

(2003) 11 AP CK 0042

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 4674 of 2004

Madigiri Kiran Kumar

APPELLANT

Vs

Swarnagiri Subbamma

RESPONDENT

Date of Decision : 04-11-2003

Acts Referred:

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

Citation : AIR 2004 AP 104

Hon'ble Judges : G. Yethirajulu, J

Bench : Single Bench

Advocate : K.S. Gopala Krishnan, for the Appellant;

Final Decision : Allowed

Judgement

G. Yethirajulu, J.—This revision petition is filed by the petitioner/defendant in I.A. 313 of 2002 in O.S. No. 168 of 2001, against the order, dated, 20-7-2002 on the file of Senior Civil Judge, Nellore.

2. The respondent herein filed O.S. No. 168 of 2001 for recovery of money basing on a promissory note and also filed I.A. 829 of 2001 under Order 38 Rule 5 of C. P. C., for attachment of the schedule property before judgment. The lower Court passed a conditional order on 5-9-2001 and made the said order absolute on 7-9-2001. Afterwards the respondent-defendant filed I.A. 313 of 2002 to raise the attachment by offering bank security for the suit amount. The lower Court dismissed the said application as devoid of merits by observing that the defendant did not furnish security as directed by the Court. The defendant being aggrieved by the order of the lower Court preferred this revision, questioning its validity and legality. The respondent filed the suit for recovery of money. The application filed for attachment was allowed and the said attachment was also made absolute on 7-9-2001. While ordering attachment, the lower Court made the following order :

Issue Ad-interim attachment of the petition schedule property in the event of the

respondent failing to furnish security of Rs. 4,25,000/- within 48 hours after service of notice on him....."

3. Undisputedly, the revision petitioner was served with a notice, but he failed to furnish security within 48 hours as directed by the lower Court. Therefore, the lower Court made the attachment absolute.

4. Subsequently, on 26-3-2002, the revision petitioner filed the application under Order 38 Rule 9 of C. P. C., to vacate the order of ad-interim attachment before judgment over the petition schedule property after accepting the bank guarantee for the suit claim. The lower Court observed that the revision petitioner filed the said application after lapse of more than six months from the date of order of attachment. There is no illegality or irregularity in ordering the attachment of the property, due to failure of the defendant in furnishing security as directed by the Court.

5. The learned counsel for the revision petitioner submitted that though the revision petitioner failed to furnish the security within the time stipulated, it shall not be a bar for the Court to accept the bank guarantee to satisfy the suit claim and to raise the attachment.

6. The purpose of attachment is to ensure recovery of money by the creditor after obtaining decree from a Court of Law and to prevent the debtor from transferring his properties to others to defeat the decree that is likely to be passed in favour of the plaintiff. Whenever the defendant comes forward with proper security, there shall not be any bar to raise the attachment by accepting the bank security in order to ensure recovery of the money covered by the suit which is likely to be decreed in favour of the plaintiff. The learned counsel for the revision petitioner relied on a judgment in N.R. Thirtiverigadam Vs. Kaliannan, , a learned single Judge of the Madras High Court while dealing with the provisions of Order 38 Rule 9 of C. P. C., held as follows :---

The remedy provided under Order 38 Rule 9 is in the nature of an independent remedy and can be availed of by a defendant even after an order for attachment under Order 38 Rule 6(1) has been made. The provision made under Order 38 Rule 9 is a beneficial one intended to give an opportunity to defendants who despite an order of attachment passed against them, are in a position to offer security for safeguarding the claims of plaintiff made in the suit and pray for a withdrawal of the order of attachment made already either over their other assets or moneys."

It was further observed by the said Court that,

Where the defendant filed an application under Order 38 Rule 9 praying for the raising of the attachment, which was already allowed, after hearing the defendant and had become final in the sense that the defendant had not preferred any appeal against the order, the application would be maintainable."

Rule 9 of Order 38 regarding the removal of attachment after furnishing security

reads as follows :

Removal of attachment when security furnished or suit dismissed :-- Where 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."

7. The wording of the Section made it mandatory on the part of the Court to withdraw the attachment when the defendant furnishes the security required including the costs of attachment etc.

8. In the case on the hand, the learned counsel for the revision petitioner submitted that the revision petitioner is ready to furnish the bank guarantee to the satisfaction of the Court to satisfy the decree that is likely to be passed in favour of the respondent. The Law on this subject is clear and there is no bar for the Court to raise the attachment whenever there is offer for security to the satisfaction of the Court.

9. In the light of the above circumstances, the order of the lower Court refusing to raise the attachment is not proper and it is liable to be set aside. Simply because the revision petitioner did not furnish security within a period of 48 hours it shall not bar him to make an application under Order 38 Rule 9 of C. P. C., to accept the security and to raise the attachment.

10. In the result, the revision petition is allowed, the order of the lower Court, dated 20-7-2002 is set aside. The lower Court shall raise the attachment after the revision petitioner furnishing bank guarantee to its satisfaction. No order as to costs.