BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 14.06.2017
CORAM:
THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.M.A(MD)No.687 of 2013
and
M.P(MD) Nos.1 and 2 of 2013

S.Suresh Kumar ... Appellant/ Respondent/ Defendant
vs.

K.Nagesh ... Respondent/ Petitioner/Plaintiff

Appeal is filed under Order 43 Rule 1(r) of Civil Procedure Code to set aside the fair and decretal order dated 07.12.2011 passed in I.A.No.285 of 2011 in O.S.No.101 of 2011 on the file of the Learned District Judge, Nagercoil, Kanyakumari District.

For Appellant : Mr.V.Balaji
For Respondent : Mr.M.Senthil Kumar

JUDGMENT

Aggrieved by an order of attachment by the trial Court in I.A.No.285 of 2011 in O.S.No.101 of 2011 on 07.12.2011, the defendant in O.S.No.101 of 2011 is before this Court by way of this appeal.

2.The suit in O.S.No.101 of 2011 was filed by the respondent herein seeking recovery of sum of Rs.34,00,000/- along with 12% interest from the date of filing of the suit till date of decree for the eight dishonored cheques issued by the appellant. The respondent has also filed an application in I.A.No.285 of 2011 seeking attachment before judgment. In the affidavit filed in support of the application for attachment, the respondent has averred as follows.

> *"5.The respondent/defendant is the owner in possession and enjoyment of schedule properties. Now with an intention to defeat, or delay and obstruct the execution of money decree, that is most likely to be passed in my favour, the respondent is taking hectic steps at selling his properties and abscond the local jurisdiction of this Court."*

3.The appellant/defendant filed a counter affidavit contending that the appellant had purchased item No.1 of the scheduled property hardly one month prior to filing of the case ie., on 02.05.2011 under a settlement deed and with regard to item

No.2 scheduled property obtained from his father on 12.05.2011 and he has no intention to alienate the same.

4.The Trial Court considering the rival contentions and relying upon the third party affidavit filed by the respondent herein directed the appellant to furnish security for the suit claim of Rs.38 lakhs on or before 06.01.2012 failing which the petition property shall be attached pending disposal of the suit.

5.Learned counsel for the appellant would contend that the allegations made in the affidavit filed in support of the application did not satisfy the requirements of Order 38 Rule 5 of C.P.C. Order 38, Rule 5 C.P.C reads as follows:-

> *"Order 38, Rule 5 of C.P.C. 'Attachment before Judgment':*
>
> *(1)Where, at any stage of a Suit, the Court is satisfied, by Affidavit of 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, 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.Learned counsel would rely upon a judgment of this Court in ***Raman Tech & Process Engg.Co. and another Vs.Solanki Traders*** reported in ***(2008) 2 MLJ 1058 (SC)*** and submit that the power under Order 38 Rule 5 C.P.C should not be exercised mechanically and it should be used sparingly and strictly in accordance with the Rule. The relevant portion of the said judgment would run thus:-

> *5. The power under Order 38 Rule 5 C.P.C is a 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 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."

7.Learned counsel for the appellant would contend that the respondent made bald allegations against the appellant not even giving estimation of the value of the property and therefore, he would not be entitled to order of attachment before judgment. He would rely upon the judgment of the Division Bench of this Court in ***C.S.S.Corp Private Limited Vs.Space Matrix Design Consultants Private Limited*** reported in ***2012 (1) CTC 225*** wherein the Division Bench has held as follows.

20.Of course the power under Section 9 of Arbitration and Conciliation Act is wide. Interim order passed under Section 9 of the Act is a drastic order. In the decision of the Bombay High Court relied upon by the respondent, National shipping company of Saudi Arabia Vs. Setrans Industries Limited, AIR 2004 Bom. 136, the Court has held that the Court has to keep in mind the drastic nature of such an order. Clear case has to be made out not only on the merits of the claim, but also the Applicant should establish that denial of order would result in grave injustice to the party seeking protection. The statutory discretion given to the Court under Section 9 (ii)(b) of the Act must be exercised judicially in accordance with the established legal principles and having regard only to the relevant considerations. In the absence of any specific averment that appellant is having obstructive conduct or that acting in a manner to defeat the award, no interim order directing furnishing security could be passed. Appellant is stated to be a reputed concern having financial stability and in such circumstances, by denial of interim order, no irreparable injury would be caused to the Respondent. In our considered view, the learned Judge was not right in directing the appellant to furnish security for Rs.4,56,22,368/- and the impugned order is liable to be interfered with.

8.In ***M.Padmini Vs.M.Anandan*** reported in ***2014 (3) CTC 792,*** the Division Bench of this Court has held as follows:-

"13.It is a trite proposition of law that merely making a bald allegation that the plaintiff is given to understand that the defendant is going to sell the property through real estate agents may not be sufficient and there must a specific averment or allegation made. In the absence of any specific allegation it is well settled by the Honourable Apex Court as well as by this Court that extraordinary remedy should not be granted. It is true that the Court is vested with powers to exercise power under order 38, Rule 5, C.P.C. But, it remains to be stated that if it is a fit case, it should be exercised. It is an extraordinary power and such power should not be exercised mechanically. The Courts have held that it must be used strictly in accordance with the rules. The purpose of order 38 , rule 5 , is not to convert an unsecured debt into a secured debt."

9.Placing reliance on the judgments cited (*supra*), learned counsel for the appellant would contend that the trial Court was not right in relying upon the third party affidavit and directing attachment of the properties. According to the learned counsel, the affidavit filed by the third party does not satisfy the requirement under Order 38 Rule 3 of Code of Civil Procedure.

10.Learned counsel for the respondent would however contend that the appellant had admitted the loan of Rs.19,00,000/- obtained from the respondent and he has not disputed the signatures found in the dishonored cheques.

11.It is to be noted that the appellant has filed a counter affidavit in I.A.No.285 of 2011 and stated as follows:-

"5.Hence the allegation that the respondent would dispose of the properties to strangers and abscond from the jurisdiction of the Honourable Court is without any basis or reason. The respondent has no intention to do so."

12.The statement made in the affidavit in paragraph 5 of the said affidavit is recorded. The appeal is allowed setting aside the order of attachment before judgment made in I.A.No.285 of 2011 in O.S.No.101 of 2011, dated 07.12.2011. Since the appeal is of the year 2011, the trial Court namely, the District Court, Kanyakumari at Nagercoil is directed to dispose of the suit within a period of six months from the date of receipt of a copy of this order.

M.P(MD)No.2 of 2013

This application has been filed under Order 41 Rule 27 C.P.C, for production of the affidavit filed by a third party namely, Piramu Asari as additional evidence in support of the application filed for attachment before judgment. This in my considered opinion is not required for the disposal of the appeal. Hence, M.P(MD)No.2 of 2013 is dismissed. No costs. Consequently, M.P.(MD)No.1 of 2013 is closed.

Sd/-
Assistant Registrar (CS-II)

/True copy/

Sub Assistant Registrar

To:
The District Judge,
Kanyakumari District at Nagercoil.

+1 CC to M/s.V.BALAJI, Advocate, SR No. 60533.

RMI/VSG
PSM/MR-KKR/SAR3/12.07.2017/5P/3C

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