



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 18.10.2019

CORAM:

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

C.R.P (PD) (MD)No.708 of 2014

and

M.P. (MD) .No.1 of 2014

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G.Baskar

.. Petitioner / Petitioner / Plaintiff

Vs.

A.Vijayan

.. Respondent / Respondent / Defendant

Prayer: This Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the fair and final order, dated 05.12.2013 in I.A.No.595 of 2013 in O.S.No.111 of 2013, on the file of the Principal District Judge, Virudhunagar District at Srivilliputhur, by allowing this Civil Revision Petition with costs and to direct attachment before judgment of the properties mentioned in the I.A.

For Petitioner : Mr.A.Sivaji

For Respondent : Mr.S.Selvakumar

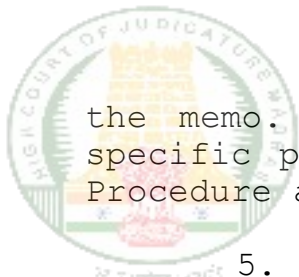
ORDER

This Civil Revision Petition has been filed challenging the order passed by the Court below accepting the memo filed by the respondent and closing the petition.

2. The petitioner is the plaintiff in the suit filed for recovery of money against the respondent/defendant. The suit has been filed for the recovery of a sum of Rs.30,56,330/- with interest. Along with the complaint, an application was filed in I.A.No.599 of 2013 under Order XXXVIII Rule 5 seeking for attachment of the property on the ground that the respondent is taking hasty steps to alienate the property and that even if the petitioner succeeds in the suit, there will be nothing left to execute the decree.

3. The respondent filed a memo before the Court below to the effect that he will not alienate or transfer the property, which is the subject matter of the application. This memo was taken on file and the petition was closed. Aggrieved by the same, the present Civil Revision Petition has been filed before this Court.

4. The learned counsel for the petitioner submitted that the Court below went wrong in closing the petition by merely recording



the memo. The learned counsel further submitted that there is a specific procedure that has been provided under the Code of Civil Procedure and the same has not been followed by the Court below.

5. In order to substantiate the submissions, the learned counsel for the petitioner relied upon the judgment of this Court in **C.Sengottaiyan v. K.Saravanan**, reported in **2013(6)CTC 456**. The relevant portions of the Judgment is extracted hereunder:

"10.A perusal of the said provision makes it clear that if the defendant, in pursuant to such direction, furnished his suit property as security for the satisfaction of the decree, then such furnishing of security by the defendant will bind and prevent him from dealing with the said property in any other manner. However, before ordering attachment, an opportunity is given to the defendant under Rule 5 (1) either to furnish security and produce the property at disposal of the court as and when required or to show cause as to why he should not furnish security. Once the defendant furnishes the security as contemplated under sub rule (i), then there is no necessity for ordering attachment of the said property in view of the fact that the very furnishing of security and producing and placing the property at the disposal of the court would in effect is a self disciplined attachment by the defendant himself. When such security is offered and accepted by the Court followed by recording of the same, then the defendant cannot be heard to say that he is not bound by such security or undertaking and he is at liberty to alienate the property in the absence of any attachment made by the Court. In effect furnishing of such security is in lieu of attachment and not in the absence of attachment.

11. At this juncture, it is useful to refer Order 38 Rule 6 C.P.C. which deals with the stage at which attachment has to be made. The following is the said provision:

Order 38 Rule 6 C.P.C.

"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



(Title)

Whereas at the instance of, the plaintiff in the above suit,the defendant has been directed by the Court to furnish security in the sum of Rs..... to produce and place at the disposal of the Court the property specified in the schedule hereunto annexed;

Therefore I..... have voluntarily become surety and do hereby bind myself, my heirs and executors, to the said Court, that the said defendant shall produce and place at the disposal of the Court, when required, the property specified in the said schedule, or the value of the same, or such portion thereof as may be sufficient to satisfy the decree; and in default of his so doing I bind myself, my heirs and executors, to pay to the said Court, at its order, the said sum of Rs.....or such sum not exceeding the said sum as the said Court may adjudge.

Schedule

Witness my hand at.....this.....day of19.....

Witnesses

- 1.
- 2.

(Signed)

14. A comparative study of both this Form No.6 and the security given by the defendant would show that both are in verbatim same, in same format and in strict compliance of the requirement under Order 38 Rule 5 C.P.C. Further, from the reading of the recitals in the said security given by the defendant, it could be seen that it was not a simple undertaking not to alienate the property. On the other hand, he had bound himself to produce and place the property at the disposal of the court as and when required for the satisfaction of the decree. Further, if the order made on 07.02.2001 in the application filed under Order 38 Rule 5 C.P.C. is perused, it clearly shows that the defendant had offered the entire petition mentioned property as security to the suit debt and the value of the immovable property offered as security satisfied the suit claim. The said order



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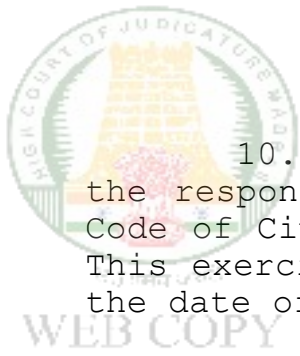
further shows that the defendant had categorically asserted that he would produce and place the property at the disposal of the Court as and when required by it. Thus, the court by accepting the security so made had consequently recorded the same. From these facts, three things are evident viz., security offer of security, acceptance of the same and recording it by the Court. Since the defendant had offered the security and the court had accepted the same and recorded it, there was no need or occasion for the Court to make an order of attachment before judgment. No doubt, the plaintiff objected to mere furnishing of security and he wanted some other document as security. The court below has rejected the same by accepting that the property offered satisfied the suit claim. When that being the order made in the application filed under Order 38 Rule 5 C.P.C., I am unable to appreciate the finding of the court below that the property cannot be proceeded with since it was not attached by the court. Since the very settlement of the property by the defendant in favour of his parents is void transaction the same should have been ignored by the Court."

6. Per contra, the learned counsel appearing on behalf of the respondent submitted that the petition properties have already been mortgaged to the Bank of Maharashtra and therefore, there is no question of alienating the property and the Court below is right in accepting the memo and passing the order.

7. This Court has carefully considered the submissions made on either side and the materials available on record.

8. It is clear from the above Judgment that has been cited by the learned counsel for the petitioner that the undertaking given by the respondent has to be given in a particular format under Form No.6 and the Court below was not right in closing the petition by merely recording a memo. Therefore, the learned counsel for the petitioner is right in insisting for the proper format for furnishing the security, since it will be beneficial to the petitioner while ultimately executing the decree. In the meantime, any alienation of property can also be prevented since by furnishing such a security, the same can be forwarded to the office of the Sub Registrar and the same will get reflected in the records(EC).

9. In view of the above discussion, this Court has no hesitation to interfere with the fair and final order passed by the Court below and accordingly, the same is hereby set aside.



10. The Court below is directed to take the undertaking from the respondent in Form No.6 read with Order XXXVIII Rule 5 of the Code of Civil Procedure and proceed further in accordance with law. This exercise shall be completed within a period of four weeks from the date of receipt of a copy of this order.

11. In the result, this Civil Revision Petition is allowed and the Court below is directed to complete the proceedings in O.S.No.111 of 2013, within a period of three months from the date of receipt of a copy of this order. No Costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS III)

// True Copy //

Sub Assistant Registrar(CS)

PJL

To

The Principal District Judge,
Virudhunagar District at Srivilliputhur.

+1 CC to M/s.A.SIVAJI, Advocate (SR-93427[F] dated 22/10/2019)

**C.R.P (PD) (MD) No. 708 of 2014
18.10.2019**

KK/SAR/11.11.2019/6P-3C/