BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 07.12.2023

Delivered on : 20.02.2024

CORAM:

THE HON'BLE MR.JUSTICE K.MURALI SHANKAR

C.R.P.(MD)No.2652 of 2023
and
C.M.P.(MD)No.13821 of 2023

Kanagaraj : Petitioner/Petitioner/Plaintiff

Vs.

1. Rajalakshi

2.Vishwa

3.Harshini : Respondents/Respondents/Defendants 2 to 4

Prayer : This Civil Revision Petition filed under Article 227 of the Constitution of India, to call for the records pertaining to the order dated 09.08.2023 in I.A.No.1 of 2022 in O.S.No.856 of 2022 on the file of the learned II Additional Subordinate Judge, Trichy and set aside the same.

For Petitioner : Mr.R.Vigneshwaran

For Respondents : Mr.A.Zubaitha Banu

ORDER

The Civil Revision Petition is directed against the order passed in I.A.No.1 of 2022 in O.S.No.856 of 2022, dated 09.08.2023 on the file of the II Additional Subordinate Court, Trichy, dismissing the petition filed under Order 38 Rule 5 of the Code of Civil Procedure.

2. The revision petitioner/plaintiff has field the above suit for recovery of Rs.6,58,679/- due on the promissory note alleged to have been executed by the first defendant and the deceased Sathiskumar, husband and father of the respondents/defendants 2 to 4. Pending suit, the plaintiff has filed an application under Order 38 Rule 5 of C.P.C., seeking orders for attachment before judgment of the petition mentioned property owned by the deceased Sathiskumar, against the respondents/defendants 2 to 4.

3. The respondents 2 to 4 have filed a counter statement raising serious objections. The learned trial Judge, after enquiry, has passed the impugned order, dismissing the petition. Aggrieved by the order of dismissal, the plaintiff has preferred the present revision.

4. The case of the revision petitioner/plaintiff is that the first defendant and the deceased Sathiskumar approached the plaintiff on 28.11.2019 and borrowed a sum of Rs.4,00,000/- for the education and family needs of the first defendant and the deceased Sathiskumar; that both of them have executed promissory note on 28.11.2019 agreeing to repay the loan amount with interest at 24% per annum; that both of them have jointly paid the interest till November 2020; that the plaintiff subsequently came to know that the said Sathiskumar died on 06.12.2020, leaving behind the defendants 2 to 4; that the first defendant has issued a cheque for Rs.4,00,000/- on 14.06.2021 towards principal amount; that when the cheque was presented for collection, the same was returned for want of sufficient funds in the bank account of the first defendant; that after issuing statutory notice, he has preferred a complaint under Section 138 of Negotiable Instruments Act against the first defendant and the same is pending in C.C.No.952 of 2021 on the file of the learned Judicial Magistrate No.I, Trichy; that the second defendant has given a copy of the sale deed standing in the name of her husband Sathiskumar on 14.06.2021 as a form of security with assurance that they would pay the principal

amount within a month; that the plaintiff has thereafter come to know that the deceased Sathiskumar had already created two equitable mortgages on 26.10.2018 and 06.02.2019 totalling to the tune of Rs.32,03,000/-; that there is every likelihood of SARFAESI proceedings being initiated by the Indian Bank; that the petitioner is at a loss to recover the loan amount that was extended and the only source/security through which, the petitioner can recover the said amount, is by creation of a second charge on the petition mentioned property and that therefore, the petitioner was constrained to file the above application.

5. The defence of the respondents is that the deceased Sathiskumar has already discharged the loan due to the plaintiff; that though the deceased Sathiskumar has subscribed his signatures as guarantor for the loan obtained by the first defendant, the plaintiff has filed the suit as if the plaintiff and the deceased Sathiskumar had borrowed the amount and executed the promissory note; that the plaintiff was very much aware of the mortgage with Indian Bank and that since the first respondent and her husband, after obtaining loan from the bank, have mortgaged the petition mentioned property, the present application seeking attachment before

judgment is legally unsustainable and that therefore, the petition is liable to be dismissed.

6. In a petition filed under Order 38 Rule of C.P.C., the petitioner seeking attachment before judgment has to show that he has a *prima facie* and that thereafter, he has to show that the defendant has been attempting to remove or dispose of his assets with intention of defeating the decree that may be passed. At this juncture, it is necessary to refer the judgment of the Hon'ble Supreme Court in ***Raman Tech. & Process Engg. Co. & Anr vs Solanki Traders*** reported in ***2008 (2) SCC 302***, wherein the Hon'ble Apex Court has observed 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 5CPC. 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."

7. Considering the above, it is very much clear that the concerned Court is duty bound to first see as to whether the plaintiff has a *prima facie* case and then to decide as to whether that the defendants are attempting to remove or dispose of their assets with intention to defeating the decree that may be passed.

8. It is pertinent to note that the trial Court has to satisfy itself that the plaintiff has shown a *prima facie* case; that his claim is *bona fide* and that the defendants have been taking steps to remove or dispose of whole or part of the property with intention of obstructing or delaying the execution of any decree that may be passed against him.

9. It is the specific case of the respondents/defendants that the loan obtained by the deceased Sathiskumar has already been discharged and that for the loan obtained by the first defendant, the deceased Sathiskumar stood only as a guarantor and that there is no provision to attach the property of the guarantor.

10. The learned trial Judge, considering the above plea of the respondents has observed, " As the one of the person who borrowed is no more, at this stage it cannot be adjudicated that the deceased had stood as a co-borrower. Moreover, at this stage before trial the signature looks like guarantor. If the deceased stood as guarantor if charge is ordered then definitely there will be prejudice because as the real borrower is the first

defendant Selvakumar, then how come the property of the deceased Sathiskumar/guarantor can be attached or charged." Such an observation is not in accordance with law. Even assuming for argument sake that the deceased Sathiskumar has only stood as a guarantor, even then, the principle debtor as well as the guarantor are equally liable to pay the loan amount due to the creditor and no distinction can be made between the debtor and the guarantor with respect to the repayment of the loan amount.

11. It is pertinent to note that the revision petitioner/plaintiff in the affidavit filed in support of the petition has only stated that he came to know that the deceased Sathiskumar has already created two mortgages on 26.10.2018 and 06.02.2019 totalling to the tune of Rs.32,03,000/-; that there is every likelihood of SARFAESI proceedings being initiated by the Indian Bank and that since the petition mentioned property alone is available, is entitled to proceed against the said property.

12. The learned counsel for the petitioner has also relied on the judgment of this Court in ***M/s.Viprah Technologies Limited, rep. by its Managing Director Vs.T.Ganesan and others*** reported in ***2022 1 L.W.***

729, wherein the order of attachment before judgment already made was raised and charge was created over the said property for the value of the suit claim by imposing certain conditions.

13. The above decision cannot be applied to the facts of the case on hand. In the present case, the petitioner has nowhere whispered that the second respondent has been attempting to alienate or encumber the petition mentioned property. Even according to the revision petitioner, the deceased Sathiskumar had already mortgaged the petition mentioned properties twice and that the Indian bank has been contemplating to initiate SARFAESI proceedings against the petition mentioned property. It is necessary to refer the following passages in the ***Raman Tech. & Process Engg. Co's*** case above referred.

> "*5. 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 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.

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 bonafide 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 Rule 5 CPC. 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.)"

14. As rightly contended by the learned counsel for the respondents, the petitioner/plaintiff has neither averred nor produced any iota of materials to show that the respondents have been taking steps with

intention to prevent the plaintiff from realizing the fruits of the decree that may be passed against them. As already pointed out, the petitioner has nowhere stated that the respondents have been attempting to dispose or remove the petition mentioned property so as to obstruct or delay the execution of the decree that may be passed.

15. On considering the entire facts and circumstances of the case, as rightly contended by the learned counsel for the respondents, the petitioner by seeking attachment before judgment or charge over the property, has been attempting to convert the unsecured deed into secured deed and such an attempt cannot be entertained.

16. As rightly observed by the learned trial Judge, the first respondent/wife of the deceased Sathiskumar for herself and on behalf of her minor children have given an undertaken that she will not alienate or encumber the petition mentioned property further. The learned trial Judge, on the basis of undertaking affidavit filed by the respondents, has closed the petition.

17. Considering the submission made by the learned counsel for the revision petitioner, the undertaking affidavit filed by the respondents is hereby recorded. Hence, the respondents are hereby directed not to alienate or encumber the petition mentioned properties till the disposal of the suit. But at the same time, it is clarified that this direction will not prevent the proceedings already initiated or to be initiated by the secured creditors.

18. With the above direction, this Civil Revision Petition is disposed of. Consequently, connected Miscellaneous petition is closed. No costs.

20.02.2024

NCC :yes/No
Index :yes/No
Internet:yes/No
das

To

1.The II Additional Subordinate Judge,
Trichy.

2.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.

K.MURALI SHANKAR,J.

das

Order made in
C.R.P.(MD)No.2652 of 2023
and
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Dated : 20.02.2024