

Saseendran Vs. Sadanandan

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Court : Kerala

Decided On : Aug-26-2003

Reported in : 2003(3)KLT680

Judge : K.S. Radhakrishnan and; Pius C. Kuriakose, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 115 - Order 38, Rules 5, 6 and 6(2) - Order 43, Rule 1 - Order 48, Rule 1; ;[Constitution of India](#) - Article 227

Appeal No. : Unnumbered F.A.O. of 2003

Appellant : Saseendran

Respondent : Sadanandan

Advocate for Pet/Ap. : Grashious Kuriakose, Adv.

Judgement :

ORDER

K.S. Radhakrishnan, J.

1. This appeal has been preferred against the order in I.A. No. 1858 of 2002 in O.S.No. 180 of 2002 on the file of the Additional Sub Court, Thalassery.

2. I.A. No. 1858 of 2002 was a petition filed under Order XXXVIII Rule 5 read with Section 151 of the Code of Civil Procedure and I.A. No.395 of 2003 was a petition

filed under Section 151 of the Code to receive additional affidavit in support of I.A. No. 1858 of 2002. Both the applications were preferred by the plaintiff who instituted the suit for realisation of an amount of Rs. 5,90,000/- alleged to be due from the defendant. Plaintiff-petitioner apprehended that the defendant would deal with his properties unless an order of attachment is made before judgment. The Court below found no merit in the contentions raised by the petitioner and dismissed the applications. Before dismissing the applications opportunity was given to the defendant to file his counter affidavit. It is after considering the objections raised by the defendant that the petitions were dismissed against which the present appeal was preferred.

3. Registry of this Court raised objection stating that the order challenged is an order under Order XXXVIII Rule 5 of the C.P.C. and consequently appeal is not maintainable and the appeal memorandum was returned. Counsel for the appellant made the following reply:

'The appeal is filed against an order passed under Order XXXVIII Rule 6 C.P.C. Hence appeal under Order XLVIII Rule 1(q) is maintainable in the case'.

The Registry has taken the view that the proper remedy of the appellant is to file a regular appeal and not F.A.O. Request was made to post the matter before Bench.

4. Counsel appearing for the appellant submitted that appeal is perfectly maintainable since order has been passed under Order XXXVIII Rule 6 of the Code of Civil Procedure. Consequently appeal is maintainable under Order XLIII, Rule 1(q). We find it difficult to accept the contention of the counsel. Appellant had filed petition for attachment under Order XXXVIII Rule 5 C.P.C., which reads as follows for easy reference.

'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 the 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 opportunity 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.

Under Order XXXVIII Rule 5 Court is free to give direction to the defendant either to furnish security or to produce and place at the disposal of the court 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. Under Order XXXVIII Rule 5(3) the Court may also in the order direct the conditional attachment of the whole or any portion of the property specified for attachment. Defendant respondent in this case filed counter statement stating that there is no idea to sell the property since it is mortgaged to Union Bank of India. The Court below found no merits in the petition, consequently the same was dismissed. Counsel appearing for the appellant submitted that dismissal is under Order XXXVIII Rule 6 and not under Rule 5, consequently appeal is maintainable.

5. We find it difficult to accept the contention of the counsel. Order XXXVIII Rule 6 deals with only attachment of property and not dismissal of an application for attachment before judgment. For easy reference, we may extract the said rule as well.

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. Under Order XXXVIII Rule 6(2) the Court can also withdraw attachment and make such other order as it thinks fit. We are of the view only in case where attachment is effected or in case where attachment is withdrawn appeal is provided under Order XLIII Rule 1 (q). In this case no attachment has been effected and no order of attachment was withdrawn. Consequently impugned order will not fall under Order XXXVIII Rule 6 and no appeal is maintainable under Order XLIII Rule 1 (q). In this connection we may refer to the decision of a learned Single Judge of this Court in *Varghese v. Varghese* (2001 (1) KLT 489). Learned judge held that the order contemplated under Sub-rule (6) is one based on the consequences of the failure of the defendants to comply with the Court's directives under Sub-rule (5). Counsel appearing for the appellant submitted that this is a case where no objection was filed by the defendant-respondent. Consequently it is submitted that the order challenged would fall under Order XXXVIII, Rule 5 and not under Rule 6. Counsel submitted that in a case where no objection has been filed then the order would fall under Order XXXVIII Rule 6. We are afraid such a contention cannot be accepted. In this connection we may refer to the decision of a Division Bench of this Court in *Pareed Master v. Antony* (1987 (2) KLT 649) wherein also plaintiff in the suit for realisation of money preferred petition under Order XXXVIII Rule 5 C.P.C. for interim attachment. First defendant resisted the application. The trial court dismissed the application. Plaintiff then preferred appeal before this Court. Preliminary objection was raised by the defendant stating that appeal is not maintainable under Order XLIII Rule 1(q) since impugned order was passed under Order XXXVIII Rule 5 C.P.C. Scope of Order XXXVIII Rule 5 C.P.C. was considered by the Division Bench and the Court has held as follows: 'The impugned order shows that the learned Subordinate Judge has passed the order

under Order 38, Rule 5 C.P.C. Order 38, Rule 6 would apply only in a case where the court passes a conditional or interim attachment and issues notice to the defendant to show cause why he should not furnish security. If an order is passed under Clause (1)(b) of Order 38 Rule 5, directing the defendant to furnish security within a time fixed by the court, or to appear and show cause why he should not furnish security and thereafter an order was passed by the Court, then only the same could be said to be an order passed under Order 38, Rule 6. From a reading of Sub-rule (2) of Order 38, Rule 6 it is clear that it is not applicable in a case where there was no conditional attachment of the whole or portion of the property, or in other words, Sub-rule (2) of Order 38, Rule 6 is not intended to cover cases in which the defendant successfully shows cause against attachment before judgment in which no conditional attachment under Rule 5(3) had been made. Order 38, Rule 6 contemplates cases where conditional attachment before judgment was ordered and later withdrawn when the defendant showed cause. Therefore, the impugned order squarely comes within order passed under Order 38, Rule 5, which is not made appealable under Order 43, Rule 1(q)'.

We are in agreement with the reasoning of the Division Bench in Pareed Master's case (1987 (2) KLT 649). In the instant case petition was filed under Order 38, Rule 5 C.P.C. Objection was filed by the respondent and the petition was dismissed. Such an order would fall under Order XXXVIII, Rule 5 C.P.C. and not under Rule 6. Consequently this appeal is not maintainable.

6. We are also of the view that the noting of the Registry that only a regular appeal would lie is not correct. In this connection we may hasten to add that in Pareed Master's case (supra), the Division Bench ultimately held that only revision would be maintainable under Section 115 C.P.C. In view of the amendment to the C.P.C. now no revision is maintainable before this Court. The Apex Court in *Surya Dev Rai v. Ram Chandra and Ors.* (JT (2003) 6 SC 465) held that after the 1999 CPC amendment revision under Section 115 is not maintainable, but only a petition under Article 227 of the Constitution. Article 227 be invoked only sparingly in order to keep the subordinate courts within the bounds of their authority and not for correcting errors. In any view, regular appeal is not maintainable as noted by the Registry. We therefore hold that First Appeal from Orders is not maintainable.

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