



S.A.(MD) No.688 of 2012

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED: **23.08.2024**

CORAM

THE HONOURABLE Ms.JUSTICE **P.T.ASHA**

S.A.(MD) No.688 of 2012

Palanisamy

... Appellant

VS.

1.Muniyandi

2.Madasamy

...Respondents

Prayer:- Second Appeal filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree passed in A.S.No.15 of 2010 on the file of the Principal District Judge, Virudhunagar District at Sriviliputhur dated 28.10.2011 confirming the fair and decreetal order passed in E.a.No.452 of 2006 in E.P.No.28 of 2006 in O.S.No.103 of 2005 on the file of the Subordinate Judge, Srivilliputhur dated 11.03.2010.

For Appellant : Mr.R.Niresh Kumar

For R1 : Mr.M.Thirunavukarasu

For R2 : No appearance

JUDGMENT

The plaintiff is the appellant before this Court. He challenges the judgment and decree in A.S.No.15 of 2020 on the file of the Principal District



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Judge, Virudhunagar District at Srivilliputhur dated 28.10.2011 confirming the judgment and decree passed in E.A.No.452 of 2006 in E.P.No.28 of 2006 in O.S.No.103 of 2005 on the file of the Subordinate Court, Srivilliputhur dated 11.03.2010.

2. The parties are referred to in the same litigative status as before the Trial Court.

PLAINTIFF'S CASE:

3. The facts of the case are as follows:

3.1. This second appeal emanates from a claim petition filed by the first respondent herein under the provisions of Order XXI Rule 57 and 58 of the Code of Civil Procedure in the execution proceedings in E.P.No.28 of 2006 in O.S.No.103 of 2005.

PETITIONER'S/CLAIMANT'S CASE:

3.2. The suit property originally belonged to one J.S.Pillai, S/o. Madasamy Pillai and the said J.S.Pillai had executed a settlement deed on 22.10.1980 in favour of his sisters and one Kalimuthu, who is the father of the second respondent. The said Kalimuthu accepted the gift and since then was in



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possession and enjoyment of the suit property. The said Kalimuthu had constructed a terraced house over the suit property and he had died leaving behind him surviving his wife, Madathiammal, sons, the second respondent herein and his brother, Muniswaran and the daughter, Muthulakshmi three years prior to the filing of the claim petition.

3.3. Kalimuthu during his life time had executed a mortgage deed along with his daughter, Muthulakshmi with the Srivilliputhur Agricultural Co-operative Development Bank in the year 1987. The suit property was the subject matter of the mortgage. Once again in the year 2002, the said Kalimuthu and his daughter, Muthulakshmi had mortgaged the suit property to the very same Cooperative Development Bank and raised a loan of Rs.63,500/-. To discharge the debts, the said Kalimuthu and his legal heirs including the second respondent had executed a power of attorney in favour of one Thangavel, S/o.Velunaickar on 25.08.2005 and another power of attorney in favour of one Aarumuga Pandian in respect of another property. The said Thangavel and Aarumuga Pandian had paid the sale consideration to the legal heirs of Kalimuthu and the possession was handed over to them.

3.4. The petitioner/claimant had purchased the suit schedule property on



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03.10.2005 from the power of attorney, Thangavel for a valuable consideration.

From the date of purchase, he alone is in possession and enjoyment of the same.

The petitioner later came to know that the schedule mentioned property was to be auctioned on 08.12.2006 and on enquiry, he came to know about the judgment and decree passed in O.S.No.103 of 2005. The petitioner would submit that the property is a self acquired property of Kalimuthu and the second respondent had only got a share in the property and not the entire property.

Therefore, he prayed to have the attachment raised.

CASE OF THE 1ST RESPONDENT/PLAINTIFF:

4. The plaintiff, the first respondent, had filed a counter *inter alia* denying the contentions raised in the petition and contending that the petition itself was not maintainable. The first respondent/plaintiff would submit that the property was already attached in I.A.No.243 of 2005 in O.S.No.103 of 2005 and knowing the facts, the petitioner had purchased the property. The plaintiff/first respondent would submit that the petition itself had been filed in collusion with the second respondent/sole defendant. The receipt dated 25.08.2005 and the sale effected were hit by *lis pendens*. Therefore, the plaintiff/first respondent sought to have the claim petition dismissed.



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4.1. During the enquiry, the petitioner had adduced evidence as P.W1 and Thangavel was examined as P.W2. Exs.P1 to P12 were marked on their side. On the side of the plaintiff/first respondent, the first respondent had examined himself as R.W1 and Exs.R1 to R4 were marked.

TRIAL COURT:

5. The learned Subordinate Judge, Srivilliputhur had proceeded to allow the petition and raised the attachment granted in I.A.No.243 of 2005 in O.S.No. 103 of 2005. The learned Judge drawing from the deposition of R.W1 observed that from the very deposition it was clear that the second respondent had only a 1/4th share in the suit schedule property. That apart, the said Kalimuthu, the original owner, had mortgaged the properties on 27.12.1997 and 06.02.2002 as evidenced by Ex.R4, encumbrance certificate and therefore, the subsequent attachment was only subject to the aforesaid encumbrance. The said Thangavel has got general power from the legal heirs of Kalimuthu under Ex.P2 and he has discharged the aforesaid mortgages under Ex.P3 and Ex.P4 and thereafter sold the property under Ex.P5 to the claimant. Therefore, the attachment of the entire property was wrong, as the second respondent only had 1/4th share over the property. The learned Judge therefore held that the entire property cannot be attached and brought to sale.



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APPELLATE COURT:

6. Aggrieved by the judgment and decree, the first respondent/the plaintiff had filed A.S.No.15 of 2010 on the file of the Principal District Court, Virudhunagar. The learned Judge also confirmed the judgment and decree of the trial Court.

SECOND APPEAL:

7. Challenging the same, the plaintiff is before this Court. The above second appeal has not been admitted and only notice was ordered.

8. On hearing the arguments of the learned counsel on either side, the following substantial question of law would arise:-

Whether the sale deed in favour of the petitioner on 03.10.2005 is void in the light of the order of attachment dated 15.09.2005 passed by the Sub Court, Srivilliputhur in I.A.No.243 of 2005 in O.S.No.103 of 2005?

SUBMISSIONS:

9. The learned counsel appearing for the appellant/claimant would submit



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that the sale in favour of the claimant was invalid, since there was an order of attachment on 15.09.2005. The order of attachment was an conditional order and would therefore come into effect on the very same day when the order was passed ie., on 15.09.2005 and this order had been made absolute on 03.10.2005. It is only thereafter that the property has been sold to the claimant and therefore, the sale was void.

10. In support of the said arguments, the learned counsel for the appellant would rely upon the judgment reported in **2000 (II) CTC 13 (D.V.Raghavan Vs. A.J.Suresh Kumar and another)**, wherein this Court had held as under:

"15. In my view. Order 21, Rule 54 (3) Madras Amendment will also apply to the facts of this case. Order 21, Rule 54 (3) runs as follows:

"Order of attachment shall be deemed to have been made as against transferees without consideration from the judgment-debtor from the date of the order of attachment and as against all other persons from the date on which they respectively had knowledge of the order of attachment or the date on which the order was



duly proclaimed under sub-rule (2) whichever is earlier"."

11. The learned counsel would further submit that the discharge of the mortgage has been done after the conditional order of attachment has been passed.

12. *Per contra*, the learned counsel appearing for the respondents would submit that a perusal of Ex.R4, encumbrance certificate, would clearly indicate that the property had been mortgaged by Kalimuthu even as early as on 27.12.1997 and 06.02.2002, much before the filing of the suit by the first respondent. He would submit that the said Thangavel though appointed as power agent was in fact a purchaser since he had discharged the entire amounts due under two mortgage deeds and thereafter sold the property to the claimant. He would further submit that the very conduct of the first respondent was suspect, since even before the attachment had become absolute entry was recorded in the encumbrance certificate. Since as per the order, the attachment was to come into effect on 03.10.2005 if the second respondent failed to furnish security, however the entry has been made in the encumbrance certificate on the very next day ie., on 16.09.2005 as evidenced by Ex.R4, the encumbrance



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certificate, whereas Ex.R3 would show that the affixure has been done on 18.09.2005. He would further submit that the said Thangavel has discharged the mortgage even prior to the attachment order and had sold the property before the attachment could come into effect.

13. He would rely upon the judgment of the Hon'ble Supreme Court reported in 2009 5LW 361 (N.Kailasam Vs. K.Rajeh) and the judgment of this Court reported in **2000 (II) CTC 524 (Sri Krishna Chit Funds (Sattur Private Limited) Vs. R.S.Pillai and another)** in support of his argument regarding as to how the order of attachment has to be carried out. It is his contention that the attachment has not been effected as per procedure.

14. He would further rely upon the judgment of this Court in ***W.P.(MD) No.33223 of 2019 (P.Tamilselvi Vs. The Deputy Registrar of Cooperative Societies, Kancheepuram District and another)*** as well. He would submit that the Courts below have rightly considered the evidence on record and had rightly dismissed the appeal and no substantial question of law has been framed.

15. Heard the learned counsel on either side.



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16. The entire arguments on the part of the appellant would rest on the fact that the sale in favour of the claimant was invalid, as on the date of the purchase by the claimant, there was already an order of attachment in place. On 15.09.2005, the learned Subordinate Judge, Sriviliiputhur, had passed a conditional order of attachment, which reads as follows:

"Heard. Records perused. Issue notice to respondent to furnish security for 3,00,000/- failing which the petition mentioned property will be attached. Batta in 3 days by 03.10.2005"

17. On 03.10.2005, the following order has been passed:-

"Court notice refused as affixed. Security not furnish. Property attached and valued. Sub Registrar Office copy served. Respondent called absent. Set exparte. Petition allowed. Attachment made absolute. Id/-C.K., Sub Judge., 03.10.2005."

18. The learned counsel for the appellant relying upon the judgment reported in **2000 (II) CTC 13, (D.V.Raghavan Vs. A.J.Suresh Kumar and another)** would submit that the attachment had come into effect on 15.09.2005 itself. However, it is seen that the defendant in the suit, Kalimuthu, had a right



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only to a 1/4th share of the property, whereas the entire property has been attached.

19. That apart, it is seen that the entry of the attachment has been made on 16.09.2005 as it is evident by Ex.R4, but Ex.R3 would show that the attachment before the order had been affixed on the suit property was only on 18.09.2005 and the warrant had been returned by the Senior Bailiff on 23.09.2005. It is not known as to how the Senior Bailiff could effect the attachment, when the first hearing fell due on 03.10.2005 and the conditional order gave the defendant time till 03.10.2005 to furnish security and it is only on the failure to furnish security that the attachment would come into effect. The claimant had purchased the property on 03.10.2005. Therefore, it is clear that the procedure for attachment has not been effected as per procedure.

20. In the judgment reported in **2000 (II) CTC 524 (Sri Krishna Chit Funds (Sattur Private Limited), through its Managing Director, Vs. R.S.Pillai and another)**, this Court had held that where the mandatory provisions of Order XXI Rule 58A and Order XXXVIII Rule 11B has not been followed, the order of attachment is liable to be raised. Therefore, the finding of the Courts below



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that the petitioner is a *bona fide* purchaser for value has to necessarily be upheld.

21. In fine, this Second Appeal stands dismissed. No costs.

Index : Yes / No
Internet : Yes/ No

23.08.2024

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To

- 1.The Principal District Judge,
Virudhunagar District at Sriviliputhur.
- 2.The Subordinate Judge,
Srivilliputhur.
- 3.The Section Officer, (2 copies)
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.



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P.T.ASHA, J.

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