



C.R.P.(MD)No.1747 of 2019

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 20.09.2023

CORAM:

**THE HONOURABLE MR.JUSTICE C.KUMARAPPAN**

**C.R.P.(MD)No.1747 of 2019**

**and**

**C.M.P.(MD)No.8956 of 2019**

K.Shobha

... Petitioner/  
Petitioner/Plaintiff

Vs.

Kalaiselvi

... Respondent/  
Respondent/  
Defendant

**PRAYER:** Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the order dated 04.07.2019 passed by the I Additional Sub Court, Trichy in I.A.No.309 of 2017 in O.S.No.465 of 2017.

For Petitioner : Mr.T.Lenin Kumar

For Respondent : Mr.R.Suresh Kumar

### **ORDER**

The instant Civil Revision Petition has been filed by the petitioner under Article 227 of the Constitution of India, against the order, dated



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04.07.2019, made in I.A.No.309 of 2017, in O.S.No.465 of 2017, on the file of the I Additional Sub Court, Tiruchirappalli.

2. The petitioner herein is the plaintiff and the respondent herein is the defendant before the Court below.

3. For the sake of convenience, the parties will be referred to as per the litigative status before the trial Court.

4. The learned counsel appearing for the plaintiff would submit that they have filed an application to recover a sum of Rs.3 lakhs based upon a promissory note, dated 06.06.2015.

5. It is also the submission of the learned counsel appearing for the plaintiff that they moved an application under Order 38 Rule 5 of the Code of Civil Procedure (hereinafter referred as CPC) so as to direct the defendant to furnish security, failing which, to pass an order of attachment of property before judgment. However, the said application was dismissed by the Court below on the ground that, no proof has been submitted to substantiate the ownership of the defendant over the schedule mentioned property.



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6. Aggrieved with the said dismissal order, the plaintiff has approached this Court by way of this Civil Revision Petition.

7. The learned counsel appearing for the plaintiff would submit that though they have submitted the encumbrance certificate, at that point of time, they were not in a position to submit the title deeds of the petition mentioned property. Therefore, the Court below has found the same as a reason to dismiss the application. Aggrieved with the order of dismissal, this revision petition has been filed.

8. The learned counsel appearing for the plaintiff would also submit that, now that they have submitted the settlement deed executed by the defendant in favour of his daughter, which by itself shows the ownership of the defendant and his intention to defeat the right of the plaintiff to overcome the attachment before judgment. Hence, he prayed to allow this petition.

9. Per contra, the learned counsel appearing for the defendant would submit that, against the dismissal of application under Order 38 Rule 5 for furnishing security, no Civil Revision Petition is maintainable and the only available remedy is to prefer a Civil Miscellaneous Appeal.

Therefore, on the ground of maintainability, the learned counsel



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appearing for the defendant would submit that this Civil Revision Petition is liable to be dismissed.

10. It is also the further submission of the learned counsel appearing for the defendant that the petition mentioned property has already been gifted by the defendant to his daughter. Therefore, as of now, the petition mentioned property is not at all belonged to the defendant. Hence, he prayed to dismiss this petition.

11. I have given my anxious consideration to either side submissions.

12. Before this Court embark into the submissions made on either side, it has to be decided whether the Civil Revision Petition is maintainable against the order of dismissal of an application filed under Order 38 Rule 5 of CPC. It is pertinent to mention here that, though under Rule 5 of Order 38 application, prayed to furnish security, on failure prayed for the relief of attachment, and that, the attachment would falls under Order 38 Rule 6 of CPC. In view of the said position, the learned counsel appearing for the defendant would urge before this Court that under Order 42 Rule 9 the only remedy available for the plaintiff is to prefer a Civil Miscellaneous Appeal.



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13. However, the learned counsel appearing for the plaintiff has relied upon the judgment of the Hon'ble Division Bench of this Court reported in **CDJ 2000 MHC 242 (R.S.Pillai Vs. Smt.M.L.Peratchi Alias Solvi and others)**, wherein, this Court has held that, when an application is filed under Order 38 Rule 5, and that when the said application has been dismissed, the Court found that the parties never reached the stage contemplated by Rule 6 of Order 38, in such an event, the Civil Revision Petition is maintainable. Therefore, this Court holds that though, there is prayer for the relief of attachment is sought for, in the absence of offering security, since the petition has been dismissed at the stage of offering security itself, as held in the above Division Bench Judgment, this Court is of the indubitable view that even in this case, the parties never reached the stage contemplated by Rule 6 of Order 38. Therefore, this Court holds that the instant Civil Revision Petition is maintainable.

14. Now, coming to the merits of the matter, while considering the observation made by the Court below, the Court below has rejected the prayer on the ground that the plaintiff has not proved the ownership of the schedule mentioned property. Now that, the plaintiff has come forward by production of the settlement deed in respect of the schedule mentioned property, dated 31.01.2019. Therefore, this Court is of the



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view that in view of the submission of the settlement deed, and in respect of the proof that the petition mentioned property originally belonged to the defendant, this Court deems it appropriate to set aside the order passed by the Court below and remit the matter back to the trial Court, for fresh consideration.

15. In the result, this Civil Revision Petition is allowed and thereby, the order passed in I.A.No.309 of 2017 in O.S.No.465 of 2017, dated 04.07.2019 is set aside, and the matter is remitted back to the Court below. The Court below is directed to dispose of the application in I.A.No.309 of 2017 according to law within a period of three months from the date of receipt of copy of this order. It is made clear that the Court below is directed to dispose of the application without being influenced by any of the observation made in this order, as it has been done only for the disposal of this petition. Consequently, connected Miscellaneous Petition is closed. There shall be no order as to costs.

**20.09.2023**

NCC:Yes/No  
Index:Yes/No  
Internet:Yes/No  
csm



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To

WEB COPY

1. The I Additional Sub Court,  
Trichy.



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**C.KUMARAPPAN, J.**

csn

**ORDER MADE IN**

**C.R.P.(MD)No.1747 of 2019**

**and**

**C.M.P.(MD)No.8956 of 2019**

**Dated : 20.09.2023**