IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	**20.12.2023**
Pronounced on	**24.01.2024**

CORAM :

THE HONOURABLE MR. JUSTICE J.SATHYA NARAYANA PRASAD

Civil Revision Petition No.78 of 2021
and M.P.No.596 of 2021

Ishwarya Marketting
A partnership firm,
represented by its partner,
P.Devendran ... Petitioner

Vs.

1.M/s.Avathar Rotary,
A partnership firm,
represented by its partner,
D.Saraswathi

2.D.Saraswathi

3.Faridabanu … Respondents

Civil Revision Petition filed under Article 227 of Constitution of India praying to set aside the order and decreetal order in I.A.No.3 of 2019 in O.S.No.488 of 2019 dated 21.02.2020 on the file of the I Additional District Judge, Erode.

For Petitioner : Mr.R.Ganesh
for M/s.V.Srimathi

For Respondents 1 & 2 : Mr.V.S.Kesavan

For Respondent 3 : No appearance

ORDER

The present civil Revision Petition has been filed challenging the order and decreetal order in I.A.No.3 of 2019 in O.S.No.488 of 2019 dated 21.02.2020 passed by the I Additional District Judge, erode, dismissing the application filed under order XXXVIII, Rule 5 and 6 r/w section 151 of Civil Procedure Code.

2. The revision petitioner is the plaintiff in the suit. Learned counsel for the revision petitioner submitted that the first respondent is a partnership firm carrying on business in dyes and chemicals in textile printing and the respondents 2 & 3 are the partners of the firm and responsible for the day to day management of the firm and accountable for the acts of commission and omission of the firm. The first respondent firm has been purchasing dyes and chemicals from revision petitioner's firm since 14.12.2015 on credit basis and

the last purchase made by the first respondent firm was on 24.03.2017 and the total value of the business done being Rs.45,83,866/- and as per the statement of accounts, there is outstanding balance of Rs.24,35,628/- and as per the terms of sale, the first respondent firm is bound to pay interest @ 18% per annum.

3. Learned counsel for the petitioner would further submit that in order to repay the said sum, the respondents 2 &3 representing the first respondent partnership firm gave 12 post dated cheques and promised to clear the same on presentation and the cheques were issued during the last week of March 2018 and at the time of issuance of the said cheques, the balance amount due was Rs.28,75,082/-. The cheques were presented for collection through Lakshmi Vilas Bank, Brough Road, Erode and the same was dishonoured by the drawer bank with remarks "Funds insufficient" and the revision petitioner has taken action as per Negotiable Instrument Act against the respondents herein and the same is pending consideration in S.T.C.No.603/2019 and S.T.C.No.624/2019 of Fast Track Magistrate Court No.II, Erode and under the terms of sale, the respondents are bound to pay interest at 18% per

annum.

4. Learned counsel for the petitioner would further submit that the last payment made by the respondent’s firm was on 02.03.2019. As against the purchases made, the respondent's firm remitted a sum of Rs.21,48,238/- and the payments made by the respondent’s firm was in general and against the running account and the respondents have appropriated the payments in general against all the outstanding bills and thereby reviving all the bills and thus, the claim of the revision petitioner is within law of limitation and even after the issuance of post-dated cheques, the respondent's firm has made few payments against the outstanding amount.

4.1. The revision petition has been requesting the respondents to pay the arrears of principal and accrued interest but the respondents have been evading payment and the respondents 2 & 3, who are now heading the operations of the firm and persons at the helm of affairs of the first respondent's firm are showing no signs of clearing the legitimate dues and they have benefited by retaining the value and hence, they are liable to pay the interest and further, the transaction being commercial in nature, warrants the payment of interest and thus, the revision petitioner is constrained to file a suit for recovery of Rs.24,35,628/- together with interest worked out since 01.04.2018 and cost of litigation. Thereafter, the revision petitioner has filed application in I.A.No.3 of 2019 under Order 38 Rule 5, 6 and Section 151 Civil Procedure Code directing the respondent to furnish sufficient security to meet the suit claim, future interest and cost. However, the respondents were not responding to the fervent plea of recovery of the claim and also stoic silence is a manifestation of their evil design and the property described in I.A.No.3 of 2019 is belongs to the second respondent and the other assets of the firm have been encumbered by the respondents and this property alone is free of encumbrance.

5. Learned counsel for the petitioner would further submit that the revision petitioner had information from persons in the chemical business in Erode that the respondent is taking all efforts to create further encumbrances over the schedule property mentioned in I.A.No.3 of 2019 with a view to defeat and delay the legitimate claim of petitioner firm. However, the Trial

Court has dismissed the I.A.No.3 of 19 on 21.02.2020 holding that as per order 38 rule 7 of the Civil Procedure Code, the attachment can be made in the manner provided for attachment of property in execution of a decree and as per Section 60 of Civil Procedure Code, the properties belonging to the judgment debtor or the property on which he had a disposing power can only be attached. The second respondent has gifted the property to her husband and she has no title or disposing power with regard to the petition mentioned property on the date of serving of notice to furnish security. Aggrieved over the said order dated 21.02.2020, the revision petitioner has filed this petition and prays for allowing the petition.

6. Learned counsel for the petitioner has also relied on various judgments and orders of this Court and the same is reads as follows:

(i) In the case of Chandra Vs. V.Rangachariar in C.M.S.A.No.1 of 1994, dated 21.08.2001, reported in (2002) 2 LW 263.

(ii) In the case of N.K.Pushpam Achi Vs. K.Rajkumar & Others in C.R.P(PD)No.3879 of 2007, dated 03.09.2009.

(iii) In the case of Shakuntla Devi Vs. Kalu Ram & Another in C.R.P.No.4362 of 2012, dated 26.07.2012, re[prted om 2012 SCC Online

P&H 12795.

(iv) In the case of C.Sengottaiyan Vs. K.Saravanan in C.R.P(NPD)No.4168 of 2009, dated 31.07.2013, reported in (2014) 1 MLJ 527.

(v) In the case of C.Angulakshmi Vs. P.Srinivasan in C.R.P(NPD) No.4242 of 2013 dated 06.01.2014, reported in (2014) 7 MLJ 17.

7. Per contra, learned counsel appearing for the respondents 1 & 2 submitted that the respondents 2 & 3 never issued 12 post-dated cheques during the month of March 2018 for compliance amount of Rs.28,75,082/- and the same were returned by the Lakshmi Vilas Bank with an endorsement "Funds insufficient". The property mentioned in the petition was originally belongs to second respondent and the same was already gifted to her husband under registered gift settlement deed dated 09.12.2019 itself and the Court notice in the application filed by the revision petitioner to furnish the security for the aforesaid lone amount was served to the second respondent on 12.12.2019 i.e., three days after she gifted the property to her husband vide registered gift settlement deed dated 09.12.2019.

8. Learned counsel appearing for the respondents 1 & 2 further submit that the revision petitioner's firm have supplied the substandard chemicals to the respondents and the same cannot be used by the respondents for the needs of the clients and some of the chemical products used for dyeing cloths caused damages to the cloth consequently, many clients of the respondents sent a debit note for several lakhs. This was duly informed to the revision petitioner also and the revision petitioner is alone responsible for supplying the substandard chemicals, which resulted loss to the respondents and therefore, the respondents returned chemicals worth several lakhs to the revision petitioner, which was supplied by invoices.

9. Learned counsel appearing for the respondents 1 & 2 further submitted that the respondents initially agreed to waive the bill payments and both of them sat together and worked out the balance amount in the last week of February 2019 and they arrived a settlement that the respondents ready to pay a sum of Rs.25,000/- towards full and final settlement. Accordingly, the respondents also paid a sum of Rs.25,000/- on 02.03.2019 and settled the entire due amount. Moreover, the petition mentioned property has already been gifted to the husband of the second respondent and the same was also

accepted by him and now, he is in possession and enjoying the property as absolute owner. In fact, the said property was purchased out of the income of her husband Mr.R.Duraisamy so as to give back the same, the second respondent has executed a gift settlement deed in his favour and that apart the second respondent has possess other properties and therefore, it is false to say that the second respondent with a view to delay the claim made in the suit has transferred the property mentioned in the petition.

10. Learned counsel appearing for the respondents 1 & 2 further submitted that the second respondent was not aware that the revision petitioner is going to file the suit for recovery of the amount and come for attachment of the petition mentioned property. The second respondent has transferred the said property without any ill motive in her mind. Simply because the revision petitioner has filed case under Section 138 will not give any cause of action for the attachment of the petition mentioned property. As the second respondent has no salable interest in the petition mentioned property, it cannot be brought for sale. The value of the petition mentioned property is worth Rs.2 crores and the entire property cannot be attached for

the suit claim of Rs.27,13,288/- and in fact 1/8 share of the petition mentioned property is sufficient to answer the suit claim.

11. Heard the learned counsel on either side and perused the materials available on record.

12. It is an admitted fact that the revision petitioner and the first respondent firm are dealing with chemical business. The petitioner has supplied chemicals to the respondents and in that business transaction, there is an outstanding due of sum of Rs.24,35,628/- to be paid by the respondents to the revision petitioner as claimed in the suit O.S.No.488 of 2019, which was filed on 21.10.2019 and the same was taken on file on 02.12.2019 and the application furnishing security in I.A.No.3 of 2019 was filed by the revision petitioner on 22.10.2019 directing the respondent to furnish security.

13. The notice in that petition was served on the second respondent on 12.12.2019, whereas, the property was gifted by the second respondent viz., D.Saraswathy in favour of her husband namely Mr.R.Duraisamy by way of settlement deed on 09.12.2019 i.e., three days prior to the service of the

notice in this petition by this Court. It is pertinent to note that on the date of service of notice i.e., on 12.12.2019, there is no salable property in favour of the second respondent viz., D.Saraswathi.

14. The main contention of the petitioner is that the second respondent has intentionally executed the settlement deed in favour of her husband on 09.12.2019, after having come to know that the revision petitioner has filed a suit along with the application to furnish the security, failing which for attachment of the property mentioned in the application in I.A.No.3 of 2019 is only to avoid the attachment of the property for the outstanding due of a sum of Rs.24,35,628/-, and the same was also dismissed by the Trial Court on 21.02.2020, since there is no salable property in the name of the second respondent as on the date of service of notice to furnish security. For better appreciation, the relevant paragraph of the order dated 21.02.2020 is extracted hereunder:

> *"13. As per order 38 rule 7 Civil Procedure Code, the attachment can be made in the manner provided for attachment of property in execution of a decree and as per section 60 of Civil Procedure Code the properties belonging to the judgment debtor or the properties on which he had a disposing power can*

be attached. As stated earlier, the 2nd respondent had gifted the property to her husband and she had no title or disposing power with regard to the petition mentioned property on the date of serving of notice to furnish security. Hence the citation submitted by the petitioner is squarely applicable to the facts of the present petition. Hence the court is of the view that the petition mentioned property cannot be made liable for attachment as the second respondent had no salable interest on the date of serving of notice to furnish security and hence the petition has to be dismissed. Point No.1 and 2 are decided accordingly."

15. Thereafter, another settlement deed dated 26.02.2020 was executed by Mr.R.Duraisamy, husband of the second respondent viz., D.Saraswathy in favour of his son Mr.D.Thiyagu, bearing Document No.1234 of 2020 on the file of Joint VII Sub-Registrar, Erode. Then, the partition deed bearing document No.5816 of 2023 dated 12.09.2023 was also executed between the second respondent viz., D.Saraswathi and her sons Mr.R.D.Saravana Kumar and D.Thiyagu. According to which, the B-Schedule property was allotted to Mr.R.D.Saravana Kumar and the C-Schedule property was allotted to D.Thiyagarajan.

16. Thereafter, Mr.R.D.Saravanakumar, son of the second respondent

has sold the petition mentioned property, which was allotted to him by way of partition deed dated 12.09.2023 and executed a sale deed in favour of one A.Mukhil Anand and the said sale deed was registered as Document No.7442 of 2023 on the file of Joint VII Sub-Registrar, Erode.

17. The Trial Court has dismissed the I.A.No.3 of 2019 on 21.02.2020 holding that there is no salable property in favour of the second respondent viz., D.Saraswathi since, she has executed the settlement deed in favour of her husband viz., R.Duraisamy on 09.12.2019 i.e., three days prior to the service of notice in the petition filed to furnish the security in the suit O.S.No.488 of 2019. Thereafter, many transactions have been taken place as mentioned supra.

18. Learned counsel for the petitioner has relied on various judgments of this Court, however, the same is not applicable to the present case on hand. In regard to first judgment the petitioner has failed to prove that the judgment debtor had other properties. In regard to second judgment, it is related to impleading of the wife and children of the defendants. in whose

favour, the first defendant/judgment debtor has executed the settlement deed and the same is not applicable to the present case on hand. The third judgment is also not applicable to this case. The fourth judgment is also not applicable to the present case on hand for the reason that the judgment debtor has already given an undertaking that he will not alienate the property and thereafter, he has violated the undertaking, the Court attached the property mentioned in the undertaking given by the defendants/judgment debtor. The fifth judgment is also not applicable to the case for the reason that the judgment debtor has sold the property, however, no document has been produced before the Court to substantiate the claim that the property has been sold and her objection was rejected by the Trial Court but in the case on hand, the settlement deed document was produced dated 09.12.2019 which was registered as document No.7681 of 2019 on the file of Joint VII Sub-Registrar, Erode.

19. Learned counsel appearing for the respondents 1 & 2 has relied on the judgment of this Court in the case of ***M.Padmini Vs.M.Anandhan in C.M.A.No.3286 of 2013, reported in 2014 (3) CTC 792, dated 18.03.2014***

and the relevant paragraph is extracted hereunder:

10. (iv) Paragraph Nos.4,5 & 6 of the judgment reported in Raman Tech. & Process Engg. Co. v. Solanki Traders, 2008 (3) LW 744, which read as follows:

4. The object of supplemental proceedings (applications for arrest or attachment before judgment, grant of temporary injunctions and appointment of receivers) is to prevent the ends of justice being defeated. The object of order 38 rule 5 CPC *in particular, is to prevent any defendant from defeating the realization of the decree that may ultimately be passed in favour of the plaintiff, either by attempting to dispose of, or remove from the jurisdiction of the court, his movables. The Scheme of Order 38 and the use of the words `to obstruct or delay the execution of any decree that may be passed against him' in Rule 5 make it clear that before exercising the power under the said Rule, the court should be satisfied that there is a reasonable chance of a decree being passed in the suit against the defendant. This would mean that the court should be satisfied the plaintiff has a prima facie case. If the averments in the plaint and the documents produced in support of it, do not satisfy the court about the existence of a prima facie case, the court will not go to the next stage of examining whether the interest of the plaintiff should be protected by exercising power under Order 38 Rule 5* CPC*. It is well-settled that merely having a just or valid claim or a prima facie case, will not entitle the plaintiff to an order of attachment before judgment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may* *be passed. Equally well settled is the position that even where the defendant is removing or disposing his assets, an attachment before judgment will not be issued, if the plaintiff is not able to satisfy that he has a prima facie case."*

20. He further relied the judgment of Division Bench of this Court in the case of ***Global Plastics Vs. T.K.K.N.N. Vysya Charities in O.S.A.No.48 of 2018, reported in 2019 (2) MWN (Civil) 409 dated 25.04.2018*** and the relevant paragraph is extracted hereunder:

"Code of Civil Procedure, 1908 (5 of 1908), Order 38, Rule 5 – Attachment before judgement – principles enunciated – suit for recovery of money – order of attachment before judgement passed – appeal filed – attachment cannot be ordered on mere appreciations – vague allegations that defendant is about to dispose of property without any supporting materials, not sufficient – Court should be subjectively satisfied that there is reasonable chance of a decree being passed in suit – power to attach not to be exercised in a lighter and cavalier fashion – attachment before judgment being a draconian and harsh remedy, not to be ordered unless a prima facie case is made out – order passed on apprehension, set aside – appeal allowed."

21. Learned counsel appearing for the respondents 1 & 3 further relied the judgment made in ***C.R.P.MD.No.498 & 499 of 2018 dated 02.11.2023*** in the case of ***D.Pankiraj Vs. A.Innasi and other*** For better appreciation, the

relevant paragraph is extracted hereunder:

> *" 7. Admittedly, on the date of attachment being effected by the Court, in furtherance of the order passed in I.A.No.41 of 2015, the defendant was not having any subsisting right or interest in the subject property, he having already conveyed the same in favour of the revision petitioner, by executing a registered sale deed dated 12.05.2015. The trial Court has made a roving discussion with regard to the bonafides and lack of it on the part of the revision petitioner and that he has not given any paper publication before purchasing the property and that he had hurriedly proceeded to purchase the property to defeat the claim of the plaintiff."*

22. In view of the above factual matrix of the case and the ratio laid down by this Court, the order passed by the I Additional District Court, Erode in I.A.No.3 of 2019 dated 21.02.2020 does not warrant any interference by this Court and the same is hereby confirmed.

23. In the result, this Civil Revision Petition stands dismissed. No costs. Consequently, connected miscellaneous petition is also closed.

24.01.2024

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Index : Yes/No
Speaking Order : Yes/No
Neutral Citation : Yes/No

J.SATHYA NARAYANA PRASAD,J.

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