

**In the Court of the Additional District & Sessions Judge,
Srivilliputtur.**

**Present : Tmt. Gajara R. Jiji, M.A., LL.M.,
Additional District Judge,
Srivilliputtur.**

Thursday, the 31st day of August 2023

I.A.No. 1/2022

in

O.S. No. 52/2022

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R. Chelladurai .. Petitioner / Plaintiff

.. VS ..

B. Kanagaraj .. Respondent / Defendant

This petition came before me for final hearing on 18.08.2023 in the presence of Thiru.K. Kalidoss, Advocate for the petitioner, and of Thiru.S. Sankaranarayanan, Advocate for the respondent, and upon hearing arguments on both side and perusing the case records, this Court passed the following

ORDER

This is a petition under Order 38 Rule 5 and Section 151 of IPC to attach the schedule property before judgment.

1) Averments in the petition in brief are as follows:

The petitioner is the plaintiff in the suit. The respondent had borrowed Rs.9,00,000/- from the petitioner on 15.08.2019 in order to attend to his family needs and to pay back debts. The interest was accepted at 1% per 100 Rupees each month. The respondent also executed a promissory note in favour of the petitioner. The

respondent failed to pay back the loan amount even after repeated demands. While so the petitioner is trying to dispose the schedule property with the dishonest intention to cheat the petitioner. The petitioner learnt from one K. Kasivel about attempt to dispose of the schedule property. If the respondent dispose the schedule property, the petitioner cannot get back the loan amount from the respondent and hence prays to attach the petition schedule property before judgment.

2) Averments in the counter statement filed by the respondent in brief are as follows :-

The respondent never obtained any loan from the petitioner. The respondent/defendant had not executed any promissory note in favour of the petitioner/plaintiff. The signature in the promissory note is not admitted by the respondent. The suit has been filed on the basis of forged pronote and hence this petition is not maintainable. The respondent would be put to irreparable loss and hardship if the schedule property is attached before judgment. Hence prays to dismiss the petition.

3) No witnesses were examined on either side. Ex.P1 was marked on the side of the petitioner. No documents were marked on the side of the respondent. Both side Arguments heard and carefully considered and Case Records perused.

4) Points for Consideration

- 1) Whether the petition schedule property has to be attached before judgment as prayed for?
- 2) Whether the petition is to be allowed or not?

5) Points and answer :-

The petitioner is the plaintiff in the suit. The petitioner filed the suit for recovery of money. The petitioner would state that the money has been lend on promissory note and that even after repeated demands the respondent has not paid the loan amount. The petitioner states that the respondent is planning to dispose the property and cheat the petitioner of his money.

6) The petitioner would produce Ex.P1, Encumbrance Certificate which would show that the respondent gained title to the schedule property by way of a partition deed executed on 12.08.2021. The learned Counsel for the petitioner would argue that when the defendant/borrower is clandestinely trying to dispose of the property, it is necessary to attach the property of the defendant. However, the petitioner failed to provide any materials to show that the respondent is trying to clandestinely dispose of the property. The petitioner has provided a third party affidavit alone to support this claim of disposal of property. It is usual procedure to enclose a third party affidavit while filing a petition to attach a property before judgment.

7) The learned Counsel for the respondent would submit that the power under Order 38 Rule 5 is an extra ordinary power and it should not be exercised mechanically or for mere asking and would refer to the judgment of our Honourable High Court in ***Global Plastics and others Vs. T.K.K.N.N. Vysya Charities 2019(2) MWN (Civil) 409*** wherein the judgment of our Honourable Supreme Court in

Raman Tech. & Process Engg. Co. & another Vs. Solanki Traders 2008(2) SCC 302 has been relied upon. In the said case law in para 5 the Honourable Supreme Court observed as

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.

The above mentioned case law would make it clear that attachment before judgment cannot be granted on the mere asking and that an unsecured debt cannot be converted into a secured debt using the provision under Order 38 Rule 5. In the case in hand, the loan has been obtained on 15.08.2019 whereas the partition deed has been executed only on 12.08.2021. The schedule property has been allotted to the share of the respondent only after the date of promissory note. Hence the petitioner

would not have lend the money on the basis of the property available to the respondent. Be that as it may, the petitioner has filed his affidavit incorporating the requirements in Order 38 Rule 5 CPC and the affidavit averments does not create the prima facie case showing that the respondent is trying to dispose of the property in order to cheat the petitioner. The respondent as the owner of the schedule property has every right to deal with the property, however if the respondent is trying to dispose the property with the dishonest intention to defraud the petitioner then the property could be attached under Order 38 Rule 5 of CPC. However the petitioner failed to establish the dishonest intention of the respondent to defraud the petitioner or that the respondent is clandestinely trying to dispose the property. Hence in the light of the judgment of our Honourable Supreme Court and in the facts of this case it is clear that the relief of attachment before judgment cannot be granted to the petitioner.

8) The attachment before judgment cannot be granted on vague and bald allegations that the respondent is trying to alienate the property. The Petitioner, who seeks an Order of attachment before Judgment, should specifically plead regarding the allegation of sale of the property and satisfy the Court that such sale is being attempted to thwart the interest of the petitioner. In the case in hand, the petitioner has not made out a prima facie case to show that the respondent is trying to alienate the schedule property with an intention to defeat and delay the interest of the petitioner/plaintiff. The petitioner has not made any allegations regarding the

preparations taken by the respondent to sell the schedule property or the dates on which such preparations were made or whom the respondent had approached for sale of property or atleast how the petitioner came to know that the respondent is trying to sell of the property. Hence in the light of the above discussions this Court finds that there is no prima facie case made out by the petitioners to attach the schedule property before judgment and as such the petition warrants dismissal.

In the result, the petition is dismissed. No costs.

Dictated to Steno Typist, typed by her in computer, then corrected and pronounced by me in open court, on this the 31st day of August 2023.

Additional District and Sessions Judge,
Srivilliputtur.

List of witness examined on the side of the petitioner:-

- Nil -

List of documents marked on the side of the petitioner :-

Ex.P1 06.12.2022 Encumbrance Certificate for the period from
01.01.2021 to 05.12.2022.

List of witness examined on the side of the respondent:-

- Nil -

List of documents marked on the side of the respondent:-

- Nil -

Additional District and Sessions Judge,
Srivilliputtur.

*Additional District & Sessions Court,
Srivilliputtur,
I.A. 1/2022 in O.S. No. 52/2022
Order (Web copy)
Date: 31.08.2023*