



C.R.P.No.1952 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On : 24.04.2023

Delivered On: 30.06.2023

CORAM :

**THE HON'BLE MR. JUSTICE SATHI KUMAR SUKUMARA KURUP**

C.R.P.No.1952 of 2021

and

C.M.P.No.15110 of 2021

M.Ramesh

... Petitioner

Vs.

Kumar

... Respondent

**PRAYER:** Civil Revision Petition filed under Article 227 of Constitution of India, to set aside the fair and final order dated 23.02.2021 made in I.A.No. 1 of 2020 in O.S.No.291 of 2020 on the file of the I Additional District Judge, Coimbatore.

For Petitioner : Mr.K.S.Karthik Raja

For Respondent : Mr.S.Mukunth, Senior Counsel  
for M/s.Sarvabauman Associates



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## **ORDER**

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This Civil Revision Petition has been filed to set aside the fair and final order dated 23.02.2021 made in I.A.No. 1 of 2020 in O.S.No.291 of 2020 on the file of the I Additional District Judge, Coimbatore.

2. The learned Counsel for the Revision Petitioner submit that the Revision Petitioner is the Plaintiff in O.S.No.291 of 2020 on the file of the learned I Additional District Judge, Coimbatore. The suit was filed for the recovery of money. Along with the suit, he had filed I.A.No.1 of 2020 under Order XXXVIII Rule-5 CPC for attachment of the property before the judgment. In the petition, he had sought direction from the Court for directing the Defendant/Respondent herein to furnish security for the suit claim. In the same petition, he had stated that the Respondent is attempting to alienate the property. After due enquiry, the learned I Additional District Judge, Coimbatore by order dated 23.02.2021 dismissed the petition under Order XXXVIII Rule-5 CPC in I.A.No.1 of 2020 in O.S.No.291 of 2020. Aggrieved by the same, the Petitioner had approached this Court by filing this Civil Revision Petition.



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3. It is the contention of the learned Counsel for the Revision Petitioner that the learned Judge had dismissed the petition on the ground that mere apprehension cannot be a ground to order attachment of property before judgment. Thereby, dismissed the petition.

4. Mr. S.Mukunth, learned Senior Counsel appearing for the Respondent would submit that the learned Trial Judge, after hearing both parties, had placed reliance on the rulings cited by the learned Counsel for the Respondent before the Trial Court and had dismissed the petition observing that the mere apprehension that the Respondent/Defendant in the suit attempts to encumber the property will not be a sufficient ground to attach the property under Order XXXVIII Rule 5 CPC. The learned Senior Counsel for the Respondent invited the attention of this Court to the contents of the affidavit of the Plaintiff particularly in Paragraph No.4 in the petition under Order XXXVIII Rule-5 CPC which is extracted hereunder:-



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*“4. I respectfully submit that the respondent after receipt of the borrowal the respondent was very lethargic in repaying the amount further their failed to pay the interest as accepted. I respectfully submit that he never turned to settle the outstanding at any point of time. I submit that despite of the repeated demands by me, the respondent failed to pay either the principal amount or the accrued interest and the respondent dodged me by some pretext or other. I submit that as on 16.11.2019, the respondent liable to pay a sum of Rs.12,06,032/- being the principal amount along with accrued interest”.*

He also invited the attention of this Court to the contents of the  
plaint particularly in Paragraph Nos. 2, 3 and 4 which are extracted  
hereunder:-

*“2. The Plaintiff further submits that the defendant severaltimes borrowed small amounts like 50,000, 1,00,000 from the plaintiff and he was repaid the same in time as he promised. The Plaintiff further submits that accordingly, on 02.11.2019, the defendant approached the plaintiff and requested the plaintiff to lend a sum of Rs.10,50,000/-(Rupees Ten Lakhs Fifty Thousand Only) as loan for his family commitments and promised to pay interest at the rate of 24%.*

*“3. The Plaintiff further submits that, since the defendant is the brother (Uncles's son) of Plaintiff and the defendant is well known to the plaintiff from childhood as well as the defendant several times*



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*borrowed small amounts from the plaintiff and he was repaid the same in time as he promised, the plaintiff decided to advance the loan to defendant.*

*“4. The plaintiff further submits that on 16.11.2019, the defendant borrowed a sum of Rs.10,50,000/-(Ten Lakhs Fifty thousand only) from the plaintiff as loan at plaintiff's residence and promised to pay interest at the rate of 24% P.A and the defendant promised to the plaintiff that the defendant would repay the said sum within five months and on the same day the defendant also executed a on demand promissory note in favour of the plaintiff in the presence of witness”.*

5. The learned Counsel for the Respondent also invited the attention of this Court to the contents of the written statement filed by the Defendant particularly in Paragraph Nos. 5, 6 and 7 which are extracted hereunder:-

*“5. The allegation made para III-2 of the plaint is false and baseless. The Defendant did not borrow any amount like Rs.50,000/- or Rs.1,00,000/- from the Plaintiff at any point of time and the repayment does not arise at all. This Defendant never approached the Plaintiff and did not request him to lend the sum of Rs.10,50,000/- for his family expenses. The Defendant did not execute any promissory note in favour of the Plaintiff”.*

*“6. The allegation made in para III-3 of the*



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*plaint is yet another false and baseless averment. The real story is that one Kamalam sister of the Defendant having some misunderstanding and family quarrels with each other in order to grab the property of the Defendant, with the help of the Plaintiff, the said Kamalam has manipulated a promissory note and through the Plaintiff has filed the present suit. Now the Plaintiff and the said Kamalam are hand in glove with each other and created the suit mentioned promissory note. Both the Plaintiff and the said Kamalam in order to grab the property belonging to the Defendant, are making the Defendant to become under the clutches and sympathy of the Plaintiff and the said Kamalam”.*

*“7.One Mrs. Panchavarnam, the mother of the Defendant preferred a police complaint against the Plaintiff, her daughter Mrs. Kamalam, Muthu, Malar and Velu on 16.06.2020 mentioning that they are trying to grab her property worth over Rs.25,00,000/- before the Malliyakarai Police station. The said police issued a receipt bearing C.S.R.No.96 of 2020. The copy of police complaint and the CSR receipt given by the police are filed herewith”.*

6. The Defendant is disputing the claim of the Plaintiff by mere filing of petition under Order XXXVIII Rule-5 CPC is not at all maintainable as per the reported ruling cited by the Respondent herein as the Respondent before the Trial Court.



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7. In support of his contentions, the learned Senior Counsel for the Respondent had relied upon the rulings reported in **2008 (2) SCC 302** in the case of ***Raman Tech and Process Engineering Co. and another Vs Solanki Traders*** particularly relied Paragraph Nos.5 and 6 which are extracted hereunder:

*“5. The power under Order 38 Rule 5 CPC is 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 utilize 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 settlement, under threat of attachment”.*

*“6. A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him. Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment. A plaintiff should show, prima facie, that his claim is bonafide and valid and also satisfy the court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any*



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*decree that may be passed against him, before power is exercised under Order 38 Rule 5 CPC. Courts should also keep in view the principles relating to grant of attachment before judgment (See - Prem Raj Mundra v. Md. Maneck Gazi, AIR (1951) Cal 156, for a clear summary of the principles.)”.*

8. In addition to the above rulings, he also relied upon the rulings of Division Bench of this Court reported in **2014 (3) CTC 792** in the case of **M.Padmini Vs M.Anandhan**. Based on the reported ruling of Hon'ble Supreme Court in **2008 (2) SCC 302** that the petition itself is to be dismissed as having no merit.

9. Point of consideration:

***Whether the order passed by the learned I Additional District Judge, Coimbatore dismissing the I.A.No.1 of 2020 in O.S.No.291 of 2020, the petition under Order XXXVIII Rule-5 CPC seeking attachment of the property before judgment dated 23.02.2021 is to be set aside?***

10. On consideration of the rival submissions and on perusal of the



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affidavit filed by the Plaintiff as Petitioner in I.A.No.1 of 2020, the counter filed by the Defendant as Respondent in I.A.No.1 of 2020, the plaint in O.S.No.291 of 2020, the written statement in O.S.No.291 of 2020 and the order passed by the learned I Additional District Judge, Coimbatore, it is found that the suit was filed seeking recovery of money of Rs.12,06,032/- (Rupees Twelve Lakhs six thousand and thirty two only) being principal Rs.10,50,000/- along with the accrued interest.

11. The Defendant/Respondent herein had resisted the suit stating the contents in the written statement filed by the Defendant.

12. While so, the petition filed by the Plaintiff in I.A.No.1 of 2020 in O.S.No.291 of 2020 under Order XXXVIII Rule- 5 CPC seeking attachment of the property before judgment is treated as a coercive action by the Plaintiff. Without *bona fide* claim, when the suit claim itself is disputed by the Defendant, mere apprehension expressed by the Plaintiff that the Defendant is attempting to sell the property cannot be considered as valuable ground to attach the property as per the rulings of the Hon'ble



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Supreme Court reported in **2008 2 SCC 302** in the case of ***Raman Tech and Process Engineering Co. and another Vs Solanki Traders***. The Plaintiff as Petitioner had not produced any document to support his contention that the Defendant as Respondent in the I.A.No.1 of 2020 had attempted to sell the properties and to cause loss to the Plaintiff. Thereby, his intention to obstruct or delay the execution of any decree that may be passed against the Defendant. Here, in this case, as per the written statement filed by the Defendant in the suit, the claim itself is not *bona fide*. The defendant claim that the Plaintiff had created documents as though the Defendant owe money to the Plaintiff. Also it is stated that criminal complaint had been filed against the Plaintiff before the Malliyakarai police station that they are attempting to grab the property worth Rs.25 lakhs. Under those circumstances, the claim of the Plaintiff itself is in doubt. It is to be proved in evidence before the Court regarding the money transaction between the Plaintiff and the Defendant and the claim of the Plaintiff is to be proved before the Court. The Plaintiff has not filed any document that the Defendant is attempting to sell the property or create encumbrance with an intention to defeat the claim of the Plaintiff. Therefore, Order XXXVIII



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Rule-5 CPC is not to convert an unsecured debt into a secured debt. Any attempt by the Plaintiff to utilise the provisions of Order XXXVIII 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 realized by unscrupulous Plaintiff by obtaining orders of attachment before judgment and forcing the Defendants for out of Court settlement under threat of attachment. The Defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him. Shifting of business from one premises to another premises, removal of machinery to another premises is not a ground for granting attachment before judgment. The Plaintiff who show, the *prima facie*, that this claim is *bona fide* and valid and satisfied the Court that the Defendant is about to remove or dispose of the whole or part of his property with an intention to obstruct or delay the execution of any decree that may be passed by him before exercising powers under Order XXXVIII Rule-5 CPC. In the above observation of the Hon'ble Supreme Court, the claim of the Plaintiff in this case before the learned 1<sup>st</sup> Additional District Judge, Coimbatore itself is doubtful claim and it has to be proved through evidence. The Defendant had



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vehemently objected to the claim stating that it is a fictitious claim based on forged documents. Under those circumstances, the attempt of the Plaintiff seeking attachment of the property before judgment on the mere apprehension that the Defendant is attempting to encumber the property without even filing any document regarding the claim that the Defendant is attempting to cause encumbrance of the property was rightly rejected by the learned 1st Additional District Judge, Coimbatore based on the rulings cited by the Defendant/Respondent herein before the learned 1st Additional District Judge, Coimbatore.

13. In the light of the rulings of the Hon'ble Supreme Court reported in **2008 2 SCC 302** which was reiterated by the Division Bench of this Court in **2014 (3) CTC 792** in the case of **M.Padmini Vs M.Anandhan**, Order 38 Rule 5 CPC is extracted hereunder:-

***Code of Civil Procedure, 1908(5 of 1908),  
Order 38 Rule 5- Order of Attachment- Grant of-  
Factors to be considered- Suit for recovery of  
money-Plaintiff seeking order of attachment before  
Judgment-Application opposed by Defendant-When  
Application was posted for orders, Plaintiff filing  
Additional affidavit-On basis of Additional***



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*Affidavit, Trial Court ordered attachment-Appeal against that order of attachment- In Affidavit filed in support of Application seeking attachment, there is no allegation to effect that Defendant was making arrangement to dispose of her properties- When matter was posted for pronouncing Order, Additional Affidavit was filed by Plaintiff alleging that Defendant is about to dispose of her properties-Order of Attachment could be granted, only when property is about to be disposed of with an intention to delay or obstruct execution of Decree that may be passed- Bald allegations are not enough to secure Order of Attachment- In absence of specific allegation, requirement of Order 38 Rule 5, not made out and Court will not grant extraordinary remedy of attachment of attachment before Judgment- Power under Order 38 Rule 5, is drastic and extraordinary-Such power should not be exercised mechanically or just for asking- Power should be used strictly in accordance with Rules- Plaintiff has not satisfied ingredients of Order 38 Rule 5- Impugned Order set aside-C.M.A allowed.*

14. The order of the learned 1<sup>st</sup> Additional District Judge, Coimbatore dismissing the I.A.No. 1 of 2020 in O.S.No.291 of 2020, the petition under Order XXXVIII Rule-5 CPC as not maintainable is found to be reasoned order and does not warrant any interference by this Court.



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15. In the result, **this Civil Revision Petition is dismissed.** The order passed by the learned 1<sup>st</sup> Additional District Judge, Coimbatore is confirmed. The learned 1<sup>st</sup> Additional District Judge, Coimbatore is directed to proceed with the trial of the suit and dispose of the same as early as possible. Consequently, connected miscellaneous petition is closed.

**30.06.2023**

Index: Yes/No  
Internet: Yes/No  
Speaking Order/Non-speaking Order  
nr



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- To
1. The learned I Additional District Judge, Coimbatore.
  2. Section Officer,  
V.R.Section,  
High Court, Madras.



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**SATHI KUMAR SUKUMARA KURUP, J.**

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**Order made in**  
**C.R.P.No.1952 of 2021**  
**and**  
**C.M.P.No.15110 of 2021**

**30.06.2023**