

Rema Haridas Vs A.P. Amina and Another

Court: High Court Of Kerala

Date of Decision: Jan. 6, 2014

Acts Referred: Civil Procedure Code, 1908 (CPC) - Order 21 Rule 58, Order 9 Rule 8

Citation: (2014) 1 KHC 303 : (2014) 1 KLJ 606 : (2014) 1 KLT 313

Hon'ble Judges: S.S. Satheesachandran, J

Bench: Single Bench

Advocate: C.A. Chacko, C.M. Charisma and N.A. Shafeek, for the Appellant; K.A. Salil Narayanan, Thomas Antony and Titus Mani Vettom, for the Respondent

Judgement

S.S. Satheesachandran, J.

Appeal is directed against the order passed by the learned Sub Judge, Kozhikode, allowing a claim petition

filed under Order 21 Rule 58 of the CPC (for short, "the Code"). Application of first respondent/claimant setting forth claim, title, right, and

interest over the property attached in the execution over a decree obtained by appellant/decree-holder, after adjudication, was allowed by the

learned Sub Judge, and its correctness is assailed in this appeal. Decree executed was passed in a suit for dissolution of a partnership firm and

settlement of accounts. In execution of that decree appellant proceeded against the second respondent/judgment-debtor and a property belonging

to him was attached. Objections raised by judgment-debtor/second respondent impeaching the attachment on the ground that he had alienated that

property before institution of suit was repelled by execution Court holding it as a fraudulent transfer, and the proceedings continued. At that stage,

first respondent moved a claim petition over the attached property on the basis of assignment obtained from the transferee of the second

respondent. Her claim was resisted by the appellant/decree-holder. The execution Court holding that transfer of the attached property by second

respondent/judgment-debtor to the vendee of first respondent was before institution of the suit upheld the claim and lifted the attachment.

Questioning the correctness of that order, decree-holder/appellant has preferred this appeal.

I heard counsel on both sides. After hearing the submissions made and taking note of the facts and circumstances presented, I find the order of

learned Sub Judge cannot be sustained. Admittedly, before filing the present application, first respondent/claimant had moved another application

for releasing the attachment. That claim petition was dismissed for default Later on application moved by her for restoring the claim application

dismissed for default was also turned down by the execution Court. The question then emerges for consideration whether second application after

dismissal of previous application for default could be gone into on merits, to adjudicate her claim over the attached property. If we go by the

provisions of Order 21 Rule 58 of the Code, there can be a dismissal in limine of an application for lifting and attachment, under sub-rule (1) of that

Rule where the execution Court is satisfied that the claim or objection was designedly or unnecessarily delayed or by the time such application was

filed the attached property had already been sold. That is a dismissal where application is not considered on its merits but rejected as not

entertainable by the execution Court. If the claim petition is entertained and proceeded further, the execution Court in such enquiry has to consider

all questions, including questions relating to right, title or interest in the property attached arising between the properties, and determine the claim or

objection on the pleadings and materials produced by both parties. Upon determination of such questions the Court has to allow the claim or

objection to release the property from attachment wholly or in part, or disallow the claim or objection or pass further order as in the circumstance

of the case deem fit and proper. If a claim or objection over attached property proceeded with enquiry demanding adjudication as indicated

above, it has to be considered and treated as a plaint in a suit. If such petition is dismissed for default of the claimant then the same rule as under

Order 9 Rule 8 is applicable to such a situation precluding the claimant from prosecuting the claim by a fresh petition. Realising and understanding

the situation as referred to, the claimant had previously moved an application for restoring her application dismissed for default. When that was

turned down by the execution Court, whatever be the reasons thereof, the only remedy open to the claimant was to prefer an appeal against the

order dismissing the application for restoring the claim petition. Claimant was not entitled to move a fresh claim petition before the execution Court

for releasing the property from attachment, and, so much so, entertaining of her second application in the circumstances indicated and allowing her

claim by the execution Court cannot be sustained. Order passed by the execution Court allowing the claim petition is set aside.

Appeal is allowed directing both parties to suffer their costs.