BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
Date : 11.12.2019
CORAM

THE HONOURABLE MRS. JUSTICE R. THARANI
C.M.A.(MD)No.421 of 2019
and
C.M.P.(MD)No.5048 of 2019

1.A.Veerabathiran @ Sivanesan
2.Sivagnanadevi .. Appellants/Respondents/Defendants

Vs.

A.C.Manavalan .. Respondent /Petitioner/Plaintiff

Prayer : This Civil Miscellaneous Appeal is filed under Order XLIII Rule 1 (c)of Civil Procedure Code, 1908, to set aside the fair and decreetal order dated 15.03.2019 made in I.A.No.146 of 2018 in O.S.No.86 of 2018 on the file of the Additional District Court, Theni.

For Appellants : Mr.R.Suriyanarayanan
For Respondent : Mr.C.Jeyanathan

JUDGMENT

Heard the learned counsel appearing on either side.

2.This Civil Miscellaneous Appeal has been filed against the order passed in I.A.No.146 of 2018 in O.S.No.86 of 2018 dated 15.03.2019, on the file of the learned Additional District Judge, Theni.

3.The appellants herein are the defendants and the respondent herein is the plaintiff in the suit. The respondent herein has filed a suit in O.S.No.86 of 2018 for recovery of money. In the suit, the respondent herein filed a petition in I.A.No.146 of 2018 for attaching the suit property before judgment. That petition was allowed by the trial Court. Against which, the appellants preferred this appeal.

4.The brief substance of the application in I.A.No.146 of 2018 is as follows:

The respondent/plaintiff is a Sub Contractor. He is doing real estate business. The appellants/defendants were running a theatre . The appellants borrowed a sum of Rs.12,00,000/- (Rupees Twelve Lakhs only) from the respondent on 10.01.2014 and executed a promissory note on the same day. Again the defendants borrowed a sum of Rs.10,00,000/- (Rupees Ten Lakhs only) on 26.06.2014 and executed a promissory note on that date. During the existence of the two earlier loan amount, the defendants jointly borrowed another sum of Rs.10,00,000/- (Rupees Ten Lakhs only) on 18.02.2015 executed a promissory note on that date itself. Totally the defendants borrowed Rs.32,00,000/- (Rupees Thirty Two Lakhs only) from the plaintiff. The plaintiff approached the defendants on 08.11.2015 requesting them to repay the loan amount with interest. They executed an undertaking document on 08.11.2015 undertaking to pay the amount along with interest before the month of May 2016. The defendants paid a sum of Rs.10,000/- (Rupees Ten Thousand only) only as interest for the loan of Rs.12,00,000/- on 10.05.2016 and an endorsement was made in the promissory note dated 10.01.2014. On 10.04.2017, the defendants paid a sum of Rs.10,000/- (Rupees Ten Thousand only) towards interest for the loan of Rs.10,00,000/- (Rupees Ten Lakhs only) and made an endorsement in the promissory note dated 10.04.2017. On 15.12.2017, the defendants paid a sum of Rs.10,000/- (Rupees Ten Thousand only) towards interest and made an endorsement in the promissory note dated 18.02.2015. The defendants are taking hectic steps to alienate the property and trying to go abroad. The appellants should be directed to give security for a sum of Rs.43,62,972/- (Rupees Forty Three Lakhs Sixty Two Thousand Nine Hundred and Seventy Two only) or to attach the property before judgment.

5.The brief substance of the counter in I.A.No.146 of 2018 is as follows:

The properties are purchased from the nucleus of ancestral properties and the children of the defendants are having equal share and the defendants have only 1/3rd right over the suit property and the property was under mortgage with the Central Bank of India. Symbolic possession was taken by the Bank on 06.10.2016 under the SARFAESI Act. The plaintiff is the former employee of the defendants and he is aware of these facts. The plaintiff was working as a cashier in the theatre run by the defendants. Subsequently, he was the Manager of the theatre and he left service in January 2016 on his own accord. The last salary drawn by the plaintiff is Rs.4,000/- (Rupees Four Thousand only) per month with a batta of Rs.100/-. It is impossible for the plaintiff to give Rs.32,00,000/- (Rupees Thirty Two Lakhs only) to the defendants as a loan. The defendants handed over three blank signed pro notes to the plaintiff during 2012 and even during that time itself, the plaintiff obtain their signature in the back side of the promissory note also. Even after the amount was settled, the plaintiff retained the signed promissory notes he got from the film distributors. The children of the plaintiff filed a suit in O.S.No.55 of 2006 before the learned Principal District Judge, Theni against the defendants and the Bank and they got a decree and judgment in their favour and attachment cannot be made in the property, as the Bank has taken symbolic possession of 1/3rd portion of the property and the promissory notes are time barred and the endorsement in the promissory notes are fabricated.

6.After considering both sides, the trial Court allowed the petition and ordered attachment before judgment. Against which, the petitioner preferred this revision petition.

7.On side of the petitioners, it is stated that pre-conditions for ordering for attachment before judgment is not followed by the trial Court. There is material irregularity in exercising the jurisdiction. The trial Court failed to consider that the plaintiff is not having sufficient funds to lend Rs.32,00,000/- (Rupees Thirty Two Lakhs only) to the defendants. The legal requirements under Order 38 Rule 3 of CPC is not present. There is no specific pleadings how the plaintiff came to know of the alleged intention of the defendants to alienate the property as stated in the plaint. The attachment petition is filed only to coerce the defendants to come to an unfair compromise. This petition cannot be used as a short cut tool to recover the amount unethically. An unsecured debt cannot be converted in to a secured debt by means of an application for attachment before judgment. The suit property was already mortgaged with the Central Bank of India and a sum of Rs.1,96,44,540/- (Rupees One Crore Ninety Six Lakhs Forty Four Thousand Five Hundred and Forty only) is pending collection under SARFAESI Act.

8.On the side of the revision petitioners, it is stated that the plaintiff worked as a Manager in the defendants' theatre and he was earning Rs.4,000/- per month as salary and he misused the blank signed promissory notes. There is no relationship of borrower and money lender between the plaintiff and the defendants. The claim of the defendants is time barred. Merely because the plaintiff was not prejudiced, it does not empower the Court to pass an order of attachment before judgment.

9.The learned counsel for the appellants relied on the judgment passed by the Hon'ble Supreme Court in the case of ***Raman Tech. And Process Engg. Co. and another v. Solanki Traders*** reported in ***(2008) 1 (SC) 263***, wherein it is stated as follows:

> *"The object of Order 38 Rule 5 CPC in particular, is to prevent any defendant from defeating the realization of the decree that may ultimately be passed in favour of the plaintiff, either by attempting to dispose of, or remove from the jurisdiction of the Court, his movables. The Scheme of Order 38 and the use of the words 'to obstruct or delay the execution of any decree may be passed against him' in Rule 5 make it clear that before exercising the power under the said Rule, the Court should be satisfied that there is a reasonable chance of a decree being passed in the suit against the defendant. This would mean that the Court should be*

satisfied that the plaintiff has a prima facie case."

10.The learned counsel for the appellants relied on the judgment passed by this Court in the case of ***M.Padmini v. M.Anandhan*** reported in ***(2014) 3 CTC 792s***, wherein it is stated as follows:

"Per contra, learned counsel for the respondent/plaintiff by referring the application filed at the first instance in I.A.No.116 of 2013 would contend that averments have been made by the plaintiff that the appellant along with husband joining together created some documents and also changed some documents in the Bank with a view to defeat the claim and to cheat them. Therefore, the plaintiff wanted a direction from the Court directing them to furnish security to the satisfaction of the decree amount and thereafter order for an attachment.

Order of Attachment before judgment is a drastic remedy and the power has to be exercised with utmost care and caution, as it may be likely to ruin the reputation of the party against whom the power is exercised. As the Court must act with the utmost circumspection before issuing an order of attachment, the affidavit filed by the applicant should clearly establish that the defendant, with intent to obstruct or delay the execution of the decree that may be passed against him is about to dispose of the whole or any part of his property."

11.The learned counsel for the appellants relied on the judgment passed by the Calcutta High Court in the case of ***Premraj Mundra v. Md.Maneck Gazi and others*** reported in ***AIR 1951 Cal 156***, wherein it is stated as follows:

"10. From a perusal of all the authorities, I think that the following guiding principles can be deduced :

(1) That an order under Order 38, Rules 5 & 6, can only be issued, if circumstances exist as are stated therein.

(2) Whether such circumstances exist is a question of fact that must be proved to the satisfaction of the Court.

(3) That the Court would not be justified in issuing an order for attachment before judgment, or for security, merely because it thinks that no harm would be done thereby or that the defts. would not be prejudiced.

(4) That the affidavits in support of the contentions of the applicant, must not be vague, & must be properly verified. Where it is affirmed true to knowledge or information or belief, it must be stated as to which

portion is true to knowledge, the source of information should be disclosed, & the grounds for belief should be stated.

(5) That a mere allegation that the deft. was selling off & his properties is not sufficient. Particulars must be stated.

(6) There is no rule that transactions before suit cannot be taken into consideration, but the object of attachment before judgment must be to prevent future transfer or alienation.

(7) Where only a small portion of the property belonging to the deft. is being disposed of, no inference can be drawn in the absence of other circumstances that the alienation is necessarily to defraud or delay the pltf's claim.

(8) That the mere fact of transfer is not enough, since nobody can be prevented from dealing with his properties simply because a suit has been filed: There must be additional circumstances to show that the transfer is with an intention to delay or defeat the pltf.'s claim. It is open to the Court to look to the conduct of the parties immediately before suit, & to examine the surrounding circumstances, & to draw an inference as to whether the deft. is about to dispose of the property, & if so, with what intention. The Court is entitled to consider the nature of the claim & the defence put forward.

(9) The fact that the deft. is in insolvent circumstances or in acute financial embarrassment, is a relevant circumstance, but not by itself sufficient.

(10) That in the case of running businesses, the strictest caution is necessary & the mere fact that a business has been closed, or that its turnover has diminished, is not enough.

(11) Where however the deft. starts disposing of his properties one by one, immediately upon getting a notice of the pltf.'s claim, &/or where he had transferred the major portion of his properties shortly prior to the institution of the suit & was in an embarrassed financial condition, these were grounds from which an inference could be legitimately drawn that the object of the deft. was to delay and defeat the pltfs'. claim.

(12) Mere removal of properties outside jurisdiction, is not enough, but where the deft. with notice of the pltfs'. claim, suddenly begins removal of his

properties outside the jurisdiction of the appropriate Court, & without any other satisfactory reason, an adverse inference may be drawn against the deft. Where the removal is to a foreign country, the inference is greatly strengthened.

(13) The deft. in a suit is under no liabilty to take any special care in administering his affairs, simply because there is a claim pending against him. Mere neglect, or suffering execution by other creditors, is not a sufficient reason for an order under Order 38 of the Code.

(14) The sale of properties at a gross undervalue, or benami transfers, are always good indications of an intention to defeat the plaintiff's. claim. The Court must however be very cautious about the evidence on these points & not rely on vague allegations."

12.It is stated that the SARFAESI proceedings is pending and there is no question about alienating the property.

13.On the side of the respondent, it is stated that the contention of the appellant about non borrowal of amount, non execution of promissory note and non execution of endorsement may be decided in the main suit and it cannot be decided in the petition for attachment before judgment. The trial Court has given an opportunity for the defendants to furnish security for the loan amount. Even then the defendants did not come forward to furnish any security.

14.The contention of the appellants is that the plaintiff was not having sufficient fund to lend loan to the defendants and there is an earlier charge in the suit property and that intention of the defendants to alienate the property was not proved. The contention of the respondent is that the merits of the case, the factum of borrowal and the execution of the promissory note can be decided at the time of the trial and sufficient opportunity was given to the defendants to furnish security subject to the earlier charge by the Central Bank of India, the plaintiff will be having second charge over the property.

15.The first citation is not applicable to the present facts and circumstances of the case, as the signature in the promissory note were admitted by the defendants and a prima facie case is made out. Hence, this citation is not applicable to the facts of this case. The second judgment cited by the appellants is not applicable to the present facts and circumstances of the case, as the Court directed the defendants to furnish security within specified time and only on failure to do so, the order of attachment of the property was ordered. The third citation is that the object of attachment before judgment must be to prevent future transfer or alienation and that there is charge against the property under the SARFAESI proceedings by the Central Bank of India and that no prejudice would be caused to the defendants. The allegation in the plaint is that the defendants are borrowing money from other persons also. There is sufficient circumstances available to sought for a secured stand.

16.The signature in the promissory notes were admitted by the defendants. The defendants had earlier loan transaction with the Central Bank of India and the proceedings in SARFAESI Act is pending. It is alleged that the defendants are having other creditors. There is no prejudice to the defendants in passing an order of attachment before judgment subject to the SARFAESI proceedings so that the plaintiff can get priority over the other creditors.

17.In the above circumstances, there is nothing sufficient enough to interfere in the order passed by the trial Court. This Civil Revision Petition is dismissed and the order passed in I.A.No.146 of 2018 in O.S.No.86 of 2018 dated 15.03.2019, on the file of the learned Additional District Judge, Theni is confirmed. No Costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

Mrn

To

The Additional District Judge, Theni.

+1 CC to M/s.VEERA ASSOCIATES, Advocate (SR-104602[F] dated 12/12/2019)

+1 CC to Mr.R.SURYANARAYANAN, Advocate (SR-104693[F] dated 12/12/2019)

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