



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON	17.09.2021
DELIVERED ON	28.09.2021

CORAM :

THE HONOURABLE MRS.JUSTICE S.ANANTHI

C.R.P. (MD) .Nos.373 to 375 of 2021

**and C.M.P. (MD)Nos.2080, 2083,
2086, 2087, 2092 & 2094 of 2021**

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C.R.P. (MD)No.373 of 2021

Sri Eshan Capital,
Rep. By its Managing Partners,
KAS Eswaramurthi. and
E/Shembakavalli

... Petitioner/Petitioner/Plaintiff

Vs.

K.Palaniyammal

... Respondent/Respondent/3rd defendant

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order dated 25.08.2020 in I.A.No.637 of 2019 in O.S.No.147 of 2019 on the file of the Principal District Court, Karur.

C.R.P. (MD)No.374 of 2021

Sri Eshan Finance,
Rep. By its Managing Partners,
KAS Eswaramurthi and
E.Shembakavalli

... Petitioner/Petitioner/Plaintiff

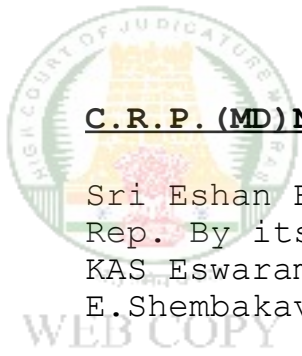
Vs.

1.K.Ramesh

2.K.Palaniyammal

... Respondents/Respondents/Defendants 2 & 3

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order dated 25.08.2020 in I.A.No.639 of 2019 in O.S.No.148 of 2019 on the file of the Principal District Court, Karur.



C.R.P. (MD)No.375 of 2021

Sri Eshan Enterprises,
Rep. By its Managing Partners,
KAS Eswaramurthi and
E.Shembakavalli

... Petitioner/Petitioner/Plaintiff

Vs.

K.Ramesh

... Respondent/Respondent/2nd Defendant

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order dated 25.08.2020 in I.A.No.641 of 2019 in O.S.No.149 of 2019 on the file of the Principal District Court, Karur.

In all CRPs.

For Petitioner	: Mr.Srinivasa Ragavan for Mr.K.Prabhakar
For Respondents	: Mr.S.Meenakshi Sundaram Senior Counsel for Mr.R.Mathiyalagan

COMMON ORDER

These Civil Revision Petitions have been filed to set aside the order, dated 25.08.2020 passed by the learned Principal District Judge, Karur, in I.A.Nos.637, 639 & 641 of 2019 in O.S.No.147 to 149 of 2019.

2.The revision petitioner herein/plaintiff has filed a suit in O.S.Nos.147, 148 & 149 of 2019 on the file of the Principal District Court, Karur. During the pendency of the above suits, the revision petitioner herein/plaintiff has filed three interlocutory applications in three suits in I.A.Nos.637, 639 & 641 of 2019 in O.S.Nos.147, 148 & 149 of 2019.

3.The learned Principal District Judge, Karur, has passed a common order, dated 25.08.2020 in I.A.Nos.637, 639 & 641 of 2019 in O.S.Nos.147, 148 & 149 of 2019 is as follows:

"In the result, the security furnished by the respondent is hereby accepted. Further, the respondent is directed not to alienate or encumber or create any mode of transfer pending suit and the petition is closed."

4.The issues in these Civil Revision Petitions are one and the same and therefore, common order is passed.



5.Heard Mr.Srinivasa Ragavan for Mr.K.Prabhakar, learned Counsel appearing for the revision petitioner and Mr.S.Meenakshi Sundaram, learned Senior Counsel for Mr.R.Mathiyalagan, appearing for the respondents. Perused the material documents available on record.

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6.The revision petitioner/plaintiff has filed three suits in O.S.Nos.147, 148 & 149 of 2019 on the file of the Principal District Court, karur, for recovery of money due on three pronotes executed by the 2nd defendant on behalf of 1st defendant with the consent of 3rd defendant.

7.The revision petitioner herein/plaintiff has filed three petitions in I.A.Nos.637, 639 & 641 of 2019 under Order 38 Rule 5 of Civil Procedure Code to attach the schedule mentioned properties before Judgment. In all the three petitions the schedule of properties are same.

8.The 1st respondent/2nd defendant has filed a memo in each petitions in I.A.Nos.637, 639 & 641 of 2019 in which he furnished alternative property for security. The schedule of property mentioned in those memos are same property.

9.The Court below has accepted the security furnished by the defendant in the memo and directed the defendant not to alienate the property during the pendency of the suit and with the above observations the I.A.Nos.637, 639 & 641 of 2019 were closed on 25.08.2020. Aggrieved by the said order, the revision petitioner/plaintiff is before this Court.

10.The following issues are to be decided in these Civil Revision Petitions:

1.Whether the Civil Revision Petition is maintainable against the order under Order 38 Rule 5 of Civil Procedure Code?

2.Whether the respondents herein can offer different properties other than the plaintiffs claimed?

3.Whether the value of properties offered by the respondents is sufficient for the amount claimed in the suit?

11. Issue No.1 :

Admittedly, only Civil Appeals are lie against the order passed under Order 38 Rule 5 of Civil Procedure Code, as per law. But, in the case on hand no order of attachment before Judgment was passed. On the other hand, the Court below has simply accepted the security offered by the defendants.

12.The relevant portion of the Judgment reported in **2020 SCC**

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Online Ker 4412 (FB) in the case of Sadasivan Vs.Surendradas, is extracted hereunder:

.....

"74. Notwithstanding that in **Pareed Master** and **Saseendran**, elaborate legal reasons are not mentioned for entering a finding that Order XXXVIII Rule 6(2) of the Code cannot apply to a case where there was no conditional attachment of the whole or any portion of property or in other words, Order XXXVIII Rule 6(2) is not intended to cover cases in which defendant successfully showed cause against attachment before Judgment, in which no conditional attachment order under Order XXXVIII Rule 5(3) of the Code has been granted, we agree with the views taken in the decisions. We answer the reference affirming the views in **Pareed Master** and **Saseendran**.

75. We find that the appeal against the impugned order is not maintainable under Order XLIII Rule 1(q) of the Code since there was no order of conditional attachment passed by the Court below to make it an order under Order XXXVIII Rule 6(2) of the Code. Hence, the records shall be returned to the appellant and he may work out his remedy in a legally proper manner."

13. The revision petitioner has relied on the Judgment reported in **2010(1) CTC 199** in the case of **Madras Gymkhana Club & Ors. V. KC Sukumar** in which another Judgment reported in **2002(1) CTC 183 in the case of Roshan Deen V. Preeti Lal** is discussed. The relevant portion is extracted hereunder:

.....

"the Supreme Court has held that the very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The lookout of the High Court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the by product of an erroneous interpretation of law. If justice became the by product of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law."

14. Further, the learned counsel appearing for the revision
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petitioner contended that the learned Principal District Judge, Karur, has no power to accept the alternative property offered by the defendant by which the Court below erred in understanding the law laid in Order 38 Rule 5 & 6 and also exceeds its Judgment. Therefore, he can very well invoke jurisdiction of this Court under Article 227 of the Constitution of India. Therefore, this Court can entertain these Civil Revision Petitions under Article 227 of the Constitution of India.

15. Issue No. II:

The learned counsel appearing for the revision petitioner argued that as per Order 38 Rule (1) 4(2) of Civil Procedure Code, the specified properties means properties described in the schedule of attachment before Judgment petition.

16. The revision petitioner has also relied on the Judgment reported in **ILR 2000 Kar 586** in the case of **Meera Arya & Anr. V. Leela Nagraj & Anr.** and the relevant portion of the Judgment is extracted hereunder:

.....

"6. The wordings of the said rule makes it clear that for the attachment to be vacated, the Court may direct the defendants either to furnish security for the plaint claim or direct him to produce and place at the disposal of the Court when required the "said property" or value of the same. What is meant by the "said property"? The meaning of the "said property" is provided by sub-rule (2) of Rule 5 of Order 38. The "said property" therefore mean, the property indicated in sub-rule (2). The said property referred to in Order 38, Rule 5 could be only the property that has been attached and it may not be alternative property. It is clear from the wordings of the Rule that property that can be offered as security under Order 38, Rule 1, can be only that property that is sought to be attached and not any other property. The need to specify the property is mandatory by virtue of sub-rule (4). Thus a property has to be indicated by the plaintiff for attachment under sub-rule (1) and attachment can be made absolute or varied on the security of the "said property". A different property, if objected to by the plaintiff, cannot be substituted for the original property.

Mr. Dayanand, learned Counsel highlighted his contention relying on Order 38, Rule 6 and sub-rule (2). That rule reads as under:



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"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 as appears sufficient to satisfy any decree which may be passed in the suit, be attached".

"(2) Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit".

(Underlining supplied)

Sub-rule (1) makes it clear that where defendant fails to show cause why he should not furnish security or fails to furnish security required within time fixed, the Court may order that property "specified", or such portion thereof as appears sufficient to satisfy the decree which may be passed in the suit be attached. The emphasis in sub-rule (1) is with respect to the property specified, which is sought to be attached under Rule 5. Rule 5 refers to the property initially sought to be attached. The wordings in sub-rule (2) of Rule 6 makes it clear that the property specified in Rule 5 would be dealt with under the rule and no other property. Therefore, the conjoint reading of sub-rules (1) and (2) of Rule 6 can be only keeping in mind the requirement of Rule 5, makes it clear that the property referred to in Rule 6 is the property which is the subject-matter of attachment under Rule 5. If that is so the sister of defendant cannot come forward to offer her property as security nor can the Court accept any such security unless the plaintiff himself is prepared to accept the same. Much worse is the situation when the Court states that value of the alternate property and other objections raised by the plaintiff with respect to the property offered by the sister of the defendant will be considered at a later stage. Such order cannot be described as a judicial exercise of power, as it is totally against



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known provisions of law. I am of the view that the order passed by the Court below cannot be sustained. It is accordingly vacated. The vacating of the attachment by the Court below is not justified. The attachment made in I.A. I is made absolute. Appeals are allowed. No costs''.

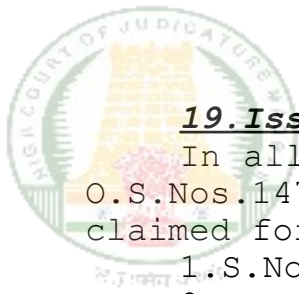
17.As per Judgment reported in **1993 MLJ P.33 in the case of Kalianna Kounder and others V. Marappa Kounder**, this Court held as follows:

.....

"6.It is evident that O.38, Rule 6, C.P.C., merely refers to the security. It does not refer to the nature of security. It does not indicate that it is not open to the defendant to furnish the third-party security, personal or property. A reading of Form No.6 in Appendix F of C.P.C., would show that if the personal security of third party is not contemplated under O.38, Rule 5, C.P.C., the said form could not have been prescribed. The security referred to in O.38, Rule 6 is the security as contemplated under O.38, R.5, C.P.C. In view of the above, I am clear that the Court below has committed an illegality in rejecting the security furnished by the third party. Mr.R.Sekar would rely upon Adduru Dasaratha Rami Reddy V. Vamireddy Vishnu (Minor), A.I.R. 1992 A.P.307, wherein it was held that the nature of security contemplated under O.38, Rule 6 is not qualified and it may be even of a third party. With respect I agree with the view of the High Court of Andhra Pradesh.

7.Inasmuch as I have held that the property furnished by a third-party can be accepted as security, the next stage would be whether it would be sufficient enough to discharge the decree that may be passed, if the defendant fails to produce the property which is sought to be attached or value of the same".

18.Even a property of third party, when the third party agreed can be accepted. It is admitted fact that the offered property is owned by the respondents herein/defendants. Therefore, they can very well offer alternative property as security.



19. Issue No. III:

In all the three petitions in I.A.Nos.637, 639 & 641 of 2019 in O.S.Nos.147, 148 & 149 of 2019, the revision petitioner/plaintiff claimed for attachment before Judgment is same property, that is,

1.S.No.67	1.96 ½ acre
2.S.No.610/2	.70 acre
3.S.No.613	3.49 acre
Total	6.15 acres

which are all approved house sites valued about Rs.50 lakhs. The claim in all the three suits are more than Rs.3 crores.

20.Now the respondents herein/defendants have offered a property in S.No.607 is 77 cents for all the three claims at value of Rs.3,35,41,000/-.

21.The Court below has to consider whether the security furnished by the 2nd defendant is sufficient and without any encumbrance.

22.The encumbrance stated by the plaintiff was that in S.F.No.607 already an extent of Ac.1.96 ½ was converted into layout called P.R.K.Avenue and in the said survey number, a land measuring about Ac.0.95 is the subject matter in O.S.No.94 of 2018 filed by one Balusamy. The revision petitioner/plaintiff has also produced a plaint copy in O.S.No.94 of 2018 filed by said Balusamy. The defendant has stated that the property is separate property and not connected with the suit filed by the Balusamy. The Court has considered this aspect. The petitioner also sought for attachment of property in S.F.No.607. Therefore, the revision petitioner/plaintiff knowing well that the property is part of subject matter in O.S.No.93 of 2018 and O.S.No.94 of 2018, filed this petition seeking attachment of the property. On perusal of the plaint in O.S.No.93 of 2018 and O.S.No.94 of 2018, both suits were filed by Balusamy seeking relief of specific performance and alternative relief refund of advance money. It is only an agreement for sale and cannot be treated as encumbrance. On perusal, only a portion of property in that survey number is the subject matter of earlier suit. Therefore, the revision petitioner/plaintiff has claimed the property in S.No.607 in attachment before Judgment petition. He cannot now objected that the property is in encumbrance. Only a portion of the property is subject matter of earlier suits.

23.Regarding valuation the respondents herein/defendant estimated the value of offered property is as Rs.3,35,41,000/-. In support of the contention of the respondents herein/defendant have produced a valuation report of an approved valuer. The valuer is not a government valuer. The property also an agricultural property.



24.As per encumbrance certificate, dated 03.01.2021, the value of the square feet in S.No.607 is Rs.302 per sq. feet. Therefore, the value is less than the claim amount. So, the Court below cannot accept the properties which has lower value instead of property in attachment before judgment petition.

25.The valuer was also not examined. The revision petitioner has no opportunity to cross examine him.

26.The Court below has accepted 77 cents instead of 6.15 acres, that too not house site. Therefore, the learned Principal District Judge, Karur, has wrongly accepted the value.

27.Further, the learned counsel appearing for the respondents contended that this case comes under Commercial Court Act since the value of claim is more than Rs.3 crores and also it is a commercial transaction. Therefore, these Civil Revision Petitions filed under Article 227 of the Constitution of India, will not lie.

28.These cases are taken as ordinary suit and order also passed in the I.A.Nos.637, 639 & 641 of 2019 in O.S.Nos.147, 148 & 149 of 2019. The respondent did not raise any objection before the Principal District Court, Karur. He cannot add new plea. As per Section 15(5) of Commercial Courts Act, the respondents herein/defendants may file a petition to transfer the case to the Commercial Court.

29.Finally, these Civil Revision Petitions are partly allowed by modifying the order, dated 25.08.2020 in I.A.Nos. I.A.Nos.637, 639 & 641 of 2019 in O.S.Nos.147, 148 & 149 of 2019. The learned Principal District Judge, Karur, is directed to call for additional security other than the accepted security for the suit value within a period of one month, from the date of receipt of copy of the order. If the respondents are failed to produce further security within a period of one month, thereafter the Court below shall pass an order of attachment of properties as mentioned in the petitions in I.A.Nos.637, 639 & 641 of 2019 in O.S.Nos.147, 148 & 149 of 2019. No Costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (P & A)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

ksa



Note In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

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To

The Principal District Court,
Karur.

+3 CC to M/s.K.PRABHAKAR, Advocate (SR-30562[F] dated 28/09/2021)

**Common Order made in
C.R.P. (MD) .Nos.373 to 375 of 2021
28.09.2021**

SRK(CO)/RS (08.10.2021) 10P 5C