



HIGH COURT OF ANDHRA PRADESH
WEDNESDAY ,THE FIFTEENTH DAY OF JUNE
TWO THOUSAND AND TWENTY TWO

PRESENT

THE HONOURABLE SRI JUSTICE NINALA JAYASURYA
CIVIL REVISION PETITION NO: 1287 OF 2021

Between:

1. ABBURI VARA PRASAD S/o. Pullayya, Hindu, Aged 56 years,
R/o. Flat No. 503, Paras Paradise Apartments,
Block No. 3, Indiragandhi Nagar Area,
Near Old Dairy Farm, Visakhapatnam.

...PETITIONER(S)

AND:

1. PADALA SATYANARAYANA REDDY S/o. Prahlada Reddy, Hindu, Aged 64 Years, R/o. D.No. 49-34-1/42, Akkayyapalem, Visakhapatnam.
2. Padala Girija Satyanarayana Reddy W/o. Satyanarayana Reddy, Hindu, Aged 57 Years,
R/o. D.No. 49-34-1/42, Akkayyapalem, Visakhapatnam.
3. Padala Swapna Satyanarayana Reddy D/o. Satyanarayana Reddy,
Hindu, Aged 32 Years,
R/o. D.No. 49-34-1/42, Akkayyapalem, Visakhapatnam.
4. Sneha Satyanarayana Reddy D/o. Satyanarayana Reddy, Hindu, Aged 27 Years, R/o. D.No. 49-34-1/42, Akkayyapalem,
Visakhapatnam.

...RESPONDENTS

Counsel for the Petitioner(s): VENKATESWARA RAO GUDAPATI

Counsel for the Respondents: T D PANI KUMAR

The Court made the following: ORDER



HIGH COURT OF ANDHRA PRADESH AT AMARAVATHI

CIVIL REVISION PETITION No.1287 OF 2021

Between:

Abburi Vara Prasad, S/o Pullayya, Hindu,
Aged 56 years, R/o Flat No.503, Paras Paradise
Apartments, Block No.3, Indiragandhi Nagar Area,
Near Old Dairy Farm, Visakhapatnam.

..... Petitioner

And

1) Padala Satyanarayana Reddy,
S/o Prahlada Reddy, Hindu, Aged 64 years,
R/o D.No.49-34-1/42, Akkayya Palem,
Visakhapatnam.

2) Padala Girija Satyanarayana Reddy,
W/o Satyanarayana Reddy, Hindu,
Aged 57 years, R/o D.No.49-34-1/42,
Akkayyapalem, Visakhapatnam.

3) Padala Swapna Satyanarayana Reddy,
D/o Satyanarayana Reddy, Hindu, Aged
32 years, R/o D.No.49-34-1/42,
Akkayyapalem, Visakhapatnam.

4) Sneha Satyanarayana Reddy,
D/o Satyanarayana Reddy, Hindu, Aged
27 years, R/o D.No.49-34-1/42, Akkayyapalem,
Visakhapatnam.

..... Respondents

DATE OF ORDER PRONOUNCED: 15-06-2022

THE HON'BLE SRI JUSTICE NINALA JAYASURYA

1. Whether Reporters of Local newspapers
may be allowed to see the Judgments? Yes/No
2. Whether the copies of judgment may be
Marked to Law Reporters/Journals. Yes/No
3. Whether Their ladyship/Lordship wish
to see the fair copy of the Judgment? Yes/No

NINALA JAYASURYA, J



***THE HON'BLE SRI JUSTICE NINALA JAYASURYA**

+ CIVIL REVISION PETITION No.1287 of 2021

%Date : 15.06.2022

Abburi Vara Prasad Petitioner

Versus

\$ Padala Satyanarayana Reddy & 3 others Respondents

! Counsel for the Petitioner : Mr.Venkateswara Rao Gudapati

^ Counsel for Respondents : Mr.T.D.Phani Kumar

< GIST : --

> HEAD NOTE : --

? Cases referred : --



THE HON'BLE SRI JUSTICE NINALA JAYASURYA

CIVIL REVISION PETITION No.1287 of 2021

ORDER:

The present Revision Petition has been preferred aggrieved by the Orders dated 28.10.2021 in I.A.No.117 of 2021 in O.S.No.198 of 2021 on the file of the Court of the VI Additional Senior Civil Judge, Visakhapatnam, Visakhapatnam District.

2. Heard Mr.Venkateswara Rao Gudapati, learned counsel for the petitioner and Mr.T.D.Phani Kumar, learned counsel for the respondents.

3. The petitioner herein is the defendant in the above referred suit filed by the respondents/plaintiffs seeking recovery of an amount of Rs.43,91,880/- from him. In the said suit, the respondents/plaintiffs filed an application in I.A.No.117 of 2021 under Order XXXVIII, Rule 5 of the Code of Civil Procedure (hereinafter called as 'CPC') seeking a direction to the petitioner/defendant to furnish security for the suit amount within the time fixed by the Court, failing which to order conditional attachment of the petition schedule property before Judgment. The petitioner/defendant resisted the said application by filing a detailed counter. The learned Trial Judge after referring to the contentions advanced on behalf of the respective parties and after noting that the direction of the Court dated 07.07.2021 to the petitioner/defendant to furnish security for the suit amount or to show cause why the attachment should not be made within 72 hours from the time of receipt of the Order was not complied with and failed to



furnish any security to the suit amount, passed an Order dated 28.10.2021 allowing the attachment in respect of item No.2 of the petition schedule property before Judgment, while setting aside the *ad interim* attachment Order dated 07.07.2021, in respect of item No.1 of the petition schedule property is concerned. Aggrieved by the said Order, the present Revision came to be filed.

4. Though the learned counsel for the petitioner advanced several contentions, as an issue with regard to maintainability of the Revision Petition was raised, it is deemed appropriate to examine the same instead of delving into the merits of the case. In this regard, it is the contention of the learned counsel for the petitioner that the impugned Order was passed under Order XXXVIII, Rule 5 of CPC and as there is no provision for filing appeal against the said Order, the present Revision is filed and the same is maintainable. Drawing the attention of this Court to the relevant provisions, the learned counsel would submit that Order 43, Rule 1(q) of CPC provides for appeals against an Order passed under Rules 2 and 3 of CPC or Rule 6 of Order XXXVIII of CPC and in the absence of specific provision providing for appeal against an Order under Order XXXVIII, Rule 5 of CPC, the only remedy available to the petitioner is to file a Revision Petition invoking the powers of this Court under Article 227 of the Constitution of India.

5. The learned counsel without prejudice to the said contention would also submit that even otherwise also the Order under challenge is not sustainable, in as much as, the learned Trial Judge without assigning any reasons, much less, plausible reasons committed material



irregularity in coming to the conclusion that the respondents/plaintiffs have categorically established that the petitioner/defendant is about to dispose of item No.2 of the petition schedule property. The learned counsel accordingly submits that the Order under challenge is liable to be set aside and the matter deserves to be remanded back for consideration and passing Orders afresh, in accordance with Law.

6. The learned counsel for the respondents on the other hand submitted that the Order under challenge was passed by the learned Trial Judge, as the petitioner/defendant failed to comply with the direction dated 07.07.2021. He submits that Order XXXVIII, Rule 6 of CPC empowers the learned Trial Court to pass an order of attachment, as the petitioner/defendant failed to avail the opportunity provided to him, in terms of Order XXXVIII, Rule 5(1)(b) of CPC. While submitting that merely because in the Order under challenge, the specific provision is not mentioned, it cannot be treated that the Order was passed under Order XXXVIII, Rule 5 of CPC and therefore the Revision is maintainable.

7. The learned counsel would also submit that it is only Order XXXVIII, Rule 6 of CPC, which enables the Court to either allow the Order of *ad interim* attachment or withdraw the attachment, in the event the defendant shows sufficient cause or furnishes the security. He submits that in the present case, the impugned Order of attachment dated 28.10.2021 falls within the powers of the Court under Order XXXVIII, Rule 6 of CPC and therefore an appeal lies against the same.



8. In order to appreciate the contentions of the learned counsel, it may be appropriate to refer to the relevant provisions of Law. Order XXXVIII, Rule 5 of CPC deals with attachment before judgement, which reads as follows:-

5. Where defendant may be called upon to furnish security for production of property.

(1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,-

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule such attachment shall be void.

9. The above provision of Law provides that if the Court is satisfied by an affidavit or otherwise that the defendant with an intent to obstruct or delay the execution of any Decree that may be passed against him is about to dispose of the whole or any part of his property or his about to hold any part of his property from the local limits of the



jurisdiction of the Court, it may call upon the defendant within a time fixed by it, either to furnish security or to appear and show cause why he should not furnish security.

10. In the above said provision, the consequences of non-compliance or compliance of the directions issued under Rule 5 of Order XXXVIII of CPC were not contemplated, but Rule 6 of Order XXXVIII of CPC deals with the same, which reads thus:

6. Attachment where cause not shown or security not furnished.

(1) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

(2) Where the defendant shows such 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.

11. A conjoint reading of the above provisions of Law would make it clear that though an Order passed by the competent Court refers to Order XXXVIII, Rule 5 of CPC pursuant to an application filed under the said provision, it is traceable to Rule 6 of Order XXXVIII of CPC, even though it is not specifically mentioned in the Order. Non-mentioning of the provision, it is settled Law is not fatal, more particularly, when the power exists. Order XXXVIII, Rule 6 of CPC empowers the competent Court to make an Order of attachment absolute, when there is failure to comply with the directions under Order XXXVIII, Rule 5(1)(b) of CPC.



12. In **Union Bank of India, Visakhapatnam vs. M/s Andhra Technocrat Industries**¹, a Division Bench of the erstwhile High Court of Andhra Pradesh at Hyderabad had an occasion to examine as to whether an Order dismissing the application under Order XXXVIII, Rule 5 of CPC seeking attachment before Judgment is appealable. It is a case, wherein the Union Bank of India filed a suit for recovery of money against the defendant M/s Andhra Technocrat Industries and moved an application under Order XXXVIII, Rule 5 of CPC for attachment of Rs.3,00,000/- lying with the Director General, Naval Project, Visakhapatnam. The said application was dismissed on contest. Aggrieved by which, the Union Bank of India preferred an appeal under Order 43, Rule 1(q) of CPC. The Division Bench after referring to the relevant provisions of Law at Paras 5 and 6 held as follows:-

5. The dominant object of R. 5 is to prevent the decree that may be passed against the defendant from being rendered unfruitful. The provisions of R. 5 can only be invoked when the Court is satisfied at any stage of the suit that the defendant has done or is about to do any act with intent to obstruct or delay execution of any decree that may ultimately be passed against him. The Court may issue, on the application, notice to the defendant to appear and furnish security or show cause why he should not furnish security for the satisfaction of the decree. The Court may also pass by the same order, immediately ordering attachment of the whole or any portion of the property specified by the defendant. Rule 6 contemplates orders of two kinds in an application under R. 5: (1) Where the defendant fails to show cause on an application under R. 5 why he should not furnish security, or fails to furnish the security required. Within the time fixed by the Court, the Court may make an unconditional order of attachment, (2) Where the defendant appears and shows cause or furnishes the required security in pursuance of the notice issued under R. 5 and the specified property or any portion of it has been attached under sub-rule (3) of Rule 5, the Court shall order the attachment to be withdrawn.

1 (1982) 2 ALT (NRC) 19



6. Now O. 43, R. 1 (q), C. P. C. makes both these orders under R. 6 appealable. The other orders are not appealable. An order dismissing an application under O.38, Rule 5 is not appealable. An order under Rule 5 merely directing the defendant to furnish security or to appear and show cause why security should not be furnished is not appealable. Only an order allowing an application under Rule 5 and an order withdrawing the attachment made under sub-rule (3) of Rule 5 any cause being shown by the defendant, are appealable.

13. In the said Judgment the Hon'ble Division Bench referred to the views expressed by the Hon'ble High Court of Calcutta in **Hara Gobinda Das vs. Bhur and Co., I.L.R.**², wherein it was held that *"an Order passed in an application under Order XXXVIII, Rule 5 of CPC is appealable only when it comes under Order XXXVIII, Rule 6 of CPC. Sub-rule (1) of Rule 6, Order XXXVIII covers all cases where the applications under Order XXXVIII, Rule 5 are eventually granted. Sub-rule (2) or Rule 6, Order XXXVIII, however which deals with cases where applications under Order XXXVIII, Rule 5 are dismissed, does not cover all such cases but includes only those cases where a conditional order of attachment is made under Order XXXVIII, Rule 5."*

14. In **New India Assurance Co. Ltd., vs. M/s Bhagyanagar Ventures Ltd.**,³ another Division Bench of erstwhile High Court of Andhra Pradesh following the decision of the earlier Division Bench in **Union Bank of India's** case reiterated the legal position. It was dealing with a matter, wherein on an application filed under Order XXXVIII, Rule 5 of CPC, the Trial Court passed an Order directing the defendant to show cause, why he should not be directed to furnish security. After referring to the relevant provisions of Law and the Forms

² ILR 1955 (1) Calcutta 478

³ AIR 2010 Andhra Pradesh 96



provided in Appendix-F of CPC, the Hon'ble Division Bench while holding that the appeal is not maintainable, at Para 7 of the Judgment *inter alia* opined as follows:-

"....., there cannot be any doubt that the exercise of power by the Civil Court in the matter of attachment of property and direction to furnish security is in two stages. In the first stage, the defendant is asked to show cause. If after receiving the said show cause notice within the time stipulated in Form No.5 proceedings, the defendant fails to appear before the Court or appears and fails to satisfy the Court, the Court can issue an Order in Form No.7 directing attachment of property. The law contemplates appeal only at the second stage actually attaching the property and not at the stage of show cause notice."

15. In the present case, it is not in dispute a conditional attachment Order was passed on 07.07.2021 directing the petitioner/defendant to furnish security for the suit amount or to show cause, why the attachment should not be made within 72 hours from the time on receipt of the Order and he failed to comply with the said direction. Thereafter the impugned Order dated 28.10.2021 was passed. In such circumstances, the matter squarely falls under Order XXXVIII, Rule 6 of CPC and the Order of the Trial Court is appealable, in the light of the authoritative pronouncements of the Hon'ble Division Benches referred to supra.

16. For the foregoing reasons, this Court is inclined to hold that the present Revision is not maintainable. However, the petitioner is at liberty to pursue appropriate remedies as available in Law. It is made clear that this Court has not examined the merits or otherwise of the Order under challenge, except maintainability of Revision Petition



against the same, and in the event, the petitioner avails the other legal remedies, the observations if any, made by this Court would not come in the way of the competent Court in deciding the matter independently. The Registry is directed to return the original copies of the Order and other documents to the petitioner to enable him to present before the appropriate Court.

17. The Civil Revision Petition is accordingly, dismissed with the above directions. No Order as to costs.

As a sequel, miscellaneous applications, if any, pending shall stand closed.

Date: .06.2022

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NINALA JAYASURYA, J



THE HON'BLE SRI JUSTICE NINALA JAYASURYA

Civil Revision Petition No.1287 of 2021

Date: .06.2022

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