

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

CIVIL REVISION PETITION No.5137 of 2016

ORDER:

The unsuccessful petitioner in I.A.No.174 of 2016 seeking attachment before judgment of the Flat No.2E bearing No.8-2-269/3/MF/2E in the 2nd Floor, May Fair Apartments, within its plinth area admeasuring 1698 square feet including with common areas, with undivided 1/38th right in the land admeasuring 68.42 square yards out of 2600 square yards in the premises municipal number supra of road No.2, Banjara Hills, Hyderabad, within the boundaries described saying that it is one of the properties of late Kistaiah no other than husband of 1st respondent and father of other respondents; pending disposal of the suit claim in O.S.No.99 of 2016 maintained for recovery of Rs.35,00,000/- with interest and costs stating said Kistaiah on 06.08.2013 borrowed and received Rs.25,00,000/- and again received Rs.10,00,000/- on 28.08.2013 and passed receipt undertaking to repay and on 20.03.2015 also he wrote a letter to the plaintiff for settlement of the account on or before 10.04.2015 and while so, he breathed last on 12.06.2015 and despite demand notice dated 09.12.2015 to the defendants with a false reply they are not paying and on the other hand they are trying to alienate the property to third parties and already alienated part of property of the deceased in their hands by sale deed which are reflected by Exs.P1 to P8 before the lower Court covered by the impugned order. It is the submission of even a third party affidavit also filed of the tenant of the premises sought to be attached of persons visiting who the prospective purchasers to substantiate. The contest of the respondents in the counter affidavit of 1st respondent while denying liability and execution, on the other hand saying

payments already made by the deceased to the plaintiff and not liable further to pay any amount. The lower Court since dismissed the application, the revision maintained saying lower Court went wrong in dismissal of the application without appreciation of facts and hence to allow the revision by setting aside the dismissal order and by granting conditional order of attachment before judgment.

A perusal of the impugned order of the lower Court while reflecting some of the facts however by referring to the Exs.P1 to P8 which are documents referred supra in saying there is no agreement of sale executed by respondents in favour of the petitioners saying the alleged offer by them of the landed property in plots 248 and 249 in S.No.96/10 and 97 of Bandlaguda, Rajendra Nagar Mandal, Hyderabad, to make believe said oral submission, the notice issued is after death of kistaiah demanding the suit claim and the respondents issued reply denying the liability and there is no proof filed regarding the petition schedule sought for attachment owned by late kistaiah and lying in the hands of the defendants, though Ex.P7 sale deed executed by the defendants in favour of third party belongs to Kistaiah after his death and plaintiff failed to establish that defendants are trying to leave the jurisdiction of the Court to avoid suit amount even in the event of its decree, apart from the respondents are Government employees or software engineers as the case may be and contention of plaintiff that to deprive him to get the fruits of the decree they are trying to alienate cannot be considered.

The respondent even served the notice on the advocate on record failed to attend. Heard and perused the impugned order of the lower Court.

What Order 38 Rules 5 to 7 CPC as follows:

“5. Where defendant may be called upon to furnish security for production of property.- (1) Where, at any stage of a suit, the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,—

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule, such attachment shall be void.

6. Attachment where cause not shown or security not furnished.- (1) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the court, the court may **Order** that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

(2) Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the court shall order the attachment to be withdrawn, or make such other order as it thinks fit.

7. Mode of making attachment.- Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree.”

Here respondents served with notice and filed counter. It is affidavit averment of the plaintiff before the lower Court apart from that third party affidavit of the schedule property sought for attachment shows trying to alienate, that they already alienated some of the property of deceased after his death and if they are allowed to alienate it is difficult to realize the debt. That is in fact sufficient to constitute the requirements of Order 38 Rule 5 as the attempt for

alienation by the respondents when claimed by plaintiff is with intend to delay the execution and deprive the fruits of the suit claim and it is not even the case of the defendants that what the property alienated covered by Ex.P7 of the deceased after his death lying in their hands is distributed to any legitimate creditors or they are ready to pay any debt due. No doubt they are denying the suit claim. But it is not even to say ready to furnish any security to satisfy in the event of plaintiff's success. The third party affidavit of the tenant of the premises under the respondents/defendants also show prospective purchasers are coming in support of the attempt of the respondents to alienate and the counter of respondents no way say the petition schedule sought to be attached does not belong to deceased Kistaiah and not even in their hands as legal representatives succeeded, leave about Section 52 (2) CPC for non accounting of what proceeds of the sale covered by Ex.P7 not properly distributed to creditors to make the respondents even personally liable as if decree against them, otherwise decree to be passed is against the estate of the deceased in the hands of legal representatives, the respondents. The means of the respondents thus no way criteria in dismissing the application for attachment before judgment by the lower Court.

Hence, the order of the lower Court dismissing the application is unsustainable and the same is set aside by directing the respondents to furnish any immovable property security for satisfaction of the suit claim in the event of its decree within three (03) weeks from the date of receipt of this order and not to alienate the property sought for attachment meantime and in the event of failure to furnish security the lower Court shall cause the property to be attached before judgment.

Accordingly and in the result, the revision petition is allowed.

No costs.

Consequently, miscellaneous petitions, if any shall stand closed.

JUSTICE Dr. B.SIVA SANKARA RAO

Date: 17.11.2016
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