

(2000) 01 KAR CK 0033

In the Karnataka High Court

Case No : Miscellaneous First Appeal No"s. 2837 and 2542 of 1999

Smt. Meera Arya and Another

APPELLANT

Vs

Smt. Leela Nagraj and Another

RESPONDENT

Date of Decision : 17-01-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5, Order 38 Rule 5 (2), Order 38 Rule 6

Citation : (2000) 3 CivCC 557 : (2000) ILR (Kar) 586 : (2000) 4 KarLJ 72 : (2000) 2 KCCR 1380

Hon'ble Judges : V.P. Mohan Kumar, J

Bench : Single Bench

Advocate : Sri Anant Mandgi, for the Appellant; Sri B.N. Dayananda, for the Respondent

Judgement

1. These two appeals arise from a proceedings in suit O.S. No. 6317 of 1997 on the file of the 7th Additional Civil Judge, Bangalore. The plaintiff is the appellant. Mr. B.N. Dayanand, learned Counsel who was appearing for the defendants submits that he takes notice for the respondents and will file power within two weeks. On this basis he agrees that the appeals may be heard and disposed of finally.

2. The brief facts relevant for this disposal are as follows:

The suit is one for recovery of money. Along with the plaint, I.A. I was filed by the plaintiff seeking attachment of properties scheduled as Schedules A and B properties belonging to the defendant before judgment. Interim attachment was granted. Defendants appeared and filed an I.A. to vacate the attachment. Later on the said I.A. filed to vacate the interim attachment was dismissed as not pressed. After dismissal of that I.A., defendants filed yet another application offering his sister's property as property for attachment in substitution of Schedules A and B properties. The reason given was that the defendants intended to develop the Schedules A and B properties and any attachment would

cause difficulties for them in his venture. This application was objected by the plaintiff alleging that there is nothing on record to show what is the title and interest of the sister over the property to offer the said property as security and that even if there be the value of the property is less. It was also pleaded by them that the value of the property is hardly Rs. 5,00,000-00 whereas the plaintiff claim itself is more than Rs. 15 lakhs. The plaintiff also contended that the sister's property cannot be offered as security. The Court below vacated the attachment order and dismissed the application of the plaintiff for attachment before judgment. It further allowed the application filed by the defendant offering alternative property as security observing further that the question of right of the sister to offer the property as security and the value of the property, etc., will be gone into at the final stage of litigation. Aggrieved by these orders, the plaintiff has come up in appeal.

3. M.F.A. No. 2837 of 1999 has been filed by the plaintiff against the order dismissing the application for attachment. M.F.A. No. 2542 of 1999 is against the order allowing the application accepting alternative property as security.

4. I have heard Mr. Anant Mandgi, learned Counsel appearing for the appellant as also Mr. B.N. Dayananda, learned Counsel for the respondents.

5. I am afraid the order passed by the Court below cannot be sustained. The attachment order cannot be vacated accepting property other than the property of the defendant and thereafter release, the attached property. In this behalf we may advert to Order 38, Rule 5 of the CPC. In particular, we may refer to sub-rule (1), of Order 38, Rule 5 which reads as under:

"(1) Where at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him-

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security".

(emphasis supplied)

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to the attached and the estimated value thereof".

6. The wordings of the said rule makes it clear that for the attachment to be vacated, the Court may direct the defendants either to furnish security for the plaintiff claim or direct him to produce and place at the disposal of the Court when

required the "said property" or value of the same. What is meant by the "said property"? The meaning of the "said property" is provided by sub-rule (2) of Rule 5 of Order 38. The "said property" therefore mean, the property indicated in sub-rule (2). The said property referred to in Order 38, Rule 5 could be only the property that has been attached and it may not be alternative property. It is clear from the wordings of the Rule that property that can be offered as security under Order 38, Rule 1, can be only that property that is sought to be attached and not any other property. The need to specify the property is mandatory by virtue of sub-rule (4). Thus a property has to be indicated by the plaintiff for attachment under sub-rule (1) and attachment can be made absolute or varied on the security of the "said property". A different property, if objected to by the plaintiff, cannot be substituted for the original property.

7. Mr. Dayanand, learned Counsel highlighted his contention relying on Order 38, Rule 6 and sub-rule (2). That rule reads as under:

"6. Attachment where cause not shown or security not furnished.--(1) Where the defendants fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached".

"(2) Where the defendant shows such 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".

(emphasis supplied)

Sub-rule (1) makes it clear that where defendants fails to show cause why he should not furnish security or fails to furnish security required within time fixed, the Court may order that property "specified", or such portion thereof as appears sufficient to satisfy the decree which may be passed in the suit be attached. The emphasis in sub-rule (1) is with respect to the property specified, which is sought to be attached under Rule 5. Rule 5 refers to the property initially sought to be attached. The wordings in sub-rule (2) of Rule 6 makes it clear that the property specified in Rule 5 would be dealt with under the rule and no other property. Therefore, the conjoint reading of sub-rules (1) and (2) of Rule 6 can be only keeping in mind the requirement of Rule 5, makes it clear that the property referred to in Rule 6 is the property which is the subject-matter of attachment under Rule 5. If that is so the sister of defendants cannot come forward to offer her property as security nor can the Court accept any such security unless the plaintiff himself is prepared to accept the same. Much worse is the situation when the Court states that value of the alternate property and other objections raised by the plaintiff with respect to the property offered by the sister of the defendant will be considered at a later stage. Such order cannot be described as a judicial exercise of power, as it is totally against known provisions of law. I am of the view that the order passed by the Court below cannot be

sustained. It is accordingly vacated. The vacating of the attachment by the Court below is not justified. The attachment made in I.A. I is made absolute. Appeals are allowed. No costs.