

M/s. Gem Graphics Vs M/s. Sri Sai Papers

Court: Madras High Court

Date of Decision: Dec. 14, 2012

Acts Referred: Civil Procedure Code, 1908 (CPC) – Order 38 Rule 5, Order 38 Rule 5(1), Order 38 Rule 5(3), Order 38 Rule 6(2), 94(b)

Citation: (2013) 1 LW 452

Hon'ble Judges: R.S. Ramanathan, J

Bench: Single Bench

Advocate: Ravichandran Sundaresan, for the Appellant; S. Veeraraghavan, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

R.S. Ramanathan, J.

Defendant is the revision petitioner. The respondent/plaintiff filed the suit for recovery of a sum of Rs. 95,278/= and

also filed application under Order XXXVIII Rule 5 for attachment of the property of the revision petitioner stating that they came to know that the

revision petitioner was attempting to alienate the property with the intention to delay and defeat the creditors. The learned XI Assistant Judge, City

Civil Court, Chennai directed the revision petitioner to furnish security for a sum of Rs. 95,278/= and ordered notice to the revision petitioner and

adjourned the case to 30.11.2012. On 30.11.2012, the revision petitioner entered appearance by filing vakalat and as the security was not

furnished, the properties mentioned in the schedule to the petition filed for attachment was ordered and aggrieved by the same, this revision is filed.

2. Learned counsel for the revision petitioner submitted that the court below mechanically passed a conditional order on 17.11.2012 directing the

revision petitioner to furnish security without forming an opinion whether the respondent has made out a case for directing the revision petitioner to

furnish security and also without looking into the schedule of properties which are sought to be attached and on the first date of appearance, he

filed vakalat and as the security was not furnished immediately, the court below passed an order of attachment and therefore, the order of the court

below is liable to be set aside and relied upon the judgment in Raman Tech. and Process Engg. Co. and Another Vs. Solanki Traders,

3. On the other hand, Learned counsel for the respondent submitted that under Order XXXVIII Rule 5 of the Code of Civil Procedure, the court

has got discretion either to issue notice to the revision petitioner/defendant to show cause why an order directing him to furnish security should not

be passed or the court can directly pass an order directing the revision petitioner to furnish security and having regard to the allegations made in the

affidavit, the court below though it fit to pass a conditional order without issuing show cause notice and the revision petitioner did not comply with

the conditional order and therefore, on 30.11.2012, the court below has passed the order of attachment and there is no illegality in the order

passed by the court as the revision petitioner failed to furnish security as ordered earlier and the order of the court below dated 17.11.2012

directing the revision petitioner to furnish security cannot be considered as a non-speaking order and the court below, after considering the

affidavit, passed the order and hence, the order of the court below need not be interfered with. He also relied upon the judgments in Rajendran

and Others Vs. Shankar Sundaram and Others, and Jayalakshmi, K. v. S.M. Muthiah (1989-1-LW 549) in support of his contention.

4. According to me, the court below has committed a serious error in ordering attachment without properly appreciating the averments made in the

affidavit filed in support of attachment.

5. It is seen from the judgment reported in K. Jayalakshmi Vs. S.M. Muthaier, that if the court is satisfied that the defendant is about to dispose of

whole or part of its properties with the intent to obstruct or delay the execution of any decree that may be passed in the suit, the court is entitled to

order interim attachment even without notice. The learned Judge relied upon the judgment of this court reported in W. Pappammal Vs. I.

Chidambaram, wherein the learned Judge discussed the law on that subject as follows:-

If O. 38 R. 5(1) and (3) C.P.C. are so construed as to mean that in all cases, any order of attachment can be passed only after the defendant

appears and furnishes security or otherwise makes arrangements to the satisfaction of the Court to meet the liability under the decree that may be

eventually passed in response to a notice issued under O.38, R. 5(1), C.P.C. then that would result in the defendant being enabled to defeat the

very power of the court to attach and also afford protection by the process of attachment and even the very decree that may be eventually passed,

by resorting to dilatory tactics resulting in his or her not receiving the notice at all and by disposing of all his properties meanwhile. With a view to

safeguard the interest of a plaintiff during the interregnum between the filing of the application for an order of attachment and the service of notice

on the defendant and his or her appearing in response to that with reference to matters mentioned in the notice and showing cause etc the court is

empowered under O.38, R. 5(1), C.P.C. to direct a conditional attachment of the whole or any portion of the property specified in the application

for attachment. In this connection, the language of O.38, R. 5(3) C.P.C. should also be borne in mind. The expression used therein is "conditional

attachment" and that would mean that it is not absolute attachment but only in the nature of dependent attachment or an attachment which would

enure and depend upon certain conditions, namely, the defendant appearing and showing cause or not. In other words, such conditional attachment

would be operative during the interregnum or the intervening time. If it were not so, the defendant can, meanwhile, part with all his or her valuable

properties, pending receipt of a notice under O.38, R. 5(1) C.P.C. and the Court as well as the plaintiff, who may be successful eventually, would

be left helpless and high and dry and justice would be defeated, to prevent which the power of attachment is conferred on courts under S. 94(b)

C.P.C. to be exercised in conformity with and after satisfying the requirements of O.38, R. 5(1) and (3), C.P.C. That is why the power to direct a

conditional attachment of the whole or any portion of the property is also made available under O.38, R. 5(3), C.P.C. which can be exercised by

the Court while passing an order under O.38, R. 5(1) C.P.C. It is easy to perceive the spirit and the object behind O.38, R. 5(1)) and O.38, R.

5(3), C.P.C. In an application for attachment before judgment, the court, if satisfied that the requirements of O.38, R. 5(1) C.P.C. have been

made out, may issue a notice to the defendant in appropriate form conforming to the requirements of O.38, R. 5(1) C.P.C. for all or any of the

purposes mentioned therein and at the same time direct a conditional attachment of the whole or any part of the property under O. 38, R. 5(3),

C.P.C. If, in response to such a notice, the defendant appears and shows cause, or otherwise satisfies the court, then the court may proceed to

withdraw the attachment effected earlier, under O. 38, R. 6(2), C.P.C. If, on the other hand, the defendant does not show cause why he or she

should not furnish security or fails to furnish security, then it will be open to the Court to proceed under O. 38, R. 5(1) C.P.C. and the Court may

order attachment of the property specified in the application of such portion thereof, as appears sufficient to satisfy the decree that may be passed,

in the suit, in the appropriate form, namely, Form 7-A in Appendix-F.

6. In the judgment reported in Rajendran and Others Vs. Shankar Sundaram and Others, the Honourable Supreme Court held that before

ordering attachment before judgment or before directing the defendant to furnish security, the court has to prima facie form an opinion that the

defendant is about to dispose of his property with the intention of delaying or defeating the rights of the plaintiff. In the judgment reported in Raman

Tech. and Process Engg. Co. and Another Vs. Solanki Traders, , it is held as follows:-

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 5 C.P.C. 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.

5. The power under Order 38 Rule 5 C.P.C. 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 settlements, under threat of attachment.

7. Bearing these principles in mind, we will have to see whether the court below was justified in passing an order directing the revision petitioner to

furnish security without issuing show cause notice. The court below passed the order on 17.11.2012 calling upon the revision petitioner to furnish

security as follows:-

Heard petitioner side, records perused order pronounced. As per the averments contained in Para 9 of the affidavit of this petition. The petitioner

stated preciously the ground on which behalf of apprehension is entertained that the respondent is likely to disposes off or remove the property.

Hence it is just and necessary the order as prayed for and this Hon"ble Court inclined to direct the respondent to furnish security of suit claim of

Rs. 95,278/= failing which attachment will be order. Issue notice to respondent as per Order 38 Rule 5(1) of CPC by Private RPAD call on

30.11.2012.

As stated supra, as per the judgment of the Honourable Supreme Court reported in Raman Tech. and Process Engg. Co. and Another Vs. Solanki

Traders, before passing any order, the court has to form a prima facie opinion that the plaintiff has got a prima facie case and there is a reasonable

chance of a decree being passed in the suit against the defendant and only after forming an opinion that the plaintiff has got a good chance of

success in the suit, the court can proceed further. In this case, as seen from the order dated 17.11.2012, the court has not formed any prima facie

opinion about the merits of the case of the plaintiff and only observed that the plaintiff entertained an apprehension that the revision petitioner is

likely to dispose of its immovable properties and hence, the revision petitioner has to be directed to furnish security. Therefore, the requirement

stated in Raman Tech. and Process Engg. Co. and Another Vs. Solanki Traders, by the Honourable Supreme Court has not been complied with.

Further, having regard to the schedule of properties which are sought to be attached in the event of failure to furnish security or the allegations that

the revision petitioner is going to sell the schedule properties, the court below should not have passed the order directing the revision petitioner to

furnish security. In the schedule of properties to be attached, the respondent/ plaintiff mentioned computers, air conditioner, furniture and stock-in-

trade worth Rs. 95,278/=. The suit was filed for recovery of a sum of Rs. 95,278/= being the amount payable by the revision petitioner for the

goods received from the respondent/plaintiff. In the affidavit filed in support of the petition for attachment, the respondent/plaintiff has only stated

that the revision petitioner/defendant is intending to delay and defeat the rights of the creditors by attempting to alienate the properties and on such

allegation, the court below also, without looking into the schedule of properties which are sought to be attached, ordered the defendant to furnish

security. Having regard to the schedule of properties to be attached, if the attachment is effected, that will amount to closing down the properties of

the defendant and as per the judgment of the Honourable Supreme Court in Raman Tech. and Process Engg. Co. and Another Vs. Solanki

Traders, the purpose of Order XXXVIII Rule 5 of the CPC is not to convert an unsecured debt into a secured debt and any attempt by the

plaintiff to use the provision of Order XXXVIII Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged.

Therefore, I am of the opinion that the court below, without looking into the schedule of properties to be attached in the event of failure by the

revision petitioner to furnish security, erred in ordering attachment as the order of attachment will amount to closing down its business and that is

not the object of Order XXXVIII Rule 5 of the Code of Civil Procedure. Hence, the order passed by the court below dated 30.11.2012 ordering

attachment of the schedule of properties is set aside and the matter is remanded to the court below and the court below is directed to give

opportunity to the revision petitioner to file counter to the application filed by the respondent/plaintiff and thereafter, the court below is directed to

pass appropriate orders on merits.

In the result, the civil revision petition is allowed. No costs. The connected miscellaneous petition is closed.