(2009) 08 MAD CK 0086

In the Madras High Court

Case No : Application No. 3523 of 2007 in C.S. No. 336 of 2007

Mrs. Krishna Ponnuswamy and Nirmal Kumar APPELLANT

Vs

K. David Anna Durai and Manohari Kalimuthu RESPONDENT

Date of Decision : 11-08-2009

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 151

Citation : (2009) 5 LW 849 : (2010) 1 MLJ 967

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : R. Subramanian, for the Appellant; K.J. Rebello for D1 to D5 and C. Duraipandian, for D-6 to D-9, for the Respondent

Final Decision : Allowed

Judgement

K. Chandru, J.—This is an application filed by the applicants/plaintiffs under Order 38 Rule 5 read with Section 151 CPC, seeking for an

attachment before judgment of the immovable property comprised in Survey No. 166/4A, measuring an extent of 0.92 cents and the petrol bunk in

the name of the fourth defendant and the property belonging to the sixth defendant comprised in Survey No. 374/2A3C Tagore Street, Sree

Nagar, described in the schedule.

2. When the matter came up on 23.4.2007, this Court found that there was prima facie case in asking the defendants to furnish security. The suit is

filed by the plaintiffs against the defendants seeking for payment of Rs. 27,35,000/- with interest at the rate of 12% per annum.

3. It was stated by the applicants/plaintiffs that the defendants 1 to 5 are the children of late Kalimuthu (then Speaker of the Tamil Nadu Legislative

Assembly). They were born through his first wife Nirmala Kalimuthu. The 6th defendant is the second wife, by name Manohari Kalimuthu. The

defendants 7 to 10 are the children of the said late Kalimuthu born through his second wife. After the death of Kalimuthu, the defendants are the

legal heirs of the said Kalimuthu. They are also entitled to succeed to the estate of late Kalimuthu. It was also stated that late Kalimuthu was having

financial strain to run the petrol bunk situated at Madurai, which was run in the name of his son, the fourth defendant. Late Kalimuthu also wanted

to conduct the marriage of his daughter (8th defendant) and was in need of money. In view of his financial strain and various financial commitments,

late Kalimuthu approached the second plaintiff for an hand loan during the month of May, 2006. The late Kalimuthu also happened to be related to

the plaintiffs.

4. The second plaintiff considered his request and gave a loan of Rs. 25 lakhs to late Kalimuthu. The second plaintiff was a Software Engineer and

Consultant to many countries and was having his office at Buffalo, USA. Therefore, he transferred from his personal account a sum of Rs. 20 lakhs

to his mother''s account, who is the first plaintiff. The amounts were credited into the account maintained by the first plaintiff in the State Bank of

India, Vinayaga Nagar Branch, Madurai. It was only with a view to facilitate the request of late Kalimuthu to meet his financial commitments for his

family business and for domestic expenses, including the marriage of his daughter. It was also stated the funds given by the second plaintiff to the

first plaintiff was credited into her account in State Bank of India on 26.5.2006. On receipt of the said funds, the first plaintiff obtained three

demand drafts. Two demand drafts were for a sum of Rs. 9,00,000/- and one demand draft was for a sum of Rs. 2,00,000/-, dated 29.5.2006.

After getting the three demand drafts, they were handed over to late Kalimuthu at his residence at Villapuram in the presence of the fourth

defendant on the said date. Late Kalimuthu also executed a demand promissory note on 29.5.2006 undertaking to repay the amount with interest

at the rate of 12% per annum. The loan was given to late Kalimuthu only because he is also related to the plaintiffs. Therefore, they did not demand

any commercial interest.

5. Late Kalimuthu also fixed his daughter''s marriage on 10.9.2006. He once again sought for Rs. 5 lakhs to meet the wedding expenses. The

second plaintiff mobilized the said amount and issued a cheque in his name for Rs. 5 lakhs dated 20.8.2006 drawn on Lakshmi Vilas Bank, No.

62, Cathedral Road, Chennai-86 with a request to encash the same after a period of two months. Thus it was claimed that late Kalimuthu had

borrowed a total sum of Rs. 25 lakhs from the plaintiffs. However, Kalimuthu died on 8.11.2006 leaving behind the defendants to succeed to his

estate. Subsequent to his death, the first plaintiff approached the legal heirs (defendants) and informed about the details of the loan availed by late

Kalimuthu for the purpose of his family business and the domestic expenses including for marriage expenses of the 8th defendant.

6. It was the case of the plaintiffs that the first defendant being the nominee of her father informed that the whole family was fully aware of the loan

availed by late Kalimuthu and they will fulfill the commitments made by them without any hassles by the end of December, 2006. Believing their

word, the plaintiffs waited. But despite several reminders, their commitment was not fulfilled. This necessitated them in filing the present suit and the

application.

7. When the matter came up on 23.7.2008, it was referred to a Lok Adalat. By an endorsement, dated 18.9.2008, by the Lok Adalat and as no

compromise was possible, the matter came back to this Court for a regular hearing.

8. On notice from this Court, respondents 1 to 5 filed a counter affidavit sworn to by the first respondent. It was stated that the fourth respondent

was not in charge of any family business and there was no family business done by them. The fourth respondent, according to them, was a

practicing Advocate and was not doing any business. The allegations that he was running a petrol bunk at Ayan Pappakudi Village, Madurai South

Taluk was denied. It was stated that the petrol bunk business is not carried out by the fourth respondent or any other respondents 1,2,3 and 5.

The properties were not owned by their father late Kalimuthu, but by the deceased Nirmala Kalimuthu, who is the mother of respondents 1 to 5.

Item I in the schedule to the judges summons was also not owned by Kalimuthu, but owned by the deceased Nirmala Kalimuthu. Similarly, item 2

in the schedule is owned by Nirmala Kalimuthu. On her death, it was devolved upon respondents 1 to 5. The allegation that it was purchased by the self acquired funds of late Kalimuthu was also denied. It was further stated that the defendants 1 to 5 are not under obligation to pay any

amount to the plaintiffs. They have also filed a written statement to the same effect.

9. The plaintiffs have filed a reply affidavit. It was stated that the fourth defendant was doing family business and is not practicing as an Advocate.

He had obtained a licence for running a retail outlet to run the petrol bunk at Ayan Pappakudi Village, Madurai. He had obtained no objection

certificate from the competent authority. For getting the no objection certificate, late Kalimuthu and respondent 1 to 3 have given their joint consent

for the issuance of the no objection certificate in favour of the fourth respondent/ defendant. It was also stated that subsequent to filing of the suit,

the respondents have changed the constitution of their business and transferred the business in favour of one Winfred, who is closely related to

them. It was also stated that all the properties were originally standing in the name of Nirmala Kalimuthu, wife of late Kalimuthu. The said

properties were purchased by late Kalimuthu out of his funds as he was a Minister in the Government of Tamil Nadu from 1977 to 1983. During

that period, the properties were purchased in the name of his wife Nirmala Kalimuthu and she never had any assets to purchase so many

immovable properties. It was once again stated that the transactions that the plaintiffs had with late Kalimuthu were all borne out by records and

payments were made through demand drafts. The applicants/plaintiffs were having sufficient funds was also proved by documents. Having obtained

such a large amounts for the family business and family expenses, due to the demise of late Kalimuthu, his family cannot disown their liability to pay

the amount. The plaintiffs are having prima facie case to succeed and therefore, attachment of the properties in question should be made by this

Court.

10. In support of his contentions, Mr. R. Subramanian, learned Counsel for the applicants relied upon the judgment of the Supreme Court in

Rajendran and Others Vs. Shankar Sundaram and Others, . He placed reliance upon the following passages found in paragraphs 11 and 12 of the

said judgment, which are as follows:

11. The application for attachment before judgment was filed by the plaintiff so

as to protect his interest in the event the suit is decreed. The court

exercises, in such a situation, jurisdiction under Order 38 Rule 5 of the Code of Civil Procedure. The Division Bench of the High Court merely

directed the appellants herein to furnish security within the time specified thereunder. It was directed that only on their failure to do so, an order of

attachment of the second item on the schedule to the petition shall be issued.

12. The appellants, in our opinion, are not seriously prejudiced thereby. The court while exercising its jurisdiction under Order 38 Rule 5 of the

CPC is required to form a prima facie opinion at that stage. It need not go into the correctness or otherwise of all the contentions raised by the

parties. A cheque had been issued in the name of the firm. The appellants are partners thereof. A pronote had been executed by a partner of the

firm. Thus, even under the Partnership Act prima facie the plaintiff could enforce his claim not only as against the firm but also as against its

partners.

11. As rightly contended, the applicants have established a prima facie case regarding the loan taken by late Kalimuthu, the father of defendants 1

to 5 for the family business. It is futile for the respondents to contend that the family property in the form of petrol bunk and the other properties

were devolved upon them and that it was self acquired properties of late Nirmala Kalimuthu.

12. It has been held by the Supreme Court in S. Noordeen v. V.S. Thiru Venkita Reddiar and Ors. reported in 1996 (3) SCC 289 that the

attachment before judgment is an encumbrance preventing the owner of the property to create encumbrance, sale or create charge thereon. The

attachment before judgment does not create any right, title or interest, but it disables the judgment debtor to create any encumbrance on the

property. Ultimately when a decree is passed, the property will form part of the decree so as to enable the decree holder to proceed with against

the property to realise the decreetal debt. Even the properties which are not part of schedule mentioned in the suit will nonetheless be the part of

the decree.

13. It is not the case of the respondents that the respondents have either sold away the property or have created an encumbrance in the petrol

bunk. It is merely stated that they are not running the petrol bunk and there is no reference to any transfer of ownership. The applicants have made

it clear that the no objection certificate was given by the whole family for running the petrol bunk. Therefore, it will have to be presumed that it is

their family business. With reference to other properties, no counter affidavit has been filed by the second respondent/6th defendant.

14. In the light of the factual matrix set out above and the legal precedents referred to, the applicants are entitled to succeed. Accordingly, the

application is allowed as prayed for. No costs.