Alluru Pappayamma Vs. U.V. Rama Raju

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Court : Orissa

Decided On : Aug-09-1961

Reported in : AIR1962Ori69

Judge : R.L. Narasimham, C.J. and ;R.K. Das, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 47 - Order 21, Rule 58

Appeal No. : A.H.O. Nos. 4 and 5 of 1960

Appellant : Alluru Pappayamma

Respondent : U.V. Rama Raju

Advocate for Def. : K.S.R. Murty, Adv. in A.H. No. 4 of 1960

Advocate for Pet/Ap. : N.V. Ramdas, Adv. in A.H.O. Nos. 4 and 5 of 1960

Disposition : Appeals allowed

Judgement :

Narasimham, C.J.

1. These two appeals arise out of one judgment passed by our learned brother Misra J. in M. As. 76 and 77 of 1957 which arose out of an order passed by the District Judge of Jeypore in two miscellaneous cases, M. J. C. 36 of 1955 and M. J. C. 5 of 1956 in the course of an execution, proceeding (Execution case No, 6 of 1954).

2. The respondent brought a suit for recovery of a sum of Rs. 4500/- together with interest (Suit No. 1 of 1952) against the appellant's husband Alluri Rangaraju (who was defendant No. 1) and who was the executant of the handnote. The appellant was impleaded as defendant 2 and her sons were impleaded as defendants 3 to 5 in that case. There was also a prayer that in respect of the properties described in the plaint schedule a charge might be created in favour of the plaintiff in respect of the sum found due from the defendants. From the judgment of the District Judge it appears that those properties were admitted to be in possession of the appellant (defendant No. 2), She claimed them to be her Stridhan property, though the creditor alleged, that some of them belonged in reality to her husband, and that they were taken benami in the name of the defendant no. 2. The learned District Judge did not decide this question in that suit, but passed the following decree in favour of the creditor:

'The suit be decreed with contest against defendants 2 to 5 and without contest against defendant .1. Plaintiff do recover a sum of Rs. 4500/-with interest at 6 per

cent per annum from the date of execution of the suit handnote till realisation against defendant No. 1 personally, and against defendants 2 to 5 to the extent of the assets of defendant No. 1 in their hands.'

A decree was drawn up accordingly and on 26th June 1954 the decree-holder fifed Execution Petition No, 6 of 1954 wherein he gave a list of properties which were the same as those attached to the plaint and requested the executing court to take steps to attach and sell those properties. In the actual execution petition, however, he did not say whether those properties belonged to judgment debtor (defendant No. 1) or else whether though in possession of defendant No. 2 (appellant) they were really assets of defendant No. 1 in her hands. The judgment of the District Judge also is entirely silent on this question. In the course of the execution these properties were attached. One of the items of properties was a house situated in village Kotpad, in respect of which the appellant filed an bjection, in M. J. C. No. 23 of 1955. But that objection petition was dismissed and the matter was not taken up in appeal.

Subsequently in M. J. C. No. 36 of 1955 a similar objection to the attachment was raised not only in respect of the house but also in respect of some lands situated in village Kotpad. Then again in M. J. C. 5 of 56 another objection petition was filed against attachment and sale of some of the landed properties situated in the village Asana. The main objection filed by the appellant against this attachment and execution was that these properties were her Stridhan properties with which her husband (defendant No. 1) had no concern whatsoever and that as the decree expressly limited her liability for the decretal amount,

'to the extent of the assets of defendant No. 1 in her hands these properties were not liable to attachment and sale. The petition was described as an objection under Section 47 C. P. C. and Order 21, Rule 58 C, P. C.'

The appellant's evidence was taken on commission, but subsequently 011 the date fixed for further hearing the appellant's lawyer failed to appear and after taking the evidence of the respondent the trial court (District Judge) overruled both the objections observing that in her application under Order 21, Rule 58 C. P. C. defendant No. 1 had failed to establish her claim. On appeal the learned Single Judge of this Court upheld this view.

3. The main point of law urged in support of these appeals is that both the Courts erroneously assumed that the objection was under Order 21, Rule 58 C. P. C. whereas in reality it was one under Section 47 C. P. C. and further that both the courts wrongly cast the burden on the appellant to establish her claim to the properties sought to be attached, notwithstanding the express mention in the decree that her liability in respect of the decretal amount would be limited to the assets of her husband in her hands. In my opinion, this contention must prevail. It is well settled that an objection, to execution filed by a judgment-debtor must be dealt with as an application under Section 47 C. P. C. and Order 21, Rule 58 C. P. C. has no application. It is true that by way of extra precaution mention was made of Order 21, Rule 58 C. P. C. but care was taken to describe the petition as also one under Section 47 C. P. C. Hut as the appellant was one of the judgment-debtors though to a limited extent the objection to the attachment of the properties should have been dealt with under Section 47 C. P. C.

4. Similarly, on the question of burden of proof also both the Courts committed an

error, presumably because they over-looked the fact that the very same properties were described in the schedule attached to the plaint and the decree-holder asked the court to create a charge in respect of them. While refusing to accept this prayer the Court observed that the appellant (defendant no. 2) 'was evidently in possession of these properties''. Though the possession was thus admitted the title was under challenge. The appellant was claiming them as her Stridhan property whereas the decree-holder was alleging that her husband (defendant No. 1) was the real owner and she was only a benamidar. The learned District Judge refused to decide this question, but in the decree, as already pointed out, he made it absolutely clear that her liability was limited to the extent of the assets of her husband in her hands. The decree-holder wag thus clearly aware of the limitation on her liability as mentioned in the decree. Nevertheless in the execution petition he asked for attachment and sale of the very same properties without specifying whether those properties were in reality 'the assets of her husband' in her possession. In view of this omission the execution petition should have been dismissed in limine. But it was registered in due course and the parties were given an opportunity to be heard. In his objection to the petition of the appellant also, the decree holder did not claim that those properfies were really benami in the name of defendant no. 2 but that they actually belonged to defendant No. 1.

The counter petition of the decree-holder dealt with some other aspects of the matter which have no material bearing on the main question. Then the appellant examined herself on commission and claimed the properties as her stridhan properties of the next date of hearing, though she was absent, there was ex parte evidence against the decree holder to show that those properties belonged to her husband. In this meagre state of the evidence no court could possibly hold that the properties were purchased benami in the appellant's name by her husband (defendant no. I). The burden of proving the benami nature of the transaction is very heavy on the person asserting the same, especially when, in the decree, it was made absolutely clear that her liability would arise only if the assets of her husband were in her possession. It was the decree-holder's duty, in the initial stages, to establish this fact and then the question as to whether she has rebutted the inference arising out of this piece of evidence will come up for consideration.

5. Both the courts however seem to have thought that as this was an application under Order 21, Rule 58 C. P. C. the claimant had the initial onus of establishing that the property was her own property and that as there was nothing more than just the evidence of the parties she failed to discharge this burden. Had they appreciated the fact that the burden lay on the other side they would have found that the decree-holder failed to establish that the properties which he had desired to attach were in the possession of the appellant though they belonged to her husband. On his failure to establish this fact the prayer for attachment of these properties must necessarily fail.

6. For these reasons we allow these appeals, set aside the order of the District Judge in M. J. C. 36 of 1955 and M. J. C. 5 of 1956, allow the objection filed by the appellant (defendant no. 2) and direct that the attachments of the lands in Asana and Kotpad as described in items 1 and 2 of schedule attached to the execution petition be release.

Both parties will bear their own costs throughout.

R.K. Das, J.

7. I agree.