

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.2362 of 2017

ORDER:

This Civil Revision Petition, under Article 227 of Constitution of India, is filed challenging the order, dated 13.04.2017, passed in I.A. No.170 of 2017 in O.S. No.362 of 2017 by II Senior Civil Judge, City Civil Court, Hyderabad.

2) The petitioner filed suit for recovery of Rs.5,03,367/- based on the promissory note. Along with the suit, he filed an application under Order XXXVIII Rules 5 & 6 read with Section 151 C.P.C requesting to furnish security for the suit claim, failing which order for attachment of FDR No.50300135500698 with HDFC Bank, Hyderabad for Rs.3,15,100/-, dated 18.03.2016 of respondent pending disposal of main suit, on the ground that the respondent is going to encash the amount covered by the said FDR. Though third party affidavit is not filed, the apprehension of the petitioner indicates that if the respondent is permitted to encash the amount, he will be left without any means to realise the debt due under the decree that may be passed against the respondent, hence sought for attachment of the FDR before judgment.

3) The respondent filed counter opposing the petition on the ground that she did not execute any promissory note and no amount was received from the petitioner and thereby, the attachment of FDR does not arise and the alleged apprehension is not based on any material and prayed to dismiss the application.

4) Upon considering rival contentions, the trial Court concluded that the petitioner failed to make out any prima facie case for granting relief of attachment of the FDR of the respondent/ defendant before judgment as the petitioner failed to file any supporting, third party affidavit to establish that the respondent/ defendant is about to close her business and trying to run away from the jurisdiction of the Court in order to defeat the decree that may be passed against her and more over the bank, in which the FDR lies, was not impleaded as a party to the suit, when as the respondent/ defendant categorically denied the loan transaction and execution of suit documents, dismissed the said application.

5) Aggrieved by the order, the present revision is filed on various grounds, the main ground urged is that filing of third party affidavit would arise only in case where immovable property is alienated to others to avoid payment of debt due under the decree that may be passed against her, but in case of encashment of FDR, filing of third party affidavits to substantiate the contention of the petitioner would not arise and the trial Court committed an error in dismissing the application. While requesting the petitioner to furnish security for the suit amount and costs otherwise to order for attachment before judgment of FDR with the HDFC bank for Rs.3,15,100/-.

6) Whereas learned counsel for respondent mainly contending that the petitioner is not encashing FDR with HDFC

Bank and apart from that the suit transaction itself is doubtful. In such case, the question of encashing does not arise and prayed for dismissal of the application.

7) I.A. No.170 of 2017 is filed under Order XXXVIII Rules 5 & 6 of C.P.C to order attachment of FDR lying with HDFC bank before the judgment, but the trial Court dismissed the petition on two grounds viz., (i) that the bank is not made as a party to the suit, and (ii) that the petitioner failed to make out a prima facie case.

8) So far as dismissal of petition on the first ground that the bank is not made as a party is concerned, the suit is for recovery of amount and the bank in FDR need not be impleaded as a party, since there is no relationship between bank and petitioner as debtor and creditor and no privity of contract between the petitioner and bank. Therefore, dismissal of the petition on the ground that the bank is not made as a party to the proceeding is not legal and thereby, such finding in the order of the trial Court cannot be sustained.

9) The Second ground is that the petitioner did not make out prima facie case. Prima facie case is not defined. However, the petitioner has to prove that there is a subsisting relationship between the parties to suit as creditor and debtor and that there is likelihood of encashing the FDR amount lying with HDFC Bank.

10) Here, to substantiate his contention the petitioner produced the promissory note allegedly executed by defendant—respondent herein i.e., document sued upon and prima facie the

promissory note would disclose the subsisting relationship of creditor and debtor. Of course she denied.

11) But here, except raising a ground that the petitioner did not make out any prima facie case, nothing was discussed to show whether there is any material, prima facie, in favour of the petitioner. Hence, the finding of the trial Court that the petitioner did not make out prima facie case illegal.

12) The other ground is that the third party affidavits are not filed to establish the averment of the affidavit that respondent/defendant is likely to encash the FDR amount lying with HDFC Bank, if it is immovable property, necessity of filing third party affidavits about the intention to alienate, but, in case of encashment of FDR amount lying in deposit, it is difficult for the third party to have knowledge about encashment of FDR. Therefore, even if no affidavit is filed alleging that the respondent is going to withdraw the amount, it is difficult to accept such affidavits as per the judgment of this Court reported in *Ananthula Buchiramulu vs Sakinala Janaki Ramaiah*¹, wherein it is observed in para No.6 that when an assertion is made there did not exist any material to establish that the respondent is making attempts to alienate the said property. In a way, the trial Court indicated that in the absence of any advertisements, or negotiations, emanating from the respondent; attachment cannot be ordered. In this context, it needs to be seen that, it is too difficult for anyone to know the mindset or proposals of any individual. There does not

¹ 2004 (2) ALD 730

exist any apparatus to discern the thinking process, or proposals, on the part of an individual. It is not as if everyone is required to reveal and divulge all his proposals and ideas to the others. Transactions running into huge sums can be brought about within a very short time and without the knowledge of any others. In fact, the law does not curb the liberty of an individual to do so. In matters of this nature, the state of affairs have to be ascertained more than the attitude of the person, than to insist on proof by the person complaining. If the respondent in fact, does not intend to dispose of or part away with the property in question, one sentence in his counter affidavit could have put an end to the controversy. As long as he does not commit to the Court that he does not intend to sell the property, the needle of suspicion swings more in favour of the petitioner, than relieving the respondent of his obligation.

13) The other principle laid down in the above decision is that in the case of alienating movable property, it is difficult to rely on the affidavits of third parties, till such transaction is completed and insisting upon a third party affidavit about the intention of the respondent to encash the FDR amount lying in HDFC Bank is not a ground for dismissal of the petition.

14) According to Order XXXVIII Rule 5 –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.

Rule 6 deals with effect of failure to furnish security:

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 show 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.

15) Here, in this case, the very transaction is denied but truth or otherwise in the allegation, contention of respondent cannot be decided, at this stage without trial and hence the petitioner made out prima facie case by producing promissory notes allegedly executed by respondent, which created relationship of creditor or debtor between them, is sufficient to go for trial and made out an arguable case. As regards prima facie case, the trial Court did not consider the same in a proper perspective, of Apex Court made clear that the petitioner has to made out prima facie case but did not make endeavour to discuss anything based on available material. Therefore, in view of discussion, it is established that the petitioner made out a prima facie case and dismissal of the petition on the ground that the petitioner failed to file third party affidavit is unsustainable.

16) One of the contentions of the learned counsel for the petitioner is that the respondent came from different State and she has no movable or immovable property in this State within the jurisdiction of this Court. In view of specific admission that the respondent did not possess any movable or immovable property

except FDR the apprehension of the petitioner can be accepted that if the respondent is allowed to encash the FDR, it is difficult for the petitioner to realise the decree debt in the event of passing any decree, therefore, it is a fit case to order attachment of FDR before judgment.

17) In that view of the matter, the respondent is directed to furnish security for the suit amount together with interest and costs within a period of one week from the date of receipt of a copy of this order receipt of copy of order itself shall be treated as a notice to the respondent and in the event of failure to furnish security within one week from the date of receipt of copy of the order, order of attachment before judgment of FDR vide FDR No.50300135500698 for an amount of Rs.3,15,000/- dated 18.03.2016 of the respondent pending disposal of the suit, in the schedule annexed to the petition be served on the Bank, in the meanwhile the respondent is directed not to encash FDR shown in the schedule.

18) With the above direction, the Civil Revision Petition is disposed of.

19) Miscellaneous Petitions, if any, pending in this revision shall stand closed. There shall be no order as to costs.

M.SATYANARAYANA MURTHY, J

Date:03.07.2017
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THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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