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CMA.(MD)No.293 of 2024

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 12/07/2024

CORAM

The Hon'ble Mr.Justice **G.ILANGOVAN**

CMA (MD) No.293 of 2024

and

CMP (MD) No.3923 of 2024

V.Sathish Kumar : Appellant/Respondent/
Defendant

Vs.

Shylas : Respondent/Petitioner/
Plaintiff

PRAYER:- Civil Miscellaneous Appeal is filed under Order 43 Rule 1 r/w 96 of the Civil Procedure Code, to set aside the order, dated 28/10/2022 passed in IA No.15 of 2019 in OS No.9 of 2018 on the file of the Additional District Judge, Padmanabhapuram.

For Appellant : Mr.Niranjana S.Kumar

For Respondent : Mr.R.Narayanan

JUDGMENT

This Civil Miscellaneous Appeal is filed seeking to set aside the order, dated 28/10/2022 passed in IA No.15 of 2019 in OS No.9 of 2018 by the the Additional District Judge, Padmanabhapuram.



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2.The facts in brief:-

The suit in OS No.9 of 2018 was filed by the respondent herein namely Shylas against the appellant herein for recovery of Rs.38,00,000/- with interest at the rate of 12% p.a. Pending further process, a petition in IA No.15 of 2019 was taken out by the respondent herein under Order 38 Rule 5 and 151 CPC, for directing the appellant herein to furnish security for Rs.38,00,000/- and Sathish Kumar furnished security and for attachment of half share in the schedule mentioned properties.

3.The following averments are made in the pleadings:-

In the course of transaction between himself and the appellant herein, the appellant said to have borrowed a sum of Rs.36,49,000/- as detailed in the tabulation.

Sl.No.	Date	Amount
1.	03.02.2017	Rs.10,00,000/-
2.	05.04.2017	Rs. 4,00,000/-
3.	10.05.2017	Rs.10,00,000/-
4.	06.07.2017	Rs. 7,00,000/-
5.	08.09.2017	Rs. 3,00,000/-
6.	14.09.2017	Rs. 1,63,000/-
7.	30.10.2017	Rs. 86,000/-
	Total Amount	Rs.36,49,000/-



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Ultimately between 03/02/2017 and 30/10/2017 for his family necessities. He promised to repay the amount after selling his properties. Towards discharge of a portion of the amount, he issued a cheque bearing No.023393 on 26/12/2017 for a sum of Rs.38,00,000/- drawn on Axis Bank, Marthandam Branch, promising to honour the cheque after receiving the sale deed from his vendee. That cheque was presented for payment before the State Bank of India, Thiruvattar Branch, Kanyakumari District, on 02/01/2018, but returned as unpaid on 04/01/2018. Now, he realized that the appellant intend to sell his 33.5 cents situated in Re-Survey Nos.241/6B, 241/6C and 241/6D in Kulasekharam A Village, Kalkulam Taluk, Kanyakumari District. Hence, the suit.

4.That was resisted by the appellant herein by filing counter stating that the respondent is totally stranger and there was no need for him to borrow money from him; He never issued any cheque; The property belongs to the appellant's wife and he has no right in the property.

5.The trial court, after hearing both sides recorded a finding that that there is no denial on the part of the appellant in issuing the cheque, accordingly ordered the



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appellant herein to furnish security on or before 15/11/2022. When the matter was called on 16/12/2022, it appears that security was not furnished.

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6.In the meantime, a report is called from the trial court as to the stage of the suit. The trial court namely the Additional District Judge, Padmanabhapuram, submitted a report stating that it is pending for further evidence on the side of the plaintiff and posted to 31/07/2024.

7.Challenging the order of attachment or furnishing the security, this appeal is preferred defendant as appellant.

8.Heard both sides.

9.The learned counsel appearing for the appellant would submit that against the order of attachment, he preferred CRP and the CRP was dismissed with a direction to the trial court to consider the same on its own merits; That was not properly considered by the trial court even after remand; Settlement was effected even before the suit in favour of his wife; No *prima facie* finding was recorded by the trial court for furnishing of security and the encumbrance certificate was not produced along with the petition.



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10. Per contra, the learned counsel appearing for the respondent would submit that the issuance of cheque was admitted; It was presented for payment on 02/01/2018, got dishonoured, on 04/01/2018; Now it has been stated by the appellant that the cheque was found missing, on 02/12/2017 itself. Apart from that, he has also stated that after the dishonour memo only, settlement deed was executed by the appellant in favour of his wife to delay or defeat the decree. The appellant, on what facts of question, as to how the application under Order 38 Rule 5 CPC must be addressed. What are the principles taken into account by the trial court before passing the order of furnishing the security. In ***Suravee Business Services Pvt. Ltd., Vs. Chittavalsah Jute Mills Limited [(2022) 0 Supreme (Cal) 341***, it has been held as follows:-

"12. So far as other reliefs of order of attachment before judgment and injunction are concerned, the parties rely upon several authorities. In Premraj Mundra (supra), while considering an application under Order XXXVIII Rules 5 and 6 of the Code of Civil Procedure, 1908, the Court laid down guiding principles governing such provision. Paragraph 18 thereof is as follows:



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"18.From a perusal of all the authorities, I think that the following guiding principles can be deduced:

(1)That an order under O. 38, Rr. 5 & 6, can only be issued, if circumstances exist as are stated therein.

(2)Whether such circumstances exist is a question of fact that must be proved to the satisfaction of the Court.

(3)That the Court would not be justified in issuing an order for attachment before judgment, or for security, merely because it thinks that no harm would be done thereby or that the debts. would not be prejudiced.

(4)That the affidavits in support of the contentions of the applicant,must not be vague, & must be properly verified. Where it is affirmed true to knowledge or information or belief, it must be stated as to which portion is true to knowledge, the source of information should be disclosed & the grounds for belief should be stated.

(5)That a mere allegation that the debt, was selling off & his properties is not sufficient. Particulars must be stated.



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(6) There is no rule that transactions before suit cannot be taken into consideration, but the object of attachment before judgment must be to prevent future transfer or alienation.

(7) Where only a small portion of the property belonging to the deft, is being disposed of, no inference can be drawn in the absence of other circumstances that the alienation is necessarily to defraud or delay the pltf's. Claim.

(8) That the mere fact of transfer is not enough, since nobody can be prevented from dealing with his properties simply of cause a suit has been filed: There must be additional circumstances to show that the transfer is with an intention to delay or defeat the pltf.'s claim. It is open to the Court to look to the conduct of the parties immediately before suit, & to examine the surrounding circumstances, to draw an inference as to whether the deft. is about to dispose of the property, & if so, with what intention. The Court is entitled to consider the nature of the claim & the defence put forward.



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(9) The fact that the debt, is in insolvent circumstances or in acute financial embarrassment, is a relevant circumstance, but not by itself Sufficient.

(10) That in the case of running businesses, the strictest caution is necessary & the mere fact that a business has been closed, or that its turnover has diminished, is not enough.

(11) Where however the debt, starts disposing of his properties one by one, immediately upon getting a notice of the pltf.'s claim, &/or where he has transferred the major portion of his properties shortly prior to the institution of the suit & was in an embarrassed financial condition, these was grounds from which an inference could be legitimately drawn that the object of the debt. was to delay and defeat the pltfs'. claim.

(12) Mere removal of properties outside jurisdiction, is not enough, but where the debt, with notice of the pltfs'. claim, suddenly begins removal of his properties outside the jurisdiction of the appropriate Court, & without any other satisfactory reason, an adverse inference may be drawn against the



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deft. Where the removal is to a foreign country, the inference is greatly strengthened.

(13)The deft, in a suit is under no liability to take any special care in administering his affairs, simply because, there is a claim pending against him. Mere neglect, or suffering execution by other creditors, is not a sufficient reason for an order under O. 38 or the Code.

(14) The sale of properties at a gross undervalue, or benami transfers, are always good indications of an intention to defeat the pltfs. Claim. The Court must however be very cautious about the evidence on these points & not rely on vague allegations.

Premraj Mundra was considered by the Division Bench in Kohinoor Steel Pvt. Ltd. (supra). In the facts of that case the Division Bench refused to grant the relief of attachment before judgment as also injunction.

The Supreme Court in Raman Tech. & Process Engg. Co. (supra) while considering the provisions of Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 is of the following view:



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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."

11.Now, we will go to the above said rival submissions.

12.Let us see whether the order of furnishing security passed by the trial court is as per law.

13.As mentioned above, the cheque was presented for payment on 02/01/2018. The deed was executed on 14/07/2017 and the relinquishment deed, dated 08/01/2018. The appellant has stated that the property was jointly purchased by him and his wife and on the date of the document, received Rs.9,48,216/- for releasing his half share in the property in his favour. This, according to the respondent, was made after the memo of dishonour issued by the Appellant Bank. So, according to him, this itself shows that the document was executed only with a view to stall the decree to be passed in the suit.



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14.The learned counsel appearing for the appellant would submit that in January 2008, he lodged a complaint before the Superintendent of Police, Kanyakumari against the respondent and others, wherein he has stated that the cheque, which was missed by him was presented for payment by the respondent.

15.By citing this complaint, he would submit that consideration itself is not *prima facie* established by the respondent. In the absence of any proper consideration, the order passed by the trial court directing him to furnish security is without jurisdiction. But these are the factual aspects, which got to be agitated during the course of the trial process. When *prima facie*, it is seen that the appellant executed a release deed in favour of his wife relinquishment or releasing his right in the property mentioned in the petition, I am of the considered view that the apprehension on the part of the respondent that the appellant is trying to evade the execution of the decree, the order passed by the trial court requires no interference.



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16.In the result, this Civil Miscellaneous Appeal is **dismissed**. No costs. Consequently connected Miscellaneous Petition is closed.

12/07/2024

Index:Yes/No
Internet:Yes/No
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To,

- 1.The Additional District Judge,
Padmanabhapuram,
Kanyakumari District.
- 2.The Section Officer,
VR/ER Section,
Madurai Bench of Madras High Court,
Madurai.



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G.ILANGO VAN, J

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