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(1960) 10 AP CK 0008

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 317 of 1957

Chimandas Methuram and Others — APPELLANT

Vs

Manager Mahadevappa Firm and Others — RESPONDENT

Date of Decision : 25-10-1960

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 46, Order 38 Rule 5, 136, 46

Citation : AIR 1961 AP 417

Hon'ble Judges : P. Chandra Reddy, C.J;Ramachandra Rao, J

Bench : Division Bench

Advocate : I. Panduranga Rao, for P.R. Ramachandra Rao, for the Appellant; A. Bhujanga Rao and R. Ramalinga Reddy, for the Respondent

Final Decision : Dismissed

Judgement

Chandra Reddy, C.J.—This revision petition raises an interesting question, namely whether the properties situate beyond the jurisdiction of a Court in which a suit is filed could be attached under Order 38, Rule 5 or Order 21, Rule 46 of the Code of Civil Procedure.

2. The material facts may be briefly stated. The first respondent plaintiff laid an action for the recovery of Rs. 5,080/- based on a document executed by defendants 1 to 4 on 14-1-1955 to the District Munsif''s Court, Adoni. Pending the suit, he applied1 for attachment before judgment of the immovable properties described in the schedule annexed to the petition and certain monies in the hands of the present appellants who were constituted trustees for the purpose of discharging the debts due by defendants 1 to 4 who were not in solvent circumstances.

3. The petition was opposed chiefly on the ground that as the properties were outside the local limits of the jurisdiction of the Court in which the suit was filed, they could not be attached. We are unconcerned here with the other objections to the application.

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4. Overruling this opposition, the trial court directed the attachment of the properties in question.

5. Dissatisfied with this order, defendants 5 to 7 who as we have already stated, were trustees to whom defendants 1 to 4 conveyed their properties for the purpose mentioned above, filed the revision petition u/s 115 C.P.C.

6. When the petition came on for hearing before our learned brother Seshachalapati J. he referred the matter to a Bench as, in his opinion, there should be an authoritative decision of a Bench Of this Court.

7. The main controversy in this petition is Whether Order 38, Rule 5 or Order 21, Rule 46, C.P.C. will be attracted to properties situate outside the jurisdiction of a Court in which the suit is instituted.

8. It is convenient at this stage to read the relevant statutory provisions.

9. Order 38, Rule 5 C. P. C.

"(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, where 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 estimated 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."

10. Order 21, Rule 46;

"(1) In the case of-

(a) a debt not secured by a negotiable instrument;

(b) a share in the capital of a Corporation,

(c) other movable property not in the possession of the judgment-debtor, except property deposited in, or in the custody of, any court, the attachment shall be made by a written order prohibiting-

(i) in the case of the debt, the creditor from recovering the debt and the debtor''

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from making payment thereof until the further order of the Court;

(ii) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon;

(iii) in the case of the other movable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor.

(2) A copy of such order shall be affixed on some conspicuous part of the court-house and another copy shall be sent in the case of the debt, to the debtor, in the case of the share, to the proper officer of the Corporation, and, in the case of the other movable property (except as aforesaid) to the person in possession of the same.

(3) A debtor prohibited under Clause (i) of Sub-rule (1) may pay the amount of his debt into court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same-"

Section. 136(1):

"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 decrees, 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.

(2) The District Court shall, on receipt of such copy and amount cause the arrest or attachment to be made by its own officers, or by a Court subordinate to itself, and shall inform the Court which issued or made such warrant or order of the arrest or attachment.

(3) The court making an arrest under this section shall send the person arrested to the Court by which the warrant was issued, unless he shows cause to the satisfaction of the former Court, why he should not be sent to the latter Court, or unless he furnishes sufficient security for his appearance before the latter court or for satisfying any decree that may be passed against him by that Court in either of which cases the Court making the arrest shall release him.

(4) Where a person to be arrested or movable property to be attached under this section is within the local limits of the ordinary original civil jurisdiction of the High Court of Judicature aft Fort William in Bengal or at Madras or at Bombay the copy of the warrant of arrest or of the-order of attachment, and the probable amount of costs of the arrest or attachment, shall be sent to the Court of Small Causes of Calcutta, Madras, or Bombay as the case may be, and that Court, on receipt of the copy and amount, shall proceed as if it were the District Court."

11. It is seen from the language of Order 38, Rule 5 and Order 21, Rule 46 C.P.C.

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that it does not impose any restriction on the power of the Court to levy attachment In regard to properties1 outside the local limits of the jurisdiction of the Court in which the suit is filed. We are persuaded that such authority is implicit in these provisions of law. That such power is implied in these two provisions of law could also be gathered'' from Section 136 C.P-C. extracted above- Otherwise, that section would be unmeaning, it is plain from Section 136 that it is not this section that vests jurisdiction to issue a writ attaching the property in the Court under Order 38, Rule 5 or Order 21, Rule 46 C. P. C.

That section provides only a mode of effecting attachment of properties not within the local limits of the jurisdiction of the Court which has seisin of the suit. It only prescribes the procedure and does not affect the competence of a Court to levy attachment. We are inclined to the view that Order 38, Rule 5 and Order 21, Rule 46 read in the light of Section 136 make it abundantly clear that a court can attach the properties notwithstanding that they do not lie within the jurisdiction of the Court in which the suit is filed.

12. We may now refer to the decided case* on this topic. We shall begin with Krishnaswaml v. Engel, ILR 8 Mad 20. It was laid down by Turner C.J. and Batchina J., that Sections 483, and 484 of the Code of Civil Procedure, 1882, warranted the attachment before judgment only, of property within the jurisdiction of the Court. Their Lordships thought that this result flowed1 from the expression "within the jurisdiction of the Court," which words were introduced for the first time into the Code by the Act of 1879.

A dissenting note was struck by Abdur Rahlm J. in Amara Veerayya v. Annamala Chetty, ILK 31 Mad 502. It was ruled by the learned Judge that u/s 648 of the Civil Procedure Code, 1882, even property outside the jurisdiction1 of the Court In which the suit was pending could we attached by that Court in anticipation of Its judgment. Both these cases arose under the Civil1 Procedure Code of 1882.

13. We need not now embark upon an enquiry as to which of the two views is sounder, since a change has been effected in these provisions of law in the'' Code of 1908. Section 483 of the Code of 1882 runs as follows:

"If at any stage of any suit the plaintiff satisfies the Court by affidavit Or otherwise that the defendant with intent to obstruct op 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 to remove the same from the jurisdiction of the court in which the suit is pending, or

(b) has quitted- the jurisdiction of the Court leaving therein property belonging to him, the plaintiff may apply to the Court to call upon the defendant to furnish security to satisfy any decree that may he passed against him in such suit and, on his failing to give such security, to direct that any portion of his property within the jurisdiction of the Court shall be attached until the further order of the Court.

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The application shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof....."

14. If is manifest that the expression ''in which the suit is pending7 occurring in Clause (a) and ''within the jurisdiction of the Court'' in Clause (b) are omitted in Order 38, Rule 5 of the Civil Procedure Code, 1908 which was substituted for Section 483. We are here unconcerned with the effect of the deletion of the words ''in which the suit is pending in Clause (a). But the words ''within the jurisdiction of the Court'' in Clause (b) have a direct bearing in that, in our opinion, it is that expression that was responsible for the ruling in ILR 8 Mad 20.

15. Order 38, Rule 5 of the present Code was the subject-matter of judicial decisions. Various High Courts had to consider this provision. The High Courts of Rangoon, Lahore and Allahabad have taken the view that Order 38, Rule 5 C.P.C., comes into play even in regard to properties which are not within the local limits of the jurisdiction of the Court in which the suit is pending. This is the purport of the rulings in M.S.M.M. Chettiyar v. Maung Sein, AIR 1931 Rang 279, Desraj Chananlal v. Ramjasrar Madanchand, AIR 1937 Rang 367, Firm Firm Surajbali Ram Harakh Vs. Mohar Ali and Others, Kanhya Ram v. Firm Dina Nath Hardial Mall, AIR 1926 Lah 330, Mariamma v. Ittop Poulo, AIR 1952 TC 159 (FB) and Gajanan Ramkrishna Mule Vs. Bhaskar Balvant Kulkarni,

l6. In Surendra Nath Gosami v. Bansi Badan Goswami, 36 Ind Cas 457: (AIR 1918 Gal 911), a Bench of the Calcutta High Court has taken contrary view. The learned Judges had to deal with the applicability of Order 38, Rule 5 C. P. C in regard to properties beyond the jurisdiction of the Court in which the suit was pending. In support of the conclusion that there was lack of jurisdiction in a Court to attach the properties outside its jurisdiction, reliance was placed on Begg Dunlop and Co. v. Jagannath Marwari, ILR 39 Cal 104. We will presently show that the latter case does not really substantiate this proposition. We may also point out that the learned judges in 36 Ind Cas 457: (AIR 1918 Cal 911) merely applied the principle laid down in ILR 39 Cal 104 without any discussion of the subject.

17. That ILR 39 Cal 104 does not really lend any support to the theory propounded in 36 Ind Cas 457: (AIR 1918 Cal 911) is apparent from the discussion at pages 117 and 118 of the report. The learned Julges observed:--

"The Subordinate Judge has held that as in the case of an attachment before judgment, tne writ can be issued in respect of properties outside the jurisdiction Haji Jiva Nur Muhammad v. Abubakar Ibrahim, 8 Bom HC (O.C.) 29; Rampertab v. Madho Rai, 7 Cal WN 216 and ILR 31 Mad 502. The same doctrine ought to be applied to cases of attachment in execution proceedings. But apart from the fact that there is weighty authority against this view..... there is no analogy between the two classes of cases. In the case of attachment before judgment, the question turns upon the construction of Order 38, Rules 5 and 6 read with Section 136."

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This makes a distinction between attachment before judgment and attachment in execution of a decree. Evidently, the foundation for this distinction is Section 138 C.P.C., which clearly says that it applies to attachment of property under the provisions of the Code not relating to execution of decrees, which means that it does not govern attachment of properties, in execution of a decree. We feel that ruling is in accord with propositions enunciated in, the other line of cases. Thus, 36 Ind Cas 457: (AIR 1918 Cal 911) is the solitary voice that is heard in opposition to the doctrine embodied in AIR 1926 Lah 330 and that line of cases. We are satisfied that this view is in consonance with the intendment of Order 38, Rule 5 C.P.C. read with Section 136 C. P. C.

18. We have next to see whether the pronouncement of the Privy Council in Setrucharlu Ramabhadra Raju Bahadur v. Maharaja of Jeypore, ILR 42 Mad 813: (AIR 1919 PC 150) on which reliance is placed by the learned counsel for the petitioners renders him any assistance. There, their Lordships were considering whether the Subordinate Judge, Visakhapatnam, could enforce the mortgage of property which was situated partly in the Visakhapatnam District and partly in the Agency Tract which was a scheduled district.

Their Lordships decided that so far as the decree was for sale of the property in the schedule district, the Courts had no jurisdiction to make it since Section 21 of the Code was not applicable to such a case. In considering the bearing of this judgment on the instant case, we have to remember that the CPC was not applicable to schedule areas in the State of Madras excepting Sections 36 - 43 and Order 34 of that Code. In such a situation, their Lordships ruled that the Subordinate Judge of Visakhapatnam was not competent to pass a decree in regard to the mortgage properties lying in the Agency Tract.

It was specifically mentioned by their Lordships that this was the result of Section 1(3) of the Code which excluded from the schedule districts the provisions of the CPC with the exception of certain sections which have already been mentioned. To the same etiect is Zubeda Begam Saheba Vs. Kommana Kanniah and Others, . We, therefore, feel that ILR 42 Mad 813: (AIR 1919 PC 150) and Zubeda Begam Saheba Vs. Kommana Kanniah and Others, do not lay down any proposition contrary to the view expressed by us above.

It follows that Order 38, Rule 5 C.P.C. comes into play even in cases of properties situate outside the local limits of the jurisdiction of the Court in which the suit is pending. In our judgment, the same principle is applicable to Order 21, Rule 46 C.P.C. That provision of law does not contain any prohibition against the levy of attachment of properties beyond the jurisdiction of the Court in which the suit is pending. Section 136 is equally applicable to it.

19. In this case, it is unnecessary for us to consider the effect of non-compliance with Section 136 C.P.C. and whether the failure to keep in mind the terms of that section would render the attachment void or whether it is a mere regularity since that stage has not yet been reached. The moment the trial court made up its

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mind to issue a warrant of attachment, the appellants filed this revision petition and obtained stay of further proceedings. That being the position, it is unnecessary for us to resolve the conflict between Firm Surajbali Ram Harakh Vs. Mohar Ali and Others,

20. It is not absolutely necessary for the present purpose to consider whether Section 46 C.P.C. could be invoked by the decree-holder. However, since some arguments were addressed to us on this aspect of the matter, we would like to express our final opinion on this. Section 46 says:

"(1) Upon the application of the decree-holder the court which passed the decree may, whenever it thinks fit, issue a precept to any other court which would be competent to execute such decree to attach property belonging to the judgment-debtor and specified in the precept.

(2) The court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree.

Provided that no attachment under a precept-shall continue for more than two months unless the period of attachment is extended by any order of the court which passed the decree....."

In our judgment, recourse could be had to the Section as it governs attachments in execution of a decree and does not come into play in the context Of Order 38, Rule 5 or Order 21 Rule 49 C. P. C.

21. In the result, the revision petition is dismissed with costs.

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