

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.10.2020

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THE HONOURABLE MR.JUSTICE T.RAJA

C.M.A.Nos.1276 & 1293 of 2020

R.Harikrishnan .. Appellant in both the C.M.A's/ Defendant

-vs-

Mrs.Vimaladevi

W/o G.D.Srinivasan ... Respondent in C.M.A.No.1276 of 2020/
Defendant

G.D.Srinivasan ... Respondent in C.M.A.No.1293 of 2020

Memorandum of Grounds of Civil Miscellaneous Appeals filed under Order XLIII, Rule 1(2) of the Code of Civil Procedure, against the fair and decretal orders dated 26.06.2020 passed in I.A.No.2 of 2020 in O.S.No.13 of 2020 and in I.A.No.2 of 2020 in O.S.No.15 of 2020 respectively, on the file of the learned Principal District Judge, Namakkal.

For Appellant :: Mr.N.Suresh

For Respondent(s)/Caveator(s) :: Mr.C.Prabakaran

JUDGMENT

Heard learned counsel for the parties through video conferencing due to the Covid-19 pandemic.

2. These two civil miscellaneous appeals are directed against the impugned fair and decretal orders dated 26.06.2020 passed in I.A.No.2 of 2020 in O.S.No.13 of 2020 and in I.A.No.2 of 2020 in O.S.No.15 of 2020 respectively, by the learned Principal District Judge, Namakkal.

3. Mr.N.Suresh, learned counsel appearing for the appellant/defendant argued that the respondent/plaintiff in each of the civil miscellaneous appeals filed the respective suit in O.S.Nos.13 and 15 of 2020 on the file of the learned Principal District Judge, Namakkal for recovery of a total sum of Rs.39,90,000/- and Rs.29,95,000/- respectively, on the basis of two promissory notes said to have been executed by the appellant/defendant in favour of each of the respondent/plaintiff herein. Although detailed counter

affidavits have been filed explaining clearly that both the suits are frivolous and vexatious, both on law and on facts, for the reason that the appellant/defendant never borrowed any loan as alleged by each of the respondent/plaintiff herein and that the appellant/defendant had not executed the suit promissory notes in favour of each of them, making it clear that the alleged promissory notes were forged one, the Court below, without considering the same, has passed the impugned decretal orders granting the orders of attachment before judgment, resultantly, half share in both the first and second item of properties belonging to the appellant/defendant has been directed to be attached after completion of the lockdown period. Aggrieved thereby, the appellant/defendant has come to this Court.

4. One of the arguments advanced by Mr.N.Suresh, learned counsel appearing for the appellant/defendant challenging the impugned decretal orders passed by the Court below shows that the Court below ought to have attached one item of property to satisfy the claim made in the suits, instead of half share in both items of properties. As a matter of fact, he pleaded that the value of the subject matter of the attached properties is three times more than the claim made in the suits. Although the learned counsel appearing for the defendant heavily argued that at no point of time the appellant attempted to alienate the properties, the Court below, without even giving an opportunity to the appellant/defendant to furnish security as mandated under Order 38, Rule 5 of the Code of Civil Procedure, passed the orders of attachment before judgment, as such orders ought to have been passed only on the failure of the appellant/defendant to furnish security. Admittedly, there was no such opportunity given calling upon the appellant/defendant to furnish security. Secondly, there was no failure on the part of the appellant/defendant to furnish security. Thirdly, it is well settled legal position that before passing the orders of attachment before judgment, the Court below, as a matter of fact, should grant an opportunity to the appellant/defendant to furnish sufficient security. Only in the event of his failure alone, the Court can proceed to pass the orders of attachment before judgment.

5. Again Mr.N.Suresh, learned counsel appearing for the appellant/defendant, relying upon Order 38, Rule 5(1)(b) & Rule 5(4) of the Code of Civil Procedure, emphatically argued that the Court has to direct 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, as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security and if an order of attachment is made without complying with the

provisions of sub-rule (1) of this rule, such orders of attachment shall be void. Now in the present cases, after being satisfied with the case of the respondent/plaintiff in each of the suit that there is overwhelming evidence for disposal of whole or any part of the properties, in such event, the Court below ought to have directed the appellant/defendant to furnish security by passing a separate order giving an opportunity. As no such order has been passed directing the appellant/defendant to furnish security, the impugned decretal orders are running contrary to the provisions of Order 38, Rule 5(1)(b) and Rule 5(4) of the Code of Civil Procedure. Hence, the impugned decretal orders are liable to be set aside. Finally, Mr.N.Suresh also submitted that although the Court below has passed the impugned decretal orders directing half share in both the items of properties to be attached before judgment, the appellant/defendant is prepared to furnish the second item of property as security, wherein he has got 3/4 share and the balance 1/4 share belonging to his mother to satisfy the claim made in the suits. He also made it clear that the appellant/defendant and his mother are also prepared to file individual affidavits before the trial Court to that effect.

6. Mr.C.Prabakaran, learned counsel appearing for each of the respondent/plaintiff in both the appeals, opposing the above prayer, submitted that it is not open to the appellant/defendant to say that the Court below has not followed the mandatory provisions mentioned in Order 38, Rule 5(1)(b) and Rule 5(4) of the Code of Civil Procedure. Drawing my attention to paragraph-6 of the impugned decretal orders, he argued that the appellant/defendant, after receipt of notice, has filed his counter affidavit, wherein he has denied the borrowal of the loan amount from each of the respondent/plaintiff herein and then, he also stated that he is ready to furnish security. But, as promised, he has not filed any security equal to the claim made in the suits. Therefore, the Court below, accepting the submission made by the learned counsel appearing for each of the respondent/plaintiff herein that the appellant/defendant has been trying to alienate the petition mentioned properties, has finally passed the orders of attachment before judgment. Hence, no perversity or infirmity can be found with the impugned decretal orders.

7. I also agree with the submissions advanced by the learned counsel appearing for the respondent/plaintiff in each of the appeals. However, in view of the present Covid-19 pandemic situation, since Mr.N.Suresh, learned counsel appearing for the appellant/defendant pleaded before this Court that the value of the petition mentioned properties is three times more than the claim made in the suits, accepting his request that the appellant/defendant and his mother are ready to furnish the

entire second item of property, wherein he has 3/4 share and the rest 1/4 share belonging to his mother, as security towards the claim made in both the suits and also will file individual affidavits to that effect before the Court below towards the satisfaction of the claim made in both the suits, this Court hereby directs the appellant/defendant to file the affidavits and also furnish the second item of property as security as agreed before this Court, within a period of two weeks from the date of receipt of a copy of this order. On compliance of the said conditions by the appellant/defendant, the impugned decretal orders passed by the Court below shall stand set aside. Needless to mention that if the appellant/defendant fails to comply with the aforementioned conditions within the time stipulated in this order, the impugned decretal orders passed by the Court below shall stand automatically revived. With this direction and observation, both the civil miscellaneous appeals stand disposed of. Consequently, C.M.P.Nos.9070 & 9157 of 2020 are closed. No costs.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

To

1. The Principal District Judge
Namakkal.

+2 cc's to M/s.C.Prabakaran,advocate,sr.32601, 32602

+1 cc to M/s.N.Suresh,advocate,sr.33017.

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C.M.A.Nos.1276 & 1293 of 2020

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