

(1996) 09 AP CK 0006

In the Andhra Pradesh High Court

Case No : Appeal Against Order No. 969 of 1996

Sripathi Panditarajula Venkanna Babu

APPELLANT

Vs

Varalakshmi Finance Corporation

RESPONDENT

Date of Decision : 11-09-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5, Order 38 Rule 5(1), Order 38 Rule 5(3), Order 38 Rule 5(4), Order 38 Rule 6

Citation : (1996) 4 ALT 253 : (1996) 2 APLJ 369 : (1996) 1 APLJ 369 : (1997) 3 CivCC 268

Hon'ble Judges : Lingaraja Rath, J;C.V.N. Sastri, J

Bench : Division Bench

Advocate : T. Veerabhadrayya, for the Appellant; Dhanamjaya, for the Respondent

Judgement

Lingaraja Rath, J.—This appeal is directed against the order of the Principal Subordinate Judge, Rajahmundry directing, on 14-6-1996 in I.A.No. 2580/1995, attachment of the properties of the appellant before judgment. It is urged, assailing the impugned order that the order was passed in mechanical manner under Order 38 Rule 6 CPC without following the mandatory procedures of law and without forming the requisite satisfaction of there being a genuine case made out that the appellant was trying to dispose of the schedule properties.

2. It appears that on an application, LA. No. 2580/1995 filed under Order 38 Rule 5 CPC by the respondent, an order was passed on 4-12-1995 by the learned Subordinate Judge as follows:

"Heard the advocate for petitioner. Respondent is directed to furnish security for the suit amount failing which conditional attachment and notice 14-12-1995.

Court Order:

The respondent is directed to furnish security for the suit amount failing which conditional attachment. Hence the Bailiff of City Small Cause Court, Madras is

directed to carry out the above order."

3. The bailiff of the City Small Cause Court, Madras was accompanied by the agent of respondent-plaintiff to carry out the order. The endorsement of the bailiff on 12-12-1995 was to the effect that he had gone on 11-12-1995 along with the plaintiff's agent to the address of the appellant who was not present. The bailiff recorded in his report that the security was not furnished and the plaintiff's agent asked him to attach the property. On an enquiry, the bailiff was informed that the respondent had gone out and the time of his return was not known. He affixed a copy of the notice on the door of the premises. Item No. 1 property of the petition was not attached as the street's name of the property was not mentioned in the warrant, but the bailiff went to the Item II property and as the respondent was not present, he attached the property since no security was furnished. It is submitted by the learned Counsel for the respondent that an application registered as LA. No. 136/1996 was filed to amend the schedule of the petition under Order 38 Rule 5 CPC so as to correctly describe item No. 1 of the schedule property. That petition was allowed on 28-2-1996. The matter was put up for final orders before the Court which passed orders on 14-6-1996, after hearing both the parties, that the third-party affidavit established of the appellant's attempt to alienate the schedule properties to defeat the claim of the petitioner for which the respondent was entitled to attachment before judgment. The Court directed the attachment already effected in respect Item II of the schedule property as being made absolute and directed fresh warrant of attachment in respect of Item No. 1 of the properties. Later on, the Court Ameen at Madras, accompanied by the respondent's agent, went to Item I of the property on 3-7-1996 and recording that no security was furnished, attached the property.

4. Sri T. Veerabhadrayya, the learned Counsel for the appellant submits that item No. 1 of the schedule property does not belong to the appellant but for the purpose of the case, we do not want to enter into any decision on the question.

5. Apparently, the order impugned is one passed under Order 38 Rule 6 CPC as a final order of attachment of the property before the judgment in the suit Order 38 Rule 5 sub-rule (4) provides an order of attachment made under Order 38 Rule 6 without complying with the provisions of sub-rule (1) to be void. Under Order 38 Rule 5 sub-rule (1), the Court is called upon, when a petition for attachment before judgment is moved before it, to call upon the defendant to furnish security as stated therein. Order 38 Rule 6 prescribes that only when the defendant fails to show cause why he should not furnish security or fails to furnish the security required, the attachment of the property may be directed. This attachment is different than the conditional attachment as contemplated under sub-rule (3) of Order 38 Rule 5. Explaining the scheme of the provisions of Order 38 Rule 5 and Order 38 Rule 6 one of us (viz., Justice Lingaraja Rath) observed in Smt. Kamala Panda Vs. Krishna Cloth Stores and Another, as follows:

"The provisions show, so far as relevant to the present case, that the Court after

reaching the satisfaction that a protective order is necessary may, under sub-rule (1) either call upon the defendant to furnish security in the shape of a specific sum to produce and place at the disposal of the Court, when required, the property specified by the plaintiff in his petition or such portion of it as may be sufficient to satisfy the decree or call upon him to show cause as to why he shall not furnish security, and while passing such orders may also pass under sub-rule (3) a conditional order of attachment. Sub-rule (4) to Rule 5 which came by way of amendment by the Amending Act of 1976, is a rider to the power of conditional attachment to the effect that unless action under sub-rule (1) has been taken, an order of attachment is void. The only order of attachment under Order 38, Rule 5 is as contemplated under sub-rule (3) thereof. A conditional order of attachment can only be passed if the pre-condition there for provided under sub-rule (1) of calling upon the defendant to either furnish security or show cause why such security should not be furnished is complied with. In terms, Order 38, Rule 5 does not contemplate the passing of final order of attachment, but leaves it to Rule 6 under which if the defendant either fails to show cause why the security shall not be furnished or fails to furnish the security as required, the Court may direct the property to be attached."

6. It does not appear from the impugned order that the procedure under Order 38 Rules 5 & 6 was followed before passing final order. The scheme of the Code, as explained above, contemplates, before any order is passed under Order 38 Rule 6, the defendant to be called upon to furnish security to satisfy the decree that may be ultimately passed and only on his failure to furnish security, to direct attachment. In the present case, the order passed on 4-12-1995 shows that the appellant was not called upon to furnish security for the purpose of passing an order under Order 38 Rule 6 CPC. The security was called upon to be furnished for passing the conditional attachment order. Passing an order for furnishing security ex parte would obviously require the order to be brought to the notice of the defendant and reasonable time granted to furnish the security. The essential conditions to be satisfied are that the Court must on proper materials be satisfied that there is an attempt of alienation of the properties so as to frustrate the decree that may be passed in the suit and secondly, on being called upon, the defendant fails to furnish security or to show cause why the security would not be furnished. If the Court comes to prima facie view that an attempt is being made to dispose of the properties it may pass a conditional order of attachment while calling upon the defendant to furnish security. Hence the primary requirement is of the satisfaction of the Court that attachment is necessary to make the decree a reality and realisable and not one at vacuum. In the present case, it appears that the Court had passed orders on two affidavits filed, one by the Managing Partner of the respondent company, Sri Simhadri Surya Rao and the another affidavit by the Clerk of the respondent company, Sri Bolla Krishna Rao as a third party affidavit. In the first affidavit, it was stated that the appellant was trying to alienate the petition schedule properties with an intention to defeat or delay the claim of the respondent. In the second affidavit, the clerk

of the plaintiff stated that he had been to Madras on business work of the company and he was there on 28th, 29th and 30th of November, 1995. During his stay at Madras, he learnt of the appellant's attempt to alienate the properties.

7. An order of attachment before judgment affects the right of the owner of the property to deal with the same even before any verdict is available against him as regards the claim of the plaintiff. Such an order is not to be passed merely for the asking or in the routine manner. There must be cogent, prima facie materials to lead the Court to the conclusion that there have been attempts by the defendant to dispose of the property with a view to defeat the decree. Mere satisfaction that there has been an attempt to dispose of the property is in itself not sufficient and there must be further conclusion, again prima facie, that the attempt to alienate is to delay or defeat the decree. For reaching such satisfaction, there has to be before the Court some tangible material than the mere statement without giving any particulars and without disclosing the source of the information of attempted alienation. The learned Subordinate Judge should have been alert to the fact that there was actually no third party affidavit as the second affidavit was only of the Clerk of the respondent-firm who was under its control as an employee. The affidavits in themselves do not disclose as to when an attempt was made to alienate, what type of alienation was intended to be made and to whom the alienation was being desired to be made and who gave such information. The learned Subordinate Judge did not make any such enquiry before passing the order which grossly and adversely affected the appellant. In the order passed on 4-12-1995, no time was fixed to enable the appellant to furnish security. While passing the final order, the Court was not alive to the fact that the respondent's agent had accompanied the bailiff from the Madras Court and finding the respondent merely absent recorded remark that the security was not furnished by the appellant. One fails to understand us to how if the appellant was absent, he failed to furnish security. Merely because the appellant was not present at the spot when the bailiff went there, it did not mean that he was absent for all times. It could not certainly be said that the appellant must be found at his place whenever the bailiff chooses to visit and the moment he is not found, the property would be attached. There was no genuine attempt made to enable the appellant to furnish security. The report further shows that the bailiff went to item one of the property and finding that the appellant was absent, he called upon the wife and son of the appellant to furnish security and on their failure to do so, attached the property. Obviously no time was given to the respondent to know of the order of the Court and to furnish security as directed. The procedure followed is highly irregular. Consequently, we are to hold that the appellant was never given any opportunity to furnish security for which the impugned order passed is void under Order 38 Rule 5(4) CPC In that view of the matter, we set aside the impugned order and allow the civil miscellaneous appeal with costs.