

(2003) 06 KL CK 0047

High Court Of Kerala

Case No: C.R.P. No. 751 of 2003

Tony and another

APPELLANT

Vs

Navodaya Enterprises

RESPONDENT

Date of Decision: June 12, 2003

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 57, Order 38 Rule 11A, Order 38 Rule 5, Order 38 Rule 7

Citation: AIR 2004 Ker 245 : (2004) 1 ILR (Ker) 107 : (2003) 2 KLJ 1078 : (2003) 2 KLT 866 : (2003) 4 RCR(Civil) 191

Hon'ble Judges: Kurian Joseph, J; Jawahar Lal Gupta, J

Bench: Division Bench

Advocate: C.C. Thomas, for the Appellant; N. Subrahnam and M.S. Narayanan, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Kurian Joseph, J.

What is the difference between attachment before judgment under Order XXXVIII and attachment in execution under Order XXI? Whether a pre-decretal attachment under Order XXXVIII would be treated as post decretal attachment in execution under Order XXI by virtue of the 1976 amendment to the CPC introducing Rule 57 under Order XXI and Rule 11A under Order XXXVIII? These are the two interesting issues for consideration in this civil revision petition. Short facts: The petitioners, husband and wife, are the judgment debtors in E.P. No. 684/1999 in O.P. No. 175/1985 on the files of the II Additional Sub Court. Trichur. The suit was filed for realisation of amounts advanced to the petitioners - defendants. An attachment under Order XXXVIII Rule 5 was effected on 25-3-1985. The suit was decreed on 8-4-1988. The plaintiff - respondent filed E.P. No. 182/1990 against the first

petitioner herein by initiating steps under Rule 37 of Order XXI. However, the E.P. was dismissed on 31-01-1992. There was no direction whatsoever that the attachment continued. Thereafter the respondent filed E.P. No. 224/1996 against both the petitioners by proceeding against the pre-decretal attached property having an extent of 17.5 cents. That petition was also dismissed on 29-11-1997 without making any observation as to the continuance of the attachment. Thereafter E.P. No. 687/1999 was filed for proceeding against the properly attached under Order XXXVIII Rule 5. In the meanwhile the judgment debtors transferred the property to (sic) in C.R.P. No. 289/2002 it was held by this court that the transfer (sic) submitted that a review petition is pending in the matter in the (sic) attachment this court directed the Sub Court to consider the (sic) attachment under Order XXXVIII Rule 5 subsists even after the (sic) execution petition. By the impugned order dated 13 12 2002 in L.P. (sic) O.S. No. 171/1985 the Sub Court held that the attachment (sic) dismissal of the execution petition. The decision was rendered by following (sic) decision of this court reported in Arumughom Ammal v. (sic) KLT 264.

2. It is the contention of the learned counsel for the petitioner that after the (sic) of the Code in 1976 introducing Rule 57 under Order XXI and Rule (sic) XXXVIII a pre-decretal attachment under Order XXX VIII Rule 5 (sic) as an attachment in execution under Order XXI and therefore by (sic) Order XXI unless the execution court, while dismissing an (sic) order as to the continuance of the attachment, the attachment shall be (sic) ceased on the dismissal of the execution petition. Reliance is placed on the (sic) this court in Sebastian Joseph v. Cherian Varghese. 1994(1) (sic) that neither party had brought this decision to the notice of the execution (sic) therefore, the impugned decision is rendered only by following the (sic) in Arunugam Ammal's case (supra).

3. In Sebastian Joseph's case the learned single Judge has taken the view (sic) the introduction of the amendment in 1976, there is change in the legal position and hence the Full Bench decision has no relevance. It was held that even in the case of pre decretal attachment under Order XXXVIII which continues to exist by (sic) 11 of Order XXX VIII. when execution petition is dismissed, unless the (sic) direction with respect to attachment as provided under Rule 57 of (sic) attachment will cease to exist.

4. In an unreported judgment dated 22-5-2000 in C.R.P.No.(sic) referring to the judgment rendered by Manoharan, J., in (sic) Hariharan Nair, J., held that once an attachment before judgment is (sic) properly it will continue in force till completion of the execution or a (sic) except where the suit happens to be dismissed for default. In view of the (sic) views Padmanabhan Nair J. in C.R.P. No. 288/2002 referred the (sic) authoritative pronouncement by order dated 1-11-2002. Since the (sic) the parties in the said case was settled, reference was not answered (sic) Kuriakose. J. had posted this case also in view of the (sic) taken up along with the referred revision petition and thus the matter (sic) Us.

5. In order to appreciate the position it is necessary to look into the provisions of the CPC relating to attachment before judgment and also attachment in execution. Order XXXVIII Rule 5 provides for attachment before judgment. Order XXXVIII Rule 7 deals with the mode of making attachment wherein it is provided that "save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree". Thus as far as the procedural aspects of the attachment under Order XXXVIII are concerned, recourse will have to be made to the procedure in execution proceedings provided under Order XXI. Order XXXVII Rule 11 provides that property attached before judgment need not be re-attached in execution proceedings. It reads as follows:-

Where property is under attachment by virtue of the provisions of this order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property.

Order XXI Rules 41 to 57 deal with attachment of property in execution of a decree. Order XXI Rule 57 introduced by the 1976 amendment deals with determination of attachment, which reads as follows:-

57. Determination of attachment:- (1) Where any property has been attached in execution of a decree and the Court, for any reason, passes an order dismissing the application for the execution of the decree, the court shall direct whether the attachment shall continue or cease and shall also indicate the period up to which such attachment shall continue or the date on which such attachment shall cease.

(2) If the Court omits to give such direction, the attachment shall be deemed to have ceased.

6 It is clear from the provisions referred to above that once an attachment under Order XXXVIII at the pre decretal stage is made, it will continue in force until full satisfaction of the decree or till the attachment is lifted. Such property attached under Order XXXVIII can be proceeded against under Order XXI in execution of the decree without re-attachment. But the question is whether Rule 57 will apply in such cases. It may be noted that Order XXI Rule 57 applies only in respect of any property attached in execution of a decree. Therefore, it has to be seen that when an Execution Petition is dismissed, unless the execution court indicates the continuance of the attachment made under Order XXI, it would be deemed to have ceased. But as far as the execution against a property attached under Order XXXVIII is concerned, Rule 57 has no application since the provision deals only with attachment made in execution proceedings. In other words, when an execution petition for executing a decree by proceeding against a property attached at the pre decretal stage under Order XXXVIII is dismissed, even if the execution court does not give any indication as to the continuance of the attachment, the attachment would not cease. Attachment under Order XXXVIII ceases to exist only by the full

satisfaction of the decree or when the attachment is otherwise lifted, with the only exception under Order XXXVIII Rule 11A. Order XXXVIII Rule 11A introduced by 1976 amendment reads as follows:-

11A. Provisions applicable to attachment. - (1) The provisions of this Code applicable to an attachment made in execution of a decree shall, so far as may be, apply to an attachment made before judgment which continues after the judgment by virtue of the provisions of rule 11.

(2) An attachment made before judgment in a suit which is dismissed for default shall not become revived merely by reason of the fact that the order for the dismissal of the suit for default has been set aside and the suit has been restored.

7. Rule 11A introduced by the 1976 amendment under Order XXXVIII provides that the provisions of the Code applicable to an attachment made in execution of a decree apply to an attachment made before judgment which continues after the judgment. Obviously what is indicated in the provision is the procedural aspects on attachment in execution, modification of the order of attachment and the lifting of attachment. It has to be seen that those aspects are provided only under Order XXI. In fact sub-rule (2) of Rule 11A makes the position clear. It is provided therein that an attachment made before judgment in a suit which is dismissed for default shall not become revived merely for the reason that the suit was restored after setting aside the order of dismissal for default. Thus sub-section (2) carves out the only exception to Rule 11 of Order XXXVIII in the case of pre decretal attachment. Apparently it is intended only to prevent any dilatory tactics on the part of the decree-holder. In all other aspects, the Code respects the position of the decree holder and protects him as far as a pre decretal attachment is concerned. What is intended by Rule 11A of Order XXXVIII is the additional protection to the decree holder which is available in proceedings for execution under Order XXI. Otherwise the position of the decree holder with a pre decretal attachment would be weaker when compared to the decree holder with an attachment at the execution stage. The Code obviously does not intend such an effect.

8. Analysing the facts of the instant case it may be noted that the petitioners - judgment debtors transferred the property in favour of their son after the dismissal of E.P. No. 224/1996. In C.R.P. No. 289/2002 this Court has already held that the transfer is fraudulent. Since a review petition is said to be pending, we refrain from making any observation in the matter. Anyhow the transfer apparently is not bona fide. It is calculated to defeat the decree. If the petitioners' contention is accepted it would lead to failure of justice. The legislature could not have intended such a consequence while introducing Rule 11A under Order XXXVIII. The provision is additionally intended to secure and ensure justice.

9. It is significant to note that it is not Rule 57 or Rules 41 to 57 dealing with attachment under Order XXI that is made applicable to an attachment before

judgment as per Rule 11A. What is stated is "the provisions of the Code Applicable to an attachment made in execution of a decree shall, so far as may be. apply loan attachment made before judgment...." Rules 11 and 11A under Order XXX VIII read together with the special significance to the sole exception under Rule 11A(2) certainly make it clear that an attachment under Order XXXVIII continues until the decree is fully satisfied, or until it is specifically modified or lifted. Of course the attachment ceases to exist when the suit is dismissed for default.

10. With great respect we are unable to agree with the view taken in Sebastian Joseph's case. Order XXI Rule 57 does not apply in the case of attachment under Order XXXVIII by the operation of Order XXXVIII Rule 11 A. We overrule the decision in Sebastian Joseph's case. Though for reasons not stated in the order under revision, we do not find any illegality or irregularity in the view taken by the execution court. There was a pre decretal attachment of the scheduled property ever since 25-03-1985. The property continued to exist inspite of the dismissal of E.P. No. 224/1996. The attached property can be proceeded against in execution of the decree. The C.R.P. is dismissed. No costs.