

HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU

CIVIL REVISION PETITION No.1565 OF 2017

ORDER:

This is a revision filed against the order dated 02.06.2016 passed in I.A.No.707 of 2016 in O.S.No.247 of 2016 by the learned X Additional Chief Judge, City Civil Courts, Hyderabad.

The said I.A.No.707 of 2016 is filed under Order 38 Rule 5 CPC for attachment of the property described in the petition schedule. The lower Court ordered notice vide its order dated 26.04.2016 directing the respondent to appear and show cause. On 02.06.2016, the lower Court noticed that the notice to the respondent was served but he did not appear. By a cryptic order, the lower Court held as follows:-

“Heard. The averments in support of application make out circumstance for grant of relief.

In the result, petition is allowed. The respondent is directed to furnish security for the suit amount within 76 hours failing which there shall be attachment of petition schedule property pending the suit.”

This order is impugned in the present revision.

Heard Sri Rajagopallavan Tayi, learned counsel for the revision petitioner and Sri S.Raja Shekar Rao, learned counsel for the respondent.

It is the submission of the learned counsel for the revision petitioner that the remedy under Order 38 Rule 5 CPC is an extraordinary remedy that is to be exercised only under certain exceptional circumstances when there is positive proof that the defendant is about to alienate his property with an intention to

defeat the decree that is to be passed. The source of the information should also be specified in the affidavit according to the learned counsel. It is the submission that the affidavit in question is a very cryptic affidavit and it does not meet the requirements of Order 38 Rule 5 CPC. It is also pointed out by the learned counsel that the title deeds with respect to the petition schedule property are already mortgaged to the defendant and the defendant has created the equitable mortgage over the same. Hence, the submission of the learned counsel is that there is no ground whatsoever to order attachment before the judgment.

In reply, the learned counsel for the respondent submits that despite notice by the Court, the respondent did not appear in the lower Court and therefore, the lower Court is right in passing the order since he did not appear and show cause. It is also his submission that the impugned order is an appealable order and as such the invocation of the extra ordinary jurisdiction of this Court is wrong. Learned counsel also cited a judgment of this Court in ***Shahabhanu @ Susheela Bai v. Saval Sakharam and others***¹ wherein this Court relying on earlier judgments including the judgment of the Supreme Court of India held that when there is an effective alternative remedy, revision under Section 227 of the Constitution of India does not lie.

A perusal of Order 43 Rule 1 (q) of Civil Procedure Code reveals that an order under Rules '2', '3' or '6' of Order 38 are appealable and orders under other rules are not appealable. Hence, this Court finds that the CRP filed is maintainable.

¹ AIR 2003 SC 3044

Coming to the merits of the matter, it is apparent that there is an equitable mortgage on the property. So the apprehension that is necessary to be proved namely the sale of the property to defeat the decree is unlikely to happen. It is also the submission of the learned counsel for the revision petitioner that the affidavit in question does not meet the stringent requirements of Order 38 Rule 5 CPC and that lower Court mechanically passed an order granting an attachment. This Court finds sufficient strength in the submission made by the learned counsel for the revision petitioner. Except a brief assertion in para 8 of the affidavit there is no material available to show that the ingredients for granting an order are present.

Learned counsel for the respondent also states that despite the attachment, some part of the property has already been sold. However, there is no record available with this Court to accept this submission.

The impugned order is also a very cryptic order and is devoid of reasons. Therefore, the said order is set aside and the matter is remanded to the lower Court for disposal according to law on merits after giving opportunity to both the parties without being influenced by what is mentioned in this order.

Accordingly, the Civil Revision Petition is disposed of.

The Miscellaneous Petitions, if any, pending shall stand closed.

D.V.S.S.SOMAYAJULU, J

Date : 02.01.2018
ssp