

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 27TH DAY OF FEBRUARY 2015/8TH PHALGUNA, 1936

OP(C).No. 217 of 2015 (O)

AGAINST THE ORDER dtd. 22.11.14 in I.A.No.2148/14 IN OS 66/2014 of
II ADDL.SUB COURT,KOZHIKODE

PETITIONER/RESPONDENT/DEFENDANT:

DR.NANDAKUMAR, AGED 56 YEARS
S/O.UNNIKRISHNAN NAMBEESHAN, NADANIVAS, MORIKARA P.O
MAKKADA AMSOM, MORIKARA DESOM, KOZHIKODE DISTRICT.

BY ADV. SRI.P.V.KUNHIKRISHNAN

RESPONDENT/PETITIONER/PLAINTIFF:

SREELAJA A K, AGED 45 YEARS,
D/O.A.K.BALAN, 'SREEGAL', A U P SCHOOL ROAD
MALAPARAMBU, VENGARI AMSOM, NEDUNGOTTOOR DESOM
KOZHIKODE- 673 009.

BY ADV. SRI.K.M.FIROZ

BY ADV. SMT.M.SHAJNA

THIS OP (CIVIL) HAVING COME UP FOR ADMISSION ON
27-02-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

OP(C).No. 217 of 2015 (O)

APPENDIX

PETITIONER'S EXHIBITS:

EXHIBIT-P1-TRUE COPY OF THE PLAINT O.S 66/2014 DATED 29/05/2014 ON
THE FILE OF THE IIND ADDITIONAL SUB JUDGE, KOZHIKODE.

EXHIBIT-P2-TRUE COPY OF THE PETITION FILED UNDER ORDER 38 RULE 5
OF THE CIVIL PROCEDURE CODE WHICH IS NUMBERED AS
I.A 2148/2014 IN O.S 66/2014 ON THE FILE OF THE IIND
ADDITIONAL SUB JUDGE, KOZHIKODE.

EXHIBIT-P3-TRUE COPY OF THE COUNTER DATED 30/08/2014 FILED BY THE
PETITIONER TO EXHIBIT-P2 APPLICATION.

EXHIBIT-P4-TRUE COPY OF THE SALE AGREEMENT DATED 11/09/2013
EXECUTED BETWEEN THE PETITIONER AND THE RESPONDENT.

EXHIBIT-P5-TRUE COPY OF THE ORDER DATED 22/11/2014 IN
I.A 2148/2014 IN O.S 66/2014 ON THE FILE OF THE IIND
ADDITIONAL SUB JUDGE, KOZHIKODE.

RESPONDENT'S EXHIBITS: NIL.

// True Copy //

P.A. to Judge.

smp

P.BHAVADASAN, J.

Original Petition (Civil) No.217 OF 2015

Dated this the 27th day of February, 2015.

J U D G M E N T

A very short point arises for consideration in this original petition filed under Article 227 of the Constitution of India. Admittedly, petitioner entered into an agreement for sale with the respondent for an extent of 8 cents of property. It fell through and the respondent instituted a suit for return of advance amount paid by her along with damages and compensation. Along with the suit, she moved I.A.No.2148/2014 seeking interim attachment of the property of the petitioner. It would appear that no conditional order was issued and notice was issued to the defendant asking to show cause as to why security should not be furnished for the decree amount. The application was filed on 29.05.2014 and the defendant filed his counter to the show cause notice on 30.08.2014. Surprisingly, on 22.11.2014 the impugned order was passed which reads as follows.

“In the result, petition allowed. Considering the facts of the case, issue show cause notice to the respondent calling upon him why he shall not furnish security to the tune of Rs.16,00,000/-. Meanwhile there shall be a conditional order of attachment over the petition schedule property to the above tune. Petition disposed accordingly”.

2. The grievance of the learned counsel for the petitioner is that after having filed his counter affidavit, without hearing him a conditional order is passed and it is clearly unsustainable. Once counter affidavit is filed, the matter should have been heard on merits. The specific contention of the petitioner was that only 8 cents was the subject matter of agreement and under such circumstance attachment of 38 and odd cents is unnecessary. It is pointed out that initially no conditional order is passed and only show cause notice is issued and a counter affidavit is filed by the respondent. It is incumbent upon the court to consider the objection before passing orders thereon. The present order is neither has the character of a final order nor an interim order. Result is that petitioner is not in the know of the nature of the actual order passed by the court below.

3. Learned counsel appearing for the respondent contended that apart from seeking a decree of return of advance amount, respondent-plaintiff also sought for a decree of compensation and that would come to a considerable amount and it was taking into consideration that aspect that the court below had passed the present order.

4. It is significant to notice that the suit is one for realisation of Rs.15 lakhs paid to the defendant as part of sale consideration with 18% interest and also for realisation of Rs.1 lakh as compensation. The suit was based on an agreement for sale which, according to the plaintiff, was breached by the petitioner herein. As to who has committed breach is a matter to be determined at the time of trial. Whatever that be, respondent herein laid the suit and sought to attach about 38 and odd cents of property of the petitioner. It may be remembered here that the agreement for sale was in respect of 8 cents of property. It is also significant to notice that security was sought for only for Rs.16 lakhs and purchase price for 8 cents of property as per the agreement was Rs.21 lakhs.

5. When the notice for attachment was served on the petitioner, he filed objection pointing out that whatever may be the circumstance, attachment of 38 and odd cents of property is unnecessary and if at all necessary a portion of the property alone need be attached.

6. There seems to be considerable force in the submission made by the learned counsel for the petitioner. It is not discernible from the order of the court below whether it is a conditional order or final order. It is not disputed before this Court that before the impugned order was passed, petitioner had filed his counter to the show cause notice and the order now passed again calls upon the petitioner to show cause why property should not be attached.

7. The specific contention of the petitioner was that 39 and odd cents of property was not liable to be attached since the subject matter of agreement was 8 cents and the total sale consideration was Rs.21 lakhs which would indicate the price of the property. Without considering this aspect, impugned order has been passed. Whatever that be, in the light of the fact that

objection had been filed before the impugned order has been passed, the court below was bound to consider the objections filed by the petitioner to the notice issued to him to show cause as to why security should not be furnished to satisfy the decree and thereafter only an order could have been passed. Of course, court could have initially passed a conditional order which was not done in the case. The present order is one after the petitioner filed his objection to the show cause notice.

In the result, the impugned order is set aside and the matter is remanded to the trial court for fresh consideration of I.A.No.2148/2014 in accordance with law. The petition shall be disposed of within a period of three weeks from the date of receipt of a copy of this judgment. In the meanwhile, the petitioner shall not alienate the property.

Sd/-

**P.BHAVADASAN
JUDGE**

smp