

HON'BLE SMT. JUSTICE LALITHA KANNEGANTI

Civil Revision Petition No.2639 of 2022

O R D E R:

This civil revision petition is filed seeking the following relief:

“..... to allow the C.R.P by setting aside the order and decree dt.04.11.2022 passed in I.A.No.434 of 2022 in O.S.No.63 of 2022 on the file of Hon'ble Judge, Family Court-cum-VI Additional District Judge at Nalgonda and to grant such other relief or reliefs as this Honb'le Court deems fit and proper in the circumstances of the case”.

2. Mr. Chanikya Bandy, learned counsel for the petitioners submits that a frivolous suit has been filed i.e. O.S.No.63 of 2022 stating that the respondent herein has lent an amount of Rs.50,00,000/- to the petitioners. He submits that in the said suit, the plaintiff has only stated about the promissory notes that are executed and has not mentioned how the amount is paid and basing on the said suit, notices were issued to the petitioners. In the meantime, respondent has filed the I.A.No.434 of 2022 under Order 38, Rule 5 of Code of Civil Procedure, 1908 (for short “the CPC”) and the petitioners have approached the court below and the court below is insisting to furnish the security. He submits that the schedule properties are owned by petitioner No.2 and in the year 2019 itself, she executed a Gift Deed in respect of the said properties to her younger son prior to the alleged false and fabricated promissory note dated 04.08.2021 for Rs.30,00,000/- and another dated 15.11.2021 for Rs.20,00,000/-.

2. Learned counsel for the petitioners submits that now, by

virtue of the order dated 04.11.2022 passed by the court below, the petitioners are put to lot of hardship.

3. Mr. L. Prabhakar Reddy, learned counsel appearing for the respondent/plaintiff submits that the order passed by the court below is in consonance with the Order 38, Rule 5 of the CPC and the petitioners ought to have furnished the security for the same. He also relied on the order passed by this court in Yenamala Chandra Reddy vs. Nuvvula Chandramouli Naidu and others “C.R.P.No.3247 of 1989, dated 21.01.1991” wherein it is held that under Order 38, Rule 5 (3) CPC, the court can order conditional attachment along with a show cause notice to be issued under Order 38, Rule 5(1) CPC and the court can adopt the first part of Form No.5 and in such an event, it may be necessary for the court to hear the defendant before issuing such a notice. It is further held that it is also open to the court to adopt both the first and the second parts of Form No.5, without issuing notice and direct the Bailiff to attach the property straight-away, if the defendant fails to comply with the first part of the Form and in the latter case, the order will be one of conditional attachment and however, if the defendant comes to court and satisfies the court, it will be open to the court to withdraw such conditional attachment under Order

38, Rule 6(2) and the above interpretation of the provisions seems to be in harmony with the intention of the legislature and sub-rule (4) of Order 38, Rule 5 does not come into play at the stage of ordering conditional attachment and no order of conditional attachment can be declared as void on account of the court not following the procedure under Order 38, Rule 5(1) CPC.

4. Learned counsel appearing for the respondent/plaintiff has relied on another order passed by this court in case of Hamali Co-operative Labour Contract Society Ltd., Warangal vs. K. Venkataiah and another C.R.P.No.6775 of 1980, dated 19.03.1981 wherein it is observed that “the only question for consideration is whether the lower court gave the finding in regard to the intention and conduct of the petitioner before passing the impugned order and the contention of the learned counsel is that there is no such finding and on the examination of the impugned order, it does not appear that there is any express finding in regard to the intention or the conduct of the defendant so as to render him liable to a direction for furnishing security, but, what Order 38, Rule 5 CPC contemplates is not an express finding, but, a satisfaction on the part of the court by affidavit or otherwise and no doubt, whenever the law enjoins upon the court to pass on order after being fully

satisfied, it is necessary for the court to express its satisfaction in the form of a finding but the fact that the court does not express a specific finding cannot detract from the substantial value of the order if the order shows that it has been passed after the satisfaction required under the law”. Further, in the said order, the court has extracted the below observation of the learned Subordinate judge:

“R1 is registered society. It has an obligation to discharge liability of plaintiff if it is true. Under the amended provision of Order 38 Rule 5 CPC and under the circumstances of this case, R1 is bound to furnish security for Rs.70,000/- towards suit claim, failing which the petitioner shall be entitled to the pro-order as prayed. By furnishing security R-1 can avoid alleged hardship. By mere allegation that he would suffer hardship R-1 cannot make the petitioner suffer”.

He submits that in the said order, the court has come to the conclusion that the observations of the learned subordinate judge makes it more than clear that in passing the impugned order, he was satisfied with the allegation of the plaintiff to the effect that the defendant was disposing of his property with the intention of defeating the decree that may be passed in the suit and therefore, the learned judge has dismissed the said revision.

5. Learned counsel for the respondent submits that the

impugned order dated 04.11.2022 passed by the learned judge is very much in consonance with the provisions of Order 38, Rule 5 of CPC and after coming to the conclusion that there is eminent necessity, this order of attachment before judgement is passed wherein the petitioners were directed to furnish the security.

6. Heard learned counsel for the petitioners and learned counsel for the respondent and perused the entire material on record.

7. The respondent herein has filed the suit i.e.O.S.No.63 of 2022 against the petitioners herein for recovery of an amount of Rs.56,75,999/- on the foot of promissory notes dated 04.08.2021 and 15.11.2021. The specific case of the respondent/plaintiff is that on 04.08.2021, the petitioners/defendants have approached the plaintiff along with one Gattu Srikanth Reddy at Nalgonda and borrowed a sum of Rs.30,00,000/- for meeting their personal and business necessities and they have executed a promissory note and that again, they have approached the plaintiff at Nalgonda on 15.11.2021 and borrowed a sum of Rs.20,00,000/- to meet their personal and business necessities and executed a promissory note. It is the further case of the plaintiff that when he came to know that the defendants are trying to alienate the property, he has filed

the suit i.e.O.S.No.63 of 2022. The entire plaint only speaks about the amounts that were given to the petitioners and no other details how the amounts were paid are mentioned in the plaint.

8. The suit was filed in the month of November, 2022. Thereafter, notices were issued to the respondents on 08.11.2022 asking them to appear in person on 05.12.2022. The petitioners have come up before this court questioning the warrant issued in I.A.No.434 of 2022 to attach the petition schedule properties belonging to them before the passing of judgement. It is the case of the respondent/plaintiff that the petitioners/defendants have borrowed the amounts from several persons on interest and they are not in a position to clear of the same and they are trying to sell away the properties by transferring it to third parties and they are approaching many persons to sell away the said properties and except the petition schedule properties, there are no other properties.

10. It is the case of the petitioners herein/defendants that they have received the notices on 08.11.2022 and the order impugned is passed on 04.11.2022. It is stated that they have immediately approached the court below and also submitted that the properties

were gifted by petitioner No.2 in favour of her younger son by way of registered gift deed on 21.11.2019 i.e. even before the suit is filed, but, the court has insisted the petitioners/defendants to comply with the order impugned, which made the petitioners/defendants to approach this court. The learned judge by order impugned 04.11.2022 has only observed that the plaintiff has proved to the satisfaction of the court that the defendants became due an amount of Rs.56,75,999/-, hence, they have directed the defendants in the suit i.e. petitioners herein to furnish security for the sum of Rs.56,75,999/-.

11. The satisfaction that is required under Order 38, Rule 5 CPC is that where at any stage of the suit, if the court is satisfied by affidavit or otherwise that the defendant with an intent to obstruct or delay the execution of any decree that may be passed against him is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court may direct the defendant, within a 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.

12. The whole object and purport of Order 38, Rule 5 CPC is to safeguard the interest of the plaintiff. If the court is satisfied that when a decree is obtained by the plaintiff, he may not be able to realize the fruits of the decree whereby preventing the defendant from defeating the realization of the decree either by attempting to dispose of or remove from the jurisdiction of the court. The court shall never use this power under Order 38, Rule 5 CPC for the sake of mere asking. It shall be used sparingly and strictly in accordance with the provision. Plaintiff must show prima facie that his claim is a bonafide and valid and also satisfy the court that the defendant is about to remove or dispose the whole or part of his property.

13. In this case, this court is not able to appreciate the contention raised on behalf of the learned counsel for the respondent/plaintiff stating that the court has recorded its satisfaction relying on the judgement passed by this court in The Hamali Co-operative Labour Contract Society Ltd., Warangal vs. K. Venkataiah and another “C.R.P.No.6775 of 1980, dated

19.03.1981". In this case, learned judge has not even recorded about his satisfaction about the acts of the defendants whereby they are going to alienate the property, but, he has only recorded his satisfaction that the petitioners herein/defendants are due an amount of Rs.56,75,999/- to the respondent herein/plaintiff. According to this court, that is not satisfaction that has to be recorded under Order 38, Rule 5 CPC. Apart from this, it is the specific case of the defendant that the properties were gifted by petitioner No.2 in favour of her younger son way back in the year 2019 and further, the plaintiff has not even stated in the plaint the manner in which the amount is paid to the defendants. The learned judge ought to have satisfied himself about the prima facie case. According to the petitioners herein/defendants, the promissory notes are forged and basing on that, a frivolous suit is filed by the plaintiff. In these circumstances, this court finds it appropriate to set aside the order under revision.

14. Hence, the order under revision is set aside and both parties shall appear before the court on 19.12.2022 and the court below shall consider the application i.e.I.A.No.434 of 2022 afresh and by that time, the petitioner/defendants shall file their counter to the said application. The court below shall decide taking into

consideration the material available on record.

15. Accordingly, the Civil Revision petition is disposed of. There shall be no order as to costs.

The miscellaneous applications, if any shall stand automatically closed.

28th November, 2022
gvl

LALITHA KANNEGANTI, J