

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

WEDNESDAY, THE 18TH DAY OF NOVEMBER 2015/27TH KARTHIKA, 1937

OP (FC).No. 493 of 2015 (R)

[AGAINST THE ORDER IN IA NO.183/2015 IN OP 22/2015 of FAMILY COURT,
THODUPUZHA DATED 11.9.2015]

PETITIONER(S):

SMITHA
W/O.SAJU, CHEMPARATHY HOUSE,
MUTHALAKODAM, THODUPUZHA VILLAGE.

BY ADVS. SRI.K.C.CHARLES
SRI.M.POLY MATHAI
SRI.P.CHELLAPPAN
SRI.VIMAL K.CHARLES
SMT.A.T.RENJU

RESPONDENTS(S):

1. P.C.VARGHESE
S/O.CHACKO, CHEMPARATHY HOUSE,
MUTHALAKODAM, THODUPUZHA VILLAGE, 685584.
2. SAJU V.CHEMPARATHY
S/O.P.C.VARGHESE, CHEMPARATHY HOUSE,
MUTHALAKODAM, THODUPUZHA VILLAGE, 685584.

R1 BY ADV. SRI.V.SETHUNATH

THIS OP (FAMILY COURT) HAVING BEEN FINALLY HEARD ON 18-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER(S) ' EXHIBITS:

EXHIBIT-P1: A TRUE COPY OF THE O.P.22/2015 ON THE FILE OF THE FAMILY COURT, THODUPUZHA DATED 23.01.2015.

EXHIBIT-P2: A TRUE COPY OF I.A.19/2015 DATED 23/01/2015 IS FILED FOR ATTACHMENT ON THE FILE OF THE FAMILY COURT, THODUPUZHA.

EXHIBIT-P3: TRUE COPY OF CONDITIONAL ORDER OF THE ATTACHMENT PASSED BY THE FAMILY COURT, THODUPUZHA DATED 24.01.2015.

EXHIBIT-P4: A TRUE COPY OF THE COUNTER AFFIDAVIT IN I.A.19/2015 ON THE FILE OF THE FAMILY COURT, THODUPUZHA DATED 15/05/2015.

EXHIBIT-P5: A TRUE COPY OF I.A.183/2015 DATED 3/06/2015 ON THE FILE OF THE FAMILY COURT, THODUPUZHA.

EXHIBIT-P6: A TRUE COPY OF THE OBJECTION FILED BY THE PETITIONER HEREIN TO I.A.183/15 DATED 13/06/2015 ON THE FILE OF THE FAMILY COURT, THODUPUZHA.

EXHIBIT-P7: A TRUE COPY OF I.A.229/2015 DATED 3/07/2015 ON THE FILE OF THE FAMILY COURT, THODUPUZHA.

EXHIBIT-P8: A TRUE COPY OF THE COUNTER AFFIDAVIT IN I.A.229/2015 DATED 24/06/2015 ON THE FILE OF THE FAMILY COURT, THODUPUZHA.

EXHIBIT-P9: A TRUE COPY OF THE LIST OF DOCUMENTS DATED 20/07/2015 FILED BY THE PETITIONER IN O.P.NO.22/2015 ON THE FILE OF THE FAMILY COURT, THODUPUZHA.

EXHIBIT-P10: A TRUE COPY OF ORDER IN I.A.NO.183/2015 IN O.P.NO.22/2015 ON THE FILE OF THE FAMILY COURT, THODUPUZHA DATED 11/9/2015.

EXHIBIT-P11: A TRUE COPY OF THE REVIEW PETITION (I.A.358/2015) FILED BY THE PETITIONER DATED 18/09/2015 ON THE FILE OF THE FAMILY COURT, THODUPUZHA.

EXHIBIT-P12: A TRUE COPY OF THE REVISED ORDER DATED 30/9/2015 IN I.A.NO.183/2015 IN O.P.NO.22/2005 ON THE FILE OF THE FAMILY COURT, THODUPUZHA.

RESPONDENT(S) ' EXHIBIT:

EXHIBIT R1(a): TRUE COPY OF THE FAIR VALUE NOTIFICATION ISSUED BY THE GOVT. OF KERALA.

-TRUE COPY-

P.S.TO JUDGE.

“C.R.”

**C.K. ABDUL REHIM, J.
&
MARY JOSEPH, J.**

O.P (FC) No. 493 OF 2015

DATED THIS THE 18th DAY OF NOVEMBER, 2015.

J U D G M E N T

Mary Joseph, J:

Challenge in this original petition filed under Article 227 of the Constitution of India is against Exts.P10 & P12 orders passed by the Family court, Thodupuzha in IA No.183/2015 in OP No.22/2015, on 11-09-2015 and on 30-09-2015, respectively. The petitioner herein had instituted OP No.22/2015 before the Family court against the respondents seeking return of money of Rs.20,00,000/- along with interest and also for return of 60 sovereigns of gold ornaments or its value of Rs.12,72,000/-. The petitioner is the wife of the 2nd respondent, their marriage being solemnized on 17-06-2006. It is the case of the petitioner that, after the betrothal ceremony the father of the petitioner had entrusted a sum of Rs.20,00,000/- with the 1st respondent at the residence of the petitioner, in the

presence of friends and relatives of both the families. As agreed upon, 70 sovereigns of gold ornaments were purchased for the marriage of the petitioner from 'Bhima Jewellery', Kottayam and those ornaments were worn by the petitioner at the time of the marriage. After the marriage the petitioner was residing in the family of the respondents. During the year 2007, marriage of the younger sister of the 2nd respondent was fixed. It was decided to give 60 sovereigns of gold ornaments and a sum of Rs.15,00,000/- as her share. For raising funds, the 1st respondent suggested to utilize the cash and ornaments of the petitioner, on the promise that an extent of 1.99 Acres of land would be transferred into her name. The said property is described in the original petition as A-schedule. The proposal was agreed upon and it was decided to register necessary documents with respect to the transfer of A-schedule property into the name of the petitioner, after the marriage of the sister of the 2nd respondent. Accordingly the petitioner gave 60 sovereigns of gold ornaments to the 1st respondent. But A-schedule property

was not transferred into the name of the petitioner, as promised. The 1st respondent was not willing to execute necessary documents with respect to plaint A-schedule property, nor was he ready to return the value of 60 sovereigns of gold ornaments or the sum of Rs.20,00,000/-. Therefore the original petition was filed before the court below claiming reliefs as mentioned above.

2. Along with the original petition the petitioner had filed IA No.19/2015 seeking attachment before judgment of the petition schedule property. The court below passed an ad-interim order of conditional attachment, as evidenced from Ext.P3, on 24-01-2015. The 1st respondent filed a counter affidavit in IA No.19/2015. He has also filed another interim application as IA No.183/2015, seeking withdrawal of the attachment on accepting the security furnished. In the affidavit filed in support of the said application it is mentioned that the 1st respondent was holding a total extent of 2 Acre 99 Cents of property, out of which 1 Acre was gifted to the 2nd respondent, who is his son, in the year 2007. It is stated that the wife of the 1st respondent is

undergoing treatment for Cancer and the 1st respondent himself is a chronic patient undergoing treatment for various diseases since the last so many years. According to the 1st respondent, since there is no other income to meet the expenses for their treatment to be undergone, he had entered into an agreement with one Sri.V.M.Abbas for sale of 70 Cents of property situated on the northern side of the remaining extent of 1 Acre 99 Cents. On getting information about this, the 2nd respondent herein had filed a suit as OS No.369/2014 before the Munsiff Court, Thodupuzha, seeking fixation of the boundary between the property gifted to him and the property proposed to be sold to Sri. V.M. Abbas, raising an allegation that the latter property includes a portion of the property gifted to the 2nd respondent also. In fact, both properties are situated on the northern and southern ends of the family property, which are about 50 feet apart. According to the 1st respondent the only intention behind institution of such a suit was to restrain him from selling 70 cents of the property from the total extent of property to the above said person. In OS

No.369/2014, the properties were surveyed and identified at the instance of the 1st respondent. The Munsiff's Court found that the property agreed for sale does not take in any property belonging to the 2nd respondent. Accordingly the Munsiff's Court vacated the order of temporary injunction granted to restrain the 1st respondent from conducting the sale. Having met with such a situation, the 2nd respondent instigated the petitioner herein to file the original petition before the court below. It is contended that at no stretch of imagination it can be believed that the parents of the petitioner have offered to pay such a hefty amount at the time of her marriage. The claim was frivolous and the above original petition was filed only with an intention to obtain an order of attachment of the entire extent of property, solely to restrain the proposed sale of 70 Cents to Sri.V.M.Abbas. It is contended that money and gold ornaments, if any, if at all given to the petitioner from her family, was only kept by her, and that the claim is totally baseless. In the circumstances it is contended that, lifting of the order of attachment with respect to 70 cents is highly necessary and

therefore the 1st respondent prayed for the same subject to the acceptance of the remaining property under attachment as security.

3. The petitioner had filed detailed objection to IA No.183/2015, contending that sufficient reason is not there for lifting the order of attachment and if the 70 Cents out of the entire extent of property under attachment, is permitted to be sold, the petitioner will be deprived of enjoying the fruits of any decree which may be passed in her favour. The petitioner had also filed IA No.229/2015 seeking direction to the 1st respondent to produce the alleged agreement for sale executed with Sri. V.M. Abbas. The 1st respondent had filed counter affidavit in IA No.229/2015 contending that production of the agreement for sale executed with Sri. V.M. Abbas is unwarranted.

4. The court below had considered IA No.183/2015 and vide order passed as Ext.P10 on 11-09-2015 allowed the lifting of attachment with respect to the property having an extent of 70 Cents on the northern extremity of the total area of 1.99 Acres. In the said order, it was observed that

the factum of execution of agreement for sale with Sri.V.M.Abbas was admitted by the petitioner herein. It was further observed that the petitioner has no dispute and had consented for sale of an extent of 70 Cents of property on the northern extremity, out of the 1.99 Acres of land. Accordingly, the order was passed vacating the order of attachment in respect of 70 cents of property and to accept the balance extent offered as security to secure the claim of the petitioner.

5. The petitioner sought for review of Ext.P10 order through IA No.358/2015 filed on the premise that she has not consented for lifting of the attachment with respect to 70 cents of property and for its sale. The review petition was allowed by the court below and IA No.183/2015 was considered afresh. The court below passed a revised order as Ext.P12, on 30-09-2015. It is found that the 1st respondent is in dire need to sell 70 Cents of property out of the total extent of 1.99 Acres and that the balance extent of 1.29 Acres will be sufficient to secure the claim of the petitioner in the original petition. The court below also

found that there is no harm in withdrawing the attachment in respect of the 70 Cents of property situated on the northern side of the entire property, in a manner not affecting the enjoyment of the property belonging to the 2nd respondent. It is found that the 1st respondent will be at liberty to contract the sale of 70 Cents of property in order to meet the imminent requirement of treatment for himself and his wife. While arriving at such a conclusion the court below had also observed that the claim of the petitioner is not bonafide and valid, as no satisfactory evidence was produced to establish the same. It is discernible from the attendant circumstances that the sale of a portion of the property was necessitated to meet the expenses of the treatment of the 1st respondent and his wife. The court below found that, 1.29 Acres of property offered by the 1st respondent is sufficient to satisfy the plaint claim. Aggrieved by the said order of lifting of the attachment with respect to an extent of 70 Cents, the petitioner has approached this Court.

6. It is mainly contended on behalf of the petitioner

that the Family Court had failed to consider some crucial and relevant aspects while permitting withdrawal of attachment with respect to a portion of the property. There was no appraisal on the part of the Family Court as to whether the balance extent will be sufficient for securing the plaint claim, if ultimately a decree is passed in favour of the petitioner. It is pointed out that, despite offer of the 1st respondent to furnish security for the claim raised in the original petition, he has not produced any proof before the court below for substantiating that the remaining extent of 1.29 Acres of property is worth enough to meet ₹32,72,000/-, the claim in the original petition. It is pointed out that the finding that the balance extent of property will suffice to secure the claim was arrived at by the court below without any basis. It is contended that the finding of the court below that the original petition is filed by the petitioner in collusion with the 2nd respondent, is totally without any basis and unwarranted also. Absolutely, cogent and sufficient materials are not available before the court below

to observe that the claim made by the petitioner is not bonafide. It is contended that, the court should not have permitted lifting of the attachment in respect of 70 cents of property so as to enable the first respondent to conduct its sale, especially when the latter failed to produce the alleged agreement for sale despite direction from the court. Absolutely materials are also not forthcoming from the side of the first respondent to substantiate his dire need of money.

7. Refuting contentions of the petitioner, the 1st respondent had filed a detailed counter affidavit mainly pointing out that, even going by the 'fair value' fixed by the Government, the property in question is having a valuation of Rs.1,12,500/- per Are, which corresponds to Rs.45,546.56 per cent. Calculated on that basis, valuation of 1.29 Acres of land would come to Rs.58,75,506.20. A copy of the relevant extract of the Government Notification fixing the 'fair value' is produced as Ext.R1 (a). It was also pointed out that, as observed in Exts.P10 & P12 orders, even if the attachment of 70 Cents of land is lifted, there is road access to the

remaining property from the eastern side. Therefore the assertion of the petitioner that the remaining property would not have any road access, is refuted. All the contentions raised in the counter affidavit was denied through a reply affidavit filed by the petitioner. Much emphasis was given to the contention that first respondent has thoroughly failed to produce the copy of the alleged agreement for sale in order to substantiate his claim.

8. It is pertinent to note from the observations made by the court below in the impugned order that the petitioner in I.A.No.19/2015 failed to satisfy the court below that the respondent has taken steps to dispose of the whole or any portion of his property with intention to obstruct or delay the execution of the decree that may be passed against him. In this regard it may be relevant to consider the provisions in Rule 5 of Order XXXVIII. Under Sub-rule (1) of Rule 5 the court need to arrive at a satisfaction based on an affidavit or otherwise that the defendant with the intention to obstruct or delay the execution of any decree which may be passed against him is about to dispose of the

whole or any part of his property. Under Sub-rule (2) of Rule 5 it is obligatory on the part of the plaintiff to specify the property required to be attached and to show the estimated value thereof. Therefore, the plaintiff, who is seeking attachment before judgment has to state convincingly that he has obtained reliable information about the intention of the defendant to dispose of the whole or any part of the property belonging to him, with a view to obstruct or delay the execution of any decree that may be passed against him. Further it is the duty of the plaintiff to specify the property required to be attached and to show the estimated value thereof. It is from such materials which are to be furnished mandatorily, that the court can arrive at a satisfaction that, the defendant with a view to obstruct or delay the execution of any decree that may be passed, is intending to dispose of the whole or any part of his property. Only upon arriving at such a satisfaction the court can direct the defendant, either to furnish security or to appear and show cause as to why he should not furnish security for such amount as specified. It is only upon such

satisfaction and on issuing such show cause notice directing to furnish security, that the court can pass any order of conditional attachment as contemplated under Sub-rule (3) of Rule 5.

9. In the case on hand, specific findings rendered by the court below in the order dated 24.1.2015 conditionally attaching the property are that the petitioner had failed to satisfy the court that the defendant is making any attempt to dispose of his property with intention to obstruct or delay the execution of a decree which may be passed against him. More over, the affidavit filed in support of IA No.19/2015 does not indicate anything about the value of the property sought to be attached. Therefore, it is to be presumed that, while passing the order of ad-interim conditional attachment on 24-01-2015 the court below has not properly applied its mind and has not arrived at any satisfaction as required and contemplated under Sub-rule (1). In this regard, it is pertinent to note that, under Sub-rule (4) of Rule 5 of Order XXXVIII it is provided that, an order of attachment if made without complying with the provisions

of Sub-rule (1), such attachment shall be void.

10. A learned Judge of this court had occasion to consider the scope of Sub-rule (4) of Rule 5, in **Retnamma v. Govinda Pillai (1995 (1) KLJ 270)**. It is held therein that:-

“Sub-rule (4) of Rule 5 proclaims that if an order of attachment is made without complying with the provisions of sub-rule(1), such attachment shall be void. That would mean the observance of the provisions contained in sub-rule(1) is imperative and the court has no power to dispense with the compliance of those provisions. “

If the allegations are vague and evasive in nature, and it is difficult for the court to hold on its basis that the defendant had an intention to obstruct or delay the execution of the decree, there is clear failure to comply with the provisions of Sub-rule (1) of Rule 5, which forbids the remedy of attachment before judgment. In **Rai Premchand and others V. P.K. Ahamed and Co. (1982 KLT 294)**, it is held that

“Vague and general allegations that the defendant is about to dispose of the property or

remove it beyond the jurisdiction of the court, unsupported by particulars would not be sufficient compliance with the Rule. It is incumbent upon the plaintiff to state the grounds on which he entertains the belief or apprehension that the defendant would dispose of or remove the property, or, to give the source of his information and belief in the matter..... The court must insist upon strict proof of the said allegations."

A Division Bench of this Court in **Pareed Master v. Antony (1987 (2) KLT 649)** held that:-

"..... The court while construing these provisions should keep in mind the pragmatic difficulties of a plaintiff. The defendant if he had intention to defeat or delay the execution of the decree that may be passed against him would be disposing of the property in a clandestine manner. The plaintiff would not be in a position to know all the details of that transaction. It is true that mere allegation of the plaintiff is not sufficient to order an attachment before judgment."

Therefore, it is followed from the aforesaid decisions that requirements provided under sub-rule (1) of Rule 5 cannot

be dispensed with by the courts.

11. Sub-rule (4) of Rule 5 was inserted by the Code of Civil Procedure (Amendment) Act, 1976 [Act 104 of 1976], when divergent opinions were prevalent among various High Courts as to whether an attachment made before judgment without complying with the procedure specified in Rule 5 is a nullity or is only voidable. It is in resolution of that conflict that Sub-rule (4) was incorporated under Rule 5 by way of amendment to make it clear that an order of attachment made without complying with the provisions of Sub-rule (1), shall be void. Therefore, provisions contained in Sub-rule (1) of Rule 5 shall be complied with *stricto sensu*, before effecting attachment of any property of the defendant.

12. The Hon'ble Apex Court in **Raman Tech & Process Engg. Co. and another V. Solanki Traders ((2008) 2 SCC 302)** held that:-

“..... The scheme of Order 38 and use of the words “to obstruct or delay the execution of any decree that may be passed against him” in rule 5 make it clear that

before exercising the power under the said Rule, the court should be satisfied that there is a reasonable chance of a decree being passed in the suit against the defendant. “

Therefore, the plaintiff needs to establish that the defendant is attempting to remove or dispose of his assets with intention to defeat the decree that may be passed. The power under Rule 5 is a drastic and extraordinary power. Such power should not be exercised mechanically or on mere asking. It should be used sparingly and strictly in accordance with Rule 5. The purpose of Order XXXVIII Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order XXXVIII Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realized by unscrupulous plaintiff by obtaining orders of attachment before judgment and forcing the defendants for out of court settlements under threat of attachment.

13. When the facts of the case are analysed based on

the dictum laid down by the Hon'ble Apex Court, there was a clear failure on the part of the court below in arriving at a satisfaction as to the prima facie sustainability of the plaint claim. This is especially because, the court below had arrived at a conclusion in the impugned order, that the suit is filed only by way of collusion and that the claim is not bonafide. In the case on hand, as already observed, there was total lack of compliance of the requirements by the plaintiff to convince the court below about the necessity for passing an order of attachment. Moreover, the failure to furnish materials to substantiate the estimated value of the property to be attached is also vital. Therefore, the ad-interim order of attachment passed by the court on 24-01-2015 itself is a nullity, considering the provisions contained in Sub-rule (4) of Rule 5 of Order XXXVIII. But, it is to be noted that the court below had passed the ad-interim order of conditional attachment as Ext.P3 as early as on 24-01-2015 with specific direction to the plaintiff to take steps to issue notice to the defendants to show cause on 24-02-2015. The order of conditional attachment was

served through Amin deputed from the court on 29-01-2015. But the 1st respondent had never cared to furnish security or show cause against furnishing of security in IA No.19/2015, till 15-05-2015. He never challenged the order of attachment as unsustainable. On the other hand, he had filed IA No.183/2015 under Order XXXVIII Rule 9 seeking removal of the attachment, on proposal to furnish security. No specific challenge was raised by the first respondent against the conditional order of attachment issued by the court below in I.A.No.19/2015, based on any of the legal infirmities as mentioned hereinabove and the 1st respondent had already offered to furnish security for the plaint claim, by conceding the continuance of the attachment with respect to the remaining extent of 1.29 Acres of property.

14. It is pertinent to note here that despite the service of show cause notice upon him, the first respondent kept silent till 3.6.2015 on which date, he moved I.A.No.183/2015 under Order XXXVIII Rule 9 of the Code. The relief sought for in the said I.A., copy of which is produced as Ext.P5 was withdrawal of attachment with respect to 70 cents of

property from the total extent of 1.99 acres of property under order of attachment by accepting the required security. The 70 cents of property was sought to be let free from the order of attachment on the premise that it is proposed to be sold to a third party named Sri. V.M. Abbas for raising money for treatment of the first respondent who is age old and his wife, who is a cancer patient. It is also contended in I.A.No.183/2015 that 1.29 acres of property left apart under the order of attachment would be sufficient to satisfy the plaint claim of ₹32,72,000/-. If the first respondent had timely responded with the contentions as aforesaid in I.A.No.19/2015 to the show cause notice served upon him, definitely the court below would have applied its mind to those aspects and limited the operation of the order of attachment to that extent of property sufficient to answer the plaint claim. Therefore, while permitting lifting (withdrawal) of the attachment, either in full or in part, it was obligatory on the part of the court below to ensure that proper security is furnished with respect to the plaint claim. It is not

discernible from the impugned orders (Exts.P10 & P12) that the 1st respondent had discharged his burden of furnishing security for the claim in the original petition. In other words, there is nothing to indicate that the 1st respondent had established before the court below that the remaining extent of 1.29 Acres would be sufficient to meet ₹32,72,000/-, the claim in the original petition. The finding arrived at by the court below in the impugned orders that 1.29 acres proposed to be furnished by the petitioner as sufficient security to meet the plaint claim is not supported by any material. It is true that Ext.R1(a) Notification is produced before this court, and that displays the 'fair value' fixed by the Government in respect of the property in question. Undoubtedly, it is discernible on a look at the fair value fixed for the property in Ext.R1(a) that the property left under attachment after releasing the attachment in respect of 70 cents is sufficient security. But we are of the considered opinion that it is a matter which needs to be considered by the court below. Further, the findings

contained in Ext.P12 order regarding bonafides of the claim and also with respect to the suspected collusion between the petitioner and the 2nd respondent in filing the suit, are matters which need to be considered with respect to the sustainability of the relief of attachment before judgment. It may not be out of context to observe that the findings contained in Ext.P12 order are to a great extent unwarranted and it should not have been made by the court below in such a manner as those may tend to affect the right of the petitioner and the ultimate disposal of the suit.

15. The court below has observed in the impugned order produced along with this original petition as Ext.P12 that “.....the security offered i.e., 1.29 acres of land is sufficient enough for the claim if any, raised by the first respondent in O.P.No.22/2015 and there is no harm in withdrawing the attachment effected for 70 cents of land on the northern side of the property unaffected to the enjoyment of the property of the

respondents”. The court below found on its basis that the petitioner therein is at liberty to contract the sale of 70 cents of property and to alienate the same in order to meet his dire need of the treatment of himself as well as his wife. Accordingly, the court below allowed I.A.No.183/2015 and by the impugned order, lifted the attachment of the property effected in I.A.No.19/2015 to the extent of 70 cents on the northern side of the total extent of 1.99 acres. Petitioner in O.P.No.22/2015, who had obtained the order of attachment before judgment in respect of 1.99 cents of property was thrown into utter grievance by the passing of the impugned order and therefore, has come up with this original petition seeking to quash Exts.P10 and P12 orders alleging that the orders are passed without assigning any valid reasons and therefore, vitiated by material irregularity, illegality and impropriety especially, for want of any reason for lifting the attachment.

16. I.A.No.183/2015 being filed under Order XXXVIII Rule 9 of the Code, the provision needs to be imported here. It reads:-

“9. Removal of attachment when security furnished or suit dismissed.--Where an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the cost of the attachment, or when the suit is dismissed.”

Under Rule 9 of Order XXXVIII, a court is empowered to withdraw the attachment when the required security is furnished by the defendant together with security for the cost of the attachment or when the suit is dismissed.

17. Necessarily on furnishing the required security, an order of attachment is possibly be lifted. Under the said provision, the court is not empowered to determine the extent of the property required to be kept under attachment or the security required to be furnished in lieu thereof. The provision only says that the court has the power to lift the attachment when the required security is furnished. It is in respect of the property conditionally attached that the security is required to be furnished. The security can either be the property under attachment or anything having equivalent

value thereof. Therefore, the extent of the property required to meet the plaint claim is something to be decided by the court prior to the passing of the conditional attachment of the property and it is in respect of that extent that the court is empowered to pass an order under Rule 5 of Order XXXVIII of the Code.

18. In the case on hand, the conditional order of attachment passed in I.A.No.19/2015 is not made available to us. But, the court below made observations in Ext.P12 about the order in I.A.No.19/2015 to the effect:-

“.....The first respondent filed O.P.22/2015 and attachment obtained as per order in I.A.19/2015 not satisfied the court that the petitioner is expecting to dispose of the portion of his property with the intention of obstructing or delay the execution of the decree that may be passed against him. Moreover the claim of the petitioner is not bonafide and valid for which also no satisfactory evidence produced in the attendant circumstance.”

19. Therefore, it appears to us that the court below was not satisfied as to the bona fides of the claim of the petitioner in O.P No.22/2015 and with respect to the bona fides in the apprehension

of the petitioner that the defendant was about to dispose of his property with a view to defeat the decree being passed in respect of the plaint claim while passing the order conditionally attaching the property.

20. If that be the situation, the court below ought not to have passed a conditional order of attachment. Moreover, there is nothing on record to convince us that the petitioner has furnished any material before the court below as mandated by sub-rule (2) of Rule 5 Order XXXVIII to assist the court to arrive at the estimated value in respect of the property sought to be attached. The court below has made an observation in Ext.P12 that

“.....Upon hearing both sides and on perusing the documents produced, it is revealing that the security offered i.e., 1.29 acres of land is sufficient enough for the claim if any, raised by the first respondent O.P.No.22/2015 and there is no harm in withdrawing the attachment effected for 70 cents of land on the northern side of the property uneffected to the enjoyment of the property of the respondents.....”

21. Therefore, it appears to us that the court below was not

satisfied as to the extent of the property required to be attached on the basis of its valuation prior to the passing of the order in I.A.No.19/2015. Despite the aforesaid references, the full text of the order in I.A.No.19/2015 is not produced before us. The respondent had failed to furnish any cause when he was called upon to do so as per sub-rule(1) of Rule 5 of Order XXXVIII of the Code. He remained silent without apprising the court below of any of the infirmities, as referred to in the impugned order, if those were actually existing in the order of conditional attachment passed in I.A.No.19/2015. Nevertheless, the respondent has now expressed his intention to furnish the required security for the plaint claim. According to him, 1.29 acres of property remaining after releasing attachment of 70 cents of property would meet the plaint claim satisfactorily. Without any materials being available indicating the valuation of the property that the court below arrived at the finding that 1.29 acres of property would be sufficient to meet the claim of the petitioner in O.P.No.22 of 2015.

How the court below has arrived at such a satisfaction as to the sufficiency of the extent of property to be accepted as security is unknown.

22. The challenge of the petitioner in the O.P. before us was that the court below went wrong by releasing attachment in respect of 70 cents of property. According to her, retention of attachment in respect of 1.99 acres of property is absolutely necessary for meeting the decree that may be passed in O.P.No.22/2015 and the court below is highly unjustified in ordering withdrawal of attachment in respect of 70 cents of property. Despite raising such a claim in challenge, she failed to produce any material to support her contention that the entire property i.e. 1.99 acres itself is sufficient to meet her claim. It is pertinent to note here that the respondent has produced Ext.R1(a), copy of the Notification showing the fair value fixed by the Government of Kerala along with the counter affidavit. If Ext.R1(a) or any other authentic document evidencing valuation of the property in question had been

produced before the court below by the petitioner, as mandated by sub-rule(2) of rule 5 or by the respondent as is done before this Court, the order of the court below would not have been the one as passed in I.A.No.19/2015.

23. Therefore, we are of the considered opinion that Exts.P10 and P12, the impugned orders would not sustain in the eye of law. Those were passed in a circumstance when materials, sufficient to arrive at the estimated value of the property scheduled for attachment were not available before the court below. Court below has also conceded that it has not looked into those aspects while ordering conditional attachment of the property scheduled in I.A.No.19/2015. Nevertheless, the respondent has produced Ext.R1(a) which indicates that the property has valuation to the tune of Rs.75,000/- per Are. The learned counsel has also handed over across the bar an extract of GO(P) No.188/2014/TD dated/Trivandrum 14.11.2014, a Notification, which has been published by the Govt. of Kerala, Taxes(E) Department in exercise

of the powers conferred under sub-section (1B) of Section 28A of the Kerala Stamp Act, 1959 (Act 17 of 1959), in the official Gazette as SRO No.698/2014. It is revealed therefrom that the fair value of land in Kerala fixed as per sub-section(1) of Section 28A of the Kerala Stamp Act has been increased by 50% of its existing value as on date. It is also stated therein that the said Notification came into force on 17.11.2014 and that separate Notifications for the purpose by the Revenue Divisional Officers concerned are not necessary. The said Notification took notice of the fact that the market value of the land has been increased considerably but, fair value has not been revised correspondingly in tune therewith. The attention of the Government was drawn in the matter and therefore, the Government was pleased to increase the fair value by 50% of the existing value. The extract of GO(P) Notification indicates that the property would fetch higher value than that was notified as per Ext.R1(a). When viewed in the light of the aforesaid notification, the value of the scheduled property per Are would come to

Rs.1,12,500/- per Are. These documents if had been made available by any of the parties before the court below at the relevant time, Ext.P10 and P12 ought not to have been passed by the court below. More over, despite all the infirmities referred supra, the respondent has offered to furnish the required security which could only be ascertained on the basis of materials as those produced before us and of which reference made hereinabove. Therefore, we feel it appropriate to provide an opportunity to the court below to pass appropriate orders in I.A.No.183/2015 after duly applying its mind to the facts involved in the case on the basis of materials that would be produced from either side. Order in I.A.No.183/2015 suffers as it is not a speaking order as the conclusion regarding sufficiency of security was arrived at without any basis.

In the result, the Original Petition is allowed and Ext.P10 and P12 orders, which are under challenge are set aside. The court below is directed to reconsider I.A.No.183/2015 relying

on materials indicative of fair value and to pass appropriate orders. Parties to this original petition are directed to appear before the court below on 7th April, 2016. The parties are at liberty to produce relevant materials indicating fair value in respect of the property under orders of attachment and thereby, to assist the court in arriving at satisfaction as to the security required to satisfy the claim of the petitioner. At any rate, I.A.No.183/2015 shall be considered and disposed of by the court below within one month from the date of receipt of a copy of this judgment.

C.K. ABDUL REHIM, JUDGE.

MARY JOSEPH, JUDGE.

