

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **07.04.2021**

CORAM:

THE HON'BLE MR.JUSTICE **C.V.KARTHIKEYAN**

C.R.P.(PD).No.755 of 2021

Palaniyappan

.. Petitioner

Vs.

Pandiyan

Respondent

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the Docket Order passed in I.A.No.19 of 2020 in O.S.No.10 of 2020 dated 18.01.2021 on the file of the III Additional District Judge, Kallakurichi.

For Petitioner

: Mr.R.Jayaprakash

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ORDER

This Civil Revision Petition has been filed questioning the Order in I.A.No.19 of 2020 in O.S.No.10 of 2020 which suit is now pending on the file of the III Additional District Judge, Kallakurichi.

2. The plaintiff in the suit is the petitioner herein. The plaintiff had filed the civil suit as against the defendant for recovery of a sum of Rs.21,46,200/- (Rupees Twenty One Lakhs Forty Six Thousand Two Hundred only) together with future interest till date of realization and also for costs of the suit. Along with the said suit, the petitioner herein had filed I.A.No.19 of 2020 under Order 38 Rule 5 of the Code of Civil Procedure seeking to attach the property which had been mentioned in the schedule. The said property is land and house measuring 1816 sq.ft in New Natham Survey No. 360/16 in Chinna Salem Village in Kallakurichi. When the said application came up for hearing, on receipt of notice, the respondent / defendant had filed an affidavit of undertaking not to deal with the property in any manner whatsoever. That undertaking was recorded by the learned Additional District Judge and the application filed by the petitioner under Order 38 Rule 5 of CPC was closed. No effective adjudication was made.

No effective orders was passed.

3. The grievance expressed by Mr.R.Jayaprakash, learned counsel for the petitioner is that the respondent / defendant had already mortgaged the said property and to substantiate that particular statement, a copy of an encumbrance certificate has been filed as a document along with the revision petition. It is seen that even earlier, on 30.10.2017 itself, the respondent / defendant had mortgaged the very same property with the Karur Vysa Bank Limited, Chinna Salem Branch. Naturally, Karur Vysa Bank Limited becomes a secured creditor and if a formal order is not passed on the application filed by the petitioner seeking to attach the said property of the security, the petitioner will only have to stand in a queue as unsecured creditor, if ever Karur Vysa Bank brings the property to sale or proceeds further under the strength of mortgage.

4. Closure of the application of the petitioner, based on the affidavit giving an undertaking cannot be appreciated. The Court will necessarily have go through the averments made in the affidavit filed in support of the petition filed under Order 38 Rule 5 of the Code of Civil

Procedure, determine whether the plaintiff has made out a case for recovery of money or atleast, a probable case for recovery of money and whether there is a possibility of the respondent alienating or dealing with the property to give an opportunity to the respondent to furnish security to value of the suit claim, and if the respondent / defendant fails to do so, and does not give any acceptable reason for not furnishing security, then the Court can proceed further to attach the property, again keeping in mind the provisions and stipulations under Order 38 Rule 5 of CPC.

5. The respondent / defendant had already mortgaged the property and had dealt with the property. This is to the detriment of the present petitioner / plaintiff. Therefore, the order is set aside with a direction to the trial Court, namely, the III Additional District Court, Kallakurichi, to once again recommence the hearing in I.A.No.19 of 2020 and proceed in accordance with law and pass effective orders which can be appreciated by both the petitioner herein and also by the respondent herein. An order of simple closure cannot be understood by either one of the two parties.

6. In view of all these aspects, this Civil Revision Petition is

allowed with directions to the III Additional District Judge, Kallakurichi to re-hear I.A.No.19 of 2020 and pass further orders. No order as to costs.

07.04.2021

Index : Yes / No
Web : Yes / No
rna

To

The III Additional District Judge,
Kallakurichi.

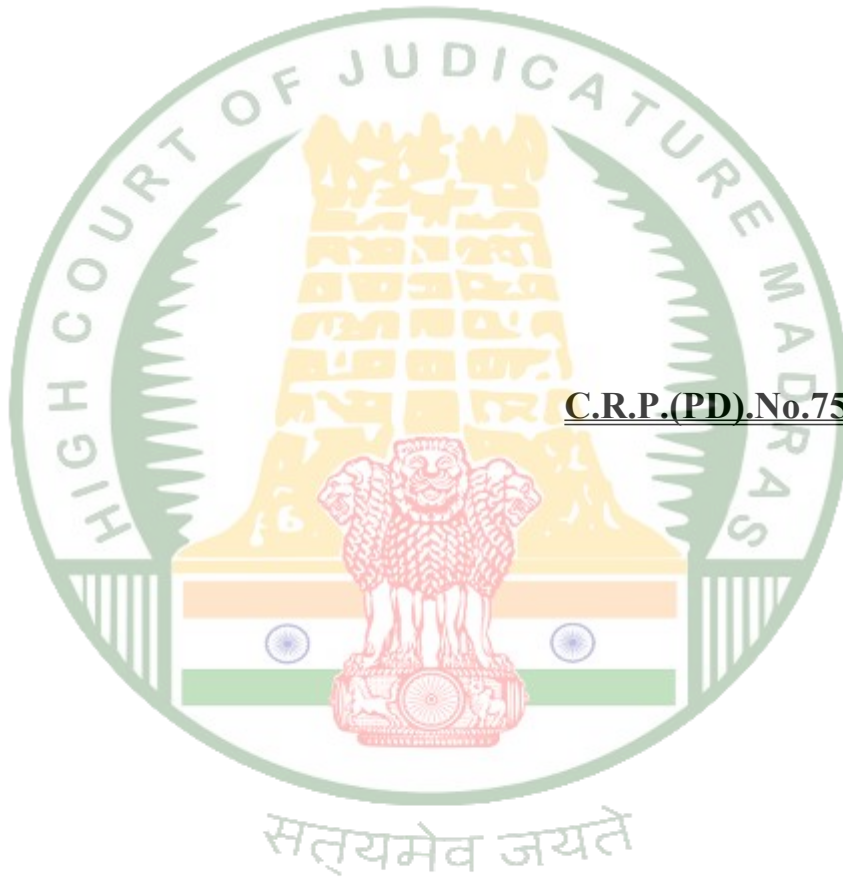


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