
(2012) 07 KL CK 0149
In the High Court Of Kerala
Case No : F.A.O. No. 59 of 2012

E.k. Kunhammedkutty

APPELLANT

Vs

Ariyilakath Kunhikandy Mehroof

RESPONDENT

Date of Decision : 19-07-2012

Acts Referred:

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

Citation : (2012) 07 KL CK 0149

Hon'ble Judges : P.N. Ravindran, J;K.M. Joseph, J

Bench : Division Bench

Advocate : C.P. Mohammed Nias, for the Appellant; K.M. Firoz and Smt. M. Shajna, for the Respondent

Final Decision : Allowed

Judgement

P.N. Ravindran, J.—The sole defendant in O. S. No. 381/2010 on the file of the Court of the Subordinate Judge of Kozhikode has filed this appeal challenging an order of attachment passed under Rule 5 of Order XXXVIII of the Code of Civil Procedure. The respondent is the plaintiff in the suit. The respondent herein instituted the suit, O.S. No. 381/2010 on 27.5.2010 for realisation of the sum of Rs. .1,78,81,802/= stated to be due from the appellant under three heads. Along with the plaint, he filed I.A. No. 1815/2010 under Rule 5 of Order XXXVIII of the Code of Civil Procedure, praying for attachment of eight items of immovable properties belonging to the appellant, situated in Kacheri Village/Kasaba Village/ Panniyankara Village of Kozhikode Taluk, Kozhikode District. A conditional order of attachment was passed on 28.5.2010 and thereupon another order was issued on the same day attaching the aforesaid properties, for the reason that the defendant/appellant has failed to furnish security for Rs. .2 Crores.

2. Upon receipt of summons, the appellant entered appearance and filed a counter affidavit to the application under Rule 5 Order XXXVIII of the Code of Civil Procedure. Apart from raising various contentions, he contended that the order of attachment which was passed on 28.5.2010 is in violation of the

provisions contained in Rule 5 of Order XXXVIII of the CPC and is, therefore, null and void. He also contended that he has no intention to sell the properties which are sought to be attached. The court below considered the rival contentions and passed the impugned order dated 04.01.2012 (wrongly shown as 04.01.2010) whereby the conditional order of attachment which was passed on 28.5.2010 was made absolute. Hence this Appeal.

3. We heard Shri C. P. Mohammed Nias, learned counsel for the appellant and Shri K. M. Firoz, learned counsel appearing for the respondent. The learned counsel for the appellant contended that the suit instituted by the respondent is not maintainable, in view of the fact that the subject matter of the present suit is the subject matter of an earlier suit, OS. No. 171/2007 filed by the appellant herein for partition and rendition of accounts, which is pending before the Ist Additional Sub Court, Kozhikode, that the respondent has not raised such a claim in the written statement filed by him in O.S. No. 171/2007 and, therefore, as the relief sought is not maintainable in a separate action, the court below erred in passing the impugned order. The learned counsel for the appellant also contended that the appellant had offered security, that no notice under Rule 5 of Order XXXVIII of the CPC was issued, based on the order of conditional attachment which was passed on 28.5.2010 and, therefore, the impugned order is null and void. The learned counsel for the appellant further contended that though besides contesting the application for attachment on the merits, the appellant had offered security, there is no finding about the adequacy of the security offered by the appellant, and that the court below has also not entered a finding that the appellant is attempting to dispose of the properties which are sought to be attached. The learned counsel for the appellant submitted that the appellant is prepared to file an undertaking in the court below to the effect that he will not transfer or alienate or encumber the properties which are sought to be attached till the disposal of the suit, and that in view of the order of attachment, he is even disabled from paying the land tax in respect of the properties.

4. Shri K. M. Firoz, learned counsel appearing on behalf of the respondent would, on the other hand, contend that the appellant who was the power of attorney holder of the plaintiff, is bound to account for the rental income received by him from the buildings jointly owned by him and others, that the order of attachment passed on 28.5.2010 does not suffer from any infirmity whatsoever, and that having regard to the nature of the relief sought for in the plaint, unless an order of attachment is issued, the plaintiff will be rendered remedyless, if the immovable properties attached by the impugned order are disposed of.

5. We have considered the submissions made at the Bar by the learned counsel appearing on both sides. Shorn of details, the apprehension of the respondent is that notwithstanding the undertaking given by the appellant that he will not transfer the immovable properties sought to be attached pending disposal of the suit, it is likely that in violation of the undertaking, the properties will be

transferred to persons who have no notice of the suit, that they are likely to raise a defence that they are innocent purchasers and thereby, serious prejudice will be caused to the respondent. In our considered opinion, having regard to the undertaking given by the appellant that he will not transfer, alienate or otherwise dispose of the properties or encumber the properties till the disposal of the suit, the interests of the parties can be safe-guarded by restraining the appellant from disposing of the properties scheduled to the attachment petition or from encumbering the properties except after obtaining the previous permission of the trial court. Such an order, in our opinion, will serve the purpose for which the respondent moved the trial court for attachment of the properties and ensure that the properties will be available until the suit is disposed of. We are also of the opinion that the interests of the respondent can be safe-guarded by communicating a copy of the order which we propose to pass, to the concerned Sub Registrar.

We accordingly allow the appeal, set aside the impugned order and restrain the appellant from disposing of the properties scheduled to IA. No. 1815/2010 in OS. No. 381/2010 on the file of the Sub Court, Kozhikode or from encumbering the properties during the pendency of the suit, except after obtaining the previous permission of the trial court. The attachment effected pursuant to the order passed by the Sub Court, Kozhikode in IA. No. 1815/2010 shall stand vacated. The Registry shall communicate a copy of this judgment along with a copy of the schedule to IA. No. 1815/2010 in O.S. No. 381/2010 to the District Registrar, Kozhikode, who shall in turn communicate copies thereof to the Sub Registrar having jurisdiction over the area where the properties are situate. We make it clear that it will be open to the appellant to exercise acts of possession and pay land tax in respect of the properties and to possess and enjoy the properties other than by transferring the properties to third parties or by encumbering the properties, except with the previous permission of the trial court. The trial court shall endeavour to dispose of the suit expeditiously and, at any rate, within six months from the date of receipt of a copy of this Judgment. It will be open to either of the parties to move the District Court, Kozhikode for transfer of the suit to the same court for simultaneous trial of the suits.