

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

CIVIL REVISION PETITION No.563 of 2015

ORDER:

This Civil Revision Petition is filed challenging the order dt.26-11-2011 of the Senior Civil Judge, Rayachoti, Kadapa District in I.A.No.303 of 2011 in O.S.No.99 of 2011.

2. The petitioner herein is defendant in the said suit. The suit was filed for recovery of a sum of Rs.7.00 Lakhs against petitioner by respondent with interest and costs.
3. Along with the suit, the respondent/plaintiff filed I.A.No.303 of 2011 under Order XXXVIII Rule 5 of C.P.C. to attach the properties mentioned therein before judgment.
4. After hearing the arguments of the learned counsel for respondent, the Court below passed an order on 26-11-2011 directing issuance of show cause notice to respondent to furnish security and in the meantime ordered conditional attachment over the subject property.
5. Subsequently, the attachment directed by the Court was affected on 01-12-2011. Notice issued in the said I.A. was also served by R.P.A.D. and through Court on petitioner. But the petitioner did not show cause as directed in the order passed by the Court below on 26-11-2011.
6. Without doing so, he straight away filed Revision Petition before this Court contending that the notice prior to attachment was not issued to him.
7. In **Yenamala Chandra Reddy Vs. Nuvvula Chandra Mouli Naidu** and others, a Division Bench of this Court held that

the conditional attachment is permissible under Order XXXVIII Rule 5(1) of C.P.C. and that while issuing notice, it is open to the Court to give a further direction to the Bailiff to attach the property. It further held :

“21. The above interpretation of the provisions of Order XXXVIII, Rule 5 and Form No. 5 would be consistent with the provisions of Sub-rule (2) of Order XXXVIII, Rule 6, and under that Sub-rule, where the defendant shows cause or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn or make such other order as it thinks fit. This withdrawal of attachment under Order XXXVIII, Rule 6 (2) can only be of an order of conditional attachment granted under Order XXXVIII, Rule 5 (3). In fact, if there could be no conditional order of attachment--without notice to the defendant--there would be no occasion for the defendant to invoke Order XXXVIII Rule 6 (2) for withdrawal of the attachment. In our view, Order XXXVIII Rule 6 (2) deals with withdrawal of 'conditional orders' of attachment. The circumstances under which Sub-rule (2) of Order XXXVIII, Rule 6 would come into play would be, where the court had previously exercised the power under Sub-rule (3) of Order XXXVIII Rule 5 to order conditional attachment, either of moveable or Immovable property, in addition to directing the defendant to furnish security or show cause why he should not furnish security.”

It further held that before an order of conditional attachment is passed, it is not necessary to hear the respondent and dissented with the view expressed by the learned Single Judge of this Court in **Nullimarla Jute Mills Co. Ltd. Vs. Sree Mahaveer Rice & Oil Mills**. It observed:

“24. For the aforesaid reasons, we hold that the Court by reason of its power under Order XXXVIII, Rule 5 (3) can order conditional attachment 'also' along with a show cause notice to be issued under Order XXXVIII, Rule 5 (1) of CPC. The court can adopt the first part of Form No. 5, and in such an event, it may be necessary for the court to hear the defendant before issuing such a notice. It is also open to the court to adopt both the first and the second parts of Form No. 5, without issuing notice and direct the Bailiff to attach the property straight-away, if the defendant fails to comply with the first part of the Form. In the latter case, the order will be one of 'conditional attachment'. However, if the defendant comes to court and satisfies the court, it will be open to the court to withdraw such conditional attachment under Order XXXVIII, Rule 6 (2). The above interpretation of the provisions seems to us to be in harmony with the intention of the Legislature, In any event, Sub-rule (4) of Order XXXVIII

Rule 5 does not come into play at the stage of ordering conditional attachment. No order of conditional attachment can be declared as void on account of the court not following the procedure under Order XXXVIII Rule 5 (1) C.P.C.”.

8. Having regard to this declaration of law, there is no illegality committed by the Court below in directing issuance of notice as well as directing conditional attachment of properties of petitioner. But it is open to the petitioner to show cause against such attachment and seek raising of such attachment. Therefore, petitioner is given liberty to file an application to raise the attachment on any grounds which he chooses including that the value of the property attached is far more than the suit value and it is therefore unnecessary to attach all the properties of petitioner. If any such application is filed by the petitioner, the same shall be decided by the Court below within one month from the date of filing of such application.
9. The Civil Revision Petition is disposed of. No costs.
10. As a sequel, all miscellaneous petitions, if any pending, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 09-04-2015

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