

**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT:**

**THE HONOURABLE MR.JUSTICE P.N.RAVINDRAN  
&  
THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN**

**FRIDAY, THE 9TH DAY OF JANUARY 2015/19TH POUSHA, 1936**

**UNNUMB.FAO.No. 367 of 2015 ()**  
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**(AGAINST THE ORDER PASSED IN I.A.NO.367 OF 2014 IN O.S.NO.18 OF 2014 DATED  
25.08.2014 ON THE FILE OF THE SUB COURT, KATTAPPANA)**

**APPELLANT/PETITIONER/PLAINTIFF:**  
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**MATHUKUTTY MATHEW,  
AGED 40, S/O. MATHEW,  
KADUPIL HOUSE, KATTAPPANA P.O.,  
KATTAPPANA VILLAGE,  
UDUMBANCHOLA TALUK,  
IDUKKI DISTRICT.**

**BY ADV. SRI.G.SREEKUMAR (CHELUR)**

**RESPONDENTS/DEFENDANTS:**  
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- 1. SUNNY, S/O. VARKEY, KALAYATHINAL HOUSE,  
KATTAPPANA P.O., KATTAPPANA VILLAGE,  
UDUMBANCHOLA TALUK, IDUKKI DISTRICT.**
- 2. SEBASTIANE, S/O. VARKEY, KALAYATHINAL HOUSE,  
KATTAPPANA P.O., KATTAPPANA VILLAGE,  
UDUMBANCHOLA TALUK, IDUKKI DISTRICT.**
- 3. FR. ALEX, KALAYATHINAL HOUSE,  
KATTAPPANA P.O., KATTAPPANA VILLAGE,  
UDUMBANCHOLA TALUK, IDUKKI DISTRICT.**
- 4. THOMAS, S/O. VARKEY, KALAYATHINAL HOUSE,  
KATTAPPANA P.O., KATTAPPANA VILLAGE,  
UDUMBANCHOLA TALUK, IDUKKI DISTRICT.**
- 5. SAJI JOSEPH, S/O. JOSEPH, MALIKAPURATHU HOUSE,  
ERATTAYAR P.O., KALKOONTHAL VILLAGE,  
UDUMBANCHOLA TALUK, IDUKKI DISTRICT.**

**THIS UNNMNERED F.A.O HAVING COME UP FOR ADMISSION ON  
09-01-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

**St/-**

**P.T.O.**

**C.R.**

**P.N. RAVINDRAN  
&  
ANIL K. NARENDRA, JJ.**

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Unnumb. F.A.O. No..... of 2015  
(Z.F.A.O No.367 of 2015)  
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Dated this the 9<sup>th</sup> day of January, 2015

**ORDER**

**P.N. Ravindran, J.**

The Registry has declined to number the appeal on the ground that the impugned order is not an appealable order.

2. The appellant is the plaintiff in O.S.No.18 of 2014 on the file of the Court of the Subordinate Judge of Kattappana. The respondents are the defendants therein. The suit instituted by the appellant is for return of the advance paid by him to defendants 1 to 4 pursuant to an agreement entered into by them to sell the plaint schedule property. Along with the plaint, the appellant filed I.A.No.367 of 2014 under Order XXXVIII rule 5 of the Code of Civil Procedure, for attachment before judgment of the plaint schedule property. Defendants 1 to 4 entered appearance and filed a counter statement resisting the application. They also contended that they have sold the property to fifth defendant. The trial court after considering the rival contentions, dismissed the application by

order passed on 25.08.2014, holding that the appellant has failed to establish his case under Order XXXVIII rule 5. The said order is under challenge in this appeal. The Registry has, as stated earlier, declined to number the appeal on the ground that the impugned order is not an order under rules 2, 3 or 6 of Order XXXVIII which alone are made appealable by virtue of the provisions contained in Order XLIII rule 1(q) of the Code of Civil Procedure.

3. Learned counsel appearing for the appellant submitted that notwithstanding the fact that a conditional order of attachment is not passed under rule 5, if ultimately an application for attachment before judgment is dismissed after hearing both sides, it should be deemed to be under Order XXXVIII rule 6 of the Code of Civil Procedure and therefore, an appeal would lie from the said order. Learned counsel also submitted that the mere fact that in the instant case, a conditional order of attachment was not passed and an order directing the defendants to furnish security or show cause why security shall not be furnished was also not passed, is not a reason to hold that the impugned order is not an order under rule 6 of Order XXXVIII of the Code of Civil Procedure.

4. The issue raised is, in our opinion, covered by the decision of a Division Bench of this Court in '**Pareed Master v. Antony**' [1987 (2) KLT 649]. In that case also, on the application for attachment before judgment, a conditional order of attachment or an order directing the defendant to furnish security or to show cause why security shall not be furnished was not passed. The application was dismissed after hearing both sides. The plaintiff challenged the order in appeal in this Court. The maintainability of the appeal was challenged by the respondent. Upholding the contention of the respondent, the Division Bench of this Court held in ***Pareed Master's case (supra)*** that Order XXXVIII rule 6 will apply only in cases where the court passes a conditional or interim order of attachment and issues notice to the defendant to show cause why he should not furnish security. The Division Bench held that from a reading of sub-rule (2) of Order XXXVIII rule 6 of the Code of Civil Procedure, it is clear that it is not applicable in a case where there was no conditional attachment of the whole or portion of the property and that sub-rule (2) of rule 6 of Order XXXVIII is not intended to cover cases in which the defendant successfully shows cause against

attachment before judgment, in which no conditional attachment under rule 5(3) had been made. In other words, the Division Bench held that Order XXXVIII rule 6 of the Code of Civil Procedure contemplates cases where conditional attachment before judgment was ordered and was later withdrawn on the defendant showing the cause. The relevant portion of the judgment of the Division Bench of this Court in '**Pareed Master v. Antony**' [1987 (2) KLT 649] is extracted below:

*"2A. The plaintiff filed an application under Order 38 Rule 5 C.P.C for interim attachment before judgment of the petition schedule immoveable properties belonging to the 1<sup>st</sup> defendant. The first defendant resisted this application for the reason that the averments in the accompanying affidavit were vague and inaccurate. The court below dismissed the application. The reasons for the dismissal of the application are given in the last paragraph of the order which is to the following effect:*

*"On this aspect I find that the pleadings contained in the affidavit filed in support of this petition is vague one and the plaintiff has made a general pleading that respondent-first defendant is attempting to transfer or assign his properties. There is no specific pleadings as to whom he is going to sell or an agreement made etc."*

3. *The learned counsel for the first defendant as a preliminary objection questioned the maintainability of this appeal. It was contended that the impugned order was passed under Order 38 Rule 5 of C.P.C and therefore the same is not appealable under Order 45 Rule 1(q). The orders made under Order XXXVIII Rule 2, 3 and 6 alone are made appealable. In the instant case the plaintiff filed the application for interim attachment and the notice was ordered, and in pursuance of the notice advocate appeared and filed objection. No interim or conditional attachment was granted on presentation of the petition. After hearing both sides the court below passed the impugned order disallowing the prayer for attachment. (emphasis supplied).*

3A. *The question that arises for consideration is whether the impugned order can be construed as one passed under Order 38 Rule 6 C.P.C. The relevant provisions, Order 38 Rules 5 and 6, read as follows:*

*"5. Where defendant may be called upon to furnish security for production of property--*

*(1) Where, at any stage of a suit, the Court if 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.*

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

*(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.*

*(4) If an order of attachment is made without complying with the provision of sub rule (1) of this rule, such attachment shall be void.*

*(6) Attachment where cause not shown or security not furnished--(1) Where the defendant 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."*

*The impugned order shows that the learned Subordinate Judge has passed the order under Order 38 Rule 5 C.P.C. Order 38 Rule 6 would apply only in a case where the court passes a conditional or interim attachment and issues notice to the defendant to show cause why he should not furnish security. If an order is passed under clause (1)(b) of Order 38 Rule 5, directing the defendant to furnish security within a time fixed by the court, or to appear and show cause why he should not furnish security and thereafter an order was passed by the Court, then only the same could be said to be an order passed under Order 38 Rule 6. From a reading of sub-rule (2) of Order 38 Rule 6 it is clear that it is not applicable in a case where there was no conditional attachment of the whole or portion of the property, or in other words, sub-rule (2) of Order 38 Rule 6 is not intended to cover cases in which the defendant successfully shows cause against attachment before judgment in which no conditional attachment under Rule 5(3) had been made. Order 38 Rule 6 contemplates cases where conditional attachment before judgment was ordered and later withdrawn when the defendant showed cause. Therefore, the impugned order squarely comes within the order passed under Order 38 Rule 5, which is not made appealable under Order 43 Rule 1(q)" (emphasis supplied).*

5. The case on hand is identical. In view of the binding decision of this Court, the objection raised by the Registry has necessarily to be upheld. We accordingly uphold the objection raised by the Registry. Registry is directed to return to the

learned counsel for the appellant, the certified copy of the impugned order, after retaining a photostat copy in the files.

Sd/-  
**P.N. RAVINDRAN**  
**JUDGE**

Sd/-  
**ANIL K. NARENDRA**  
**JUDGE**

//true copy//

P.S. To Judge

St/-