

**HONOURABLE SRI JUSTICE P.NAVEEN RAO**

**CIVIL REVISION PETITION NO.3539 OF 2017**

**Date: 14.12.2017**

Between:

Dubbaka Padma w/o. Balaiah, Aged 45 years,  
Occu: Housewife, r/o. H.no.4-2-78/C, Gundlagadda,  
Jangaon Town and Mandal, Warangal District.

.....Petitioner/  
Defendant no.2

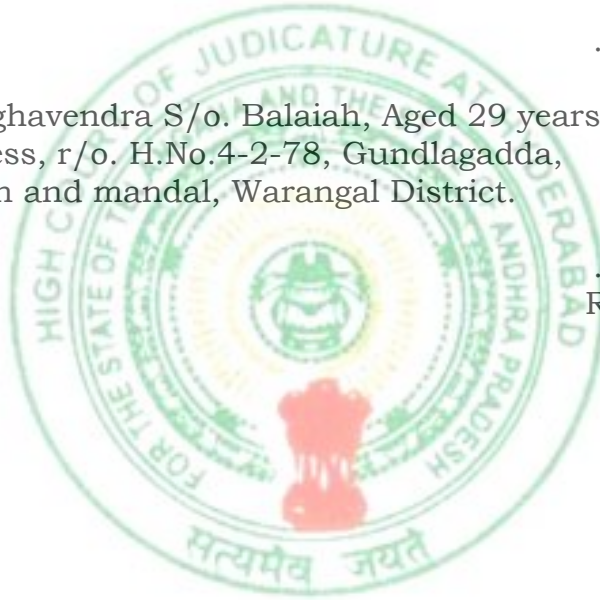
And

Bollam Narayana s/o Rasaiah, Aged 60 years,  
Occu: Business, r/o. H.no.4-3-81, Gundlagadda,  
Jangaon Town and Mandal, Warangal district.

.... Respondent/  
Plaintiff

Dubbaka Raghavendra S/o. Balaiah, Aged 29 years,  
Occu; Business, r/o. H.No.4-2-78, Gundlagadda,  
Jangaon town and mandal, Warangal District.

.... Respondent/  
Respondent no.1



The Court made the following:

**HONOURABLE SRI JUSTICE P.NAVEEN RAO**

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**ORDER:**

Heard Sri D.V.Chalapathi Rao, learned counsel for petitioner/defendant no.2 and Sri S.Chalapathi Rao, learned counsel for respondent/plaintiff. The parties are referred as arrayed in the suit.

2. Plaintiff filed O.S.No.63 of 2016 on the file of Court of Senior Civil Judge at Jangaon, Warangal district, for recovery of money of 6,17,335/-. In the said suit, plaintiff filed I.A.No.280 of 2016 under Order XXXVIII Rule 5 read with Section 151 of Code of Civil Procedure (CPC) praying to order attachment before judgment the suit schedule mentioned property. By order dated 05.06.2017, Court below held plaintiff has shown *prima facie* case in his favor, allowed the I.A. and directing to the Bailiff of the Court. This order of attachment is under challenge in this revision by the 2<sup>nd</sup> defendant.

3.1. Learned counsel for 2<sup>nd</sup> defendant contended that Order XXXVIII of CPC envisages detailed procedure to be followed to attach the property before judgment, whereas in the instant case, such procedure was not followed and straightaway the order was made and directions issued to the Bailiff under Order XXXVIII Rule 5 of CPC. No show-cause notice was issued and no opportunity was afforded before attaching the property. Thus, the order is vitiated on this ground alone. According to the learned counsel, as valuable right to enjoy the property is sought to be taken away,

procedure as envisaged in Rule 5 of Order XXXVIII of CPC has to be strictly complied with and any order made in violation of the said procedure, is void and unenforceable.

3.2. According to learned counsel, 2<sup>nd</sup> defendant is not a party to the alleged transaction between the plaintiff and the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant did not execute any pronote nor agreed to stand as surety to the alleged amount borrowed from the plaintiff and that she was not the signatory to any mortgage claimed to have executed by the 1<sup>st</sup> defendant, that without her knowledge, her son, who is living in the same house, took away the original documents concerning the property and seems to have pledged the said document to plaintiff. He would therefore submit that as 2<sup>nd</sup> defendant is no way concerned with the alleged transaction, her property cannot be attached.

4.1. Learned counsel for plaintiff raised preliminary objection that order now passed though mentioned as Order XXXVIII Rule 5 of CPC, but in fact, as it is final order, it is deemed to have been made under Order XXXVIII Rule 6 of CPC and against order under Order XXXVIII, Rule 6, appeal lies under Order 43, Rule (1)(q) of CPC to the appellate Court and, therefore, civil revision is not maintainable.

4.2. Learned counsel for plaintiff though fairly submitted that procedure as required by Rule 5 is not followed before ordering attachment, submitted that 2<sup>nd</sup> defendant is the mother of 1<sup>st</sup> defendant; as admitted by the 2<sup>nd</sup> defendant, both are living in the same house and with the knowledge of the 2<sup>nd</sup> defendant only, the amount was borrowed and with the knowledge of 2<sup>nd</sup> defendant

only, property was pledged. Therefore, 2<sup>nd</sup> defendant cannot be permitted to contend that she had no knowledge about the loan obtained by her son by pledging the said property. Plaintiff could not have advanced the huge amount without proper security and, therefore, security was furnished. Only to defeat the claim made in the suit, defendant hatched a plan to sell away the property and, therefore, I.A. was filed praying to attach the schedule property before the judgment. He, therefore, supported the view taken by the learned trial Court in passing the order of attachment.

5.1. In reply to the objection raised by the learned counsel for plaintiff on maintainability of CRP, learned counsel for 2<sup>nd</sup> defendant submitted that under Order XXXVIII Rule 5 of CPC, a detailed procedure is envisaged before attaching the property. According to Rule 5 (4), if an order of attachment is made without complying with the provision of sub-rule (1), such attachment shall be void. Counter-affidavit was filed denying the averments in the affidavit filed in support of I.A., and thereafter straightaway order, against which this revision is filed, was issued under Rule 5. He would therefore submit that attachment order being void, the 2<sup>nd</sup> defendant need not avail the remedy of appeal and this revision is maintainable.

5.2. According to the learned counsel, invoking Rule 6 would arise only in case the defendant failed to show cause to the satisfaction of the court. Thus, even according to the Rule 6, such an order can be passed only if the defendant has not responded or not satisfactorily explained to the Court and Court is satisfied that

defendants are attempting to dispose of properties to frustrate the decree that may be passed. He, therefore, submitted that since this procedure is not followed, there cannot be attachment and, therefore, the order being void in terms of sub-rule (4), the 2<sup>nd</sup> defendant need not be compelled to avail remedy of appeal.

5.3. In support of the contentions urged learned counsel for defendant no.2 placed reliance on the following decisions:

i) **Nidhi Clearing and Forwarding Company, per Managing Partner, K.Ravi Kumar and another v. Associated Cement Companies Ltd., per Manager (Marketing) R.Venkatramani**<sup>1</sup>;

ii) **Sripathi Panditarajula Venkanna Babu v/ Varalakshmi Finance Corporation, A.Registered Firm, rep.by its Managing Partner, Simhadri Suryarao**<sup>2</sup>;

iii) **Thomas vs. Thahira Beevi**<sup>3</sup>;

iv) **Saseendran vs. Sadanandan**<sup>4</sup>;

v) **Varghese v. Varghese**<sup>5</sup>;

vi) **Vasu v. Narayanan Nambooripad**<sup>6</sup>;

vii) **L.Narayana Reddy and another v. Canara Bank**<sup>7</sup>;

viii) **Premraj Mundra v. Md. Maneck Gazi and others**<sup>8</sup>; and

ix) **Raman Tech. and Process Engineering Company and another v. Solanki Traders**<sup>9</sup>.

6. Since the suit is pending consideration of the trial Court, this Court is not expressing any opinion on merits including submission of 2<sup>nd</sup> defendant that she had no knowledge about the

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<sup>1</sup> 1995 CJ (AP) 642

<sup>2</sup> 1996 CJ (AP) 1129

<sup>3</sup> 2009 CJ (Ker) 765

<sup>4</sup> 2003 CJ (Ker) 630

<sup>5</sup> 2001 CJ (Ker) 584

<sup>6</sup> 1961 CJ (Ker) 158

<sup>7</sup> 1991 CJ (AP) 494

<sup>8</sup> 1951 CJ (Cal) 210

<sup>9</sup> 2007 CJ (SC) 966

amount borrowed by the 1<sup>st</sup> defendant and that she did not pledge her property as security to the loan borrowed.

7. Thus, the only issue for consideration before this Court is whether the trial Court erred in attaching the property without following procedure envisaged in the Order XXXVIII Rule 5 of CPC?

8.1. Before appreciating the respective submissions, it is necessary to briefly note the averments in the plaint. According to the plaintiff, defendant no.1, defendant no.2 and father of defendant no.1 have approached him on 20.06.2014 and requested to provide financial assistance to defendant no.1 for his necessities. Accordingly, plaintiff advanced hand loan of 4,00,000/-. On receipt of said amount, defendant no.1 executed the demand promissory note, undertook to repay the said amount on demand along with interest @ 12% per annum and defendant no.1 also pledged original documents of the house property standing in the name of 2<sup>nd</sup> defendant as security for repayment of loan amount by creating simple mortgage. Alleging that in spite of several demands, defendants failed to repay the principal amount as well as interest and that both defendants are jointly and severally liable, suit is filed.

8.2. In the affidavit filed in support of I.A.No.280 of 2016, plaintiff alleged that respondents indebted to several persons; that he reliably came to know that in order to defraud the creditors, defendants are planning to dispose of all their properties and are hectically making negotiations to sell away the properties to third parties. It is, therefore, alleged that if they succeed in their attempt, obtaining of decree would be redundant.

9. In the counter-affidavit filed by the 2<sup>nd</sup> defendant it is asserted that 2<sup>nd</sup> defendant has not executed the pronote and that as 2<sup>nd</sup> defendant has not borrowed money from the plaintiff and thus question of attaching her property would not arise. It is further asserted that 2<sup>nd</sup> defendant is having permanent abode and she would not dispose of any of her properties, that only to harass and to insult 2<sup>nd</sup> defendant in the eye of society, a plan is hatched for attaching the suit schedule properties. It is also appropriate to note at this stage that in the affidavit filed in support of CRP MP No.4652 of 2017, 2<sup>nd</sup> defendant contends that she had no knowledge of advancing of money, that without her knowledge the title deeds of her property were taken away and plaintiff is utilizing the same.

10. The issue raised is no more *res integra*. In several decisions this Court has considered the issue. Few decisions are noted hereunder.

11. In **Sripathi Panditarajula Venkanna Babu**, Division Bench considered the same issue. On an application filed by the plaintiff, the trial Court directed to furnish security for the suit amount, failing which condition of attachment was ordered while issuing notice. Accordingly, Bailiff was directed to carry out the above order. Division Bench noted that said direction was issued under Order XXXVIII Rule 6 CPC and is in the form of final order of attachment.

12.1. Division Bench held as under:-

“6. It does not appear from the impugned order that the procedure under Order 38 Rules 5 & 6 was followed before passing final order. The scheme of the Code, as explained above, contemplates, before any order is passed under Order 38 Rule 6, the defendant to be called upon to furnish security to satisfy the decree that may be ultimately passed and only on his failure to furnish security, to direct attachment. In the present case, the order passed on 4-12-1995 shows that the appellant was not called upon to furnish security for the purpose of passing an order under Order 38 Rule 6 CPC. The security was called upon to be furnished for passing the conditional attachment order. Passing an order for furnishing security ex parte would obviously require the order to be brought to the notice of the defendant and reasonable time granted to furnish the security. The essential conditions to be satisfied are that the Court must on proper materials be satisfied that there is an attempt of alienation of the properties so as to frustrate the decree that may be passed in the suit and secondly, on being called upon, the defendant fails to furnish security or to show cause why the security would not be furnished. If the Court comes to prima facie view that an attempt is being made to dispose of the properties it may pass a conditional order of attachment while calling upon the defendant to furnish security. Hence the primary requirement is of the satisfaction of the Court that attachment is necessary to make the decree a reality and realisable and not one at vacuum.

12.2. Division Bench further observed that:

“7. An order of attachment before judgment affects the right of the owner of the property to deal with the same even before any verdict is available against him as regards the claim of the plaintiff. Such an order is not to be passed merely for the asking or in the routine manner. There must be cogent, prima facie materials to lead the Court to the conclusion that there have been attempts by the defendant to dispose of the property with a view to defeat the decree. Mere satisfaction that there has been an attempt to dispose

of the property is in itself not sufficient and there must be further conclusion, again prima facie, that the attempt to alienate is to delay or defeat the decree. For reaching such satisfaction, there has to be before the Court some tangible material than the mere statement without giving any particulars and without disclosing the source of the information of attempted alienation.”

13. In **L.Narayana Reddy**, this Court considered the order passed by the lower Court under Order XXXVIII Rule 5 of CPC. The order of trial Court reads:

“ Head. Interim conditional attachment and notice.  
Call on 21.11.1990”.

13.1. Learned single Judge construed various provisions of Order XXXVIII and case law on the subject. Learned single Judge observed as under:

“From the above discussion, it is clear that an order of conditional attachment under Sub-rule (3) of Rule 5 of Order XXXVIII is made "HI addition to directing the defendant to furnish security or show cause why he should not furnish security" as observed by the Division Bench of this Court in Y. Chandra Ruddy case (2-A) referred to above; such directions to the defendant to furnish security or show cause why he should not furnish security can be issued under Sub-rule (1) of the said Rule 5 only after the Court reaches the satisfaction "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 remove the whole or any part of his property from the local limits of the jurisdiction of the Court".

14. The Division Bench in *Y. Chandra Reddy v. N.Chandra Mouli Naudi and others* [1991 (2) ALT 343] considered this issue elaborately. Division Bench also referred to Form-5 of Appendix –F of the First Schedule to the Code of Civil Procedure.

14.1. Analyzing the contents of Form-5 and Rule 5, Division Bench held as under:

"It will have to be noticed from the Form that the first part referred to above and the second part need not be contained in every order passed under Order XXXVIII, Rule 5 C.P.C. this is clear from the word 'also' used in Order XXXVIII, Rule 5(3). If the court thinks fit merely to order the defendant to furnish security or show cause why security should not be furnished, the order as drafted in the Form will not contain the second part. It is only where the court thinks that pending further orders, there shall also be an order of attachment, as contemplated by Order XXXVIII, Rule 5(3) that the second part of the Form will be included in the directions issued to the bailiff.

It is this second type of order that is called an order of conditional attachment'. If the defendant does not comply with the first part of the Form, the bailiff if so authorised, can invoke the second part of the Form."

15. In view of principles stated in the above precedent decisions, as seen from the facts of the case on hand, it is clear the trial Court has not followed mandatory procedure as required in Order XXXVIII Rule 5 of CPC before issuing order of attachment and the same is not sustainable.

16. The right to property is a valuable right vested in a person. Such right can be taken away or curtailed by the judiciary order only if the Court is satisfied that in the interest of justice and proper adjudication of the *lis* pending before the Court, such restraint can be imposed on dealing with the property by a party. Attachment of property forfeits the party to enjoy the property owned by him and to deal with the property as required by him. The Court has to be very careful and cautious in exercising the

extraordinary power vested in it under Order XXXVIII before attaching the property. Thus, the parameters laid down in Rule 5 are required to be complied with before passing order attaching the property. It is only an apprehension of the plaintiff that an attempt is being made to dispose of the property and if such property is disposed of, it would be difficult for the plaintiff to enforce the decree that may be passed. The Court has to satisfy that material on record would substantiate the apprehension of plaintiff.

17. Though it is vehemently contended by the learned counsel for plaintiff that order under challenge is an order passed under Order XXXVIII Rule 6 of CPC, a plain reading of the order would disclose that it is made under order XXXVIII Rule 5. Further, a careful reading of Rules 5 and 6, it is clear that the trial Court can proceed to pass orders under Rule 6 only after following the procedure under Rule 5. As noted above, procedure under Rule 5 is not observed. No notice was issued to the 2<sup>nd</sup> defendant to furnish security in such sum as may be satisfied 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; nor the Court directed the 2<sup>nd</sup> defendant to appear and show cause why he should not be directed to furnish security. Only if defendant do not give satisfactory explanation, in spite of affording due opportunity, on why property should not be attached and the Court comes to firm opinion that the facts on record would validate the apprehension expressed by the plaintiff that there is a serious attempt to dispose of the property, Court can pass final order of attachment. As could be seen from Rule 6, order of attachment can be passed only if

defendant fails to show cause, as required by the Court, or failed to furnish the required security. This procedure was not followed and straightaway order was passed. Though order passed is under Rule 5, but it is a final order made, without following due procedure. Thus, the order is not sustainable as it is in violation of statutory mandate.

18. At any rate, as the order of attachment is made under Order XXXVIII Rule 5 of CPC against which no appeal is maintainable, it cannot be said that revision is not maintainable. Furthermore, though the scope of revision under Section 115 of CPC is limited, but this Court has ample powers under Article 227 of the Constitution of India to correct the mistakes committed by the Subordinate Courts. As noted above, the trial court has not followed the procedure before passing the order against which this revision is filed. This needs to be corrected.

19. Accordingly the order of the lower Court is set aside. Civil Revision Petition is allowed. Miscellaneous petitions, if any, pending shall stand closed. There shall be no order as to costs.

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**JUSTICE P.NAVEEN RAO**

Date: 14.12.2017  
kkm

**HON'BLE SRI JUSTICE P.NAVEEN RAO**



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