



CRP.No. 3293 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.09.2023

CORAM :

THE HONOURABLE MRS. JUSTICE V. BHAVANI SUBBAROYAN

CRP.No. 3293 of 2023

B. Somasundaram

... Petitioner

Versus

1.K.Muniyammal
2.K.Senthil Murugan
3.K.Prakash Babu
4.K.Hemalatha

.. Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India, prays to set aside the order and decree dated 11.04.2023 in I.A.No. 104 of 2022 in O.S.No. 241 of 2022 on the file of II Additional Subordinate Judge, Villupuram.

For Petitioner : Mr. S. Gajapathi Krishnan



ORDER

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This Civil Revision Petition has been filed seeking to set aside the order and decree dated 11.04.2023 in I.A.No. 104 of 2022 in O.S.No. 241 of 2022 on the file of II Additional Subordinate Judge, Villupuram.

2. The case of the petitioner is that the petitioner/plaintiff has filed the suit in O.S.No. 241 of 2022 before the II Additional Subordinate Judge, Villupuram, for recovery of money against the respondents/defendants. The respondents/defendants have contested the suit by filing written statement denying all the averments made in the plaint. During the pendency of the suit proceedings, the revision petitioner/plaintiff has filed an application in IA.No.104 of 2022 under Order 38 Rule 5 and Section 151 CPC, directing the respondents to furnish the security for a sum of Rs.9,99,741/- to produce and place at the disposal of the Court, the petition mentioned properties or any other property of the value satisfy the decree that may likely be passed, on their failure, to attach the petition mentioned properties before Judgment. After perusing the records, the trial Court dismissed the application by order dated 11.04.2023. Challenging the findings of the trial Court, the petitioner/plaintiff has come forward with the present Civil Revision Petition.

3. According to the petitioner/plaintiff, the 1st respondent/defendant



had borrowed a sum of Rs.7,50,000/- from the petitioner/plaintiff on 05.05.2019 for his family expenses and development of business and the 1st respondent executed a promissory note in favour of the petitioner/plaintiff agreeing to repay the said principal with interest accrued thereon at 12% p.a. The husband of the 1st respondent died intestate leaving the respondents as his legal heirs. The respondents have not paid the said amount in spite of repeated demands made by the plaintiff. Therefore, the petitioner/plaintiff has filed the suit within the period of limitation against the legal heirs of the deceased Kaliyamoorthy. However, the respondents/defendants have been attempting to sell their immovable properties in order to delay and defraud his debts. Therefore, the petitioner/plaintiff prays to set aside the findings of the trial Court.

4. On the other hand, the respondents/defendants denied all the averments stated in the petition as false, except those that are specifically admitted. The husband of the 1st respondent, the father of other respondents had never borrowed any money from the petitioner/plaintiff and he did not aware of the plaintiff. The suit documents are created for the purpose of this case. The petitioner/plaintiff has filed the suit to grab the property of respondents/defendants. The petitioner/plaintiff has not come to the Court with



clean hands and proper court fee was not paid by the petitioner/plaintiff and there is no cause of action for the suit and the respondents/defendants pray the above Civil Revision Petition may be dismissed.

5. Heard the learned counsel for the petitioner and perused the materials available on record.

6. It is seen that the petitioner/plaintiff filed the above suit for recovery of money. The husband of the first respondent, namely, Kaliyamoorthy, had borrowed a loan of Rs.7,50,000/- from the plaintiff on 05.05.2019. He executed promissory note in favour of the plaintiff agreeing to repay the loan amount along with interest at 12% p.a. Thereafter, the said Kaliyamoorthy died intestate leaving the respondents and his legal heirs. The respondents have not paid the loan amount inspite of several demands by the plaintiff. However, it transpires that the respondents have been attempting to sell their immovable properties in order to delay and defraud his debts. On the side of the plaintiff, he has examined himself as PW1 and Ex.P1 to Ex.P3 were marked. No oral and documentary evidence on the side of the defendants/respondents.



7. It is further seen that in order to substantiate the case of the plaintiff, he has marked Ex.P1 the copy of the settlement deed dated 05.11.2015 executed by the first respondent in favour of her husband. Ex.P3 is the copy of the certified copy of partition deed dated 08.08.2022. In the meanwhile, the plaintiff has invoked provision under Order 38 Rule 5 of CPC, the relevant provision is as follows;-

Attachment before judgment:

Where defendant may be called upon to furnish security for production of property. Order 38 Rule 5)+(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....

...

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

8. According to the respondents, the deceased Kaliamoorthy, the father of the 1st respondent never borrowed money from the petitioner/plaintiff and the aforesaid documents are only created for the purpose of to grab the respondents property. In this regard, enquiry was conducted as per the documents filed by him. According to the petitioner, the respondents are trying to sell the immovable property belonging to them. But, there is no relationship between the petitioner/plaintiff and the deceased Kaliamoorthy. The copy of



the partition deed dated 08.08.2022 and the encumbrance certificate on 11.11.2022 marked as exhibits before the trial Court and after the partition deed effected on 08.08.2022, the petitioner/plaintiff has filed the petition for attachment before judgment. According to the petitioner, that there is no sale the property in question and as per the encumbrance certificate, the first respondent put up a construction after partition among themselves and subsequently, the respondents have also mortgaged the property on 28.08.2023.

9. However, it has to be seen that there is no supporting materials have been filed by the petitioner/plaintiff to substantiate his case. When there is no *prima facie* case is made out against the respondents/defendants under Order 38 Rule 5 of CPC., the trial Court has rightly dismissed the said application. According to the petitioner, the respondents have mortgaged the property to some third parties and no promissory note was executed by the husband of the 1st respondent, and there is no material would show that mortgaged the property.

10. It is also seen that there is no pleadings regarding the date of



execution of the promissory note and no notice was issued to him before the death of the said Kaliyamoorthy. Hence, this Court is of the view that the petitioner/plaintiff keeping this matter till his death, and trying to put forth the recovery of money against the legal heirs of the deceased Kaliyamoorthy. It is also seen that the property itself was belonging to the Kaliyamoorthy and the same has been settled in favour the first respondent on 08.08.2022. The said respondents/defendants have partitioned the suit property among themselves and the petitioner/plaintiff has established his claim by way of execution proceedings, but there is no material found for passing the order under Order 38 Rule 5 of CPC.

11. It is settled law that order can only be issued, if circumstances exist to the satisfaction of the Court. The contention of the plaintiff is that the respondents have made attempt to alienate the petition mentioned property and it transpires that the respondents have been attempting to sell their immovable properties in order to delay and defraud debts. The petitioner has filed an affidavit stating that the respondents have made attempts to sell the property. In order to substantiate the same not even a speck of evidence to prove the same has been adduced by the plaintiff. The burden is on the plaintiff to prove the same when there is denial. The plaintiff has not satisfied the Court that the



respondents have been attempting to sell their immovable properties in order to delay and defraud debts. In the absence of material evidence mentioned in the provisions, the plaintiff has lost his right to seek remedy under the above said provision.

12. The Court below finds that the duty cast upon the plaintiff is that, it is the plaintiff has to prove his case. Once the plaintiff proves his case, it is for the respondents to disprove the same. But in the present petition, the petitioner claimed that the respondents have made attempt to sell his agricultural land and to settle in out of station and would evade. Except the pleadings, the plaintiff has not chosen to establish his case by supporting oral and material evidence with the provision under Order 38 Rule 5 CPC. The plaintiff has failed to establish prima facie case. The plaintiff has not produced sufficient materials to prove his case under this provision. The plaintiff has not proved that the respondents had made attempt to sell his agricultural land and to settle in out of station. It is in the said circumstances, this Court is of the view that the petitioner/plaintiff has not substantiated his case to grant relief sought for the revision and the plaintiff is not entitled to the relief sought for in the petition. Hence, this Court is not inclined to interfere with the order passed by the Court below and accordingly, the revision fails and it is dismissed.



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WEB COPY **13.** In the result, the Civil Revision Petition is dismissed. No costs.

11.09.2023

Index: Yes/No

Speaking order/Non-speaking order

Neutral Citation: Yes/No

MSM



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V.BHAVANI SUBBAROYAN, J.
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