SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Unni Vs. Vijayan

Unni Vs. Vijayan

SooperKanoon Citation : sooperkanoon.com/716984

Court : Kerala

Decided On : Oct-03-1983

Reported in : AIR1984Ker32

Judge : K.K. Narendran, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Order 38, Rule 5, 5(1), 5(3) and 6

Appeal No. : C.R.P. No. 903 of 1983

Appellant : Unni

Respondent : Vijayan

Advocate for Def. : K.P. Dandapani, Adv.

Advocate for Pet/Ap. : P.V. Aiyappan and;N.P. Samuel

Disposition : Revision allowed

Judgement :
ORDER

K.K. Narendran, J.

1. The short point that arises for consideration is whether under Order XXXVIII of the Code of Civil Procedure an attachment before judgment other than a conditional attachment under Sub-rule (3) of Rule 5 can be ordered without either

directing the defendant to furnish security within a time fixed by the Court or directing him to appear and show cause why he should not furnish security The petitioner is the tenant of a building belonging to the respondent-landlord. A suit was filed by the respondent for arrears of rent against the petitioner. Along with the plaint the respondent moved for attachment before judgment of some immovable property of thepetitioner. An interim attachment ordered by the trial Court was later lifted by it on hearing both sides on the ground that there was no arrears of rent due from the petitioner. The respondent filed a civil miscellaneous appeal against the above order. The lower appellate Court set aside the order of the trial Court and directed the petitioner to deposit the arrears of rent in the trial Court within two weeks and held that in default the respondent 'is entitled to get the property attached'. The petitioner challenges the above judgment of the lower appellate Court in this Civil revision.

2. Order XXXVIII, Rule 5 (1) of the Code of Civil Procedure provides for calling upon the defendant to furnish security or to appear and show cause why security should not be furnished if the Court at any stage of a suit is satisfied that the defendant with intent to obstruct or delay the execution of any decree that may be passed against him is about to dispose of his property or was to remove it from the local limits of its jurisdiction. Sub-rule (4) of the rule makes an attachment made without compliance of Sub-rule (1) void. But Sub-rule (3) of the rule provides for a conditional attachment before judgment. It must be clear from the order that is issued under Sub-rule (3) that the attachment will be in force only if security is not furnished or sufficient cause why security should not be furnished is not Shown within a time specified therein. So, an order which does not contain the above conditions cannot be saved as an order of conditional, attachment under Sub-rule (3). Thus it is clear that an interim attachment before judgment can only be under Sub-rule (3) of Rule 5. In such a case, the actual order of attachment will be passed only under Rule 6 and that too when the defendant does not furnish security or fails to show cause why security should not be furnished. So, the rules in the Code regarding attachment before judgment do not contemplate, an attachment without affording the defendant an opportunity to furnish security or to show cause why the should not furnish security. In this case, the interim order of attachment was set aside by the trial Court The lower appellate Court interfered

with that and directed the petitioner-defendant to deposit the arrears of rent claimed in the suit and held that in default, the respondent-plaintiff was entitled to get the property attached. If this amounts an attachment before judgment it is hit by Rule 5 because before making the attachment the defendant petitioner was not given an opportunity as insisted by Rule 5 (1). It is not an order of conditional attachment under Sub-rule (3) because deposit of plaint claim cannot be insisted. So, the direction by the lower appellate Court in its judgment is one which it has no jurisdiction to give under Rule 5. Hence the judgment is set aside. It is made, clear that if the circumstances contemplated in Rule 5 (1) still subsist, the plaintiff-respondent can move the trial Court for a fresh attachment before judgment and the trial Court will have to dispose of the same on the merits.

3. The civil revision is allowed as above. No costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com