



C.M.A.(MD)No.245 of 2022

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 17.10.2022

Pronounced on : 02.12.2022

CORAM:

THE HON'BLE MR.JUSTICE K.MURALI SHANKAR

C.M.A.(MD)No.245 of 2022
and C.M.P.(MD)No.2245 of 2022

K.Rajesh Kumar

...Appellant/1st Respondent/1st Defendant

Vs.

1. Suresh

...Respondent/Petitioner/Plaintiff

2. Krishnamoorthy

3. Manjula

...Respondents/Respondents 2 & 3/
Defendants 2 & 3

Prayer : This Civil Miscellaneous Appeal filed under Order 43 Rule 1 r/w Section 104 of Civil Procedure Code, to set aside the order and decree passed dated 23.01.2020 made in I.A.No.110 of 2019 in O.S.No.82 of 2019 on the file of the learned Additional District Judge (Fast Track Court), Kumbakonam and allow this appeal.

For Appellant : Mr.G.Gomathi Sankar

For Respondents : Mr.Shangar Murali for R1

No appearance for R2 and R3



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JUDGMENT

The Civil Miscellaneous Appeal is directed against the order passed in I.A.No.110 of 2019 in O.S.No.82 of 2019 dated 23.01.2020 on the file of the Additional District Court, Kumbakonam.

2. The appellant is the first respondent/first defendant and the respondents 2 and 3 are the respondents 2 and 3/defendants 2 and 3 and that the first respondent is the petitioner/plaintiff in I.A.No.110 of 2019 in O.S.No.82 of 2019 on the file of the Additional District Court, Kumbakonam.

3. The first respondent/plaintiff has laid the above suit for recovery of Rs.50 lakhs with interest and costs against the appellant/first defendant. The first respondent/plaintiff has also filed an application under Order 38 Rule 5 of Code of Civil Procedure seeking attachment of the petition mentioned property in I.A.No.110 of 2019. The appellant/first defendant as well as the respondents 2 and 3/defendants 2 and 3 have filed their counter statement opposing the claim for attachment before judgment. The learned Additional District Judge, after enquiry, has passed the impugned order dated 23.01.2020 allowing the application and ordered attachment of the petition mentioned property before



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judgment. Aggrieved by the said order, the first defendant has come forward with the present appeal.

4. For the sake of convenience and brevity, the parties herein-after will be referred as per their status / ranking in the trial Court.

5. Admittedly, the defendants 2 and 3 are husband and wife and the first defendant is the son of the defendants 2 and 3.

6. The case of the plaintiff is that the first defendant borrowed a sum of Rs.56,50,000/- on several occasions and remitted a sum of Rs.7 lakhs to the plaintiff, that the first defendant, in order to discharge the above debt, has issued a post dated HDFC Bank cheque bearing No.0003 dated 01.11.2016 for Rs.50 lakhs on 27.10.2016 in favour of the plaintiff, that when the cheque was presented for collection, the same was returned 'dishonored' for want of sufficient funds in the bank account of the first defendant, that the plaintiff has then sent a legal notice on 26.11.2016 demanding payment of the amount covered by the cheque, that the first defendant, having received the notice on 15.12.2016, has neither sent any reply nor made any payment, that therefore, the plaintiff was constrained to file a complaint in S.T.C.No.776 of 2017 before the



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concerned Judicial Magistrate Court, that subsequently, the plaintiff and the defendants 1 and 2 have entered into a compromise and wherein, the defendants voluntarily offered to execute a sale deed in favour of the plaintiff in respect of one of the apartment constructed in the petition mentioned property for Rs.75 lakhs, that the plaintiff, after coming to know that the apartment will fetch a sum of Rs.40 to 45 lakhs, refused to accept the offer, that the plaintiff came to know that the third defendant colluding with the defendants 1 and 2 has been attempting to sell the four apartments in the suit property with an intention to cheat and defraud the plaintiff and that therefore, the plaintiff is constrained to file the above suit for recovery of money and also the above application for attachment of the petition mentioned property before judgment.

7. It is the specific contention of the plaintiff that the suit property was purchased by the defendants 1 and 2 in the name of the third defendant, that the third defendant is only an ostensible owner and not the real owner of the suit property and that therefore, the suit property is liable to be attached before judgment.

8. The first defendant, in his counter statement, has admitted the existence of money transaction between him and the plaintiff, but he denied and disputed



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the balance amount of Rs.50 lakhs allegedly due by him and that the cheque was not issued by him and the same was fabricated by the plaintiff for the purpose of the suit.

9. According to the first defendant, the suit property is belonging to his mother, the third defendant and that since he has nothing to do with the suit property, the question of seeking attachment before judgment of the suit property does not arise at all. The defendants 2 and 3 have taken a stand that the suit property was purchased from the income of the defendants 2 and 3, in the name of the third defendant, that they have raised housing constructions therein, that the first defendant has no right or title in the suit property and that the plaintiff has come forward with the imaginary claim to grab the suit property and to take revenge on their family.

10. It is pertinent to note that even according to the plaintiff, the first defendant alone has borrowed the amounts shown in the plaint and there was a balance of Rs.50 lakhs due by the first defendant to him. Though the plaintiff has alleged that the second defendant has also borrowed a sum of Rs.10 lakhs from him, he has repaid the same. It is not the case of the plaintiff that the defendants 2 and 3 have also borrowed the amounts from the plaintiff along



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with the first defendant or that they stood as guarantors for the repayment of the loan amount.

11. As already pointed out, the plaintiff has specifically prayed for a decree only against the first defendant for recovery of Rs.50 lakhs with interest and costs. Admittedly, the petition mentioned property stands in the name of the third defendant. Though the defendants 2 and 3 have taken a stand that the suit property was purchased and the buildings were constructed therein with the help of their own funds, in the counter statement, they have specifically admitted that the suit property is owned by the third defendant.

12. As rightly contended by the learned counsel appearing for the first defendant, the plaintiff, in order to invoke Order 38 Rule 5 of Code of Civil Procedure, has alleged that the third defendant is only an ostensible owner and the property was purchased by the defendants 1 and 2.

13. As rightly pointed out by the learned counsel appearing for the first defendant, the plaintiff, in para No.4 of the plaint, has specifically stated that the suit property was purchased by the second defendant from the known sources of income of the defendants 2 and 3, but in the name of the third defendant and that the defendants 2 and 3 have recently developed the suit property and put up



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four apartments in it. Considering the above, it is very much clear that the plaintiff himself has specifically admitted that the suit property was purchased by the defendants 2 and 3 and the four apartments were constructed by them therein. But in subsequent para, he has taken a U-turn and stated that the suit property was purchased by the defendants 1 and 2 in the name of the third defendant and that the third defendant is only an ostensible owner and not the real owner of the property.

14. As rightly contended by the learned counsel appearing for the first defendant, interestingly, the plaintiff has also taken a stand in para No.4 of the plaint that it has been represented by both the defendants 2 and 3 that the suit property is given to the first defendant being their sole surviving legal heir. The plaintiff has not elaborated anything further.

15. The learned trial Judge, by raising a point by himself, whether the properties stands in the name of the third defendant is the self-acquired property or constructed by the third defendant with the money given by the second defendant or the money given by the first defendant are triable issues and the same can only be decided at the trial and that since the apartment was constructed during the period of borrowal from by the plaintiff, has come to a



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decision that the ordering of attachment before judgment is very much necessary to meet the ends of justice.

16. It is not the definite case of the plaintiff that the suit property is owned by the defendants 1 and 2, but purchased in the name of the third defendant. No doubt, the second defendant being the husband can very well purchase the property in the name of his wife, third defendant and that he can very well claim that property as per the provisions of Benami Transactions (Prohibition) Act, 1988, but he has to prove that the said property had been purchased not for the benefit of the wife. It is pertinent to note that the first defendant being the son cannot take such a plea, as the same is prohibited by the Benami Transactions (Prohibition) Act, 1988.

17. It is very much shocking to notice the observation of the learned trial Judge that the defendants 2 and 3 have not averred that they are having any other legal heir to succeed their properties, that the plaintiff has averred that the third defendant is only an ostensible owner and that the first defendant is the sole legal heir of the defendants 2 and 3, while ordering attachment before judgment.



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18. At this juncture, it is necessary to refer the decision of this Court in ***N.Pappammal Vs. L.Chidambaram*** reported in ***AIR 1984 MADRAS 70***, wherein, the essential requirements for invoking Order 38 Rule 5 of Code of Civil Procedure have been dealt with and the same are extracted hereunder:-

“6. The essential requirements for invoking the power of Court to effect an attachment under Order 38, rule 5(1), Civil Procedure Code, are that the Court must be satisfied that the defendant is about to dispose of the whole or any part of his or her property or the defendant is about to remove the whole or any part of his or her property from the local limits of the jurisdiction of the Court and the defendant is intending so to do with a view to cause obstruction or delay the execution of any decree that may be passed against him or her. It is incumbent that the plaintiff should state precisely the grounds on which the belief or apprehensions are entertained that the defendant is likely to dispose of or remove the property. It may even be necessary in some cases to give the source of information and belief. A mere mechanical repetition of the provisions in the Code or the language therein without any basis strata of truth underlying the allegation or vague and general allegations that the defendant is about to dispose of the property or remove it beyond the jurisdiction of the Court totally unsupported by particulars would not be sufficient compliance with the first part of Order 38, rule 5(1), Civil



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Procedure Code.”

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19. It is pertinent to note that the power under Order 38 Rule 5 of Code of Civil Procedure is a drastic and extraordinary power. The Hon'ble Supreme Court in ***M/s.Raman Tech & Process Engg. Co. Vs. M/s.Solanki Traders*** reported in ***2008 (2) SCC 302*** has specifically observed that the power under Order 38, Rule 5 should be used sparingly and not mechanically and the relevant passages are reproduced hereunder:-

“5. The power under Order 38, Rule 5 Civil Procedure Code is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38, Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilise the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs, by obtaining orders of attachment before judgment and forcing the defendants for out of court settlements, under threat of attachment.

6. A defendant is not debarred from dealing with his



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property merely because a suit is filed or about to be filed against him. Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment. A plaintiff should show, prima facie, that his claim is bona fide and valid and also satisfy the court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38, Rule 5 CPC. Courts should also keep in view the principles relating to grant of attachment before judgment (See – Prem Raj Mundra v. Md. Maneck Gazi, AIR 1951 Calcutta 156, for a clear summary of the principles).”

20. It is settled law that attachment before judgment cannot be granted on vague and bald allegations that the defendant is trying to alienate the property with an intention to defeat or delay the execution of any decree that may be passed against him. The plaintiff, who is claiming an order of attachment, is duty bound to make specific averments and the Court must be satisfied that the defendant is about to dispose of the whole or any part of his property with an intention to obstruct or delay the execution of the decree that may be passed against him.



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21. It is pertinent to note that the plaintiff has to plead and show that there existed *mala fide* intention and the conduct of the defendant in disposing of or about to dispose of his property with the dishonest intention of defeating or delaying the decree that may be passed in the suit. To put it in other way, the plaintiff has to plead and establish that the defendant is about to dispose of the whole or any part of his property and that the said disposal is being done with an intention to obstruct or delay the execution of the decree that may be passed against him.

22. In the case on hand, as already pointed out, the plaintiff, in the affidavit filed in support of the above petition, has alleged that the defendants, in order to cheat and defraud the plaintiff, are attempting to alienate the suit property so as to prevent the plaintiff from enjoying the fruits of the decree that may be passed in his favour. Except the above bald allegation, the plaintiff has not raised any other pleadings to satisfy the essential requirements contemplated under Order 38 Rule 5 C.P.C.

23. As rightly observed by this Court in **N.Pappammal's** case, it is a mere mechanical repetition of the provisions in the Code without any basic strata of truth underlying the allegation. As rightly contended by the learned counsel



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appearing for the first defendant, it is only a vague and general allegation that the defendants are attempting to alienate the suit property so as to prevent the plaintiff from enjoying the fruits of the decree.

24. Considering the above and on applying the legal position, above referred, this Court has no hesitation to hold that the plaintiff has not complied with the requirements contemplated in the first part of Order 38, Rule 5(1), Civil Procedure Code and that therefore, the attachment made is void in view of the Order 38, Rule 5(4), Civil Procedure Code.

25. Section 94(b) of Code of Civil Procedure contemplates the power on the Court to direct the defendant to furnish security, to produce any property belonging to him to place the same at the disposal of the Court or order the attachment of any property.

26. It is pertinent to note that Sub-Rule 4 to Rule 5 has been inserted in Order 38 vide amendment Act 104 of 1976 contemplating that any attachment made, without complying with the provisions of Sub-Rule 1 of Rule 5 shall be void. It can be easily be inferred that the newly inserted provision is a protective measure conceived in the interest of, a defendant and intended to invalidate



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orders of attachment before judgment passed indiscriminately without notice, giving an opportunity to stay off the attachment by giving security.

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27. In the case on hand, admittedly, the learned trial Judge, while passing the final orders in the petition for attachment before judgment, has ordered for attachment of the property before judgment directly, without giving any opportunity for the defendants to furnish security for the suit claim.

28. As rightly contended by the learned counsel appearing for the first defendant, since the impugned order was passed in total violation of the mandatory requirements under Order 38 Rule 5(1), the impugned order for attachment shall be void, as per the mandate of Order 38 Rule 5(4) of Code of Civil Procedure.

29. Considering the above, viewing from any angle, this Court has no hesitation to hold that the impugned order is not in accordance with law and the same is liable to be set aside.

30. In the result, this Civil Miscellaneous Appeal is allowed and the impugned order dated 23.01.2020 passed in I.A.No.110 of 2019 in O.S.No.82 of 2019 on the file of the Additional District Court, Kumbakonam is set aside.



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Parties are directed to bear their own costs. Consequently, connected
Miscellaneous Petition is closed.

02.12.2022

Index :yes/No

Internet:yes/No

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To

1. The Additional District Court,
Kumbakonam.



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K.MURALI SHANKAR,J.

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Pre-Delivery Order made in

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