
(2009) 04 AP CK 0075

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 107 of 2009

Marico Limited

APPELLANT

Vs

S.S. Transport, Rajahmundry and Another

RESPONDENT

Date of Decision : 17-04-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 46, Order 21 Rule 46A, Order 21 Rule 46B, Order 21 Rule 46C, Order 21 Rule 46E
Constitution of India, 1950 — Article 227

Citation : (2009) 04 AP CK 0075

Hon'ble Judges : A. Gopal Reddy, J

Bench : Single Bench

Advocate : S. Niranjan Reddy, for the Appellant; Siva Bhami Reddy, for the Respondent

Final Decision : Dismissed

Judgement

A. Gopal Reddy, J.—This revision under Article 227 of the Constitution is directed against the order dated 22-09-2008 passed in E.A. No. 32 of 2008 in E.P. No. 57 of 2007 in O.S. No. 57 of 2006 by the I Additional District Judge, East Godvari at Rajahmundry whereby the application filed by the petitioner/garnishee under Order XXI Rule 46-C r/w 151 CPC to discharge the petitioner as the garnishee and absolve him from any liability has been dismissed.

2. The facts, which give rise for filing this revision and which are not in dispute, are as under:

3. For the sake of convenience the parties are referred to as arrayed in the court below.

4. The 1st respondent/decreed-holder filed the above suit against the 2nd respondent/defendant for recovery of Rs. 18,43,049/- and along with the suit I.A. No. 1709 of 2006 was filed under Order XXXVIII Rule 5 CPC wherein the Court by order dated 19-10-2006 ordered conditional attachment of the amount

lying with the petitioner/garnishee, who was arrayed as second respondent in the said I.A. The sole defendant remained ex-parte. The 2nd respondent herein put up his appearance and filed a counter admitting the availability of the amount of Rs. 4,61,118/- payable to the 2nd respondent. The said I.A. was allowed on 12-04-2007 attaching the amount lying with the petitioner to a tune of Rs. 4,61,118/- with a direction to deposit the said amount. Since the defendant remained ex-parte, suit was decreed in favour of the decree-holder on the same day. Later the decree-holder filed E.P. requesting the Court to send the attached amount in I.A. No. 1709 of 2006 from the garnishee. On filing such E.P. the Executing Court issued attachment order under Rule 46-A of Order XXI CPC but the petitioner/garnishee has not send the amount and later filed the above E.A. No. 32 of 2008 contending that petitioner entrusted 15,690 Kgs. of coconut oil value at Rs. 5,39,350/- to the 2nd respondent/judgment debtor vide consignment note No. 63925 dated 08-09-2006 to be transported from Kanjikode to Bangladesh border. The 2nd respondent/judgment debtor handed over the consignment to the 1st respondent to be delivered to Bangladesh border and the 2nd respondent neglected to perform the contractual obligations and illegally withheld the consignment at Rajahmundry without informing to the petitioner. Then the decree-holder filed I.A. No. 327 of 2007 in O.S. No. 57 of 2006 seeking appointment of advocate receiver to take possession of oil tanker containing coconut oil covered by consignment dated 08-09-2006 falsely averring as if the coconut oil belongs to the judgment debtor. The 1st respondent/decreed-holder has not pressed the said application on 16-06-2007. Since the petitioner was not made a party to I.A. No. 327 of 2007 though the respondents knew that the petitioner is the owner of the oil, deliberately failed to perform contractual obligation by the judgment debtor. The amount supposed to pay to the 2nd respondent/judgment debtor has to be deducted by the petitioner from the amounts payable to it and since the value of the goods is more than the value payable, they are not liable to pay any amount.

5. The lower court by the impugned order dismissed the E.A. holding that the petitioner/garnishee undertook to deposit the amount and the contention put forward by it is devoid of merit. Hence the present revision.

6. Learned Counsel for the petitioner strenuously contended that garnishee is entitled to prove debt owed to him by judgment debtor for the purpose of set off the claim, the same has to be adjudicated by the Court. In support of the same, reliance is placed on the judgments in Addepalli Satyanarayanamurthy Vs. Vadlamannati Venkateswararao, and in Aditya Electronics Vs. A.S. Impex Limited and Others, .

7. On the other hand, learned Counsel for the respondents contended that Order XXI Rule 46-C CPC application is not maintainable because before making attachment of the amount lying with the garnishee a notice was issued to him in I.A. No. 1709 of 2006 and after hearing garnishee the amount lying in his hands were attached. E.A. No. 32 of 2008 was filed on 23-01-2008 i.e. much after the

decree was passed in favour of the plaintiff. No suit as such was filed against the judgment debtor for the damages caused to the petitioner. When the debt arises to the garnishee after the attachment is effected, the garnishee has no right to adjustment or set off. For the said proposition he placed reliance on the Division Bench judgment of the Kerala High Court in *G. Sankaran Nair Vs. Krishna Pillai Krishna Pillai Kaippally Madathil and Another*, . Once the petitioner agreed to deposit the amount, he cannot raise objection about maintainability by placing reliance on the judgment of this Court in *Kuchimanchi Nagamani Vs. Mantri Prasada Agnihotrudu and others*, . He lastly contended that against the dismissal of E.A. an appeal lies under Rule 46-H of Order XXI CPC, but the present revision under Article 227 of the Constitution cannot be maintained.

8. Indisputably before attachment of the amount at the hands of garnishee, absolutely a notice was issued to the petitioner/garnishee in I.A. No. 1709 of 2006 and the petitioner put up its appearance and filed a counter admitting the availability of the amount to a tune of Rs. 4,61,118/- payable to the judgment debtor. Since they have not denied the liability, there is no necessity for the Court to conduct an enquiry as contemplated under Rule 46-C of Order XXI CPC and accordingly accepting the plea of the petitioner allowed the I.A. ordering attachment of amount lying with the petitioner payable to the credit of judgment debtor. The suit was also decreed on 12-04-2007. According to the petitioner, they are not entitled to the value of the goods transported through the judgment debtor under the consignment dated 08-09-2006, which was not delivered by the judgment debtor as per consignment note. The judgment debtor/respondent No. 2 wilfully failed and neglected to perform the contracted obligation by wrongfully withholding the consignment by exercising the right of lien over the consignment for alleged dispute between respondent No. 1 and respondent No. 2 though petitioner was not a party to the agreement between them; petitioner suffered huge loss due to non-delivery. The said dispute with regard to non-delivery arises only after decreeing the suit; the decree holder has not pressed the application on 15-06-2007 accordingly I.A. No. 327 of 2007 was dismissed.

9. Admittedly the conditional order of attachment of the amount was passed on 19-10-2006 and later it was made absolute on 12-04-2007 and the liability of the judgment debtor to the petitioner even as per its own admission is only after 15-10-2007 i.e. much after the attachment order is made absolute.

10. In *Satyanarayana Murthy's* case (supra) when the attachment of the debt at the hands of garnishee was sought, an objection to the attachment was made on the ground judgment debtor owed the garnishee a sum or sums of money which extinguished. He further pleaded set off. Therefore, he is entitled to consider the set off in the execution proceedings. On dismissing the above petition by the executing court and on revision being filed to the Madras High Court, it was held that the existence of the debt cannot in execution proceedings be challenged. ...There is clear authority upon this point that in execution proceedings such matters can be gone into i.e. in *Tayabali Gulam Husein Vs.*

Atmaram Sakharam Vani, and my attention has not been drawn to any case in which the principle laid down there has not been followed or has been dissented from and accordingly allowed the revision.

11. A Division Bench of the Calcutta High Court in Mackinnon Mackenzie and Company Pvt. Ltd. Vs. Anil Kumar Sen and Another, after referring to the decision of the English Court of Appeal Hale v. Victoria Plumbing Co. Ltd. and En-Tout-Cas Co. Ltd. (1966) 2 All. E.R. 671 and various judgments held that once the garnishee disputed the claim of the judgment debtor and when claims set off for a sum of Rs. 31,500/-, after setting off nothing is due by the garnishee, the same has to be enquired by the court when an order of attachment was made under Order XXI Rule 46 CPC in the suit restraining the garnishee from making any payment to the defendant/judgment debtor.

12. In the above case, the affidavit filed by the garnishee discloses accounts between the parties for the period prior to May 5, 1972 were adjusted and nothing remained due and accounts subsequent to May 5, 1972 were also adjusted and nothing remained due except as referred in the affidavit. Since attachment is made on May 22, 1973 the attachment and set off arose much prior to the attachment, the Calcutta High Court held that the same has to be adjudicated in the suit proceedings.

13. The facts in the above two cases are different to the facts in the present case.

14. A Division Bench of the Kerala High Court in Sankaran Nair's case (supra) held, where the debt owing from the judgment debtor to the garnishee arises after the attachment is effected, the garnishee has no right to adjustment or set off. The same is nearer to the facts of the present case. In view of the same, the claim of the garnishee against the judgment debtor which had arisen after the attachment order is made absolute, admitting the amounts due to the judgment debtor on the date of attachment, he cannot plead adjustment or set off to a claim arisen after the attachment is made absolute.

15. Further, Rule 46-H of Order XXI CPC says an order made under Rule 46-B, Rule 46-C or Rule 46-E shall be appealable as a decree. It is well settled that when an appeal lies against the orders passed under Rule 46-C of Order XXI CPC to the High Court, a revision under Article 227 of the Constitution cannot be entertained as held by the Supreme Court in A. Venkatasubbiah Naidu Vs. S. Challappan and Others, .

16. For the conclusions reached by me, the revision filed by the petitioner cannot be entertained and it is accordingly dismissed. No costs.