



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON	15.12.2021
DELIVERED ON	12.01.2022

CORAM :

THE HONOURABLE MRS.JUSTICE S.ANANTHI

C.M.A. (MD) .No.572 of 2021

and

C.M.P. (MD) No.5582 of 2021

Elango ...Appellant/Respondent/Defendant

Vs.

Subramaniyan ...Respondent/Appellant/Plaintiff

PRAYER: Civil Miscellaneous Appeal filed under Order 43 Rule 1(q) of Civil Procedure Code, to set aside the Judgment and Decree, dated 01.03.2021 passed in I.A.No.2 of 2019 in O.S.No.9 of 2019 on the file of the learned Additional District and Sessions Judge, Sivagangai, and allow the Civil Miscellaneous Appeal.

For Appellant	:Mr.G.Prabhu Rajadurai
For Respondent	:Mr.S.I.Muthiah

ORDER

This Civil Miscellaneous Appeal has been filed to set aside the Judgment and Decree, dated 01.03.2021 in I.A.No.2 of 2019 in O.S.No.9 of 2019, passed by the learned Additional District and Sessions Judge, Sivagangai.

2. The respondent herein/Plaintiff has filed a petition in I.A.No.2 of 2019 in O.S.No.9 of 2019 on the file of the learned Additional District and Sessions Judge, Sivagangai, under Order 38 Rule 5 and 151 of Civil Procedure Code, seeking an order of attachment before Judgment and the same was allowed on 01.03.2021. Against the said order, the appellant/defendant is before this Court.

3.This Civil Miscellaneous Appeal is find on the ground that there is no money transaction between the Plaintiff and the Defendant. The remedy under Order 38 Rule 5 of Civil Procedure Code is a harsh one and the Judicial discretion should not be exercised until a clear case has been made out to satisfy the order of attachment. The order of attachment would cause great prejudice to the appellant.



4. Heard on either side. Perused the material documents available on record.

5. The Respondent/Plaintiff has filed a suit in O.S.No.09 of 2019 for recovery of money on the basis of a deposit receipt letter alleged to have been executed by the Appellant/Defendant for a sum of Rs.60,000/-. The Respondent/Plaintiff has also filed a petition under Order 38 Rule 5 for attachment before judgment which was allowed by the learned Additional District and Sessions Judge, Sivagangai. Aggrieved by the said order, this present appeal has been filed.

6. The ingredients of Order 38 Rule 5, is extracted hereunder:

" ATTACHMENT BEFORE JUDGMENT

5. Where defendant may be called upon to furnish security for production of property:-

(1) Where at any stage of a suit, the Court is satisfied, by affidavit or otherwise that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him.

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court,

(c) the Court may direct, within time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same or such portion thereof as may be sufficient to satisfy the decree or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof,

(3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(4) If an order of attachment is made direct without complying with the provisions of sub-rule (1) of this rule, such attachment shall be void."

7. The Respondent/Plaintiff has to establish that he has prima facie case. The Respondent/Plaintiff has filed the suit in O.S.No.9 of 2019 on the basis of a deposit receipt. The Appellant/defendant has denied the deposit receipt including his signature in the written statement filed by him. But, the deposit receipt should be proved by the plaintiff by evidence or oral document.



8. Further the loan is also an unsecured loan. It cannot be converted into secured loan.

9. The plaintiff has to prove that the defendant is made an attempt to remove or dispose of his assets with an intention of defeating the decree that may be passed.

10. Here the appellant/defendant has executed a power deed on 11.08.2018 in favour of one Abdul Wahab even before filing the suit. The Appellant/defendant has also entrusted the same land to the Panchayat to form road on 18.08.2018. The suit was filed only on 20.08.2018. During the pendency of the suit, the power agent had sold plots in the property except five plots but before attachment.

11. The learned counsel appearing for the Appellant relied upon the Judgement reported in **2008 2 SCC 305, Vinay Devanna Nayak Vs. Ryot Sewa Sahakari Bank Ltd.**, the Hon'ble Supreme Court held as follows:

.....
"5. The power under Order 38 Rule 5 CPC 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 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 party, with the intention of obstructing or delaying the execution of any decree that may be passed against him. "

12. Admittedly, the plaintiff and the defendant are brothers. They had joint family properties also. It cannot be disposed by the appellant/defendant alone.

13. So, attachment before judgment is not necessary in this case. The Appellant/Defendant disposed the property before attachment through power agent to whom the power grants before suit, after that it cannot be attached.



14. Finally, this Civil Miscellaneous Appeal is allowed by setting aside the Judgment and Decree, dated 01.03.2021 in I.A.No.2 of 2019 in O.S.No.9 of 2019, passed by the learned Additional District and Sessions Judge, Sivagangai. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS II)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

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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.

To

The Additional District and Sessions Judge,
Sivagangai.

+1 CC to M/s.G.PRABHU RAJADURAI, Advocate (SR-1646[F] dated 19/01/2022)

C.M.A. (MD) .No.572 of 2021
12.01.2022

MGJ(28.01.2022) 4P 3C