

THE HON'BLE SRI JUSTICE S.V.BHATT

C.R.P. No.403 of 2018

ORDER:

Heard Mr.Vijay Aashrith holding for Mr.V.Raghunath, Ms.I.Sujatha holding for I.L.N.Shastry and Mr.Ganga Prasad.V for parties.

The revision petitioners are 3rd parties to E.P.No.28 of 2015 in O.S.No.9 of 2012 in the Court of Principal District Judge, Karimnagar. The revision is directed against the order dated 05.12.2017 in E.A.(SR).No.4966 of 2017 filed by revision petitioners. The revision petitioners through EA(SR) raised objections under Order XXI Rule 58 and 59 of Civil Procedure Code. The instant EA(SR) relates to the prayer of revision petitioners for stay of all further proceedings in E.P.No.28 of 2015 under Order XXI Rule 59.

The learned Principal District Judge after hearing the revision petitioners on the office objections passed the following order:

“Heard the learned counsel for the petitioner.

This petition is filed by III party U/o.21 Rule 58, 59 r/w Sec.151 of C.P.C. Claiming title to the property brought for sale by the R1 the DHR who obtained mortgage decree against R2 and R3 the JDRs. And also

stating that fraud is played in obtaining Decree in the mortgage suit.

Rule 58 and 59 of Order 21 of C.P.C. are relating to adjudication of claims or objection to attachment of property and stay of sale of such attached property.

Here in this case, no attached was ordered and effected. But the sale ordered is relating mortgage property. Hence, the objection raised by the office as to how this petition is maintainable is sustained.

The contention of the learned counsel for the petitioner that since fraud is played and instead of proceeding with sale and to adjudicate his claim on merits is desirable is not acceptable in the absence of non-applicability of the provisions i.e., Order 21 Rule 58 and 59 C.P.C.”

Mr.Vijay Aashrith submits that Judgment Debtor in O.S.No.9 of 2012 is one of the appellants in SA.No.696 of 1999 and the Second Appeal was filed against one Nagula Narsaiah, the vendor of the revision petitioners. On 24.10.2010, the Second Appeal was dismissed by this Court and the litigious claim pursued by the Judgment Debtor in E.P.No.28 of 2015 was rejected or disbelieved by this Court. Thereafter, on 20.01.2012, the revision petitioners through a registered sale deed have purchased the property from Nagula Narsaiah. Later on, O.S.No.9 of 2012 was filed by the 1st respondent herein basing on the mortgage deed dated 15.02.2011.

According to Mr.Vijay Aashrith, the consideration of dates and events would go to show that O.S.No.9 of 2012 is a collusive suit, the respondent herein is playing trick to keep the litigation alive. The revision petitioners being purchasers from a successful party in the earlier round of litigation are apprehending dispossession of revision petitioners from EP schedule property and that the rights of revision petitioners are adversely effected by orders in this E.P. Under these circumstances, he contends that the claim petitions filed under Rules 58 and 59 of Order XXI will have to be considered and appreciated keeping at the back of one's mind, the purpose of attachment referred to in Rule 54 of Order XXI. According to him, attachment of EP schedule is a step in aid for realization of a decree and beyond that it is not always necessary that the claim petitions can be entertained under Rules 58 and 59 of CPC only when there is attachment of EP schedule property. In other words, he contends that the jurisdiction conferred on executing Court by Rule 58 is to decide all questions relating to right, title or interest in the property attached arising between the parties to a proceeding. He prays for allowing the revision.

Learned counsel appearing for the respondent support the order by contending that Rule 54 provides the details of attachment simplicitor. Attachment of property is a mandatory requirement for entertaining application under Rule 58 or 59 by the executing Court. The counsel further contends that the reading of Rule 58 discloses three stages, attachment, a person aggrieved by attachment, filing claim to raise attachment and in the process right, title etc., of the property is examined by executing Court.

In support their contentions, the learned counsel rely on ***T.Nabi Sab v. G.Venkatesulu and another¹, G.K.Prabhakaran & Co., Irinjalakuda v. David Traders, Trichur² [FB] and B.Venkatadri Reddy v. P.A.Vanajakshi and another³*** and prayed for dismissing the revision.

In ***T.Nabi Sab's case (supra 1)*** this Court at para 4 and 5 held as follows:

“Order 21 Rule 58 CPC states as follows:

“Adjudication of claims to, on objections to attachment of property-

¹ 2008 (4) ALT 231

² AIR 1973 KERALA 1 (V 60 C 1)

³ 2005 (1) ALT 640

(1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment upon the claim or objection in accordance with the provisions herein contained.”

(5) The above provision discloses that the said provision is attracted only where the claim is preferred, or objection is made to the attachment of any property which was attached in execution of a decree.”

In ***G.K.Prabhakaran’s case (supra 2)***, the Kerala High Court, at para 5 held as follows:

“In order to prevent the ends of justice being defeated certain protective orders can be passed by the court pending suit (see S. 94, C.P.C.). Under Order 38 Rule 5, in a suit for money when, on filing the suit the plaintiff finds that the defendant, with a view to defeat or delay the execution of a decree that may be passed against him, is attempting to dispose of or otherwise deal with his property, the former can move the court to call upon the defendant to furnish security and pending that may also seek to attach his property, moveable or immoveable. The court can issue an order only if it is satisfied by affidavit or otherwise that the plaintiff has made out a case for attachment before judgment. It is an extraordinary measure and the court is expected to be very careful in issuing *ex parte* orders. If a third party is aggrieved by the attachment he can move the court for raising the attachment. It is only then that his right to move the court can arise and is recognized. His claim or objection will be investigated in the same manner as a claim petition is enquired into in execution of the decree

under Order 21 Rules 58 to 63, C.P.C. The enquiry under these rules is of a summary nature and the aggrieved party has a right of suit under Order 21 Rule 63 and the period of limitation will be one year under Article 98 of the Limitation Act. All these are covered by express provisions under the Code and the Limitation Act.

It is said that if the third party can move the Court only after property is attached it will be of no assistance to him because by the process of attachment harm would have been done to him. His reputation and credit would have been damaged beyond repair. This risk is safeguarded by the Code itself providing that the Court can issue the order only on being satisfied by affidavit or otherwise of the need for attachment. The risk to the plaintiff in countenancing this ante-attachment claim of the third party is greater. It will more often than not afford an opportunity to the defendant to defeat or delay the seizing of his property and thereby defeat the realization of the fruits of the decree that may be passed in future. Again, the nature of enquiry, the character of the order that the Court may pass, its conclusiveness on the rights of parties, the question of a right of suit that the aggrieved party may have, the period of limitation within which that suit may be filed are all controversial points which may arise as a consequence of the entertaining an application before actual attachment. All these will conflict with the scheme and provisions of the Code and the intention of the Legislature. Hence, the inherent power of the Court cannot be invoked to consider the application of the third party before attachment of the property.”

B.Venkatadri Reddy's case (supra 3), this Court held as follows:

“Having regard to the language employed in Rule 58, it can be said that the cause of action for filing an application under that provision would arise, only when an attachment is effected and in the absence of an effective attachment, the occasion to file such an application, has to be invariably to raise the attachment. If there did not exist any attachment, the question of raising it does not arise and the whole exercise would become futile.”

Mr.Vijay Aashrith tried to convince the Court with the circumstances stated in the affidavit filed along with respective EA's. This Court ought not take up the merits of the averments stated by the revision petitioner in the affidavit filed along with these I.A's or the objections now raised by the 1st respondent for entertaining the claim petition. The Court considers only the legal ground on which the SR was rejected.

The contention raised by the revision petitioners does not take note of the procedure stipulated under Order XXI Rule 97 of CPC.

In the case on hand, no attachment order is passed, the objections available to revision petitioners cannot effectively be canvassed at this stage, nothing

prevents the petitioners if they are advised to pursue other remedies available at other stage of EP, including to raise objections under Order XXI Rule 97 of CPC.

The objections raised by the trial Court are sustained. Civil Revision Petition fails and accordingly dismissed. No order as to costs.

Miscellaneous petitions, if any, pending, shall stand closed.

Date: 11.04.2018
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S. V. BHATT, J



