

ORDER BELOW EXH. 35

(Passed on : 12.12.2018)

01. Present application is filed the defendants to reconsider the order below Exh.05, which is passed before filing of written statement, and to decide Exh.5 on merit.

02. In short, it is the contention of the defendants that in present matter order is passed below Exh.05. At that time written statement was not on record. Now they have filed the written statement by get setting aside no W.S. order. The order below Exh.05 is not on merit. By way of injunction the Court has restrained the defendants form alienating the suit properties. The defendants are having loan on family, so as to discharge their duties it need to alienate their own land which is not subject matter of the present suit. Therefore it is necessary to reconsider the order passed below Exh.05 and decide it on merit. Hence, prayed to allow the application.

03. The plaintiff filed the say at Exh. 44 and opposed the application contending that, after granting opportunities to the defendants order is passed below Exh.05. The defendants were aware about the same. Therefore now the defendants cannot raise such issue. The order is passed below Exh.05 on merit by considering the merit of the case. No appeal is preferred against the said order. Therefore said order became final. There is no change in circumstances so as to arrive

at contrary opinion. Details of loan are not mentioned. If defendants wants to alienate the properties then they have to furnish the another security, so as to obey the decree. One suit is pending in the Court of Omerga Court. Hence, prayed to reject the application.

04. Heard both the parties. It is argued by Adv. Jadhav for defendants that, present suit is for recovery of amount. The property attached is not a suit property. The Court has passed the order below Exh.05 on 21/12/2016. At that time written-statement was not on record. No Written-statement order is set aside on 21/03/2017. The order below Exh.05 amounts to attachment before judgment. Therefore it is necessary to rehear the application below Exh.05 and decide it on merit. The Court can set aside the order on injunction under Order 39 Rule 4 of the Code of Civil Procedure. Hence prayed to allow the application.

05. On the contrary, it is argued by Adv. Deshpande for the plaintiff that, the Court has passed the order below Exh. 05 on merit. The defendants were aware about the same but they have not challenged the same. Therefore said order is confirmed by the efflux of time. Said order is under the provisions of Order 38, for which no property is necessary to be there as suit property. Any property can be attached. No compelling circumstances or change in circumstances are there so as to change the said order. Another suit is pending between the parties in Omerga Court. If order is set aside the plaintiff will suffer the loss as it will difficult for the plaintiff to execute the decree. Hence prayed to

reject the application.

06. Upon hearing both the parties and perusing the record it appears that, defendant No. 1 & 2 appeared in the matter on 20/10/2016. But they failed to file the written-statement therefore no written-statement order came to be passed against them on 22/11/2016. Defendant No.3 failed to appear inspite of service of summons. Therefore suit proceeds exparte against him. Thereafter on 08/12/2016 Advocate for the plaintiff argued on application for attachment before judgment(Exh.05) but defendants failed to argue and application Exh. 05 came to be allowed on 21/12/2016. Now by this application defendants prayed to set a side that order and hear the application(Exh.05) on merit.

07. First of all it is necessary to mention here that, application(Exh.05) was for attachment before judgment and not for temporary injunction. While deciding the said application instead of granting the prayer of attachment before judgment, my predecessor thinks it proper to grant injunction restraining the defendants from alienating the properties. Accordingly injunction order came to be passed. When that application was allowed the defendants were aware about that order, inspite of that they have not challenged the said order till filling of present application. Said order is challenged by defendants after the lapse of more than one year period. Therefore there is considerable delay in filing of present application.

08. Further, the Court is having power to set aside, discharge or vacate the order of temporary injunction as per the provisions of Order 39 Rule 4 of the Code of Civil Procedure, if the application came to be filed by the party against whom the order is passed. But Court can set aside, discharge or modify the injunction order only if the case of the party falls under proviso to Rule 4 of Order 39 of the Code. First proviso attracts when the injunction came to be granted ex parte without issuing the notice to the party. Second proviso attracts if the party shows that there is change in circumstances or undue hardship will be caused to him due to order of injunction.

09. So far as matter before me is concerned, the order of injunction is passed after the appearance of defendants and giving full opportunities to them therefore first proviso will not attract. So far as second proviso is concerned the defendants put-forth the ground to set aside the order that, to clear the debts of other persons it is necessary to alienate the properties. But that is not a ground to again consider the application below Exh.05. Defendants for their own default cannot said that order of injunction is not on merit. The defendants could have challenged the order of injunction immediately after passing of the order below Exh.05. In spite of that they had done nothing and remained silent till filing of this application.

10. Further, no documents are filed by defendants to show that they have obtained the loan amount from any other persons. Even there

are no details about that loan. Mere contention of defendants is not sufficient to hear the application(Exh.05) again. My predecessor has passed the order below Exh.05 after considering all the relevant facts in the matter and after granting opportunities to defendants. Therefore there is no necessity to re-hear the application.

11. Further, this suit is for recovery of amount. Therefore the application(Exh.05) was filed to attach the property. My predecessor after considering the facts take a view to restrain the defendants from alienating the properties by the order of injunction to protect the rights of the plaintiff. Therefore I do not found any substance in this application. In view of above discussion application deserves to be rejected. Hence, I pass the following order,

ORDER

Application is rejected.

Nilanga.
Dated : 12.12.2018.

Sd/-
(R. P. Kulkarni)
Civil Judge Senior Division,
Nilanga.