

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:07.08.2017

CORAM:

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

CRP (PD) NO.2701 of 2017

Boopathi

... Petitioner

versus

1. M/s. Sree Thendral Finance,
Registered Firm,
Represented by its Manager C.Natarjan,
No. 67, Kamarajar Street, Maniam Complex,
Salem-636 001.

2. Chitra

... Respondents

PRAYER: Civil Revision Petition has filed under Section 227 of the Constitution of India, for a direction directing the learned II Additional Subordinate Judge, Salem to entertain the Unnumbered Batta Memo No... of 2017 in I.A.No.379 of 2012 in O.S.No.402 of 2012 filed by the petitioner.

For Petitioner : Mr.S.Prabhakaran
Senior Advocate
for Mr.R.Nalliyappan

ORDER

The petitioner is the second defendant in the suit. The Subordinate Court, Salem has ordered attachment before the judgment on 22.12.2012 and the same was made absolute on 08.01.2013. Thereafter, by order dated 27.03.2015, the suit was dismissed and the attachment made on the suit property was also raised. Subsequently, the petition filed under order XXXVIII Rule 9 was also dismissed with a direction to inform the concerned Sub Registrar.

2. The petitioner/second defendant has filed communication batta memo to communicate the order of the Trial Court to Sub Registrar's Office. However, the said memo was returned by the Court on 27.07.2017, with the following endorsement:

"1) The batta represented in the open Court by counsel for respondents / defendants in O.S.402/12 in the Open Court.

2) When the matter is pending before Appellate Court

in AS 96/15 it is not fair to pass any order without hearing other side.

3) This Batta should be filed along with memo after giving due notice to other side.

4) Though the order was passed by this Court on 27.3.15, now the Appeal is pending and Batta presented after lapse of 2 years more over back bundle not available with this Court.

5) hence this Batta is returned for the reasons stated above and it has to be filed in the manner known to law and in accordance with natural justice.

Time one month."

Aggrieved over the return made by the Trial Court, the Civil Revision Petition came to be filed.

3. The learned Senior Counsel appearing for the petitioner would submit that as per the provisions contained under Order XXXVIII Rule 9 CPC, where an order is made for attachment before judgment, the Court shall order the

attachment to be withdrawn when the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed. In the instant case the suit itself was dismissed and the learned Sub Judge has also raised the attachment by dismissing the petition filed under Order XXXVIII Rule 9 of the C.P.C with a direction to communicate the order of attachment to the Sub Registrar. While the matter stood thus, the requirement under Order XXXVIII Rule 9 is complied with and the Court cannot stick on to other formalities.

4. The learned Senior Counsel for the petitioner would rely on a judgment of this Court in ***Letchumanan Vs Karuppan [CDJ 1998 MHC 986]*** wherein it is observed that:-

"A perusal of the said provision shows that the court shall order the attachment to be withdrawn when the defendant furnishes the security required together with security for the costs of the attachment when the suit is dismissed. As stated earlier, neither the sufficiency of the security nor the genuineness of the security is doubted. In the said circumstances, the

relief sought for under Order XXXVIII, Rule 9, Civil Procedure Code is mandatory and the court is bound to pass a consequential order."

5. The learned Senior Counsel for the petitioner would rely on another judgment of this Court in **BALARAJU CHETTIAR VS. MASILAMANI PILLAI AND OTHERS [1930 (58) MLJ 675]** wherein it is observed as follows:

" The object, therefore, of the attachment is to satisfy any decree which may be passed in the suit; and if this is read with Order 9, it seems clear that so far as this attachment is concerned, the decree passed in the suit is the decree passed by the Trial Court and not the appellate decree. If it were the decree which might be passed in appeal, there would be no reason why the attachment should be withdrawn merely because the suit is dismissed by the Trial Court and still less would there be any reason for making it compulsory for the Court to withdraw such an attachment. Evidently, therefore, the attachment is for a purpose which depends on the decree of the Trial Court. If the Court decrees the suit, the attachment will of course continue, but if the Court dismisses the suit, the fact that it

is enjoined to withdraw the attachment shows that the attachment is not made as security for the decree which may be passed in appeal, but for the decree which may be passed by the Trial Court. We see no reason to depart from the consensus of opinion of all the other Courts which have dealt with this question, especially as it is a matter of procedure. Of the two cases in this Court which have resulted in conflicting decisions, the later is in favour of the view held by the other Courts."

6. Therefore, it is very clear that if the Court dismisses the suit, the order of attachment stands withdraw, as it would not be security for the decree, which may be passed in the appeal. Therefore, the pendency of the appeal as cited by the Court below is not a valid reason for returning the memo. Further, by order dated 27.03.2015, the Court has already passed the consequential order by directing to communicate the same to the concerned Sub Registrar. Once decision is taken, the procedure of carrying out it is only Ministerial and no judicial order is required.

7. The petitioner has filed a communication Batta to

carry out the order passed by the Trial Court. As long as the attachment continues, the petitioner is entitled to get it deleted from the Sub Register Office, by communicating the order passed by the Trial Court and no notice is required to be served on the other side. Therefore, a direction is issued to the learned Second Additional Sub Judge, Salem, to entertain the unnumbered batta memo No... of 2017 in I.A.No.379 of 2012 in O.S.No.402 of 2012 and pass orders, on merits and in accordance with law, within a period of one month from the date of receipt of a copy of this order, provided there is no other order of attachment passed by the Appellate Court in A.S.No.96 of 2015.

8. With the above observation and direction, this Civil Revision Petition is disposed of. No Costs.

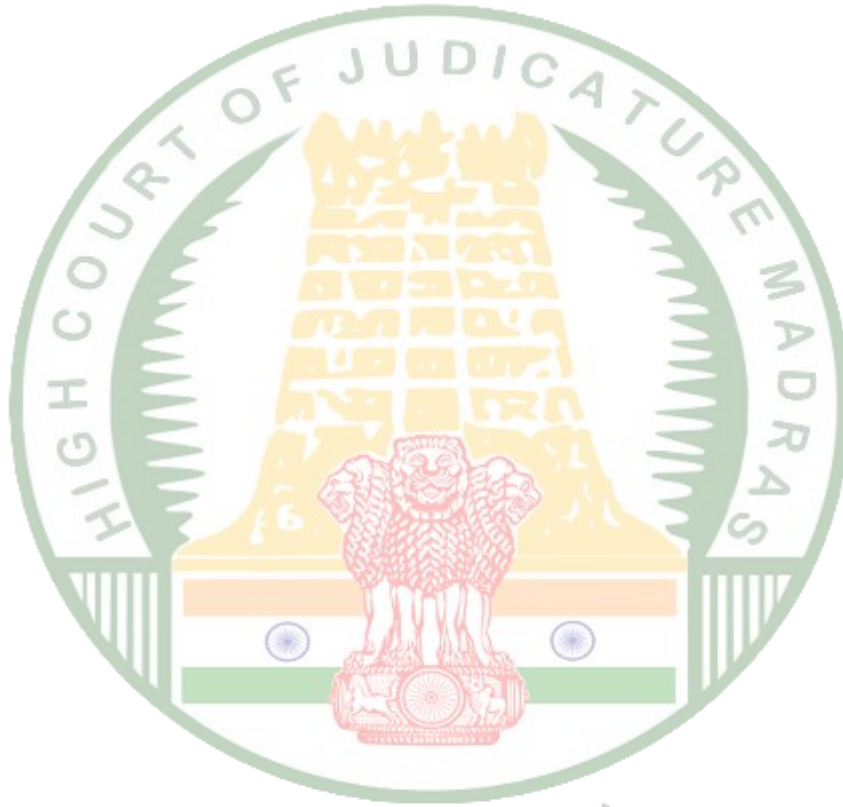
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To

The Second Additional Subordinate Judge
Salem.



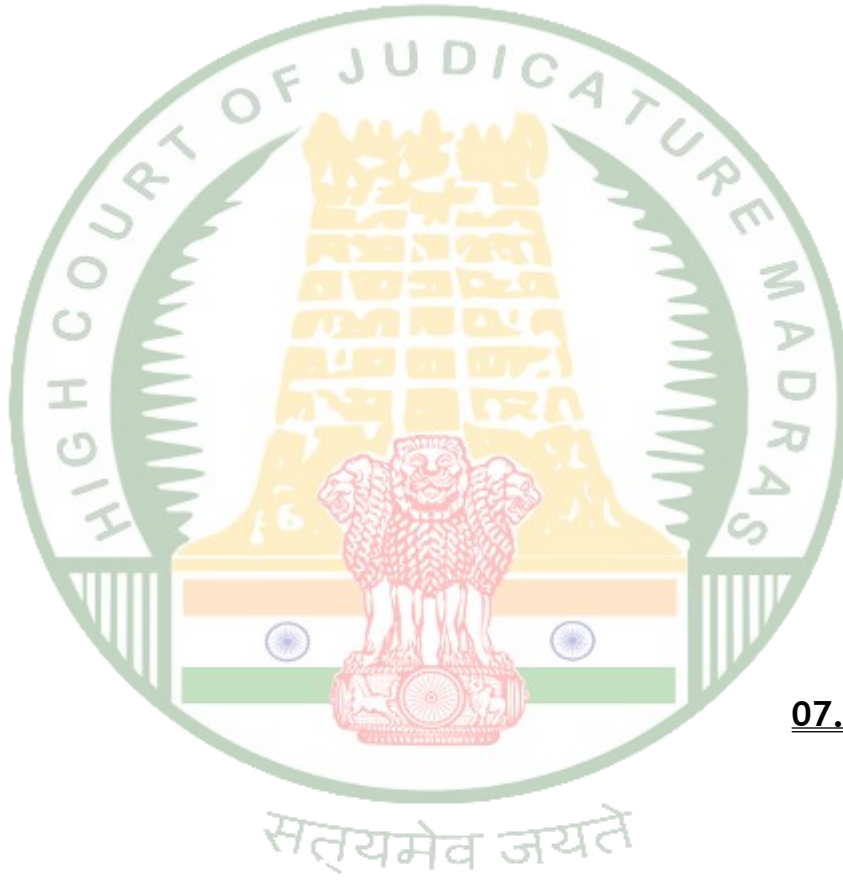
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M.GOVINDARAJ, J.

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