

THE HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD

CIVIL REVISION PETITION No. 4099 of 2010

ORDER:

This civil revision petition is filed challenging the order dated 20.08.2010 passed by the Chief Judge, City Civil Court, Hyderabad, in E.P.No.173 of 2009 filed under Order XXI Rules 54 and 64 of Code of Civil Procedure.

2. The facts necessary for disposal of this petition are as follows:

The plaintiff (decree holder) filed O.S.No.16 of 2002 before the Chief Judge, City Civil Court, Hyderabad, (for short, 'the trial Court') against the defendant (judgment debtor No.1) for recovery of Rs.50,74,109/-with interest thereon. The defendant is a Civil Contractor who undertakes Government works. In the said suit, the plaintiff has also filed I.A.No.83 of 2002 praying the Court to issue prohibitory orders against the Executive Engineer, R&B, Hyderabad, (for short, 'the garnishee') and thereby restrain the garnishee from making payments to the defendant for the works undertaken by the defendant. The trial Court passed prohibitory orders against the garnishee on 22.01.2001 and the same were extended and confirmed on 23.09.2002. Against the said prohibitory order dated 22.01.2001, the defendant filed C.M.A.No.2987 of 2002 before this Court (i.e., High Court) and obtained interim stay and had withdrawn Rs.21 lakhs from the garnishee. This Court, by order dated 14.11.2002, disposed of the C.M.A.No.2987 of 2002 with a direction to the defendant to furnish third party security for the suit amount. The defendant did not immediately comply with the order 14.11.2002 passed by this Court with regard to furnishing third party security for the suit amount. Therefore, the plaintiff filed I.A.No.535 of 2003 before the trial Court seeking a direction to the Garnishee not to pay any further amount to the defendant till he furnishes third party security as directed by the High Court. In the said interlocutory application, the trial Court passed interim orders dated 18.02.2003 restraining the Garnishee from

making any further payments to the defendant. Thereafter, the defendant filed I.A.No.136 of 2003 before the trial Court on 25.06.2003 requesting to receive the title deeds/documents of the property of his wife as third party security and vacate the interim orders dated 18.02.2003. Exs.B1 to B22 are the said title deeds/documents filed by the defendant as third party security before the trial Court. The trial Court has disposed of both the interlocutory applications i.e., I.A.No.535 of 2003 and I.A.No.136 of 2003, by way of a Common Order, accepting the title deeds/documents furnished by the defendant as third party security, and vacated the interim order passed on the Garnishee, and the trial Court has also directed that the title deeds/documents i.e., Exs.B1 to B22 furnished by the defendant as third party security shall be kept in the custody of the Court till final disposal of the suit and realization of the decretal amount in case the suit is decreed in favour of the plaintiff; and, in case the suit is dismissed and confirmed ultimately by the Highest Court, in the event of an appeal, the third party can take away the title deeds and other documents.

The suit ended in dismissal before the trial Court. The plaintiff filed an appeal before this Court (i.e. High Court) in CCCA No.253 of 2004 and the appeal was partly allowed vide judgment dated 27.02.2009 by decreeing for Rs.34,82,000/- with interest at 12% per annum from 14.02.2001 till realization. Aggrieved thereby, the defendant filed a Special Leave Petition (Civil) No.12352 of 2009, and also a Review Petition No.1377 of 2009, before the Supreme Court, and they ended in dismissal, and thus the judgment of this Court in CCCA No.253 of 2004 stood confirmed and became final.

During pendency of the Special Leave Petition before the Hon'ble Supreme Court, the defendant died and his wife and children, who are judgment debtors 2 to 4, were brought on record as legal representatives of the deceased defendant.

Thereafter, the plaintiff filed execution petition in E.P.No.173 of 2009 before the trial Court for realisation of the decretal amount by

way of attachment and sale of property that was furnished as third party security by the deceased judgment debtor No.1. The trial Court, by order dated 20.08.2010 ordered attachment of the schedule property while directing the Execution Petition to be called on 20.09.2010.

Questioning the legal sustainability of the order dated 20.08.2010, the present civil revision petition is filed by the judgment debtors 1 to 4.

3. Heard Sri Vedula Venkata Ramana, learned senior counsel appearing for the revision petitioners/judgment debtors 2 to 4; and Sri P. Sri Raghu Ram, learned senior counsel appearing for the respondent/decree holder.

4. Sri Vedula Venkata Ramana, learned senior counsel for the revision petitioners, contended that attachment before judgment ordered during pendency of the suit would not survive after dismissal of the suit. As per Order XXXVIII Rule 9, the order of attachment before judgment ceases to operate when the suit is dismissed. As per Order XXXVIII Rule 11A, Clause (2), an attachment made before judgment in the suit which is dismissed for default shall not become revived merely by reason of the fact that the order of dismissal of the suit for default has been set aside and the suit has been restored. As per Order XXXVIII Rule 10, the attachment before judgment shall not affect the rights of strangers nor bar the decree holder from applying for sale. It is also contended that as per Section 50 of the Code of Civil Procedure (CPC), the estate of the deceased which is in the hands of the legal heirs can only be attached in an execution petition. As the judgment debtor No.2 is a third party and is not a party to the suit, the decree passed against the sole defendant judgment debtor No.1 which is a personal decree, the property of judgment No.2 cannot be attached in an execution petition filed against the judgment debtor No.1 who died subsequent to the decree. It is further contended that the revision petitioners have

not executed any bond which would create any rights for execution of the decree. On these grounds, the learned senior counsel for revision petitioners sought for setting aside the orders passed by the executing Court ordering attachment of properties of judgment debtor No.2.

Learned senior counsel further contended that third party security was given by the sole defendant K.R. Mohan Reddy and since he died, the third party security will come to an end. It is further submitted that since no guarantee or security given by a third party would be valid after the death of a person for whom such surety or guarantee was given, the third party surety comes to an end after the death of judgment debtor No.1. Referring to the provision under Section 50 of CPC, the learned senior counsel contended that in a money decree, the execution can go against the property of the deceased judgment debtor which is in the hands of the legal representatives and no personal liability can be fastened to the properties of the legal representatives. Therefore, it is contended that the finding of the executing Court that a third party surety given by the Judgment Debtor No.1 would survive inspite of the death of the sole defendant is a material irregularity.

Learned senior counsel for the revision petitioners placing reliance on the decision in the case of **Kumaji Sare Mal Firm and partners v. Kalwa Devadattam and others**¹, submitted that even if a decree is obtained against the father personally, the decree could be executed against the sons shares as they are liable for the father's debt. The sons could escape the liability only on the ground that the debt is immoral or illegal one. It is contended that in the light of the above decision, the legal representatives who are the wife and children of the deceased are not liable as the decree passed against the 1st judgment debtor is a personal decree and therefore the 2nd judgment debtor is not liable for attachment of the property.

Learned senior counsel for revision petitioners placed reliance on another decision in the case of **Gangappa v. Boregowda and**

¹ AIR 1958 ANDHRA PRADESH 216 (VOL. 45, C. 60)(1)

others², and submitted that there is an express provision under Order 38 Rule 9 of CPC which specifically laid down that an attachment before judgment shall cease on the dismissal of the suit. Reliance was placed on **Narahariappa v. Mohamed Moulana**³, and submitted that there is no bond executed in the present case and therefore the deposit of title deeds in the Court does not create any right against third party. Therefore, it is contended that the attachment order by the executing Court is not in accordance with law and is liable to be set aside.

Learned senior counsel for the revision petitioners also placed reliance on **Doorvas S.S. Subbarama Aiyar v. Somalinga Subba Aiyar and another**⁴, and submitted that when a bond is given as security to Court that may be passed by a Court, it should be construed as meaning that security was available to the proceedings not only in the Court but also in the Court of Appeal that would really depend on the language of the bond as construed with reference to the surrounding circumstances. It is contended that in the present case there was no bond executed by the parties and therefore the deposit of title deeds will not have any impact in the absence of execution of bond with any recitals to bind the parties.

Learned counsel for the revision petitioners further submitted that as per Order XXXVIII Rule 10, the property of a third party cannot be attached and therefore the rights of strangers bar the decree holder from applying for sale.

Learned senior counsel for the revision petitioners placed reliance on Order XXXVIII Rule 11A of CPC which reads as under:

“11-A. 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 (S) AIR 1955 MYSORE 91 (Vol. 42, C.N. 29) (1)

³ AIR 1967 ANDHRA PRADESH 5 (V 54 C 2)

⁴ AAO No. 324 of 1923

(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."

5. Per contra, Sri Raghu Ram, learned counsel appearing for the respondent, contended that as per Order XXXVIII Rule 11, once the property is attached before judgment, it need not be re-attached in execution of the decree. It is argued that appeal is a continuation of suit, and therefore, though the suit was dismissed by the trial Court, the appeal by the plaintiff was allowed and, therefore, the attachment made before judgment shall continue to operate and no re-attachment is required. It is further submitted that the decree holder filed execution petition under Order XXI Rule 54 and Rule 64 of CPC for attachment of the property of judgment debtors. As the appeal was allowed in part in decreeing the suit, and the judgment and decree in the appeal has become final as the Special Leave Petition preferred by the defendant before the Hon' ble Supreme Court has been dismissed. The attachment ordered by the **executing** Court is in accordance with law in view of the provisions under Order XXXVIII Rule 11 and Section 50 of CPC read with Order XXI Rule 54 and 64. The executing Court in consideration of the order passed by the trial Court in the two interlocutory applications referred above has ordered attachment of the property which is in accordance with law.

Learned counsel for the respondent further submitted that the decree holder may apply to the Court which passed the decree to execute the same against the legal representatives of the deceased. The defendant furnished third party security in a petition filed under Order XXXVIII Rule 5 CPC for attachment before judgment and when the said petition was allowed and the title deeds were received as security by the Court, the attachment subsists and no further attachment is required at the time of execution. Referring to Order XXXVIII Rule 11, the learned counsel for the respondent contended that the property

once attached before the judgment need not be re-attached in execution of a decree. It is pertinent to note that the attachment has not been raised nor the Court has passed any order at the time of dismissal of suit ceasing the operation of attachment.

Learned counsel for the respondent further contended that judgment debtor No.2 is no other than the wife of judgment debtor No.1, who has deposited her title deeds as security in the Court with full knowledge of judgment debtor No.2 while withdrawing an amount of Rs.21 lakhs from the garnishee and, therefore, judgment debtor No.2 is not a stranger as such Order XXXVIII Rule 10 is not applicable to this case. Learned counsel further contended that though judgment debtor No.2 is not a party to the original suit, she being the legal heir of judgment debtor No.1, she was brought on record.

6. On consideration of the arguments of learned counsel appearing for both the parties, it is obvious that the executing Court has considered the order passed by the trial Court in the interlocutory applications and came to the conclusion that judgment debtor No.1 has furnished third party security during pendency of suit in an application filed for attachment before judgment. No doubt, the suit was dismissed, but subsequently the appeal filed before this Court was allowed. The Special Leave Petition was dismissed as such the order passed by the High Court became final. Therefore, the decree holder has sought for execution of decree by filing an application under Order XXI Rule 54 and Rule 64 of CPC. Order XXI Rule 54 deals with attachment of immovable property prohibiting the judgment debtor from transferring or charging the property in any way to persons from taking any benefit from transfer or charge. Therefore, the executing Court has passed an order of attachment under Order XXI Rule 54 of CPC in this case.

7. Under Order 38 Rule 9, either the party has to file a petition for raising attachment before judgment by furnishing sufficient security

for raising attachment, or the Court shall pass an order when the suit is dismissed. The liability of the judgment debtor No.2, who is the surety by way of depositing title deeds of her property, is co-extensive with that of the judgment debtor No.1.

8. The observation of the executing Court is that the Judgment Debtor No.2 has furnished third party surety for vacating the interim injunction granted in I.A.No.535 of 2003, and the trial Court, in common order passed in I.A.Nos.535 of 2003 and I.A.No.136 of 2003, has made clear that the title deeds shall be kept in the custody of the Court till realization of the decretal amount if the suit is decreed in favour of the plaintiff, and if the suit is dismissed and is eventually confirmed by the Highest Court in the event of appeal, the third party can take back the title deeds. It is clear and categorical finding of the executing Court that the decree holder has not filed E.P. for realization of the property of Judgment Debtor No.1, which is in the hands of the legal representatives, but it is only against the property which was furnished as surety for realizing the decretal amount. It was further held by the executing Court that the E.P. was not maintainable against the legal representatives of the deceased while holding that the schedule property was furnished as surety by Judgment Debtor No.2. therefore, the E.P. is maintainable against Judgment Debtor No.2, as such the property is liable for attachment under Order XXI Rule 54. Order XXI Rule 54 reads as under:

“Attachment of immovable property – (1) Where the property is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

¹[1(A) The order shall also require the judgment-debtor to attend Court on a specified date to take notice of the date to be fixed for settling the terms of the proclamation of sale]

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court house, and also, where the property is land paying revenue to the Governemnt, in the office of the Collector of the district in which the land is situate ²[and, where the property is land situate in a village, also in the office of the Gram Panchayat, if any, having jurisdiction over that village]"

9. It is appropriate to refer to the common order passed by the trial Court in I.A No. 535 of 2003, and I.A.No.136 of 2003, which reads as under:

"11. The first objection of the plaintiff that the original sale deed is not filed, is satisfied by filing the original sale deed. The 2nd objection is that the valuation certificate is given by a private surveyor and not by Sub- Registrar. The Sub-Registrar, Sanjeeva Reddy Nagar area gave Ex.B22 certificate that the present market value of the building and site is Rs.67,26,000/- . Hence the objections are overruled. I.A.No.136 of 2003 is allowed. The documents are received as security for the suit amount as creation of mortgage by deposit of title deeds. The injunction granted in I.A.No.535 of 2003 is vacated and the same is to be informed to the concerned Garnishee. Ex.B1 to B22 shall be kept in the court till the final disposal of the suit and recovery of the decree amount in case of the suit being decreed in favor of the plaintiff. If the suit claim of the plaintiff is dismissed and confirmed ultimately by the Highest Court, in the event of an appeal, third party can take away the title deeds and other documents. The petitions are disposed of accordingly."

10. As a matter of fact, the trial Court has passed a common order in the above I.As. on the aspect of return of documents that the third party can take away the documents, subject to the result of the suit and confirmation of the same by the Highest Court in the event of appeal. So, there is an order passed by a competent Court as contemplated under Order XXXVIII Rule 9 CPC. The title deeds are filed before the trial Court and they were not taken back by the 2nd respondent judgment debtor after dismissal of the suit or even after allowing the

appeal. The appeal is subsequently allowed and the order of dismissal passed by the trial Court has been set aside in the appeal. The order passed in I.A. along with the suit would revive.

11. In fact, the decree holder has filed a petition under Section 50 of the CPC, for execution of the decree. The executing Court has ordered attachment of property of judgment debtor No.2. It is appropriate to refer to Section 50(2) of CPC at this juncture with regard to the enforcement of decree against legal representatives.

(1) ---

(2) *Where the decree is execute against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.*

12. However, as per Order 38 Rule 11 CPC, no re-attachment is required for execution of decree as the appeal is continuation of suit, and since the appeal is allowed, the property need not be re-attached. Order 38 Rule 11 CPC reads as under:

"11. Property attached before judgment not to be re-attached in execution of decree:- 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.

"11-A. 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.”

13. In the instant case, the suit was disposed of on merits and subsequently the orders of dismissal were set aside by the appellate Court on merits. Therefore, the provision under Order 38 Rule 11A has no application to the present case.

14. In the case of **Bankim Chandra v. Chandi Prasad**⁵, the Patna High Court has held that orders of stay pending disposal of the suit are ancillary orders and they are all meant to supplement the ultimate decision arrived at in the main suit and, therefore, when the suit, dismissed for default, is restored by the order of the Court, all ancillary orders passed in the suit shall revive, unless there is any other factor on record or in the order of dismissal to show to the contrary.

15. In the case of **Nandipati Rami Reddi v. Nandipati Padma Reddy**⁶, a Division Bench of this Court held that when the suit is restored, all interlocutory orders and their operation during the period between dismissal of the suit for default and restoration shall stand revived. That once the dismissal is set aside, the plaintiff must be restored to the position in which he was situated, when the Court dismissed the suit for default. Therefore, it follows that interlocutory orders which have been passed before the dismissal would stand revived along with the suit when the dismissal is set aside and the suit is restored unless the Court expressly or by implication excludes the operation of interlocutory orders passed during the period between dismissal of the suit and the restoration.

16. In **Tavvala Veeraswamy v. Pulim Ramanna and others**⁷, it was held that it does not seem to me reasonable that the plaintiff in a suit who as got an attachment before judgment should have again, after

⁵ AIR 1956 Pat 271

⁶ AIR 1978 AP 30

⁷ AIR 1935 Madras 365

the restoration of the suit after its dismissal for default, to apply to the Court for a fresh attachment and that having done so the defendant should have to apply to raise the attachment by producing a surety or sureties. The common sense view of the matter is that all ancillary orders should be restored on the suit's restoration without any further orders.

17. The Hon' ble Supreme Court, in **Nancy John Lyndon v. Prabhati Lal Chowdhury**⁸, has held that in view of Order 21 Rule 57 of CPC, it is clear that with the dismissal of the title execution suit for default, the attachment levied earlier ceased. However, it has been further held that when the dismissal was set aside and the suit was restored, the effect of restoring the suit was to restore the position prevalent till the dismissal of the suit or before dismissal of the title execution suit. We repeat that this judgment was under Order 21 Rule 57 whose scheme is similar to Order 38 Rule 11 and Rule 11A of CPC and therefore we cannot put all interlocutory orders on the same basis.

18. In the present case, the deceased judgment debtor No.1 has deposited the title deeds of the property of his wife i.e., Judgment Debtor No.2, along with her affidavit, towards third party security before the trial Court as per the orders of this Court in C.M.A. No.2987 of 2002. The trial Court has considered the affidavit and accepted the title deeds as security, considering it as creation of an equitable mortgage, passed a Common Order directing to keep the title deeds in the Court till disposal of the suit with a condition, that if the suit is ultimately dismissed and, in the event of appeal, the dismissal order is confirmed by the Highest Court, the documents are to be returned to the 2nd judgment debtor i.e., the wife of the Judgment Debtor No.1.

19. By virtue of the provision under Order 38 Rule 11, if a decree is subsequently passed in favour of the plaintiff, it shall not be necessarily upon an application for execution of such decree to apply for re-

⁸ 1987 (4) SCC 78

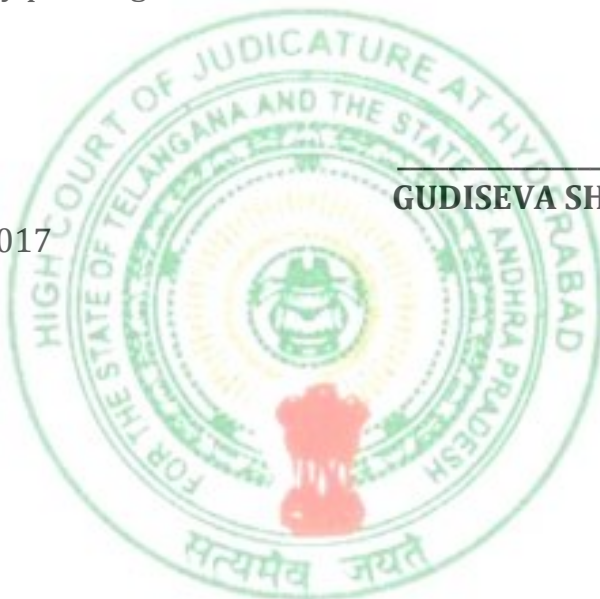
attachment of property. In the light of the foregoing reasons and since the decree holder has filed E.P. under Section 50 of Code of Civil Procedure for attachment of property of 2nd judgment debtor which is kept in the Court as surety, the property of 2nd judgment debtor is liable for attachment. The 2nd judgment debtor is to be considered as a surety for the amount due, therefore the attachment under Order XXI Rule 54 for executing the decree doesn't require any interference.

20. **IN THE RESULT**, the civil revision petition is dismissed, confirming the order dated 20.08.2010 passed by the Chief Judge, City Civil Court, Hyderabad, in E.P.No.173 of 2009. No costs. Miscellaneous petitions, if any pending, shall also stand dismissed.

11th August, 2017

KSM

GUDISEVA SHYAM PRASAD, J



THE HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD



CIVIL REVISION PETITION No. 4099 of 2010

11th August, 2017

KSM