

(1979) 09 AP CK 0019
In the Andhra Pradesh High Court
Case No : C.R.P. No. 1295 of 1979

Kurapati Venkata Krishnareddy and Others APPELLANT
Vs
Kalavakuru Ramana Reddy and another RESPONDENT

Date of Decision : 19-09-1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, Order 21 Rule 58(1), Order 38 Rule 8, 11(4), 47

Citation : (1979) 09 AP CK 0019

Hon'ble Judges : Madhava Rao, J

Bench : Single Bench

Advocate : N. Subba Reddy, for the Appellant; S. Anand Reddy, for the Respondent

Judgement

Madhava Rao

1. This is a revision petition filed against the order rejecting the petition filed under Order 21, Rule 58 of the CPC to raise the attachment. The learned counsel for the petitioners contended that the petition filed for raising the attachment is not even numbered and there is no enquiry at all whatsoever but on the simple ground that the petition is belated the lower Court dismissed it. This is contrary to the provisions of the Act and also to the principles of natural justice. When the Court has rejected the claim petition on the ground that it was designedly or unnecessarily delayed without giving an opportunity to explain it by adducing evidence it cannot be held that the delay was unexplained. Therefore the order deserves to be set aside. The learned counsel for the petitioners also in support of his contention relied on the decisions in Allada Eswarappa and Another Vs. M. Krishna Reddy and Others, and M. Ramachandra Rao Vs. A. Papayya Sastry and Another, . The learned counsel for the 1st respondent on the other hand contended that the attachment was effected on 21-2-1974. The claimants purchased the property on 27-2-1975 as is evident by the order of the lower court and the claim petition is filed on 17-10-1978 after four years after the

properly was attached. The delay is inordinate on the face of it and therefore the petition was rightly rejected by the lower Court. I was taken through the order of the lower Court. The lower Court on the ground that the petition was filed after the property was put up for sale and the inordinate delay in filing the claim petition was not explained refused to entertain the claim petition and rejected it. The learned counsel for the petitioners submitted that the question of delay is beside the point and that should not come in the way of entertaining a claim petition. A Bench of this Court in *M. Ramachandra Rao Vs. A. Papayya Sastry and Another*, had an occasion to deal with the proposition. What is laid down in the decision is that a person who omits to prefer a claim under Order 38, Rule 8, Civil procedure Code, does not run the risk of being prevented from raising an objection under Sec. 47, Civil Procedure Code, at the stage of execution of the decree. If he wishes he can lay a claim but he would not entail the penalty contemplated under the principle laid down under Sec. 11 (4) of the Civil Procedure Code. The facts of that case are different. When the attachment before judgment was effected for five items 1 to 5 a claim petition was filed immediately for items 1, 2, and 5 claiming that they are separate properties and are not liable to be that they are separate properties and are not liable to be attached and no objection was taken with regard to items 3 and 4. The trial Court allowed the objection. But the appellate Court allowed the appeal and directed that the attachment should continue. Thereafter no suit was filed to raise the attachment within the period of one year. After the decree was passed in the execution proceedings the claimant again took the objection not only with regard to the items 1, 2 and 5 but also in respect of items 3 and 4 stating that they are his separate properties and requested the court to treat the petition as a petition under Sec. 47 of the CPC and investigate into the matter. A learned single Judge of this Court, on the basis that no suit was filed within one year with regard to item 1, 2 and 5 held that the claimant cannot request for a further adjudicate Under sec. 47 of the Code of Civil Procedure. In Letters Patent Appeal the Bench took the view that when an attachment is made under Order 38, Rule 8 of the CPC the period of limitation is not one year but six years under Article 12 of the Limitation Act and the petition filed by the claimant was within six years. Even though the prayer made in the High Court to convert that petition into a suit was after a lapse of six years, the petition having been filed within six years, the Court permitted such a conversion, and directed it to be enquired into. Therefore, the question with regard to the belatedness in filing the claim petition does not arise in this decision. Therefore the authority has no application to the facts of the present case.

2. The learned counsel for the petitioners next referred to the decision in *M. Ramachandra Rao Vs. A. Papayya Sastry and Another*, in this case, a claim petition was filed. The attachment of the property was effected on 3-12-1965. The petition to raise the attachment was filed on 23-12-1965. In the petition for raising the attachment it was specifically stated that the claimant had half a share in the Cinema Theatre known as Prabhat Talkies at Visakhapatnam. A

money decree was obtained and the entire theatre was attached. The said attachment was not valid and binding on the claimant so far as his share was concerned. A sale proclamation was not issued for the entire property including the claimant's share. The petitioner came to know about the attachment recently when he came to the Court in connection with other matters and hence the petition could not be filed earlier as the petitioner was not aware of the alleged proclamation till he was informed about the same in the Court, and that the sale is posted on 8-3-1972 and the petition is being filed for stay of further proceedings including the sale. This petition was returned for filing documents, if any, to show that he has got title and possession by the date of attachment, and also to give the exact date of attachment. There are three or four endorsements of returns and representations. Ultimately so far as the date of attachment is concerned the petitioner stated that the known date is 23-6-1972 and prayed that the attachment may be raised to the extent he got title and possession by the date of attachment. With regard to the documents, it was represented that they were with the High Court advocate. On this the Court passed the Order;

Rejected as it is belated one.

It was observed by the High Court that from the order it does not appear that any opportunity was given to the petitioner to show cause how the petition was not designedly or unnecessarily delayed. In that it was also opened

.....that in case under the proviso to Rule 58 of Order 21 it is incumbent upon the Court to give an opportunity to the petitioner to show cause how it was not designedly or unnecessarily delayed and after taking such evidence thereon, which the petitioner may adduce, it must come to the conclusion...

It is one thing to say that an opportunity has been given and the court has not been satisfied while it is a different thing to say that the Court can reject an application even without giving such an opportunity.

Accordingly having found that this requirement of the proviso to Rule 58 of Order 21 C.P.C., is not satisfied, the order of the lower Court was set aside and the application was remanded for consideration afresh on merits after giving the required opportunity. In the instant case the agreement was entered into on 11-10-1974 and the attachment took place on 21-12-1974, i.e., within a period of two months from the date of agreement. The agreement is alleged to have been entered into by the wife, the judgment debtor. After attachment of the property no claim petition was filed either by the judgment debtor or by his wife for raising the attachment and on the other hand the sale-deed was got registered on 27-2-1975, after the property was attached. Even after this registration for a period of about three years no proceedings were taken and the present application was filed on 17-10-1978. Even according to the facts given by the petitioners by the date of the attachment no interest in the property was passed on in favour of the petitioners. Even after the registration of the sale deed the matter was slept over for about 3 years after the attachment. At this

stage it is relevant to note section 64 of the CPC which reads as under:

64. Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.

So, according to this provision all private alienations of the attached property are void as against the claims enforceable under the attachment. Therefore, these facts of the instant case are clearly distinguishes from the facts in M. Ramachandra Rao Vs. A. Papayya Sastry and Another, . There, the claimant was having half share in the attached property even by the date of attachment and he was the joint owner along with the judgment debtor therein whereas neither of these two factors is present in favour of the claimants herein. Further in that case the petition was dismissed simply on the ground that it was belated, but in the instant case the lower Court applied its mind to the facts of the present case and prima facie found that the registered sale-deed was subsequent to the attachment and that the petition was filed after several years of the attachment. Excepting a bald averment that the petitioner came to know about the attachment and proposed sale recently, nothing is stated specifically as to what enquiries were made with regard to ownership of and encumbrances over the property at the time of purchase on 27-2-75. There is also no specific explanation as to how and why he came to know about the matter very recently while the attachment effected was some three years ago. In these circumstances the learned Judge concluded that there was no acceptable explanation for the inordinate delay in filing the petition. Further keeping in view that the alienation in favour of the claimants was pending attachment, the present application was rejected. Order 21 rule 58 (1) provides that:

58 (1) Where any claim is preferred to, or any objection is made to the attachment of any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained:

Provided that no such claim or objection shall be entertained--

(a) where, before the claim is preferred or objection is made, the property has already been sold; or

(b) where the Court considers that the claim or objection was designedly or unnecessarily delayed...

Therefore according to rule 58 (1) (b) it is open to the court not to entertain the petition which is considered to be designedly or unnecessarily delayed, in cases where the petition was refused to be entertained, the party against whom such an order was made may institute a suit under rule 58 (5) to establish the right which he claims to the property in dispute and this order of refusal is conclusive

only subject to the result of such a suit, if any, filed. In the face of these provisions and the facts stated the lower Court was of the view that the petition does not deserve to be entertained and accordingly rejected. In these circumstances, I do not see any reason to interfere with the order of the lower Court. The revision is accordingly dismissed, but in the circumstances the parties will bear their own costs.

It is made clear that the observations herein made will not be taken into consideration while disposing of the suit that may be filed. The learned counsel for the petitioners requested that two months' time may be granted for filing the suit and that time is accordingly granted from this day. The lower Court can meanwhile take other steps in the matter.