



IN THE HIGH COURT OF JUDICATURE OF MADRAS

DATED: 04.02.2021

CORAM:

THE HONOURABLE MRS. JUSTICE V.BHAVANI SUBBAROYAN

C.R.P. No.124 of 2021

and

C.M.P.No.1155 of 2021

1.Suseela

2.Poomukilan

3.Vignesh

...Petitioners / Petitioners
Vs

1.Gopal

2.Shanmugam

...Respondents/ Respondents

PRAYER: Civil Revision Petition filed under Section 227 of Civil Procedure Code to set aside the fair and decretal order dated 06.03.2020 passed in I.A.No.3 of 2019 in I.A.No.607 of 2018 in O.S.No.180 of 2018 on the file of the Sub-Court, Gobichettipalayam.

For Petitioner : Mr.K.Govi Ganesan
for Mrs.Raja Shama Gayathri

ORDER

The limited prayer sought for in the present civil revision petition to set aside the fair and decretal order dated 06.03.2020 passed in I.A.No.3 of 2019 in I.A.No.607 of 2018 in O.S.No.180 of 2018 on the file of the Sub-Court, Gobichettipalayam.

2. The plaintiff/first respondent had filed the suit directing the defendant to pay a sum of Rs.5,24,800/- with future interest from the date of suit till the date of realization and to direct the defendant to pay the costs of the suit to the plaintiff.

3. The suit in O.S.No.180 of 2018 was filed for recovery of a sum of Rs.5,24,800/- with interest from the respondent/defendant. Pending the suit, the plaintiff had filed I.A.No.607 of 2018 seeking attachment of the petition mentioned properties that is alleged to have been belonging to the defendant. As the plaintiff came to know that the defendant is trying to alienate the properties or encumber the properties, he approached the Court by filing I.A.No.607 of 2018 under Order 38 Rule 5 and Section 123 of CPC seeking for



attachment of the scheduled mentioned property before passing any judgment. The respondent has filed a detailed counter affidavit stating that the petition mentioned properties are joint family properties and he cannot have any right over the properties and already the properties in Item Nos.1,2 and 3 were sold by the joint family on 11.09.2018 and the plaintiff cannot attach those properties and the remaining 4 and 5 items were allotted to the share of the respondent's brother. Hence, he is not the owner of the property and the properties cannot be attached.

4. The Court below, after considering the rival submissions, had found that the partition deed marked as Ex.B1 and Sale deeds have marked as Ex.R2. It is also seen that the petitioner was not in possession to furnish any security to the suit claim by the time granted as on 10.09.2018. The respondent stated that the notice dated 10.09.2018 was not received by him. Subsequently, a fresh notice was ordered the respondent received the notice on time. The respondent submitted that he is not residing at that place, but residing elsewhere and produced a copy of his Aadhaar Card to prove that he is staying in the residence. Hence, the Court below had come to the conclusion that the properties sold to third parties in Item Nos.1 to 3 are only after receiving the said notice and with a knowledge of fixation of the suit having sold the same. Item Nos.1 and 3 were not attached but directed to attach the item Nos. 4 and 5 by 17.12.2018. The Court was also of the view that the notice was received by the respondent on 05.09.2018. Having executed the partition deed on 11.09.2018 and having received the notice on 12.09.2018, there is no sufficient cause shown by the respondent for not furnishing the security or for not attaching the said property and hence, the Court below dismissed the application and directed for attachment on 17.12.2018.

5. Aggrieved by the said order, the third parties, who are the brother, brother's wife and child of the brother who had been allotted the items of the said property, has filed I.A.No.3 of 2019 before the Court below and sought for raising the attachment of scheduled mentioned property in Item No.5 in Survey No.71/3.

6. The Court below, after considering the arguments of both the side, dismissed the said application, by observing that the respondent was already directed to furnish security for the suit claim by 10.09.2018, but the respondent did not receive the notice intensively. The respondent's contention that he is not aware of the Court proceedings was not accepted and that the Court below was of the opinion that the respondent had prior knowledge about the suit proceedings and hence, the Court was of the view that when the petitioner's brother and mother are residing in the petition mentioned address, they ought to have known about the notice Hence, the Court below had come to the decision that they have the



difference of knowledge regarding the pendency of the suit and affixure of the notice. The Court has also considered the same earlier in I.A.No.607 of 2018 and passed a decree. Aggrieved by the said dismissal, the petitioners herein, who are the third parties to the suit proceedings, have filed the present petition.

7. The learned counsel for the petitioner would submit that the fair and decreetal order of the Court below is against law vitiated with material irregularities and if allowed to stand, would cause a failure of justice and cause irreparable injury to the petitioner herein. Further, he would submit that the Court below has erroneously dismissed the application filed under Order 38, Rule 9 of C.P.C., for raising the attachment and the same is liable to be set aside. The Court below failed to see that the petitioners have nothing to do with the transactions between the plaintiff and defendant and therefore, the attachment of their properties is not correct. It is the further submission of the learned counsel that the Court below has presumed that the petitioners had knowledge about the 6-A notice and they knew about the pendency of the case and based on that, has erroneously dismissed the interlocutory application. The Court below failed to see that there is no bar for effecting partition, pending the suit and hence, ought not to have harped much on that. The Court below failed to see that it has neither jurisdiction nor power to question the mode of partition between the parties as the same remains within the domain of the co-owners. Hence, the petitioner herein prays to allow this civil revision petition.

8. Heard the learned counsel for the petitioners and perused the materials available on record.

9. The suit has been filed only for recovery of money to an extent of Rs.5,24,800/- and the said suit was filed on 30.08.2018. Immediately, on the same day, he has filed the I.A.No.607 of 2018. The defendant in the said suit had filed the counter affidavit. From the said averments in the suit, the plaintiff had filed a petition seeking attachment before judgment in the petition mentioned property. The plaintiff had submitted that the respondent has no other source of income to repay the money borrowed and also he is trying to alienate the petition mentioned properties. The respondent have denied all the averments by stating that he had not borrowed any money, but stated that he is liable to pay the said amount to the petitioner and the properties are liable to be sought for attachment, since it is a joint family property.

10. The Court below, after considering all the averments, had partly allowed the application. On going through the typed set of papers in I.A.No.3 of 2019, the brother, brother's wife and brother's child, who were allotted Item No.5, have filed



the application seeking for raising the attachment stating that his father had passed away on 26.05.2019 and the legal heirs of the said brother Srinivasan are in possession of the said Item No.5 and they came to know about the said attachment only when they obtained a loan from the bank, which resulted in failure to obtain encumbrance certificate. Immediately, they have filed this petition seeking for raising of the attachment. There is no relationship between the parties regarding the loan obtained by the first defendant and that due to the said act of the first respondent, they are put into great hardship, since they are still recovering from their father's death.

11. It is found that only after filing the suit, the family had divided the properties among themselves and only item Nos.4 and 5 have been divided among brothers. It is also seen that the properties are respectively only an affixure of notice on 05.09.2018 and it is clearly seen that it is only to avoid payment of money. Hence, this Court is of the view that the parties are directed to pay 50% of the amount as a security before the Court below, within a period of three months from the date of receipt of copy of this order and thereafter, the Court can raise the attachment on a condition that the parties shall not alienate the said property. The possession will be with the parties herein till the outcome of the suit.

12. With the above condition, the present civil revision petition stands disposed of. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

sbn

To

The Sub-Court,
Gobichettipalayam.

C.R.P. No.124 of 2021
and
C.M.P.No.1155 of 2021

SRA (CO)
SB(12/11/2021)