
(2006) 09 AP CK 0054
In the Andhra Pradesh High Court
Case No : CRP No. 3735 of 2006

Mahindra and Mahindra Financial Services Ltd. and Another	APPELLANT
Vs	
Talamadla Durga Goud	RESPONDENT

Date of Decision : 11-09-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5, Order 38 Rule 6

Citation : (2006) 5 ALD 821 : (2006) 5 ALT 645

Hon'ble Judges : Gopala Krishna Tamada, J

Bench : Single Bench

Advocate : K.V. Subramanya Narasu, for the Appellant; Y.S. Yella Nand Gupta, for the Respondent

Judgement

Gopala Krishna Tamada, J.—This revision is directed against the order dated 26-7-2006 passed in IA. No. 541 of 2006 in O.S. No. 128 of 2006 by the Senior Civil Judge, Nizamabad, whereby the learned Senior Civil Judge while ordering notice to the petitioner herein (first defendant) to show-cause as to why the property mentioned in the petition schedule shall not be attached and further directed the Bailiff of the Court to attach the property and keep the same under his safe custody.

2. The facts are that the respondent herein instituted O.S. No. 128 of 2006 against the petitioners herein for recovery of an amount of Rs. 4,27,500/-. However, apprehending that the petitioner-first defendant may close his business and leave Nizamabad, the respondent herein filed LA. No. 541 of 2006 under Order XXXVIII, Rule 5 of the Code of Civil Procedure, 1908 seeking attachment before judgment of the petition schedule property belonging to the petitioner-first defendant and the Court below passed the impugned order.

3. Heard learned Counsel for the parties and perused the impugned order and other material on record.

4. The relevant portion of the order dated 26-7-2006 in LA. No. 541 of 2006 in

O.S. No. 128 of 2006 reads as under-

These are to command you to call upon the said respondents/defendant 1, either to furnish security for Rs. 4,35,000/- (Rupees Four lakhs thirty five thousand only) to produce and place at the disposal of this Court when required or to value thereof or such portion of the value as may be sufficient to satisfy any decree that may be passed against them or appear and show-cause why they should not furnish third party security within four days, from the date of giving notice by you, and you are further ordered to attach the schedule property and keep the same under your safe custody. You are further commanded to return this warrant on or before 17-8-2006 with endorsement certifying the date on which and the manner in which it has been executed or the reason why it has not been executed.

5. This Court is of the view that the said order is wholly wrong and contrary to the provisions of Order XXXVIII Rule 5 of CPC. Order XXXVIII of CPC deals with arrest and attachment before judgment and Rule 5 of Order XXXVIII of CPC deals with attachment before judgment. As per the said provision at any stage of a suit, the Court has the power to order attachment before judgment. Further, according to the said provision, before ordering attachment, the Court shall call upon the defendant to furnish security for production of property and if no security is furnished, then as provided under Rule 6 of Order XXXVIII of CPC, the Court may order attachment of the property.

6. From the order extracted above, it is clear that the Court below has directed the defendant to show-cause why the property mentioned in the petition schedule should not be attached. So far as that portion of the order is concerned, the Court below is justified, but the subsequent direction to the Bailiff of the Court to attach the schedule property and keep the same in his safe custody, is unsustainable for the simple reason that both the show-cause notice and order of attachment cannot be done simultaneously. As stated above, the Court below shall issue a notice directing the defendant to show-cause as to why his property shall not be attached and if no explanation is offered, then only the Court below can order attachment before judgment. Hence, this Court has no hesitation to hold that the impugned order is contrary to the provisions of Rules 5 and 6 of Order XXXVIII of CPC and as such the entire order is liable to be set aside. However, setting aside the entire order and directing the Court below to issue another show-cause notice as provided under Rule 5 of Order XXXVIII of CPC would cause any amount of delay. Hence, this Court is of the view that it is suffice to set aside the second limb of the order Le." You are further ordered to attach the schedule property and keep the same under your safe custody." The impugned order shall be treated as show-cause notice provided under Rule 5 of Order XXXVIII of CPC. As the time for four days granted by the Court below was over long back, the first petitioner-first defendant is directed to show-cause as directed by the Court below within ten days from today.

7. With the above modifications and directions, the civil revision petition is

disposed of. No costs.