



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 04.01.2022

CORAM:

THE HONOURABLE MS.JUSTICE P.T.ASHA

C.R.P. (MD)No.2143 of 2021

and C.M.P. (MD) No.11384 of 2021

WEB COPY

1.G.Senthil Kumar

2.O.Sendeepan

... Petitioners

-vs-

G.Murali

... Respondent

Prayer :- Petition filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order dated 08.10.2021 passed in I.A.No.1 of 2019 in O.S.No.62 of 2019 on the file of the learned I Additional District and Sessions Judge (PCR), Tiruchirappalli.

For Petitioners : Mr.R.Vigneshwaran,
for M/S.U.Nirmalarani

ORDER

The plaintiffs, aggrieved by the order passed by the learned First Additional District and Sessions Judge (PCR), Tiruchirappalli, in rejecting their petition filed under the provision of Order 38 Rule 5, are the revision petitioners before this Court.

2.The brief facts, which are necessary for appreciating the issue on hand, are herein below narrated and the parties are referred to in the same array before the District Court:-

(i) The plaintiffs had filed the suit O.S.No.62 of 2019 for recovery of a sum of Rs.11,69,111/- together with interest at 12% per annum from the defendants. It is their case that the second plaintiff and the defendants are engaged in the business of cable TV and have had the long-standing relationship. The second plaintiff in turn had a close business relationship with M/s.Surya Finance, Thilainagar and had also referred his friends to the said finance company as and when they had required finance. The defendants and the second plaintiff had joined together with other partners and floated a business venture in the name of M/s.Bharath Digital Vision, which was a limited liabilities partnership.

(ii)While so, the defendants had approached the second plaintiff seeking financial assistance for their Cable TV business. The second plaintiff had facilitated the loan from the said Surya Finance. The defendants had borrowed a sum of Rs.4,00,000/- on 12.10.2015 agreeing to repay the same on demand with interest at 24% per annum. At the time of extending the loan, Surya Finance had urged the second plaintiff and the defendants to furnish security



either in the form of property or by way of a guarantee by the second plaintiff for the loan. The second plaintiff had very hesitatingly agreed to act as a guarantor. Thereafter, a further sum of Rs.4,00,000/- was borrowed by the defendants on 22.04.2016 from the said Surya Finance on the strength of the second plaintiff's guarantee. The defendants had also agreed to pay the above sum with interest on demand. The earlier loan of Rs.4,00,000/- and the loan borrowed on 22.04.2016 were clubbed together and a promissory note was executed by the defendants on 22.04.2016 favouring the said Surya Finance agreeing to repay the total principal sum of Rs.8,00,000/- with interest. The second plaintiff has signed as a guarantor and witness for this transaction.

(iii) It is the case of the plaintiffs that the defendants had failed to pay the said sum and Surya Finance had started pressuring the second plaintiff to ensure that the defendants clear the loan. Therefore, the second plaintiff had taken it upon himself to clear the liability with Surya Finance. For this purpose, he has requested the first plaintiff to assist him in discharging the said loan. After the loan was discharged, Surya Finance had made over the promissory note on 05.01.2018 in favour of the plaintiffs. The plaintiffs have therefore demanded the money from the defendants who did not come forward to do so and the plaintiffs also came to learn that the defendants were attempting to secrete their properties with a view to defeat and delay their creditors. A legal notice dated 02.03.2018 was issued by the plaintiffs to the defendants seeking recovery of the amounts under the promissory note, dated 22.04.2016. Though the first defendant had received the notice, the one sent to the second defendant was returned as 'door locked'. The defendants assured the plaintiffs that they would settle the payment shortly, but however observed the assurance in a breach. Meanwhile, the arbitration proceedings were initiated between the partners of the second plaintiff and the defendants. The defendants gave a proposal for settlement on which the plaintiffs were made to believe. Since the period of limitation was past approaching, the plaintiffs had proceeded to file the instant suit.

(iv) The defendants have filed the written statement *inter alia* denying the very borrowal and contending that they had no nexus with the said Surya Finance and had neither executed a promissory note nor borrowed any amount from the said Surya Finance. The defendants would submit that they had already borrowed a loan from the Nationalized Bank and there was no necessity for them to borrow from a private money lender. The defendants would submit that the entire case of the plaintiffs was false and the plaintiffs, who claim to have settled the payment to Surya Finance, have not put the defendants on notice about their proposal to settle the loan to Surya Finance and even after the payment of the said loan, no notice has been issued to the defendants which clearly shows that the entire allegations are false. The defendants would further submit



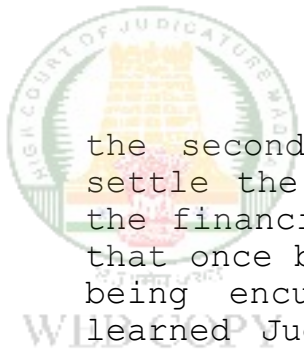
that the second plaintiff is not a partner in M/s.Bharath Digital Vision and the allegations to the contrary, are absolutely false and frivolous. The defendants would submit that there is no cause of action for filing the suit.

WEB COPY (v) Along with the plaint, the plaintiffs had filed I.A.No.1 of 2019 for an attachment before the judgment against the second defendant alone. The plaintiffs had reiterated their contention in the plaint in a nutshell and they would submit that the property given by the second defendant and other partners was likely to be brought for auction under SARFAESI Act and the bank is likely to proceed against the property of the defendants, who act as managing partner of the partnership concern for the amount due to the Bank. The defendants are therefore taking steps to alienate their property whereby defeating and delaying the claim of creditors, like the petitioners herein. The plaintiffs would further submit that the second defendant owns the property, which is detailed in the schedule of the petition, which had not been encumbered. However, the second defendant was taking steps to make a fraudulent transfer in order to escape his liabilities to the creditors. Therefore, the plaintiffs sought to have the property attached before judgment.

(vi) The second defendant had filed a counter *inter alia* once again denying the very claim of the plaintiffs and further submitting that when the very execution of the promissory note as well as the receipt of the amounts, were denied by the defendants, there is no question of their property being attached before judgment. That apart, the second defendant has also stated that he had no necessity for alienating any of his property. The second defendant would submit that the entire suit is only an attempt to harass the defendants.

(vii) The learned First Additional District and Session Judge, Tiruchy, after hearing the parties and perusing the records filed on both side, dismissed the said application. The learned Judge had clearly observed that the respondent had denied the execution of the promissory note as well as the loan transaction with the said Surya Finance. That apart, the dispute between the partners was already the subject matter of reference to an Arbitrator. The plaintiffs had not shown proof about the likelihood of the second respondent disposing of his property. Therefore, the learned Judge proceeded to dismiss the application. Challenging the same, the revision petitioners are before this Court.

3.Mr.R.Vigneshwaran, learned counsel appearing on behalf of the petitioners/plaintiffs would vehemently argue that the defendants have executed two promissory notes, which were later clubbed into in single one and a fresh promissory note obtained and had also received money from the said Surya Finance through the good offices of the second plaintiff. Since the loan was given at the behest of



the second plaintiff, the second plaintiff was morally bound to settle the dues to the said Surya Finance, which he had done with the financial assistance from the first plaintiff. He would submit that once borrowing has been proved and the factum of the properties being encumbered to avoid creditors has been established, the learned Judge ought not to have dismissed the application as the schedule property was only an unencumbered property of the second defendant. If when the suit is decreed, the plaintiffs would be left with no security for recovering the decree amount. He would therefore submit that the order of the learned Judge suffers from a grave irregularity, since the plaintiffs have shown a *prima facie* case. He would further argue that there has been no response to the legal notice and therefore, an adverse inference of admission of liability has to be inferred.

4. Heard the learned counsel appearing for the petitioner and perused the records.

5. The defendants have denied the execution of the promissory note as well as the receipt of money from the said Surya Finance. The plaintiffs have not produced any proof to show passing of consideration to the defendants. The second plaintiff, who pleaded that he has executed the guarantee deed in favour of the Surya Finance for the said loan, has not produced the said document nor has he produced proof of the repayment of the amount due under the promissory note to the said Surya Finance. Therefore, the plaintiffs have failed to make out a *prima facie* case for grant of an order of attachment before the judgment. The entire case of the plaintiffs has to be established only during the trial and after perusing the documents as well as the oral evidence, since the defendants have come forward with the categorical case of not having borrowed nor executed the promissory note. The cause action itself has to be first established by the plaintiffs to claim any interim order. Further, in the counter filed to the impugned petition, the second defendant had stated that he has no intention to sell the property. This fact has also been taken note of by the learned District Judge.

6. In these circumstances, I do not find any reason to interfere with the well considered order of the Court below. Accordingly, this Civil Revision Petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-II)

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/ /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 I Additional District and Sessions Judge (PCR),
Tiruchirappalli.

+1 CC to M/s.M.P.SENTHIL, Advocate (SR-310[F] dated 05/01/2022)

C.R.P. (MD) No. 2143 of 2021

and

C.M.P. (MD) No. 11384 of 2021

Dated: 04.01.2022

VR (CO)

TR (04.02.2022) 5P 3C