

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM
&
THE HONOURABLE MRS. JUSTICE MARY JOSEPH

THURSDAY, THE 8TH DAY OF OCTOBER 2015/16TH ASWINA, 1937

OP (FC).No. 476 of 2015 (R)

PETITIONER/RESPONDENT:

VARADARAJAN NAIR, AGED 56,
S/O. MADHAVAN PILLAI, BINDHU BHAVAN,
THOTTATHUVILAKATHU, AVANAVANCHERI,
ATTINGAL, THIRUVANANTHAPURAM.

BY ADV. SRI.LIJU. M.P

RESPONDENT(S)/PETITIONERS:

1. KALAMALINI, AGED 46, D/O. SANTHAKUMARI,
BINDHU BHAVAN, THOTTATHUVILAKATHU,
AVANAVANCHERI, ATTINGAL, THIRUVANANTHAPURAM.
2. SINDHU NAIR, AGED 25, D/O. KALAMALINI,
BINDHU BHAVAN, THOTTATHUVILAKATHU,
AVANAVANCHERI, ATTINGAL, THIRUVANANTHAPURAM.
3. SUNIL KUMAR, AGED 20, S/O. KALAMALINI,
BINDHU BHAVAN, THOTTATHUVILAKATHU,
AVANAVANCHERI, ATTINGAL, THIRUVANANTHAPURAM.

THIS OP (FAMILY COURT) HAVING COME UP FOR ADMISSION
ON 08-10-2015, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:

mbr/

OP (FC).No. 476 of 2015 (R)

APPENDIX

PETITIONER(S)' EXHIBITS:

**P1 - TRUE COPY OF THE OP NO. 918/2014 ON THE FILE OF FAMILY COURT,
ATTINGAL DT. 16.9.2014.**

**P2 - TRUE COPY OF THE ORDER DT. 09.4.2015 PASSED IN IA NO. 1508/2014 IN
OP NO. 918/2014 ON THE FILE OF THE FAMILY COURT, ATTINGAL.**

RESPONDENTS' EXHIBITS: NIL.

//TRUE COPY//

P.S. TO JUDGE

mbr/

C.K.ABDUL REHIM & MARY JOSEPH, JJ.

OP(FC) No. 476 of 2015

Dated this the 8th day of October, 2015

JUDGMENT

Abdul Rehim,J.

The petitioner, who is the respondent in OP.No.918/2014 on the files of the Family Court, Attingal, is approaching this court invoking the supervisory jurisdiction vested under Article 227, challenging Ext.P2 order passed by that court in IA.No1508/2014. The respondents herein are the petitioners in the original petition before the Family Court.

2. The original petition was instituted by the respondents seeking return of gold ornaments, money, marriage expenses for the 2nd respondent etc. Ext. P1 is the copy of the original petition. Along with the original petition the respondents have moved IA.No.1508/2014 seeking attachment before judgment of the immovable

properties scheduled thereunder. On 9.4.2015 the court below passed Ext.P2 order in IA.No.1508/2014 ordering a conditional attachment of the petition schedule properties. It is aggrieved by the said order, this original petition is filed.

3. Contention of the petitioner is that the petitioner had filed caveat before the court below under section 148A of the Code of Civil Procedure and claimed a right to appear before the court below on the hearing of the application seeking any interlocutory relief . The respondents have furnished a copy of the original petition and the interlocutory application, on the basis of the caveat lodged by the petitioner. But it is alleged that, the impugned order was passed, without affording any opportunity to the petitioner to object the interim relief sought for. It is further contended that the impugned order is passed in an irregular manner, in violation of the procedure contemplated under Order XXXVIII Rule 5 of Code of Civil Procedure. It is pointed out that no show cause notice as contemplated

under the said Rule was issued, before passing the order of attachment. Under such circumstances it is contended that the impugned order is legally unsustainable and is issued in a highly improper or irregular manner, under an erroneous exercise of the jurisdiction vested on the Family Court.

4. From the contents of the impugned order it is evident that the court below had passed an order of conditional attachment, after calling upon the petitioner to furnish security for a sum of Rs.76,50,000/-. Such an order is passed after the court became prima facie satisfied with respect to sustainability of the claims raised in the original petition, and after being convinced that in order to defeat such claim the petitioner herein may attempt to alienate the petition schedule property. Going by provisions contained in Rule 5 of Order XXXVIII of the Code of Civil Procedure, when the court is satisfied that the defendant with an intention to obstruct or delay the execution of any decree which may be passed against him is about to dispose

of or to remove the whole or any part of the property from the local limits of the jurisdiction, the court can direct the defendant either to furnish security with respect to such sum as may be satisfied or to produce and place the said property or the value of the same at the disposal or directing to show cause as to why the defendant should not furnish security for the satisfaction of the decree which may be passed.

5. Under Sub Rule (3) of Rule 5 the court is entitled to pass a conditional attachment along with the direction issued to the defendant to furnish security or to show cause as to why such security shall not be furnished. In the present case it is evident that the court had ordered to furnish security to the tune of Rs.76,50,000/-. Evidently such an order is passed under Rule 5(1) of Order XXXVIII of Code of Civil Procedure. Going by the above said provisions, it is at the discretion of the court on being satisfied that the defendant is about to dispose of the

scheduled property to order conditional attachment under Sub Rule (3) of Rule 5. But while issuing an order under Sub rule (1) of Rule 5 the court should afford an opportunity to the defendant to show cause as to why security need not be furnished. Evidently, in the impugned order the court had directed the petitioner herein to furnish security and simultaneously passed an order of conditional attachment with respect to the scheduled properties. It is true that an opportunity which could have been availed by the petitioner for showing cause against the direction for furnishing security, is not afforded in the case at hand. But at the same time, we are of the considered opinion that, the impugned order directing to furnish security and ordering conditional attachment is well within the competence of the court under Rule 5(1) and (3) of Order XXXVIII.

6. Since it is brought to the notice that the petitioner had already entered appearance on the basis of the caveat lodged, it would have been more appropriate for the court to

issue show cause notice before ordering to furnish security and passed a conditional attachment. So that the petitioner could have afforded with an opportunity to dispute the sustainability of the claim made in the original petition or to convince the court that the apprehension expressed with respect to disposal of the property is baseless. Since such an opportunity is not afforded in the case at hand, this court is of the considered opinion that the court below can be directed to accept objections if any to be filed by the petitioner against the application for attachment, and the court can be directed to finalise the matter after hearing both the parties.

7. Since the relief proposed in this original petition is only to afford such an opportunity and since the respondents can be afforded sufficient opportunity of hearing before the court below while deciding the matter, this court is of the opinion that issuance of notice to the respondents in this original petition can be dispensed with,

and the case can be disposed of at the admission stage itself.

8. Under the above mentioned circumstances the above original petition is hereby disposed of by directing the Family Court, Attingal to consider the objections if any already filed or to be filed by the petitioner herein against IA.No.1508/14, to the extent of showing cause as to why the security need not be furnished or as to why the attachment could not be ordered. The court below shall decide the question of confirming the conditional order of attachment as contemplated under Rule 6 of Order XXXVIII, after affording opportunity of hearing to both sides on the basis of the objection/counter affidavit if any filed by the petitioner as well as reply affidavit/ replication if any filed by the respondents. The petitioner shall file counter affidavit/objections to IA.No.1508/14 within a period of 2 weeks from the date of receipt of a copy of this judgment. The Family Court shall finalise and dispose of the IA as

directed above, within a period of 2 weeks from the date of filing of such counter affidavit/objections.

C.K.ABDUL REHIM, JUDGE

MARY JOSEPH, JUDGE

Pmn/

