

AIR 1969 AP 184

Andhra Pradesh High Court

Case No: Civil Revision Petition No. 2162 of 1965

Ravi Nagabhushanam

APPELLANT

Vs

Neti Gopala Krishna
Murthy

RESPONDENT

Date of Decision: Sept. 8, 1967

Acts Referred:

Civil Procedure Code, 1908 (CPC) – Order 21 Rule 17, Order 21 Rule 55, Order 21 Rule 64, Order 21 Rule 83, Order 38 Rule 5(3)

Citation: AIR 1969 AP 184

Hon'ble Judges: Gopalrao Ekbote, J

Bench: Single Bench

Advocate: C. Susheela Devi, for the Appellant; M.B. Rama Sarma, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Gopalrao Ekbote, J.

This is a revision petition directed against an order of the Subordinate Judge, Tenali passed in I. A. No. 668 of 1965

in O. S. No. 55 of 1962. It arises in the following circumstances.

2. The petitioner before me filed a suit against the respondent for recovery of an amount of over Rs. 9,000 on the foot of a promissory note. He

filed an application under Order 38, Rule 5, C. P. C. and the property was conditionally attached under sub-rule (3) of Rule 5. After-wards under

Order 38, Rule 6, the order of attachment was made final. I am told that the suit has since been decreed.

3. During the pendency of the attachment and the suit, the respondent filed an application, I. A. No. 1362 of 1964, seeking permission of the

Court to release from the attachment the first item of the property comprising of 1 acre and 13 cents of wet land in order to pay other pressing

debts. This petition was ordered on 4-1-1965 permitting a private sale of the property for the purpose of discharging the debts other than the one

for which the present suit was filed.

4. This petition, I. A. No. 668 of 1965, out of which the present revision petition arises, was then filed with a request that half of Item 2 comprising

7 acres of dry land should be released from attachment for the purpose of satisfying the debts other than the suit debt. This petition was resisted by

the plaintiff on the ground that the attached property was not sufficient to pay the debts due to the plaintiff. The trial Court by its order under

revision directed the release of half of the second item of the attached property for the purposes of discharging the mortgage debts of third parties.

The Court was of the opinion that the property still left under attachment would be sufficient to satisfy the suit debt. It is this view that is now

challenged in this revision petition.

5. I was taken through the petition filed by the 1st defendant as well as the order passed on that petition. I was also taken through the affidavit filed

in this Court. After carefully going through these documents, I am satisfied that the lower court has not made even summary enquiry in order to find

out whether the property, which would be left after the release of 3 acres and 50 cents of land, would be enough for the purpose of satisfying the

suit debt. In the petition itself, it is contended that the property, which would be left under attachment, is in dispute. It is also admitted in the petition

that it is also attached in several decrees. It is also seen from the record that it is under mortgage. The same case is with regard to the house which

remains under attachment. It may be worth Rs. 40,000 according to the report of the Amin, but is under mortgage and attachment of several

decrees. Apart from that, it is also clear from the record that the partition suit against the 2nd defendant is pending in which his sons have claimed a

share in the properties. In these circumstances, and particularly when one item of property under attachment was already released, it was

incumbent upon the lower court to at least institute a summary enquiry in order to find out whether the property, which would be left under

attachment, is free from dispute, that out of it nothing would go to the share of the sons without holding them liable, and that the decrees in which

this property is attached, could also be paid off apart from the plaintiff claim. It was also necessary to see as to what is the amount due under the

mortgages. Without going into these questions, the lower Court has observed:

His statement that the house is worth Rs. 80,000 may be inaccurate but I am sure it is highly valuable. The remaining attached properties are

subject to certain securities but I feel sure that they are sufficiently substantial and adequate to discharge the securities and the respondent's decree

debt too as and when the respondent obtains a decree in the suit.

This observation clearly indicates that there was no material before the learned Judge to arrive at that conclusion. It must be remembered that when

a property is attached under Order 38, Rule 5, it was attached on the basis that the property sought to be attached is worth approximately the

amount for which it was sought to be attached, and once that is assumed, then the property ought to be released very cautiously from attachment.

6. My attention was drawn to the affidavit filed by the respondent in this Court. That affidavit also does not give the details about anything in regard

to what is stated above except the fact that his debts are only Rs. 19,000 and the property left is worth Rs. 60,000. These are the very questions

which prima facie have to be gone into in order to release the property from attachment, if it could be released under the law. All these questions

do not seem to have been gone into by the lower court at all. The order, if I may say, is a very casually written order. It must be remembered that

the claim of the plaintiff, who has attached the property, also must be adequately secured.

7. It has also be seen whether, when once an order under R. 5 of O. 38, Civil P. C. is made final under R. 6 of Order 38, Civil P. C. an

application to release the property from attachment for the purpose of privately selling it in order to discharge the debts of third parties is

permissible under O. 38, Civil P. C. A combined reading of Rr. 5, 6 and 9 of O. 38 Civil P. C. would leave no one in doubt that when a

conditional order of attachment is made under Sub-rule (3) of R. 5, it can be either withdrawn or made absolute after notice to the defendant under

R. 6. The effect of sub-rule (2) of R. 6 is not to provide for a further stage of showing cause or furnishing security after an order of attachment

under sub-rule (1) of R. 6 has been made. The only other stage of directing removal of attachment made under R. 6 is under R. 9. While sub-rule

(2) of R. 6 refers to the withdrawal of a conditional attachment made under R. 5 (3). R.9 refers to the withdrawal of an unconditional attachment to

be withdrawn when (1) the defendant furnishes the security required together with security required together with security for the costs of

attachment or (2) the suit is dismissed.

8. In the instant case conditional order of attachment was made under R. 5 (3). It was made absolute under R. 6. The attachment was not

withdrawn under R. 9 as there was no application under that rule made by the defendant.

9. Under what rule then the defendant filed I. A. 668 of 1965 to permit him to sell privately half of item 2 in order to discharge the debts of other

creditors than the plaintiff? There is no provision under O. 38 under which the present petition can be brought.

10. Except R. 7 which applies the provisions of O. 21 in so far as they relate to the mode of making attachment and R. 8 which applies to the

relevant provisions of O. 21 which relate to the manner in which investigation of claims to property attached in execution of a decree can be made

under O. 21, Rr. 58 to O. 21 Rr. 63, there is no other provision of O. 21 which is made applicable to an attachment made under Order 38.

11. Assuming that Order 21 is applicable whenever it is possible to apply any provision to a situation in regard to attachment made under order 21

there is no other provision which can apply to an application of the kind filed by respondent (I. A. 668/65).

12. Now a reading of Rule 83 would disclose that it is applicable only at a stage after an order for the sale of immovable property has been made.

That stage obviously had not arisen when I. A. 668 of 1965 was made. Moreover under that rule, the judgment-debtor has to be satisfy the Court

that

there is reason to believe that the amount of the decree may be raised by the mortgage or lease or private sale of such property, or some part

thereof, or of any other immovable property of the judgment debtor"".

The Court can on an application made in that behalf by the judgment-debtor postpone the sale of the property comprised in the order of sale on

such terms and for such period as the Court thinks proper. This is done only to enable the judgment-debtor to raise the amount. Under sub-rule

(2), in such case, the Court shall grant a certificate to the judgment-debtor authorising him to make the proposed mortgage, lease or sale. It must

however be noted that the proviso to that sub-rule provides that all monies payable under such mortgage, lease or sale shall be paid, not to the

judgment-debtor, but into court. It is further provided that no such transfer shall become absolute unless it has been confirmed by the Court. It is

plain that money raised by private alienation would be deposited in the Court and would go to the satisfaction of the decree in execution of which

the sale of the property was ordered. This Rule does not empower the Court to grant permission to the judgment-debtor to sell the property

privately for the purpose of discharging his other debts. Evidently the application was neither made under this rule nor the order was made under

this rule. I am not aware as to whether any certificate was issued or whether the sale was confirmed. In any case I have no manner of doubt that

this rule is inapplicable to I. A. No. 668 of 1965.

13. In this connection it is relevant to consider two other provisions of Order 21. One is Order 21, Rule 17 and the other is Rule 64.

14. The proviso to Rule 17 enjoins that in the case of a decree for the payment of money, the value of the property attached shall, as nearly as may

be, correspond with the amount due under the decree. Rule 17 relates to the procedure of receiving application for execution of decree. It is at this

stage that the Court can call upon the decree-holder to specify the approximate value of the property sought to be attached and to see that the

value of the property to be attached corresponded as nearly as may be with the amount due under the decree. It must however be remembered

that merely because the value of the property attached is more than the sum due under the decree it does not make the attachment invalid either

partially or wholly. It is nevertheless a valid attachment. Thus if the property of which value is more than the amount due is attached without any

objection being raised in that behalf, the only other stage when this question can be considered is at the time of sale. Under Rule 64, the Court

executing a decree may order that any property attached or such portion thereof as may be sale. It is thus permissible under this Rule to order the

sale of a portion of the attached property. It does not however provide for raising the attachment of the property not directed to be sold. The

attachment will obviously continue.

15. It is in this context necessary to consider Rule 55. A reading of that Rule would disclose that attachment will be removed only in cases where

(a) the amount due under the decree is paid in entirety;

(b) the decree is otherwise satisfied;

(c) the decree is set aside or reversed.

A reading of these provisions of Order 21 leads us to the conclusion that at the time of attachment it has to be considered whether the value of the

property sought to be attached is more than the amount due and care should be taken to attach only such property whose value as nearly as may

be is equal to the amount due under this decree. But once that stage is passed the next stage is only to direct sale of a part of the property

attached. That would not however mean that attachment to the extent of the property not directed to be sold could be lifted. The attachment once

effected can thus be removed only by satisfaction of the decree or on its being set aside or reserved. This is of course subject to the result of claim

proceedings if any in regard to attached property under O. 21 Rr. 58 to O. Rr. 63. The under O. 21 also, except at the stage of R. 17 at no

subsequent stage-barring Rr. 58 to 63 - properly attached can be removed from such attachment except on satisfaction of the decree or it is

reversed or set aside. The only rule which permits private sale withdrawing the property attached from the effect of R. 54 is Rule 83. That rule is

for the benefit of the decree-holder.

16. In the presence of the above said schemes of O. 21 and O. 38, what is to be considered is whether Section 151, Civil P. C. can be pressed

into service. This point was mentioned in the course of argument but it was not completely argued. Moreover, whether in the face of the abovesaid

provisions Section 151 can be relied upon will have to be considered along with the facts and circumstances of this case. Since I am of the opinion

that the lower Court has not considered either the legal aspect or the factual aspect of the case properly. I would leave the consideration and

disposal of this question to the lower Court.

17. The revision petition is allowed, the order of the Court below is set aside and the matter is sent back with a direction that the Court would

allow the parties to file such documents as they intend to file and then dispose of the application in accordance with law. In the circumstances, I

make no order as to costs.

18. Revision allowed; case remanded.