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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 14.02.2024

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THE HON'BLE MRS.JUSTICE S.SRIMATHY

C.M.A(MD)No.682 of 2023

and

C.M.P(MD)No.9212 of 2023

Rathakrishnan

... Appellant

Vs.

Senthilkumar

... Respondent

PRAYER: Civil Miscellaneous Appeal is filed under Section 43(1)(q) of Civil Procedure Code, to call for the records relating to the fair and decreetal order, dated 16.03.2023 in I.A.No.2 of 2022 in O.S.No.143 of 2020 on the file of the Additional District Judge, Karur, set aside the same and allow the civil miscellaneous appeal.

For Appellant : M/s.B.Prasanna Vinoth

For Respondent : Mr.V.Balaji

JUDGEMENT

This Civil Miscellaneous Appeal is filed against the Fair and Decreetal order, dated 16.03.2023 in I.A.No.2 of 2022 in O.S.No.143 of 2020 on the file of the Additional District Judge, Karur.



2. The defendant is the Appellant herein and the plaintiff is the respondent herein. For the sake of convenience, the contesting parties shall be referred to as Plaintiff and Defendant. The defendant herein has preferred this Appeal against the order passed by the Court below for “attachment before the Judgment”.

3. The contention of the appellant is that he has filed an undertaking affidavit stating that he would not alienate the property. He further submitted that he had provided Form VI, furnishing of security. Without considering the same, the Trial Court has passed an order for “attachment before the Judgment”.

4. The Learned Counsel appearing for the Appellant relied on the Judgment rendered by the Hon'ble Supreme Court in the case of ***Raman Tech and Process Engg. Co. & Another Vs. Solanki Traders***, dated 20.11.2007.

The relevant portion is extracted here under:

...

“The power under Order 38 Rule 5 CPC is drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt



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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 settlement, under threat of attachment”.

5. Learned Counsel appearing for the respondent submitted that since the appellant herein has not furnished original copies, then the Court below is absolutely right in granting the Order of Attachment before Judgment. For which, the Learned Counsel appearing for the respondent relied on the Judgment reported in ***2002-1-L.W.760 in the case of Sriram Capital Trust (P) Limited, Madras – 600 017 and another Vs. D.B.S. Properties Limited, Madras and others.*** The relevant Paragraph Nos.13 to 15 are extracted here under:

*“13. The security to be effective must be by way of registered simple mortgage. Usually instead of creating a simple mortgage by executing a registered deed of charge for the purpose of furnishing immovable property security, normally the procedure of deposit of title deeds is followed. Mortgage by deposit of title deeds cannot be created unless the originals are produced and deposited, that is the reason why the office insists upon production of the originals. **If there is any difficulty in submitting the original documents of title deeds, the defendant can execute a simple mortgage by a registered mortgage deed. Under such circumstances, the original***



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documents need not be submitted, certified or xerox copy of the documents can also be produced along with the registered simple mortgage deed. Therefore, the prayer of the petitioner that the office be directed to accept the certified copies of titled deeds, valuation certificate, encumbrance certificate etc., for executing immovable property security cannot be granted.

14. It is clarified that in order to create a charge in respect of immovable property, it is necessary that the same is required to be embodied in a document; and when it is more than Rs.100/- it should be a registered document.

15. Therefore, immovable property security can be furnished either by producing and submitting the original Title deeds along with a bond or by execution of a registered simple mortgage. That is immovable property security cannot be furnished by submitting a certified copy of xerox copy or the title deeds”.

6. In the above judgments it is held that if there is any difficulty in submitting the original documents of title deeds, the defendant can execute a simple mortgage by a registered mortgage deed. If the same is executed then the original documents need not be submitted and certified or xerox copy of the documents can be produced along with the registered simple mortgage deed. It is seen from the impugned order that the Trial Court has simply dismissed the plea of the appellant. This Court is of the considered opinion that the Trial Court ought to have directed the appellant to execute simple mortgage rather than attaching the property. Since the Trial Court had not followed the dictum



laid down by this Court as well as the Hon'ble Supreme Court, this Court is inclined to set aside the impugned order passed by the Court below.

7. Accordingly, the impugned Fair and Decreetal order, dated 16.03.2023 passed in I.A.No.2 of 2022 in O.S.No.143 of 2020 on the file of the Additional District Judge, Karur, is hereby set aside and this Civil Miscellaneous Appeal stands allowed. The Court below is directed to accept the Form VI and the undertaking of the appellant. The appellant is strictly directed not to encumber the property. Since trial has commenced in the suit, the Court below is directed to complete the trial and dispose of the suit in O.S.No.143 of 2020 within a period of four months from the date of the receipt of a copy of the order. The parties shall cooperate for the disposal of the case.

8. With these observations and directions, this Civil Miscellaneous Appeal is partly allowed. No Costs. Consequently, connected miscellaneous petition is also closed.

14.02.2024

NCC : Yes / No
Index : Yes / No
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To

1. The Additional District Court,
Karur.
2. The Section Officer,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SRIMATHY, J.

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**Order made in
C.M.A(MD)No.682 of 2023**

14.02.2024