

(2019) 09 KAR CK 0028

In the Karnataka High Court

Case No : Miscellaneous First Appeal No. 4263, 7496 Of 2019 (Cpc)

Muniswamaiah N

APPELLANT

Vs

Ashok Kumar C

RESPONDENT

Date of Decision : 26-09-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Section 151, 64(1), Order 38 Rule 2, Order 38 Rule 4, Order 38 Rule 5, Order 38 Rule 5(a)(1), Order 38 Rule 5(b)(1), Order 38 Rule 5(1), Order 38 Rule 5(2), Order 38 Rule 5(3), Order 38 Rule 6, Order 38 Rule 6(2), Order 38 Rule 9, Order 43 Rule 1(q)

Citation : (2019) 09 KAR CK 0028

Hon'ble Judges : Sreenivas Harish Kumar, J

Bench : Single Bench

Advocate : K.Sreedhara, M.N.Raghu

Final Decision : Disposed Of

Judgement

1. These two appeals are disposed of by a common judgment as they arise from O.S.No.1567/2018 pending on the file of the Additional City Civil and Sessions Judge, Bengaluru (CCH-33).

2. MFA No.4263/2019 is filed by the defendant assailing the order dated 25.04.2019 on IA Nos.10 & 11. MFA No.7496/2019 is also filed by the defendant impugning the order dated 12.02.2019 passed on IA No.9.

3. Brief facts are as follows:

The respondent in these two appeals is the plaintiff in the suit filed for recovering Rs.30,90,000/- from the appellant/defendant. In this suit, the respondent made an application as per IA No.1 under Order 38 Rule 5 of Civil Procedure Code for attaching two items of properties bearing same number situated at 4th E Cross, Rajaini Farm, Rajeshwari Nagara, Laggere, Bengaluru - 560 058, each property measuring East-West 15 feet and North-South 40 feet. On 14.01.2019, the trial Court allowed this application and passed an order attaching these two items of

properties. Aggrieved by the said order, the appellant filed a writ petition before this Court in W.P.No.2362/2019. Said writ petition was dismissed on 28.01.2019 observing that writ petition was not maintainable as any order to be passed on an application under Order 38 Rule 5 CPC would amount to an order passed exercising power under Order 38 Rule 6 of CPC, which is appealable under Order 43 Rule 1(q) of CPC. However liberty was given to the appellant to seek for raising the attachment by furnishing security. Accordingly the appellant made an application under Order 38 Rule 2 of CPC (correct provision is Order 38 Rule 6(2) or Order 38 Rule 9 CPC) as per IA No.9 seeking permission to furnish an immovable property belonging to his mother as security for the suit claim. The trial Court following the decision of this Court in the case of MEERA ARYA AND ANOTHER VS. LEELA NAGARAJ AND ANOTHER (ILR 2000 KAR 586) dismissed the application observing that the property of a third party could not be offered as security for the suit claim. Aggrieved by this order MFA No.7496/2019 has been filed.

4. It appears that the appellant sold the attached property on 08.02.2019 and received consideration of Rs.1,04,00,000/- (Rupees One Crore Four Lakhs only). Therefore the respondent made three applications as per IA Nos.10 to 12. IA No.10 was filed under Section 151 of CPC to enforce the order of attachment dated 14.01.2019, IA No.11 was filed under Section 151 of CPC seeking a direction to the appellant to deposit the suit claim and IA No.12 was filed under Order 38 Rule 4 of CPC to arrest and detain the appellant in Civil Prison. The trial Court allowed IA Nos.10 and 11 and dismissed IA No.12 by order dated 25.04.2019. Aggrieved by the orders passed on IA Nos.10 and 11, MFA No.4263/2019 has been filed by the defendant.

5. Learned counsel for the respondent takes preliminary objection with regard to maintainability of MFA No.4263/2019. According to him appeal is not maintainable and writ petition should have been filed. Technically learned counsel for the respondent is right, but in my opinion whether it is writ petition or miscellaneous first appeal, it lies to High Court only, classification of cases is not so significant sometimes. Since the impugned order is in relation to order passed by the trial Court on an application filed under Order 38 Rule 5 of CPC, I do not think that so much of importance can be given to the objection raised by the respondent's counsel. This appeal can also be disposed of on merits.

6. First I would like to deal with MFA No.7496/2019. The Court below rejected the appellant's application for accepting the property of his mother as security for the suit claim following the judgment of this Court in the case of MEERA ARYA AND ANOTHER VS. LEELA NAGARAJ AND ANOTHER (ILR 2000 KAR 586).

I do not think that this judgment will come in the way of Court accepting the security of a property belonging to a third party. In Meera Arya's case, this Court has interpreted the words or expression "said property" to mean that property belonging to the defendant only. I fully endorse the view. But in my opinion further explanation is required.

7. Whenever an application under Order 38 Rule 5 of CPC is filed for attaching a property before judgment, the property sought to be attached must be a property belonging to the defendant or in other words, the plaintiff cannot seek attachment of any property not belonging to the defendant. This becomes very clear if clauses (a) and (b) of sub Rule 1 of Order 38 Rule 5 are read. The words used in clauses (a) and (b) are, 'his property'. 'His' means defendant only. While deciding this application, the court has to follow the procedure envisaged in sub Rules 1, 2 and 3 of Order 38 Rule 5 of CPC. The Court cannot direct attachment of defendant's property soon after application is made. The proper procedure is that the Court should direct the defendant to furnish security in a sum of money as may be specified in the order, or 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. The Court may also direct the defendant to appear and show cause as to why he should not furnish security; an order of conditional attachment may also be passed. Here lies the distinction. In the first instance, the Court may direct the defendant to furnish security for the amount specified in the order and in the next part i.e., 'requiring the defendant to produce the said property at its disposal, the expression "said property" refers to the property belonging to the defendant only. If the Court does not think of passing an order like this and instead directs the defendant to appear and show cause as to why he should not furnish security, the defendant has got two options. Firstly, he may submit before the Court that he is ready to offer any kind of security for the plaintiff's claim to avoid attachment of property described in the application filed under Order 38 Rule 5 of CPC and secondly he may offer the property of a third party as security if that third party is ready and willing to offer his property as security.

8. The last sentence in para 6 of the judgment of this Court in Meera Arya's case (supra) reads like this: 'A different property if objected to by the plaintiff cannot be substituted for the original property'. Here the original property means the property described in the application for attachment before judgment and belonging to the defendant. That means the defendant is at liberty to offer any other property not belonging to him as a security for the plaintiff's claim. But when somebody's or third party's property is offered as security, the title holder of that property must appear before the Court and file his affidavit stating that he is ready to offer his property as security for the plaintiff's claim. This is in the nature of bailing out the defendant. The Court must satisfy itself that the third party has volunteered to offer his property as security and that he possesses absolute right, title and interest over the property and it is free of encumbrance. Then only third party's property can be accepted as security. It is in these circumstances that a third party's property can be accepted as security instead of attaching the property belonging to the defendant. In this case the trial Court has straight away rejected the appellant's offer to provide his mother's property as security for the plaintiff's claim. It has also given a reason that property documents do not stand in the name of mother, but its main reason that third

party's security cannot be accepted does not stand to reason. Therefore I find error in the impugned order. With these observations, MFA No.7496/2019 stands disposed of.

9. In MFA No.4263/2019 the appellant has assailed the order passed on IA Nos.10 and 11. Learned counsel for the respondent has argued that attachment order was passed on 14.01.2019 and the appellant sold the attached property on 08.02.2019. According to Section 64 (1) of CPC any private transfer of the property after the attachment order is void as against the claims enforceable under the attachment order. But Sub Section (2) says that if there was a contract for such transfer prior to attachment and it was registered, Sub Section (1) of Section 64 does not apply. If there was no prior contract between the appellant and the purchaser before attachment and if it was not registered, it is needless to say that the sale deed dated 08.02.2019 is void. The appellant should have made an application according to Order 38 Rule 9 of CPC and sought for removal of attachment by furnishing security and after removal of attachment he could have sold it. Therefore the attachment order passed by the trial Court on 14.01.2019 is effective. There was no need or necessity to file applications under Section 151 of CPC as per IA Nos.10 and 11. Therefore the applications filed by the respondent are misconceived. I do not think that the Court should direct the appellant to deposit the money as attachment has not been raised or vacated. With these observations this appeal is also disposed of.

However disposal of these two appeals does not come in the way of appellant furnishing security to the satisfaction of the Court by making proper application.