



O.S.A.(CAD)No.70 of 2021

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 02.11.2023

DELIVERED ON : 20.11.2023

CORAM:

**THE HONOURABLE MR. JUSTICE D.KRISHNAKUMAR
AND
THE HONOURABLE MR. JUSTICE P.DHANABAL**

O.S.A(CAD)No.70 of 2021

CMP.No.13903 of 2021

A.Pradeep

... Appellant

Vs.

1.Tmt.Binu Christeena,
2.M.A.R.Juherniza,
3.Mrs.A.J.Manaraseena,
4.Mrs.A.T`hameemnisa,
5.Mr.A.J.Shahar Banu,
6.Mrs.A.J.Noornisa,
7.Mr.J.Khaja Moideen
8.Mrs.A.J.Shabina Parveen

... Respondents

PRAYER: Original Side Appeal filed under Section 13 of the Commercial Courts Act, 2015 against the order dated 20.04.2021 made in Application No.885 of 2021 in C.S.No.81 of 2021.

For Appellant : M/s.A.S.Balaji
For Respondents : M/s.K.Rajasekaran



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JUDGMENT

[Judgment of the Court was made by *D.KRISHNAKUMAR, J.*]

This Intra Court appeal is filed, challenging the order dated 20.04.2021 made in A.No.885 of 2021 in C.S.No.81 of 2021.

2. The facts leading to the filing of this appeal, briefly narrated, are as under:

2.1. The first respondent / plaintiff has filed a Suit in C.S.(Commercial Division) No.81 of 2021 under Order IV Rule 1 CPC for judgement and decree against the appellant and the respondents 2 to 8 herein / defendants for recovery of a sum of Rs.2,39,18,494/- with interest at the rate of 18% per annum on the Suit amount of Rs.1,31,00,000/- from the date of the Complaint till the date of realisation.

2.2. The respondents 2 to 8 / defendants are the absolute owners of the property bearing Plot Nos.8, 9 & 10, situated at Second Cross Street, Sea View Avenue, Sri Kabaleeswarar Nagar, Neelankarai, Chennai-115, comprised in S.No.92/2A, as per Patta No.2496, bearing S.No.92/238-A admeasuring 14,645



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Sq.Ft. and with a view to sell the aforesaid property, they have executed a General Power of Attorney in favour of Mr.A.Pradeep, the 8th respondent herein.

2.3. The plaintiff / first respondent has approached the appellant and offered her willingness and agreed to purchase the aforesaid property for Rs.1,25,00,000/- per ground. On measurement, it was found that the actual extent of the property is 12,823 Sq.Ft., and therefore, the plaintiff agreed to purchase the aforesaid property for a total consideration amount of Rs.6,67,86,458/- by executing a Sale Agreement dated 25.07.2016.

2.4. The first respondent / plaintiff has filed a Suit in C.S.No.81 of 2021 for recovery of money along with attachment before judgment application in A.No.885 of 2021 before this Court, in which this Court, vide order dated 20.04.2021, has directed the 8th respondent to furnish security within a period of six weeks. Challenging the same, the present intra-Court appeal is filed.



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3. The learned counsel for the appellant contended that there is no reason/averment found in the affidavit filed by the respondent/plaintiff that the appellant / defendant would make attempt to dispose of their property or is about to remove the property from its jurisdiction and before passing the order of attachment under Order 38 Rule 5(1) of the Civil Procedure Code, the learned Judge has failed to consider the same and therefore, the order of the learned Single Judge is unsustainable and the same is liable to be set aside.

4. *Per contra*, Mr.K.Rasekaran, learned counsel for the first respondent/plaintiff has raised a preliminary objection as to the maintainability of the present appeal as against the order passed in the application filed under Order 38 Rule 5 CPC. In support of his contention, he drew the attention of this Court to the decision in ***Hubtown Limited v. IDBI Trusteeship Service Limited reported in 2016 SCC Online Bom 9019 and Hindustan Unilever Limitd Ponds House v. S.Shanthi reported in 2021 SCC Online Mad 5428.***



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5. In reply, the learned counsel for the appellant submitted that this appeal is maintainable and seeks for allowing of this appeal.

6. We have anxiously considered the rival submissions of the parties on the maintainability of this appeal.

7. The object and scope of Order 38 Rule 5 of CPC is only to safeguard the plaintiff from any damage caused or likely to be caused by the defendant acquiring the suit property while the case is pending. "Attachment before Judgment" is a punitive remedy since it significantly interferes with the defendant's property rights prior to the ultimate settlement of the dispute. A defendant is not forbidden from engaging with the suit property merely because a lawsuit has been filed against him. The burden of proof lies on the plaintiff. The plaintiff must establish *prima facie* that his claim is substantial and genuine, as well as satisfy the court that the defendant intends to impede the property by disposing of all or part of his property or delay the execution of any decree that may be made against him.



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8. Order 38 Rule 5 of the Code of Civil Procedure reads as follows:

"38(5)-Attachment Before Judgment: 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,

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.

(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 to specified.

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

The Courts, while exercising its jurisdiction under Order 38 Rule 5 CPC, shall consider as to whether prima facie averments found in the affidavit for invoking



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Order 38 Rule 5 CPC. It need not go into the correctness or otherwise of all contentions raised by the parties.

9. In the case on hand, the preliminary objection has been raised by the first respondent/plaintiff on the maintainability of the appeal. Therefore, let this Court shall consider the preliminary objection before advertng to the merits of the case.

10. The present intra Court appeal has been filed under the provisions of Section 13(1) of the Commercial Courts Act, 2015, which details with appeal remedy from decrees of Commercial Courts and Commercial Divisions and the same reads as follows:

13.Appeals from decrees of Commercial Courts and Commercial Divisions:- (1) Any person aggrieved by the decision of the Commercial Court or Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of the judgment or order, as the case may be:

Provided that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order 43 of the Code of Civil Procedure, 1908 (5 of 1908) as amended by this Act and Section 37 of the Arbitration and Conciliation Act, 1996.

(2) Notwithstanding anything contained in any other law for the



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time being in force or Letters Patent of a High Court, no appeal shall lie from any order or decree of a Commercial Division or Commercial Court otherwise than in accordance with the provisions of this Act."

Proviso to Section 13(1) of the Commercial Courts Act specifies that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order 43 Rule of CPC.

11. Order 43 Rule 1 CPC deals with appeals from orders and the same reads as under:

" Appeals from Orders

An appeal shall lie from the following Orders under the provisions of Section 104, namely:-

(a) an Order under rule 10 of Order VII returning a plaint to be presented to the proper Court 1[except where the procedure specified in rule 10A of Order VII has been followed];

2* * * *

(c) an Order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an Order to set aside the dismissal of a suit;

(d) an Order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an Order to set aside a decree passed ex parte.

2* * * * *

(f) an Order under rule 21 of Order XI;

2* * * * *

(i) an Order under rule 34 of Order XXI on an objection to the draft of a document or of an endorsement;

(j) an Order under rule 72 or rule 92 of Order XXI setting



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aside or refusing to set aside a sale;

1[(ja) an Order rejecting an application made under sub-rule (1) of rule 106 of Order XXI, provided that an Order on the original application, that is to say, the application referred to in sub-rule (1) of rule 105 of that Order is appealable.]

(k) an Order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit;

(l) an Order under rule 10 of Order XXII giving or refusing to give leave;

3* * * * *

(n) an Order under rule 2 of Order XXV rejecting an application (in a case open to appeal) for an Order to set aside the dismissal of a suit;

4[(na) an Order under rule 5 or rule 7 of Order XXXIII rejecting an application for permission to sue as an indigent persons:]

3* * * * *

(p) Orders in interpleader-suits under rule 3, rule 4 or rule 6 of Order XXXV;

(q) an Order under rule 2, rule 3 or rule 6 of Order XXXVIII;

(r) an Order under rule 1, rule 2 4[rule 2A], rule 4 or rule 10 of Order XXXIX; (s) an Order under rule 1 or rule 4 of Order XL;

(t) an Order of refusal under rule 19 of Order XLI to re-admit, or under rule 21 of Order XLI to re-hear, an appeal;

(u) an Order rule 23 [or rule 23A] of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court;

5* * * * *

(w) an Order under rule 4 of Order XLVII granting an application for review."

A careful reading of Order 43 Rule 1 CP reveals that an order passed in the



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application filed under Order 38 Rule 5 CPC would not come under the purview of appealable orders under Order 43 Rule 1 CPC.

12. A Hon'ble Division Bench of this Court had an occasion to deal with a similar issue in an appeal filed against the dismissal of the application seeking rejection of the plaint under Order VII Rule 11 CPC in the decision in ***Hindustan Unilever Limited Ponds House v. S.Shanthi and Others [2021 SCC Online Mad 5428]***, wherein it was held as under:

"98. The appellant in OSA No. 208 of 2021 has referred to a judgment reported at (2005) 4 SCC 480 (*Kailash v. Nanhku*) for the proposition that merely because a provision of law is couched in a negative language implying a mandatory character, the same is not without exceptions; and, when a court is called upon to interpret the nature of the provision, it may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory, though worded in the negative form. That matter also pertained to the delay in filing a written statement; but in an election petition. The submission of the relevant appellant by placing the judgment is that if it is possible, in the interest of justice, to read down negative words and make for exceptions, the absence of negative words in the proviso to sub-sections (1) and (1A) of Section 13 of the said Act should guide the court to interpret such provision as being permissive of appeals rather than restricting the scope of appellability.

105. Accordingly, OSA (CAD) No. 3 of 2021 is found to be not maintainable since it is an appeal against an order refusing to



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reject the plaint under Order VII Rule 11 of the Code and no appeal is provided against such an order in Order XLIII of the Code. For the same reason, OSA (CAD) No. 4 of 2021 is held to not be maintainable since the appeal is directed against an order refusing to strike off a defendant from the array of parties, against which no appeal is provided for in Order XLIII of the Code. OSA (CAD) No. 29 of 2021 is not maintainable as the order impugned is one dismissing an application for revocation of the leave granted under Clause 12 of the Letters Patent. Though such appeal may have been maintainable under Clause 15 of the Letters Patent, in view of the bar under Section 13(2) of the said Act and no provision for such appeal being recognised in Order XLIII of the Code, such appeal is not maintainable. For the same reasons, OSA (CAD) No. 30 of 2021 is found to not be maintainable as the order impugned is the dismissal of an application to reject the plaint under Order VII Rule 11 of the Code. Nonetheless, the objections raised by the appellant may be urged at the trial."

13. Considering the aforesaid provisions of the Act as well as the Division Bench decision of this Court cited supra, the order passed in the application filed under Order 38 Rule 5 CPC would not come under the purview of appealable orders under Order 43 Rule 1 CPC. Therefore, accepting the contention of the respondent that the instant appeal cannot be entertained and the same is not maintainable, this Court is of the view that the present appeal is liable to be dismissed as not maintainable.



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14. Accordingly, the present Original Side Appeal stands dismissed as not maintainable. If the appellant is aggrieved, it is open to him to challenge the impugned order before the appropriate forum. No costs. Consequently, connected miscellaneous petition is dismissed.

(D.K.K., J.) (P.D.B., J.)
20.11.2023

Intex : Yes/No
Internet : Yes/No
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and
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Judgment in
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