

Basappa Vs. Nanjamma

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Court : Karnataka

Decided On : Aug-17-1951

Reported in : AIR1951Kant122; AIR1951Mys122

Judge : Mallappa, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 38, Rule 5

Appeal No. : Appeal No. 272 of 1950-51

Appellant : Basappa

Respondent : Nanjamma

Advocate for Def. : C. Nagaraja Rao, Adv.

Advocate for Pet/Ap. : M.K. Srinivasa Iyengar, Adv.

Disposition : Application dismissed

Judgement :

ORDER

Mallappa, J.

1. This is an application under Order 38, Rule 5, read with Sections 107 and 151, Criminal P. C., for attachment before judgment of the properties described in the schedule, on the ground that the respondent defendant is about to dispose of the

properties and that her doing so will leave the plaintiff-appellant without any adequate means of recovering the decree amount in case he obtains a decree in this Court. An affidavit has been filed by the applicant and in the first portion of it he sets out under what circumstances he had got the properties attached in the lower Court. The suit was later dismissed and the order of attachment of that Court has come to an end.

2. The point for consideration is whether there is now any reason for attaching before judgment the properties of the defendant. As stated in Order 38, Rule 5, the Court must be satisfied by affidavit or otherwise, first, that the defendant is about to dispose of the whole or any part of his property or that he is about to remove the whole or any part of the property from the local limits of the jurisdiction of the Court, and secondly that his doing so is with intent to obstruct or delay the execution of any decree that may be passed against him. In the affidavit the plaintiff, appellant states, no doubt, that the respondent-defendant has been making preparations to sell away the properties. He has also stated that if the defendant does so, it will make it impossible for him (plaintiff-appellant) to recover any portion of the decree. Assuming what is stated in the petition is true, it is clear that it is nowhere stated that the intention of the defendant-respondent in selling away the property is to obstruct or delay the execution of any decree that may be passed against her. It is one thing to say that the selling away of the property would result in the obstruction or delay of the execution proceedings, and it is another thing to say that that result was intended. What is required under Rule 5 of Order 38 is that the disposal of the property should be with the intention of obstructing or delaying the execution of any decree that may be passed against the defendant. Since there is no such allegation in the affidavit, it is clear that, even if what is stated in the affidavit is true, it cannot be said that the Court has material to feel satisfied that the requirements of the section for attaching the properties before judgment are fulfilled.

3. The next point that has to be noticed is that a mere vague statement in an affidavit that the defendant is about to dispose of the property is not sufficient. Pull particulars as to what made the plaintiff think that the defendant is about to dispose of his properties and how the plaintiff-appellant came to know of them

must be furnished. It is not uncommon for the lower Courts to attach immovable properties before judgment as a matter of course. This is not correct. Referring to the decisions of the Patna High Court, it has been observed in 13 Mys. L. 3. 143 as follows:

'In a later case, the same High Court has laid down that the power to attach is not to be exercised lightly or without clear proof of the existence of the mischief aimed at in the rule. To attach a defendant's property before his liability has been established by a decree may have the effect of seriously embarrassing him in the conduct of his defence. This power should be exercised only when the Court is satisfied not only that the defendant is about to dispose of his property or to remove it from the jurisdiction of the Court, but also his object in so doing is to obstruct or delay the execution of any decree that may be passed against him and so deprive the plaintiff, if successful, of the fruits of victory. Chandrika Pershad v. Sira Lal, A. I. E. (11) 1924 Pat.312.'

4. Then again, as observed in 27 Mys. H. C. R. 29 :

'Attachment before judgment is an extraordinary remedy which should be granted with due circumspection and only in those cases in which there is the most perfect good faith on the part of the plaintiff. Rule 5 of Order 38 lays down two conditions which are both indispensable, first that the defendant is about to dispose of the whole or any part of his property from the local limits of the jurisdiction of the Court, secondly, that this has been done with intent to obstruct or delay the execution of any decree that may be passed against him.

The fact that the defendants are involved in circumstances with suits (not being collusive ones) pending against them for the recovery of heavy sums is not equivalent to an attempt on their part to dispose of property.'

Moreover, in this case, the defendant-respondent has filed an affidavit saying that she has no intention of alienating the properties at all. Normally that should be sufficient to meet vague allegations made by the applicant. This aspect of the matter is also supported by a decision reported in 3 Mys. L. J. R. 143.

5. On the whole, this is not a case in which it can be said that there is material for the Court to feel satisfied that the defendant-respondent is about to dispose of the whole or any part of her property and that she is doing go with the intention of obstructing or delaying the execution of any decree that may be passed against her. The application under Order 38, Rule 5 read with Sections 107 and 151, Civil P. C. stands dismissed, and the interim order of attachment is vacated.

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