
(1931) 12 AHC CK 0007
In the Allahabad High Court

Lala Chokhey Lal and Another

APPELLANT

Vs

Pandit Sri Kishen and Another

RESPONDENT

Date of Decision : 03-12-1931

Acts Referred:

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

Citation : 140 Ind. Cas. 95

Hon'ble Judges : Grimwood Mears, C.J.; Sen, J

Bench : Division Bench

Judgement

1. On the 16th of April, 1931, Lala Chokhey Lal and Lala Murli Dhar instituted a suit for recovery of Re. 23,254-2-0 on foot of two promissory notes, dated the 10th of January, 1929, and the 10th of March, 1830, executed by Sri Kishan and Bhan Deo in their favour, On the same day they made an application which purported to be under Order XXXVIII, Rule 5 of the Code of Civil Procedure. The learned Subordinate Judge passed the following order on the application:

The defendant will be ordered to appear and furnish, security for Rs. 23,000 or show cause why it should not be furnished. The property in the list will be conditionally attached pending such showing of cause.

2. It appears that the application of the plaintiffs was accompanied by a list of property possessed by the defendants. In answer to the notice issued to the defendants the latter appeared in court and showed cause. The court held that it was not established that the defendants had done anything which came within the purview of Order XXXVIII, Rule 5, CPC and the result was that the court cancelled the conditional order of attachment and dismissed the plaintiffs' application with costs, Plaintiffs appeal-to this Court from this order. A preliminary objection has been taken to the hearing of the appeal on the ground that no appeal lies under Order XLIII, Civil Procedure Code. Where in response to a notice issued to the defendant under Order XXXVIII, Rule 5, Civil Procedure

Code, the defendant appears in court and shows cause why no order for furnishing security for costs should be passed against him and why no order should be passed directing the attachment of his property, the order of the court accepting the contention of the defendant is an order which falls within Order XXXVIII, Rule 6(2), Civil Procedure Code. From such an order an appeal lies under Order XLIII, (1)(q), Civil Procedure Code. We, therefore, hold that an appeal lies to this Court and we reject the preliminary objection.

3. On the merits, we are clearly of opinion that the appeal is without any substance. The plaintiffs in order to succeed had to establish that the defendants, with intent to obstruct or delay the execution of any decree that might be passed against them, were about to dispose the whole or any part of the property or about to remove the whole or any part of the property from the local limits of the jurisdiction of the court. We have examined the affidavit of Lala Murli Dhar, dated the 16th of April, 1931. There is nothing in this affidavit to show that the defendants with intent to obstruct or delay the execution of any decree which might ultimately be passed against them were about to do one of the two things mentioned in Sub-rule 1 of Rule 5 of Order XXXVIII, Civil Procedure Code. We are, therefore, of opinion that the application is incompetent. We accordingly affirm the order of the court below and dismiss this appeal with costs. The record should be sent to the lower Court with the intimation that this Court hopes that the case will be proceeded with and disposed of at the earliest possible moment.