



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 29/1/2015

C O R A M

THE HONOURABLE Mrs.JUSTICE PUSHPA SATHYANARAYANA

C.R.P.PD(MD) No.123 of 2015

Jothis Kumar

... Petitioner/Petitioner/Respondent/Defendant
Vs

J.P.Samraj

...Respondent/Respondent/Petitioner/Plaintiff

Petition filed under Article 227 of the Constitution of India for a direction to dispose the petition in I.A.No.215 of 2013 in I.A.No.292 of 2012 in O.S.No.64 of 2012 on the file of the III Additional District Court, Tirunelveli.

For petitioner

... Mr.H.Arumugam

O R D E R

The defendant in the suit is the petitioner herein.

2. The respondent herein had filed a suit in O.S.No.64 of 2012 on the file of the III Additional District Court, Tirunelveli against the petitioner herein for recovery of Rs.14 lakhs with interest based on a promissory note. Pending suit, the respondent/plaintiff filed I.A.No.292 of 2012 for attachment before judgment of the property belonging to the petitioner and it was ordered on 20/12/2012. The said attachment was also duly registered in the Encumbrance Register of the Sub-Registrar's office. While so, the suit itself was dismissed on 6/11/2013 on the ground of maintainability. However, while disposing the suit, the trial Court had not passed an order withdrawing the attachment as contemplated under Order 38 Rule 9 of the Code of Civil Procedure.

3. Be that as it may. The petitioner preferred a revision to the Sub-Registrar for de-registering the endorsement of attachment in the Encumbrance Register in the Sub-Registrar's office. But the Sub-Registrar, insisted for an order of Court. Hence the petitioner filed I.A.No.215 of 2013 for raising the attachment.

4. The learned counsel appearing for the petitioner had contended that the trial Court, while disposing of the suit had not passed a consequential order withdrawing the attachment order. Though no notice is required to be issued to the respondent, notice was issued on 7/1/2014 to the respondent and counter was filed on 14/3/2014. Thereafter, several adjournments were given but no order was passed by the trial Judge. It was adjourned from time to time stating that the Court had become functus officio. In the above circumstances, the petitioner has come up with the above revision, seeking a direction to be given to the trial Judge to dispose of I.A.No.215 of 2013 to raise the attachment.

5. Normally, if any suit is disposed of either on merits or for default, Interlocutory orders subsisting thereon would merge with the main judgment. In the event of restoration of a suit dismissed for default of the interlocutory orders that were subsisting during the pendency will also be restored automatically. So far as the attachment under Order 38 Rule 5 of the Code of Civil Procedure is concerned, Rule



11 A is applicable. Rule 11 A of the Code of Civil Procedure is usefully extracted hereunder:-

"The provisions of this Code applicable to an attachment made in execution of a decree shall, so far as may be, apply to an attachment made before judgment which continues after the judgment by virtue of the provisions of Rule 11."

6. As per Rule 11 A (2) of the Code of Civil Procedure, if the suit is dismissed for default and when the same is revived, any order of attachment before judgment will not be automatically revived, thereby meaning that the attachment order issued before judgment would automatically is deemed to be disposed of.

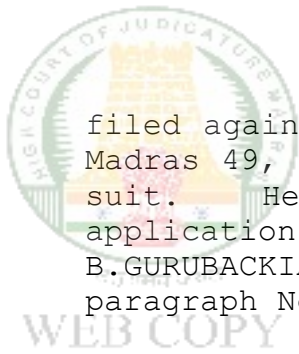
7. Rule 11 B of the Code of Civil Procedure which is this Courts' amendment is usefully extracted as follows:-

"Order of attachment to be communicated to the Registering Officer - Any order of attachment passed under Rule 5 or 6 of this order raising the attachment passed under Rule 9 of this order shall be communicated to the Registering Officer within the local limits of whose jurisdiction the whole or any part of the immovable property comprised in such order, is situate." (Amendment dated 29/6/1987)."

8. As per the above provision, which is an amendment dated 29/6/1987, if the attachment is removed by virtue of the suit being dismissed, then the same shall be communicated by the Court to the Registering Officer within whose local limits, the whole or part of the immovable property is situate. Similar amendment is introduced in Order 21 Rule 58 of the Code of Civil Procedure on the same date as Rule 58 A of the Code of Civil Procedure. In view of the above State amendments, a duty is cast upon the Court to communicate the order raising attachment to the Registering authority.

9. In the present case, the Court, after the dismissal of the suit, ought to have communicated to the Registering Officer about the raising of the attachment as per Rule 9 of Order 38 of the Code of Civil Procedure. The Registering Officer, at least, ought to have removed the order of attachment from the Encumbrance Register on production of the judgment and decree. This principle has been laid by this Court way back in the year 1934 in SARANATHA AYYANGAR Vs. MUTHIAH MOOPANAR AND OTHERS reported in AIR 1934 Madras 49, wherein it has been held that on restoration of a suit dismissed for default, all interlocutory matters shall stand restored unless the order of restoration says to the contrary". It means that when the suit is restored, all interlocutory orders and their operation during the period between the dismissal of the suit for default and restoration shall stand revived. Once the dismissal order is set aside, the plaintiff must be restored to have possession in which he was situated when the Court dismisses the suit for default.

10. The case on hand is a converse case where the suit was dismissed and there is no restoration of the same or no appeal has been



filed against it. Applying the above said principle set out in AIR 1934 Madras 49, the interlocutory orders also merge with the order in the main suit. Hence there is no orders subsisting in the interlocutory application. This was followed by the Division Bench of this Court in B.GURUBACKIAM AND OTHERS reported in {2011 (1) MLJ - 861}, wherein in paragraph No.28, it has observed and held as follows:-

"It is a well settled proposition of law that orders of stay pending disposal of the suit or proceeding are ancillary orders and they are all meant to supplement the ultimate decision arrived at in the main suit or proceeding. Hence, the suit or proceeding dismissed for default and subsequently restored by the order of the Court, all ancillary orders passed in the said suit or proceeding shall stand revived unless there is any other factor on record or in the order of dismissal to show to the contrary."

11. The above said Division Bench is based on the decision of the Supreme Court in VAREED JACOB Vs. SOSAMMA GEEVARGHESE AND OTHERS reported in {2004 SC - 3992} = {2004 (6) SCC - 378}, wherein in paragraph Nos.59 to 61, it has been held as follows:-

"59. The consequences of an order of attachment before judgment, as also an order of injunction, can be grave. By reason of such an order, a right of a party to the lis may be affected or remain under animated suspension. By reason of an interlocutory order whether in terms of Order 38, Order 39 or Order 40, a person's right to transfer a property may remain suspended as a result whereof he may suffer grave injury. When the suit is dismissed for default, he may exercise his right. If it is to be held that on restoration of the suit an order of attachment before judgment or an order of injunction is automatically revived, as a result whereof the status of the parties would be in the same position as on the date of passing of the initial interlocutory order, they may be proceeded with for violation of the order of injunction or an order of attachment before judgment. The right of subsequent purchaser may also be affected. By reason of taking recourse to supplemental proceedings, the rights of the parties and in some cases, the right of even a third party cannot be allowed to be taken away."

60. In this case, this Court is not concerned with the question as to whether substantive changes have been made in Order 38 Rule 5 by the Code of Civil Procedure, 1908 vis-a-vis the Code of Civil Procedure, 1859. The question is as to whether the power of the Court to pass an order of attachment before judgment is an ancillary power or a supplemental power. The provisions of Order 38 and Order 39 have been equated by the Court presumably not on the ground that they provide for different interlocutory reliefs but having regard to the nature of the proceedings vis-a-vis the reliefs which can ultimately be granted. It



would also not be correct to hold that the attachment proceedings is in effect and substance different from an order of injunction on the ground that the former is a part of execution process.

61. The provisions of Order 38 Rule 9 of the Code of Civil Procedure, in my considered opinion, are not of much importance. The rule confers an independent and substantive statutory right on a defendant to bring it to the notice of the Court that he is in a position to furnish security to meet the claim of the plaintiff and as such an order of attachment need not continue. The order of attachment also comes to an end in terms of the aforementioned provision when the suit is dismissed. The very nature of an order of attachment entails that in the event of dismissal of suit, the order comes to an end. Such a provision has been made by the legislature by way of abundant caution. Although it is of not much importance but we may notice that there exists a conflict of opinion as regards consequences of an order of attachment upon reversal of a judgment of dismissal of suit in appeal, namely, as to whether in the event the suit is decreed by the appellate Court, an order of attachment would automatically be restored or not."

12. In view of the above decisions and in view of the Madras High Court amendment under Rule 11 B, any order raising the attachment ought to have been communicated to the Registering Officer. In the case on hand, the suit was dismissed on 6/11/2013. There is no appeal filed thereafter and the same has become final. The order of attachment before judgment also is automatically raised. The learned District Munsif ought to have communicated this to the registering authority as per Rule 11 B of the Code of Civil Procedure at least after filing of I.A.No.215 of 2013. As there is no attachment that submits after the disposal of the suit, the endorsement registered before the Registrar has to be cancelled. In the above factual matrix, the learned District Munsif is directed to communicate to the Registering authority about the raising of attachment and pass suitable orders in I.A.No.215 of 2013 in I.A.No.292 of 2012 in O.S.No.64 of 2012 within a period of two weeks from the date of receipt of the copy of this order.

13. With the above direction, this Civil Revision Petition is disposed of. No costs.

Sd/-

Assistant Registrar (Per Admn)

/True copy/

Sub Assistant Registrar

To

1. The III Additional District Judge, Tirunelveli.
2. The District Munsif, Tirunelveli.

(For communicating the Registering Authority about the raising of attachment)

Mvs

<https://hcservices.ecourts.gov.in/hcservices/>
SR : 16.03.2015 : 4p/3c

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