BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
Reserved on : 10.08.2021
Pronounced on : 16.08.2021

CORAM
THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

CRP(PD)(MD).No. 769 of 2021and
CMP(MD).No.4190 of 2021

Prema : Petitioner/Petitioner/plaintiff

Vs.

Somu : Respondent/Respondent/defendant

PRAYER:- Civil Revision Petition filed under Article 227 of the Constitution of India as against the fair and decreetal order dated 19.03.2021 in I.A.No.618 of 2018 in O.S.No.175 of 2018 passed by the Subordinate Judge, Kovilpatti and set aside the same.

For petitioner : Mr. A. Srinivasan
For respondent : Mr. R. Karunanithi

ORDER

The Civil Revision is directed against the order passed in I.A.No. 618 of 2018 in O.S.No.175 of 2018, dated 19.03.2021, on the file of the Subordinate Court, Kovilpatti, dismissing the petition filed under Order 38 Rule 5 CPC.

2. The revision petitioner is the plaintiff and she filed the suit against the respondent / defendant for recovery of Rs.9,83,200/- with interest and costs due on the promissory note, dated 22.01.2017 alleged to have been executed by the defendant in favour of the plaintiff. The plaintiff filed an application in I.A.No.618 of 2018 under Order 38 Rule 5 CPC seeking attachment of the property owned by the defendant before Judgment. The defendant has filed her counter statement disputing the liability. The learned Subordinate Judge, after enquiry, has passed the impugned order on 19.03.2021 dismissing the petition. Aggrieved by the said order, the plaintiff has come forward with the present revision.

3. The main contention of the revision petitioner is that the respondent herself has stated in her counter statement that the property sought to be attached is under mortgage to the Devan

Housing Finance Corporation Limited, that subsequently the plaintiff came to know that the defendant had repaid the loan amount on 11.09.2019 and executed a power of attorney in favour of a third party, who in turn executed a sale agreement in favour of another third party on the next day itself, that though the petitioner has filed the Encumbrance Certificates, the trial Court has not considered the same, that the trial Court has passed a cryptic and non-speaking order and that therefore, the impugned order is liable to be set aside.

4. The learned counsel for the respondent would submit that the respondent has filed her written statement and also counter statement specifically disputing the suit borrowal and the execution of the alleged promissory note, that the respondent has never seen the petitioner at any point of time and that since the defendant is not liable for the claim, the question of attaching her property before the Judgment does not arise at all.

5. The learned Subordinate Judge, in her brief order, by observing that the defendant has clearly and strongly denied the debt and the signature in the pronote and hence, the Court could decide the liability at the trial, that the attachment before the Judgment could not be passed mechanically and that there is no sufficient material to pass an order for attachment of property, dismissed the petition.

6. It is very common that the defendant, in money suits, takes the defence of disputing the borrowal and denying the execution of promissory notes. No doubt, if the defendant disputes the borrowal and execution of the promissory note, those aspects can only be gone into at the trial, but that by itself is not sufficient to say that the petition for attachment before the Judgment cannot be looked into. In the case on hand, as rightly pointed out by the plaintiff's counsel, the plaintiff has produced the Encumbrance Certificate along with the plaint. Moreover, the defendant in her counter statement has specifically stated that she had mortgaged the petition mentioned property to the Devan Housing Finance Corporation Limited and the said loan was utilized for constructing the house property and that since the said mortgagor Devan Housing Finance Corporation Limited is a necessary party, the petition is liable to be dismissed for non-joinder of the necessary party.

7. It is evident from the Encumbrance Certificate that the defendant has discharged the mortgage loan on 11.04.2019 and on that day itself, she has executed a power of attorney in favour of one Marimuthu, who in turn, executed a sale agreement in favour of another person on 12.04.2019. But the learned Subordinate Judge, without considering the pleadings of both parties and the documents produced and also without discussing as to whether the ingredients so as to attract Order 38 Rule 5 CPC are available or not, has

passed the very brief order. As rightly contended by the learned counsel for the revision petitioner, the impugned order can only be considered as a non-speaking order. Hence, this Court decides that impugned order is not good in law and the same is liable to be set aside and consequently, the matter is to be remitted back to the trial Court.

8. In the result, the Civil Revision Petition is allowed and the impugned order, dated 19.03.2021 passed in I.A.No.618 of 2018 in O.S.No.175 of 2018 by the Subordinate Judge, Kovilpatti is set aside and the matter is remitted back to the trial Court and the trial Court is directed permit the parties to adduce documentary evidence, if any and conduct an enquiry and pass orders in accordance with law, within a period of four weeks from the date of receipt of a copy of this order. No costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

trp

To

The Subordinate Judge, Kovilpatti.

+1 CC to M/s.A.SRINIVASAN, Advocate (SR-26547 [F] dated 16/08/2021)

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