

(1993) 02 MAD CK 0047
In the Madras High Court

Kalianna Kounder and Others

APPELLANT

Vs

Marappa Kounder

RESPONDENT

Date of Decision : 22-02-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5

Citation : (1993) 2 MLJ 33

Hon'ble Judges : Pratap Singh, J

Bench : Division Bench

Judgement

Pratap Singh, J.—This civil revision petition and the civil miscellaneous appeal are against the orders passed in I.A. No. 775 of 1991 in O.S. No. 231 of 1991 on the file of Subordinate Judge, Sankari.

2. The short facts are:-The respondent herein had filed the suit on a promissory note against the first revision petitioner and had also filed a petition in I.A. No. 775 of 1991 for attachment before judgment. In that petition, the first petitioner in the civil revision petition who was the defendant in the suit and the second revision petitioner in C.R.P. No. 1638 of 1992 who was a third party in the suit, had offered the properties belonging to the second revision petitioner/third party as security. Learned Subordinate Judge had rejected it stating that the property offered by the third party as security cannot be accepted. Aggrieved by that order, C.R.P. No. 1638 of 1992 is filed by the defendant as well as the third party, as revision petitioners. After rejecting the security offered by the third-party, learned Subordinate Judge, has passed an order of attachment. Aggrieved by the order of attachment before judgment, C.M.A. No. 509 of 1992 is filed.

3. Mr. R. Sekar, learned Counsel appearing for the revision petitioners/appellants would submit that the court below is wrong in rejecting the security furnished by the third-party and that Order 38, Rules 5 and 6 and Form No. 6 in Appendix-F of Civil Procedure Code, would clearly indicate that a third-party can furnish security in such contingencies and the lower court is wrong in rejecting the same.

4. Per contra, Mr. V.K. Muthusami, learned Counsel appearing for the respondent, would submit that the language of Order 38, Rules 5 and 6, C.P.C. does not explicitly permit a third-party to furnish security nor can it be implied from the language of Form No. 6 in Appendix-F of C.P.C. He would further submit that in case his submission is not accepted, the matter may be remitted back to the trial court for finding whether the security offered by the third-party is enough to discharge the decree that may be passed if the defendant fails to produce the property which is sought to be attached or value of the same and only in case the solvency of the property offered by the surety is accepted Form 6 in Appendix-F can be taken into account by the court below.

5. I have carefully considered the submissions made by the rival counsels. For a better appreciation of the rival contentions Order 38, Rules 5 and 6 Form in Appendix F of C.P.C. need extraction.

Order 38, Rule 5; Where defendant may be called upon to furnish security for production of property:

(1) "Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,-

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security

(2) The plaintiff shall, unless the court otherwise directs, specify the property required, to be attached and the estimated value thereof.

(3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(4) If an order of attachment, is made without complying with the provisions of Sub-rule (1) of this rule, such attachment shall be void. Rule 6: Attachment where cause not shown or security not furnished (1) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

(2) Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit.

Form No. 6 in Appendix-F:

Security for the Production of Property (Order 38, Rule 5)

(Title)

Whereas at the instance of..., the plaintiff in the above suit, the defendant has been directed by the Court to furnish security in the sum of Rs. .. to produce the place at the disposal of the Court the property specified in the schedule here into annexed;

Therefore, I have voluntarily become surety and do hereby bind myself, my heirs and executors, to the said Court, that the said defendant shall produce and place at the disposal of the Court, when required, the property specified in the said schedule, or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, and in default of his so doing I bind myself, my heirs and executors, to pay to the said Court, at its order, the said sum of Rs. .. or such sum not exceeding the said sum as the said Court may adjudge. Schedule
Witness my hand at this day of 19

(Signed) Witness 1. 2. ...

6. It is evident that Order 38, Rule 6, C.P.C. merely refers to the security. It does not refer to the nature of security. It does not indicate that it is not open to the defendant to furnish the third-party security, personal or property. A reading of Form No. 6 in Appendix F of C.P.C. would show that if the personal security of third party is not contemplated under Order 38, Rule 5, C.P.C., the said form could not have been prescribed. The security referred to in Order 38, Rule 6 is the security as contemplated under Order 38, Rule 5, C.P.C. In view of the above, I am clear that the court below has committed an illegality in rejecting the security furnished by the third party. Mr. R. Sekar would rely upon Adduru Dasaratha Rami Reddy and another Vs. Vamireddy Vishnu, , wherein it was held that the nature of security contemplated under Order 38, Rule 6 is not qualified and it may be even of a third party. With respect 1 agree with the view of the High Court of Andhra Pradesh.

7. In as much as I have held that the property furnished by a third-party can be accepted as security, the next stage would be whether it would be sufficient enough to discharge the decree that may be passed, if the defendant fails to produce the property which is sought to be attached or value of the same. So the matter has necessarily to be remitted back to the trial court and the trial court shall consider whether the property offered by the security is enough to discharge the decree that may be passed if the defendant fails to produce the property which is sought to be attached or value of the same, after hearing the objections in this regard by the plaintiff.

8. In view of the above, both the C.R.P. and the C.M.A. are allowed and the orders of the court below are set aside and the matters remitted back to the court below for fresh disposal according to law in the light of the observation

made in this order.