

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.03.2015

CORAM:

THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM

C.R.P.(PD)No.4601 of 2014

and

M.P.No.1 of 2014

Rajesh Kumar Goel

... Petitioner

Vs.

Mamta

... Respondent

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India against the order dated 02.08.2014 passed in I.A.No.11728 of 2014 in O.S.No.4278 of 2014 made by the learned VII Assistant Judge, City Civil Court, Chennai passing of the order of attachment before judgment Under Order 38 Rule 5 and Section 94(b) C.P.C. to furnish security and interim conditional attachment order.

For Petitioner : Mr.Rajendran Prasad Tayal

For Respondent : Mr.T.Srikanth

ORDER

This revision arises against the order passed by VII Assistant Judge, City Civil Court, Chennai in I.A.No.11728 of 2014 in O.S.No.4278 of 2014.

2. The petitioner is the defendant in the suit in O.S.No.4278 of 2014 on the file of the VII Assistant Judge, City Civil Court, Chennai. The respondent has filed the suit against the petitioner under Order 37 of C.P.C for recovery of Rs.6,20,000/- on the basis of a promissory note dated 18.06.2013. In the suit, the respondent filed I.A.No.11728 of 2014, under Order 38 Rule 5, Sections 94(b), 136 and 151 of C.P.C., seeking attachment before judgment of the property of the defendant.

3. The plaintiff has averred in the affidavit filed in support of the petition that the defendant at the time of borrowing money represented that is in dire need of funds to meet his needs and he owns and possess a property and he has ample means to pay the amount borrowed from her. The defendant has further promised and assured that he would repay the amount within a short period, but he failed and neglected to repay the money and he was postponing the repayments. On enquiries, the plaintiff learnt that he has raised large sums from various financiers and he has collected all the out standings from their constituents. But instead of discharging their debts, secreted the same beyond the reach of his creditors. The defendant with a view to defeat and defraud his creditors, including the plaintiff and with intent to delay and obstruct the execution of any decree that may be passed in the suit is making hasty and

clandestine attempts to dispose of his only property described in the schedule to the petition.

4. The plaintiff has further alleged that if the defendant succeeds in his attempt in disposing of the property, the plaintiff would lose the entire claim in the suit and if the property is not attached before judgment, not even a single pie can be recovered from the defendant. The trial Court by order dated 02.08.2014 issued notice to the defendant to furnish security for the suit amount on or before 22.09.2014 and also passed an interim conditional attachment till then. Aggrieved by the order, the present civil revision is filed.

5. The impugned order would run thus:

“Prima facie made out. Balance of convenience is in favour of the petitioner. Notice to respondents to furnish security for the suit amount on or before 22.09.2014 interim conditional attachment is ordered till then.”

6. Mr. Rajendran Prasad Tayal, learned counsel for the petitioner submitted that the impugned order is a non speaking and cryptic order and it does not satisfy the mandatory provisions contained in Order 38 Rule 5(1) of

C.P.C. The learned counsel further submits that even before serving notice on the defendant and without giving opportunity to the defendant to furnish security as per Order 38 Rule 5(4) of C.P.C., if any order of attachment is passed it is void as per Order 38 Rule (5) of C.P.C. The learned counsel relied on a judgments reported in **2009-5-L.W.510, 2009-5-L.W.361, 2009-5-L.W.661** and the unreported judgment passed in **C.S.No.667 of 2004**.

7. Per contra, Mr.T.Srikanth, learned counsel for the respondent would submit that the plaintiff issued a notice to the defendant, which was successfully avoided by the defendant; When the defendant evaded to receive the notice, it can be presumed that the defendant has attempted to defraud the plaintiff; that the defendant has borrowed money from various financiers and third parties and with a view to delay and defraud the creditors has attempted to sell the property, which was known to the plaintiff through other creditors and that as per Section 94(b) and Order 38 Rule 5 of C.P.C., the trial Court has got power to order interim attachment in the interest of justice. The learned counsel has relied on the judgments in **AIR 1984 Madras 70** and **2000 (II) CTC 13**.

8. It is seen from the records that the plaintiff has instituted the suit under Order 37 of CPC for recovery of money on the basis of a promissory

note dated 18.06.2013. The plaintiff has categorically stated in the affidavit filed in support of the petition filed under Order 38 Rule 5, Sections 94(b), 136 and 151 of C.P.C that the defendant has promised and assured that he would repay the amount within a short period, subsequently, he failed and neglected to pay the money borrowed by the plaintiff, on enquiries, the plaintiff learnt that he has raised huge amounts from various financiers and secreted the same beyond the reach of his creditors and the defendant with a view to defeat and defraud his creditors, making hasty and clandestine attempts to dispose of his only property. The plaintiff has further alleged that if the defendant succeeds in his attempt in disposing of his property, the plaintiff stands the danger of losing the entire claim in the suit.

9. I would like to refer the judgment relied on by the learned counsel for the petitioner:

i) In ***M.K.Hariprasad V. Uma Keshav*** reported in 2009-5-L.W. 510, the Division Bench found that the averments contained in the affidavit filed under Order 38 Rule 5 of CPC was vague and bald in nature and held the power under Order 38 Rule 5 of CPC is a drastic and extraordinary power, which has to be used sparingly and strictly.

ii) In *J. Josephine Christobell V P. Subramanian* reported in **2009-5-L.W.361**, this Court has held as follows:

“7. It is true that in the application filed under Order 38 Rule 5 of CPC by the respondent, the Court below has directed the garnishee not to disburse the amount which is more or less an order of attachment, as the petitioner is restrained from dealing with the amount in any manner and therefore, it cannot be considered as a mere direction. Even before passing such an order under Order 38 Rule 5 of CPC, a notice to the petitioner to furnish security to the said amount is necessary. Order 38 Rule 5 of CPC clearly lays down that a Court at the first instance must direct the defendant to furnish security or to show cause why he should not furnish security and only after he failed to do so, conditional order of attachment has to be made. The said provision is mandatory and an order of attachment passed straightaway without complying with the provisions under Order 38 Rule 5(1) CPC would be void and the impugned order passed by the Court below without complying with the said requirements makes the order illegal and ultra vires and therefore, I am of the considered view that passing an order of direction in the nature of attachment without notice to the petitioner cannot be considered as substantial compliance of the provisions of Order 38 Rule 5(1) of CPC.”

iii) The same view was taken by this Court in the judgment reported in **2009-5-L.W.661** and the unreported judgment in **C.S.No.667 of 2004**.

10. In the judgment relied on by the learned counsel for the respondent in **N.Pappammal Vs. L.Chidambaran** reported in **AIR 1984 Madras 70**, this Court had an occasion to consider the provisions of Order 38 Rule 5(3) of CPC and the power of the Court to order attachment under Section 94(b) of CPC, it is held as follows:

“The expression used therein is 'conditional attachment' and that would mean that it is not an absolute attachment, but only in the nature of a dependent attachment or an attachment which would ensure and depend upon certain conditions, namely, the defendant appearing and showing cause or not. In other words, such a conditional attachment would be operative during the interregnum or the intervening time. If it were not so, the defendant can, meanwhile, part with all his or her valuable properties, pending receipt of a notice under O.38, R.5 (1), C.P.C., and the court as well as the plaintiff, who may be successful eventually, would be left helpless high and dry and justice would be defeated, to prevent which the power of attachment is conferred on courts under S.94(b), C.P.C.,

to be exercised in conformity with and after satisfying the requirements of O.38, R.5(1) and (3) C.P.C. That is why the power to direct a conditional attachment of the whole or any portion of the property is also made available under O.38, R.5(3), C.P.C., which can be exercised by the court while passing an order under O.38, R.5(1) C.P.C.

ii) in ***D.V.Raghavan Vs. A.J.Suresh*** reported in **2000 (II) CTC 13**, this Court has held as follows:

“14.Those two decisions will not apply to the facts of the present case. The Court was well within its jurisdiction to pass conditional attachment even before notice. This is also the ratio of the decision in Jayalakshmi V S.M.Muthaier, 1989 (I) L.W.549 : 1989 (I) MLJ 411.”

11. In the judgments relied on by the learned counsel for the petitioner, this Court has held that before passing an order under Section 38 Rule 5 of CPC, the Court has to order notice to the defendant and after providing opportunity to furnish security as contemplated under Order 38 Rule 5(1) CPC, the final order of attachment should be passed. However, in the instant case, the trial Court passed an order of conditional attachment as per Section 94(b) of CPC. Therefore, I am of the view that the judgments relied on by the learned counsel for the petitioner would not have any bearing on the

facts of the case. In the instant case, the trial Court having satisfied the averments contained in the affidavit, while issuing notice to the defendant passed conditional order of attachment. In the light of the judgment of this Court reported in *AIR 1984 Madras 70 and 2000 (II) CTC 13*, I do not find any illegality or irregularity in the order impugned in this revision.

12. In the result, this civil revision petition is dismissed. However, it is open to the petitioner to file his counter and contest the petition before the trial Court. The petitioner under takes to file his counter within a period of two weeks. The trial Court shall dispose of I.A.No.11728 of 2014 within a period of four weeks from the date of receipt of a copy of this order on merits and in accordance with law without being influenced by any of the observations made in this order. No costs. Consequently, connected miscellaneous petition is closed.

11.03.2015

Index : Yes
Internet: Yes
vsm

To

The VII Assistant Judge,
City Civil Court, Chennai.

OK.KALYANASUNDARAM,J.

C.R.P.(PD)No.4601 of 2014

=

11.03.2015