

IN THE COURT OF THE ADDITIONAL SUBORDINATE JUDGE,  
TIRUPPUR.

Present :- Thiru. K.R.Kannan,B.A., B.L.  
(J.O.Code.TN1220)  
Additional Subordinate Judge,  
Tiruppur.

Saturday the 04<sup>th</sup> day of January 2025

I.A. No.1 / 2024

in

O.S.No. 230 / 2024

M/s. New Allwin Dyers,

represented by Proprietor Ponnusamy

....Petitioner/Plaintiff

//Vs//

1. M/s. SMV Tex,

Represented by its partners Mr.Ayyanan Sonai  
and Sonai Velayee

2. Mr.Ayyanan Sonai

Partner of M/s. SMV. Tex

3. Mr.Sonai Velayee,

Partner of M/s. SMV. Tex

.....Respondents/Defendants

This Petition came before me on for the 18.12.2024 for the final hearing in the presence of Thiru.M.Nagarajan,B.Sc.,B.L., Advocate for the Petitioner/Plaintiff and Thiru.R.Vignesh,B.A.,L.L.B., Advocate for the Respondents/Defendants and upon hearing both side arguments, and on perusal of available records, this court delivered the following...

**// ORDER //**

1. This petitioner, who is the plaintiff filed this petition under Order XXXVIII Rule 5 of CPC to direct the respondents to furnish security to the suit claim

failing which to pass orders for attachment of property mentioned in the petition.

**2. The averments stated in the affidavit filed by the petitioner is as follows:**

2.1) The petitioner is the proprietor of the plaintiff New Allwin Dyers. The 1<sup>st</sup> defendant is a partnership concern engaged in business of Dyeing. The defendant's 2 and 3 are the partners looking after the day today affairs of 1<sup>st</sup> defendant.

2.2) As per the regular course of business the plaintiff supplied the raw materials to the defendant's and the defendants executed an agreement of indemnity to the effect. As per the several invoices raised by the defendants the plaintiff have paid the entire amount including GST. As, per the indemnity bond executed by the defendant they are jointly and severally liable to pay a sum of Rs. 2,82,181/- (Rupees Two Lakhs Eighty Two Thousand and One hundred and Eighty one only) towards the loss incurred by the plaintiff as pleaded in the plaint.

2.3) The plaintiff made repeated demands and requested the defendants to pay the suit amount as per the indemnity but the defendants failed to repay the same.

2.4) The petition mentioned property is the only property which was owned by the respondent. Now, in order to cheat the plaintiff the respondent reliably came to know the respondents 2 and 3 are attempting to sell the petition mentioned property to 3<sup>rd</sup> parties in order to defeat the plaintiff claim.

2.5) So, the petitioner asked the respondents to furnish security to the suit claim failing which asked this Court to attach the petition mentioned property before Judgment as prayed for in the petition with cost.

**3. The Memo filed by the respondents dated 04.12.2024 is as follows :-**

3.1) In the above suit the petitioner has filed an application to attach of respondent's property before Judgment. The respondent has filed written statement in O.S.No.230 of 2024 and filed a memo to treat the same as counter in this application.

3.2) However, the petition mentioned property i.e., the Respondent's property has been already mortgaged and secured by Ujjivan Small Finance Bank dated 07.01.2021 and registered the same before Joint-1 Sub-Registrar Office, Tiruppur bearing document No.157/2021, the same has been cited in Encumbrance Certificate and has been produced with the Memo.

3.3) The Citation MANU/TN/0512/2014 dated 28.02.2014 (R.Ramesh Vs R.Raveender) relating to this application has also been filed along with this memo.

4) In the written statement, the defendants denied the allegations stated in the plaint and admitted the recitals stated in Para no. 2 of the plaint. The plaintiff denied all the allegations stated in para no.3, 4, 5, 6, 7 and 8 of the plaint.

4.1) In para No. 9 the defendants has stated as follows :- The real fact of the case is the Plaintiff has approached the Defendants stating that they have been doing dyeing business for which the Plaintiff demanded the Defendants to supply raw materials and it will be dyed in the Plaintiff's company. The Defendants convinced by the Plaintiff's request and supplied the raw materials, which was dyed by the Plaintiff and raised invoices for the same in various dates. The Defendants paid full and final settlement to the Plaintiff for the business done, but the Plaintiff with evil intention to claim further amount and to defraud the Defendants has filed the above suit. The Plaintiff's claim is false and alleged cause of action is vague, baseless, and unsupported by factual or documentary evidence.

4.2) The Plaintiff filed a separate application to attach the Defendant's House Property before the Judgment, Without proving their claim of this suit, they cannot approach this Honourable court to attach the Defendants Property. Hence the attachment application has to be dismissed and to try the above suit and they have burden to prove each and every allegation made against the Defendants with strict proof and asked to dismiss the petition with cost.

5. Both parties have not examined any evidence and no documents were marked on both side.

**6. Now the Point for consideration is whether this petition has to be allowed or not ?**

6.1) The petitioner herein is the plaintiff in the suit. The respondents are the defendants in the suit. The parties are discussed in this order as pleaded in the plaint.

6.2) The plaintiff company proprietor filed the suit against the defendants 1 to 3 for recovery of a sum of Rs.2,82,181/- with future interest at the rate of 12 percent p.a. till realization. As per the plaint averments the first defendant firm is having regular course of business with the plaintiff company and placed orders to the plaintiff to do dyeing on credit basis and the plaintiff will supply the raw materials. As, per the business transaction invoices there is a due to the sum of Rs.2,82,181/-.

6.3) Along with the suit the plaintiff filed the present application to attach the petition mentioned property before Judgment or to direct the defendants to furnish security for the suit claim. After receiving the notice the defendants filed a detailed written statement and asked this court to treat the same as counter for this application. The defendants failed to produce security as ordered by this Court.

6.4) The learned plaintiff counsel submitted, the first defendant is a partnership firm and the defendants 2 and 3 are partners to the first defendant firm. As, per the regular course of business the defendants are jointly and severally liable to pay the suit claim. But, after repeated demands the defendants failed to pay the suit amount and now they are trying to alienate the petition mentioned property to defraud the plaintiff claim. So, in order to safe guard the suit claim amount the plaintiff asked this court to attach the petition mentioned property as prayed for in the petition with cost. The learned plaintiff counsel further submitted, the defendants failed to obey the orders passed by this Court and have not furnish security to the suit claim. So, he asked this Court to attach the property as mentioned in the petition.

6.5) On the other hand, the learned defendants counsel strongly opposed this petition and further submitted, the defendants never made any arrangements to sell the petition mentioned property as stated by the plaintiff. The learned counsel further submitted already the said property was mortgaged and secured by Ujjivan Small Finance Bank, by way of registered debt by deposit of title deeds. To prove the same the defendants also produced the encumbrance certificate.

6.6) The learned counsel also produced the Judgment of **Hon'ble High Court of Madras relating to R.Ramesh Vs. R.Raveender** and submitted stating that if a property was in mortgage then the same cannot be attached before Judgment.

**C.M.A.No.2241 of 2013 and M.P.No.1 of 2013 Decided on : 28.02.2014  
R.Ramesh Vs. R.Raveender in Para No.1 it was held that,**

1. This appeal is filed against the fair and decretal order dated 18.03.2013 passed in LA.No. 203 of 2013 in O.S.No. 44 of 2013 passed by the Principal District Judge, Tiruppur. The suit for recovery of money to the tune of Rs.55,46,000/- was filed by the plaintiff based on promissory note and a dishonoured cheque

issued by the appellant, An interim Application under order XXXVIII Rule 5 and Section 151 of the code of Civil Procedure was also filed by the plaintiff for a direction to the defendant to furnish security failing which to attach the schedule mentioned property in the application alleging that the appellant was attempting to alienate the property. It appears from the records that an ex-parte direction was given to the appellant to furnish security for Rs.65,00,000/-. The defendant immediately, upon receipt of the order, seems to have filed a counter questioning the liability and also placing the fact and documents to show that the property was already under mortgage with the Indian Overseas Bank and sought for dismissal of the application. The Trial Court, after hearing the parties, has allowed the application attaching the property of the defendant. Aggrieved, the defendant has filed this appeal.

6.7) The learned counsel further submitted the petition mention property was already mortgaged as per the encumbrance certificate produced by the respondent. So, the learned respondent counsel submitted there is no valid grounds stated by the plaintiff to attach the property and asked this Court dismiss the petition with cost.

6.8) The arguments submitted by both parties and the available records were carefully perused. As, per the averments in the affidavit the plaintiff has stated the petition mentioned property is the only property owned by the respondent and the plaintiff came to know that the respondent's are attempting to sell the petition mentioned property to third party and so he asked to attach the suit property since the defendants failed to furnish security to the suit claim.

6.9) But, on perusal of the Encumbrance Certificate dated 03.12.2024 this Court came to know on 28.01.2016 the 2<sup>nd</sup> defendant by way deposit of the title

deeds to HDB financial service for the loan amount of Rs.3,00,000/-. Then on 07.01.2021 the first defendant again by way of deposit of title deeds obtained a loan as per doc.no.157/2021 from Ujjivan Small Finance Bank.

6.10) At the time of enquiry the plaintiff failed to prove how he came to know the defendants 2 and 3 are making serious attempts to alienate the petition mentioned property. On, perusal of the affidavit also there is no mention on which date the 3<sup>rd</sup> parties are making arrangements to purchase the suit property from the defendants 2 and 3. The plaintiff also failed to file the third party affidavit to show the defendants are making arrangements to sell the petition mentioned property.

6.11) As per Order XXXVIII Rule 5 of CPC this court is having a drastic extraordinary power but the same should not be exchange mechanically. As per the Judgment passed by Hon'ble High Court of Madras in **R.Ramesh Vs. R.Raveender the Hon'ble High Court of Madras in Para No. 5 held as follows,**

The power under order XXXVIII 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 XXXVIII Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order XXXVIII 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 realized by unscrupulous plaintiffs by obtaining orders of attachment before Judgment and forcing the defendants for out of Court settlement, under threat of attachment.

6.12) **In para No. 14 the Hon'ble High Court also held as follows,**

This Court is of the opinion that averments in the affidavit does not

satisfy the requirements of Order XXXVIII Rule 5. The respondent has not given any particulars in the affidavit whatsoever regarding the purported alienation. The Trial Court has totally failed to consider that in view of the mortgage, the appellant could not alienate the property. The Trial Court also failed to see that the property was mortgaged even prior to the date of alleged transaction with the plaintiff. There is not even a finding by the Trial Court regarding any attempt or proposal by the appellant to alienate the property to defeat the interest of the respondent. There cannot be any mechanical attachment even if security is not furnished. Therefore, the order of the Trial Court is totally devoid of merits and is not in accordance with the law. Hence, the order of the Trial Court is I.A.No.203/2013 in O.S.No.44/13 is hereby set aside. However considering the facts and circumstances, the appellant shall not create further mortgages and ensure that status quo is maintained with regard to the property pending the suit. The order of status quo will not prevent the appellant from discharging the loan with the bank.

7.13) As per the Encumbrance Certificate produced by the respondents in this case also the petition mentioned property is in mortgage before filing of the suit by way of deposit of title deeds. So, in this circumstances, there is no possibility to alienate the petition mentioned property by the respondent 2 and 3 as pleaded by the plaintiff. Further more the plaintiff also failed to plead and prove the respondents are making serious attempts to sell the petition mentioned property. So, as per the discussion made above and considering the circumstances, this Court hereby comes to a conclusion since the petition mentioned property was already is in a mortgage by way of deposit of title deeds there is no possibility for the respondents to alienate the same.

Hence, this petition is dismissed. No cost.

Dictated to the Steno-Typist, typed by him directly into the computer, corrected, printed out and pronounced by me in the Open Court on this the 04<sup>th</sup> day of January 2025.

Additional Subordinate Judge,  
Tiruppur.

**I. Petitioner and Respondent's side Evidences and Documents : Nil**

Additional Subordinate Judge,  
Tiruppur.