

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 03.04.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

CRP(PD)No.1615 of 2013

M/s.Color Chemicals,

A Registered Partnership Firm,

Rep. by its Power Agent

K.Kolanji

.. Petitioner

vs.

1.M.Dhanalakshmi

2.Nallammal

3.Kaviraj

4.Minor. Kamalraj

.. Respondents

Rep. by mother N.Dhanalakshmi

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against the Fair and Final Order dated 21.12.2012 made in I.A.No.475 of 2012 in O.S.No.168 of 2012, on the file of the First Additional Subordinate Court, Erode.

For Petitioner : Mr.V.P.Sengottuvel

For Respondents : Mr.A.K.Kumarasamy (for R1 to R3)

ORDER

The plaintiff is the civil revision petitioner before this Court, challenging the order in I.A.No.475 of 2012 in O.S.No.168 of 2012, dated 21.12.2012, on the file of the First Additional Subordinate Court, Erode.

2.The case of the petitioner/plaintiff is that the petitioner is the power agent of M/s.Color Chemicals, a registered Partnership firm.

3.The petitioner/plaintiff further states that the plaintiff is the registered partnership firm having its office at No.73, Bhavani Main Road, Veerappanchatram, Erode-4 and doing business in Dyes and Chemicals. The first defendant and her husband late A.Mohanasundaram were the partners of M/s.Kamalraj Process. The said concern was doing business at No.242, West Street, Sengunthapuram Chithode, Erode District and the said concern is one of the customers of the plaintiff concern and was regularly purchasing Dyes and Chemicals from the petitioner/plaintiff concern on credit basis. Since 2009, pursuant to various orders placed by through order

from and telephone message the said concern the plaintiff concern sold and supplied various quantities of Dyes and Chemicals on credit basis to the said concern for the past several years. The petitioner/plaintiff also made the supplies of the said materials as per the above mentioned orders and also sent their invoice cum delivery challans along with the said supplies. The petitioner/plaintiff made the last payment to the respondents/defendants on 04.10.2011 by way of cheque towards part satisfaction of its liability.

4.The petitioner/plaintiff also states that the balance payment for the materials was to be made by the said respondents concern within 120 days from the date of the invoice and the contractual rate of interest as mentioned in the invoice was to be paid at the rate of 24% per annum by the said concern for delayed payments. It is apparent from the above said invoices and relevant accounts details kept by the plaintiff in its regular course of business that as on 07.05.2012 a principal amount of Rs.4,73,083.20/- is due and payable by the said concern to the plaintiff and as on 07.05.2012 an interest of Rs.1,00,775.40/- with the interest at the rate of 24% p.a. on the principal is due and payable by the said concern to the plaintiff. Therefore, as on 07.05.2012, a total sum of Rs.5,73,858.60/- is due and payable by the said concern to the

plaintiff. Therefore, the said Mr.A.Mohanasundaram is liable to answer the claim of the plaintiff. Therefore, the petitioner/plaintiff has initiated the said suit for the claim amount of Rs.4,73,083.20/- with the interest at the rate of 24% per annum upto 03.04.2012 by totally Rs.5,73,858.60/-.

5. Along with the suit, the petitioner/plaintiff also filed an application in I.A.No.475 of 2012 for attachment of the properties. In the said application, the plaintiff states that the respondents/defendants were attempting to alienate the petition mentioned property to third parties and the petitioner/plaintiff saw the first respondent negotiation with one real estate broker on 03.05.2012. Therefore, he filed the above application to furnish security for the satisfaction of the decree amount and prayed the Court below for granting order of attachment of the petition mentioned property.

6. The respondents/defendants have filed the written statement along with the counter in I.A.No.475 of 2012 and the written statement in O.S.No.168 of 2012. In the written statement, the respondents/defendants stated that the suit itself is not maintainable and it is hit by Order 3 Rule 2 of C.P.C., without filing the application and without leave of the Court, the said application is not

maintainable and the same is liable to be dismissed.

7.The respondents/defendants were admitted that the deceased Mohanasundaram was a partner and he was died and therefore, the respondents are the legal heirs of the said Mohanasundaram. The respondents/defendants also stated that the attachment sought for by the petitioner/plaintiff was already pledged with Indian Overseas Bank, Periyasemur Branch. The said bank also initiated proceedings against the respondents based on the property under the loan No.718/term loan 260600007/term loan 260900001. Therefore, the petitioner cannot proceed against the properties now sought to be attached.

8.Apart from this, the respondents also stated that there is no evidence to show that the respondents negotiation for the sale of property and if the attachment was ordered by the trial Court, there will be serious loss to the respondents as well as the bank. The respondents also stated that without prejudice to the contentions raised in the affidavit, without filing an application for temporary injunction, the present application for attachment before judgment is not maintainable, since there was no privity of contract between the petitioner and the respondents. Therefore, the present suit itself is

not maintainable and all the documents are fabricated on perusal of the documents on 03.08.2012 and the suit itself is barred by limitation. Therefore, the respondents/defendants prayed for dismissal of the said application.

9.Considering both side arguments, the learned First Additional Subordinate Judge, Erode was pleased to dismissed the application, on the ground that the petitioner is bound to disclose the particulars about the allegations levelled by the respondent to dispose the said property. The petitioner also states that the burden is upon the petitioner to show that the respondent has made attempts to encumber the property so as to defraud the claim of the petitioner. But, the petitioner has not made specific averment in this petition regarding the allegation that the respondent is making attempt to sell the properties to the third parties. In the absence of any specific allegation the extra ordinary remedy should not be granted.

10.Apart from this, the learned Judge also states that the defendant is not debarred from dealing with his property merely because the suit is filed against him. In order to get the relief, the petitioner must make a specific averment which would warrant for getting such relief. Considering the case in the order passed by this

Court reported in **2010 (1) M.W.N. Page 432**, the learned Judge also dismissed the application on the ground that the above said judgment mere filing of suit or averment in affidavit cannot by itself suffice for granting relief of attachment before judgment. The learned Judge also states that the plaintiff must make specific averment to warrant order for furnishing security or attachment before judgment.

11.I heard Mr.V.P.Sengottuvel, learned counsel appearing for the petitioner and Mr.A.K.Kumarasamy, learned counsel appearing for the respondents and perused all the records.

12.Admittedly, there is a claim made by the petitioner/plaintiff alleged that the petitioner/plaintiff was made the supplies of the said materials to the respondents/defendants. It is the case of the petitioner/plaintiff that the respondents/defendants should pay the said amount from the date of delivery within 20 days, but if not paid the said amount within the time, the respondent should pay the interest at the rate of 24% per annum to the petitioner/plaintiff.

13.Apart from this, it is the case of the petitioner/plaintiff that the petitioner/plaintiff was made the supplies of the said materials to the first defendant's husband late A.Mohanasundaram. Therefore, the

petitioner/plaintiff has to prove whether the deceased Mohanasundaram being made the payment of the said claim in O.S.No.168 of 2012 or not. Therefore, on evidence, on the trial made in the suit only the claim should be proved and dismissed the said application. Challenging the said order dated 21.12.2012 made in I.A.No.475 of 2012 in O.S.No.168 of 2012, on the file of the First Additional Subordinate Court, Erode, this petitioner has been filed the present Civil Revision Petition before this Court.

14.Apart from this, it is the case of the petitioner/plaintiff that the application filed under Order 38 Rule 5 of C.P.C. seeking attachment of the properties. Order 38 Rule 5 of C.P.C. is 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.]”

15. The learned counsel appearing for the petitioner has produced the judgment in the case of ***Sardar Govindrao Mahadik and another v. Devi Sahai and others*** reported in ***AIR 1982 Supreme Court 989(1)***, the said Judgment, the Hon'ble Apex Court has held as follows:

"58.What is the effect of attachment before judgment? Attachment before judgment is levied where the court on an application of the plaintiff is satisfied 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 sole object behind the order levying attachment before judgment is to give an assurance to the plaintiff that his decree if made would be satisfied. It is a sort of a guarantee against decree becoming infructuous for want of property available from which the plaintiff can satisfy the decree. The provision in Section 64 of the Code of Civil Procedure provides that where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment debtor of any debt, dividend or other monies contrary to. such attachment, shall be void as against all claims enforceable under the attachment. What is claimed enforceable is the claim for which the decree is made. Motilal's suit was for a money claim. It finally ended in a

decree for Rs. 500/- by High Court and in between the 1st appellate court had dismissed Motilal's suit in entirety. There is nothing to show that the attachment which would come to an end on the suit being dismissed would get revived if a second appeal is filed which ultimately succeeds. In fact, a dismissal of the suit may terminate the attachment and the same would not be revived even if the suit is restored and this becomes manifestly clear from the newly added provision in sub rule (2) of Rule 11-A of Order XXXIII, C.P.C. which provides that attachment before judgment in a suit which is dismissed for default shall not be revived merely because by reason of the fact that the order for the dismissal of the suit for default has been set aside and the suit has been restored. As a corollary it would appear that if attachment before judgment is obtained in a suit which ends in a decree but if in appeal the decree is set aside the attachment of necessity must fail. There should be no difficulty in reaching this conclusion."

16.Per contra, the learned counsel appearing for the respondents has produced two judgments reported in

(i) ***M.K.Hariprasad, Sole Proprietor, Yehem Agency, 60, Gangadeeswarar Koil Street, Purasaiwalkam, Chennai-600 084 and another v. Uma Keshav*** reported in **2010 (1) MWN (Civil) 432**, this Court has held as follows:

“Code of Civil Procedure, 1908 (5 of 1908), Order 38, Rule 5 – Power under provision is drastic and extraordinary – Mere filing of Suit or averment in affidavit cannot by itself suffice for granting relief of attachment before judgment – Plaintiff must make specific averment to warrant order for furnishing security or attachment before judgment – Held, order of Single Judge denying relief is perfectly valid.”

(ii) ***Pappal and another v. C.Nagarajan and another*** reported in **2012-3-L.W. 928** held as follows:

“property is under the prior mortgage, it does not mean that the property cannot be brought for sale, but the sale could be effected subject to mortgage.”

17. In yet another judgment passed by the Hon'ble Apex Court in the case of ***Raman Tech & Process Engg. Co. and another v. Solanki Traders*** reported in **2008 (2) MLJ 1058 (SC)**, wherein the

Hon'ble Apex Court has held as follows:

"5. The power under Order 38, Rule 5, C.P.C. 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. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out of court settlement, under threat of attachment.

6. A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him. Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment. A plaintiff should show, prima facie, that his claim is bonafide and valid and also satisfy the court that the defendant is about to remove or dispose of the

whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38 Rule 5. C.P.C. Courts should also keep in view the principles relating to grant of attachment before judgment (See – Prem Raj Mundra v. Md. Maneck Gazi, AIR (1951) Cal.156, for a clear summary of the principles.)”

18.If the plaintiff has filed the suit for recovery of money or the averment in the affidavit cannot be itself suffice for granting the relief of attachment of the judgment. In order to get the relief of direction for furnishing security or in default, attachment of the judgment, the petitioner/plaintiff who seeks the remedy must make a specific averment which would warrant for getting such a relief. The case of the petitioner that it is a drastic and extraordinary power vested in the hands of the Court under Order 38 Rule 5 of CPC.

19.When this Court need not go into decide the claim, the petitioner claim itself is barred by limitation at this stage. Hence, as long as the ground is not made out for exercising the powers of the Court under Order 38 Rule 5, the order of the learned First Additional

Subordinate Judge, Erode is correct. The Hon'ble Division Bench of this Court also held that whenever any claim for recovery of money is made before a Court of Civil Law, every application filed for attachment of the judgment should be ordered. It is well settled proposition of law that in a given case, asking for a direction to the defendants to furnish security and in default an order of attachment is an extraordinary remedy. It is also settled proposition of law that in a given case if the allegations are bald, the Court has no option than to deny the relief.

20. The trial Court passed an order by citing the Judgment reported in **2010 (1) MWN (Civil) 432** in which this Court held as follows:

"9. It is not that whenever any claim for recovery of money is made before a Court of civil law, every application filed for attachment before judgment should be ordered. It is well settled proposition of law that in a given case, asking for a direction to the defendants to furnish security and in default an order of attachment is an extraordinary remedy. It is also settled proposition of law that in a given case if the allegations are bald, the Court has no option than to deny the relief. What is all

mentioned in paragraph 11 of the affidavits in support of the applications is as follows:

"11.I reliably understand that the 2nd respondent herein is making hectic efforts to dispose of the land to keep it out of the reach of the creditors and particularly me. I have come to understand that the real estate agents in the area have been pressed into service for the purpose and this fact is known to the people stationed locally. If the second respondent is allowed to sell the property, I would be left with no remedy to recover my suit claim and any decree that may be passed would only be on paper, incapable of execution. This would lead to great hardship and loss and could well result in serious miscarriage of justice also."

10.The very reading of the above would clearly indicate that the allegations are bald. There is no specific averment or allegation made. In the absence of any specific allegation, it is well settled by the Apex Court and also by this Court that this extraordinary remedy should not be granted. It is true that the Court is vested with powers to exercise under Order 38 Rule 5 of CPC. But, it

remains to be stated that if it is a fit case, it should be exercised. The learned Single Judge in order to dismiss the applications fortified the decision of the Apex Court reported in (2008) 2 MLJ 1058 (SC) (RAMAN TECH & PROCESS ENGG. CO. AND ANOTHER V. SOLANKI TRADERS) wherein the Apex Court has held as follows:

"5.The power under Order 38 Rule 5 C.P.C. is a drastic and extraordinary power. Such power should 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. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs, by obtaining orders of attachment before judgment and forcing the defendants for out of Court settlements, under threat of attachment.

6.A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him. Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment. A plaintiff should show, *prima facie*, that his claim is bona fide and valid and also satisfy the Court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38 Rule 5 C.P.C. Courts should also keep in view the principles relating to grant of attachment before judgment (See *Prem Raj Mundra v. Md.Maneck Gazi*, AIR 1951 Cal.156, for a clear summary of the principles)."

21.The very reading of the above would clearly indicate that the allegations are bald. There is no specific averment or allegation made. In the absence of any specific allegation, it is well settled by the Hon'ble Apex Court and also by this Court that this extraordinary

remedy should not be granted. Though it is true that the Court is vested with powers to exercise under Order 38 Rule 5 of CPC. But, it remains to be stated that if it is a fit case, it should be exercised. The learned Judge considering those facts and the orders of this Court passed in 2010 (1) MWN (Civil) 432 dismissed the application, which is not warranting interference by this Court. Therefore, there is no infirmity found in the order passed in I.A.No.475 of 2012 and not warranting by this Court for interference. Accordingly, the same is liable to be dismissed.

22.In the result:

(a) this civil revision petition is dismissed by confirming the order passed in I.A.No.475 of 2012 in O.S.No.168 of 2012, dated 21.12.2012, on the file of the First Additional Subordinate Court, Erode;

(b) the trial Court namely the First Additional Subordinate Judge, Erode, is hereby directed to dispose of the suit within a period of three months from the date of receipt of a copy of this order, since the suit is for the year 2012, without giving any adjournment to either parties and both the parties are hereby directed to give their

fullest cooperation for early disposal of the suit. No costs.

03.04.2017

Note: Issue order copy on 05.07.2017
Speaking order
Index: Yes

vs

To

The First Additional Subordinate Court,
Erode.

M.V.MURALIDARAN, J.

VS

Pre-Delivery order made in
CRP(PD)No.1615 of 2013

03.04.2017
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