

(1987) 09 AP CK 0017

In the Andhra Pradesh High Court

Case No : Appeal Against Order No. 503 of 1982

J. Rama Murthy and Others

APPELLANT

Vs

Srinivas Corporation General Merchants and Commission
Agents and Others

RESPONDENT

Date of Decision : 10-09-1987

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, Order 21 Rule 58(2), Order 21 Rule 58(4), Order 38 Rule 10, Order 38 Rule 11

Citation : AIR 1989 AP 58

Hon'ble Judges : Bhaskar Rao, J

Bench : Single Bench

Advocate : D. Sudershan Reddy, for the Appellant; N.V.R. Shankar Rao, for the Respondent

Final Decision : Allowed

Judgement

Bhaskar Rao, J.—The only question involved in this appeal is whether the Court below after decreeing the suit can continue inquiry into a petition under Order 38, Rules 8, C.P.C. filed pending the suit for raising the order of attachment before Judgment.

2, The facts of the case are: The property of the appellants was attached by order of the lower Court dt. 24-7-1978. It was an attachment before Judgment in a suit filed for recovery of money by the 1st respondent against 2nd and 3rd respondents. The appellants filed LA. 619/78 to raise the attachment. The suit was decreed on 9-12-1981. On 12-2-1982, long after decreeing the suit, 1.A. 619/78 was dismissed for default. In fact on that very date an adjournment petition for 1.A. 619/78 was filed by the appellants. However, that adjournment petition was dismissed on 12-2-82 and also consequently the 1.A. 619/78 for default. Therefore on 12-2-1982 itself, the appellants filed 1.A. 175/82 to restore 1.A. 619/78 dismissed on that very date for default. While dismissing that 1.A. the Court below held :

"....One of the petitioners came to the Court on the same day and filed the present petition. Therefore I find that there is just and reasonable cause for the petitioners to absent themselves on 12-2-82, at the time when the matter was called. But when the main suit was disposed of all the interlocutory Applications filed in the main suit shall stand as closed. But the Court without closing this petition, unnecessarily posted this matter for enquiry. Under these circumstances. I am of the opinion that the petitioners instead of prosecuting this petition, which is an Interlocutory application in the Main suit, are at liberty to file a separate petition under Order 21, Rules 58, C.P.C. if the Plaintiff files, E.P. Seeking execution of the Decree."

From the above, it is to be noticed that the Court below found justification for the absence of the appellants at the time when the I.A., was called. However, it dismissed the restoration petition on the ground that the appellants can renew the petition under Order 21, Rules 58, C.P.C, if the plaintiff seeks execution of the decree. It also thought that LA. 619/78 was unnecessarily kept pending when the main suit itself was disposed of. Whether this order of the lower Court is correct or not is the question involved in this appeal.

3. It is now, therefore, necessary to advert to the provisions governing this aspect of the matter. Order 38, Rules 5, C.P.C., empowers the Court to order conditional attachment before Judgment. It is Order 38, Rules 6 that contemplates passing of an order of attachment before Judgment in cases where the defendant fails to furnish security or shall not show cause why such a direction to furnish security shall not be issued, etc. Order 38, Rules 8, C.P.C. refers to the manner of adjudication of claim petitions preferred to property attached before Judgment. It is under this provision the appellants filed a claim petition before the Court below. The provision runs as under : --

"8. Adjudication of property attached before Judgment : Where any claim is preferred to property attached before Judgment, such claim shall be adjudicated upon in the manner hereinbefore provided for the adjudication of claims to property attached in execution of a decree for the payment of money."

Order 38, Rules 9 contemplates removal of attachment before Judgment in cases where the defendant furnishes security or the suit results in dismissal. Order 38, Rules 10 clarifies that the attachment before Judgment shall not affect rights of strangers nor shall it bar the decree holder from applying for sale. Now, Rules 11 declares in categorical terms that where the property is already under attachment before Judgment and subsequently there was a decree passed in favour of the plaintiff in the suit then it shall not be necessary upon an application for execution of such decree to apply for re-attachment of the property. Rule 11-A specifically states that the provisions applicable to an attachment made in execution of a decree shall apply to an attachment made before Judgment which continues after the Judgment by virtue of the provisions of Rules 11.

4. Thus, Order 38, Rules 10 enables the plaintiff decree-holder, there being no bar, to apply for sale of the property attached before Judgment. Rule 11 lays down a bar for re-attachment of the property which was already under attachment before Judgment. Rule 11 A contemplates continuance of proceedings, by virtue of Rules 11 initiated under Order 38, Rules 8 to raise the attachment before Judgment, even after the suit is decreed. Therefore, the reason assigned to sustain the order of dismissal of I.A., for default that the appellants can file another petition under Order 21, Rules 58, C.P.C. , if the plaintiff seeks execution of the decree, is not tenable in view of the above provisions, further, the observation of the lower Court that "But when the main suit was disposed of all the interlocutory applications filed in the main suit shall stand as closed is obviously one running contra to Order 38, Rules 11 and Rules 11-A.

5. Now, as postulated by Order 38, Rules 8 & 11-A the claim shall be adjudicated upon in the manner provided by the earlier provisions of C.P.C., for adjudication of claims to property attached in execution of a decree for the payment of money. It is Order 21, Rules 58 that provides for adjudication of the claims of property attached in execution of a decree for the payment of money. Therefore, a petition filed under Order 38, Rules 8, C.P.C., receives its adjudication as contemplated by Order 21, Rules 58, Order 21, Rules 58(2) contemplates adjudication of the claim by the Court dealing with the said claim and not by a separate suit. So much so, Order 21, Rules 58(4) is categorical and specific in stating that the order made after such an adjudication shall have the same force and shall be subject to the same conditions as to appeal or otherwise as if it were a decree. Thus, the claim petition would virtually have the status of a suit as per the amended Code.

6. In view of the above discussion it is clear that there is absolutely no bar and on the other hand it is permissible as contemplated by Order 38, Rules 11 and 11-A for a petition filed under Order 38, Rules 8 to be continued even beyond the date of decree of the suit, and that the said application has got to be tried as if it is a plaint as per Order 21, Rules 58(2) and (4).

7. In the circumstances, the order under appeal is set aside and the lower Court is directed to decide I. A. 619/78 after giving opportunity to both sides on merits. The appeal is accordingly allowed. No costs. The interim order granted by this Court will continue pending disposal of I.A. No. 619/78.