

(1991) 03 AP CK 0002

Andhra Pradesh High Court

Case No: Civil Revision Petition No. 3505 of 1990

L. Narayana Reddy and Another

APPELLANT

Vs

The Canara Bank

RESPONDENT

Date of Decision: March 23, 1991

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 38 Rule 5, Order 38 Rule 5(1), Order 38 Rule 5(2), Order 38 Rule 5(3), Order 38 Rule 5(4)

Hon'ble Judges: Parvatha Rao, J

Bench: Single Bench

Advocate: B. Prakasa Rao, for the Appellant; M. Lakshmana Sarma, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Parvatha Rao, J.

In this Civil Revision Petition the laconic order of the Subordinate Judge at Jangaon in I.A. No. 313 of 1990 in O.S. No. 31 of 1990 dated 25-10-1990 is questioned. That application was made by the 1st Respondent herein under Order XXXVIII Rule 5 read with Section 151 CPC to attach before judgment the petition schedule property of the Petitioners herein who are the defendants in the suit and the Subordinate Judge allowed it by the following order:

Head. Interim conditional attachment & notice. Call on 21-11-1990.

The order does not give any reasons whatsoever.

2. The Subordinate Judge has failed to see that Rule 5 or any other Rule of Order XXXVIII does not provide for any interim conditional attachment. This is made clear by Seetharam Reddy, J., in [The Nullimarla Jute Mills Co. Ltd. Vs. Sree Mahaveer Rice and Oil Mills](#), as follows:

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 later part, the Court must inevitably 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.

The order of the lower Court questioned in the case and set aside, reads as follows:

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

3. Sub-rule (1) of Rule 5 of Order XXXVIII CPC provides that the Court after the satisfaction specified therein is reached, "may direct the defendant, within a time to be fixed by the either to furnish security, in such 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". Sub-rule (3) of the said Rule 5 provides that while giving such directions to the defendant, the Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified. From a reading of Sub-rules (1) and (3) of the said Rule 5, it is apparent that the Court will have to direct the defendant to do one or the other of the two: (i) to furnish security for a sum specified in the order within the time specified in the order, or (ii) to appear and show cause why he should not furnish security; and while giving one or the other of such directions, the Court may also direct "conditional attachment" of the property or any part of it. Analysing the said Rule 5, Syed Shah Mohd. Quadri, J., observed in *M. Venkaiah Naidu v. V. Neelavenamma* 1990 (1) ALT 311, as follows:

Sub-rule (1) provides that the Court may direct the defendant(i) either to furnish security as may be specified by it to produce and place at the disposal of the court, when required the property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or (ii) to appear and show cause why he

should not furnish security. Before issuing such a direction, the Court has to be satisfied by affidavit or otherwise that the defendant (a) is about to dispose of the whole or any part of his property; (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court and (c) his intention is to obstruct or delay the execution of any decree that may be passed against him. Sub-rule (2) casts an obligation on the Plaintiff to specify the property required to be attached and its estimated value. Sub-rule 3 confers power on the Court to order conditional attachment of the whole or any portion of the property. Sub-rule (4) which is inserted by the CPC (Amendment) Act, 1976 (for short the Amendment Act) declares that if an order of attachment is made without complying with the provision of Sub-rule (1) such attachment shall be void. Before insertion of Sub-rule (4) judicial opinion was divided in regard to consequence of non-compliance of provisions of Sub-rule (1). The controversy is set at rest by adding declaration contained in Sub-rule (4), therefore, it follows that only after the defendant is granted time to show cause or furnish security within the specified time and if he fails to show cause or commits default in furnishing security that the Court can order attachment. Any order of attachment without complying with the mandatory requirements of Sub-rule (1) is void.

In that case admittedly no direction or notice was issued to the Petitioner under Sub-rule (1) before passing the order under revision. Indeed, the order was not a speaking order". It was therefore set aside.

4. In a recent judgment of a Division Bench of this Court in [Yenamala Chandra Reddy Vs. Nuvvula Chandramouli Naidu and Others](#), the scope of Sub-rule (3) of Rule 5 of Order XXXVIII was considered and it was observed as follows:

The point is whether, for purposes of granting conditional attachment under Sub-rule (3) of Order XXXVIII, Rule 5, the procedure of notice contemplated in Clause (b) of Order XXXVIII Rule has to be followed. A reading of Order XXXVIII Rule 5 and Rule 6 would show that the legislature is making a distinction between an order of "attachment" and an order of "conditional attachment". What the legislature meant by the words "conditional attachment" is not very clear from the statute but the said words have received a particular meaning ever since the Code came into force in 1908. The indication of what the legislature meant by the use of the words "conditional attachment" can also be gathered from Form No. 3 of Appendix-F of the First Schedule to the Code of Civil Procedure. The title to the Form reads as follows: "Attachment before judgment, with order to call for security for fulfilment of decree". It is a direction to the Bailiff of the Court to do certain things. The form reads as follows:

To

The Bailiff of the Court.

WHEREAS. ...has proved to the satisfaction of the Court that the defendant in the above suit....;

These are to command you to call upon the said defendant...on or before the...day of...19...either to furnish security for the sum of rupees...to produce and place at the disposal of this Court when required or the value thereof, or such portion of the value as may be sufficient to satisfy any decree that may be passed against him; or to appear and show cause why he should not furnish security; and you are further ordered to attach the said...and keep the same under safe and secure custody until the further order of the Court; and you are further commanded to return this warrant on or before the....day of...19...with an endorsement certifying the date on which and the manner in which it has been executed, or the reason why it has not been executed.

Given under my hand and the seal of the Court, this...day of...19...Judge.

The first part of the form directs the defendant to furnish security in a particular amount or produce and place at the disposal of the Court the said property or its value or such portion of the value as may be sufficient to satisfy any decree that may be passed against him and also requires the defendant to appear and show cause why he should not furnish security. The first part of the form, therefore, is a reproduction of the procedure as to notice envisaged by Clause (b) of Order XXXVIII Rule 5(I), but the more important part of the form is the second part and this throws considerable light as to what the legislature meant by the words "conditional attachment". This second part contains a further direction to the Bailiff to attach and it reads as follows:

...and you are further ordered to attach the said...and keep the same under safe and secure custody until the further order of the Court.

It will have to be noticed from the Form that the first part referred to above and the second part need not be contained in every order passed under Order XXXVIII, Rule 5 CPC this is clear from the word "also" used in Order XXXVIII, Rule 5(3). If the court thinks fit merely to order the defendant to furnish security or show cause why security should not be furnished, the order as drafted in the Form will not contain the second part. It is only where the court thinks that pending further orders, there shall also be an order of attachment, as contemplated by Order XXXVIII, Rule 5(3) that the second part of the Form will be included in the directions issued to the bailiff.

It is this second type of order that is called an order of "conditional attachment". If the defendant does not comply with the first part of the Form, the bailiff, if so authorised, can invoke the second part of the Form.

This decision makes it clear that an order of conditional attachment under Sub-rule (3) of the said Rule 5 is made when the court thinks it necessary, along with the

directions that are given under Sub-rule (1) of the said Rule 5 ordering the defendant to furnish security or to appear and show cause why he should not furnish security. Though the Division Bench has been referring to "notice contemplated in Clause (b) of Order XXXVIII, Rule 5", it is obvious that what is being referred to is "notice contemplated in Order 38, Rule 5 because Clause (b) of the said Rule 5 does not refer to any notice, but only mentions one of the pre-conditions to be satisfied before directions under Clause (1) of the said Rule 5 are to be given. This will be apparent from a reading of Sub-rule (1) of the said Rule 5 which is as follows:

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 local 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.

5. Dealing with M. Venkaiah Naidu's case (supra) the Division Bench observed that "it is not clear whether the learned Judge (in that case) had meant that notice should be given and the defendant be heard before an order of "conditional attachment" could be passed under Sub-rule (3) of Order XXXVIII, Rule 5. In fact, a reading of the facts of that case shows that the learned Judge was perhaps not laying down any such principle as being applicable to conditional attachments. In that case, the order of attachment was made on 2-5-1989 in respect of certain amount lying in deposit with the second Respondent therein and the point that was raised was that the order was passed in violation of the provisions of Order XXXVIII, Rule 5, and that, therefore, the attachment order was void. It does not appear to us that any specific question as to the conditional attachment was raised, much less any question that such an order was passed before hearing the defendant." Referring to the observations of Seetharam Reddy, J., in Nultimarla Jute Mills Co. Ltd. case (supra) the Division Bench makes it clear that "if the learned Judge meant that an order of conditional attachment should not be made under Sub-rule (3) of Rule 5 of Order XXXVIII before hearing the defendant, we respectfully dissent from the above said judgment". The Division Bench approved the view of Ratnam J., of the Madras High Court [S. Venkitachalam Iyer Vs. S. Rama Iyer](#), and quoted with approval the following passages from the judgment of Ratnam, J.

If Order 38 Rule 5(1) and (3) CPC is so construed as to mean that in all cases, any order of attachment can be passed only after the defendant appears and furnishes

security or otherwise makes arrangements to the satisfaction of the court to meet the liability under the decree that may be eventually passed, in response to a notice issued under Order 38 Rule 5(1) Code of Civil Procedure, then that would result in the defendant being enabled to defeat the very power of the court to attach and also afford protection by the process of attachment and even the very decree that may be eventually passed, by resorting to dilatory tactics resulting in his or her not receiving the notice at all and by disposing of all his properties meanwhile.

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The expression used therein is "conditional attachment" and that would mean that it is not an absolute attachment, but only in the nature of a dependent attachment or an attachment which would ensure and depend upon certain conditions, namely, the defendant appearing and showing cause or not. In other Words, such a conditional attachment would be operative during the interregnum or the intervening time.

Ratnam, J., also held as follows:

That is why the power to direct a conditional attachment of the whole or any portion of the property is also made available under Order 38, Rule 5(3), Code of Civil Procedure, which can be exercised by the Court while passing an order under Order 38, Rule 5(1) Code of Civil Procedure. It is easy to perceive the spirit and, the object behind Order 38, Rule 5(1), and Order 38, Rule 5(3), Code of Civil Procedure. In an application for attachment before judgment, the Court, if satisfied that the requirements of Order 38, Rule 5(1), Code of Civil Procedure, have been made out, may issue a notice to the defendant in appropriate form conforming to the requirements of Order 18, Rule 5(1), Code of Civil Procedure, for all or any of the purposes mentioned therein and at the same time direct a conditional attachment of the whole or any part of the property under Order 38, Rule 5(3), Code of Civil Procedure. If, in response to such a notice, the defendant appears and shows cause, or otherwise satisfies the court, then the court may proceed to withdraw the attachment effected earlier, under Order 38, Rule 6(2) Code of Civil Procedure. If on the other hand, the defendant does not show cause why he or she should not furnish security or fails to furnish security, then it will be open to the court to proceed under Order 38, Rule 6(I), CPC and the court may order attachment of the property specified in the application or such portion thereof, as appears sufficient to satisfy any decree that may be passed, in the suit, in the appropriate form, namely, Form 7-A in Appendix F.

To the same effect is the decision of T.C. Raghavan, J., of the Kerala High Court in [Vasu Vs. Narayanan Nambooripad](#), wherein it is observed as follows:

Order XXXVIII, Rule 5 lays down the procedure for attachment before judgment. Sub-rule (1) thereof enacts that at any stage of the suit, if the Court is satisfied that the defendant, with intent to obstruct or delay the execution of any decree that may

be passed against him, is about to dispose of any part of his property or is about to remove the property from the local limits of the jurisdiction of the Court, the Court may direct him either to furnish security, in such sum as may be specified to produce and place at the disposal of the Court, when required, the said property or the value of the same, or to appear and show cause why he should not furnish security.

Sub-rule (3) provides that the Court may also in the same order direct the conditional attachment of the whole or any portion of the property specified by the Plaintiff.

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The only attachment that is contemplated by Rule 5 is the conditional attachment by the same order directing the defendant to furnish security or the appear and show cause why he should not furnish security.

From the above discussion, it is clear that an order of conditional attachment under Sub-rule (3) of Rule 5 of Order XXXVIII is made "in addition to directing the defendant to furnish security, or show cause why he should not furnish security" as observed by the Division Bench of this Court in Y. Chandra Reddy's case referred to above; such directions to the defendant to furnish security or show cause why he should not furnish security can be issued under Sub-rule (1) of the said Rule 5 only after the Court reaches the satisfaction "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 remove the whole or any part of his property from the local limits of the jurisdiction of the Court". In view of the above, in as much as the Subordinate Judge in this case has not specified the sum in respect of which security was to be furnished and the time within which the security was to be furnished or to appear and show cause why he should not furnish security, and because, no reasons whatsoever are given in the order showing that he is satisfied that the requirements of Sub-rule (1) of the said Rule 5 are fulfilled, this Civil Revision Petition is allowed. The order of the Subordinate Judge I.A. No. 313 of 1990 dated 25-10-1990 is set aside. This does not preclude the Subordinate Judge from considering the matter afresh and passing appropriate orders in the said I.A. There will be no order as to costs.