



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 21.12.2020

CORAM :

THE HONOURABLE MR. JUSTICE **N. SESHASAYEE**

C.R.P (MD) No. 1075 of 2020

and

C.M.P (MD) No. 7017 of 2020

Rajayyan

... Petitioner/Petitioner/Plaintiff

Vs.

Devasagayam

... Respondent/Respondent/Defendant

PRAYER: The Civil Revision Petition is filed under Article 227 of the Constitution of India against the fair order and decretal order dated 22.09.2020 made in I.A.No.1 of 2019 in O.S.No.102 of 2018 on the file of the Subordinate Judge, Kuzhithurai, Kanyakumari District.

For Petitioner : Mr.S.Titus

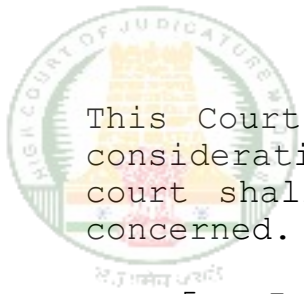
ORDER

In this case, the plaintiff has filed a suit in O.S.No.102 of 2018 and has preferred a petition under Order 38 Rule 5 C.P.C for attaching certain property of the defendant. The property sought to be attached appears to be outstanding on mortgage to a financial institution. Therefore, the learned trial Judge has dismissed the petition on the ground that without the mortgagee of the property in the party array, an application under Order 38 Rule 5 C.P.C could not be allowed.

2. Heard the learned counsel for the petitioner.

3. It has to be stated that the learned trial Judge has got law slightly wrong in that. The mortgagee of the property always has a preferential charge over the properties. There is a word of difference between Order 34 Rule 1 and Order 38 Rule 5 C.P.C. Only in the case of any mortgage suit filed under Order 34 Rule 1 C.P.C, all the parties, who are of interest in the mortgaged properties, should be before the court and it is not necessary for a petition under Order 38 Rule 5 C.P.C.

4. This Court therefore deems it appropriate to allow this Civil Revision Petition. Accordingly, the order dated 22.09.2020 made in I.A.No.1 of 2019 in O.S.No.102 of 2018 on the file of the Subordinate Judge, Kuzhithurai, Kanyakumari District, is set aside.



This Court remands the matter back to the trial court for *denovo* consideration in the light of what this Court has stated. The trial court shall decide the matter in the presence of all the parties concerned.

5. In the result, this petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (A.E)

// True Copy //

/ /2021

Sub Assistant Registrar (CS)

CM

To

The Subordinate Judge,
Kuzhithurai, Kanyakumari District.

Copy to: The Section Officer,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai. (2)

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CK (CO)

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