

THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE U.DURGA PRASAD RAO

C.M.A.NO.837 OF 2016

J U D G M E N T
(Per Sri Justice Sanjay Kumar)

This Civil Miscellaneous Appeal under Order 43 Rule 1(q) CPC arises out of the order dated 30.06.2016 passed by the learned IV Additional District Judge, Visakhapatnam, in I.A.No.471 of 2010 in O.S.No.149 of 2010. This suit was filed by the respondents herein for recovery of a sum of Rs.93,57,770/- with subsequent interest and costs. I.A.No.471 of 2010 was filed by them under Order 38 Rule 5 CPC to direct the defendants to furnish third party immovable property security for the suit amount and in the event of failure, to attach the petition schedule property. The petition schedule property is a multi-storied shopping complex known as **Bommana** Residency, situated at Pushkara Ghat Road, Rajahmundry, East Godavari District. On 27.05.2010, the trial Court passed the following order therein:

‘Heard the counsel for the petitioner.

Perused the affidavit of the petitioner, plaint, third party affidavit and documents filed along with the plaint.

In the circumstances stated in the affidavit, **CONDITIONAL ATTACHMENT** is order.

Issue notice by 16.06.2010.’

After the defendants filed their counter in the I.A., the trial Court took up the matter for hearing and passed the order under appeal. Therein, the trial Court observed that the procedure adopted while passing the order dated 27.05.2010 was not proper. The trial Court took note of the fact that the defendants contended

that the petition schedule property did not belong to them exclusively as a half-share therein belonged to wife of defendant 2. The trial Court also adverted to the fact that attachment before judgment should not be granted for the mere asking and the Court must be satisfied that the conditions precedent for granting such relief should be established. Having stated so, the trial Court then referred to the fact that the earlier attachment order was passed in the year 2010 and was in operation for five years and therefore, the same could not be withdrawn at this stage on the basis of some technical irregularities. The attachment was therefore made absolute. Aggrieved thereby, the defendants are before this Court by way of this appeal.

Heard Sri G.Rama Gopal, learned counsel for the appellants/defendants, and Sri A.S.C.Bose, learned counsel for the respondents/plaintiffs.

Parties shall hereinafter be referred to as arrayed in the suit.

As rightly pointed out by the trial Court, attachment before judgment is not a relief to be granted for the mere asking. The provisions of Order 38 Rule 5(1) CPC mandate that the Court must be satisfied, be it by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of the property or remove it from the local limits of the Court's jurisdiction. If so satisfied, the Court may direct the defendants, within a time to be fixed by it, either to furnish security or to appear and show-cause why he should not furnish security. Order 38 Rule 5(3) CPC however empowers the Court to direct conditional attachment of the whole or a portion of the property. Order 38 Rule 5(4) CPC sounds a

caution that an order of attachment made without complying with the provisions of Order 38 Rule 5(1) CPC shall be void.

In ***RAMAN TECH. & PROCESS ENGG.CO. V/s. SOLANKI TRADERS***¹, the Supreme Court observed that the power under Order 38 Rule 5 CPC is a drastic and extraordinary power which should not be exercised mechanically or merely for the asking. It was further observed that such power should be used sparingly and strictly in accordance with law as the purpose of Order 38 Rule 5 CPC is not to convert an unsecured debt into a secured one. As to the requirements posited under Order 38 Rule 5 CPC which need to be satisfied, the Supreme Court observed as under:

‘4. The scheme of Order 38 and the use of the words “to obstruct or delay the execution of any decree that may be passed against him” in Rule 5 make it clear that before exercising the power under the said Rule, the Court should be satisfied that there is a reasonable chance of a decree being passed in the suit against the defendant. This would mean that the Court should be satisfied that the plaintiff has a prima facie case. If the averments in the plaint and the documents produced in support of it, do not satisfy the Court about the existence of a prima facie case, the court will not go to the next stage of examining whether the interest of the plaintiff should be protected by exercising power under Order 38 Rule 5 CPC. It is well settled that merely having a just or valid claim or a prima facie case, will not entitle the plaintiff to an order of attachment before judgment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. Equally well settled is the position that even where the defendant is removing or disposing his assets, an

¹ (2008) 2 SCC 302

attachment before judgment will not be issued, if the plaintiff is not able to satisfy that he has a *prima facie* case.'

As rightly out pointed out by Sri G.Rama Gopal, learned counsel, neither in the order dated 27.05.2010 nor in the order under appeal, the trial Court recorded satisfaction as to either a *prima facie* case being made out or that the defendants were attempting to remove or dispose of their property so as to defeat any decree that may be passed in the suit. Mere filing of a third party affidavit in a cursory manner, as in the present case, is wholly insufficient for this purpose. This, being the fundamental lacuna underlying the earlier order dated 27.05.2010, the trial Court was not correct in holding that merely because such an illegal order of attachment had been passed long ago, it should be permitted to continue till disposal of the suit.

The order of attachment is accordingly set aside and the matter is remitted to the trial Court for consideration afresh of the subject I.A in terms of the mandatory requirements of the provision as succinctly pointed out by the Supreme Court in the above decision. However, as the attachment has been in operation for all these years, Sri G.Rama Gopal, learned counsel, stated that the half-share of the defendants in the petition schedule property would not be disposed of till the disposal of the I.A. afresh. Learned counsel would however pray that a specific time frame may be fixed in this regard.

In the light of this fair undertaking given by the learned counsel, the trial Court is directed to dispose of the I.A. on its own merits and in accordance with law expeditiously and in any event

not later than six weeks from the date of receipt of a copy of this order.

The Civil Miscellaneous Appeal is allowed to the extent indicated above. Pending miscellaneous petitions, if any, shall stand closed in the light of this final order. No order as to costs.

SANJAY KUMAR, J

U.DURGA PRASAD RAO, J

4th JANUARY, 2017

PGS

