

In the High Court of Judicature at Madras

Dated: 30.04.2008

Coram

The Honourable Mr.Justice S.J.MUKHOPADHAYA
and
The Honourable Mr.Justice R.SUBBIAH

Original Side Appeal Nos.407 and 408 of 2007
and M.P.No.1 of 2007 in two Appeals

1. Premchand Jain
2. Suresh Kumar
3. Kattariya Jewellers
rep.by its Proprietrix
Mrs.Chitra Devi ..Appellants in both Appeals

..vs..
1. M/s.Jupiter Jewel Tech.
Rep.by its Partner
S.Dilli having its Office
at No.2, Sathiamoorthy Colony,
Thiruvalleeswarar Nagar,
Anna Nagar, Chennai-600 040.
2. S.Dilli
3. S.Saravanan
4. S.Sarveswaran ..Respondents in both Appeals

Original Side Appeals filed against the order of the learned single Judge of this Court in Original Application No.1145 of 2007 and Application No.6696 of 2007 in C.S.No.876 of 2007 dated 30.11.2007.

WEB COPY

For Appellants : Mr.B.S.Gnanadesikan, Senior Counsel
for Mr.Sanjeev Kumar

For Respondents : Mr.R.Krishnasamy, Senior Counsel
for Ms.Bhavatharini

COMMON JUDGMENT

R.SUBBIAH, J.,

The appellants in both the above appeals are the plaintiffs No 1 to 3 in the Civil Suit No.876 of 2007. These two appeals arise out of a common order, dated 30.11.2007 passed by the learned single judge dismissing the applications filed by the appellants in the said suit viz., O.A.No.1145 of 2007 for injunction restraining the respondents/defendants from in any way dealing with the property more fully described in the schedule to the Judges Summons by way of sale , mortgage, lien , lease or otherwise pending disposal of the suit and another application Viz., A.No.6696 of 2007 for an order of attachment before judgment of the property more fully described in the schedule to the Judges Summons as security for realization of the amount claimed in the said suit pending disposal of the suit.

2. The brief facts, which are necessary to decide the merits of the contentions raised by the appellants questioning the order of dismissal dated 30.11.2007 passed by the learned single judge, are as follows:

(a) The first appellant is the proprietrix concern and it represented by its proprietrix N.Chitra Devi's husband namely Mr. Narendra Kumar Jain. The 3rd appellant firm was started in the month of June, 2004 and is carrying on the business in gold Jewelleries. On 07.08.2004 the third appellant firm entered into an agreement with the respondents 2 to 4, who are brothers and also the partners of the First respondent firm M/s Jupiter Jewel Tech. As per the agreement, the respondents have agreed to manufacture the items of gold jewellery with their Trade Mark 'JJT' with the 3rd appellant Trade mark 'KJ' to the extent of the gold supplied by the third appellant and further agreed by a hand letter to return the gold as converted into gold casting jewellery to the third appellant to market the same. According to the appellants 19 Kg. of gold was handed over to the respondents on 22.06.2004, to convert the same as gold casting Jewellery and the respondents have issued blank cheques in their individual names and also on behalf of the first respondent firm and that apart, the respondent 2 to 4 had also executed a blank promissory note jointly and the third respondent executed a blank promissory note separately as security for the above transaction.

(b) Apart from the blank Cheques and pronotes executed by the respondents, according to the appellants, the respondents have also handed over an original receipt dated 11.12.2003 issued by the Recovery officer, Debt Recovery Tribunal towards the 25% of payment made by them as earnest money deposit in respect of the value of the

property situated at Survey No.649 Pallikkaranai Village, Saidapet Taluk (i.e., the property against which the prayers of interim orders were sought by the appellants) taken by them in auction held on 10.12.2003 for a total sale consideration of Rs.63,10,000/- as security for the due return of the gold casting jewels. Though the respondents had agreed to hand over the gold jewellery within a period of 7 to 9 days from the date of receipt of the gold, they failed to do so, but, on the other hand, they had converted the part of the gold handed over to them to the tune of Rs.24,00,000/- for making further payment to the Debt Recovery Tribunal to obtain a sale certificate in respect of the property taken out by them in auction. However, the respondents had agreed to hand over the sale certificate issued by the Debt Recovery Tribunal as security for the gold handed over to them and also further assured the appellants that they would hand over the gold jewellery in a short span of time. But, the respondents instead of fulfilling their promise had handed over a letter dated 11.6.2005 by which they acknowledged the receipt of the gold weighing 14464.10 g. and cash of Rs.24,00,000/- for working progress and promised to repay the same on or before 31.8.2005 with interest. The appellants subsequently came to know that the respondents had converted the gold given by the appellants and had sold the same to various traders. Further on enquiry, the appellants were shocked to know that the respondents have entered into an agreement of sale dated 27.12.2004 with one J.Aswin in respect of the Pallikaranai property purchased by them through Debt Recovery Tribunal, Chennai. When the appellants enquired about the sale agreement with the respondents, who had authorized the appellants to fill up the blank cheques and present it for encashment for a total sum of Rs.75,00,000/- in part payment of the appellants' dues. When the appellants presented the cheques, all the cheques were dishonoured on the ground of "insufficient fund". Hence the appellants had issued a notice under section 138 of the Negotiable Instruments Act and they are contemplating proceedings under section 138 of the said Act. The present suit has been filed by the appellants for the recovery of 19 Kgs. of gold handed over to the respondents. Pending the suit, an application for granting injunction in O.A.No.1145 of 2007 and another application for attachment before judgment in O.A.No.6696 of 2007 were filed before the learned Single Judge, who dismissed both the applications by a common order dated 30.11.2007. In this connection it may be noted that the prayer in both the applications relate to the property in S.No.649 to an extent of 1.70 acres in Pallikaranai village, Saidapet Taluk, which is described in the schedule to the Judge's Summons. It is only as against the common order passed in the said applications the present appeals are filed by the appellants.

(c) The respondents have filed a detailed counter denying all the allegations made by the appellants and also explaining in detail about the circumstances under which they entered into the sale agreement dated 27.12.2004 with one J.Aswin. As stated supra, the

said agreement is also in respect of the said Pallikaranai property. According to the respondents, since the value of goods handed over to them was more in lakhs, they have agreed to hand over the properties stood in the name of their mother at Thoosi village, Cheyyar Taluk, Tiruvannamalai District to an extent of 14.84 acres and also another document which stood in the name of the 2nd respondent at Kodaikanal to the extent of 3 grounds apart from handing over the blank promissory notes, cheques, letter pad and stamp papers to the appellants. Since the appellants insisted that a general power of attorney should also be given in favour of the mother of the first and second appellants viz., S.Sukhibai, the same was executed by the respondents in favour of their mother hoping that they would not misuse the same. So far as the Pallikaranai property is concerned, the respondents were declared as a successful bidder by the Debt Recovery Tribunal in the auction conducted on 10.12.2003 and they have also paid 25% of the earnest money deposit with the Debt Recovery Tribunal, Chennai. On confirmation of the auction in their favour there was a third party claim before the Tribunal and as such there was some delay in confirming the auction in their favour. Only on 26.3.2004 the Debt Recovery Tribunal confirmed the auction, by then the respondent was in financial crisis and the appellants have volunteered to pay the balance to the Debt Recovery Tribunal, as the appellants wanted to continue the business relationship with the respondents. But, when the respondent gave a letter on 22.6.2004 to the Debt Recovery Tribunal stating that on receipt of the amount from the appellants the documents can be handed over to the appellants with the necessary sale certificate in their favour, for which the officials of the Debt Recovery Tribunal refused by saying that as per rules they will not do so and the balance amount was to be paid by the respondent only and the sale papers would be executed only to the respondent as per the procedure. By then the appellants were also not able to mobilize the funds and were not in a position to help them. In the mean time one J.Aswin came forward to extend financial assistance with an assurance that once the sale is confirmed in favour of the respondent, the property should be sold to him. On that assurance the balance amount was arranged and payments were made to the Debt Recovery Tribunal and the sale certificate was also issued to the respondent on 24th December, 2004 and the sale was registered at the Sub-Registrar's Office, Saidapet, Chennai. Thereafter only the respondents entered into a registered agreement for sale on 27.12.2004 with the said Aswin. Thereby the respondents contended that the allegation of the appellant that the respondents gave the Pallikaranai property as security for the gold handed over by the appellants and subsequently in order to defeat any legitimate claim of the appellants the respondents entered into an agreement with the said J.Aswin is blatant false. It is further stated by the respondents that on the contrary it was the appellants, who, by misusing the power of attorney executed in favour of their mother viz., Sukhibai, got the two valuable properties which were given as security, for trade purposes, transferred one in favour of the 1st

appellant and another property in favour of the husband of the 3rd appellant with the fraudulent intention. This fact came to be known to the respondents only subsequently. Similarly the respondents have also contended that they never instructed the appellant to fill up the blank cheques and present the same in the bank, which were given for the security purpose. On the other hand, without any instructions from the respondents the appellants presented the said cheques and misused the same. Thus the respondents contended that the security given to the appellants was misused and the appellants have to submit their accounts to the respondents as per the power of attorney executed by their mother, and the second respondent herein and in such circumstances the appellants are not entitled to the reliefs sought for in their applications.

(d) The appellants have filed the reply to the counter of the respondents admitting that the two valuable properties were given by the respondents as security and also about the transfer of the said properties in favour of the first appellant and the husband of the 3rd appellant, but, at the same time contending that the two valuable properties were given as security in respect of an independent transaction which the respondents had with the mother of the appellants 1 and 2 and it has no nexus or relation with the present suit transaction. Further it was contended by the respondents that the properties were got transferred only with the knowledge of the respondents and as such there is no fraudulent intention on the part of the appellants.

(e) On the above said contentions, after hearing the arguments of the appellants, the learned Single Judge dismissed both the applications filed by the appellants on the ground that no prima facie case was made out for granting the interim prayers sought for therein for the reasons set out in the common order.

3. Now in these appeals, the learned senior counsel for the appellants vehemently argued that the learned Single Judge, without properly looking into the facts, has come to the conclusion that no prima facie case is made out and dismissed the applications on that ground.

4. The learned senior counsel for the appellants took us through the findings given by the learned Single Judge. On going through the common order, we have observed that the learned Single Judge has dismissed the applications by coming to the conclusion that,

- (1) there is no document showing the delivery of 19 kg. of gold;
- (2) the contention of the appellants that the property at Pallikaranai was offered as security is not supported by any materials; and
- (3) the issuance of the blank cheques by the appellant

would not establish the *prima facie* case of the appellants for delivery of the gold.

5. Challenging the above said findings, the learned senior counsel for the appellants contended that the learned Single Judge has erred in coming to the conclusion that there is no document showing delivery of 19 kg. of gold which conclusion is falsified by the fact that in the income-tax returns filed by the appellants, they (the appellants) have made a declaration about the purchase of gold and deposit of the same with the respondents in grams. If the weight of the gold as mentioned in the income-tax returns is taken as 20742 grams it would be equivalent to 18.999 kg. (19 kgs.). Therefore, the finding of the learned Judge that no document was available to prove *prima facie* case of the appellants for delivery of 19 kg. of gold to the respondents is not correct. In the above circumstances we are unable to accept this argument of the appellants for the reason that there is no direct document between the parties to establish the delivery of 19 kg. of gold by the appellants to the respondents. When the appellants were careful enough to receive the blank promissory notes and blank cheques it is surprising as to why they have not obtained any receipt from the respondents for delivery of gold is a matter of evidence. Hence no reliance can be placed at this stage on the income-tax returns for granting interim order, on the basis of the self-made statements, in the absence of any other supporting and clinching evidence. In fact, in para 17 of the impugned order the learned Single Judge has given detailed reasons for discarding this argument.

6. The next line of arguments of the learned senior counsel for the appellants is that the findings of the learned Single Judge that there is no material to show that the property at Pallikaranai was offered as security towards the trade transaction between the appellants and the respondents is not correct. Further, the learned senior counsel for the appellants took us through the letter dated 22.6.2004 given by the respondents 2 to 4 to the Senior Officer, Debt Recovery Tribunal No.I, Chennai to hand over the sale certificate and other documents of title regarding the property at Pallikaranai directly to Mr.Suresh Kumar, the second appellant herein and contended thereon that unless there is an intention of giving the particular property as security there is no necessity for the respondents to give this letter to the Senior Officer, Debt Recovery Tribunal to hand over the title documents in favour of the second appellant.

7. Opposing the above contentions, the learned senior counsel for the respondents argued that the circumstances under which the letter was issued is in no way connected to the trade transaction. According to learned senior counsel for the appellants, this property was taken in auction by the respondents on 12.12.2003 by paying 25%

of the earnest money deposit, but, immediately the sale certificate was not issued by the Senior Officer, DRT, since there was a third party claim pending. By the time the third party application was disposed of, the respondents were not in a position to pay the balance amount. At this juncture, the appellants came forward to extend the financial assistance to the respondents for which the Debt Recovery Tribunal did not agree stating that the rules do not permit to do so. In the meantime the appellants, who came forward to extend financial assistance also went back and, therefore, the respondents entered into an agreement with one J.Aswin, who agreed to give financial assistance and as such, connecting this letter dated 22.6.2004 with the trade transaction is not proper. We have carefully considered the arguments of the learned senior counsel on both sides. On perusing the documents we find that except the receipt dated 11.6.2003 issued by the Recovery Officer, Debt Recovery Tribunal towards 25% of the earnest money deposit made by the respondents and also the letter dated 22.6.2004 issued by the respondents to the Senior Officer, Debt Recovery Tribunal no other document was available to show that the property was given as security to the appellants towards the suit transaction. But, on the other hand, the respondents categorically stated that they have given two valuable properties one standing in the name of their mother and the other standing in the name of the respondents 2 and 3 at Kodaikanal as security, which properties were also got transferred mala fide in the name of the first appellant and also in the name of the husband of the third appellant, Chitra Devi the mother of the appellants by misusing the power of attorney executed in her favour.

8. It is pertinent to note that in the affidavit filed by the appellants these facts were not revealed. Only after filing the counter by the respondents, the appellants by way of reply admitted this fact stating that these properties were given as security in respect of different transactions which the respondents had with their mother. When it is the specific allegation of the respondents that two valuable properties were given as security in respect of this trade transaction the appellants would have filed the necessary documents to prove their contention that the properties were given as security in respect of some other transaction. On the other hand, by baldly stating that it is not in respect of the trade transaction will not help the appellants in any way to make out a *prima facie* case for granting injunction in respect of the suit properties. Therefore, the finding of the learned Single Judge that the appellants have suppressed these facts cannot be challenged.

9. With regard to the deposit of blank cheques, the argument of the learned senior counsel for the respondents is that those blank cheques were given only as security even much before the agreement was entered into, but, without any prior intimation the appellants have presented the cheques in the bank. Therefore, the presentation of the cheques cannot in any way establish the appellants' case,

particularly in the absence of any averment in the legal notice sent by them (the appellants) under section 138 of the Negotiable Instruments Act that these cheques were connected with the suit trade transaction. In our opinion, the argument put forth by learned senior counsel for the respondents seems to be reasonable and tenable. Therefore, the finding of the learned Single Judge that under what circumstances the cheques were presented is a matter of evidence cannot be challenged.

10. In this regard, learned senior counsel for the appellants relied on a judgment in RAJENDRAN Vs. SHANKAR SUNDARAM (2008) 2 SCC 724) in support of his contention. But, the dictum laid down in the said decision is not applicable to the facts and circumstances of the present case, where no *prima facie* case is made out. We do not find any infirmity in the order passed by the learned Single Judge.

For the reasons stated above, the common order passed by the learned Single Judge is confirmed and both the appeals are dismissed. There shall be no order as to costs. Consequently, connected M.Ps. are closed.

Sd/-
Asst. Registrar.

Sub Asst. Registrar.

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To

The SAR
Original Side,
High Court of Madras.

+ 2 CC to Mr.B.S.Gnanadesikan Advocate SR NO.25958

+ 1 CC to Mr. K.Bhawatharini Advocate SR NO.25962

Pre-delivery judgment in
O.S.A.No.407 and 408 of 2007

CMP (CO)
JJM (07.05.08)