

(1983) 10 MAD CK 0030

In the Madras High Court

Case No : C.R.P. No. 2544 and 2545 of 1983

N.R. Thirtiverigadam

APPELLANT

Vs

Kaliannan

RESPONDENT

Date of Decision : 28-10-1983

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5, Order 38 Rule 6, Order 38 Rule 9

Citation : AIR 1984 Mad 112 : (1983) 96 LW 672

Hon'ble Judges : Ratnam, J

Bench : Single Bench

**Advocate : M.B. Dominique, K. Sukumaran and S. Thenkodi, for the Appellant;
T. Muruga Minickam, for the Respondent**

Judgement

1. In these civil revision petitions at the instance of the second defendant in O. S. No. 955 of 1981 and O. S No. 956 of 1981. District Munsiff's

Court, Gobichettipalayam, directed against the order of dismissal of the applications in I. A. No. 573 of 1982 and I. A. No. 574 of 1982 in O. S.

No. 955 of 1981 and O. S. No.- 956 of 1981 filed by, the Petitioner under O. 38 R." 9 C. P. C., the question that arises for consideration is

whether the court below was right in dismissing the applications on the ground that they were not maintainable. The circumstances under which the

proceedings arose may be stated as under the respondents in these civil revision Petitions instituted O. S. No. 955 of 1981 and O. S. No. 956 of

1981 against the petitioner and others for the recovery of a sum of Rs. 7.987/- and Rs. 64511 respectively with subsequent interest on the basis of

a savings deposit scheme conducted by the Petitioner. The petitioner and others are resisting those suits on several grounds, which are not very

relevant for purposes of these civil revision petitions. In 1. A. No. 1571 of 1981

and I. A. No, 1572 of 1981 the respondent-, herein applied for attachment before judgment of a sum of Rs. 10.000 /- and R.s. 8000/- respectively belonging ,a to the petitioner. Initially, the court passed an order of conditional attachment and subsequently the attachment was also made absolute after earning the objections raised by, the petitioner and others. It is not in dispute that the order of attachment absolute has become final in the sense that the petitioner had not preferred any appeal against the orders of attachment. However, the petitioner subsequently filed 1. A. No. 573 of 1982. A. No. 574 of 1982 in O. S. No. 955 of 1981 anti O. S. No. 956 of 1981 under O. 38 R. 9 C. P.C. praying for the raising of the attachment effected in I. A. No. 1571 of 1981 and L A. No. 1572 of 1981 in O. S. No. 41 of 1981 and O. S. No. 956 of 1981. In the affidavit filed by the petitioner in support of those applications, the petitioner after referring to the attachment already effected in I. A. No. 1571 of 1981 and I. A. No. 1572 of 1981, stated that though he is possessed of sufficient property to clear all the amounts that may be due to the respondent in the event of the respondents succeeding in the suit yet. he had also spent quite large amounts in raising sugar cane crops in his lands which had been harvested by the Receiver and the amounts were lying with the Receiver and the Sugar. Mill as well and that he had not been paid any amount at all it was also further stated by the petitioner that he was in need of money and that he was prepared to furnish sufficient security for the payment of money due to the respondents without prejudice to his contentions in the Suits. A draft security bond was also stated to have been furnished along with the petition. Ultimately the petitioner prayed that after accepting, the security so furnished by him. - The order of: attachment effected in I. A. No. 1571 -of 1981 and I. A. No. 1572 of 1981 may be raised. The respondents herein on the ground resisted that application, that immediately: "after the Institution of the suits an order for conditional attachment was passed by the court and after the petitioner- and others appeared and, contested the proceedings the court was satisfied that a case for malting, the conditional order of attachment absolute had been, made out and passed an order also to that effect on 23-9-1981 and therefore the petitioner Cannot be permitted again to offer security and release the: amounts already attached.

According to the respondents. if the petitioner was acting.", bona fide then, such an application ought to have been filed even before the orders

were passed in 1. A. No. 1571 of 1981 and I. A No. 1572 of 1981 and after the disposal those applications by passing an order of attachment

absolute the remedy of the petitioner was only by way of an appeal and not to again pray for the raising of it the attachment. An objection that the

applications were not maintainable was also raised by respondents.

2. The learned Principal District Munsiff. Gobichettipalayam, who enquired into these, applications was of the view that if the petitioner was in any

manner aggrieved by the order of attachment passed already in I. A. No. 1571 of 1981 and 1. A. No. 1572 of 1981, an appeal ought to have

been preferred by him under O. 43, It. 1 (Q) C. P. C. and not having done so, it was not open, to, the , petitioner to urge again that the attachment

should be raised on accepting the security. The applications were therefore held to be maintainable and dismissed.

3. The learned counsel for the petitioner contended that though in I.A No. 1572 of 1981. an order for attachment absolute had earlier been passed.

yet that would not preclude the petitioner from approaching the court under O. 38 R. 9 C. P. C. offering security and Praying that the attachment

effected earlier should be withdrawn. It was further pointed out by the learned counsel that O. 38 R. 9 C. P. - C. is intended to facilitate the raising

of attachment already effected and to enable a party to deal with either his money or property already attached on furnishing adequate security to

meet the claim of the plaintiff to the satisfaction of the court and that the circumstance that earlier. The defendant was unable to satisfy the court that

the claims of the plaintiff would be met by offering sufficient security, would -not, preclude him from filing an application for raising the attachment

when subsequently he is able to offer immovable property or other properties as sufficient security to meet the amounts due under the decree that

may be eventually passed. Reliance in this connection was placed by the." learned counsel for the petitioner on the decision in Ravi

Nagabhushanam Vs. Neti Gopala Krishna Murthy, . On the other hand. The learned counsel for the respondents in these Petitions would submit

that the petitioner and others had already been heard in the applications for attachment before judgment and only thereafter, final orders were

passed and those orders had also become final and there after it is not open to the petitioner to re-agitate the question of furnishing security and raising the attachment again, as., the,. Proper remedy of the petitioner would only be to prefer an appeal against the order of attachment and that not having been done, the petitioner cannot pray for such a relief by another independent application. The learned counsel also drew attention to the circumstance that if such applications were permitted that would destroy the finality of the orders even without resort to remedies provided for under law.

4. The fundamental question is whether the applications are not maintainable in view of the, inaction on the part of the petitioner in not having

preferred appeals against the orders in I. A. No . 1571 of 1981 and I. A. No. 1572 of 1981. It is true that originally. On the applications for

attachment before judgment taken out by the Respondent's notice was given to the petitioner and others and they had appeared in response to

such a notice and had also shown cause as to why there should not be an attachment before judgment but their objections were overruled and the

attachment was made absolute on 23-9-1981. There is no dispute now that no appeals had been preferred by the Petitioner against those orders.

Even so the petitioner maintains that it is open to him to invite the attention of the court to the availability of security to meet the claim of the

respondents mid the hardship caused to the petitioner by the order of attachment passed against him and to request the court to raise the

attachment To appreciate this it is necessary, to refer to Sec. 94(b) and O. 38. Rr. 5. 46 and 9 C. P. C. S. 94(b) C. P. C. is the substantive

statutory Provision conferring powers on, court to direct the defendant to furnish security, to produce any Property belonging to him or her and to

place the same at the disposal of the court or order attachment of any property. Such powers have been conferred in order to prevent the ends of

justice being defeated Under O. 38. R. 5 (I) C. P. C. the court must first be satisfied that the defendant is about to dispose of the whole or any part

of his or her property or he or she is about to remove the whole or any Part of his or her property from the local limits of the jurisdiction of the

court with a view to delay or defeat or obstruct the execution of any decree that may be Passed against him or her and thereafter, the court should

issue a notice in the appropriate form conforming to the requirements of 0. 38. R 5 (I) and setting out the details specified there under within a time

to be fixed by it, either calling wpm him or her to furnish security in such sum as may be specified in the order or to produce and Place at the

disposal of the court when required the property so specified in the application or the value of the same or even such portion thereof as may be

sufficient to meet the decree or, issue notice merely directing the defendant to appear and show cause why he or she should not furnish security for

the amount claimed in the suit. 0. 38,R 5 (2) C. P. C. requires specification of the Property to be attached as well as the estimated value thereof

under 0.38.R.5 (3) C.P.C the court may consider directing the conditional attachment of the whole or any portion of the property so specified.

That power of the court is intended to safeguard and Protect the interest of the plaintiff during the interregnum between the filing of an application

for attachment before judgment and the service of notice of that application on the defendant and his or her appearing in response to that with

reference to the matters mentioned in the notice under 0. 38. R. 5 (1). C. P. C. and showing cause. The expression used in 0. 38, IL 5 (3) C. P.

C. is ""conditional attachment"" which would normality mean that it is in the nature of a dependent attachment or an attachment, which would ensure

and depend upon certain conditions namely the defendant appearing and furnishing security or showing cause. Such a conditional attachment is

intended to be operative during the interregnum, or the intervening time. As otherwise the defendant can part with ail his or her valuable properties

either pending receipt of a notice under 0. 38. R. 5 (1) C. P. C. or during the tendency of the suit as well and the Court as well as the Plaintiff

which may eventually succeed would be left helpless and just we would be defeated. to prevent which the Power of Conditional attachment is

conferred an courts under S. 94(b) C. P. C. to be exercised in conformity with and after satisfying the requirements of 0. 38. p, 5 (11 MA (3) C.

P. C. 0. 38. R. 5 (4) C. P. C is a newly introduced Provision and that states that any order of attachment If made and effected in violation of the

requirement of 0. 38. R. 5 (1) C. P. C. shall be void. 0. 38. R. 6 "(9) Provides for withdrawal of the attachment effected earlier if in response to a

notice under 0. 38. R. 5 (1) C. P. C. the defendant appears and shows cause or otherwise Satisfies the court, then the court may proceed to

withdrew the attachment effected earlier if on the other hand. the defendant does not show, cause wh3r he or she should not furnish security or fails

to furnish security, then it will be open to the court to Proceed under O. 38. R. 6 (1) C. P., C. and order attachment of the Property specified in the

application or such portion thereof as appears sufficient to satisfy any decree that may be passed in the suit in the appropriate form namely. Form

7-A in Appendix F. Then occurs O. 38 R.9 C. P. C. providing for withdrawal of the attachment made by the court when the defendant furnishes

security required together with security for the costs of the attachment or when the suit is dismissed. O contemplates all that. 38. R. 9 C. P. C. is

that though an order for attachment before judgment has been made. yet the court has power to direct the withdrawal of such attachment when the

defendant furnishes the security required together with security for costs of the attachment. The later out of O. 3& R. 9 C. P. C. declares that the

attachment shall be ordered to be withdrawn when the suit is dismissed and that would also indi6ate that the stage for applying R. 9 is really after

the court passes an order for attachment under O. 38. R. 6 (1) C. P. C. O. 38. R. 9 C. P. C. speaks merely of an order made for attachment

before judgment and Proceeds to state that nevertheless, the court shall order an attachment being withdrawn when the defendant furnishes the

required security. There is no restriction upon the exercise of such Power by the court and O. 38, R. - 9 C. P. C. has been couched in terms,

which are wide and general. Being a Provision intended to safeguard the rights of a successful Plaintiff in the suit there is really no letter on the

exercise of such a Power by the court even after the court had passed am order of attachment earlier which had become final. Indeed it clearly

appears from the phraseology adopted in O. 38. R 9 C. P, C. that an order of attachment is essential before the power of withdrawal of such an

attachment on furnishing of security contemplated in that rule can be exercised. The Rule confers an independent and substantive statutory right on

a defendant to bring it to the notice of the court that he is in a position to furnish security to meet the claim of the plaintiff and that therefore. there is

no need for an order of attachment effected earlier to continue to be operative as the security would be sufficient to meet the claim of the plaintiff

which may ripen into a decree. O. 38, Rr. 5 and 6 (1) C. P. C_ would also indicate a scheme by which the defendant is given. an opportunity to

show cause against the attachment by furnishing security and the attachment being effected owing to his failure to do so. Despite that 0 confers an independent right. 38. R. 9 C. P. C. on the defendant to furnish the required security and to pray for the withdrawal of the attachment effected already. This provision is quite understandable as it may very often happen that at the time when the application for attachment before judgment is considered by court the defendant, for no fault of his may not be in a position to furnish the required security to meet the claim of the plaintiff as he may not then own any valuable property and for his inability to furnish security the court may direct the attachment of either moneys or assets belonging to the defendant and specified in the application for attachment before judgment. Subsequently it may be that the defendant comes by some substantial property say by inheritance or a bequest or through some other unexpected but fortunate circumstance and he would then be in a position to safeguard the interest of the plaintiff with reference to the claims in the suit by the offer of security subsequently available but not available earlier and persuade the court to withdraw the attachment order so that the defendant may not be prejudiced and the interest of the plaintiff may also be adequately safeguarded. Thus the provision made in O. 38, R. 9 C. P. C is a beneficial one intended to give an opportunity to defendants who despite an order of attachment passed against them are in a position to offer security for safeguarding the claims of a Plaintiff made in the suit and pray for a withdrawal of the order of attachment made already either over their other assets or moneys.

5. The decision in *Ravi Naizabhushanam v. Neti Gopalkrishna Murthy* AIR 1969 AP 164 relied upon by the learned counsel for the petitioner

dealt with a case of release from attachment of one half of the property for the purpose of satisfying the debt other than the one sued upon. The court had ordered the release of the property from attachment on the view that the properties still left intact and under attachment would be sufficient to satisfy the debt. Even so, it was held that there was no provision under which such an application could be brought or maintained. Dealing with the scope of O. 38, Rr. 5, 6 and 9 C. P. C. Gopalrao Ekbote J., pointed out as follows at para 186 :-

It has to be seen whether when once an order under R. 5 of O. 38, Civil P. C. is made final under R. 6 of O. 38, Civil P. C. an application to

release the Property from attachment for the purpose of privately selling it in order to discharge the debts of third parties is permissible under O. 38

Civil P. C. A combined reading of Rr. 5. 6 and 9 of O. 38. C. P. C. would leave no one in doubt that when a conditional order of attachment is

made under sub-rule (3) of H. 5. it can be either withdrawn or made absolute after notice to the defendant under R. 6. The effect of sub-rule (2) of

R. 6 is not to provide for a further stage of showing cause or furnishing security after an order of attachment under sub-r. (1) of R. 6 has been

made. The only other stage of directing removal of attachment made under R. 6 is under 1R. 9. While sub rule P1 of R. 6 refers to the withdrawal

of a conditional attachment made under (3), H. 9 refers to the withdrawal of an unconditional attachment effected under R. 6, R. 9 provides that

the court shall order such attachment to be withdrawn when (1) the defendant furnishes the security required together with security for the costs of

attachment or (2) the suit is dismissed"".

In the instant case conditional order of attachment was made under R. 5 (3). It was made absolute under R. 6. The attachment was not withdrawn

under R. 9 as there was no application under that rule made by the defendant"".

The above observations would -indicate that the remedy provided for under O. 38, R. 9 C. P. C. is in the nature of an independent remedy and

can be -availed of by a defendant even after an order for "attachment under sub-r. (1) of R. 6 of O. 38, C. P. C. has been made as in this case.

The view taken by the court below that the applications filed by the petitioner are not maintainable is therefore plainly erroneous. Since the

applications had been dismissed on the ground of non-maintainability without an investigation into their merits, the orders of the court below

dismissing 1. A. No. - 573 of 1982 and L A. No. 574 of 1982 in 1982 O. S No. 955 of 1981 and O. S. No. 956 of 1981 are set aside and those

applications are directed to be restored to file to be dealt with on their merits in accordance with law. These civil revision Petitions are therefore

allowed but there will be no order as to costs.

6. Revision allowed.