
(1999) 12 AP CK 0035
In the Andhra Pradesh High Court
Case No : CRP No. 4325 of 1999

K. Chandrasekharam and another	Vs	APPELLANT
Vijay Bhargavi Chit Fund Private Limited and another		RESPONDENT

Date of Decision : 22-12-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 46, Order 21 Rule 54, Order 38 Rule 5, Order 38 Rule 7, Order 38 Rule 8

Citation : (2000) 1 ALD 761 : (2000) 2 ALT 32

Hon'ble Judges : P. Venkatarama Reddi, J

Bench : Single Bench

Advocate : Mr. K. Gani Reddy, for the Appellant;

Judgement

1. The civil revision petition is filed against an ex parte order purportedly passed under Order XXXVI11 Rule 5 read with Order XXI, Rule 46 of the CPC directing the third party to the suit, viz., BHEL to withhold an amount of Rs. 1,75,000/- from out of the voluntary retirement benefits payable to petitioners 1 and 2. This order was passed on 23-8-1999 and IA was posted to 6-9-1999. The learned Counsel says that a counter has been filed and the matter is being contested. It is not known why the final orders are not passed in IA sofar.

2. The learned Counsel for the petitioners relied on the judgment of a learned single Judge of this Court in J. Balakrishna Vs. United Bank of India and Another, . The learned single Judge was of the view that the attachment under Order XXXVIII, Rule 5 CPC cannot be ordered against a third party and there is no procedure prescribed for impleading third parties in the 1A filed for attachment. The learned Judge further held as follows:

"The money in the hands of third party also cannot be attached as a garnishee (debtor's debtor) unless a decree is passed in the suit. Such money can only be attached in execution proceedings and not in pendency of the suit. Therefore, this Court holds that both the orders in the IAs. are totally illegal and uncalled for."

3. This decision was followed by another learned single Judge in CRP No.4331 of 1999 without any further discussion. With great respect, I must say that Order XXXVIII, Rule 7 was not noticed by the learned Judges. It reads as follows:

"Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree."

4. Order XXI Rule 46 which occurs in the chapter "Execution of decrees and orders" bears the heading "Attachment of debt, share and other property not in possession of judgment debtor". The said rule provides for attachment by a written order prohibiting the debtor from making payrrient until further orders of the Court. So also, in the case of other movable properties, the person in possession of the same can be prohibited from giving it over to the judgment-debtor. The procedure for issuing notice to garnishee etc., is provided for in the Rule 46-A and the following rules. Thus, the procedure and modalities of attachment for recovery of decretal amount applies mutatis mutandis to attachment before judgment as well. Otherwise, the Rules contained in Order XXXVIII do not lay down any particular method of attachment before judgment. It only specifies the circumstances and the contingencies in which attachment before judgment could be ordered by the Court, the adjudication of claims to property and the removal of attachment. If the rules of attachment for execution of decree are not brought within the gamut of Order XXXVIII, Rules 5 and 6, there will be vacuum and the provision itself becomes unworkable. That is the reason why Rule 7 of Order XXXVIII has been advisedly introduced into the chapter "attachment before judgment".

Rule 11-A is also worth noticing: "Provisions applicable to attachment:

"11-A (1) The provisions of this Code applicable to an attachment made in execution of a decree shall, sofar as may be, apply to an attachment made before judgment which continues after the judgment by virtue of the provisions of Rule 11."

5. There is plethora of decisions in which attachment provisions contained in Order XXI have been applied while ordering attachment before judgment under Order XXXVIII. Suffice it to cite the Full Bench judgment of Patna High Court in Tapeshwar Missir Vs. Santokh Singh and Another, . In that decision, it was observed inter alia that Rule 7 in terms provides that the manner cf attachment must be the same as in regard to the attachment of properties in course of execution of a decree and therefore it will attract Rule 54 in case of immovable properties. As long back as in 1932. Curgenveti J., in Alwar Aiyangar Vs. Subramania Dikshathar and Others, observed:

"The question which arises in this case is whether- a Court attaching a debt either before judgment or in execution can inquire into the truth or the existence of the debt. The attachment in the present instance was made before judgment on an application filed on the same day as the plaint. But I cannot find that it makes any difference whether such an attachment was made before judgment or

in execution of the decree, and it appears to me that Rules 7 and 8, Order 38, CPC show that the Court has the same powers in the one case as in the other."

6. I am therefore of the view that the decisions relied on by the learned Counsel for petitioners do not lay down the correct law and shall be deemed to be "per incuriam". It is therefore not necessary to refer the case to a Division Bench.

7. The learned Counsel for the petitioners then objected to the manner in which the attachment order was issued to the gamishee straight-away without even directing conditional attachment. It is also submitted that the ingredients of Order XXXVIII Rule 5 are not satisfied. These questions can as well be raised before the trial Court and it is always open to the Court to revoke or modify the order. At this stage, no interference is called for u/s 115, CPC more so when more than four months have elapsed after gamishee order was issued and the IAs. are now coming up for final orders. However, I direct the First Senior Civil Judge, City Civil Court to take up IA No. 1295 of 1999 for hearing within two weeks from the date of receipt of this order and pass appropriate orders in the IA after hearing both the Counsel.

8. The CRP is dismissed subject to the above observations.