

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Miscellaneous Appeal No.712 of 2014

JUDGMENT:

This appeal under Order XLIII Rule 1(a) of the Code of Civil Procedure, 1908 ('the Code' for short) by the defendant is directed against the common order dated 24.03.2014 of the learned I Additional District Judge, Visakhapatnam passed in IA.No.118 of 2014 and IA.No.182 of 2014 in IA.No.118 of 2014 in OS.No.102 of 2014.

2. I have heard the submissions of the learned counsel for the appellant/defendant ('the defendant', for brevity) and the learned counsel for the respondents/plaintiffs ('the plaintiffs', for brevity). I have perused the material record.

3. The basic facts necessary for consideration in this appeal, in brief, are as follows:

3.1 The plaintiffs had brought a suit against the defendant on the foot of a promissory note *inter alia* stating that the defendant had borrowed a sum of Rs.16,00,000/- from them on 30.03.2013 for the purpose of discharging his sundry debts and meeting his family expenses and had executed the suit promissory note agreeing to repay the said sum either to the plaintiffs or their order on demand and that in spite of requests, the defendant did not repay any amount either towards principal or interest and that the defendant had kept on postponing the issue on one pretext or the other and, hence, the plaintiffs are constrained to file the suit for recovery of the said sum together with interest and costs. The plaintiffs had also filed an interlocutory application in IA.No.118 of 2014 in the aforementioned suit for attachment before judgment of the immovable property of the defendant in an extent of Ac.0.78 cents in S.No.158/6 situate in Devada village of Kothavalasa Mandal, Vizianagaram District, which is a place not within the territorial

jurisdiction of the Court, in which the suit is instituted. The trial Court had first issued a show cause notice calling upon the defendant to show cause as to why the property should not be attached under Order 38 Rule 5 of the Code on the failure of the defendant to furnish security for the suit amount within ten (10) days from the date of service of the said notice.

3.2 While resisting the application filed by the plaintiff for attachment before judgment of the aforementioned property of the defendant, the defendant had further filed IA.No.182 of 2014 requesting to withdraw the show cause notice issued by the Court below. The plaintiff had resisted the said application of the defendant.

3.3 The trial Court having heard the submissions of the learned counsel for both the sides in the aforementioned two interlocutory applications had dismissed, on merits, the petition filed by the defendant and had allowed the petition of the plaintiffs and had directed attachment of the petition schedule property in accordance with the procedure contemplated under Section 136 of the Code by further directing that the attachment warrant shall be forwarded to the Central Nazareth, Vizianagaram for its execution. Aggrieved of the said common order, the defendant had preferred this appeal.

4. The learned counsel for the defendant would contend as follows:

None of the ingredients of Order 38 Rule 5 of the Code are satisfied for granting attachment before judgment. The said relief is an extreme relief and shall not be granted as a matter of course. The plaintiffs are obliged to plead and prove the conditions, which are required to be established. The plaintiffs ought to have pleaded and established that the defendant is about to dispose of the whole or any part of the schedule property and that the defendant is intending to delay and defeat the just claim of the plaintiffs. Even when a *prima facie* case is proved, an order of attachment cannot be straight away issued without following the procedure contemplated under law. The Court below is required to record reasons before ordering issuance of warrant of attachment of the immovable property. The allegations made by the plaintiffs in the suit and in the affidavit filed in support of the petition seeking

attachment are vague and the said allegations are made in a routine manner. Even the 3rd party affidavit filed in support of the claim of the plaintiffs also contains vague and routine averments. The specific case of the defendant is that the suit promissory note is not true and that it is fabricated for a huge amount even though the defendant does not know the identity of the plaintiffs and that the defendant had never borrowed any amount from the plaintiffs. The defendant had explained in his pleadings as to how the suit was engineered in collusion with K.Venkatareddy with whom the defendant is having a dispute. The Court below had erroneously observed that the attachment of property if ordered will not affect the right of the defendant to deal with the property. The said observation is erroneous as once attachment stands affected, it amounts to converting the unsecured suit debt into a secured debt and the defendant will be deprived of his right to deal with the property. The Court below did not deal with the facts and the legal position in a proper manner and had erroneously granted the order of attachment while allowing the petition of the plaintiffs and dismissing the petition of the defendant.

5. Per contra, the learned counsel for the plaintiffs while supporting common order of the trial Court had contended as follows:

The plaintiffs had filed the suit on the foot of a promissory note and the pleadings make it clear that the defendant is admitting his signature/s on the suit promissory note; but, he is falsely pleading certain circumstances to show that he does not know the plaintiffs and that he did not borrow any amount from the plaintiffs. If the pleadings of both the sides are examined, it is clear that the plaintiffs have got a *prima facie* case. The other material aspects of the pleadings which give raise to contentious issues need not be gone into at this stage as this court has to consider a *prima facie* case only at this stage. The plaintiffs had filed an affidavit of a 3rd party who is doing civil contracts and construction of buildings works since a long time. The defence of the defendant is to the effect that he is not having any other property except the schedule land and that he is an agriculturist doing agriculture work in the

village and that he is not having any capacity to furnish any security or 3rd party security for the suit amount. Therefore, even according to the defence, the defendant is not having any other property except the schedule property against which attachment before judgment was sought and ordered. Hence, if the attachment is raised and the defendant encumbers the property or alienates or otherwise transfers the same in any manner, the plaintiffs may not be able to realise the debt under the decree that may ultimately be granted in their favour and the decree that may ultimately be granted remains a paper decree. The trial Court having considered the pleadings, the facts and circumstances of the case in the right perspective had ordered attachment before judgment by following the procedure contemplated under law. No grounds much less valid grounds are made out by the defendant/appellant to allow the appeal. The order of the court below is a well reasoned order and calls for no interference.

6. Now the points for determination are –

1. Whether or not the plaintiffs had made out valid and sufficient grounds for ordering attachment before judgment of the schedule property?

2. Whether the common order of the trial Court is unsustainable under facts and in law as contended by the defendant?

7. **POINTS:**

7.1 The facts leading to the filing of the present appeal and the contentions of both the sides are already stated supra, in detail. The plaintiffs had brought the suit on the foot of a promissory note against the sole defendant for recovery of a substantial principal sum of Rs.16,00,000/- together with interest and costs. Along with the suit, the plaintiffs had also filed the interlocutory application in IA.No.118 of 2014 and had sought attachment before judgment of the immovable property of the defendant which is situate at a place in Vizianagaram district i.e., at a place which is not within the territorial jurisdiction of the Court in which the suit was instituted. Be that as it

may. The trial Court after hearing the learned counsel for the plaintiffs had issued a show cause notice directing the defendant to show cause as to why the property should not be attached on failure of showing sufficient cause within ten (10) days from the date of receipt of the said notice. The defendant had filed an interlocutory application in IA.No.182 of 2014 for withdrawing the said show cause notice issued by the Court below. Both the interlocutory applications were heard together and the common order was passed directing attachment of the schedule property as requested by the plaintiffs and dismissing the application of the defendant.

7.2 The defendant in the affidavit filed in support of his application had *inter alia* contended that he does not know the plaintiffs and that he did not borrow any amount from the plaintiffs and that the suit promissory note is created for a huge amount. According to the specific case of the defendant, he had a financial dispute with one K. Venkatareddy of Seethammadhara of Visakhapatnam, who is having finance and Petrol Bunk businesses at Vizianagaram, and that the said Venkatareddy had placed the defendant and his family members under threat and had forcibly and high handedly obtained the signatures and thumb impressions of the defendant and his family members on various blank promissory notes, blank cheques and other papers and that on that the defendant had got published a public notice narrating all the facts apprehending that the said Venkatareddy may initiate litigations in his name or through the name lenders against the defendant and the members of his family and that thereafter the said Venkatareddy had threatened the defendant on phone stating that he would file several cases against him and his family members in several courts in the entire Andhra Pradesh to cause mental agony and financial problems to the defendant and that after the said phone call, the defendant had immediately lodged a report with the Station House Officer, Kothavalasa police station against the said person and his brother and that a case in crime no.47 of 2014 was also registered and that the said crime is under investigation and that the plaintiffs who are the business partners and relatives of the said Venkatareddy had filed this suit on a concocted document and that the debt is not enforceable.

Based on this line of defence the learned counsel for the defendant would contend that the suit promissory note is not true and that the plaintiffs have no case much less a *prima facie* case. *Per contra* the learned counsel for the plaintiffs would submit that there is no specific denial of the signature of the defendant on the suit promissory note and that on the other hand, the defendant is contending that the suit promissory note is concocted on a blank document on which the signature of the defendant was obtained by Venkatareddy and that the said defence of the defendant is false and that, in any view of the matter, since the signature on the suit promissory note is admitted, it can be inferred at this stage that the plaintiffs have a *prima facie* case. Be that as it may. The material question as to whether the suit promissory note is true or not has to be gone into after full fledged trial and no findings in regard to the truth or otherwise of the suit promissory note or any other findings, which will have a bearing on the merits of the issues involved in the suit, need be recorded at this stage while deciding these two interlocutory applications.

7.3 The plaintiffs having brought the suit for recovery of a huge amount had sought attachment of the immovable property of the defendant, which even according to the defendant is his only property. The plaintiffs had categorically alleged in the affidavit filed in support of their petition that on their enquiries made personally and through middlemen they had come to know that the defendant is having the schedule land. They had also pleaded that they had further learnt through one Senapathi Ramu, who is a resident of Visakhapatnam and who is said to be under taking civil contract works and constructions of buildings, that the defendant is trying to sell away his petition schedule landed property. In support of the said averment, the plaintiffs had also got filed the affidavit of another 3rd party-Chebolu Hemantha Kumar who is said to be doing civil contracts and construction of buildings works since a long time. According to his version, he had met the defendant in connection with his business and that the defendant had informed him that the defendant is having land in his village and that he is intending to sell the same and had asked him to look for suitable purchasers. In the affidavit of the defendant

filed in support of his application for recalling the show cause notice, the defendant had no doubt categorically stated that he has no necessity to borrow the amount or capacity to furnish the security for the suit amount. It is also his contention that there is no necessity for him to alienate the property. He did not specifically and explicitly affirm in his affidavit that he is not going to alienate the property; and, he also did not undertake that he will not encumber or alienate or transfer in any manner his property i.e., the petition schedule property. As rightly contended, if the defendant alienates the schedule property, which is his only property, the plaintiffs will not be able to realise the amount that may be due under the decree that may ultimately be passed in favour of the plaintiffs in the suit. Admittedly, the defendant is not having any property within the jurisdiction of the Court at Visakhapatnam. Except contending that the suit promissory note is concocted in the circumstances stated in the defence, no sufficient cause is shown for not ordering attachment and/or for withdrawing the show cause notice. Therefore, there is sufficient material on record to come to a safe conclusion that the defendant is about to dispose of the whole of his property. Having regard to reasons recorded supra, this Court is satisfied that the plaintiffs have made out a *prima facie* case and are able to show that their claim is bona fide. Having thus given earnest consideration to the pleadings, the facts and the submissions this Court is satisfied that the plaintiffs had made out sufficient case to safely hold that the case of the plaintiffs satisfied the existence of necessary facts and legal ingredients for ordering attachment before judgment of the schedule property and that there are no tenable objections in the defence of the defendant.

7.4 Before proceeding further, it is necessary to state that the learned counsel for the defendant had placed reliance on the following two decisions.

1. Raman Tech & Process Engg.Co., and another v. Solanki Traders ^[1]
2. Mandala Suryanarayana @ Babji v. Sri Barla Babu Rao ^[2]

In the decision in **Raman Tech** (1 supra) it is stated that the object of Order

38 Rule 5 of the Code in particular, is to prevent any defendant from defeating the realisation of the debt due under the decree that may ultimately be passed in favour of the plaintiff either by attempting to dispose of the immovable properties, or remove from the jurisdiction of the court, his movables. In this decision, it is further held as follows:

‘The Scheme of Order 38 and the use of the words ‘to obstruct or delay the execution of any decree that may be passed against him’ in Rule 5 make it clear that before exercising the power under the said Rule, the court should be satisfied that there is a reasonable chance of a decree being passed in the suit against the defendant. This would mean that the court should be satisfied the plaintiff has a *prima facie* case. If the averments in the plaint and the documents produced in support of it, do not satisfy the court about the existence of a *prima facie* case, the court will not go to the next stage of examining whether the interest of the plaintiff should be protected by exercising power under Order 38 Rule 5 CPC. It is well-settled that merely having a just or valid claim or a *prima facie* case, will not entitle the plaintiff to an order of attachment before judgment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. Equally well settled is the position that even where the defendant is removing or disposing his assets, an attachment before judgment will not be issued, if the plaintiff is not able to satisfy that he has a *prima facie* case. The power under Order 38 Rule 5 CPC is drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It Should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged.

The decision in **Mandala Suryanarayana @ Babji** (2 supra) was rendered after referring to the ratio in the aforementioned decision of the Supreme Court. The relevant ratio in this cited case is as under:

‘The power of the Court to order attachment before judgment is attracted only when plaintiff pleads and *prima facie* proves two conditions precedent. These are: that the defendant is about to dispose of whole or any part of his property and defendant is about to remove the property from local limits of jurisdiction of the Court. Even when such *prima facie* case is proved, an order of attachment cannot be straightaway issued without following procedure contemplated in Rule 5 of Order XXXVIII of CPC. The said Rule requires the Court to direct defendant to furnish security in such a sum as may be specified within the time stipulated by the Court. At the stage of Order XXXVIII Rule 5 of CPC, the order shall be in Form No.5 of Appendix-F of CPC....’

There is no dispute with the ratios in the precedents. It is already held in this case that the plaintiffs had satisfied the necessary ingredients and that if no

attachment is granted against the only property of the defendant, the defendant cannot be prevented from defeating the realisation of the debt that may be due under the decree that may ultimately be passed in favour of the plaintiffs.

7.5 Viewed thus, this Court finds that the Court below is justified in allowing the petition of the plaintiffs and directing the attachment before judgment of the petition schedule property and in dismissing the application of the defendant, which is filed for recalling the show cause notice. The Court below had very rightly directed that the procedure as contemplated under Section 136 be followed and that the attachment warrant be forwarded to the Central Nazareth, Vizianagaram for its execution and affecting attachment of the property as the property is situate at a place within Vizianagaram District, which is outside the territorial jurisdiction of the trial court. Points are accordingly answered in favour of the plaintiffs and against the appellant/defendant.

8. In the result, the Civil Miscellaneous Appeal is dismissed. There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this appeal shall stand closed.

M. SEETHARAMA MURTI, J

27th August, 2015
Vjl

[\[1\]](#) (2008)2 SCC 302

[\[2\]](#) 2010 (2) ALT 839 (DB)