



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 21.02.2019

CORAM:

WEB COPY

THE HONOURABLE **MRS.JUSTICE S.RAMATHILAGAM**

C.M.A. (MD) No.629 of 2018

and

C.M.P. (MD) Nos.7375 and 9991 of 2018

M.Maheswaran

... Appellant

Vs.

T.Alamarathan

... Respondent

Prayer: Civil Miscellaneous Appeal filed under Order XLIII Rule 1(q) of Code of Civil Procedure, against the order passed by the learned VI Additional District Judge, Madurai, in I.A.No.508 of 2018 in O.S.No.131 of 2018, dated 23.07.2018.

For Appellant

:Mr.D.Shanmugaraja Sethupathi

For Respondent

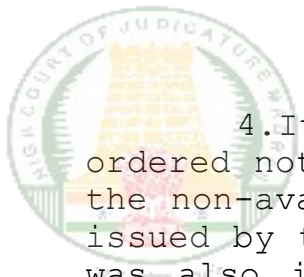
:Mr.Babu Rajendran

JUDGMENT

This Civil Miscellaneous Appeal is filed against the order passed by the learned VI Additional District Judge, Madurai, in I.A.No.508 of 2018 in O.S.No.131 of 2018, dated 23.07.2018.

2.I.A.No.508 of 2018 in O.S.No.131 of 2018 was filed by the respondent / plaintiff for an order directing the appellant / defendant to furnish security for Rs.25,00,000/-, failing which attach the property described hereunder before judgment and to pass a conditional order for attachment before judgment.

3.It is the contention of the plaintiff / respondent that he has filed the suit for recovery of Rs.24,30,000/- with interest and costs and it is also contended that in spite of repeated demands, the appellant / defendant has not repay the amount and the suit described property is the only property available for realising the amount from the respondent. Hence, the respondent / plaintiff filed the petition for order of attachment before judgment.



4.It is contended by the respondent that the trial Court has ordered notice and in spite of notice sent to the appellant herein, the non-availability of the appellant was noted and the said notice issued by the trial Court was attached in the resident and the same was also informed to the appellant / defendant's wife. The notes order of the trial Court reveals the said fact. The trial Court has also passed a conditional order to furnish security to the tune of Rs.25,00,000/-, on 03.07.2018, failing which the attachment will be ordered.

5.It is also observed from the order of the trial Court that the appellant / defendant notice was returned as affixed. Hence, the Court the ordered the attachment on 20.08.2018. Aggrieved against the said order, the appellant / defendant has preferred this Civil Miscellaneous Appeal. In this appeal, the appellant filed a miscellaneous petition in C.M.P.(MD)No.7375 of 2018 for interim stay of the order in I.A.No.508 of 2018 in O.S.No.131 of 2018.

6.In the said petition, the respondent filed the counter affidavit elucidating all the details regarding the process held before the trial Court. The respondent has very well described the date of filing of I.A., and the order passed in the said I.A., and also the process regarding the notice served to the appellant / defendant.

7.In paragraph 4 of the said counter affidavit, the respondent has contended that "It is submitted that the petitioner has appeared before the lower Court on 25.07.2018 and his counsel has filed vakalath on behalf of the petitioner on 25.07.2018. But till now no application was filed to set aside the ex parte order dated 23.07.2018 passed by the trial Court in I.A.No.508/2018. On the other hand, the petitioner has filed the copy application before the lower court on 25.07.2018 for certified copies of the petition and order passed in I.A.No.508 of 2018 and obtained the copy on 26.07.2018 and filed this appeal in C.M.A.No.629/2018 before this Honourable Court. Hence, the allegations in the affidavit filed by the petitioner / appellant that no notice was given to him and no opportunity was given by the trial Court and the trial Court had passed an order for attachment without following the procedure as laid in Order 35 Rules 5 and 6 of Code of Civil Procedure, is not correct."

8.The grievance of the appellant is that the procedure under Order 38 Rule 5 of Code of Civil Procedure was not properly considered by the trial Court. Order 38 Rule 5 of Code of Civil Procedure reads as follows:

"5. Where defendant may be called upon to furnish security for production of property

(1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,-



(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

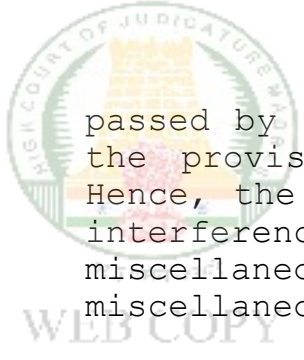
(2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

¹[(4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule such attachment shall be void.]

9. On the other hand, the respondent / plaintiff has stated all the facts in the affidavit that the attitude of the petitioner in non-making the payment and also his attempt to alienate the only property available for recovery of the said suit amount, he has filed the said petition. In the affidavit the respondent herein has ultimately discussed the facts that lead him to file such an application. It is also observed that after the order of attachment, the petitioner has appeared through counsel on 25.07.2018. Hence, now the appellant is full knowledge of order of attachment and the non-compliance of the order passed by the trial Court for furnishing security, now the appellant has stated that he has every to approach this Forum for necessary order and he need not approach the same Court, where the order was passed. However, when the remedy is available before the same Court, which passed the order of attachment, can very well observed the grievance raised by the appellant and pass suitable order, if any petition is filed.

10. It is also brought to the notice of this Court the notes order of the trial Court. Wherein, the trial Court has given time to issue notice to the petitioner for furnishing security that ascertaining the prima facie case made out against him and passed an order to furnish security on order before "03.07.2018", failing which attachment will be order. Once again, on 04.07.2018, the respondent / defendant did not appear before the trial Court. Hence, the trial Court once again issued fresh notice to the respondent / defendant and only on 23.07.2018, the respondent / defendant notice was served on him. The notice is affixed. Since it was properly attempted to serve on him, the endorsement made by the Amina has very much recorded in the notes order and hence, the order of attachment before judgment



passed by the trial Court is very much reasonable by observing all the provisions, that is stated in the Code of Civil Procedure. Hence, the order of attachment before judgment does not warrant any interference and the same is confirmed. Accordingly, this civil miscellaneous appeal is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CO)

// True Copy //

Sub Assistant Registrar

cmr

To

The learned VI Additional District Judge, Madurai.

+1CC to Mr.BABU RAJENDRAN , Advocate SR.No. 48956.

+1CC to Mr.D.SHANMUGARAJA SETHUPATHI , Advocate SR.No. 49246.

C.M.A. (MD) No. 629 of 2018

21.02.2019

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