

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

MONDAY, THE 9TH DAY OF NOVEMBER 2015/18TH KARTHIKA, 1937

OP (FC).No. 516 of 2015 (R)

**(AGAINST THE ORDER DATED 24-08-2015 IN IA No.1567/2014 IN
OP No.704/2014 OF FAMILY COURT, CHAVARA)**

PETITIONER/RESPONDENT IN OP:

**SASI,
S/O.KUMARAN, AGED 52 YEARS
MANKOOTTATHIL VEEDU, PEROORKARAZMA, CHARUMMOOD P.O
THAMARAKULAM, ALAPPUZHA DISTRICT.**

**BY ADVS.SRI.SAJITH KUMAR V.
SRI.M.JAYAKRISHNAN**

RESPONDENT/PETITIONER IN OP:

**SANTHAKUMARI,
D/O.SULOCHANA, AGED 47,
SANTHA BHAVANAM, MEMANA MURI, OACHIRA P.O
KARUNAGAPPALLY TALUK, KOLLAM DISTRICT.**

**THIS OP (FAMILY COURT) HAVING COME UP FOR ADMISSION ON 09-11-
2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

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APPENDIX

PETITIONER'S EXHIBITS

- EXHIBIT P1. COPY OF THE ORDER DATED 24.8.15 IN IA 1567/14 IN OP 704/14 OF CHAVARA FAMILY COURT.
- EXHIBIT P2. COPY OF THE ORIGINAL PETITION FOR RETURN OF MONEY FILED BY THE RESPONDENT.
- EXHIBIT P3. COPY OF THE PLEADING IN IA 1567/14 IN OP 704/2014.
- EXHIBIT P4. COPY OF THE 1ST OBJECTION FILED BY THE PETITIONER IN REPLY TO THE IA.
- EXHIBIT P5. COPY OF THE 2ND OBJECTION FILED BY THE PETITIONER IN REPLY TO IA.
- EXHIBIT P6. COPY OF THE SCHEDULE OF PROPERTY FURNISHED BY THE RESPONDENT.
- EXHIBIT P7. COPY OF THE FIAR VALUE CALCULATION FURNISHED BY THE RESPONDENT.
- EXHIBIT P8. COPY OF THE GAZETTE NOTIFICATIONS DATED 14.12.2009.
- EXHIBIT P9. COPY OF THE NOTICE UNDER ORDER 38, RULE 5 ALONG WITH THE SCHEDULE OF PROPERTIES ATTACHED.
- EXHIBIT P10. COPY OF THE NON-LIABILITY CERTIFICATES OF THE PROPERTIES OWNED BY THE PETITIONER IN THAMARAKULAM.

RESPONDENTS' EXHIBITS

NIL

True copy

P.A. To Judge

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

O.P (FC) No. 516 OF 2015

DATED THIS THE 9th DAY OF NOVEMBER, 2015

J U D G M E N T

C.K. Abdul Rehim, J:

An order of conditional attachment issued under Order XXXVIII Rule 5 of Code of Civil Procedure, in IA No.1567/2014 in OP No.704/2014 by the Family Court, Chavara, is under challenge in this original petition instituted under Article 227 of the Constitution of India by invoking the supervisory jurisdiction vested on this court.

2. OP No.704/2014 was instituted before the court below by the respondent herein against the petitioner, seeking for realization of gold ornaments to the extent of 25 sovereigns or its market value to the tune of Rs.49,97,000/-, along with interest and a sum of Rs.45,00,000/- along with interest charged on the movable and immovable properties of the petitioner herein. The respondent herein is the wife of the petitioner, their marriage being solemnized on 18-02-1992. Allegation was that, at the time of marriage, 25

sovereigns of gold ornaments was given to the respondent and 30 cents of immovable property was assigned into the joint name of the respondent and the petitioner considering the future welfare of the respondent. Two children were born out of the wedlock. Allegation of the respondent is that, she is treated with cruelty by the petitioner, both physical and mental and due to the severe torture experienced, she met with a nervous stroke on 23-03-2002 which had resulted in complete paralysis of her right side and she continuing under treatment. It is alleged that the petitioner had neglected the respondent and sent back her from Gulf countries on 10-07-2006. It is further alleged that, under compulsion of the petitioner the immovable property assigned in the name of the respondent was purchased by her Brother by paying a sum of Rs.15 lakhs to the petitioner. Subsequently when the business of the petitioner which was conducted in the Gulf countries, failed due to various reasons, he had demanded more money from the family members of the respondent and her brother was compelled to make payment of another sum of

Rs.30,00,000/- during the year 2008. Eventhough the Brother of the respondent demanded to pay back the said money for the purpose of meeting the treatment expenses of the respondent, the same was not returned. It is also alleged that the petitioner along with her sister had inflicted physical torture on the respondent on 28-06-2014. It is specifically alleged all the gold ornaments of the respondent was taken by the petitioner and is kept in his custody and despite repeated requests made, the petitioner had not returned the same. It is on the basis of the above said allegations that the claim in the suit is made.

3. Along with OP No.704/2014, the petitioner had filed IA No.1567/2014 under Order XXXVIII Rule 5 seeking attachment of certain immovable property belonging to the petitioner, described in the schedule attached along with the petition inorder to secure the plaint claim of Rs.49,97,000/-. The court below, after considering the interim application and after hearing both sides, had passed Ext.P1 order directing the petitioner herein to furnish security for an amount of Rs.49,97,000/- on or before 09-09-

2015 and ordered a conditional attachment of the petition schedule properties, till then. It is aggrieved by Ext.P1 that the above original petition is filed.

4. Contentions of the petitioner is that the impugned order is passed on an erroneous exercise of the jurisdiction vested on the Family Court. It is argued that the attachment was ordered without arriving at any satisfaction with respect to existence of the necessary ingredients under Order XXXVIII Rule 5. It is contended that the court has not arrived at any prima facie satisfaction regarding sustainability of the claim made in the suit. There was no materials available before the court below to arrive at any such satisfaction, because the averments in the plaint are totally vague with respect to details of the alleged entrustment of gold ornaments and with respect to payment of money. It is further contended that the respondent had failed to establish before the court below about any reasonable apprehension with respect to any attempt for alienation of the immovable property by the petitioner, in order to defeat any decree which may be passed against

him. The court below had failed in appreciating the averments contained in the affidavit filed in support of the application, which does not disclose any source of the information regarding such apprehension about alienation of the immovable property. Further it is argued that when the petitioner had expressed his non-intention with respect to alienation of the property, the court below ought not have issued any order of attachment.

5. The petitioner had relied on a decision of the hon'ble Supreme Court in **Raman Tech & Process Engg. Co. and another V. Solanki Traders (2008) 2 SCC 302** in order to content that an interim order of attachment need to be issued only if the court is satisfied that the plaintiff had established a prima facie case and that his claim is a bonafide and valid. It should be satisfied to the court that the defendant is about to remove or dispose of the whole or part of his property with the intention of obstructing or delaying execution of any decree which may be passed against him, before the power is exercised under Order XXXVIII Rule 5 of CPC. When there is absence of a

prima facie case, the grant of an order under Order XXXVIII Rule 5 would become illegal. Learned counsel had also placed reliance on the judgment of a learned Judge of this court in CRP No.1029/1993 in **Ratnamma V. Govinda Pillai** (not seen reported). It is contended that there must be circumstances established to the effect that the defendant is attempting to transfer or alienate the property with an intention to defeat the plaintiff's claim, for which the court has to look into the conduct of the parties immediately before the suit and to examine the surrounding circumstances and to draw an inference as to whether the defendant is about to dispose of the property and if so with what intention. The circumstances constituting an intention to obstruct or delay the execution of decree, is indispensable for ordering an attachment. Otherwise, in every suit brought against a person, that person has not been debarred from dealing with his property, simply because the suit has been filed against him. In the said decision it is further observed that, it may even be necessary in some cases to give some information and

belief. A mere mechanical repetition of the provisions in the Code or the language therein, without any basic strata of truth underlying the allegation or a vague and general allegations that the defendant is about to dispose of the property or to remove it beyond the jurisdiction of the court, which is totally unsupported by particulars, would not be sufficient compliance of the requirement under Order XXXVIII Rule 5.

6. In the case at hand, the impugned order would indicate that the petitioner had filed objections and contested the interim application. The court below had recorded satisfaction, after perusal of the original petition, affidavit filed in support of the application for attachment, and the documents produced like, Marriage Certificate, non-Encumbrance Certificate, Fair Value Certificate etc. It is specifically mentioned in the order that respondent had shown the estimated value of the property sought for attachment and satisfied by the affidavit that the counter petitioner, with a view to obstruct execution of a decree that may be passed against him has made preparations to

alienate the petition schedule properties. It is specifically found that, despite the fact that the petitioner had stated that the properties were assigned to his children, he has not specified about the type of document executed, nor had he produced any such documents alleged to have been executed. From the affidavit filed and the documents produced, the court expressed its satisfaction that the petitioner may with the object of delaying the execution of a decree which may be passed against him, has made preparations to alienate the petition schedule properties. Therefore the counter petitioner is directed to furnish security and a conditional order of attachment is passed.

7. It is to be borne in mind that this court is not sitting in appeal over the decision of the Family Court, nor it dealing with any revision against the said order. The jurisdiction vested under Article 227 is supervisory in nature and it is only a visitorial jurisdiction. Unless any grave error in the exercise of jurisdiction on the court below is committed, interference on the judicial orders passed, is not warranted. A grave error in exercise of the jurisdiction,

can be an exercise made without jurisdiction vested on the court or it can be an exercise of jurisdiction totally against provisions of law. There can also be lack of jurisdiction. But when the court below had passed an order after being arrived on its own satisfaction regarding the elementary ingredients, we do not think that exercise of the supervisory jurisdiction for interference regarding reasonableness of such an order is warranted. In the case at hand, as narrated in the foregoing paragraphs, the respondent has illustrated the nature of her claim, clear and evident in the original petition. According to her the ornaments entrusted at the time of her marriage was taken and utilized by the petitioner. It is mentioned that the property assigned in her favour was purchased by her Brother on the specific demand made by the petitioner and based on a threat that otherwise he will neglect and desert the respondent. It is also alleged that the Brother of the respondent had paid a further sum of Rs.30,00,000/- as demanded by the petitioner. It is true that the exact date of payment of the amount is not mentioned in the original petition. But it is

specifically mentioned that an amount of Rs.15,00,000/- was given to the petitioner when the immovable property was purchased. So also it is mentioned that the gold ornaments were taken by petitioner after 28-06-2014, the date on which the petitioner and his sister had allegedly caused physical assault on the petitioner. In the affidavit filed in support of interim application seeking attachment before judgment, the respondent had specifically mentioned that on coming to know about filing of the original petition, the petitioner is making attempts to sell his properties. She had specifically mentioned that she got information about such attempts from a person named, Sri. Viswanatha Pilla, Manjipuzha House, Oachira village in Kollam district. It is specifically stated that if the petitioner alienates the immovable property described in the schedule the respondent will be defeated in a decree which may be passed in favour of her. The specific allegation is that, in order to defeat or delay the decree which may be passed in the suit in favour of the respondent, the petitioner is making attempts to alienate the properties. Hence the

interim order of attachment before judgment was sought for.

8. It is evident that the petitioner had resisted Ext.P2 interim application by filing objection, as per Ext.P4. In paragraph 11 of the said objections it is specifically mentioned that, the petitioner had no intention to alienate any of his properties and that the properties mentioned in the petition schedule has been assigned in favour of the children. The court below categorically found that, despite such an objection raised, the petitioner had failed in adducing any proof before the court regarding such assignment in favour of the children. Therefore this court is of the considered opinion that there were materials available before the Family Court to arrive at a prima facie satisfaction regarding the claim made by the respondent. It is evident that the Family Court had passed the impugned order after being satisfied that the ingredients required with respect to the apprehended alienation to defeat or to delay a decree which may be passed in favour of the respondent is established. Further, despite the specific

averment made by the petitioner that he had no intention to transfer any of the properties and that the petition schedule properties stands already assigned in favour of the children, no proof regarding such transaction is produced. Hence it is evident that the court below had exercised jurisdiction vested under Order XXXVIII Rule 5 in a legal and proper manner. Moreover, going by the contentions raised by the petitioner to the effect that he has no intention to alienate his property, no prejudice will be caused to him because of the interim order of attachment, pending disposal of the suit. Further, it will be left open to the petitioner to seek for lifting the attachment in case he is intending to transfer any of the properties under attachment on furnishing adequate security as contemplated under Order XXXVIII Rule 9 CPC.

In the result, the above original petition deserves no merit, and the same is accordingly dismissed.

Sd/-

C.K. ABDUL REHIM, JUDGE.

Sd/-

MARY JOSEPH, JUDGE.

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P.A. to Judge