

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 03.01.2018

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THE HON'BLE MR. JUSTICE M.DURAI SWAMY

C.M.A.No.3368 of 2017 &
C.M.P.No.21357 of 2017

R.Chinnasamy

... Appellant

v.

A.Sivasambu

... Respondent

Civil Miscellaneous Appeal filed under Order 43 Rule 1 of Civil Procedure Code against the fair and decretal order dated 14.11.2017 made in I.A.No.83 of 2017 in O.S.No.201 of 2016 on the file of the I Additional District Court, Erode.

For Appellant : Mr.N.Manokaran

For Respondent : Mr.S.Kaithamalai Kumaran

J U D G M E N T

Challenging the order passed in I.A.No.83 of 2017 in O.S.No.201 of 2016 on the file of I Additional District Court, Erode., the defendant has filed the above Civil Miscellaneous Appeal.

2. The respondent-plaintiff filed the suit in O.S.No.201 of 2016 for recovery of a sum of Rs.13,52,666/- together with interest.

3.1 According to the plaintiff, the defendant borrowed a sum of Rs.10,00,000/- on 25.10.2013 and executed the suit promissory note. In the said suit, the plaintiff took out an application under Order 38 Rule 5 of CPC in I.A.No.83 of 2017 to attach the petition property before judgment.

3.2. The defendant filed his counter stating that on 30.12.2014, he had executed a settlement deed in favour of his wife, viz., C.Thilagavathi, and also executed another settlement deed dated 27.04.2016 in her favour. Further, he has stated that since the properties were settled in favour of his wife, the trial Court, should not order attachment before judgment in respect of those properties.

4. The trial Court, taking into consideration the case of both the parties, allowed the application. Against which, the defendant has filed the above appeal.

5. Heard Mr.N.Manokaran, learned counsel appearing for the appellant and Mr.S.Kaisthamalai Kumaran, learned counsel appearing for the respondent.

6. On a careful consideration of the materials available on record and the submissions made by the learned counsel on either side, it could be seen that the plaintiff had filed the suit in O.S.No.201 of 2016 based on the promissory note dated 25.10.2013 stating that the defendant had borrowed a sum of Rs.10,00,000/- on 25.10.2013. Admittedly, settlement deeds were executed by the defendant in favour of his wife on 30.12.2014 and 27.04.2016. The plaintiff has filed the application in I.A.No.83 of 2017 on 04.10.2016.

7. Mr.N.Manokaran, learned counsel appearing for the appellant submitted that the defendant has got no other property except the property attached in the suit.

8. Though the burden of proof lies on the plaintiff to establish that the due execution of the suit promissory note, the conduct of the defendant would establish that in order to get over the suit promissory note he had executed two settlement deeds in favour of his wife C.Thilagavathi. In the event of the plaintiff succeeding in the suit, he will not be in a position to recover the amount if the contention of the defendant is accepted. Since the settlement deeds were executed after the execution of the alleged promissory note dated 25.10.2013, the trial Court, had rightly allowed the application filed under Order 38 Rule 5 of CPC.

9. In that view of the matter, the learned counsel appearing for the appellant submitted that the plaintiff has not made out a case for attaching the property before judgment under Order 38 Rule 5 of CPC and in support of his contentions, relied upon a judgment reported in **2008(2) SCC 302 [Raman Tech. & Process Engg. Co. and another v. Solanki Traders]** wherein the Apex Court held that the plaintiff to avail the benefit need to 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 the property. with the intention of obstructing or delaying the execution of any decree that may be passed against him.

10. In the case on hand, when the suit promissory note was alleged to have been executed on 25.10.2013 without any reason whatsoever, the defendant had executed the promissory note in favour of his wife on 30.12.2014 and 27.04.2016. The very conduct of the defendant in executing the settlement deeds in favour of his wife would establish that his intention is to obstruct or delay the execution of the decree that may be passed against him.

11. In these circumstances, the judgment relied upon by the learned counsel appearing for the appellant does not apply to the present case.

12. For the reasons stated above, I do not find any ground to interfere with the order passed by the trial Court. The Civil Miscellaneous Appeal is liable to be dismissed. Accordingly, the Civil Miscellaneous Appeal is dismissed. I direct the I Additional District

Judge, Erode, to dispose of the suit in O.S.No.201 of 2016 on merits and in accordance with law, within a period of six months from the date of receipt of a copy of this judgment. No costs. Consequently, connected miscellaneous petition is closed.

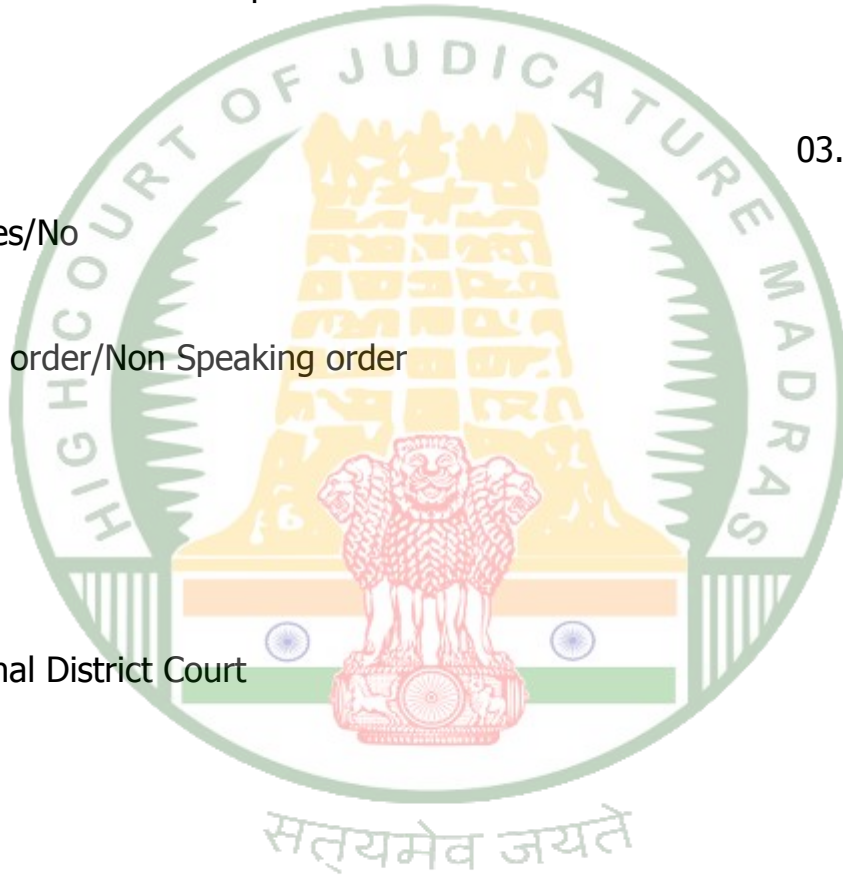
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Index: Yes/No

Speaking order/Non Speaking order

Rj

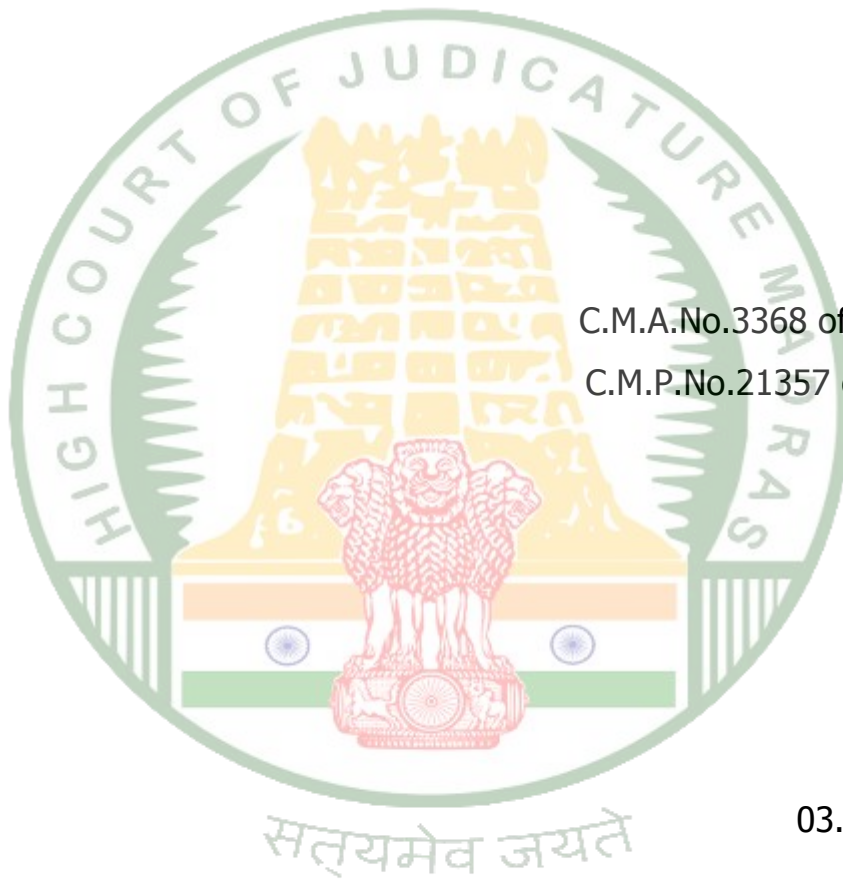
To

I Additional District Court
Erode.

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M.DURAISWAMY, J.

Rj



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