
(2004) 11 AP CK 0049
In the Andhra Pradesh High Court
Case No : CMA No. 707 of 2002

B. Venkatadri Reddy

APPELLANT

Vs

P.A. Vanajakshi and Another

RESPONDENT

Date of Decision : 24-11-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 43, Order 21 Rule 58, Order 21 Rule 97, Order 21 Rule 99

Citation : (2005) 1 ALD 729 : (2005) 1 ALT 640 : (2005) 2 RCR(Civil) 435

Hon'ble Judges : L. Narasimha Reddy, J

Bench : Single Bench

Advocate : S.V. Bhatt, for the Appellant; N. Promod, for the Respondent

Final Decision : Allowed

Judgement

L. Narasimha Reddy, J.—A short but interesting question, namely, whether an application under Rule 58 of Order XXI C.P.C., can be entertained, even before the actual attachment is effected, falls for consideration in this appeal.

2. The facts in brief that lead to filing of this appeal, are as under:

The appellant filed O.S. No. 191 of 1996, against the second respondent, in the Court of Senior Civil Judge, Madanapalle, for recovery of certain amount. The suit was decreed for a sum of Rs. 1,03,000/-, on 30.12.1999, and the decree became final. The appellant filed E.P.72 of 2000. He sought for attachment of certain movables, said to be owned, by the second respondent, in premises bearing door number 13/293-2 in Sri Lodge Building at Bangalore bus stand of Madanapalle Town. Through order, dated 11.12.2000, the Trial Court directed attachment of the movables. The Amin of the Court proceeded to the said premises twice, but could not effect attachment, on account of the fact that, the premises was locked, and resistance was offered by the first respondent.

3. Subsequently, the first respondent filed an application under Rule 58 of Order XXI C.P.C., to raise the attachment. She pleaded that the shop as well as the

various articles therein, exclusively belongs to her, and the second respondent, her husband, has nothing to do with the same. The appellant resisted the application on various grounds. Through the order under appeal, the E.A. was allowed.

4. Sri S. V. Bhatt, learned Counsel for the appellant submits that the attachment of movable property is complete, only when it is effected in accordance with the procedure prescribed under Rule 43 of Order XXI C.P.C., and in the present case, the record clearly discloses that the attachment was not effected, as required under the said provision. He submits that an application under Rule 58 of Order XXI C.P.C., is exclusively for the purpose of raising attachment, and unless an attachment was actually effected, the question of raising it does not arise. Placing reliance on certain decided cases, learned Counsel submits that the application was premature, and not maintainable. He made an attempt to convince this Court on the merits of the matter, and pleaded that the second respondent is the actual owner of the property, sought to be attached.

5. Sri N. Promod, learned Counsel for the first respondent, at the outset, submits that the objection as to the maintainability, was not raised before the Executing Court, and that it cannot be permitted to be raised at this stage. He further contends that once an order of attachment was passed by the Executing Court, the affected party, does not have to wait till he actually parts with the property, and an application for raising such an attachment can certainly be maintained. He contends that the second respondent, the judgment-debtor, has absolutely no right or interest over the properties in question, and the E.P was filed only with a view to exert pressure on the parties. He too has placed reliance upon certain precedents.

6. The suit filed by the appellant, against the second respondent, for recovery of certain amount was decreed. He filed E.P.72 of 2000, with a prayer to attach as many as 12 items of movable properties, under Rule 43 of Order XXI C.P.C. The items proposed to be attached, are mostly furniture and goods in trade. The Executing Court passed an order on 26.10.2000, directing attachment of the immovable properties mentioned in the E.P. When the Court Amin went to the site, for effecting attachment, there was resistance on the part of the first respondent, on the ground that the items of movable property belong to her. The Amin reported the same to the Court. The fact that the room was locked and attachment could not be made was recorded by the Trial Court on 11.12.2000. On 13.12.2000, the first respondent filed E.A. 444 of 2000, under Rule 58 of Order XXI C.P.C, to raise the attachment. In support of her claim in the application, the first respondent examined PWs. 1 and 2 and marked documents Exs.A-1 to A-8. The appellant was examined as RW-1 and Exs.B-1 to B-11 were marked on his behalf. The principal contention, on behalf of the appellant, is that E.A. 444 of 2000 was not maintainable, on account of the fact that, by the time the application was filed, the attachment was not effected at all. The Executing Court allowed the E.A.

7. The preliminary objection raised by the Counsel for the first respondent needs to be dealt with, before proceeding further. This relates to the permissibility of raising the ground as to non-maintainability of the application for the first time at the stage of appeal. The ground as to maintainability revolves mainly around the interpretation of relevant provisions; and neither recording of evidence nor filing of any documents is necessary for that purpose. In fact, the claim petition of the first respondent is very brief and cryptic, and it does not even mention the relevant particulars. Being a pure question of law, it can be permitted to be raised at this stage.

8. From the contentions of the parties, two questions arise for consideration in this appeal, namely, (a) whether E.P.444 of 2000 was maintainable and (b) whether the first respondent is the exclusive owner of the articles, that are sought to be attached. The necessity to deal with the second question would depend on the answer to the first question.

9. One of the most complicated stages in adjudication of civil disputes is the execution of a decree, which had become final. Several sections in the body of C.P.C, and Order XXI of its schedule, prescribe the detailed procedure to be followed, in the execution of decrees of different kinds. Attachment of movable or immovable properties of the judgment-debtors, and sale thereof, are the recognized steps in the execution of decrees, for recovery of money. Attachment, is invariably a step, which precedes the sale. Rules 41 to 54 of Order XXI C.P.C, prescribe the procedure for attachment of different kinds of properties. Prominent among them are Rules 43 and 54, which stipulate the manner in which the movable and immovable properties, respectively, can be attached, during the course of execution. Since the articles, that were sought to be attached, in the instant case, are movable properties, Rule 43 gets attracted. It reads as under:

Rule 43 of Order XXI C.P.C:

43. Attachment of movable property, other than agricultural produce, in possession of judgment-debtor :-Where the property to be attached is movable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof:

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once".

10. From a reading of the same, it is evident that attachment of movable property can be effected, only through actual seizure, and assumption of the possession or custody thereof, by an attaching officer. In contrast, attachment of immovable property can be effected under Rule 54, simply by prohibiting the judgment-debtor from transferring or changing the attached property. In the

present case, though an order directing attachment of various items of movable properties was made by the Executing Court, on 26.10.2000, it could not be effected, as is evident from the reports filed by the Amin, and endorsement on the docket. If the process of attachment becomes difficult or where the decree holder himself finds that the attachment cannot be proceeded with, for any reason, he may choose to select certain other items of property.

11. Section 47 and various Rules of Order XXI C.P.C., such as Rules 58, 97, 99 and 100 provide for adjudication of the claims by third parties, in respect of properties, which are attached or sold during the course of execution. Before the C.P.C was amended in the year 1976, such claims were required to be determined through separate suits. After the amendment, the claims of the third parties, in relation to the attached property, which are attached or sold during execution, are required to be adjudicated by the Executing Court itself. Applications filed therefor, are conferred with the status, almost of suits, and regular appeals are provided against the orders passed therein. In this case, we are concerned only with the maintainability of application under Rule 58 against an order of attachment.

12. An application made under Rule 58 being a substitute for suit, is conferred with all the tenets thereof. Having regard to the language employed in Rule 58, it can be said that the cause of action for filing an application under that provision would arise, only when an attachment is effected and in the absence of an effective attachment, the occasion to file such an application does not exist. The prayer in the application, has to be invariably to raise the attachment. If there did not exist any attachment, the question of raising it does not arise, and the whole exercise would become futile. Therefore, it needs to be seen as to whether there was an attachment of the properties in question.

13. It is contended for the first respondent that an attachment, even in respect of movable properties, comes into force, once the Executing Court passes an order directing attachment, and that the subsequent steps for taking control of the properties etc., are only ministerial in nature. He places reliance upon the judgments of the Madras High Court in *Muthiah Chetti v. Palaniappa Chetti*, AIR 1922 Mad. 447 and *Rajamraju v. Tirupatiraju*, AIR 1930 Mad. 670. The first of the cases related to the attachment of immovable properties, that too, under the un-amended provisions of C.P.C. A reading of the first of the judgments does not indicate that any principle was laid down, enabling the Court to entertain an application even in the absence of an attachment. In the second case, the nature of attachment of live stock fell for consideration. It was held that whereas live stock was attached by the Executing Court, the declaration by the attaching officer that he has effected attachment of the same, by going as near as possible to them, would be sufficient. Rule 43 of Order XXI C.P.C. does not insist that the attaching officer shall hold all the attached properties, or hold them physically. Much would depend on the nature of the properties. In fact, the Parliament has taken note of this and amended the C.P.C by introducing Rule 43 A, prescribing a

procedure for attachment of live stock, and agricultural implements. Therefore, the ratio laid therein, has no application to the facts of the present case.

14. In Hindustan Bicycle Manufacturing and Industrial Corporation Ltd. Vs. Nath Bank Ltd., , a Division Bench of the Patna High Court held that the attachment under Rule 43 of Order XXI C.P.C can be effected by actual seizure, and an assumption of custody of the attached articles by attaching officer. The circumstances under which the application under Rule 58 of Order XXI C.P.C can be maintained for raising attachment of movable properties, was dealt with by a Division Bench of Allahabad High Court in Radha Kishen Beni Prasad Vs. P.L. Jaitly and Co. and Others, It was held as under:

"There is nothing in the Civil Procedure Code, which allows a third party to come forward with objections before an attachment has been made. The reason is very obvious. So long as an attachment has not been made, no one can come forward and say that anything has been done which gives him a cause of action to come to Court. It is only after the property has been attached in pursuance of an application for attachment made by the decree-holder that a third party would have the right to come forward and say that the property should not have been attached on the ground that it belonged to him and not to the judgment-debtor".

15. Similar question fell for consideration before a Full Bench of Kerala High Court in G.K. Prabhakaran and Co., Irinjalakuda Vs. David Traders, Trichur, It affirmed the view taken by the Division Bench of Allahabad High Court in Radha Kishen v. P.L. Jaitly and Co., (supra), and further held that the Executing Court cannot invoke its inherent powers to entertain a claim petition before the attachment has actually been effected.

16. Learned Counsel for the first respondent submits that the Supreme Court held in number of cases to the effect that an application, under Rule 99 C.P.C, can be maintained by third parties, even before they are dispossessed, consequent on the sale and the same facility can be extended to the applications under Rule 58 also. In this regard, firstly a basic distinction between attachment of movable and immovable properties, has to be kept in mind. In the former, assumption of physical possession is necessary, whereas the law does not require the same, in respect of the latter. Secondly, a substantially important development, namely conferment of title on the auction purchaser takes place before the stage for filing of applications under Rule 99 is reached. It is not so in case of attachments. Further, the Supreme Court treated the nature of objections in applications under Rule 99, akin to those under Rule 97 C.P.C, and held that it hardly makes any difference, whether the application be treated as the one under Rule 97 or Rule 99 C.P.C Such a situation does not exist at the stage of attachment, that too, in respect of movable properties.

17. There is another angle from which the matter can be examined. In case, the objections raised in an application under Rule 58 are sustained and accepted, the attachment has to be raised. If the attachment is of the immovable property, no

further steps need be taken. The restrictions imposed by the Executing Court, while attaching the property, cease to be operative. However, in case of movable properties, the Court would be under an obligation to hand over or restore the possession of the attached properties, to the successful claimant. Such claimant will be entitled to seek the actual re-delivery or the value thereof. If the properties were not taken custody of, the Court will find itself in quandary, in the matter of redelivery of possession.

18. Therefore, the application filed by the first respondent for raising attachment, was not maintainable in law, and the order under appeal cannot be sustained. Since the application itself is found not maintainable, it is not necessary to deal with the second question, namely, the ownership or entitlement of the first respondent, over the items sought to be attached.

19. For the foregoing reasons, the appeal is allowed, and the order passed in E.A. 444 of 2000 is set aside. It shall be however open to the first respondent to file an appropriate application, in case the properties in question are attached in accordance with Rule 43 of Order XXI C.P.C. There shall be no order as to costs.