



C.M.A.No.728 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Reserved on 08.02.2024	Pronounced on 28.03.2024
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CORAM

THE HONOURABLE MR. JUSTICE RMT.TEEKAA RAMAN

C.M.A.No.728 of 2020

and

C.M.P.No.4463 of 2020

1.Bharathiyar, aged 49 years
S/o.Manavalan

2.Shanthi, W/o.Bharathiyar
aged 55 years

Both of them are residing at 5/216
Gurka Hills Road, Singara Thoppu
Wellington, The Nilgiris

... Appellant

Vs.

Ashok Kumar, S/o.Rajagopal
Navavor Pirivu, Vadavali
Abirami Nagar
Coimbatore 741 046

... Respondents

Prayer: Appeal filed under Order 43 Rule (1) (Q) of CPC against the fair and decretal order in I.A.No.2 of 2019 in O.S.No.37 of 2019 dated 29.01.2020, on the file of the District Judge of the Nilgiris at Udthagamandalam.



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For Appellants : Mr.V.Raghavachari
Senior counsel
for Ms.V.Srimathi

For Respondent : Mr.E.C.Ramesh

J U D G M E N T

The Appeal has been filed against the fair and decreetal order made in I.A.No.2 of 2019 in O.S.No.37 of 2019 dated 29.01.2020, on the file of the District Judge of the Nilgiris at Udhagamandalam.

2.The Defendants in the Suit is the Respondents in the IA and Appellants in the present CMA.

3.The brief facts leading to filing of the Suit is as under:

The Respondent herein is the Plaintiff in O.S.No.37 of 2019. Respondent/Plaintiff filed the above suit for recovery of money of Rs.54,62,733/- with interest. Pending suit he filed I.A.No.2 of 2019 under Order 38, Rule 5 r/w. Section 151 of CPC praying for attachment before judgment of the property belonged to the 2nd Defendant/2nd Appellant herein. Initially notice was sent to the Appellants to furnish the surety and on their



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failure to do so, attachment before judgment was ordered and hence, this Appeal.

4.Heard the learned senior counsel appearing on behalf of the Appellants and the learned counsel appearing on behalf of the Respondent.

5.Mr.V.Raghavachari, learned senior counsel appearing on behalf of the Appellants contended that the 2nd Appellant/2nd Defendant has no intention to sell the property and there is no positive evidence for passing of consideration and payment of amount said to be due for the suit amount.

6.Mr.E.C.Ramesh, learned counsel for the Respondent contended that all the payments are made through online and in the criminal complaint given against the Defendants/Appellants there matter was referred to mediation in the attachment before judgment petition and hence, this plea could not be legally sustainable and prayed for dismissal of the Appeal.

7.After hearing the rival submissions and also taking note of the citations



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referred to by the learned senior counsel appearing on behalf of the Appellants and on perusal of the documents, I find that the Respondent herein as a Plaintiff filed the above Suit in O.S.No.37 of 2019 for recovery of money. The Appellants herein are husband and wife. As per the plaint averment the Appellants herein have suffered financial loss due to the bank loan of Rs.56,20,000/- and SARFAESI proceedings were initiated and therefore, the Respondent herein pledged his property with Karur Vysya Bank, Vadavalli Branch, Coimbatore and pledged his wife's jewels in City Union Bank, Vadavalli and paid the amount to the Coimbatore Bank of India, Asset Recovery Section in CC A/c.820730110000010 and H.L.A/c.820775110000011, Rs.1,00,000/- on 15.03.2017, Rs.5,00,000/- on 16.03.2017, Rs.13,00,000/- on 20.03.2017, Rs.20,00,000/- on 30.03.2017 and Rs.17,20,000/- on 31.03.2017. The Respondent completed the entire loan amount of the Appellants from his own source and after the entire payment made by the Respondent, the Appellants were relieved from the bank loan and received their documents also.

8 [a]. As per the plaint averment the Appellants have not taken



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any steps to repay the amount to the Respondent. During August 2018 when the Respondent asked about the amount, the Appellants replied that if the Respondent has given more pressure, they will say that the amount was paid already.

8 [b]. Immediately the Respondent lodged a complaint before District Crime Branch of Coimbatore. To escape from the arrest, the Appellants, approached the Hon'ble High Court for anticipatory bail in CrI.O.P.No.28248 of 2018, in which the Respondent also filed intervening petition and a joint memo of compromise also arrived in CrI.O.P.No.28248 of 2018 and as per joint memo of compromise, the total repayable amount arrived as Rs.47,20,000/-.

8[c]. Out of which, the Appellants paid Rs.5,00,000/- by way of DD and promised to repay Rs.5,00,000/- on or before 15.02.2019 and the remaining balance of Rs.37,20,000/- should be paid within 56 months (i.e.,) on or before 31.07.2019. But the Appellants paid only the 2nd due of Rs.5,00,000/.



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8[d]. Thus as per the plaint calculation now the Appellants have to pay Rs.37,20,000/- as principal amount without interest. The respondent paid the Appellants bank account as on 31.03.2017 Rs.56,20,000/- and interest from 01.04.2017 to 05.09.2019 comes to Rs.16,42,733/- and the total amount is Rs.72,62,733/-. As on date the Appellants have not come forward to pay the total liability of Rs.54,62,733/- to the Respondent. Hence the Respondent has filed the suit for recovery of money and the petition property is the only property owned by the Appellants. But now the Appellants are trying to sell the property and if they succeed in such attempt of alienation and received the sale consideration, it is unable for the Respondent to recover the amount and to execute the decree.

9.It is specifically stated by the Respondent herein that the property is the only property owned by the Appellants herein and trying to dispose of it in an attempt to defeat the fruits of the civil Court decree. In the counter affidavit the Appellants herein admitted the arriving of joint memo of compromise on 28.01.2019 and based upon the said joint compromise memo, orders have also been passed by this Court on 01.02.2019.



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10.As per the plaint document, it is further stated by the Respondent that another eight lakhs has been paid. Before the trial Court Ex.P1 to Ex.P8 were marked. Ex.P5 is the copy of the joint compromise memo entered between the parties before the Mediation Centre attached to this Court and based upon the memo of compromise/Ex.P.5, Ex.P.6/order in CrI.OP.No.28248/2018 has been passed granting anticipatory bail.

11.Learned senior counsel further contended that the joint memo of compromise entered between the parties cannot be a legal document to show the liability and also relied upon the judgment of the Hon'ble Apex Court in ***Rama Tech. And Process Engg. Co. and Ors. Vs. Solanki Traders*** in C.A.No.6171 of 2001 reported in ***(2008) 2 MLJ 1058 (SC)***, wherein in paragraph 5 & 6, it is held as follows:

"5.The power under Order 38 Rule 5 C.P.C. is a drastic and extraordinary power. Such power should be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose



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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 settlements, 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 bona fide 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 decree that may be passed against him, before power is exercised under Order 38



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Rule 5 C.P.C. 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)."

After perusing the orders of the Hon'ble Apex Court at paragraph No.6, I find that the factual situation stated therein is totally different from the factual situation before this Court and hence the same is not applicable to the factual matrix of the present case.

12[a]. Admittedly, in Ex.P5/joint compromise memo entered between the Plaintiff and Defendants in the Suit, it was admitted that the balance of amount to be paid in the stated date in the said compromise memo. However, amount has not been paid, resulted in filing of the Petition and this Court is unable to agree with the contention of the learned senior counsel that the joint memo of compromise entered between the parties before the High Court could not be a cause of action for admitting the liability.

12[b]. A person has entered into a joint memo of compromise before the Mediation Centre without influence of any third parties or third



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force, it is a voluntary submission made by him. That is the ulterior motive and object of the Mediation Centre, which resulted in memo of compromise before the Mediation Centre. When a compromise memo has been entered before the Mediation Centre established by this Court, I have no hesitation to hold that the same amounts to admitting the liability of the person. It is open to the parties to challenge the same by separate suit. However, it cannot be contended that in an attachment before judgment petition filed in a suit it does not amounts to admitting the liability.

13[a]. Admittedly, it is the one and only property available with the Appellants/Defendants, in the Suit an opportunity to furnish surety for the suit amount has been duly given and sufficient time has also been given by the then District Judge of the Nilgiris at Udthagamandalam. Thereafter on the failure to furnish the surety as directed, the trial Court has ordered for attachment.

13[b]. The trial Court also specifically rendered a finding that the Appellants/Defendants is having the schedule property alone and they are trying to alienate the suit property and hence, the trial Court has taking note of



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the deceitful intention of the Appellants/Defendants in selling the one and only property available in their hands and also after satisfying the procedure contemplated under order 38 Rule 5 of PC and after offering an opportunity to furnish the surety has ordered attachment of the property before judgment. and

13[c]. Hence, this Court finds that the finding rendered by the trial Judge as to the *prima facie* existence of the liability on the part of the Appellants/Defendants, does not suffer from any irregularity in procedure before ordering attachment and hence I find that the order passed by the trial Court does not suffer from any illegality or irregularity warranting interference at this Appellate stage.

14. Accordingly, the Civil Miscellaneous Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

28.03.2024

Index : Yes/No
Neutral citation : Yes/No
Speaking Order/Non-Speaking Order

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To
The District Judge of the Nilgiris
Udhagamandalam.



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RMT.TEEKAA RAMAN.J,

sai

Pre-delivery Judgment made in

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Dated: 28.03.2024