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C.M.A.No.793 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 27.04.2023

Coram:

THE HONOURABLE MRS.JUSTICE N.MALA

C.M.A.No.793 of 2023

and

C.M.P.No.7290 of 2023

Y.Harris

... Appellant

Vs.

1.M.K.Arivazhagan
2.AAsife & Brothers Restaurants PVT. Ltd.
Rep. by Y.Harris.

... Respondents

Prayer: Civil Miscellaneous Appeal is filed under Order XLIII(1) of CPC, praying to set aside the order and decretal order dated 15.09.2022, passed in I.A.No.4 of 2021 in O.S.No.168 of 2021, on the file of the Additional District Court, Namakkal.

For Appellant : Mr.G.Ramesh
For R1 : Mr.E.Vinoth Kumar
For R2 : Ex-parte



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JUDGMENT

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The appeal is filed by the second defendant challenging order and decree dated 15.09.2022, passed in I.A.No.4 of 2021 in O.S.No.168 of 2021, on the file of the Additional District Court, Namakkal.

2. According to the plaintiff, the 2nd defendant is engaged in Hotel business under the name and style of "Aasife and Brothers Restaurants Pvt. Ltd.," in Chennai. While so, the 2nd defendant, through plaintiff's friends, approached the plaintiff for a hand loan of Rs.47,50,000/-. The plaintiff paid to the 2nd defendant the said sum as hand loan in the month of June 2020. The 2nd defendant, inspite of repeated reminders by the plaintiff for return of the borrowed amount, sought 3 months' time to return the said sum along with interest. The 2nd defendant handed over a post-dated cheque in favour of the plaintiff in the month of December 2020, for the said hand loan of Rs.47,50,000/- on behalf of the 1st defendant and further requested the plaintiff to deposit the cheque on 01.03.2021. The 2nd defendant promised to return the interest portion separately and subsequently, the 2nd defendant requested the plaintiff not to deposit the cheque on 01.03.2021, but asked the plaintiff to deposit the same on 22.04.2021 without fail. When the plaintiff deposited the said cheque, the same was returned on 26.04.2021 with an endorsement "Refer



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to drawer". The plaintiff therefore filed the present suit for recovery of the said hand loan of Rs.47,50,000/-, among other relief.

3. As the plaintiff apprehended that the 2nd defendant may alienate the 2nd defendant's property in Old Survey Number:200/9, New Survey Number:200/35 in Pammal Village, measuring 2690 Sq.mtrs., pending suit, the plaintiff filed an application under Order 38 Rule 5(4) of CPC for attachment of the said property to secure the suit claim.

4. The 2nd defendant filed a detailed written statement, denying the borrowal of the hand loan and also denied that he had ever executed any cheque on 01.03.2021 in favour of the plaintiff for a sum of Rs.47,50,000/-. The 2nd defendant therefore prayed for dismissal of the suit.

5. The 2nd defendant further filed a cryptic counter in I.A.No.04 of 2021 filed for attachment before Judgment of the aforesaid property.

6. The learned Additional District Judge, after referring to the entire pleadings in the I.A. and on the basis of the documents filed by the plaintiff, allowed the said application for attachment before Judgment (ABJ) in respect of



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50% of the property in Old Survey Number:200/9, New Survey Number:200/35

in Pammal Village, measuring 2690 Sq.mtrs.

7. Aggrieved by the above order of the learned Additional District Judge, the 2nd defendant has filed the present Civil Miscellaneous Appeal.

8. The learned counsel for the appellant/second defendant submitted that, as the above said property is situated in Chennai, the learned Additional District Judge in Namakkal had no jurisdiction to entertain the suit and also the ABJ petition. The learned counsel denied borrowal of the amount of Rs.47,50,000/- from the plaintiff and also the issuance of cheque for the said amount. The learned counsel further submitted that the case of the plaintiff is unbelievable for more than one reason, (i.e) The plaintiff had not produced any document to show the payment of Rs.47,50,000/- and no corroborative evidence like Income Tax Returns etc. was filed to substantiate the payment of huge amount of Rs.47,50,000/-. The learned counsel for the appellant further submitted that the case set up by the plaintiff is suspicious, as no prudent person would ever keep quiet on return of cheque for such huge amount. The fact that no coercive steps like proceedings under Section 138 of the Negotiable Instruments Act were taken, no complaint was made before the Police for cheating etc., clearly



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established that the case set up by the plaintiff was false.

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9. The learned counsel for the appellant further submitted that on the basis of the statement made by the plaintiff that the amounts were withdrawn from its two companies, namely K.S. Blue Metal Company and G.K.Blue Metal Company the suit deserved to be dismissed for non-joinder of necessary parties.

10. The learned counsel for the 1st respondent, on the other hand, submitted that the question of jurisdiction, payment of Rs.47,50,000/- and the validity of the returned cheque, were all matters to be decided based on the merits of the case and they could be decided only at the time of trial of the main suit. The learned counsel further submitted that the first respondent had established a *prima facie* case and had also filed a 3rd party affidavit to show that the appellant/D2, in order to defraud the first respondent/plaintiff, was trying to alienate the subject property. The learned counsel also submitted that the contention of the appellant/2nd defendant that the lower Court had no territorial jurisdiction to entertain the petition for ABJ, as the property is situated outside the jurisdiction of the Court, is untenable. On the above grounds, the learned counsel for the plaintiff/ first respondent herein prayed for dismissal of the appeal.



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11. I have heard both the learned counsel and perused the records placed before me.

12. I.A.No. 4 of 2021 is filed by the 1st respondent/plaintiff for attachment of the appellant's property in Old No.200/9, New No.200/35 in Pammal Village, measuring 2690 Sq.mtrs. The plaintiff's case is that he had given a hand loan of Rs.47,50,000/- to the 2nd defendant and the 2nd defendant had promised to return the same with 1% interest. As the 2nd defendant failed to keep up his promise, the plaintiff approached the 2nd defendant for repayment of the said hand loan. The 2nd defendant therefore issued a post-dated cheque on 01.03.2021, which was presented by the plaintiff on 22.04.2021, and the same was returned on 26.04.2021 with an endorsement "Refer to drawer". The plaintiff therefore filed the present suit for recovery of the hand loan of Rs.47,50,000/- as evidenced by the "returned" cheque. The 2nd defendant denied borrowal of the hand loan, as also the issuance of the cheque in question. In my view, the validity of the transactions is a matter of Trial. The returned cheque is itself a proof of the fact that there was a money transaction between the plaintiff and the 2nd defendant for Rs.47,50,000/-. Therefore, the plaintiff has *prima facie* established that there was some money transaction between the plaintiff and the 2nd defendant by producing the



returned cheque.

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13. The appellant/2nd defendant contends that the failure of the plaintiff to take either criminal action or action under the provisions of the Negotiable Instrument Act, shows that the plaintiffs contention that the cheque was returned is false. The said contention is rejected for the simple reason that the plaintiff, within 3 months of the return of the cheque, filed the suit for recovery of money on the basis of the "returned" cheque. It is not necessary for the plaintiff to institute criminal proceedings, as contended by the 2nd defendant.

14. The contention of the defendant that there was no corroborative evidence to show that the plaintiff paid the huge amount of Rs.47,50,000/- to the 2nd defendant, is again a matter of trial and therefore, the said contention at this stage, does not merit acceptance.

15. Further, the contention of the 2nd defendant that as the property sought to be attached is beyond the territorial jurisdiction of the lower Court, the IA itself is not maintainable, is also untenable, as it is trite in law that in a suit for recovery of money, the property beyond the jurisdiction of the Court could also be attached. On the contention of the 2nd defendant that, on the basis of



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the third party affidavit alone, the lower Court had directed the attachment of the property, is also untenable.

16. It is seen that the defendant entered appearance in the suit on 25.02.2022 and within 3 days of his appearance in the suit and vide document No.1962 of 2022, he executed a Power of Attorney in favour of one Venkatesh and Udayakumar. Thereafter, on 31.03.2022, the 2nd defendant, vide document No.3407 of 2022, dated 31.03.2022, cancelled the aforesaid Power and thereafter, on the very same day, he deposited the title deeds with the said Venkatesh and borrowed a sum of Rs.30,00,000/-. These transactions are reflected in Ex.A.6 filed by the plaintiff.

17. It is pertinent to note here that even though an opportunity was given to the 2nd defendant to furnish security for the suit claim, the 2nd defendant failed to do so. As discussed above it is established by Ex.A.6 and the 3rd party affidavit, that the 2nd defendant was about to dispose of the property in question, which would defeat and delay the plaintiff's claim. I therefore see no infirmity in the order of attachment of 50% of the suit property by the trial Court and so the same is confirmed.



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In view of all the above reasons, I am of the view that the appeal is devoid of merits and the same is dismissed. There shall be no order as to costs.

Consequently connected Miscellaneous Petition is closed.

27.04.2023

dsn

Index:Yes/No

Speaking Order: Yes/No

Neutral Citation: Yes/No

To

1.The Additional District Judge,
Namakkal.

2.The Section Officer,
V.R.Section,
High Court, Madras.



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N.MALA.J.,
dsn

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