
(1955) 04 MAD CK 0003
In the Madras High Court
Case No : C.R.P. No. 2523 of 1952

P.A. Modeen Batoha Rowther

APPELLANT

Vs

F.S. Sulaiman Sahib and others

RESPONDENT

Date of Decision : 28-04-1955

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 11, Order 21 Rule 11(2), Order 21 Rule 46, Order 40 Rule 1, Order 40 Rule 1(a)

Citation : (1955) 04 MAD CK 0003

Hon'ble Judges : Krishnaswami Nayudu, J

Bench : Single Bench

Advocate : M.R. Narayanaswami and K. Thirumalai, for the Appellant; K. Rajah Ayyar, N.R. Govindachari and S.K. Ahmed Meeran, for the Respondent

Final Decision : Dismissed

Judgement

Krishnaswami Nayudu, J.—This revision arises out of an execution petition No. 52 of 1952 in O.S. No. 167 of 1942 on the file of the

District Munsif's Court, Valangiman. The petitioner was the garnishee and the execution petition was filed by the plaintiff for attachment by issue of

a prohibitory order in respect of a sum of Rs. 3,000 out of Rs. 45,000 in the hands of the four garnishees of whom the petitioner was the first

garnishee under O. 21, R. 46, C.P.C. The first defendant judgment debtor died and in his place his legal representatives were impleaded as

defendants 6, 7 and 8 and the prohibitory order asked for seeks to restrain the garnishees from paying the sum of RS. 3,000 in their hands to

defendants 6 to 8 and directing them to deposit the amount into Court, and there is a prayer for appointing the plaintiff as a receiver for realisation

of the amount. Three objections were raised to the execution. One of the objections raised apart from denying the debt was that there are other

heirs of the first defendant by his Malayan wife who are not impleaded in the execution petition, in effect that the amount even if payable is payable

not only to defendants 6, 7 and 8 but also to others who are not parties to the execution. The learned District Munsif held that in view of the denial

by the garnishee of any liability to the judgment debtor the only course was to have a receiver appointed for the collection of the debt and

accordingly appointed the plaintiff as receiver for collection of the debt and also made absolute the interim order of attachment.

2. An appeal was preferred against that order by the first garnishee which came up before the Subordinate Judge of Kumbakonam before whom a

preliminary objection was raised as to the maintainability of the appeal. It was also urged that the attachment which was made absolute by the

learned District Munsif was illegal and not valid. The learned Subordinate Judge upheld the contention about the invalidity of the attachment but

took the view that no appeal lay against the order and dismissed the appeal. The view taken by the learned Subordinate Judge about the invalidity

of the attachment is however correct, since under O. 21, R. 46, C.P.C., an attachment can be made of a debt due to the judgment debtor alone

and not a debt due to a judgment debtor and another [Vide Hajee Abdulla v. Abdul Lathi 39 M.L.J. 91 = 12 L.W. 70. and Siluvaimuthu Mudaliar

v. Mohammad Sahul and others 51 M.L.J. 648. But notwithstanding the order of the learned District Munsif making the attachment absolute being

invalid, the appointment of the plaintiff as receiver cannot, however, be challenged as it is the only course open to the Court in a case where the

garnishee denies his liability under a debt alleged to be due to the judgment debtor. This will be sufficient to dispose of the revision petition and the

order of the learned District Munsif can be upheld in so far as the appointment of a receiver is concerned. But the question as to the maintainability

of the appeal has been elaborately argued before me and it therefore becomes necessary to express an opinion as to the correctness of the view

taken by the learned Subordinate Judge about the non-maintainability of the appeal before him.

3. The execution petition is presented under O. 21, R. 11.C.P.C., and the reliefs asked for are: (1) attachment by issue of a prohibitory order

under O. 21, R. 46, C.P.C. and for directing the garnishee to deposit the amount and (2) in default, for appointment of a receiver O. 21, R. 11,

describes the mode of preferring an application for execution and the particulars which if the execution petition is in writing should be given. Being a written application under O. 21, R. 11 (2), the application shall state among others the mode in which the assistance of the Court is required, and in stating the particular mode in which the assistance of the Court is required in the present case attachment is asked for under Sub-Cl. (i) (ii) and for the appointment of a receiver under Sub Cl. (i) (iv). O. 21, R. 46, provides that the attachment shall be made by a written order prohibiting in the case of a debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Court. In so far as the appointment of a receiver is concerned, though it is prescribed as one of the modes in which the assistance of the Court can be asked for under O. 21, R. 11, there is no specific provision under O. 21, prescribing the circumstances under which and the manner by which such an appointment of a receiver could be made. O. 40, R. 1, is the provision relating to appointment of receivers. The substantive provision empowering the Court to order execution of the decree is S. 51 of the Code, which says that subject to such conditions and limitations as may be prescribed the Court may, on the application of the decree-holder, order execution of the several modes including appointment of a receiver. The power of a Court to appoint a receiver in execution is derived from S. 51 of the Code but the procedure to be adopted in such an appointment not being provided for in O. 21, relating to execution, the provisions of O. 40, R. 1, have therefore to be applied by the Court, if it decides to appoint a receiver in execution. The question is that an order for appointment of a receiver having been made as in the present case in an execution petition seeking to attach a debt and recover the same from garnishee, such an order being primarily made in execution and the Court relied on O. 40, R. 1, in making the appointment whether an appeal would lie against such an order. Since a garnishee is not a party or a representative of the parties to the decree, S. 47 of the Code has no application and it would be open to the aggrieved person-in this case the garnishee - to agitate any question arising in execution by a separate suit and as such it is not open to the garnishee to have a right of appeal. It is, however, contended that the order appointing a receiver under S. 51 (d) C.P.C., being by way of equitable execution would come under O. 40, R. 1, C.P.C. and therefore

would be appealable under O. 43, R. 1 (s) which provides for an appeal against an order under R. 1, or R. 4, of O. 40. The point, there fore,

crystallises into the determination as to whether the order in question could be held to be an order under O. 40, R. 1, notwithstanding that the same

is primarily an order in execution under S. 51 (d) C.P.C.

4. The executing Court for the purpose of appointing a receiver could only act in pursuance of O. 40, R. 1, which prescribes the grounds and the

circumstances under which a Court may make an order appointing a receiver. O. 40, R. 1, provides that where it appears to the Court to be just

and convenient, the Court may by order appoint a receiver of any property, whether before or after decree, and also pass other orders as to

remove any person from the possession or custody of the property, commit the same to the possession, custody or management of the receiver

and confer upon the receiver other powers regarding the property and Cl. (2) provides that the Court has no power however to remove from the

possession or custody of property any person whom any party to the suit has not a present right so to remove. The appointment being in execution

the Court has power to appoint a receiver under O. 40, R. 1, since a receiver could be appointed after decree, but the Court must find that it is

just and convenient to appoint a receiver. In this case the receiver is appointed for the collection of the debt and the power to institute a suit and

recover the amount is what is conferred on the receiver under Cl. (d). The Court has therefore acted under O. 40, R. 1 (a) and (d). Though

primarily the order is one in execution, could it be held that the order of appointment of a receiver is solely made under S. 51 (d) C.P.C. and not

under O. 40, R. 1 as well of the Code ?

5. In support of the appealability of the order reliance is placed on *Attan Ullah Khamay v. Balamal* AIR 1927 Lah. 190 = 100 I.C. 298, where it

was held that O. 40, R. 1, is a general provision relating to appointment of receivers and even if an order appointing a receiver is made in execution

proceedings it cannot be said that it does not fall within the purview of O. 40, R. 1 and that the person affected by such an order has no right of

appeal under O. 43, R. 1 (a) C.P.C. This decision refers to a judgment of the Patna High Court in *Agabeg v. Mst. Sundari* 48 I.C. 133, and of the

Nagour Judicial Commissioner's Court in *Ramswarup v. Raghunandan* 78 I.C.

1031, where a receiver was appointed in execution directing the receiver to take possession of the estate and the person who has sought to be dispossessed objected to such an appointment an order passed dismissing such an objection, it was held that the order was appealable under O. 43, R. 1 (a) of the Code. It is, however, urged that in that case the objector's possession was disturbed and he applied to the Court appointing the receiver objecting to such appointment which had the result of dispossessing him and such an application is one that could be made under O. 40, R. 1, Cl. (2) and as such the appealability of that order could be supported on that ground. But it must be noted that the order was, however, made in an execution petition and notwithstanding that circumstance it was held that the order was appealable, treating the order as one made under O. 40, R. 1. C.P.C.

6. Following the Patna High Court, a similar view was taken in *Ramswarup v. Raghunandan* 78 I.C. 1031.

7. The decision in *Hudson v. Morgan* 35 Cal. 713, was relied upon both in the Patna and the Nagpur cases above referred to. In *Hudson v.*

Morgan 35 Cal. 713, where in a mortgage suit a receiver was appointed by the Court and he was directed to take possession of the property in

custody of a person not a party to the suit, it was held that such an order came within the corresponding provision to O. 40, R. 1 of the Code of

1882 and was appealable.

8. In *Hemendra Nath v. Prakash Chandra* 59 Cal. 205., a Bench of the Calcutta High Court held that S. 51 of the Code is to be read with O. 21,

R. 11 and an order for appointment of a receiver by way of execution of a decree must be deemed to be made under O. 40, R. 1 and can be

justified if only that rule can justify it.

9. In *Jai Indar Bahadur Singh v. Baldeo Singh* 110 I.C. 410 = 1928 Oudh 295, where in execution proceedings the Court appoints a person as

receiver of the property at the instance of the decree-holder it was held it was not open to a third party with whom the judgment debtor has

entered into an agreement to file an appeal under O. 43, R. 1(s) as such a person who has no locus standi to make an application. The decision in

Hudson v. Morgan 86 Cal. 713, was distinguished. The decision of the Oudh Chief Court however might be supported on the facts of that case as

the appellant who sought to question the order appointing receiver was held to have no locus standi to question the order, that is, the Court took

the view the person could not be said to be a person affected by the order of appointment.

10. In so far as our High Court is concerned two decisions are brought to my notice to both of which Ramesam, J. was a party. In Vishnu

Umbadri v. Tazakat Manayal (1928) M.W.N. 390, Ramesam and Davadoss JJ. in considering a Civil Miscellaneous Second Appeal arising out of

an application for appointment of a receiver in execution of a decree, took the view that the appointment of a receiver in execution being under O.

21, R. 11, and not under O. 40, R.1, a second appeal would lie. The learned Judges held that S. 47 applied and a second appeal lay and O. 40, R.

1 had nothing to do with the appointment of a receiver in execution of a decree which was dealt with by O. 21, R. 11

11. Later in Shridevi Amma v. Valianarayana AIR 1929 Mad. 20 Ramesam, J. considered that his earlier view as to an order appointing a

receiver in execution not being one under O. 40, R. 1 was not correct and held that O. 21, R. 11, Cl. (4) gives the process of execution by

appointing a receiver, the mode of appointing such a receiver being given in Q. 40, R. 1, and the obvious inference was that it was intended to be

dealt with by O. 40, R. 1 and other rules under O. 40, would apply and no second appeal would lie against such an order.

12. Taking into consideration the uniform view taken by the several High Courts and the fact that in appointing a receiver the executing Court has

necessarily to rely on O. 40, R. 1, and could make such an appointment only under the conditions and limitations specified, the order appointing a

receiver though primarily in execution and is under S. 51 (d) of the Code is in substance and reality one made under O. 40, R. 1, Civil Procedure

Code, and third parties who are affected by such an order need not have recourse to a suit but could appeal against such an order under O. 43, R.

1 (a). The test therefore will be whether a stranger who objects to the order is a person that could be said to be one against whom such an order is

made or is otherwise affected by such order and if it is shown that he is a person affected by the order appointing the receiver, the order should

necessarily be considered to be one under O. 40, R. 1, and therefore appealable, In the present case, it is however urged that the petitioner is not

affected by such order, as no property in his possession is sought to be interfered with. But this ignores the fact that the plaintiff has been empowered as receiver to institute a suit against the petitioner for recovery of the debt, the liability under which he denied. There can therefore be no doubt that the petitioner in this case, the first garnishee, is a person affected by the order and therefore the order being under O. 40, R. 1, the appeal to the lower appellate Court was maintainable and the appeal should not have been dismissed on that ground. However, in view of my upholding the correctness of the order appointing the receiver, the revision petition has necessarily to fail and is accordingly dismissed. But in the circumstances of the case, therefore will be no order as to costs.