
(1933) 11 AHC CK 0058
In the Allahabad High Court

B. Prag Nath

APPELLANT

Vs

Mt. Indra Devi

RESPONDENT

Date of Decision : 30-11-1933

Acts Referred:

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

Citation : AIR 1934 All 456

Hon'ble Judges : Sulaiman, C.J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Sulaiman, C.J.—This is a defendant's appeal from an order directing attachment of certain properties before judgment. The order purported to have been passed under Order 38, Rule 6 and an appeal from an order passed under that Rule is allowed by Order 41, Rule 1(q).

2. The defendants did not raise the objections in the Court below which is raised before us, viz., that the notice issued by the Court below ordering the attachment was not in compliance with Order 38, Rule 5. Under that order, when the Court is satisfied that the defendant, with intent to obstruct or delay the execution of any decree, is about to dispose of...his property, or is about to remove the...property from the local limits of the jurisdiction of the Court, it may direct the defendant either (1) to furnish security to produce the property or the value thereof, or (2) to appear and show cause why he should not furnish security. Under Rule 6, when the defendant fails to show cause why he should not furnish security or fails to furnish security required, the Court may order the property to be attached. In the present case, the wife had brought a suit for maintenance allowances against her husband and applied for. attachment before judgment. On the application the Court ordered.

Let notice go to the defendant to show cause, if any, against this application.

3. The learned Judge did not carefully read the provisions of Order 38, Rule 5

and worded his order wrongly. The result was that his office instead of issuing a notice on form No. 5, Appendix 17 to the Civil Procedure Code, issued a notice on the general form for notice to show cause. It directed the defendant to appear on the date fixed and show cause against the application and he was informed that if he did not appear and show cause, the application would be disposed of in his absence. As already noted, the defendant when he appeared filed objections, but did not take any objection as to the defective form of the notice. Nonetheless, there is no doubt that the provisions of Rule 5 were not complied with by the Court below. As laid down in *Nathu Mal v. Kishori Lal* AIR 1914 All. 511, such non-compliance with the provisions of the Rule amounted to an irregularity and the order passed by the Court below was both irregular and objectionable. It does not necessarily follow that it was wholly ultra vires or void ab initio.

4. The Court below however had jurisdiction under Order 38, Rule 5(3) to direct the conditional attachment of the whole or any portion of the defendant's property, if satisfied that such an attachment was necessary. It seems to us that the appellate Court u/s 107(2) has the same powers and can perform as nearly as may be the same duties as are conferred and imposed by the Code on the Courts of original jurisdiction. We are satisfied that this is a fit case in which a conditional attachment should be ordered pending the decision of the question whether any security should be demanded and if so, what security; and also whether this is a fit case in which an attachment before judgment can be ordered. The learned advocate for the appellant has urged before us that the claim was a mere declaratory claim and Order 38 Rule 5 should not apply to it. Whether the relief claimed by the plaintiff can be ultimately granted in the form asked for, is not a matter of vital importance at this stage. The relief claimed in this case is not one for declaration only, but also for ordering the defendant to pay her maintenance allowances at fixed intervals and in case of default, (or the realisation of the amount by sale of the property in the execution department. The plaintiff paid full court-fees on this substantive relief.

5. We accordingly allow this appeal and setting aside the order of the Court below send the case back to that Court with the direction that it should proceed with the case according to the provisions of Order 38, Rule 5, and after issuing a proper notice dispose of the application finally. In the meantime we order that the attachment ordered by the Court below should continue as a conditional attachment.