

**(1934) 08 PAT CK 0034**  
**In the Patna High Court**  
**Case No : Appeal No. 139 of 1933**

Kedarnath Himatsinghka and others

APPELLANT

Vs

Tejpal Marwari and others

RESPONDENT

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**Date of Decision :** 13-08-1934

**Acts Referred:**

**Citation :** (1934) 08 PAT CK 0034

**Final Decision :** Dismissed

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## Judgement

Agarwala, J.—This is an appeal by the plaintiffs from an order of the Subordinate Judge of Dumka in the Santal Perganas rejecting an application for attachment before judgment in a suit which was pending in his Court. The suit was instituted on 17th April 1931. The defendants filed their written statement on 14th April of the same year. The application for attachment before judgment was made on 22nd August of the same year. The application was taken up for hearing on 20th August 1931 but was not finally disposed of till 19th June 1933, nearly two years later. Plaintiffs' first witness was examined on 9th September 1931, the next witness on 2nd December 1931 and the third witness on 8th December 1932. Defendants' first witness was examined on 20th February 1933. In the meantime the case had been adjourned on various occasions at the request of the parties and on three occasions the order sheet shows that for the convenience of the Court the case was adjourned for periods, amounting in all, to seven months. A preliminary objection was taken as to the competence of the present appeal. O. 43, R. 1 (q) provides that an appeal lies from an order under Rr. 2, 3 or 6 O. 33. In the present appeal we are not concerned either with R. 2 or 3, or with the first part of R. 6, O. 38.

2. The appeal, if competent, must come within Cl. (2) of R. 6, O. 38 which provides that where the defendant shows 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security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit. It is pointed out by the learned advocate for the respondents that in

this case there was no conditional order of attachment under R. 5(3) O. 38. He contends therefore that the order eventually passed rejecting the application for attachment before judgment was not such an order as is made appealable by O. 13, R. 1 (q). The view contended for by the learned advocate is supported by the decision of a Division Bench of the Allahabad High Court reported in *Om Prakash v. Mahammad Ishaq*, 1933 All. 557 = 146 I.C. 838. Mr. Bose on behalf of the appellants refers to a passage in a judgment of another Division Bench of the Allahabad High Court reported in *Chobhey Lal v. Sri Kishen*, 1932 All 260 = 140 I C 95, where Sen, J., in his judgment said that

where in response to a notice issued to the defendant under O. 38 R. 5, the defendant appears in Court and shows cause why no order for furnishing security passed against him and why no order should be passed directing the attachment of the property, the order of the Court accepting the contention of defendant is an order which falls within (). 38 R. 6 (2). From such an order an appeal lies under O. 43, R. 1 (q).

3. The judgment of Sen, J, must be read in connexion with the facts of the case, in which it appears that the Court below had in fact made a conditional order for attachment of the property. In 1916 Cal 287 (3), a case decided by Mukerjee and Chatterjea, JJ, an application for attachment before judgment was made and the Court ordered notices to be issued upon the defendants to show cause why an attachment should not issue before judgment, and at the same time directed the defendants not to part with the property in any way. No formal order of attachment was however made. Eventually the application for attachment was rejected and it was held that no appeal lay against the order of dismissal inasmuch as there had been no conditional attachment under Cl. 3, R. 5. These two decisions in *Om Prakash v. Mahammad Ishaq*, 1933 All. 557 = 146 I.C. 838 and *Mahendra Narain v. Gurudas Bairagi*, 1916 Cal 287 = 33 I C 689 therefore support the preliminary objection. The appeal must therefore be held to be incompetent. Mr. Bose does not contend that the circumstances of the case justify any interference in revision. The appeal is therefore dismissed. The respondents are entitled to their costs throughout. We understand that the witnesses for the plaintiffs have now all been examined and the plaintiffs' case has been closed. There has already been inordinate delay in the disposal of the suit and it is desirable that it should be brought to a conclusion as soon as possible.

Saunders, J.

4. I agree.