
(1994) 10 MAD CK 0026
In the Madras High Court

D. Rajalakshmi APPELLANT
Vs
N. Rajamony and Another RESPONDENT

Date of Decision : 27-10-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 9

Citation : (1995) 1 MLJ 192

Hon'ble Judges : Govardhan, J

Bench : Division Bench

Judgement

Govardhan, J.—This appeal is against the order passed by the vacation civil Judge, Kanyakumari at Nagercoil, dated 26.5.1994 in I.A. No.

292 of 1994 in O.S. No. 188 of 1989 raising the attachment over items 1 and 4 of the suit schedule properties in O.S. No. 188 of 1989.

2. The plaintiff in O.S. No. 188 of 1989 who has filed the said suit for recovery of Rs. 1,07,3 00, has filed an application in I.A. No. 843 of 1989

seeking attachment before judgment of five items of suit properties. Conditional attachment was ordered directing the respondent to furnish security

to the tune of Rs. 1,25,000. Since the condition was not complied with, attachment was made absolute on 18.10.1989 by the Subordinate Judge,

Nagercoil. Subsequently the first defendant filed I.A. No. 165 of 1994 on 4.4.1994 praying to raise the attachment before judgment of the suit

properties stating that there is a proposal for sale to Tamil Nadu Small Scale Industries Corporation and the vendee has agreed to deposit the

money after the sale towards the suit claim. The respondent in the said application viz., the plaintiff has filed a counter and the application stood

posted for enquiry on 7.7.1994. In the meantime, during summer vacation on 18.5.1994, the respondent filed a fresh application in I. A. No. 292

of 1994 for raising attachment over item Nos. 1 and 4 of the suit properties contending that the liability of the first defendant for the suit claim

cannot be decided in the Interlocutory Application and since the plaintiff has filed the suit for recovery of Rs. 1,07,300 the petitioner is seeking an

order raising attachment over item Nos. 1 and 4 of the suit properties since there is a proposal to sell the above said properties and if he is allowed

to do so he will have to deposit the money immediately on receipt of sale consideration. On the above averments of the first defendant in this

petition the vacation Judge has passed the impugned order raising the attachment in respect of items 1 and 4 of the suit properties and has also

directed the petitioner to deposit Rs. 1,25,000 within 10 days of the sale.

3. Aggrieved over the same, the plaintiff has preferred this appeal.

4. The learned Counsel appearing for the appellant would argue that towards the suit claim 5 items of the suit properties were attached initially and

the said attachment was made absolute on account of the failure of the defendants to comply with the directions given by the Court to furnish

security and that nearly five years later, the first defendant has filed a petition for raising the attachment over those properties on the ground that

there is a proposal to sell the property to the Tamil Nadu Small Scale Industries Corporation and agrees to deposit the money in court after the

sale is effected and when this application is pending enquiry, the first defendant has filed a second application before the vacation court seeking an

order raising attachment over two items of the properties alone and the Vacation Judge has also passed the order raising attachment and it is

against the provisions of Order 38, Rule 9 of CPC and therefore, the said order should be set aside.

5. Order 38, Rule 9 of CPC provides for removal of attachment and it is as follows:

When an order is made for attachment before judgment, the court shall order the attachment to be withdrawn when the defendant furnishes the

security required, together with security for the costs of the attachment, or, when the suit is dismissed.

None of the two conditions under which an attachment which has already been effected, have taken place for raising the attachment over items 1

and 4. The petitioner has only stated that after the sale of the properties, he

would pay the amount. The vacation court has directed the defendant alone to deposit the amount within 10 days of the sale and it has not passed an order directing the vendee to deposit the proposed sale consideration in court towards the suit claim. If such an order has been passed at least, it can be stated that the same safeguard has been done for the amount due to the plaintiff. If after the sale is effected and the first defendant fails to pay the amount as directed by the court, serious prejudice would be caused to the plaintiff. Further, when once application filed by the first defendant for raising the attachment is already pending enquiry, it is not known how a second application could be filed by the same person for the same relief and how the court has also passed an order granting the relief sought for by the applicant when his earlier application is still pending. The learned Counsel appearing for the respondent would argue that attachment in respect of two out of five items alone have been raised and the attachment in respect of item Nos. 2,3 and 5 are still subsisting and the value of those properties will be more than sufficient to meet the suit claim of the plaintiff and the earlier order of attachment of all the properties is an order passed by the learned Sub Judge without applying his mind and it has to be set aside. In support of his above contention, the learned Counsel relies upon the decision reported in *Desk Bandhu Gupta v. N.L. Anand* (1994) 1 L.W. 49, wherein their Lordships have held that total absence of drawing up of proclamation of sale and settlement of its terms renders the sale a nullity, covered by Section 47 and that non-application of mind as to whether sale of a part of a property would satisfy the decree debt, is a material irregularity causing substantial injury to the judgment-debtor and attracts Order 21, Rule 90 of Civil Procedure Code. The above decision relied by the learned Counsel appearing for the respondent is a decision rendered by Apex Court while considering the provisions of Order 21, Rule 54(1-A) and Section 47 of CPC which are provisions of procedure after decree. In the present case, the order of attachment is before judgment. Therefore, it cannot be stated that there is non-application of mind when the court has passed the order of attachment before judgment. It has been held in the decision reported in *Ravi Nagabhushanam Vs. Neti Gopala Krishna Murthy*, , as follows:

Once a conditional order of attachment under Rule 5(3) of Order 38, is made

final under Rule 6 and the attachment is not withdrawn under Rule 9, an application by the judgment-debtor to release a portion of the property from attachment for the purpose of privately selling it in order to discharge the debts of third parties is not permissible under Order 38. Assuming that Order 21 is applicable whenever it is possible to apply any provision to a situation in regard to attachment made under Order 33 even then except Rule 83 of Order 21 there is no other provision, which can apply to an application for releasing a portion of the property attached. Reading Rules 17, 55 and 64 of Order 21 leads to the conclusion that at the time of attachment it has to be considered whether the value of the property sought to be attached is more than the amount due and care should be taken to attach only such property whose value as nearly as may be is equal to the amount due under the decree. If the property of which the value is more than the amount due is attached objection should be taken at that stage. But once that stage is passed without objection the next stage is only to direct sale of a part of the property attached. That would not however mean that attachment to the extent of the property not directed to be sold could be lifted. The attachment once effected can be removed only by satisfaction of the decree or on its being set aside or reversed.

In the present case, even assuming the value of the other properties is much more than the suit claim, when once the attachment in respect of all the properties mentioned in the plaint was effected before judgment, the defendant could get it vacated only by satisfaction of the decree or on its being set aside or reversed. The properties have been attached in the year 1989 and for the past five years attachment was subsisting and the respondent has lost the opportunity to raise objections to the attachment on the ground that the value of the property attached is much more than the suit claim. Therefore, the order passed by the learned Judge while sitting as vacation civil Judge of Kanniyakumari District at Nagercoil in I.A. No. 292 of 1994 in O.S. No. 188 of 1989 is illegal and improper and therefore, it is liable to be set aside and it is accordingly set aside.

6. In the result, the appeal is allowed setting aside the order passed by the learned vacation civil Judge, Kanniyakumari at Nagercoil in I. A. No.

292 of 1994. No costs.