Court on 14-7-1995. He is unable to make a statement whether attachment was accordingly effected or not. However, he states that his client has been depositing in the trial Court amount as ordered by the Court vide order dated 19-6-1996, while issuing Rule. It will be for the Executing Court to consider the

amount attached, deposited and its disbursement towards the amount that has become due in favour of the wife.