
(1988) 07 AP CK 0003

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No"s. 1455 and 1497 of 1988

The Nullimarla Jute Mills Co. Ltd.

APPELLANT

Vs

Sree Mahaveer Rice and Oil Mills

RESPONDENT

Date of Decision : 13-07-1988

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 39 Rule 1

Citation : AIR 1989 AP 214 : (1989) 1 APLJ 34

Hon'ble Judges : Seetharam Reedy, J

Bench : Single Bench

Advocate : M. Adinarayana Paju, for the Appellant; T. Ananntha and A. Veeraswamy, for the Respondent

Final Decision : Allowed

Judgement

Seetharam Reedy, J.—These two revision petitions can be disposed of by a common order as they involve common questions. They are preferred against an order made by the lower court in exercise of its powers under Rule 5 of Order XXXVIII, C.P.C attaching the gunny bags and the raw jute worth about Rs. 11,000/-and odd and bank account in a sum of Rs. 2 lakhs. The order of the lower court in LA. 449 in O.S. 34 of 1988, D/- 15-4-1988 reads as under:

"Heard the Counsel for the petitioner. Issue interim attachment and notice. Posted to 15-6-1988."

2. The order passed in I.A. 410 of 1988 in O.S. 32/88, dated 11-4-1988 reads as follows :

"Heard the Counsel for the petitioner. Issue interim attachment and Notice Posted to 13-6-1988."

3. The arguments advanced on behalf of the petitioner were that the impugned orders of attachment which are made by way of interim order of attachment are unknown to the provisions enacted in Order 38, Rule 5, C.P.C. What is postulated

under Rule 5 is a conditional order as laid down under Sub-section (3) of Rule 5 of the said order.

4. An order which is said to have been effected under Sub-rule (1) of Rule 5 will be declared void under Sub-rule (4) of Rule 5 if the order does not comply with the provisions of Sub-rule (1) of Rule 5.

5. The counter argument of the learned Counsel for the respondents is that the impugned orders of attachment are perfectly legal and valid. The said interim orders of attachment are not unknown, if the party brings to the notice of the court that when the interim order of attachment is not issued, the other party may cause disappearance of the property in the meantime, before notice is served and returned, thereby frustrating the very object of attachment in case finally the party gets a decree, and therefore no notice or opportunity need be given to the defendant. Secondly, against the orders made by way of interim measure, no C.R. lies. Under these circumstances, this Court has no jurisdiction to interfere with the said orders. The only recourse left open to the opposite party is to appear before the lower court and get either the order of attachment discharged or furnish security and thus get the LA. disposed of. The points, that involve for adjudication are:

(1) Whether it is competent for the lower Court to pass the orders which are impugned herein;

(2) Whether the impugned orders of attachment are in compliance with Sub-rule (1) of Rule 5 of Order XXXVIII, C.P.C. If not, what would be the consequence?

(3) Whether it would be competent for this Court, in the exercise of its revisional jurisdiction to entertain and interfere (with) the order of Interim attachment as passed in this case by the lower court?

6. Order XXXVIII, Rule 5 of C.P.C. reads thus:

"Attachment before judgment Where defendant may be called upon to furnish security for production of property.

5(1). Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant with intent to obstruct or delay the execution of any decree that may be passed against him.

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the focal limits of the jurisdiction of the Court.

The Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

2. The plaintiff shall, unless the Court otherwise directs specify the property required to be attached and the estimated value thereof.

3. The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

4. If an order of attachment is made without complying with the provisions of Sub-rule (1) of this rule, such attachment shall be void"

7. Now to the first question. The learned Counsel for the respondents relied on the following decision to the effect whether a revision to a High Court against an interim order passed in an interlocutory application, is maintainable? A learned single Judge of this Court in Venkata Ratnam v. Sravanthi Devi (1979) 1 A LT 396 held :

"In order to exercise the revisional jurisdiction under the Amendment Act of 1976, a case decided has to satisfy the two conditions laid down in the provide. Thus under the Amended Act in order to entertain a revision the two conditions laid down under the proviso have to be satisfied. The intendment of the legislative changes in the history of this section point to the fact that the scope of revisional jurisdiction is sought to be limited. There is thus no warrant to hold that by the Explanation engrafted to this section the scope of the revisional jurisdiction was intended to be enlarged so as to take in any order made in an interlocutory application. The conclusion is therefore irresistible that any case decided has to be construed where an interlocutory matter has been finally decided by the Court passing the order, though in an interlocutory matter. It does not therefore take into its ambit interim orders in interlocutory matters. The section only contemplates final orders on interlocutory petitions and not interim orders thereon."

The impugned orders read :

"Heard the Counsel for the petitioner. Issue Interim attachment and notice. Posted to 15- 6-88."

"Heard the Counsel for the petitioner. Issue interim attachment and notice. Posted to 15- 6-1988."

8. Under Rule 5 of Order XXXVIII no interim order is contemplated. However, the Legislature made a provision for conditional attachment under Sub-rule (3) of Rule 5. Therefore, any orders of attachment to be passed, even ex parte, must be in compliance of the provisions enacted in Sub-rule (1) of Rule 5. The substance of Sub-rule (1) is that when the Court is satisfied on the basis of the material furnished before it that the defendant in order to obstruct or delay the execution of any decree that may be passed against him, is either about to dispose of the whole or any part of his property, or is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, then the Court direct the defendant within a particular time either to furnish security in the sum specified therein or to produce and place at the disposal of

the court whenever required the said property or the value thereof, or to appear and show-cause why he should not furnish security. So to adopt any one of the two courses left open, as stated above, in the latter part, the Court must in evitable exercise its mind, on any one of the two aspects, on being satisfied with reference to the material placed before it that the defendant is about to dispose of the whole, or any part of his property or is about to remove the said property from the local limits of the jurisdiction of the court and issue orders. Now, if the provisions laid down under Sub-rule (1) of Rule 5 are observed in their breach by the lower court, then any order of attachment so made shall be void. That is the kernel of the amended provision enacted in Sub-rule (4) of Rule 5 brought about in the year 1976. There is therefore a definite scheme and object in Rule 5 of Order XXXVIII, C.P.C.

9. The order of attachment before judgment is indeed a very serious matter which should not ordinarily be resorted to unless exigencies as postulated in Rule 5 do exist to the satisfaction of the court on the positive material placed before it. It is not therefore a normal or ordinary circumstance where just on the basis of facts alleged if a prima facie case is made out, an injunction is resorted to in other respects. Even in such a case Order XXXIX, C.P.C. has been amended. Order XXXIX rules out certain amendments which have been brought in Rules 2 and 3. By inserting Rule 2A, adding a proviso to Rule 3 and also by inserting Rule 3 A, certain changes have been effected which are significant. Therefore a look at these amended provisions may be made.

10. Rule 2A of Order XXXIX, C.P.C. reads thus:

"Consequence of disobedience or breach of injunction:

"Rule 2A(1): In the case of disobedience of any injunction granted or other order made under Rule 1 or Rule 2 or breach of any of the terms on which the injunction was granted or the order made, the Court granting the injunction or making the order or any Court to which the suit or proceedings is transferred, may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in the civil prison for a term not exceeding three months unless in the meantime the Court directs his release.

2. No attachment made under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold and out of the proceeds, the Court may award such compensation as it thinks fit to the injured party and shall pay the balance, if any, to the party entitled thereto."

Rule -- 3 : Before granting injunction, Court to direct-notice opposite party;

Rule 3 : The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the

opposite party;

Provided that, where it is proposed to grant an injunction without giving notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay, and require the applicant -

(a) to deliver to the opposite party, or to send to him by registered post, immediately after the order granting the injunction has been made, a copy of the application for injunction together with -

(i) a copy of the affidavit filed in support of the application;

(ii) a copy of the plaint; and

(iii) copies of documents on which the applicant relies; and

(b) to file, on the day on which such injunction is granted or on the day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent"

Rule 3-A Court to dispose of application within thirty days:

Where an injunction has been granted without giving notice to the opposite party, the Court shall make an endeavour to finally dispose of the application within thirty days from the date on which the injunction was granted, and where it is unable so to do, it shall record its reason for such inability."

11. Firstly, before granting injunction, a notice is contemplated. However, if without notice injunction has to be granted in view of the exigencies of the case, a mandate has been enacted in the proviso to Rule 3 that the Court shall record reason for its opinion that the object of granting the injunction would be defeated by delay. That apart, where an injunction has been granted without giving notice, though reasons to be recorded in the order is a must, such an application must be disposed of within 30 days from the date on which the injunction was granted. If the court is unable to do so, then it has to record its reasons.

12. It is the purpose of ex parte orders of injunction to be granted, i.e. without any notice to the opposite party, certain obligations laid down in the rules have to be observed before doing so, more so in cases of ex parte order of attachment before judgment.

13. Indeed a Division Bench of this Court (to which I am a party) held in *Bacharaj Singhvi v. Hastimal Kothari* (1980) 2 AT 472 as follows :

"Under Rule 3, it is incumbent upon the Court to issue notice before granting injunction. If for any reason, the court proposes to grant interim injunction without issuing notice on account of some special circumstances, it is necessary that the Court should record reasons therefore. It is the proviso that makes it mandatory on the part of the Court to give reasons with reference to the circumstances that compelled the Court to come to the conclusion that the time

taken in serving the notice would defeat the very purpose of granting the injunction. Therefore, any order passed granting injunction without giving the reasons for invoking the exception is vitiated.

Rule 3-A specifically provides that if an injunction was granted without notice, the Court shall endeavour to finally dispose of the application within 30 days from the date on which the injunction was granted and if the court is unable to do, the Court shall record its reasons for such inability. Therefore, the emphasis is always on giving reasons. More perusal of the allegations in the affidavit and thinking that the issuance of the ex parte injunction is necessary, in no way satisfied the mandatory requirement. The order needs to disclose on the face of it that the court- has applied its mind and having been convinced, has issued the ex parte interim injunction."

14. Hence, it must be stated that if the Legislature intended to confer powers on the Court to grant ex parte ad interim orders of attachment of properties, without notice and without reasons, then a provision to that effect could have been enacted in Rule 5 of Order XXXVIII. The very title to Order XXXVIII rule 1 is "arrest and attachment before judgment" unlike the title to Order XXXIX, viz., "temporary injunction and interlocutory orders". Further, there is a provision expressly conferring power on the Court under Sub-rule (3) of Rule 5 to make orders directing the conditional attachment of the whole or any part of the property. This is no doubt an ex parte order. So, the Sub-rule (3) of Rule 5 cannot be resorted to for the purpose of making any interim attachment order as it cannot be held that it is either synonymous or similar to the "conditional" order of attachment. It is not in dispute that this is not a case of conditional attachment.

15. In view of the foregoing, I have no hesitation to hold that it is not competent for the court to issue an interim order of attachment as has been done in this case without observing the formalities, which are mandatory in nature, as laid down under Sub-rule (1) of Rule 5. In other words, an ex parte order of attachment can be made either resorting to the provisions of Sub-rule (1) of Rule 5 or Sub-rule (3) of Rule 5. There is no provision for making any interim attachment order without making it known in the order, as has been done in this case, whether it has been done resorting to the provisions enacted to in Sub-rule (1) of Rule 5. It must expressly be stated so in the order. It is not adequate if based on the material furnished before the court that the Court is satisfied without stating in the order that the attachment has been affected. The first question therefore framed herein must be answered in the negative.

16. Regarding the second question, it is very easy to be answered, as non-compliance of the provisions under Sub-rule (1) of Rule 5 is conspicuous from the order. The satisfaction of the court in respect of the various ingredients like the defendant obstructing or delaying the execution of any decree that might be obtained by the plaintiff, by trying to dispose of the property or by removing the property from the court's jurisdiction not only lies in the court directing the

defendant to furnish security, but also to show cause by appearance as to why the defendant should not furnish security. Hence, as has been widely discussed in respect of question No. 1 above, unhesitatingly, this Court holds that the impugned orders must be declared void as non-compliance of the provisions laid down in Sub-rule (1) of Rule 5 is writ large in the impugned order.

17. The contention of the learned Counsel for the respondents is that a revision to this Court against an interim order is not maintainable and so this Court cannot entertain the same. Reliance is placed on decision of this court in Venkata Ratnam v. Sravanthi Devi, (1979) 1 A LT 396. The said decision will be assistance to the case of the respondents in a case where an ad interim order in an interlocutory application is made and when at first the defendant appeared therein and was taking steps to have it either vacated or confirmed finally, he will not be allowed to have such orders revised by this court. This decision is distinguishable inasmuch as it has already been held that it is not competent for the court to issue "ad interim orders of attachment", as he has been done in this case, the very act which is illegal and void can be questioned by invoking the revisional jurisdiction u/s 115, C.P.C. as the lower Court lacked jurisdiction to pass the orders of the nature which are impugned herein. Whereas, the cited case is not the case of lack of jurisdiction which, no doubt, should not be confused with the inherent want of jurisdiction. Even under Order XXXVIII, Rule 1 ex parte interim injunctions can be issued provided they comply with certain formalities laid down in Rules 2A, 3 and 3A of the said order.

18. Reliance was also placed on an unreported decision of this Court in Transfer C.M.P. No. 3698 of 1974 in which the very provisions enacted in Rule 5 of Order XXXVIII, C.P.C. was challenged as unconstitutional and where it was held :

"As already observed by us Order 38, Rules 5 and 6 enable the Court to pass an ex parte order of conditional attachment subject to the requirement that the defendant may have the attachment raised either by furnishing security or by showing cause why security should not be furnished..... The argument of Sri Choudhary that Order 38, R 5 offended the fundamental rights guaranteed by the Constitution proceeded principally on the assumption that the provision enabled the Court to demand security from the defendant without over giving him the opportunity of showing cause why security should not be furnished. In the view that we have taken of Order 38, Rule 5 the main basis of the argument of Sri Choudhary must fall to the ground."

19. This judgment also is a pointer to the fact that the court can, at best pass a conditional order of attachment and the same is not at all an authority for the proposition that interim order of attachment without following the procedure laid down under Sub-rule (1) of Rule 5, can be passed.

20. The bar contemplated in the afore cited decisions cannot be held to operate in cases where attachment before judgment is involved Hence it is competent for this Court to entertain revision, in the exercise of its revisional jurisdiction u/s

115, C.P.C, and interfere with the orders of the Courts below which basically tack legality and competency.

21. In the result the C. R. Ps. are allowed while setting aside the orders under revision. No costs.