

(1990) 11 KL CK 0055
In the High Court Of Kerala
Case No : C.R.P. 1201 of 1990

Joy

APPELLANT

Vs

Cherukutty and Another

RESPONDENT

Date of Decision : 13-11-1990

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 55, Order 38 Rule 11A, Order 38 Rule 9

Citation : (1990) 11 KL CK 0055

Hon'ble Judges : M.M. Pareed Pillay, J

Bench : Single Bench

Advocate : C. Kochunni Nair and S. Sivarajan, for the Appellant; C.P. Damodaran Nair, for Respondent 1, for the Respondent

Judgement

M.M. Pareed Pillay, J.—Revision Petitioner is the decree-holder in O.S. 451 of 1984 of the Sub Court, Trichur, He filed the suit for realisation of the amount due on a promissory note. Certain items of properties were attached before judgment. The suit was decreed on 30th July 1988. First Respondent (first Defendant) filed I.A. 769 of 1990 under Order XXXVIII, Rule 9 for raising the attachment on two items of properties and allowing him, to pay a portion of the decree debt from the sale proceeds of those items. Revision Petitioner challenged the maintainability of the petition. The Sub Judge ordered payment of Rs. 40,000 and allowed the petition.

2. Contention of the revision Petitioner is that the Court lacked jurisdiction to pass the impugned order as the application under Order XXXVIII, Rule 9 can be entertained only before the suit was decreed and not thereafter. Counsel for the revision Petitioner submitted that the Court below failed to note that the decree amount in the case comes to around Rs. 1,00,000 and if the attachment on the substantial and valuable items of properties is lifted and the properties are allowed to be sold on deposit of Rs. 40,000 the decree holder would be driven to a position whereby he would not be able to realise the decree amount from the

remaining items of properties as they are not that much valuable.

3. The question that arises for consideration is as to whether under Order XXXVIII, Rule 9 the Court can raise attachment of an item of property out of the properties attached before judgment after the suit has been decreed. Order XXXVIII, Rule 9 provides that where an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn, when the Defendant furnishes the security required, together with security for the costs of the attachment or when the suit is dismissed. Thus it is apparent that the Court can withdraw the attachment only when the Defendant furnished the security required by the Court together with the security for the costs of the attachment or when the suit is dismissed. Court cannot release attachment over an item alone on the motion of the Defendant after the suit is decreed.

4. The provisions applicable to attachment made in execution of the decree are made applicable to attachment made before judgment which continues after the judgment by virtue of Rule 11. Rule 11 states that where property is under attachment and a decree is subsequently passed in favour of the Plaintiff it is not necessary for a re-attachment of the property in execution. Rule 11-A makes the position clear that where an attachment before judgment is made and which continues after judgment by virtue of Rule 11 provisions applicable to attachment made in execution of a decree shall be followed. Order XXI Rule 55 provides for the removal of attachment after satisfaction of decree. In view of Order XXXVIII Rule 11-A a Defendant who wants to remove the attachment over his property has to follow the procedure under Order XXI, Rule 55. Attachment of a property can be lifted under Order XXI, Rule 55 under the following conditions:

(1) If the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court.

(2) If satisfaction of the decree is otherwise made through the Court or certified to the Court and

(3) The decree is set aside or reversed.

5. Thus in a case where property was attached before judgment and later the suit was decreed, the only course open to the Defendant for the removal of attachment was to have followed the procedure under Order XXI, Rule 55. Once the suit was decreed, Order XXXVIII, Rule 9 cannot be pressed into service. The first Defendant should have applied for the removal of the attachment as contemplated under Order XXI, Rule 55 paying the amount decreed with costs and all charges and expenses resulting from the attachment and not offering a payment of his choice. First Defendant could have approached the Court under Order XXXVIII, Rule 9 before the suit was decreed. Evidently that was not done. Having not availed of the remedy under Order XXXVIII, Rule 9 before the suit was decreed first Defendant could not have filed the petition to lift attachment over items 1 and 2 properties. The Sub Judge was not justified in passing, the impugned order.

The order of the Court below is set aside. I.A. 709 of 1990 stands dismissed.
C.R.P. stands allowed with no order as to costs.