

(1978) 08 KAR CK 0015

In the Karnataka High Court

Case No : Civil Rev. Petition No's. 1940 and 1941 of 1977 and C.R.P. 1271 of 1978

Sidramappa Rachappa Chiniwar and Others

APPELLANT

Vs

Shankaralingappa Veerappa Bilagi and Others

RESPONDENT

Date of Decision : 07-08-1978

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, Order 21 Rule 58 (4), 115

Citation : AIR 1979 Kar 89 : (1978) ILR (Kar) 1713 : (1978) 2 KarLJ 429

Hon'ble Judges : N. Venkatachala, J

Bench : Single Bench

Judgement

1. "When third party's claim to or objection to attachment of any property attached, after the coming into force of the CPC (Amendment) Act, 1976, to be referred to as the Amendment Act, in execution of a decree on the ground that such property is not liable to such attachment, is adjudicated upon by the Executing Court under Rule 58 of Order XXI of the Code of Civil Procedure, 1908, as amended by the Amendment Act, to be referred to as the Amended Code, is the order of adjudication so made by the Executing court a decree as would enable the aggrieved party to question the same in an appeal as provided for in the same Rule of the Amended Code?" is a common question of law which arises for my decision in these three revision petitions, for, they become unmaintainable of my decision on the question is in the affirmative.

2. The undisputed facts which have necessitated a decision on the said question are briefly these:

One Shankaralingappa Veerappa Bilagi, the respondent in C. R. P. Nos. 1940 and 1941 of 1977 and the petitioner in C. R. P. 1271 of 1978 having obtained a money decree in O. S. No. 93 of 1973 on the file of the Court of the Munsiff at Muddebihal, desiring to execute the decree, filed Execution Case No. 10 of 1977 on the file of the same Court seeking attachment and sale of certain properties on the plea that those properties belonged to the judgment-debtor. The Court, in

turn, having ordered attachment of the said properties, the order of attachment was given effect to on 17-2-1977. The petitioner in C. R. P. 1940 of 1977, since filed an application under Rule 58 of Order XXI of the Amended Code objecting to the attachment, the application was registered by the Court as Misc. Case No. 7 of 1977 and adjudicated upon. Similarly, the application made by the petitioner in C. R. P. 1941 of 1977 was registered by the Court as Misc. Case No. 9 of 1977 and adjudicated upon. So also, another similar application made by the petitioner in C. R. P. 1271 of 1978 was registered as Misc. Case No. 11 of 1977 and adjudicated upon. By separate orders made by the Court in the said three Miscellaneous Cases, the first two cases were dismissed while the third case was allowed. Aggrieved by the said orders, the three Revision Petitions are filed by the unsuccessful parties. While the petitioners in C. R. P. Nos. 1940 and 1941 of 1977 are the objectors who objected to the attachment, it is significant to note that the petitioner in C. R. P. 1271 of 1978 is the decree-holder at whose instance all the properties concerned in the Miscellaneous Cases before Court below were attached. What becomes apparent from the conduct of the said objectors who objected to the attachment and the decree-holder in filing the Revision Petitions under consideration is that all of them have proceeded under the impression that no appeal was maintainable against the orders in question as was admittedly the legal position under the Code of Civil Procedure, 1908, as it stood prior to its amendment under the Amendment Act, to be referred to as the old Code. This is how the question formulated by me at the outset has arisen for my decision.

3. As my decision on the said question has to necessarily depend upon the view I may take on the change in the legal position that has been brought about by coming into force of the Amendment Act on 1-2-1977, I propose to set out the provisions of the old code, the Amendment Act and the Amended Code in so far as they may become relevant for the purpose of the present discussion.

4. Rules 58 to 63 of Order XXI of the old Code which dealt with investigation of claims and objections relating to properties attached in execution of a decree read thus:

"58. Investigation of claims to, and objections to attachment of attached property.-(1) Where any claims 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 investigate the claim or objection with the like power as regards the examination of the claimant or objector and in all other respects, as if he was a party to the suit:

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Postponement of sale.-where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it

pending the investigation of the claim or objection.

"59. Evidence to be adduced by claimant.-the claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached.

60. Release of property from attachment.-where upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not when attached, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment.

61. Disallowance of claim of property attached.-where the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment debtor as his own property and not on account of any other person, or who was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim.

62. Continuance of attachment subject to claim of incumbrancer -Where the Court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or charge.

63. Saving of suits to establish right to attached property where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive."

5. While sub-rule (1) of Rule 58 authorised a third party to object to attachment by means of an application filed within a reasonable time, sub-rule (2) thereof has empowered the Court to postpone the sale pending investigation of the objection. Again, while Rules 59 to 62 provided for a summary investigation by the Executing Court into possession as distinct from a thorough trial of ultimate right, Rule 63 provided for a remedy by way of a regular suit to the party aggrieved by any order made on summary investigation to establish the right claimed by him in respect of the attached property. From the said provisions, it would follow that when an order was made by the Executing court on a summary investigation under the said rules, the immediate remedy open to an aggrieved party was to get such an order revised by filing a revision petition u/s 115 of the old Code. While, however, it was open to the aggrieved party to file also a regular suit to establish the right claimed by him notwithstanding the summary adjudication. But the Amendment Act which has come into force with effect from 1-2-1977 has brought about some alterations in the provisions of the old Code.

6. Rules 60 to 63 of Order XXI of the old code are repealed by the Amendment Act, while Rules 58 and 59 of Order XXI of the old Code are substituted with new provisions by the Amendments Act.

7. Even the heading "Investigation of claims and objections" of the relevant provisions of the old Code is changed into the heading "Adjudication of claims and objections". The relevant provisions of the Amended Code, therefore, are:

"Adjudication of claims and objections 58. Adjudication of claims to or objections to attachment of, attached property.-(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 attached has already been sold; or

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

(2) All questions (including question relating to right, title or interest in the property attached) arising between the parties to a proceeding or their representatives under this rule and relevant to the adjudication of the claim or objection, shall be determined by the Court dealing with the claim or objection and not by a separate suit.

(3) Upon the determination of the questions referred to in sub-rule (2), the Court shall, in accordance with such determination-

(a) Allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit ; or

(b) disallow the claim or objection; or

(c) continue the attachment subject to any mortgage, charge or other interest in favour of any person ; or

(d) pass such order as in the circumstances of the case it deems fit.

(4) Where any claim or objection has been adjudicated upon under this rule, the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(5) where a claim or objection is preferred and the Court, under the proviso to sub-rule (1), refuses to entertain it, the party against whom such order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, an order so refusing to entertain the claim or objection shall be conclusive.

59. Stay of sale where before the claim was preferred or the objection was made, the property attached has already been advertised for sale, the court may-

(a) If the property is movable, make an order postponing the sale, pending the adjudication of the claim or objection, or

(b) If the property is immovable, make an order that pending the adjudication of the claim or objection, the property shall not be sold, or that pending such adjudication the property may be sold but the sale shall not be confirmed, and any such order may be made subject to such terms and conditions as to security or otherwise as the Court thinks fit".

8. A perusal of the said provisions of the amended Code will show that-(1) the claims to or objection to attachment of any property attached are classified into two categories, viz., (I) claims preferred or objections made after the attached property is sold or claims or objections designedly or unnecessarily delayed and (ii) claims preferred or objections made before the same of the attached property without designedly or unnecessarily delaying; (2) the claims or objections falling in the first category, when are not entertained by the Executing Court as required by the proviso to sub-r. (1) of R. 58, it is open to the aggrieved party to file a separate suit to establish his right as provided for in sub-r. (5) of R. 58; (3) the claims or objections when fall in category (ii) referred to earlier, they are to be adjudicated upon as provided for in sub-rules (2) and (3) of R. 58 and not by a separate suit; (4) the claim or objection, when is so adjudicated upon, the order made thereon is deemed to be a decree and appealable as provided for in sub-rule (4) of R. 58.

9. At this stage, I have to state that the learned counsel appearing for the contesting parties having regard to the provision contained in S. 97(2)(q) of the Amendment Act, did not dispute that the claims before the Court below were claims which had to be adjudicated upon by the Court below under Rule 58 of Order XXI of the Amended code treating them as claims falling under category (ii) adverted to earlier. In this view of the matter, though the Court below while making the orders under challenge in these revision petitions has stated that it was making summary orders and it was open to the aggrieved parties to file regular suits for establishing their rights, the orders under challenge are to be necessarily considered as decrees appealable as provided for in Sub-r (4) of R. 58 of O. XXI of the Amended Code.

10. For the foregoing reasons, I decide the question set out at the outset in the affirmative.

11. The next question that arises for my consideration is as to whether the revision petitions which are filed in the High Court under S. 115 of the Code, seeking revision of the appealable orders, are maintainable. It was not disputed that revision under S. 115 of the new Code would not lie against an order of a Court subordinate to the High Court, if an appeal lies against such order. But, what was contended was that a revision petition to the High Court would lie

against an order of a Court subordinate to the High Court, where no direct appeal lies to the High Court against such an order. This contention, in my view, cannot be countenanced and has to be rejected, for, the Supreme Court in the case of Major S.S. Khanna Vs. Brig. F.J. Dillon, has upheld the view that when an appeal lies against an adjudication to another Court from the decision of which an appeal lies to the High Court, the High Court has no power to exercise its revisional jurisdiction.

12. Hence, the revision petitions are liable to be rejected as unmaintainable.

13. Before concluding I must observe that the orders challenged in the revision petitions when gave an impression that they were made under the old Code. It is not surprising that the petitioners before me have challenged the orders by filing the revision petitions proceeding on the basis that the provisions of the old Code governed the matter. Again, the Amendment Act has come into force with effect from 1-2-1977 by a Notification issued in the Official Gazette on 17-2-1977. When it is borne in mind that the date on which the amendment came into force was notified on 17-2-1977, it cannot be said that the revision petitions are not prosecuted by the petitioners bona fide. In these circumstances, I am sure that when applications for condonation of delay in filing the appeals-when appeals are filed against the orders under revision are filed before the appellate Court, they would be considered sympathetically and the delay condoned.

14. The revision petitions are, therefore, rejected as unmaintainable. However, in the peculiar circumstances of the cases, the parties are directed to bear their own costs of the petitions.

15. Revision dismissed.