



C.M.A(MD)Nos.236 and 237 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 15.06.2022

Pronounced on : 06.07.2022

CORAM

THE HONOURABLE MRS.JUSTICE **R.THARANI**

C.M.A(MD)Nos.236 and 237 of 2021

and

C.M.P.(MD)Nos.2008 and 2011 of 2021

- 1.M/s.Dhanalakshmi Timbers,
Partnership Company through its
Share Holder Shenbagaraman
- 2.M/s.Dhanalakshmi Timbers,
Partnership Company through its
Share Holder Mallika
- 3.M/s.Dhanalakshmi Timbers,
Partnership Company through its
Share Holder Shanmugathayammal

... Appellants in C.M.A(MD)No.236 of 2021

- 1.M/s.Prakash Sawmill and Wood Industries,
Partnership Company through its
Share Holder Shenbagaraman
- 2.M/s.Prakash Sawmill and Wood Industries,
Partnership Company through its
Share Holder Mallika



C.M.A(MD)Nos.236 and 237 of 2021

3.M/s.Prakash Sawmill and Wood Industries,
Partnership Company through its
Share Holder Saranya

4.M/s.Prakash Sawmill and Wood Industries,
Partnership Company through its
Share Holder Ganeshpriya

... Appellants in C.M.A(MD)No.237 of 2021

Vs

Premkumar

... Respondent in both CMAs

PRAYER in C.M.A(MD)No.236 of 2021:-

This Civil Miscellaneous Appeal is filed under Order 43, Rule 1 read with 104 of CPC, to set aside the fair and decreetal order passed in I.A.No.03 of 2019 in O.S.No.246 of 2019 dated 23.12.2020, on the file of the Principal District Judge, Tirunelveli.

PRAYER in C.M.A(MD)No.237 of 2021:-

This Civil Miscellaneous Appeal is filed under Order 43, Rule 1 read with 104 of CPC, to set aside the fair and decreetal order passed in I.A.No.03 of 2019 in O.S.No.247 of 2019 dated 23.12.2020, on the file of the Principal District Judge, Tirunelveli.

For Appellants : Mr.P.Prabhakaran

For Respondents : Mr.V.Sasikumar

(in both CMAs)



WEB COPY



C.M.A(MD)Nos.236 and 237 of 2021

COMMON JUDGMENT

These appeals were filed against the orders made in I.A.No.03 of 2019 in O.S.No.246 of 2019 and in I.A.No.03 of 2019 in O.S.No.247 of 2019, dated 23.12.2020, on the file of the Principal District Judge, Tirunelveli. The appellants are the defendants in the original suit and the respondents in the original petition. The respondent herein is the plaintiff in the original suit and the petitioner in the I.A.,petition. The respondent herein has filed two suits in O.S.Nos.246 and 247 of 2019 for a prayer of recovery of money. Along with the plaint, the respondent herein has filed two petition in I.A.Nos.3 and 3 of 2019 in both suits, for attachment of properties.

2.Brief substance of the petition in I.A.No.3 of 2019 in O.S.No.246 of 2019 is as follows:

The petitioner is the plaintiff in the suit. The suit was filed for recovery of money. The plaintiff is doing timber business under the name and style as Nithyakalyani Timber Industries at Shenkottai. The respondents are also doing timber business under the name and style as Dhanalakshmi Timbers. There is business transactions between the plaintiff and the respondents for



C.M.A(MD)Nos.236 and 237 of 2021

many years. The respondents purchase timbers from the plaintiff on credit basis from bills dated 29.05.2017 vide Bill No.222, on 18.06.2017 vide Bill No.228, on 16.07.2017 vide Bill No.252, and on 12.10.2017 vide Bill No.262, on credit basis and balance amount to be paid is Rs.24,31,539/-. The respondents delayed the payment. The petitioner sent a legal notice on 05.08.2019 to pay the balance amount and the same was received by the respondents on 09.08.2019. The respondents sent a reply notice with false particulars. The respondents are trying to sell the petition schedule properties since 10.09.2019 and they are preparing to leave the town with an intention to defraud the petitioner. Hence the property to be attached.

3.Brief substance of the petition in I.A.No.3 of 2019 in O.S.No.247 of 2019 is as follows:

The petitioner is the plaintiff in the suit. The suit was filed for recovery of money. The plaintiff is doing timber business under the name and style as Nithyakalyani Timber Industries at Shenkottai. The respondents also doing timber business under the name and style as Prakash Saw Mill. There is business transactions between the plaintiff and the respondents for many years. The respondents purchase timbers from the plaintiff on credit basis



C.M.A(MD)Nos.236 and 237 of 2021

from bills dated 30.04.2016 vide Bill No.149, on 31.05.2016 vide Bill No. 155, on 24.06.2016, vide Bill No.159, on 22.09.2016, vide Bill No.186, on 23.09.2016 vide Bill No.187, on 24.09.2016, vide Bill No.188, on 25.09.2016 vide Bill No.189, on 26.09.2016 vide Bill No.190, on 02.03.2017 vide Bill No.215, on 01.09.2017 vide Bill No.254 and on 27.11.2017 vide Bill No.268 on credit basis and balance amount to be paid is Rs.36,81,891/-. The respondents delayed the payment. The petitioner sent a legal notice on 05.08.2019 to pay the balance amount and the same was received by the respondents on 09.08.2019. The respondents sent a reply notice with false particulars. The respondents are trying to sell the petition schedule properties since 10.09.2019 and they are preparing to leave the town with an intention to defraud the petitioner. Hence the property to be attached.

4.Brief substance of the counter filed by the first respondent adopted by the second and third respondents is as follows:

The respondents are partners and they are doing business under the name and style as Prakash Timbers and Dhanalakshmi Timbers and P.S.P.Timbers. The petitioner used to buy wooden logs for credit on behalf of other timber merchants and used to collect the amount from the respective



C.M.A(MD)Nos.236 and 237 of 2021

owners and pay the collected amount to the respondents' Timber industries, the respondent are also having business with the petitioner. The respondents make the payments through Cheque and bank transfer and often make the payment through cash to the petitioner. The petitioner has admitted the cash payment in his letter dated 20.05.2019. The petitioner has a bad intention to defraud the respondents, he willfully and wantonly failed to mention the cash payments in his audited account statement. The petitioner as the agent for the transactions held between the other timber traders and the respondents, had collected the entire sale price and failed to make any payment to the respondent. When the respondent is about to file a cheating complaint against the petitioner, the petitioner has created a concocted story of balance payment due from the respondents. All the transactions were already settled in time.

5.The property mentioned in the petition was already mortgaged with the Karur Vysya Bank, Shenkottai, for cash credit loan as well as letter of credit for import of goods. There is no cause of action under Order 38 Rule 5 of CPC. There is no necessity for the respondent to sell the schedule property. The petition is liable to be dismissed.



C.M.A(MD)Nos.236 and 237 of 2021

6.Before the Trial Court 14 documents were marked in O.S.No.246 of 2019 and 18 documents were marked in O.S.No.247 of 2019 on the side of the petitioner. No document was marked on the side of the respondents in both suits. The trial Court allowed the petitions and ordered attachment. Against that order, the respondents have approached this Court.

7.On the side of the appellants it is stated that the trial Court without complying the directions under order 38 Rule 5 of CPC, has passed an order of attachment. No notice was given for furnishing security. The Tribunal failed to consider that the property was mortgaged with the Karur Vysya Bank Limited, Shenkottai Branch. The Tribunal failed to prove that the appellants are making an attempt to alienate the property. The trial has already commenced. The trial Court ought to have closed the application. The petition was filed on 27.09.2019. Counter was filed on 07.11.2019. But the impugned order was passed only on 23.12.2020. But the trial Court failed to consider that the appellants are not attempt to alienate the property. The intention of the respondent is only to defame the appellants by attaching their property.



C.M.A(MD)Nos.236 and 237 of 2021

8.On the side of the appellants, it is further submitted that before the conclusion of the trial, the trial Court has come to the conclusion that the appellants are bound to pay the amount. The trial Court failed to consider that the respondent is trying to convert his unsecured money claim into a secured claim. The respondent has failed to satisfy the ingredients required under Order 38 Rule 5 of CPC.

9.On the side of the appellants, it is stated that the order after the examination of P.W.1 is erroneous. No notice under Order 31 Rule 5(1)(b) of CPC was issued to the appellant. Only when the appellant was trying to alienate and dispose of the property or to remove the property from the local area, the Court can call for the appellant to furnish sufficient security. Without notice to furnish security, an order of attachment is void.

10.On the side of the appellants, it is stated that the Tribunal has come to the conclusion to attach the property only on the ground that the plaintiff has insisted attachment. There was no discussion regarding the attempt to removal of property or attempt to alienate the property, in the order. No third party affidavit was filed along with the petition. The property was already



C.M.A(MD)Nos.236 and 237 of 2021

mortgaged with the bank and there is no question of alienating the property.

The plaintiff cannot convert an ordinary debt into a secured debt and the appellants herein pray this appeal to be remanded back to the trial Court for fresh consideration.

11.On the side of the appellants a judgment of the Hon'ble Supreme Court reported in **2008-2-SCC 302** in the case of **Raman Tech. & Process Engg. Co., Vs Solanki Traders**, is cited. Another judgment of this Court, reported in **2017 SCC Online Mad 9102** in the case of **M/s.Manajwasree Constructions Pvt. Ltd., Rep. by its Director vs Mrs.Jyothi Prem Proprietrix**, is cited.

12.On the side of the respondent, it is stated that when the trial has commenced P.W.1 was examined but the appellants herein have failed to cross examine the witness. 14 documents in O.S.No.246 of 2019 and 18 documents in O.S.No.247 of 2019 were marked on the side of the plaintiff. The impugned order was passed only after full contest. The respondent filed a petition for attachment only subject to the earlier mortgage with the bank. The value of the property is nearly 2 to 3 Crores and the claim of the



C.M.A(MD)Nos.236 and 237 of 2021

respondent herein is only Rs.44,00,000/-. This Civil Miscellaneous Appeal is a continuation of the original suit. Even in the appeal, the appellant has not come forward with any undertaking that they will not alienate the property or have reported their willingness to furnish security.

13.On the side of the appellants, it is stated that under Order 38 Rule 5, notice is mandatory. Unless a notice to furnish security was given to the petitioner, the order is void. Under Order 38 Rule 5(1) non issuances of notice, cannot be rectified. Calling for the appellants to furnish security is necessary. No third party affidavit was filed to prove the intention of the appellants.

14.On the side of the respondent it is stated that the appellant has not given any undertaking that they will not alienate the property. The respondent herein has marked Ex.P1 to Ex.P14 and Ex.P1 to Ex.P18 in both suits and proved that there is a prima facie case against the appellants. Third party affidavits were already filed by the respondent. In the third party affidavit, the attempt of the appellant to sell the property was mentioned. Only with a motive to alienate the property, the appellants are insisting for the removal of the attachment.



C.M.A(MD)Nos.236 and 237 of 2021

15.It has been clearly mentioned that it was the appellants herein who have made the representation to dispose of the I.A., petition first, since they were not willing to cross examine P.W.1 in the suit. Admittedly, there was business transactions between the appellants and the respondent. Based on the documents Ex.P1 to Ex.P7 and Ex.P10 in O.S.No.246 of 2019 and Ex.P1 to Ex.P11 and Ex.P15 in O.S.No.247 of 2019, the trial Court has come to the conclusion that there is some prima facie case.

16.The main contention of the appellants is that a notice under Order 38 Rule 5(1) was not served to the appellants. From the order of the trial Court, it is clear that it was the appellants who insisted for the disposal of the I.A., petition prior to the cross examination of the P.W.1. Even in the appeal, the appellant has not come forward with the statement that he will not to alienate the property. The appellants have not stated anything regarding their willingness to furnish security. In the above circumstances, issuance of notice was not necessary.

17.There is no ground sufficient enough to allow this Civil Miscellaneous Appeal. Another contention of the appellants is that the



C.M.A(MD)Nos.236 and 237 of 2021

appellants were not having any intention to alienate the property. The property was already mortgaged with the bank and that the respondent is trying to convert an ordinary debt into a security debt.

17.It is true that the property was already mortgaged with the bank. But there is every possibility of alienating a property subject to the mortgage with the bank. A third party affidavit was already filed by the petitioner and the fact was mentioned in the order. Hence this contention of the appellant is not sustainable.

18.The contention of the respondent is that the appellants, are trying to alienate the property and only with that motive, they have filed this appeal. If there is no chance for alienating the property, it is not necessary for the appellants to file this appeal. The facts of the case cited by the appellants, differs from the facts of the present case. The respondent has proved the intention of the appellants by way of a third party affidavit. The respondent proved that there is a prima facie case and that the balance of convenience is on the side of the respondent. In the above circumstances, there is nothing sufficient enough to interfere with the orders of the trial Court.



C.M.A(MD)Nos.236 and 237 of 2021

20. Accordingly, these Civil Miscellaneous Appeals are dismissed. No costs. Consequently, connected miscellaneous petitions are also dismissed.

06.07.2022

Index: Yes / No
Internet : Yes / No

pnn

To

1. The Principal District Judge, Tirunelveli.
2. The Record Keeper, Vernacular Records,
Madurai Bench of Madras High Court, Madurai.



WEB COPY



C.M.A(MD)Nos.236 and 237 of 2021

R.THARANI, J.

pnn

**C.M.A(MD)Nos.236 and 237 of 2021
and
C.M.P.(MD)Nos.2008 and 2011 of 2021**

06.07.2022