

THE HON'BLE JUSTICE SRI T. SUNIL CHOWDARY

CIVIL REVISION PETITION No.2084 of 2017

ORDER:

1 This Civil Revision Petition is filed under Article 227 of the Constitution of India assailing the order dated 15.03.2017 passed in I.A.No.302 of 2017 in O.S.No.136 of 2017 on the file of the Court of the III Additional Chief Judge, City Civil Court, Hyderabad wherein and whereby the petition filed by the first respondent under Order XXXVIII Rule 5 r/w Section 151 CPC seeking attachment of the suit schedule property was allowed.

2 The facts leading to filing of the present Civil Revision Petition, in brief, are as follows:

3 The petitioner Nos.1 to 3 have borrowed money from the second respondent – Bank for their business purpose. The first respondent stood as guarantor to the loan amount borrowed by the petitioners. For one reason or the other, the petitioners did not discharge the loan amount, therefore, the second respondent initiated proceedings against the petitioners under Section 13 (2) of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, SARFAESI Act). In spite of request made by the first respondent, the petitioners did not choose to clear off the loan amount availed by them from the second respondent bank. Having no other alternative, the first respondent approached the second respondent, who, in turn, agreed for release of the title deeds of the first respondent on a condition that she has to pay an amount of Rs.45,10,000/-. The first respondent paid

Rs.22,40,000/- and agreed to pay the balance amount of Rs.22,60,000/- in due course to the second respondent. Then the second respondent released the title deeds in favour of the first respondent. Thereafter, the first respondent filed O.S.No.136 of 2017 against the petitioners and the second respondent for recovery of an amount of Rs.45,10,000/- with interest @ 24% p.a. from the date of filing of the suit till the date of realisation. Along with the suit, the first respondent filed I.A.No.302 of 2012 under Order XXXVIII Rule 5 CPC seeking for attachment of the suit schedule property. The petitioner Nos.1 to 3 have filed counter *inter alia* contending that the first respondent has not filed third party affidavits to establish the stand taken by her, therefore, the petition is liable to be dismissed. On behalf of the first respondent Exs.P.1 to P.12 were marked. No documents were marked on behalf of the petitioners. Basing on Exs.P.1 to P.12 and other material available on record, the trial Court came to the conclusion that the first respondent is entitled to the relief of interim attachment of the suit schedule property and consequently allowed the petition. Hence the present Civil Revision Petition.

4 The point for consideration is whether there is any illegality, irregularity or impropriety in the impugned order, warranting interference of this court in exercise of powers under Article 227 of the Constitution of India?

5 Sri C. Hari Preeth, the learned counsel for the first respondent submitted that the trial Court has passed the order

under Order XXXVIII Rule 6 CPC; therefore, against the impugned order only an appeal lies but not a revision. Hence the present Civil Revision Petition is liable to be dismissed in *limine* on that score itself.

6 Refuting the contention of the learned counsel for the first respondent, Sri Vedula Venkata Ramana, the learned senior counsel appearing for the petitioners strenuously submitted that the trial Court has not passed the order under Order XXXVIII Rule 6 CPC, therefore, this revision is maintainable under law.

7 In order to appreciate the rival contentions, it is not out of place to extract Order XLIII (1) (q) CPC, which reads as under:

1. Appeal from orders-

An appeal shall lie from the following orders under the provisions of section 104, namely :--

(q) an order under rule 2, rule 3 or rule 6 of Order XXXVIII;

8 A perusal of the above **order** clearly demonstrates that as against an order passed under rule 2, rule 3 or rule 6 of Order XXXVIII CPC only an appeal lies to this Court.

9 The crucial question that falls for consideration is whether the impugned order is passed under Order XXXVIII Rule 6 CPC or not? In order to resolve the issue it is apposite to extract Order XXXVIII Rule 6 (1) CPC, which reads as under:

6. 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.

10 A perusal of the above provision clearly demonstrates that if the defendant fails to furnish security within the time fixed by the Court, attachment order follows automatically as contemplated under Order XXXVIII Rule 6 (1) CPC.

11 A perusal of the record reveals that immediately after filing of petition by the first respondent, the trial Court directed the petitioners to furnish security within 48 hours failing which attachment would follow. For one reason or the other, the petitioners did not choose to furnish security as directed by the trial Court. After hearing both sides, the trial Court allowed the petition on 15.3.2017 directing the petitioners to furnish security within seven days from the date of order to the tune of Rs.22,40,000/- failing which attachment of the suit schedule property shall be affected. The seven days time expired by 22.3.2017. Since the petitioners failed to furnish security, the attachment order came into force with effect from 23.3.2017.

12 From the above background of factual scenario, the order passed by the trial Court falls within the ambit of Order XXXVIII Rule 6 (1) CPC. Any order passed under Order XXXVIII Rule 6 CPC is appealable before this Court in view of Order XLIII (1) (q) CPC.

13 Having regard to the facts and circumstances of the case, I am of the considered view that the present Civil Revision Petition is not maintainable.

14 However, regardless of the maintainability of the revision, this court is inclined to pass orders on merits.

15 The predominant contention of the learned senior counsel for the petitioners is that the trial Court passed the impugned order without considering the scope of Order XXXVIII Rule 5 CPC, therefore, the impugned order is unsustainable either on facts or in law. He further submitted that the petitioners are not the owners of the petition schedule property.

16 *Per contra*, the learned counsel for the first respondent submitted that the trial Court has considered the scope of Order XXXVIII Rule 5 CPC in right perspective and allowed the petition. He further submitted that this court shall not lightly interfere with the order of the trial Court in exercise of jurisdiction under Article 227 of the Constitution of India unless there is an error manifest on the face of the order.

17 To substantiate the argument, the learned senior counsel for the petitioners has drawn the attention of this court to ***Raman Tech. & Process Engg. Co. And Another vs. Solanki Traders***¹ wherein the Hon'ble apex Court held at para Nos.5 and 6 as follows:

5. The power under Order 38 Rule 5 CPC is 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 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

¹ (2008) 2 SCC 302

plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out of court settlement, under threat of attachment.

6. A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him. Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment. A plaintiff should show, *prima facie*, that his claim is bonafide and valid and also satisfy the court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38 Rule 5 CPC. Courts should also keep in view the principles relating to grant of attachment before judgment (See Prem Raj Mundra v. Md. Maneck Gazi, AIR (1951) Cal 156, for a clear summary of the principles.)

18 As per the principle enunciated in the case cited *supra*, establishment of *bona fide* claim and the respondent taking hectic attempts to dispose of the petition schedule property with an intention to deprive the petitioner from enjoying the fruits of the decree likely to be passed is *sine qua non* to pass order of attachment under Order XXXVIII Rule 5 CPC.

19 A perusal of the record reveals that the petitioner Nos.1 to 3 borrowed money from the second respondent for their business purpose. The first respondent stood as guarantor to the loan amount borrowed by the petitioners and deposited her title deeds in the second respondent bank by creating an equitable mortgage. A perusal of Ex.P.1 reveals that the second respondent initiated proceedings against the petitioners and the first respondent under Section 13 (2) of the SARFAESI Act to recover the loan amount. On 25.6.2013 the second respondent issued a demand notice to the petitioners under the original of Ex.P.2. The second respondent also addressed a letter to the first respondent directing her to pay the loan amount under the

original of Ex.P.3. On receipt of Ex.P.3 letter, the first respondent addressed Ex.P.4 letter requesting the second respondent bank for settlement of her claim. Basing on Ex.P.4 letter, the second respondent agreed to release the title deeds of the first respondent subject to payment of Rs.45.00 lakhs. Initially the first respondent paid Rs.22,40,000/- and agreed to pay the balance of Rs.22,60,000/- in due course. Thereafter, the first respondent got issued Ex.P.5 legal notice directing the petitioners to pay the amount. Exs.P.6 to P.8 are acknowledgements. For one reason, or the other, the petitioners did not choose to issue reply to Ex.P.5 legal notice.

20 A perusal of the above undisputed facts *prima facie* establishes that the first respondent stood as guarantor to the loan amount borrowed by the petitioners from the second respondent bank. This Court carefully perused the counter filed by the petitioners in I.A.No.302 of 2017. The petitioners in unequivocal terms admitted that the first respondent stood as guarantor to the loan amount borrowed by them from the second respondent. They have taken a specific plea that the payment of money by the first respondent to the second respondent is within the exclusive knowledge of the first and second respondents. The petitioners have taken a specific plea in the counter that the first respondent paid the money without their knowledge. The petitioners have not denied the fact that the first respondent stood as guarantor to the loan amount borrowed by them as well as payment of money by the first respondent to the second respondent in order to release her title

deeds. At the time of arguments, the learned counsel for the first respondent submitted that the first respondent paid the remaining amount of Rs.22,60,000/- to the second respondent after disposal of I.A.No.302 of 2017. This fact was also not denied by the petitioners. Basing on the material available on record, this Court can safely arrive at a conclusion that the first respondent paid the entire loan amount of Rs.45.00 lakhs borrowed by the petitioners from the second respondent and got relieved herself as surety for the loan amount taken by the petitioners. In order to recover the money, the first respondent filed suit against the petitioners. Initiation of proceedings under Section 13 (2) of the SARFAESI Act against the petitioners indicates their financial status. The guarantor who paid the loan amount to the creditor is entitled to recover the same from the principal borrower. By marking Exs.P.1 to P.12, the first respondent *prima facie* established that her claim is a *bona fide* one.

21 The learned counsel for the petitioners submitted that the trial Court passed the impugned order without taking into consideration the basic ingredients of Order XXXVIII Rule 5 CPC. The court can pass order under Order XXXVIII Rule 5 CPC if it satisfies that the defendants are trying to alienate the property with an intention to deprive the plaintiff from enjoying the fruits of the decree likely to be passed in his/her favour.

22 A perusal of the record reveals that the petitioners failed to discharge the loan amount which prompted the second respondent to initiate proceedings under Section 13 (2) of the

SARFAESI Act. The trial Court while ordering notice, directed the petitioners to furnish security within 48 hours. But for the reasons best known to them, the petitioners did not choose to furnish security. While passing the impugned order also, on 15.3.2017 the trial Court directed the petitioners to furnish security within seven days, failing which attachment order would follow. Even then also the petitioners did not choose to furnish security as directed by the trial Court. The first respondent has taken a specific plea in the affidavit that the petitioners may dispose of the property in order to deprive her legal rights. The first respondent has also taken a specific plea that the petitioner Nos.1 and 2, in collusion with the third petitioner, may leave the jurisdiction of the trial Court. The affidavit filed by the first respondent *prima facie* satisfies the basic ingredients of Order XXXVIII Rule 5 CPC.

23 The learned counsel for the petitioners strenuously submitted that the trial Court has not given a specific finding that the petitioners may likely to dispose of the suit schedule property in order to frustrate the decree likely to be passed in favour of the first respondent.

24 The trial Court made an observation that no prejudice will be caused to the petitioners even if the petition is allowed. This court has to take into consideration the gist of the order passed by the trial Court. This court cannot place much reliance on the phraseology used by the courts below at the cost of substantial justice. The word 'no prejudice will be caused to the petitioners' if

not directly, but by necessary implication, indicates that if the attachment order is not passed, it may cause untold hardship and financial loss to the first respondent. The material placed before the court *prima facie* establishes the basic ingredients of Order XXXVIII Rule 5 CPC i.e. if no attachment order is passed, the possibility of alienating the suit schedule property by the petitioners is more probable and believable. Having regard to the facts and circumstances of the case, I am unable to accede to the contention of the learned counsel for the petitioners that the first respondent failed to establish the basic ingredients of Order XXXVIII Rule 5 CPC.

25 The learned counsel for the petitioners submitted that the petitioners are not the owners of the suit schedule property; therefore, I.A.No.302 of 2017 is liable to be dismissed.

26 *Per contra* the learned counsel for the first respondent submitted that the trial Court has rightly considered Exs.P.10 and P.11 sale deeds and allowed the petition. A perusal of Exs.P.10 and P.11, *prima facie*, reveals that the third petitioner purchased the petition schedule property under a registered sale deed on 09.09.2010. A perusal of the record further reveals that Ex.P.10 sale deed stands in the name of the third petitioner. The third petitioner purchased the property in the name of M/s. Aerochem Impex Pvt. Ltd. Even assuming but not conceding that the suit schedule property does not belong to the petitioners, how their rights are being affected by allowing the petition filed under Order XXXVIII Rule 5 CPC is not properly explained. If

really the property belongs to third party, certainly, the aggrieved party will approach the trial Court and file a petition for raising the attachment order. If the petitioners' stand is taken into consideration, the order passed by the trial Court will no way affect their rights. In such circumstances, this court is unable to understand what prompted the petitioners to approach this court in order to protect the property of somebody else. Filing of this petition by the petitioners undoubtedly indicates that the petitioners have interest over the property under attachment. At the time of arguments, the learned counsel for the first respondent submitted that M/s. Aerochem Impex Pvt. Ltd. filed application under Order I rule 10 CPC in O.S.No.136 of 2017, before the trial Court, seeking to implead themselves as one of the defendants and the trial Court dismissed the said application on 24.7.2018. If really the property belongs to M/s. Aerochem Impex Pvt. Ltd, certainly, the said company will take appropriate legal steps to protect its property. Having regard to the facts and circumstances of the case, I am unable to accede to the contention of the learned counsel for the petitioners that the petitioners are not the owners of the suit schedule property.

27 The trial Court considered the documents produced by the first respondent in the light of the pleadings of both parties. The findings recorded by the trial Court are based on material much less legally admissible material. It is needless to say that this Court shall not lightly interfere with the impugned orders unless there is an error apparent on the face of it. There is no illegality,

irregularity or impropriety in the impugned order, warranting interference of this court while exercising jurisdiction under Article 227 of the Constitution of India. Viewed from any angle, this Civil Revision Petition is devoid of any merits and is liable to be dismissed.

28 In the result, the Civil Revision Petition is dismissed. No order as to costs. As a sequel, miscellaneous petitions, if any, pending in this Civil Revision Petition shall stand closed.

T. SUNIL CHOWDARY, J.

Dt: 12.10.2018

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