

(1920) 04 CAL CK 0045
In the Calcutta High Court

Abdul Karim Dhali

APPELLANT

Vs

Nur Mohammed

RESPONDENT

Date of Decision : 15-04-1920

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5

Citation : 57 Ind. Cas. 907

Hon'ble Judges : Panton, J;Newbould, J

Bench : Division Bench

Judgement

1. This is an appeal against the order of the Additional Subordinate Judge of Backerganj reversing the order passed by the Munsif, 2nd Court of Bhola, in an execution proceeding. The appellant is the decree-holder. On the 7th April 1914 he brought a suit in the Small Cause Court and on the same day he applied for attachment of the judgment debtor's property before judgment under Order XXXVIII, Rule 5, Civil Procedure Code. The Court directed notice to show cause on or before the date of hearing why the property mentioned in the petition should not be attached and in the meantime the property mentioned in the petition be attached conditionally. No cause was shown and no other order in this matter was passed during the pendency of the suit, which was decreed on the 22nd September 1915. On the 2nd April 1918 the decree-holder applied for execution of the decree and during the pendency of these proceedings on the 4th July 1918 he also prayed that the order for conditional attachment should be made final. That application was rejected. The judgment-debtor objected to the execution of the decree on various grounds. The only question before us now is whether the attachment made in pursuance of the order of the 7th April 1914 was still subsisting. That order was certainly wrong in form, for Rule 5 empowers the Court to ask the defendant either to furnish security or to appear and show cause why he should not furnish security. Until the defendant has failed to furnish security, he should not be called on to show cause against the order of attachment. Obviously on that day no order of attachment under Rule 6 should have been passed, because such an order cannot be passed until after the

defendant has either failed to show cause why he should not furnish security or baa failed to furnish security. This the defendant had no opportunity of doing. But it is contended that though the order was in form one under Rule 6, it was in substance an order under Rule 5. But Rule 5 provides that the conditional order can only be made concurrently with the order directing the defendant to furnish security or to show cause. Subsection (3) of Rule 5 provides that the Court may also make an order of conditional attachment, and it is clear that the conditional attachment cannot be directed without an order under Clause (1) of the rule. But it is found by the final Court of fact that there was no notice to show cause issued when the order of attachment was issued.

2. It is contended before us that this finding is wrong and there is evidence to show that such a notice did issue. The lower Appellate Court has not said that there is no evidence, but has only said "the record does not show that any notice to show cause was issued." If on a consideration of the record the lower Appellate Court came to that finding, we must accept it in second appeal. Without an accompanying order to show cause the order of attachment pending suit, even if it had been made as a conditional order under Rule 5, would have been a bad order and we must, therefore, hold that the lower Appellate Court was right in its decision that there was no attachment subsisting.

3. The appeal is accordingly dismissed with costs. We assess the hearing fee at one gold mohur.