



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 18.09.2019

CORAM:

WEB COPY

THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

C.R.P. (PD) (MD) .No.1276 of 2019

M.Krishnamoorthy :Petitioner/Petitioner/Plaintiff

Vs.

K.Sivasamy :Respondent/Respondent/Defendant

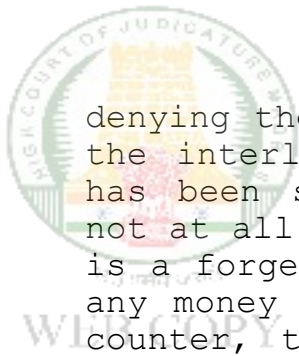
PRAYER: This Civil Revision Petition has been filed under Article 227 of Civil Procedure Code to set aside the fair and decreetal dated 12.03.2019 made in I.A.No.902 of 2018 in O.S.No.755 of 2018 on the file of the Principal Subordinate Judge, Karur.

For Petitioner : Mr.Raguvaran Gopalan
For Respondents : Mr.S.I.Muthiah

ORDER

This Civil Revision Petition has been filed by the revision petitioner to set aside the order passed in I.A.No. 902 of 2018 in O.S.No.755 of 2018, by the learned Principal Subordinate Judge, Karur.

2.The petitioner, as the plaintiff, filed a suit in O.S.No.755 of 2018 against the respondent/defendant directing him to pay the suit amount of Rs.2,63,542/- along with subsequent interest at the contractual rate to the petitioner/plaintiff till the date of its full realization. In the said suit, a written statement was filed by the respondent/defendant. Pending suit, the petitioner/plaintiff filed I.A.No.902 of 2018 directing the respondent/defendant to furnish sufficient security to the suit claim within time specified by the Court below and on failure to do so, attach the under mentioned properties before Judgment. Further, in the said I.A., a third party filed an affidavit stating that the respondent/defendant had asked him and other land brokers to get a suitable purchaser immediately for his property at higher sale price, otherwise he would encumber the same to one K.Dharmalingam to default his creditors. Further, in the affidavit, it has been stated that the respondent/defendant is now making hectic attempts to sell his properties as mentioned in the accompanying affidavit. In the said I.A., the respondent/defendant filed a counter affidavit



denying the allegations stated in the affidavit filed in support of the interlocutory application. In the said counter affidavit, it has been specifically contended that the respondent/defendant has not at all executed any promissory note and the said promissory note is a forged one. Further, the respondent/defendant has not borrowed any money from the revision petitioner/plaintiff. Further, in the counter, the respondent/defendant admitted the fact that the suit schedule property is mortgaged with the bank and such bank has to secure the suit schedule property, therefore, he cannot sell the property. Hence, the respondent/defendant prayed for dismissal of the petition in I.A.No.902 of 2018.

3.The learned trial Judge after considering the submission of both sides, dismissed the application in I.A.No.902 of 2018 stating that the petitioner/plaintiff has not made out a prima facie case for passing an order of attachment of the schedule property.

4.The learned counsel appearing for the revision petitioner/plaintiff would contend that the respondent herein borrowed a sum of Rs.2,00,000/- and issued a promissory note. Once the respondent/defendant issued a promissory note, after receipt of money, he has no *locus standi* to raise any objection. It is pertinent to note that the respondent has knowledge about the receipt of the money and issued the promissory note in favour of the petitioner/plaintiff. In these circumstances, the revision petitioner/plaintiff came to know that the respondent/defendant had made an attempt to sell the schedule property to a third party. Further, he contended that the schedule property was mortgaged with the bank and the bank is also responsible for securing the property for non-payment of money. If the property was sold out, the petitioner/plaintiff cannot get any money. Therefore, he contended that the petitioner/plaintiff filed an application for attachment.

5.Further, in support of his contention, the learned counsel for the revision petitioner/plaintiff has submitted that the third party/broker's affidavit also was filed, in which, it is clearly stated that the respondent herein/defendant made an attempt to sell the property through him. Therefore, without appreciating the facts, the Court below dismissed the application filed for attachment of property and therefore, he preferred this Civil Revision Petition. Hence, according to him, the order passed by the court below is not proper and it is liable to be set aside.

6.The learned counsel for the respondent/defendant would contend that the respondent/defendant has not borrowed any money from the plaintiff/revision petitioner and he has not at all executed any promissory note and the said promissory note is a forged one. He has also admitted the fact that the schedule property is mortgaged with the bank and such bank has to secure the schedule property. Further, he contended that he cannot sell the property, <https://hcservices.courts.gov.in/hcservices/> engaged with the Bank. Further, he submitted that the



present petition is liable to be dismissed for the following reasons:-

i) The property is already mortgaged with the bank and there is no attachment made.

ii) He disputed the signature in the promissory note that he has not borrowed any money from the petitioner/plaintiff.

7.Further, he contended that appreciating the above facts, the Court below has rightly dismissed the application in I.A.No.902 of 2018. Hence, according to him, no interference is required at the hands of this Court.

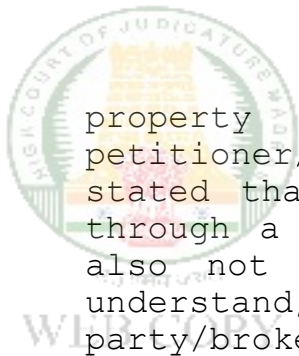
8.Further, in support of his contention, he relied upon a judgment passed by the Hon'ble Supreme Court in the case of **Raman Tech. And Process Engineering Co. and others Vs. Solanki Traders** reported in **(2008) 2 MLJ 1058 (SC)**, wherein, the Honourable Supreme Court has held as follows:-

"7.In this case, the suit claim was Rs.99200/-. The notice issued before filing the suit related to dishonour of two cheques for Rs.22487/-. The particulars of the claim in the plaint were not specific. The trial court had rejected the application on the ground that plaintiff had failed to make out a prima facie case. It did not, therefore, examine the question whether defendant was attempting to defeat any decree that may be passed by shifting his machinery. On the other hand, the High Court ignored the absence of a prima facie case. It granted relief under order 38 Rule 5, in exercise of revisional jurisdiction, swayed by the fact that the defendants had shifted their assets to another premises.

8.On the facts and circumstances, the High Court ought not to have interfered with the order rejecting the application. We therefore, allow this appeal and set aside the order of the High Court and restore the order of the trial court."

9.Heard the learned counsel appearing for the petitioner and the learned counsel appearing for the respondent. Perused the records carefully.

10.On a careful perusal of the typed set of papers, it is seen that I.A.No.902 of 2018 was filed by the plaintiff for attachment of property. The suit was filed for recovery of money based on a promissory note said to have been issued by the defendant/respondent herein. However, the respondent herein disputed the signature in the promissory note and also receipt of money. Further, he has known that the subject property is the civil



property and it was also mortgaged with the bank. The petitioner/plaintiff filed an affidavit before the Court below and stated that the respondent herein attempted to sell the property through a third person, who filed an affidavit. That person was also not cross-examined. Further, this Court is not able to understand, how the respondent/defendant approached the third party/broker to sell the property, when the property was already mortgaged with the bank.

11.The application in I.A.No.902 of 2018 has been filed under Order 38 Rule 5 of CPC, which 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

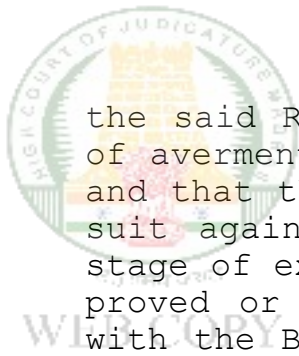
(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,
the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the 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.

[(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]"

12.The scheme of Order 38 Rule 5 uses the word "with intent to obstruct or delay the execution of any decree that may be passed against him". It makes it clear that before exercising powers under



the said Rule, the Court should be satisfied with the appreciation of averments in the plaint, the documents produced in support of it and that there is a reasonable chance of decree being passed in the suit against the defendant. Then, the Court can go to the next stage of examination whether the interest of the plaintiff should be proved or not. In this case, the property was already mortgaged with the Bank and the issuance of promissory note is also disputed by the defendant. The defendant has also disputed the borrowal of money from the plaintiff and the third party who filed an affidavit filed before the court below was also not examined.

13. In these circumstances, this Court is of the considered view that the Court below has rightly come to the conclusion that the revision petitioner is not having a *prima facie* case and rightly dismissed the application filed by the plaintiff/revision petitioner in I.A.No. 902 of 2018. In view of the above, no interference is required in the order passed by the court below in I.A.No. 902 of 2018. Hence, this Civil Revision Petition is liable to be dismissed.

14. Accordingly, the Civil Revision Petition is dismissed, by confirming the order passed in I.A.No.902 of 2018 in O.S.No.755 of 2018 by the Principal Subordinate Judge, Karur. No costs.

Sd/-

Assistant Registrar ()

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Sub Assistant Registrar(CS)

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To

The Principal Subordinate Judge,
Karur.

+1 CC to Mr.K.PRABHAKAR, Advocate (SR-87722[F] dated 19/09/2019)

+1 CC to Mr.P.GUNASEGAR, Advocate (SR-88060[F] dated 20/09/2019)

C.R.P. (MD) (PD) .No.1276 of 2019

18.09.2019

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