



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
RESERVED ON : 10.04.2018
DELIVERED ON : 09.11.2018

CORAM

WEB COPY

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

C.R.P. (MD) (PD) No.1969 of 2017
and
CMP(MD)No.9980 of 2017

Kishore Paul

.. Petitioner

vs

1.Sahaya Sheeba

2.Minor K.Anbu

3.Minor K.Karvin

.. Respondents

(Minors 2 and 3 respondents rep. by
their mother 1st respondent)

Civil Revision Petition filed under Article 227 of Constitution of India against the order dated 09.08.2017 made in I.A.No.314 of 2017 in O.S.No.130 of 2017 on the file of the learned II Additional Subordinate Judge, Nagercoil.

For Petitioner : Mr.N.Dilip Kumar

For Respondents : Mr.A.Arumugam
for Mr.C.Christopher

ORDER

This Civil Revision Petition has been filed by the petitioner against the order dated 09.08.2017 passed in I.A.No.314 of 2017 in O.S.No.130 of 2017 on the file of the learned II Additional Subordinate Judge, Nagercoil.

2. The petitioner is the defendant and the respondents are plaintiffs in the suit.

3. For the sake of convenience, the parties are referred to as per their array in the suit.

4. The plaintiffs have filed the suit for maintenance of Rs.6,000/- to the 1st plaintiff and Rs.7,000/- each for plaintiffs 2 and 3. Along with the suit, the plaintiffs have filed I.A.No.314 of 2017 under Order 38, Rule 5 CPC seeking to furnish security to the tune of Rs.2,40,000/- and on failing which to attach the petition schedule property alleging that the 1st plaintiff was the wife of the defendant and the plaintiffs 2 and 3 were children. Both the children were under the care and custody of the 1st



plaintiff. The defendant was a drunkard and never shown love and affection for them. According to the plaintiffs, the defendant was not maintaining them from October 2016 and only their relatives were helping them. It is alleged that as per the Will dated 12.9.2007 executed by the defendant's father brother Joseph Solomon, the defendant became the owner of the schedule mentioned property after the death of Joseph Solomon. Since the defendant was attempting to sell the schedule mentioned property, the plaintiffs have filed the petition seeking attachment before judgment.

5. Resisting the petition, the defendant filed counter stating that the children were not in the care and custody of the 1st plaintiff alone but also by the defendant. The defendant was not alcoholic and the defendant alone made arrangement to study the children. The relatives of the 1st plaintiff were not helping the plaintiffs. It is stated that the defendant was having valid title over the schedule mentioned property and he had no intention to sell the same. The defendant was working in the post office on daily wages and was getting salary of Rs.7,200/- per month and also was earning Rs.1,000/- per month from binding centre. The claim of the plaintiffs for Rs.2,40,000/- per annum was without any document and prayed for dismissal of the petition.

6. Upon consideration of the rival submissions, the trial Court, allowed the petition directing the defendant to furnish security to the tune of Rs.2,09,000/- on or before 23.08.2017, failing which attachment order will be passed in respect of the schedule mentioned property. Challenging the order of the trial Court, the defendant has filed the present revision.

7. The learned counsel for the petitioner/defendant submitted that the trial Court erred in allowing the petition filed by the plaintiffs under Order 38, Rule 5 of CPC seeking to pass an order for furnishing security of Rs.2,40,000/- and on failing which to attach the petition mentioned property. He would submit that in the absence of specific allegation, the trial Court directed the defendant to furnish security for Rs.2,40,000/- and also the Trial Court failed to consider that the petition mentioned property had not even been transferred in the name of the defendant and there was also no documentary proof to substantiate that the property had been transferred to the name of the defendant. The learned counsel further submitted that the trial Court failed to see that attachment before judgment cannot be granted on vague and bald allegations that the defendant was trying to alienate the property with an intention to defeat and delay the interest of the plaintiffs. The learned counsel then submitted that the defendant had filed an undertaking affidavit stating that he will not alienate the property and had no intention in doing so. In support, the learned counsel relied upon the decisions in *M.Padmini v. M.Anandhan*, reported in 2014 (3) CTC 792; *Raman Tech. & Process Engg. Co. and another v. Solanki Traders*, reported in (2008) 2 SCC 302 and *D.Dhanalakshmi v. M/s.Radhakrishna multiple Industries (P) Ltd.*, reported in 2015-3-L.W. 315.



8. Per contra, the learned counsel for the respondents/plaintiffs submitted that the defendant was not looking after the plaintiffs and he was alcoholic and also often beating the 1st plaintiff. He would submit that as per the Will dated 12.09.2007 executed by the defendant's father's brother, the defendant became the owner of the schedule mentioned property and in order to defeat the plaintiffs' claim, the defendant was trying to alienate the property to third parties and the trial Court was right in ordering furnishing of security by the defendant for the suit claim.

9. I heard Mr.N.Dilip Kumar, learned counsel for the petitioner and Mr.A.Arumugam for Mr.C.Christopher, learned counsel for the respondents and also perused the materials available on record.

10. It is an admitted fact that the 1st plaintiff and the defendant are husband and wife and plaintiffs 2 and 3 are their children. It is also an admitted fact that all of them are living in the same house bearing No.31, V.N.Volony, Irualappapuram, Kottar post, Vaideeswaram Village, Agasteeswaram Taluk, Kanyakumari District.

11. The case of the plaintiffs is that the defendant was not maintaining them properly and therefore, they are claiming maintenance of Rs.6,000/- for the 1st plaintiff and Rs.7,000/- each for the plaintiffs 2 and 3. According to the plaintiffs, the defendant became the owner of the petition mentioned property after the death of Joseph Solomon, who had executed the Will dated 12.09.2007 in favour of him. Since the defendant was attempting to sell the petition mentioned property, they have filed petition seeking furnishing of security, failing which attachment before judgment.

12. On the other hand, it is the say of the defendant that he had no intention to sell the petition mentioned property and the claim of the plaintiffs was without any documentary evidence and the trial Court erred in directing the defendant to furnish security.

13. In the affidavit filed in support of the petition seeking attachment before judgment, the plaintiffs have stated that the defendant was actively trying to find a purchaser for selling the schedule property and the sale has to be avoided in the interest of the plaintiffs. Apart from the above said allegation, nothing has been stated by the plaintiffs in the petition and no details have been given as to whom the defendant was trying to sell the property.

14. By relying upon the decision of this Court in D.Dhalakshmi v. M/s.Radhakrishna Multiple Industries (P) Ltd., <https://hcservices.ecourts.gov.in/hcservices/supra>, the learned counsel for the defendant contended that attachment before judgment cannot be granted based on the bald

allegations. In *D.Dhalakshmi v. M/s.Radhakrishna Multiple Industries (P) Ltd.*, supra, the learned Single Judge of this Court held as under:

"10. It is well settled now that attachment before Judgment cannot be granted on vague and bald allegations that the defendants/respondents are trying to alienate the property with an intention to defeat and delay the interest of the plaintiff/petitioner. The plaintiff/petitioner, who seek an order of attachment before judgment, must make specific allegation and the Courts must be satisfied that the interest of such party will be defeated, unless the order of attachment is ordered. The Judgments relied on by the learned counsel for the appellant is squarely applicable to the facts of the present case."

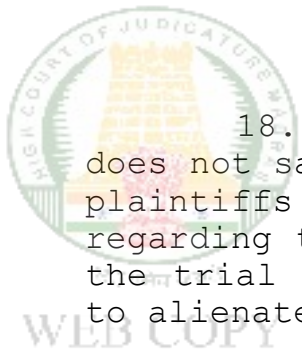
15. In *Raman Tech. & Process Engg. Co. and another v. Solanki Traders*, supra, relied upon by the learned counsel for the defendant, the Hon'ble Supreme Court held:

"5.The power under Order 38 Rule 5 CPC 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 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilise 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."

16. In *M.Padmini v. M.Anandhan*, supra, a Division Bench of this Court, after extracting the decision of the Hon'ble Supreme Court in *Raman Tech. & Process Engg. Co. and another v. Solanki Traders*, supra, held:

"11.Admittedly, in this case, in the Suit for recovery for money filed by the Plaintiff, the Plaintiff filed an Application pending Suit in I.A.No.116 of 2013 under Order 38, Rule 5, seeking for attachment of the properties before Judgment. But, a reading of the Affidavit filed at the first instance on 28.2.2013, under Order 38, Rule 5, would show that no specific allegation or averment has been made to the effect that the Defendant was making arrangement to dispose of the whole or any part of the property. If that be so, in the absence of any specific allegation, it cannot be stated that Order 38, Rule 5, ingredients have been made out."

17. On a perusal of the order under revision, I find that the trial Court after saying the scope of Order 38, Rule 5 CPC and after referring to the decision reported in 2008 (3) L.W. 744, directed the defendant to furnish security to the tune of Rs.2,09,000/- on or before 23.8.2017 and on failing which attachment order will be passed regarding the petition schedule property.



18. This Court is of the view that averments in the affidavit does not satisfy the requirements of Order 38, Rule 5 of CPC and the plaintiffs have not given particulars in the affidavit whatsoever regarding the purported alienation. There is not even a finding by the trial Court regarding any attempt or proposal by the defendant to alienate the property to defeat the interest of the plaintiffs

19. In the counter filed by the defendant in I.A.No.314 of 2017, it has been stated that he never thought to sell the property and the allegations so made was only to create a cause of action for the suit. It has also been stated in the counter that the defendant was owning the only property mentioned in the petition, in which the plaintiffs and the defendant were living. On a perusal of the long cause title of the plaint, it is seen that the plaintiffs address and the defendant address are one and the same.

20. It is pertinent to point out that in the grounds of revision, particularly ground (v), the defendant had stated that he had filed an undertaking affidavit stating that he will not alienate the petition schedule property and had no intention in doing so. When such being the undertaking given by the defendant, the trial Court erred in directing the defendant to furnish security for the suit claim. It is also pertinent to note that the suit is still pending and the quantum of maintenance has not been finalised by the trial Court. The trial Court, based on the bald allegations, directed the defendant to furnish security to the suit claim.

21. In view of the undertaking given by the defendant that he had no intention to sell the petition mentioned property and also the fact that the plaintiffs and the defendant were residing in the petition mentioned property, directing the defendant to furnish security for the suit claim does not warrant. However, the defendant is restrained from alienating the petition mentioned property without leave of the Court.

22. In the result:

(a) the Civil Revision Petition is allowed. The order of the learned II Additional Subordinate Judge, Nagercoil dated 09.08.2017 made in I.A.No.314 of 2017 in O.S.No.130 of 2017 is set aside;

(b) considering the nature of the suit, the trial Court is directed to dispose of the suit within a period of four months from the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (ADI)

// True Copy //

Sub Assistant Registrar (CS-IV)



To

The II Additional Subordinate Judge,
Nagercoil.

+1cc to Mr.C.Christopher, Advocate, Sr.No.94897.

+1cc to Mr.N.Dilip Kumar, Advocate, Sr.No.94732.

order made in
C.R.P. (MD) (PD) No.1969 of 2017
and
CMP (MD) No.9980 of 2017
09.11.2018

VSV

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