(1993) 1 KLJ 301

High Court Of Kerala

Case No: E.F.A. No. 10/92 and CMA No. 88/92

Mohammed Hariss		APPELLANT
	Vs	
Fathima		RESPONDENT

Date of Decision: Jan. 14, 1993

Acts Referred:
Civil Procedure Code, 1908 (CPC) â€" Order 21 Rule 54, Order 21 Rule 90, Order 37 Rule 5, Order 38 Rule 5, Order 38 Rule 5(1)

Citation: (1993) 1 KLJ 301

Hon'ble Judges: Mathew P. Muricken, J; K. John Mathew, J

Bench: Division Bench

Advocate: K.J. Joseph and P.N.K. Achan and George Poonthottam and P.N. Ravindran, for the Appellant; P.K.M. Hasan, A.A. Abdul Jabbar and P.M. Habeeb, for the Respondent

Judgement

John Mathew, J.
The judgment-debtor in O.S. No. 203 of 1986 on the file of the Subordinate Judge''s Court, Ernakulam, is the Appellant

in the C.M.A. That was a suit for money which was decreed on 3-1-1989, under which the decree-holder who is the Respondent in the C.M.A.

was entitled to realise a sum of Rs. 1,11,750/- together with interest from the judgment bebtor. The Appellant is hereinafter reffered to as the

judgment-debtor and the Respondent as the decree-holder. The decree-holder filed E.P. No. 523 of 1989 for realisation of the decree by the sale

of an item of property belonging to the judgment-debtor. The property involved is a two storeyed building and two cents of property in which the

building is situated, in Broadway, Ernakulam. That property was attached before judgment in the suit. In execution proceedings the decree- holder

fixed the upset price of the property at Rs. 1 Lakh. According to the judgment-debtor, the property is worth more than Rs. 10 Lakhs. Among

other objections the judgment-debtor raised such an objection also. The execution court directed that the price estimated by the judgment-debtor

may also be shown in the sale proclamation, The decree-holder bid the property for a sum of Rs. 1,5 Lakhs. Subsequently the judgment-debtor

filed execution application, E.A. No. 587 of 1990, under Order XXI Rule 90 of the Code of Civil Procedure'' for setting aside the sale. The

execution court dismissed the application. The judgment-debtor is challenging that order in C.M.A.

2. The decree-holder filed E.A. No. 242 of 1991 before the executing court impleading the judgment-debtor as well as the appllants in E.F.A. No.

10 of 1992 praying for delivery of property. The Appellants in E.F.A No. 10 of 1992 are hereinafter referred to as the tenants. The tenants filed

objection claiming that they are bona fide tenants of the building before the date of attachment. They also raised various other contentions about the

validity of the attachment. However the execution court rejected those objections and ordered delivery. The tenants have filed E.F.A. No. 10 of

1992 against the said order.

3. The C.M.A. is filed with a petition, C.M.P. No. 2681 of 1992, to condone the delay in filing the appeal. In the affidavit in support of that

petition-it is stated that the order of the execution court which is under challenge in the C.M.A. ws passed on 16-2-1992. An application for

certified copy was filed on 21- 2-1991. Stamp papers were called for on 11-3-1991. Stamp paapers were produced on 14-3-1991. On 8-4-

1991 the certified copy was notified to be ready. On the same day the copy was taken delivery, The judgment debtor had time till 22-5-1991 to

file the appeal. However, the appeal was filed only on 26-3-1992. Thus there is a delay of 267 days in filing the appeal. At the time when the

decree was passed and the property was sold in execution, the judgment-debtor''s business had dwindled and he was under great financial strain.

He was unable to obtain even expert legal opinion as to whether he could take up the matter further. He was under great mental depression. There

were other pressing financial obligations and other litigations. It was only after a little respite that he could get proper legal advice to the effect that

there was a fair chance of the sale being set aside if an appeal is filed. According to the judgment debtor, the delay in filing the appeal was not due

to any laches or negligence on his part. If the delay is not condoned, he will be put to irreparable injury, loss and damage.

4. The decree-holder filed a counter affidavit, controverting the averments in the affidavit of the judgment debtor. According to the counter affidavit

the appeal and the delay petition were filed to pressurise her to come to a compromise with the tenants, who were inducted by the judgment-

debtor after the attachment of the properties. According to the decree-holder the C.M.A was filed at the instance of the tenants. The sale was .

conducted on 27-6-1990. Subsequently on 9-7-1990 the decree-holder deposited Rs. 19,675/- in court for purchase of stamp paper. Thereafter

the judgment-debtor filed E.A. No. 587 of 1990 for setting aside the sale. That application was dismissed on 16-2-1991. Thereafter on 28-2-

1991 stamp papers were purchased for issuing a sale certificate to the decree-holder-auction purchaser. According to the decree-holder that

averment that the judgment-debtor was under great mental depression and was unable to obtain expert legal opinion was put forward without any

bona fides. The judgment-debtor gave oral evidence in support of the tenants, which the execution court rightly rejected. The judgment-debtor was

very able physically and mentally. His Advocate Shri Shyam was appearing on his behalf in the execution court. At the trial side Advocate Shri

C.K. Aravin Jaksha Menon was appearing on his behalf. Immediately after the dismissal of the petition to set aside the sale the decree-holder had

filed a Caveat O.P. before this Court. Copy of the said O.P. was sent by registered post to the judgment debtor which was returned as not

known. The registered cover is produced as Annexure- 1. The judgment-debtor was diligently helping the tenants. There is gross negligence and

absence of bona fides in the allegations of the affidavit. When this C.M.P. came up for consideration this Court directed to post it along with the

E.F.A and C.M.A. Accordingly the delay petition was also heard along with the two appeals. On a consideration of the averments made by the

judgment-debtor as well as decree-holder we are of the view that although there is considerable laches on the part of the judgment-debtor the

delay may be excused on the condition imposed by this judgment.

5. According to the judgment-debtor and the tenants the sale was not conducted properly. The sale was vitiated by material irregularity in

publishing and conducting it. Thereby the judgment-debtor sustained substantial injury. The property sold is situated in a commercially important

locality in Ernakulam town and even at the modest estimate it will fetch more than Rs. 10 Lakhs. For want of proper publication prospective

bidders could not take part in the auction at the time of sale. The decree- holder alone was present. As there was no other bidders the properties

were sold for Rs. 1.5 Lakhs which is a very low price.

6. According to the tenants there was no proper attachment and therefore the sale is liable to be set aside. In the nature of the contentions in these

appeals the following points arise for consideration: (i) Was the attachment proper and valid? (ii) Is the sale liable to be set aside? and (iii) Nature

of the order to be passed.

7. Point Nos. (i) to (iii): The suit was filed 5-5-1986 before the District Judge, Ernakulam, who was the vacation Judge. Along with the suit the

decree-holder filed I.A. No. 615 of 1986 for attachment before judgment. On 6-5-1986 the learned District Judge passed the following order on

I.A. No. of 1986.

Heard. Issue notice to the Respondent to show cause why he should not furnish security for Rs. 1,25,000/-. Also issue an interim attachment.

Notice returnable by 23.5.1986.

Copy of the order is produced as Ext. A2. There is slight mistake in the certified copy. The order is extracted from the original order in the trial

records. This order was not served on the judgment-debtor. The order that was actually served is produced as Ext. C3 which is as follows:

Whereas on the application of the Plaintiff in this suit called upon you, the Defendant, to furnish security for Rs. 1,25,000/- to fulfil any decree that

may be passed against you in the suit or to show cause why you should not furnish such security and you have failed to show cause why you

should not furnish such security/you have failed to furnish the security required within the time fixed by the court, it is ordered that you the said

Defendant be, and hereby prohibited and restrained, until the further order of the court, from transferring or charging the properties described in

the schedule hereunto annexed, by sale, gift or otherwise and that all persons, be and that they are hereby prohibited and restrained from receiving

the same by the purchage, gift or otherwise.

Given under my hand and the seal of the court this the 7th day of May, 1986.

(By Order)

Sd/-

Central Nazir.

The endorsements on Ext. C3 show that the copies were served on the Sub Registrar, Ernakulam, Village Officer, Ernakulam and it was affixed on

the notice boards of Cochin Corporation and the Sub Court, Ernakulam. There is another endorsement to the effect that the properties were

attached on 8-5-1986 in the presence of witnesses and others and it was duly announced. There is no endoresement to the effect that the order

was served on the judgment debtor. However, as P.W.1 the Amin gave evidence that the order was served on the judgment-debtor. Ext. A 1 is

the report of the Amin dated 8-5-1986. The notice about the hearing of the application for attachment is produced as Ext. C4. In Ext. C4 it was

stated that the application was posted to 23-5-1986 for hearing and directing the Defendant or his agent to appear before the court and to file

objection, if any, failing which the matter will be decided ex parte. Ext. C4 notice was served on the judgment-debtor.

8. The suit was initially decreed on 6-7-1987. On that the lower court passed the following order on. I.A No. 615 of 1986.

Suit decreed. Attachment made absolute.

Subsequently that decree was set aside and the suit was restored to file on 8-9-1988 by order on I.A. No. 3475 of 1987. Subsequently when the

suit came up for consideration the Advocate for the Defendant made the following endorsement on the written statement:

All contentions withdrawn. Suit may be decreed allowing the Defendants to pay the decree amount in monthly instalments at the rate of Rs.

10,000/-. The 1st instalment shall be paid on 8-6- 1989. In case 2 instalments are defaulted consecutively, the Plaintiff shall be at liberty to execute

the decree in toto. Half the court fee may be refunded to the Plaintiff''s Advocate."" The Plaintiff''s Advocate made the following endorsemnt."" ""I

have seen the endorsement made by the Defendants Advocate. I agree for the instalment payment with the default clause as stated by the

Defendant''s counsel. Half the court fee may be refunded to the Plaintiff''s Advocate.

The suit was decreed on 3-1-1989 allowing the Defendant to pay the decree amount in instalments.

9. Order XXXVIII, Rule 5 of the CPC which provides for attachment before judgment is as follows:

5. Where Defendant may be called upon to furnish security fo production of property.-(1) Where, at any stage of a suit, the Court is 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, specifiy 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 provisions of Sub-rule (1) of this rule, such attachment shall be void.

10. According to learned Counsel for the tenants. Order XXXVIII Rule 5(1) CPC was noncomplied with in this case and therefore the attachment

is void. According to this sub-rule the court may direct the Defendant either of furnish security or to produce the property or the value of the same

or to appear and show cause why he should not furnish security. Sub-rule (4) of Rule 5 makes it clear that if an order of attachment is made

without applying these provisions such attachment shall be void,

11. There was divergence of opinion among the different High Courts as to whether attachment before judgment without complying with the

procedure specified in Rule 5 was a nullity or only voidable. A Full Bench of this Court in Madhavan Pillai Somanatha Pillai and Another Vs. State

of Kerala and Others, held that non-compliance with the provisions of Order XXXVIII Rule 5(1) CPC only makes the order voidable and until

that is done, it is operative and cannot be ignored or collaterally attacked. It was also held that even though the attachment is erroneous and liable

to be set aside in appropriate proceedings, the order of attachment is one made with jurisdiction and is not a nullity. In holding so the Full bench

dissented from rulings reported in Abdul Karim v. Nur Mohammed AIR 1920 Cal. 526, Dular Singh Vs. Ram Chander and Another, and

Rameshwar Dayal v. Bheemsen AIR 1951 M.P. 82 and followed the judgments reported in AIR 1945 97 (Nagpur) , B. Prag Nath Vs. Mt. Indra

Devi, , Dwarka Das Badri Das v. Siri Ram AIR 1938 Lah. 49, Ayyappan Pillay v. Govinda Kurup 1949 T.L.R. 144, Badri Prasad Jhunjhunwalla

Vs. Babulal Jhunjhunwalla and Others, and Gava Thakur v. Bhgawat Parsad AIR 1963 Pat. 268. According to the Full Bench the provisions

contained in Order XXXVIII Rule 5(1) merely lay down the manner in which the jurisdiction is to be exercised and it is not a condition precedent

for the assumption of jurisdiction.

12. The objects and the reasons for inserting Sub-rule (4) to Rule 5 of Order XXXVIII were the following:

Cause 88-Sub-clause (ii)-There is a divergence of opinion between the High Courts as to whether an attachment made before judgment without

complying with the procedure specified in Rule 5 is a nullity or is voidable. Rule 5 is intended for the protection of the person whose property is

sought to be attached before judgment. It he does not receive the notice required by law and its thus denied the opportunity of preventing the

attachment by the offer of security, an injustice would accrue to him. Rule 5 is, therefore, being amended to clarify that, where the attachment is

made without complying with the procedure laid down in Rule 5, such attachment shall be void. (S.O.R.(Gaz. of Ind., 8-4-1974 Pt. II, Section 2

Ext. P.335).

However, the final recommendation of the Committee regarding Clause 88 which was re-numbered as clause 85 was as follows:

Clause 85 (Original Clause 88)-The Committee note that the proposed amendment made in new Sub-rule (4) of Rule 5 or Order XXXVIII

provides that an attachment which is not made in the manner specified in Rule 5 shall be void. But Rule 5 does not specify any manner in which an

attachment shall be made. Rule 5 only specifies the circumstances in which the attachment may be made. The committee are of the view that it

should be made clear that an attachment before judgment before judgment would be voild if the provisions of Sub-rule (1) of Rule 5 had not been

complied with, Proposed Sub-rule (4) of Rule 5 of Order XXXVIII has been amended accordingly. (J.C.R.(Gaz. of India, 1-4-1976 Pt. II,

Section 2 Ext. P804/20).

13. Thus after the insertion of Sub-rule (4) the divergence of opinion between different High Courts is now settled. An attachment made before

judgment without complying with the provisions of Rule 5(1) of Order XXXVIII is void and not merely voidable. In other words an attachment

unaccompanied by an order directing the Defendant to furnish security within a specified period or to appear and show cause why he should not

furnish security is a nullity. It is not a curable irregularity. If the court instead of issuing a notice in Form No. 5 (Appendix-F) issued a notice in the

general form, though making the attachment simultaneously, it is incumbent on the court to direct the Defendant to furnish security or to show cause

why he should not furnish security. Under Rule 6, only where the Defendant fails to show cause why he should not furnish security or fails to furnish

security as required, the court may order the attachment of the properties specified or any part thereof which is sufficient to satisfy any decree

which may be passed in the suit. The court has no power to direct conditions attachment under Sub-rule (3) of Rule 5 without an order under

Clause (1) of the same rule. The Allahabad Bank Ltd. Vs. Rana Sheo Ambar Singh and Others, . In that judgment the Allahabad High Court

following the decision in Sri Krishna Gupta and Another Vs. Shri Ram Babu and Others, held that an attachment which does not comply with the

provisions of Rule 54 of Order XXXVIII is illegal and ultra vires and, therefore, the decree-holder cannot claim any benefit under it. Even before

the indroduction of Sub-rule (4), the Andhra Pradesh High Court had held that only if an attachment is made in the manner prescribed, the

attachment, will operate as a valid prohibition against alienation. Such prohibition should also be proclaimed and made known in the way provided

by Order XXI Rule 54 Code of Civil Procedure. To render a subsequent alienation invalid, an attachment before judgment just like an attachment

in execution must be made in the prescribed manner. There cannot be any valid attachment before judgment unless all the formalities prescribed by

Order XXI Rule 54 CPC are complied with. (See Venkata Subbarao v. Krishnayya AIR 1956 A.P. 59). Thus if no opportunity is given to the

Defendant to furnish security the attachment will be void. Onkar Mal Mittal and another Vs. State Bank of Patiala and others,) it was held as

follows:

Ex parte orders of attachment dated 30-4-1987 and 23-5-1987 clearly show that while passing exparte orders of attachment, the Appellants were

not called upon to furnish security first. Under Order XXXVIII, Rule 5, of the Code, the Court has first to ask the Appellants to furnish security

and only after they fail to furnish security, conditional order of attachment can be made. As I have already indicated above that there is nothing to

show that the Appellants were called upon to furnish security and they refused to furnish the same.... But, now Sub-rule (4) inserted by Act of

1976 reads that if an order of attachment is made without complying with the provisions of Sub-rule (1) of Rule 5 or Order XXXVIII, such

attachment shall be void, Sub-rule (4 has been inserted with a view to see that the Courts do not pass such an extraordinary order in a cavalier

manner and without satisfying themselves about the requirements of Order XXXVIII, Rule 5. The simple reproduction of the language used in

Order XXXVIII, Rule 5 will not meet the requirements of Order XXXVIII, Rule 5, of the Code.

14. Ext. A2 order dated 6-5-1986 is in accordance with the provisions of Rule 5(1) of Order XXXVIII. Learned Counsel for the decree-holder

submitted that since Ext. A2 order was in accordance with the said rule, Sub-rule (4) is not attracted. According to the learned Counsel, the failure

to serve Ext. A2 order on the Defendant is only a procedural irregularity which will not attract Sub-rule (4) of Rule 5. We are of the view that such

an interpretation is against the wording of the statute as well as against the reasons for inserting Sub-rule (4) and therefore cannot accept that

contention. An order of attachment can be made only after complying with all the provisions contained in Sub-rule (1) of Rule 5 which necessitates

a direction to the Defendant to furnish security or to appear and show cause why he should not furnish security etc. Mere passing of an order by

the court in terms of Sub-rule (1) without serving it on the Defendant cannot be treated as substantial compliance with the statutory requirements.

Sub-rule (1) envisages that the Defendant should be directed to furnish security. That direction can be effective only if the order is actually served

on the Defendant. Though a court has jurisdiction to attach property, in order to achieve that object it is bound to follow procedure provided by

law. According to the judgment of the Allahabad High Court in Sri Krishna Gupta and Another Vs. Shri Ram Babu and Others, following the

decision in AIR 1928 139 (Privy Council) a thing for which provision has been made must be done in that way or not at all. If no attachment

comes into effect arrording to procedure described, any step taken towards achievement of that object is a nullity and has no effect on the

property. See also Vasavamba v. P.S. & Sons AIR 1973 Mys. 291 where the Mysore High Court held that the provisions relating to attachment

before judgment are mandatory and hence where the Court ordered conditional attachment of land but neither any notice under Order XXXVIII

Rule 5 nor a prohibitory order under Order XXI Rule 54 was served on the Defendant, the attachment is ineffective.

15. The appendices to the CPC contain the following forms to be used for effecting attachment. Appendix-E Form No. 24 is the form to be used

when attachment of immovable property in execution is ordered. Appendix-F, Form No. 5, relates to attachment before judgment, which form is

to be used in respect of attachment under Order XXXVIII Rule 5 Code of Civil Procedure. The form shows that the order is directed to the Amin

of the court to call upon the Defendant to furnish security for the specified sum or to produce and place at the disposal of the Court the property or

the value thereof, as may be sufficient to satisfy any decree that may be passed against him; or to appear and show cause why he should not furnish

security. Form No. 7 of appendix-Fis to be used on proof of failure to furnish security. This is the form to be used in respect of orders passed

under Order XXXVIII Rule 6 Code of Civil Procedure. This order is also directed to the Amin of the Court. Form No. 7A of Appendix-F is the

form for attaching immovable property before judgment, The form shows that order is directed to the Defendant after he fails to furnish security

required within the time fixed by the Court.From this it is clear that form No. 5 is to be used with necessary variations as envisaged under Order

XLVIII Rule 3 CPC whenever order of attachment under Order XXXVIII. 5 CPC is passed in respect of immovable property. The first sentence

in form No. 5 is as follows:

Whereas...has proved to the satisfaction of the Court that the Defendant in the above suit....

This form has to be filled up suitably viz. either is about to dispose of the whole or any part of his property" or is about to remove the whole or any

part of his property from the local limits of the jurisdiction of the Court." (See Order XXXVII, Rule 5(a) & (b). From a reading of Rule 5 of Order

XXXVIII along with From No. 5 of Appendix-F, it is clear from No. 5 is to be used for all orders under Order XXXVIII Rule 5, whether it is

attachment of immovable property or attachment of moveable property. No other form is prescribed for directing the Defendant to furnish security

for the plaint amount. The contention that order under Order XXXVIII Rule 5 for attachment of immovable property before judgment are to be

issued under form No. 7A, cannot, therefore, be aecepted Order under Form 7A Appendix Fis to be issued only if the Defendant fails to furnish

security after he is served with an order in Form No. 5 of Appendix F.

16. In this case the only order serve on the Defendant is Ext. C-3 (see para. 7) which is issued in Form No. 7A Ext. C3 order was dated 7-5-

1986 and signed by the Central Nazir. The order of the court which is Ext. A2 to show cause why the Defendant should not furnish security for the

plain claim, was passed on 6-5-1986. That order was not served on the Defendant at any time. Therefore, he had no opportunity to furnish

security or to show cause why he should not furnish security.

17. Ext. C3 order mentions that the Defendant failed to show cause why he should not furnish security/failed to furnish security required within the

time fixed by the court. This statement is obviously incorrect since Ext.A8 order directing to issue notice to the Defendant to show cause why he

should not furnish security was never served on the Defendant. The notice of the interlocutory application for attachment before judgment viz. Ext.

C4 only mentioned that the said I.A. was posted for hearing oon 23-5- 1986. The only direction in Ext.C4 was to appear before the court and to

file objections if any, failing which the matter will be decided exparte.

18. At this stage it may be considered whether it is sufficient that in case the Defendant was vigilant, he could have found out that the court has

passed Ext. A2 order calling upon him to furnish security and that his failure to do so would debar him from challenging the order at a later stage on

the ground that the attachment was not in accordance with Order XXXVIII Rule 5(1) Code of Civil Procedure. It was on this point that there was

divergence of opinion among the different High Courts. That controversy was settled by the introduction of Sub-rule (4) to rule 5, under which an

attachment without complying with the provisions of Sub-rule (1) is declared to be void. It is well settled that a thing for which statutory provision

has been made must be done in that way itself, (See Muthiah Chetti v. palanjappa Chetti AIR 1928 P.C. 139. Therefore, Ext. C3 order which

was not issued in accordance with the prescribed procedure is a nullity and void. It cannot be revived by the failure of the Defendant to enquire

about the proceedings in court resulting in Ext. A-2 order which was not served on him. The Defendant having never been called upon to furnish

security, Ext.C3 order served on the Defendant without complying with the legal provisions is void. (See Vasavamba v. P.S. & Sons AIR 1973

Mys. 291, Magunta Mining Cp. Vs. M. Kondaramireddy and Another, , Palghar Rolling Mills Pvt. Ltd. Vs. Visvesvaraya Iron and Steel Ltd. and

Another, , Smt. Kamala Panda Vs. Krishna Cloth Stores and Another, , Nullimarla Jute Mills Co. Ltd. v. Sree Mahaveer Rice & Oil Mills AlR

1989 A.P. 214, Onkar Mal Mittal and another Vs. State Bank of Patiala and others, and Venkata Subbarao v. Krishnayya AIR 1956 A.P. 59).

19. As observed by the Privy Council in AIR 1928 139 (Privy Council) under the CPC the most anxious provisions are enacted in order to

prevent a mere order of a Court from effecting attachment, and plainly indicating that the attachment itself is something separate from the mere

order, and is something which is to be done and effected before attachmenet can be declared to have beeen accomplished. There cannot be valid

attachment before judgment unless all the required formalities are complied with. Notice must be sent to the Defendant to furnish security or to

show cause why security shall not be furnished by him for the plaint amount. That is the first mandatory step provided in Order XXXVIII Rule 5

CPC before directing attachment before judgment. It is only when the Defendant fails to furnish security or fails to appear and show cause, the

Court will have to further proceed under Order XXXVIII Rule 6 Code of Civil Procedure. Even in proceedings where conditional attachment is

ordered under Order XXXVIII Rule 5 (3) it would be obligatory upon the Court to issue notice to the Defendant as provided under Rule 5(1). In

the present case the only order served on the judgment - debtor was Ext.C3 which is the final order of attachment under Order XXXVIII Rule 6

Code of Civil Procedure. The judgment - debtor was not served with notice under Rule 5 (1). Before an order of attachment can be made, it was

incumbent on the Court to direct the Defendant to furnish security or to show cause why he should not furnish security. Only if the Defendant fails

to give security or to show cause, the Court may order attachment of the property as provided in Rule 6. Even though the Court has the power

under Rule 5(3) to direct conditional attachment, no such order could be passed without calling upon the Defendant to furnish security or to show

cause why security shall not be furnished as provided under Rule 5(1). Here the judgment - debtor was not called upon to furnish security or to

show cause as provided in Order XXXVIII Rule 5(1). An attachment which does not comply with the provisions of Order XXXVIII Rule 5(1) is

illegal and ultra vires and it is declared to be void under Rule 5(4). A decree holder cannot claim any benefit under that order.

20. However, it was contended that even in case there is any irregularity in effecting attachment, only the Defendant can challenge the valdity of the

order since Order XXXVIII Rule 5is enacted for the protection of the defendent only, In this connection reliance was placed on N. Pappammal v.

L. Chdambaram AIR 1984 Mad. 70. It ws further contended that the Defendant may waive his right by not objecting to any irregularity in the

attachment. In support of this contention reliance was placed on G.P. Singh on Interpretation of Statutes, 3rd edition, page 275, Maxwell on

Interpretation of Statutes, 12th edition, page 328, H.W.R. Wade on Administrative Law, 4th edition, pages 286 & 456, Vellayan v. Madras

Province AIR (34) 1947 P.C. 197, Madamsetty Satyanarayana Vs. G. Yellogi Rao and Others, , Associated Hotels of India Ltd., Delhi Vs. S.B.

Sardar Ranjit Singh, , Shri Lachoo Mal Vs. Shri Radhey Shyam, , Murlidhar Aggarwal and Another Vs. State of Uttar Pradesh and Others, , The

Director of Inspection of Income Tax (Investigation), New Delhi and Another Vs. Pooran Mal and Sons and Another, and Varkey Vs. Sarojini

Amma and Others . According to the learned Counsel since the provision is solely for the benefit of the Defendant, it must be deemed that he

waived his right to object to the irregularities. Learned Counsel for the judgment - debtor submitted that it is not correct to say that the judgment -

debtor did not challenge the validity of the attachment and thus waived any of his rights. In any view of the case, during the evidence as well as in

the arguments he had challenged the validity of the attachment also. An attachment before judgment does not stand on the same footing as an

attachmentin execution, and a party who does not object to the attachment before judgment is not estopped from objecting to its validity after

decree. (See Basiram Malo v. Kalyani Debi 1911 (10) IC (305). It is well settled that waiver is an intentional act and thereafter, a clear act

showing such an intention must be alleged and proved by the person who sets up the plea of waiver. (See Janak Raj Vs. Gurdial Singh and

Another, . Before the execution court the decree - holder did not raise the contention that the judgment - debtor had waived his right to challenge

the validity of the attachment. The court has not considered that question also. On the other hand, the court has examined the validity of the order

of attachment. In case the decree - holder had a contention that the judgment-debtor had waived his right, he ought to have raised that contention

in the execution court itself. During the examination of judgment-debtor also the decree-holder did not put any question regarding the alleged

waiver by the judgment - debtor. For these reasons we hold that the contention of the decree-holder that the judgment-debtor waived his right to

challenge the validity of the attachment, cannot be accepted.

21. Another contention raised by the learned Counsel for the decree holder is that the "tenants" are not entitled to challenge the validity of the

order of attachment. We have already found that in order to make an effective order of attachment before judgment the judgment - debtor must be

served with a notice as envisaged under Order XXXVIII Rule 5(1) CPC and that in this case no such notice was served on the judgment - debtor

and therefore, the order of attachment is void. We have also found that the judgment - debtor has not waived his right to challenge the validity of

the order of attachment. No doubt, the interest of any person who is not a party to the suit is not affected by the order of attachment and therefore,

it may be unnecessary for him to challenge the validity of the attachment. However, in this case this question is of no importance because we have

already found that the order of attachment was void. (See in this connection Mansoor Ali Vs. Azizul Rahman and Others,).

22. In view of the above findings it is not necessary to consider the other contentions raised in these appeals. During the course of the arguments

we enquired whether the judgment - debtor or the tenant can offer to pay the sale price and some compensation to the decree holder. Learned

Counsel for the judgment - debtor submitted that the judgment - debtor is willing to pay the amound due under the decree as calculated up to the

date of payment together with the execution costs including the cost of stamp papers, within two months of the date of judgment of this Court so

that the sale may be set aside and full satisfaction of the decree may be entered. Learned Counsel for the tenant submitted that the tenant is willing

to pay Rs. 3 lakhs, over and above the amount of Rs. 40,000/- stated to have been deposited by the tenant towards the arrears of rent in order to

set aside the sale and in full satisfaction of the decree in favour of the decree - holder, within two months of date of judgment of this Court. These

statements are recorded. As a condition for condoning the delay in filing the appeal, the judgment - debtor is liable to pay an amount of Rs.

2,000/- to the decree holder. Although the sale is liable to be set aside for the reasons stated above, under the circumstances of this case we are of

the view that if the decree - holder opts to accept any of these offers the sale need be set aside only on condition of payment of either of these

amounts to the decree - holder. The decree holder is given the option to accept one of these offers in writing within one week from this date. In

case the decree - holder opts for any of these offers, the sale will stand set aside subject to the condition that either the judgment - debtor or the

tenant as the case may be, pays the respective amount offered by him. In any case the judgment - debtor shall pay cost of Rs. 2000/-- to the

decree - holder within two months from this date. In case the decree - holder fails to exercise the option within one week, the sale will stand set

aside without any condition. In that case the judgment - debtor will be liable to pay cost Rs. 2000/- only, to the decree holder for condoning the

delay in filing the appeal, and the E.F.A. as well as the C.M.A. will stand allowed on such payment. E.F.A. and C.M.A. are disposed of as above.

Post after a week.

Learned counsel for the decree - holder submitted that his client is not exercising the option given to her by the judgment. Accordingly the sale is

set aside without any condition. Learned Counsel for the judgment - debtor offered to pay cost Rs. 2000/- but the learned Counsel for the decree

- holder refused to accept the same. Hence he is permitted to deposit the cost in this Court within the time granted in this judgment. The Appellants

in E.F.A. No. 10/1992 are permitted to withdraw wheatever amounts deposited by them in the lower court as per the order of this Court in CMP.

No. 1939.92 in E.F.A. No. 10/92. E.F.A. and C.M.A. are allowed as above.