



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 22.12.2016

CORAM:

WEB COPY

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P(MD)No.2603 of 2016 (PD)

S.T.ShanmugansundaramPetitioner/ Petitioner/Plaintiff

Vs.

1.P.Gnanasekaran

2.G.MagudadeviRespondents/Respondents/Defendants

PRAYER: Civil Revision Petition is filed, under Article 227 of the Constitution of India, against the Fair and Decreetal order passed in I.A.No.259 of 2016 in O.S.No.136 of 2016 dated 02.11.2016, on the file of the I Additional District Court, Madurai.

For Petitioner : Mr. F.X.Eugene

For Respondents : Mr.D.Senthil

ORDER

The petitioner has filed this Civil Revision Petition against the Fair and Decreetal order passed in I.A.No.259 of 2016 in O.S.No.136 of 2016 dated 02.11.2016, on the file of the I Additional District Court, Madurai.

2.The petitioner is the plaintiff. The respondents are the defendants. The petitioner filed a suit in O.S.No.136 of 2016 before the District Court, Madurai for recovery of sum of Rs.74,57,250/- against the respondents 1 & 2. Along with suit, I.A.No.259 of 2016 was also filed for Attachment Before Judgement. According to the petitioner, he apprehends that respondents would sell the property with a view to defeat and delay the interest of the petitioner in the event of decree being passed in his favour. The petitioner also filed third party affidavit to show that the respondents are making arrangements to sell the property. Notice was ordered to the respondents to show cause as to furnish the security or to show cause why he need not furnish the security.

3.The respondents filed counter and stated that they borrowed a sum of Rs.15,00,000/- and executed a registered mortgage deed for the first and second item of the property. To secure the said loan, the petitioner filed the document and filed the present suit to usurp the properties of the respondents and claiming huge amount. The properties cannot be attached as the same are already mortgaged to the respondents. The petitioner and prayed for dismissal of the petition.



4.The learned Judge considering the averments made in the affidavit and counter affidavit and judgment of the Apex Court, dismissed the application holding that the petitioner has not made out any case for Attachment Before Judgment.

5.Against the said order of dismissal, the petitioner has come out with the present Civil Revision Petition.

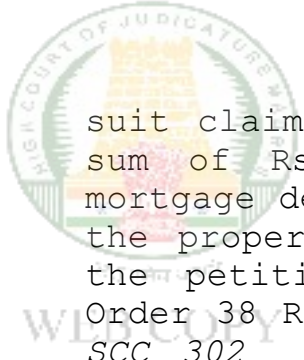
6.The learned counsel for the petitioner submitted that the learned Judge failed to consider the provisions of Order 38 Rule 5 and 6 of C.P.C., properly. The learned Judge failed to see that the suit is for recovery of Rs.74,57,250/- and property mortgaged is only to secure the loan of Rs.15,00,000/-. The learned Judge failed to properly consider the averments mentioned in the affidavit and third party affidavit. The petitioner proved that the respondents are taking steps to sell the property by filing third party affidavit. He further submitted that he has not filed the suit for recovery of Rs.15,00,000/- under mortgage.

7.The learned counsel appearing for the caveator submitted that the respondents borrowed a sum of Rs.15,00,000/- and executed the mortgage and the respondents are disputing the suit claim and the petitioner forged the document and filed the suit and the petitioner has not made out any case for Attachment Before Judgment. The respondent has made out the case for not attaching the property. The learned Judge has considered all the aspects and Order 38 Rule 5 and 6 of C.P.C., and dismissed the application and there is no reason to interfere with the said finding.

8.I have heard the learned counsel appearing for the petitioner and the respondent and also perused the entire materials on record.

9.A reading of Provisions of Order 38 Rule 5 and 6 of C.P.C., would show that said Rules are incorporated with a view to protect the interest of the plaintiff, pending suit, so that he can realise fruits of the decree which may be ultimately passed after conclusion of trial. For getting Attachment Before Judgment, the plaintiff must make out a prima facie case that the defendant is making arrangement to alienate or encumber the property with an intention to defeat and delay the realisation of the decretal amounts. Mere bald or vague statement or apprehension of the petitioner that the defendant is making arrangements to alienate the properties will not entitle him to Order Attachment Before Judgment. It is well settled that the plaintiff cannot convert the un-settled loan as settled loan. The defendant is also entitled to show that the plaintiff has not made out any case for directing the defendant to furnish security or for Attachment Before Judgment.

10.In the present case, the petitioner has stated that he apprehends that the respondent is trying to alienate the property with a view to delay the execution of decree, which may be passed in his favour. To substantiate his case he filed an affidavit from the respondent. Initially, notice was issued to the respondent to furnish security or to satisfy the Court that he need not furnish the security. The respondent filed counter and disputed the entire



suit claim. The petitioner has submitted that he borrowed only a sum of Rs.15,00,000/- from the respondent and he executed a mortgage deed in favour of the petitioner creating the charge over the property, for due to repayment of the amounts borrowed from the petitioner. The learned Judge considered the provision of Order 38 Rule 5 and 6 of C.P.C., and judgment reported in 2008(2) SCC 302 *Raman Tech & Process Engg. Co., v. Solankri Traders*, dismissed the application filed by the petitioner for Attachment Before Judgment. The petitioner has not made out any prima facie case for Attachment Before Judgment. The property said to be attached are already mortgaged in favour of the petitioner.

11.The learned Judge considered all these materials on record and Order 38 Rule 5 & 6 and judgment of Apex Court in proper perspective and dismissed the suit. The petitioner is seeking Attachment Before Judgement of the property belonging to the respondent on mere apprehension that he is going to alienate the property. In view of the averments made in the affidavit, the learned Judge rightly held that the petitioner failed to prove that the petitioner has made out prima facie case for attachment before Judgement. In the circumstances, the learned Judge has exercised his jurisdiction in proper perspective and there is no illegality or irregularity warranting interference by this Court.

12.In the result, the Civil Revision Petition is dismissed. No costs. Consequently, connected miscellaneous petition is also closed.

Sd/-

Assistant Registrar(CSII)

/True Copy/

Sub-Assistant Registrar

To

The I Additional District Court,
Madurai.

Copy to:-

The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court, Madurai

+One cc to Mr.D.Senthil, Advocate, SR.No.83084
+One cc to Mr.K.Mathan, Advocate, SR.No.68528
+One cc to Mr.F.X.Eugene, Advocate, SR.no.82670

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RL/6C/3P/SV/24.1.2017

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