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CMA No. 1461 / 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : **27.07.2023**

PRONOUNCED ON : **03.08.2023**

CORAM :

THE HONOURABLE MR. JUSTICE SUNDER MOHAN

Civil Miscellaneous Appeal No. 1461 of 2023

and

C.M.P. No. 15007 of 2023

S.Rajasekar

... Appellant

Versus

C.Sakthivel Raajhaa

... Respondent

PRAYER : Civil Miscellaneous Appeal filed under Order 43 Rule 1(t) of the Civil Procedure Code seeking to set aside the fair and decretal order dated 08.06.2023 made in I.A. No. 3 of 2022 in O.S. No. 120 of 2022 on the file of the II Additional District Court, Tiruchengode by allowing this Civil Miscellaneous Appeal.

For Appellant : Mr. N. Manoharan.

For Respondent : Mr. M. Santhanaraman.

J U D G M E N T

The above appeal challenges the Order passed in I.A. No. 3 of 2022 in O.S. No. 120 of 2022 on the file of the II Additional District Court, Tiruchengode.



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2. The facts leading to the filing of the above appeal are as follows;

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(i) The respondent herein filed a Suit based on a promissory note for recovery of a sum of Rs.24,73,000/- due to him by the appellant herein.

(ii) The respondent filed I.A. No.3 of 2022 under Order 38 Rule 5 and Section 151 of the C.P.C., for the attachment of a property belonging to the appellant. In the said petition, the respondent had stated that the appellant was due to pay the abovesaid amount; that the appellant was attempting to sell the said property; and that if the appellant alienates the property, the respondent would not be able to realise the amount due to him.

(iii) The appellant filed a counter statement denying the claim made by the respondent and stated that the respondent had misused a pro-note given as security at the time when the respondent and the appellant were dealing in a chit transaction; that the chit amount was settled and yet the respondent refused to return the pro-note; that the schedule mentioned property did not belong to the appellant and it was introduced to the partnership firm by the name 'Ekdant Promoters & Developers'; and that he was ready to furnish security for the Suit claim.



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(iv) The learned Judge had recorded the fact that the appellant had filed an affidavit of undertaking that he would not alienate or encumber the schedule mentioned property; that since the appellant had not furnished security as undertaken by him in the counter, the respondent's claim for Order of attachment is justified and hence, allowed the application for attachment. Aggrieved by the said order, the instant appeal has been filed by the appellant.

3. Mr. N. Manoharan, learned counsel for the appellant, submitted that;

(a) An order under Order 38 Rule 5 of the C.P.C., cannot be passed attaching a property which is situated outside the jurisdiction of the Court. The learned counsel referred to Section 46 of the C.P.C., in support of his submission.

(b) The learned counsel further submitted that the power under Order 38 Rule 5 of the C.P.C., is drastic and extraordinary and such power should not be exercised mechanically. In the instant case, the learned Judge had mechanically passed an order based on bald allegations without determining whether a *prima facie* case is made out and whether there was any necessity to pass an order of attachment.



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(c)The property sought to be attached is not an exclusive property of the appellant. The property was introduced into the partnership firm as capital per the partnership deed (Ex.R.2) dated 29.11.2021. Hence, the learned Judge was not right in attaching the said property.

(d)The learned counsel further submitted that the respondent had given an affidavit of undertaking not to alienate or encumber the property in any manner pending disposal of the Suit, and hence, there was no necessity to pass an order of attachment.

(e)The learned counsel relied upon the Judgment of this Court in ***M.K.Hariprasad Vs. Uma Keshav*** reported in ***2009 5 LW 510***; Judgment of this Court in ***M.Padmini Vs. M. Anandhan*** reported in ***(2014) 3 CTC 792***; and Judgment of the Honourable Supreme Court in ***Raman Tech. & Process Engg.Co. Vs. Solanki Traders*** reported in ***(2008) 2 Supreme Court Cases 302***; in support of his submissions.

4.(a) Mr. M. Santhanaraman, learned counsel for the respondent, per contra, submitted that the appellant, in his counter to the application



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filed by the respondent, had stated that he was ready to furnish security for the Suit claim. Hence, he was directed by the learned Judge as early as April 2022 to furnish security. The appellant was given nearly one year time to comply with his undertaking. However, since the appellant failed to do so, the impugned order came to be passed, and thus, there is no infirmity in the order.

(b)The learned counsel submitted that there is no restriction under Order 38 Rule 5 of the C.P.C., to attach only the properties situated within the jurisdiction of the Court. The Court has powers to attach properties within and without the jurisdiction of the Court and relied upon the Judgment of the Lahore High Court in ***Chaudhri Kanhya Ram Vs. Firm Dina Nath Hardial Mall*** reported in ***AIR 1926 Lah 330***.

(c)The learned counsel further submitted that an affidavit of the undertaking could not be treated as equivalent to furnishing security. Having undertaken to furnish security, the appellant cannot go back and ought to have furnished security in the form prescribed under the Civil Procedure Code. The learned counsel relied upon the Judgment of the Honourable Supreme Court in ***Rajender Singh Vs. Ramdhar Singh and***



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Others reported in **(2001) 6 Supreme Court Cases 213** in support of his submissions.

5. The admitted facts are that the appellant had filed a counter statement in which he had offered to furnish security for the Suit claim. He had also filed an affidavit of undertaking stating that he would not alienate or encumber the schedule mentioned property in which he has a 1/12th undivided share. In view of the admission made by the appellant that he owns 1/12th share and his undertaking that he would not alienate the property, the question with regard to the ownership need not be gone into.

6. Further, it is seen that Order 38 Rule 5 of the C.P.C., does not restrict the power of the Court to attach properties which are without the jurisdiction of the Court. In this regard, the observations of the Lahore High Court in **Chaudhri Kanhya Ram's case (cited supra)** is extracted for better understanding;

“5. An appeal has been filed by Kahnay Ram, defendant, against the attachment before judgment of



the groceries in question and of the house in Sarai Bahrain Bag belonging to him. The first argument advanced was that the Court had no jurisdiction to attach the groceries and the house as they were without its jurisdiction. This view was taken by the Calcutta High Court in Surendra Nath v. Bansi Badan¹ and by the Upper Burma Judicial Commissioner's Court in Bhai Khan v. Des Raj. A different view, however, was taken by the Lower Burma Chief Court in Soma sundaram v. Muthuveerappa³ where it was pointed out that the corresponding S. 183 of the Old Code had been modified by the omission of the words “within the jurisdiction of the Court” from the new section “O. 38, R. 5.” The view taken in the latter case is the one accepted by Mulla in his Civil Procedure Code in the commentary under O. 38, R. 6 and in Sircar's Code of Civil Procedure, 6th edition, at page 1612. It seems to me that the new Code meant that an attachment before judgment could, be of property within or without the jurisdiction of the Court, and I so hold.”

It is also seen that Section 136 of the C.P.C., provides for procedure for attachment of property outside the District. The said provision and Order 38 Rule 5 of the C.P.C., makes it very clear that there is no restriction for the trial Court to attach properties without the



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jurisdiction of the Court. Section 46 of the C.P.C., relied upon by the learned counsel for the appellant, which deals with the issue of precepts after the decree is passed to attach any property, is not applicable in a case of attachment before Judgment.

7. There cannot be any dispute with the proposition that the power under Order 38 Rule 5 of C.P.C., is extraordinary and cannot be resorted to on mere asking. However, in the instant case, the said question does not arise. The appellant had given an undertaking to furnish security. Since he has not furnished security as undertaken by him, the trial Court was justified in passing an order of attachment.

8. It is seen that the appellant had given an affidavit of undertaking stating that he would not alienate the property. However, the undertaking cannot be treated on par with furnishing security. The undertaking given by the appellant is not in the same form as in Form No. 6 provided in Appendix (F) of the Civil Procedure Code. The said form is reproduced herein for better understanding;

“No. 6

SECURITY FOR THE PRODUCTION OF PROPERTY



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(O. 38, r. 5.)

(Title)

WHEREAS at the instance of....., the plaintiff in the above suit,the defendant has been directed by the Court to furnish security in the sum of Rs.....to produce and place at the disposal of the Court the property specified in the schedule hereunto annexed;

Therefore I.....have voluntarily become surety and do hereby bind myself, my heirs and executors, to the said Court, that the said defendant shall produce and place at the disposal of the Court, when required, the property specified in the said schedule, or the value of the same, or such portion thereof as may be sufficient to satisfy the decree; and in default of his so doing, I bind myself, my heirs and executors, to pay to the said Court, at its order, the said sum of Rs.....or such sum not exceeding the said sum as the said Court may adjudge.

Schedule

*Witness my hand at.....this.....day of...
.....20.....*

Witnesses.

1.



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2.

(Signed) ”

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9. This Court, in its Judgment in **C. Sengottaiyan Vs. K. Saravanan** reported in **2013 (6) CTC 456** had held that there is a difference between a simple undertaking not to alienate the property and furnishing the security under Form No.6 wherein the defendant binds himself to the Court that he shall produce and place at the disposal of the Court, the property concerned or the value of the said property as may be sufficient to satisfy the decree. In the instant case, the undertaking given by the petitioner that he would not alienate the property is not in the above form.

10. Therefore, this Court is of the view that the impugned order passed by the trial Court cannot be faulted. However, in order to give one more opportunity to the appellant, the appellant is directed to offer security in the abovesaid form as he had expressed that he did not intend to sell his share in the property. Therefore, the appellant is directed to furnish the security within a period of four weeks from the date of receipt of a copy of this Order before the trial Court failing which the order



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passed by the trial Court attaching the property would stand confirmed.

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11. With the above observations, this Civil Miscellaneous Appeal is disposed of. No costs. Consequently, the connected Miscellaneous Petition is closed.

03.08.2023

ay

Index: Yes/No

Speaking Order / Non-Speaking Order

Neutral Citation: Yes / No

To

The II Additional District Court,
Tiruchengode.



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SUNDER MOHAN, J

ay/dk

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Dated: 03.08.2023