

Thomas Vs. Thahira Beevi

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Court : Kerala

Decided On : Jun-22-2009

Reported in : 2009(2)KLJ731

Judge : S.S. Satheesachandran, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 151 - Order 38, Rule 5;
[Constitution of India](#) - Article 227

Appeal No. : WP(C) No. 5025 of 2009(W)

Appellant : Thomas

Respondent : Thahira Beevi

Advocate for Pet/Ap. : D. Kishore, Adv.

Judgement :

S.S. Satheesachandran, J.

1. The Writ Petition is filed under Article 227 of the [Constitution of India](#) seeking the following reliefs:

1. To call for the records leading to the passing of Ext.P4 and quash the same.
2. Grant such other reliefs which this Honourable Court may deem fit and proper in the Interest of justice.

2. Petitioner is the plaintiff in O.S. No. 112/08 on the file of the Sub Court, Nedumangadu. Suit was one for money based on a promissory note. Respondent is the defendant in the suit. Ext.P1 is the copy of the plaint. With the suit, the plaintiff moved an application for attachment before judgment of an immovable property belonging to the defendant. Ext.P2 is the copy of the application moved under Order 38 Rule 5 and Section 151 of the C.P.C. for interim attachment before judgment. In that application, an interim order of attachment was passed by the learned Sub Judge. On appearance of the defendant and after considering the objections raised, attachment was made absolute. Ext.P3 is copy of the order passed by the learned Sub Judge making the Interim attachment order absolute. The defendant preferred an appeal before the District Court, Trivandrum impeaching the correctness of Ext.P3 order. The learned District Judge, after hearing both sides, passed Ext.P4 judgment reversing Ext.P3 order and remitting the application for attachment for fresh disposal within the time limit fixed. The Writ Petition is filed challenging the propriety and correctness of Ext.P4 judgment invoking the supervisory jurisdiction vested with this Court under Article 227 of the [Constitution of India](#).

3. Though notice was served, the respondent has not entered appearance.

4. I heard the learned Counsel for the petitioner. Learned District Judge went wrong in reversing Ext.P3 order of the Sub Judge making the interim attachment order absolute, and the reasons set out for interfering with that order and remitting the application for fresh consideration in Ext.P4 judgment, according to the learned Counsel, are unsustainable under law and facts. The direction given in Ext.P4 judgment as to how the enquiry on the application for attachment has to be proceeded afresh on remission is taken serious exception by the counsel contending that genuineness of the agreement of sale and its legal validity are not the decisive factors in appreciating whether a prima facie case has been made out by the plaintiff to have an order of attachment of the property of the defendant to secure the decree most likely to be passed in the suit in his favour. His application for attachment deserves to be considered and appreciated with reference to the satisfaction of the conditions necessary for an attachment before judgment as covered by Rule 5 of Order 38 C.P.C., and not on the legal effect of an agreement

of sale executed by the plaintiff over his property which is set up to resist the attachment, submits the counsel.

5. The defendant resisting the application for attachment has contended that the plaintiff is a moneylender and pursuant to a loan availed from him furnishing blank signed cheques and blank stamp papers she had to enter into an agreement of sale over her property with one Jayakumari who was introduced by the plaintiff to clear off her liability under the loan. The above said Jayakumari has instituted a suit for specific performance on the basis of an agreement of sale before the Sub Court, Trivandrum in which she volunteered before the court to execute the sale deed receiving the balance sale consideration. The court fixed a time limit for execution of the sale deed. Pursuant to that order of the court, according to the defendant, colluding with the above said Jayakumari, the present plaintiff has instituted the suit on a forged instrument and moved for attachment of her property. She further contended that she has no intention to sell the property other than to the said Jayakumari with whom she had entered into the agreement of sale before the attachment was ordered by the court. The learned Sub Judge negatived the objections raised by the defendant holding that her contention that the promissory note relied by the plaintiff to sustain the suit claim is a forged instrument is a matter to be considered in the trial of the case. Taking such a view the attachment was made absolute under Ext.P3 order by the learned Sub Judge.

6. Ext.F3 order on the face of it is shown to be unsustainable as the objections raised by the defendant to the attachment have not been appreciated and considered by the learned Sub Judge, but, relegated to be considered in trial. The order was rightly and correctly reversed by the learned District Judge in appeal. However, it is noticed that some of the observations made by the learned District Judge in Ext.P4 judgment as to how the enquiry on the attachment application is to proceed are found to be not correct. The legal effect of an agreement of sale prior to an order of attachment is adverted to by the learned District Judge with reference to the judicial pronouncements applicable thereto issuing directions to the learned Sub Judge to examine the merit of the application for attachment before judgment in the light of the binding judicial decisions referred to in Ext.P4 judgment observing that the learned Sub Judge has not considered whether the

plaintiff will get lein over the unpaid purchase money from the third party even if the contractual obligation under the agreement prevail over the attachment, and also whether the agreement of sale relied by the plaintiff was a proper document or not. Learned Sub Judge was directed to examine such questions on the basis of the materials produced by the defendant and with reference to the judicial pronouncements relating to the legal effect of an agreement of sale entered before an order of attachment.

7. I am afraid that the enquiry directed to be proceeded in the lines indicated in Ext.PS judgment is quite outside the scope of an application for interim attachment moved under Order 38 Rule 5 C.P.C. Such an enquiry as directed by the District Judge with respect to the legal effect of an agreement of sale entered into before an order of judgment over the property covered by such agreement may arise for consideration If the party In whose favour the agreement was entered Into raises a claim to challenge the order of attachment. When the defendant in the suit against whom an order of attachment before judgment is proceeded, his resistance on the basis of an agreement of sale purported to have been entered into before an order of attachment passed by the court does not call for the enquiry on the legal effect of the agreement with reference to the judicial pronouncements in the matter. To sustain an application for interim attachment, the plaintiff must show that the defendant is about to dispose whole or any part of his property or Is about to remove the whole or any part of the property from the local limits of the jurisdiction of the court, and he is doing so to cause obstruction or delay in the execution of any decree that may be passed against him. It is incumbent upon the plaintiff to state the grounds on which he entertains the belief or apprehension to hold that the defendant intent to dispose or remove the property giving the source 'of his information and belief. When such an application moved by the plaintiff is resisted by the defendant, the enquiry must be directed to the question whether the belief or apprehension raised by the plaintiff is prima facie borne out from the facts and circumstances Involved and the materials produced. The court must be satisfied that the plaintiff has reasonable and fair chances of success over the suit claim and also of the existence of the grave danger of the likelihood of the defendant disposing the whole or part of his property or removing his property from the jurisdiction of the court with an intent to defeat or delay the execution of the decree

likely to be passed in the suit. To have such satisfaction that the condition requisite for making an order of attachment before judgment exists, there must be some prima facie material. Normally, a plaintiff who moves for an attachment before judgment must state in his affidavit filed in support of the application specific particulars as to the source of information and the grounds for his apprehension as to disposal or removal of the property by the defendant to defeat or delay the decree to be passed in his favour in the suit. When resistance to such application is made by the defendant whether it be on the basis of an agreement of sale entered before the application for attachment or on any other ground, what is material is whether the essential conditions for sustaining an order of attachment have been made out or not on the facts and circumstances presented in the case. In appreciating whether such essential conditions are satisfied, the case presented by the defendant including the reliance placed on the agreement of sale may have some significance, but, the court is not expected to examine or enter a finding as to what will be the effect of such an agreement of sale entered before moving of the application for attachment with reference to the judicial pronouncements rendered over that matter. Further more, admittedly, when the agreement of sale is the subject matter of another suit pending in lis between the defendant and another, it may be inappropriate for a different court while considering an application for attachment to express any conclusive opinion regarding the genuineness of the agreement of sale. The defence canvassed by the defendant to resist the attachment, as already indicated, should be appreciated on the totality of the facts and circumstances of the case presented by her and not in particular to the agreement of sale directing an enquiry on its genuineness. Similarly, in an enquiry under Order 38 Rule 5 C.P.C. the merit of the suit claim is not expected to be analysed meticulously, but, only whether there is reasonable certainty to hold that the plaintiff has fair chances of success of getting a decree in the suit. The sole object behind an order before judgment is to give an assurance to the plaintiff that his decree, if made, would be satisfied. Such an order can be passed on an application of the plaintiff, as indicated earlier, if only the court is satisfied that the defendant with intent to obstruct or delay execution of any decree that may be passed against him is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his property from the local limits of the

jurisdiction of the court. The merit of the case advanced by the plaintiff to have an interim order of attachment before judgment has to be examined with reference to the facts and circumstances presented in the case and the materials, if any, produced by both sides. The circumstances presented by the rival side with respect to the question whether the defendant had any intention to defraud the plaintiff by disposing or removing his property to defeat the suit claim has to be analysed and in doing so the defence canvassed by the defendant must be appreciated viewing her case as a whole. Needless to point out that a prima facie opinion alone is expected on the disputed question arising for consideration in the suit at the stage of enquiry in an application for attachment before judgment. If the court is satisfied of all the Essential conditions necessary for passing an order of attachment then, it has to be ordered, otherwise, needless to say, the application deserves to be rejected.

8. The order remanding Ext.P2 application for attachment for fresh disposal under Ext. P5 judgment is sustained, but the learned Sub Judge is directed to consider and dispose that application untrammelled by any of the observations made in Ext.P5 judgment. The application for attachment shall be disposed in accordance with law taking note of the observations made above within six weeks from the date of receipt of a copy of this judgment. The Writ Petition Is disposed as above.

Send a copy of this judgment to the court concerned at the earliest, and hand over copy of a judgment to the counsel on usual terms.

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