

* I N THE HIGH COURT OF JUDI CATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADESH

* THE HON'BLE SRI JUSTI CE V.RAMASUBRAMANI AN

+ C.R.P.No.5752 of 2017

% Date: 02-02-2018

Between:

Bezwada Yohanu,
S/o. Samiyelu,
Occ: Watchman,
R/o. Nandigama Town & Mandal,
Krishna District.

... Petitioner/defendant

Vs.

Konangi Radha Krishna,
S/o. Yedukondalu,
Occ: RTC Driver,
R/o. Nandigama Town & Mandal,
Krishna District.

... Respondent/Plaintiff

! Counsel for the Petitioner : Mr. N. Gopichand

^ Counsel for Respondent : Mr. V.V.L.N. Sarma

<GIST:

> HEAD NOTE:

? Cases referred

1. (2008) 2 SCC 302

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ORDER:

Aggrieved by the refusal of the Court below to set aside an order of attachment passed under order XXXVIII Rule 5 CPC, the defendant in the suit has come up with the above revision petition.

2. Heard Mr. N. Gopichand, learned counsel for the petitioner and Mr. V.V.L.N. Sarma, learned counsel appearing for the respondent.

3. The respondent filed a civil suit in O.S.No.144 of 2014 for recovery of a sum of Rs.4,88,320/-. The suit was decreed ex parte, but later the ex parte decree was set aside.

4. Before the ex parte decree was set aside, an Execution Petition was filed and it appears that an attachment of the salary was ordered in E.P.No.38 of 2016. But after the ex parte decree was set aside, the attachment got lifted.

5. Thereafter, the respondent filed an application in I.A.No.242 of 2017 for attachment of earned leave encashment amount payable to the petitioner on his retirement on 30.06.2017. In the said application, an interim conditional order was passed on 29.06.2017.

6. Upon coming to know of the same, the petitioner filed I.A.No.250 of 2017 for setting aside the interim conditional order. The said application was dismissed by the trial Court forcing the petitioner/defendant to come up with the above revision.

7. A perusal of the order of the Court below would show that the trial Court proceeded primarily on the basis that there was an emergency in view of the impending retirement of the petitioner on 30.06.2017 and that earned leave encashment is not exempt under Section 60 C.P.C.

Therefore, on these two grounds, the trial Court dismissed the application for raising the interim conditional order of attachment.

8. The contention of the learned counsel for the petitioner is that the parameters of Order XXXVIII Rule 5 were not satisfied and that the amount representing earned leave encashment cannot be attached.

9. Under Section 60(1) (g) of C.P.C., stipends and gratuities allowed to pensioners of the Government are not liable to attachment. Earned leave encashment is not a stipend or gratuity so as to fall under Section 60 (1) (g) of C.P.C. Therefore, the contention that earned leave encashment cannot be attached, is wholly unsustainable in law.

10. However, it is seen from the order of the Court below that the trial Court did not even examine the parameters to be satisfied before passing an order under Order XXXVIII Rule 5. It is repeatedly held by the Supreme Court that an order of attachment before judgment is a harsh step and that the same cannot be resorted to in a routine manner. A useful reference can be made in this regard to Raman Tech & Process Engg. Co. and another v. Solanki Traders¹, where the Supreme Court indicated that the power under Order XXXVIII Rule 5 is a drastic and extraordinary power and that such power should not be exercised mechanically or merely for the asking. The Court should be satisfied about the existence of a prima facie case for the plaintiff. The Court should also be satisfied that with a view to obstruct or delay the execution of any decree, the defendant was about to dispose of the whole or any part of his property.

11. I do not find anywhere from the order of the Court below that such a satisfaction was reached by the Court below before ordering the

¹ (2008) 2 SCC 302

attachment. Therefore, the order of the Court below is liable to be set aside.

12. Accordingly, the civil revision petition is allowed and the impugned order is set aside and the interim conditional order of attachment is raised. The trial Court may hear the application for attachment in I.A.No.242 of 2017 on merits in the light of the parameters prescribed by Order XXXVIII Rule 5 and decide the matter in accordance with law.

13. As sequel, miscellaneous petitions pending in this revision, if any, shall stand closed. There shall be no order as to costs.

JUSTICE V. RAMASUBRAMANIAN

2nd February, 2018
Js.



THE HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN

C.R.P.No.5752 of 2017



2nd February, 2018

Js.