(2002) 09 KL CK 0061

High Court Of Kerala

Case No: C.R.P. No. 1211 of 1999

South Indian Bank		APPELLANT
	Vs	
Raveendranathan Nair		RESPONDENT

Date of Decision: Sept. 19, 2002

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 38 Rule 9

Citation: (2002) 2 KLJ 534

Hon'ble Judges: K.A. Mohamed Shafi, J

Bench: Single Bench

Advocate: K. Prabhakaran, for the Appellant; R. Krishna Raj, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

K.A. Mohamed Shafi, J.

The plaintiff in O.S. 82 of 1998 on the file of the Subordinate Judge''s Court, Mavelikka''ra has filed this application challenging the order dated 5.2,99 in I. A. 173 of 1999 vacating the order of attachment passed before the judgment.

. 2. The above suit is filed by the plaintiff, Bank for realisation of money by enforcement of the mortgage by deposit of title deeds executed by the defendants. Since the defendants alienated the mortgaged property before the institution of the suit, the plaintiff filed application for attachment before judgment of another property belonging to the 5th defendant which was allowed and the property was attached by order dated 19.9.1998. The above application is filed by the 5th defendant by offering the security of fixed deposit for Rs. 6,00,000/-. The lower court lifted the attachment by accepting the conditional security offered by the 5th defendant. The lower court found that irrespective of the transfer of the mortgaged property, the plaintiff can proceed against the mortgaged property and therefore the plaintiff can proceed against the security offered by the 5th defendant only by

way of additional security after exhausting the remedies against the mortgaged property.

3. The grievance of the revision petitioner is against the acceptance of the conditional security offered by the 5th defendant and according to them lifting the attachment is illegal.

4. Order XXXVIII, Rule 9 of CPC provides:-

"Where an order is made for attach men; before judgment, the court shall order the judgment to be withdrawn, when the defendant furnishes the security required, together with security for the costs of the attachment or when the suit is dismissed".

5. The security contemplated under Order XXXVIII, Rule 9 is an Unconditional security, not a conditional security as in this case.

6. In this case, it is not disputed that the property mortgaged in favour of the plaintiff. Bank is alienated by the mortgagors. The contention of the defendants that the alienees are liable to discharge the mortgage debt and provision is made in the sale deed to the effect that the alienees are liable to discharge the mortgage debt will not absolve their liability to offer security to lift the attachment before judgment ordered by the Court. The Court has ordered attachment before judgment in accordance with the contentions raised by the plaintiff Bank to the effect that the mortgaged property is alienated by the mortgagors. Under such circumstances, in order to lift the attachment before judgment, the defendants are liable to offer unconditional security and conditional security cannot be accepted by the Court for lifting the attachment. Merely because of the fact that the defendant has produced fixed deposit receipts as conditional security, imposing conditions to accept and act upon the security, the attachment cannot be lifted and the plaintiff cannot be asked to hunt after third parties to whom the mortgaged property is assigned by the mortgagor. Therefore, the conditional security accepted by the lower court for lifting the attachment of the property cannot be sustained. Hence that part of the order passed by the lower court accepting conditional security is not sustainable. Therefore this CRP is allowed and the impugned order is modified by lifting the attachment accepting the security for Rs. 6,00,000/- offered by way of fixed deposit receipts unconditionally for the discharge of the decree debt that may be passed in the suit.