
(1988) 02 KL CK 0016
In the High Court Of Kerala
Case No : C.M.A. No. 113 of 1985

Executive Engineer, T.C. Division, K.S.E. Board, Palghat

APPELLANT

Vs

J.H. Sharma and Another

RESPONDENT

Date of Decision : 15-02-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 46A, Order 21 Rule 46C, Order 30 Rule 5

Citation : AIR 1988 Ker 285 : (1988) 2 ILR (Ker) 349

Hon'ble Judges : U.L. Bhat, J;K.G. Balakrishnan, J

Bench : Division Bench

Advocate : Kallada Sukumaran, for the Appellant; S. Sivaraman, R. Sankaranarayana Iyer and P.V. Jyothiprasad, for the Respondent

Final Decision : Allowed

Judgement

Bhat, J.—The first respondent herein obtained a money decree against the second respondent in O.S. 390 of 1981 of the Sub Court, Trivandrum on the basis of a compromise. At the instance of the decree-holder attachment before judgment was effected of certain sum of money said to be belonging to the judgment-debtor in the hands of the appellant herein, executive Engineer of the K.S.E. Board. The decree-holder subsequently filed execution petition under Order XXI, Rule 46A, C.P.C. He filed E.A. 566/84 seeking direction to the appellant to remit the amount in Court. The application was opposed by the appellant, but was allowed by the executing court. Hence this appeal.

2. In the Court below appellant contended, inter alia that the amount in his hands is the security amount deposited by the judgment-debtor, that the judgment-debtor abandoned contract and thereby the Board sustained huge loss, final liability has not been fixed and on a proper computation the Board would owe no money to the judgment-debtor and on the other hand substantial amount would be due to the Board from the judgment-debtor. The court below held that these contentions were not available to the appellant. The court below also took

the View that the garnishee had no case that he is not the garnishee. Thus the objections were overruled.

3. Learned counsel for the appellant would reiterate the contentions raised in the court below. He also contends that the Court below was in error in holding that appellant could not raise the objections at that stage. Learned counsel for the decree-holder would contend that the appellant did not raise objections when attachment before judgment was effected, that he did not raise any objection in response to notice under Rule 46-A of Order XXI, C.P.C. and therefore he could not be allowed to raise his objections thereafter.

4. Attachment before judgment was effected under Order XXXVIII, Rule 5, C.P.C. Since the attachment was of a sum of money allegedly belonging to the judgment-debtor and lying in the hands of the appellant, it would have been effected by way of prohibitory order. Rule 11A of Order XXXVIII states that the provisions of the Code applicable to an attachment made in execution of the decree shall, so far as may be, apply to an attachment made before judgment which continues after the judgment by virtue of the provisions of Rule 11. According to Rule 11, where property is under attachment by virtue of the provisions of Order XXXVIII, and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property.

5. Attachment of debt in execution of a decree is dealt with in Rule 46 of Order XXI. Attachment is to be made by written order prohibiting the creditor from recovering the debt and the debtor from making payment thereof until further orders of the court. Sub-rule (3) of Rule 46 states that the debtor so prohibited may pay the amount of debt into Court. This is only an enabling provision. There is nothing in Rule 46 which compels the debtor to pay the amount of debt into court.

6. The further procedure is dealt with by Rule 46A onwards. Rules 46A, 46B and 46C as they apply in this State reads as follows :

"46A. Procedure when debt or any movable property not in the possession of the judgment debtor. The Court may, in the case of any debt due to the judgment-debtor (other than debt secured by a mortgage or a charge or by negotiable instrument), or any movable property in which he has an interest, but not in his possession, which has been attached under Rule 46 of this Order, upon the application of the attaching creditor, issue notice to any person liable to pay such debt or deliver an account for such movable property (such person to be hereinafter called the "garnishee" calling upon him either to pay or deliver into court the debt due from or the property deliverable by him to such judgment-debtor, or so much thereof as may be sufficient to satisfy the decree and costs of execution, or to appear and show cause why he should not do so. Such application shall be supported by an affidavit verifying the fact alleging and stating that in the belief of the deponent the garnishee is indebted to the

judgment- debtor.

Provided that if the debt or property in respect of which the application aforesaid is made is of value beyond the pecuniary jurisdiction of the Court, the execution case shall be sent to the District Court to which the said Court is subordinate and thereupon the District Court shall deal with it in the same manner as if the case had been originally instituted in that Court.

46B. Procedure when garnishee does not forthwith pay the amount. -- Where the garnishee does not forthwith or within such time as the Court may allow, pay or deliver into Court, the amount due from him or the property deliverable by him to the judgment-debtor or so much thereof as is sufficient to satisfy the decree and the costs of execution, or does not appear and show cause in answer to the notice; the court may order the garnishee to comply with the terms of such notice, and on such order being made, execution may issue as though such order were a decree against him.

46C. Procedure where garnishee disputes his liability. -- Where the garnishee disputes his liability, the Court may order that any issue or question necessary for the determination of the liability shall be tried as if it were an issue in a suit and upon determination of such issue shall make such order as may seem just:

Provided that where the garnishee admits his liability but disputes its extent and the decree-holder does not seek to recover from the garnishee any sum in excess of what he admits is due from him the Court shall not be bound to decide the dispute and may direct the garnishee to pay such sum or so much thereof as is sufficient to satisfy the decree and the costs of the execution proceedings."

6A. It has to be noticed that Rule 46 does not contain any provision enabling the garnishee to raise any objection though it gives opportunity to the garnishee to subject himself to the order by making payment into Court. The next step is provided by Rule 46A. He has to be given notice either to pay the amount into court or to show cause why he should not do so. According to Rule 46B, where he fails to pay the amount in Court and also fails to appear and show cause in answer to the notice, the court may order him to comply with the terms of the notice and on such order execution may issue as though such order were a decree against him. This is the consequence of his failure to respond in terms of the notice under Rule 46B. Where he appears and disputes his liability Rule 46C requires that the court should decide the question as if it were an issue in a suit and upon the determination of such issue the court should pass such order as it deems fit. The Court may uphold the contention raised by the garnishee or reject his contention and pass appropriate orders. Such an order is appealable under Rule 46H. Thus the scheme of the rules contemplates a specific opportunity being given to the garnishee to show cause why he should not pay the amount into Court. If he raises an objection the court has a duty to consider the objection and pass appropriate orders. The rules do not require him to raise an objection suo motu before receiving a show cause notice under Rule 46A. The

fact that he did not suo motu file an objection when the attachment was effected before judgment does not take away his right under the above rules to raise an objection.

7. Let us now see what exactly was done in the executing Court. Execution petition was filed on 9-2-1984. The Court did not order notice to the garnishee. The order sheet shows that on 22-2-1984 the Court directed a letter to be written for the amount. That is evidently a letter to the appellant requesting him to remit the amount. The case was adjourned awaiting reply. The appellant as per letter dt. 7-8-1984 sent a reply stating that the Board did not have any money belonging to the judgment-debtor and that actually amount will be due from the judgment-debt or to the Board on finalising the matter. It was thereafter that the decree-holder filed E.A. 556/84 purportedly under Rule 46A praying that the Court may be pleased to issue notice of execution to the garnishee to allow the decree-holder to recover the decree amount due from him as though he is the judgment-debtor. Even on this petition notice was not ordered. But meanwhile the appellant appeared through counsel and filed objection on 12-3-1985. Thereupon the court passed the impugned order.

8. We find that the executing Court at no stage had taken care to issue notice to the garnishee under Rule 46A calling upon him either to pay the money into court or to show cause why he should not do so. The only endorsement on the execution petition is that letter was sent to him. Learned counsel for the decree-holder invites our attention to Order V, Rule 30, C.P.C. and contends that letter must be deemed to be notice. This rule enables the court to substitute for a summons a letter signed by the Judge or an appointed officer where the defendant is, in the opinion of the Court, of a rank entitling him to such mark of consideration. However, the letter shall contain all the particulars required to be stated in the summons. The rule applies to summons and not to notice. Office copy of the letter sent to the appellant is seen in the file. Letter dt. 29-6-1984 refers to the attachment before judgment, that is, prohibitory order and states :

"In continuation of the Order under reference, I request that the amount may be sent to this court for giving credit to the concerned suit."

The reminder letter dt. 26-7-1984 does not refer to any earlier order. But nevertheless it states thus :

"Please refer to the order cited. Neither a reply nor any amount has been received so far.

Hence I request you to let me know the result immediately failing which steps under Order 21, Rule 46-B, C.P.C. will follow. The case stands posted to....."

These letters do not contain any of the particulars required to be stated in the summons or notice and therefore would not attract Rule 30 of Order V. We are therefore of the opinion that prior to the passing of the impugned order garnishee was not served with a notice under Rule 46A. Notice was not ordered

to the garnishee either in the E.P. or in the E.A. referred to earlier. The appellant appeared in court only in response to the letter and filed counter affidavit raising certain contentions. Since he raised his contentions in the counter-affidavit, the same can be treated as objections contemplated under Rule 46C, even in the absence of a formal notice under Rule 46A. That being so, the court below had a duty under Rule 46C to order that the disputed question be tried as it were an issue in a suit and to decide the issue. In the impugned order the Court below did not consider the merits of the dispute raised by the appellant. The view taken by the Court below that the contention raised that no amount is available with him is not open to him is unsustainable. The observation of the court below that garnishee had no case that he is not the garnishee does not convey any meaning. He is a garnishee in the sense that he received a prohibitory order. But it is open to him to contend that he does not have any money belonging to the judgment-debtor or due to the judgment-debtor. If such a contention is raised at the appropriate stage in response to notice under Rule 46A the Court has a duty to consider the same.

9. In the result, we set aside the impugned order and remand the proceedings for fresh disposal in accordance with law. The appeal is thus allowed, but in the circumstances without costs.