

C.M.A(MD)No.20 of 2024

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 27.04.2026

PRONOUNCED ON: 10.07.2026

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

C.M.A(MD)No.20 of 2024

and

C.M.P.(MD)No.313 of 2024

Krishnasamy : Appellant/Petitioner/Plaintiff

Vs.

1.Ganesan : 1st Respondent/1st Respondent/Defendant

2.Muthukumar : 2nd Respondent/2nd Respondent/3rd party

PRAYER:- Civil Miscellaneous Appeal filed under Order 43 Rule 1(P) C.P.C., against the order dated 11.10.2023, passed in I.A.No.395 of 2019 in O.S.No.103 of 2019, on the file of the Principal District Court, Karur.

For Appellant : Mr.K.Chengz Khan

For Respondents : Mr.V.Balaji
for R.2

: No Appearance for R.1



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JUDGMENT

This Civil Miscellaneous Appeal is directed against the order passed in I.A.No.395 of 2019 in O.S.No.103 of 2019, dated 11.10.2023, on the file of the District Court, Karur.

2. The appellant is the plaintiff. He filed a suit against the first respondent/defendant for recovery of Rs.36,86,250/- due on promissory note dated 01.02.2017, executed by the defendant in favour of the plaintiff. The petitioner/plaintiff also filed an application invoking Order 38 Rule 5 C.P.C., seeking attachment of the two petition mentioned properties before the judgment in I.A.No.395 of 2019 against the defendant and one Muthukumar – second respondent herein.

3. The case of the plaintiff is that the first respondent/defendant borrowed a sum of Rs.25,00,000/- from the petitioner/plaintiff on 01.02.2017 and executed a promissory note agreeing to repay the same with interest at 0.05 paise per hundred per day either to him or to his order on demand, that the first respondent despite repeated demands of

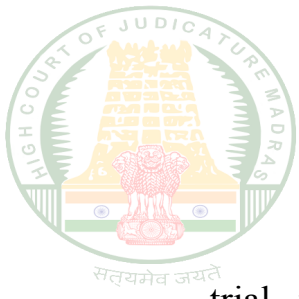


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the petitioner, has not repaid any amount towards principal or interest, that the petitioner, in the meanwhile, came to know from one Maniyarasu that the respondent has been making hectic attempts to alienate “A” schedule properties in favour of the third parties to defeat and defraud the loan amount, that the petitioner also came to know that the first respondent has alienated “B” schedule properties in favour of the second respondent on 04.03.2019 with malafide intention to defeat the rights of the petitioner and the said document was created fraudulently by both the respondents to defeat the rights of the creditors and that therefore, he was constrained to file the above petition seeking attachment before the judgment.

4. The first respondent/defendant filed a counter statement. But the second respondent remained exparte. The learned trial Judge, after enquiry, passed an order dated 18.04.2022 allowing the petition and ordering attachment of the petition mentioned properties before the judgment. It is further evident that both “A” and “B” schedule properties came to be attached on 02.06.2022 and the attachment was made absolute on 06.06.2022. It is further evident that subsequently, after full fledged

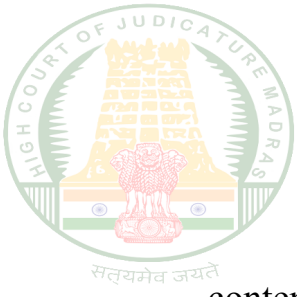


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trial, the learned District Judge passed a judgment and decree dated 31.03.2023, decreeing the suit as prayed for.

5. Thereafter the second respondent filed an application to condone the delay under Section 5 of the Limitation Act for filing a petition to set aside the ex parte order and also a petition under Order 9 Rule 13 C.P.C., for setting aside the ex parte order in I.A.No.7 of 2023 and I.A.No.8 of 2023 respectively and after enquiry, both the petitions came to be allowed vide orders dated 11.04.2023 and 30.06.2023 respectively. In pursuance of the same, the petition for attachment before judgment in I.A.No.395 of 2019 was restored to file as against the second respondent. The second respondent filed a counter statement opposing the prayer for attachment before judgment, contending that he had purchased the 'B' Schedule property from the first respondent under a sale deed dated 04.03.2019, much prior to the institution of the suit. He further contended that he had not been impleaded as a party to the suit and that an order of attachment before judgment would not affect the pre-existing rights of a person who had acquired title prior to the institution of the suit and who was not a party to the proceedings. It was, therefore,



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contended that the petition seeking attachment before judgment, insofar as it related to the second respondent and the 'B' Schedule property purchased by him prior to the filing of the suit, was not maintainable and was consequently liable to be dismissed.

6. The learned Principal District Judge, after enquiry, passed the impugned order dated 11.10.2023, partly allowing the petition and dismissed the petition as against the second respondent in respect of “B” schedule properties and also attachment in respect of “B” schedule properties was ordered to be raised. Aggrieved by the impugned order, the petitioner/plaintiff has filed the present Civil Miscellaneous Appeal.

7. It is not in dispute that one another creditor of the defendant filed Insolvency Petition in I.P.N.43 of 2019, wherein the said creditor has challenged the validity and legality of the sale deed executed by the first respondent in favour of the second respondent and that the said I.P., is pending for enquiry.

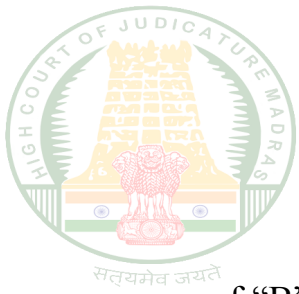


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8. The learned Counsel for the appellant would mainly contend that the first respondent is a chronic defaulter, who borrowed money from so many persons and in collusion with the second respondent, executed a sham and nominal sale deed in favour of the second respondent, that the second respondent had no bonafide intention in purchasing the property, that the learned District Judge failed to consider the pendency of the Insolvency proceedings, where the validity of the sale deed in favour of the second respondent is under challenge, that the second respondent is acting like a benami for the first respondent and as such, he could not have a separate case claiming “B” schedule properties belongs to him, that the learned District Judge ought not to have entertained the applications in I.A.Nos.7 and 8 of 2023 for setting aside the order of attachment before the judgment and that therefore, the impugned order is liable to be set aside.

9. The learned Counsel for the second respondent would mainly contend that he purchased the “B” schedule properties on 04.03.2019 and the suit itself came to be filed on 12.09.2019, after the lapse of six months since the date of sale, that the first respondent was not the owner



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of “B” schedule properties on the date of filing of the suit, that since the second respondent is not a party to the suit and is the owner of “B” schedule properties on the date of suit, is entitled to get protection under Order 38 Rule 10 C.P.C., and that the impugned order, which is very much valid and legal, is liable to be sustained.

10. It is pertinent to note that the learned District Judge, after conducting necessary enquiry in the petitions in I.A.Nos.7 and 8 of 2023 in O.S.No.103 of 2019, passed orders in favour of the second respondent and thereby setting aside the exparte order passed against him in I.A.No. 395 of 2019, dated 18.04.2022. Admittedly, the appellant has not challenged the orders passed in I.A.Nos.7 and 8 of 2023 in O.s.No.103 of 2019 and as such, the said orders have already attained finality. In pursuance of the orders passed therein, the petition in I.A.No.395 of 2019 as against the second respondent was restored to file.

11. The learned Counsel for the appellant would mainly contend that the first respondent in collusion with the second respondent has created a sham and nominal sale deed with the malafide intention to



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defeat the rights of the creditors including the petitioner and that since the sale deed in favour of the second respondent is not legally valid, attachment of “B” schedule properties before judgment cannot be found fault with and therefore, the impugned order raising the attachment in respect of “B” schedule properties cannot legally be sustained.

12. The learned Counsel for the appellant placed reliance on the judgment of the Division Bench of this Court in ***K.Thirumalaivadivu Vs. S.Rajasekaran and another*** in C.M.A.(MD)Nos.360 and 361 of 2012, dated 23.12.2021 and the relevant portion is extracted hereunder:

“18.The trial Court had miserably failed to examine the sale deed Ex.P.3, dated 03.05.2010 in the light of the recital found in the said document in respect of the consideration and the contradictions found in the application to raise attachment as well as the plaint averments in O.S.No.87 of 2010. Unfortunately, the trial Court only concentrated the validity of pendente lite transaction. Even while testing the validity of transaction, the language of Section 53 of the Transfer of Property Act, which legalize the transaction only if there is no collusion between the parties to defeat the right of any other person under any decree or order. Also, if the transfer of immovable property is made with intent to defeat or delay



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the creditor of the transferor, the same is voidable at the instance of the creditor. In the case on hand, the inconsistency regarding payment of sale consideration as exposed above clearly proves Ex.P.3 is a collusive document and also a fraudulent document created with an intention to defeat the creditor and the order of the Court.”

13. In the above decision, the sale deed came to be executed during the pendency of the suit. The point that arose for consideration before the High Court was whether the transfer of the suit property by the first respondent in favour of the second respondent, effected pendente lite, after receipt of the pre-suit notice, after service of summons in the suit, and after issuance of notice in the application for attachment before judgment, could be regarded as a bona fide transaction or whether it was vitiated by collusion and fraud. But, the facts of the present case stand on an entirely different footing. Admittedly, the sale deed in favour of the second respondent was executed prior to the institution of the suit. Therefore, the ratio laid down in the above decision has no application to the facts of the present case.

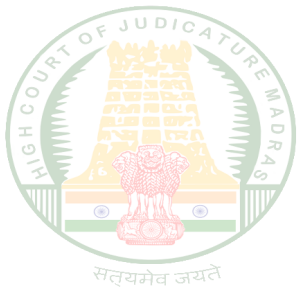


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14. The learned Counsel for the appellant also placed reliance on the judgment of the Hon'ble Supreme Court in ***Kewal Krishan Vs. Rajesh Kumar and Others*** reported in ***AIR 2022 SC 564*** and the relevant passage is extracted hereunder:

“16. Now, coming back to the case in hand, both the sale deeds record that the consideration has been paid. That is the specific case of the respondents. It is the specific case made out in the complaints as originally filed that the sale deeds are void as the same are without consideration. It is pleaded that the same are sham as the purchasers who were minor sons and wife of Sudarshan Kumar had no earning capacity. No evidence was adduced by Sudarshan Kumar about the payment of the price mentioned in the sale deeds as well as the earning capacity at the relevant time of his wife and minor sons. Hence, the sale deeds will have to be held as void being executed without consideration. Hence, the sale deeds did not affect in any manner one half share of the appellant in the suit properties. In fact, such a transaction made by Sudarshan Kumar of selling the suit properties on the basis of the power of attorney of the appellant to his own wife and minor sons is a sham transaction. Thus, the sale deeds of 10th April 1981 will not confer any right, title and

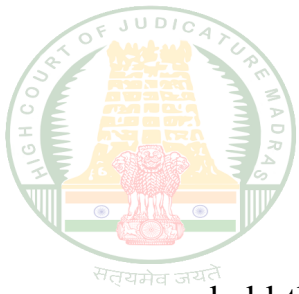


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interest on Sudarshan Kumar's wife and children as the sale deeds will have to be ignored being void. It was not necessary for the appellant to specifically claim a declaration as regards the sale deeds by way of amendment to the plaint. The reason being that there were specific pleadings in the plaints as originally filed that the sale deeds were void. A document which is void need not be challenged by claiming a declaration as the said plea can be set up and proved even in collateral proceedings. Hence, the issue of bar of limitation of the prayers for declaration incorporated by way of an amendment does not arise at all. The additional submissions made by the respondents on 16th November 2021 have no relevance at all."

15. The above decision is also clearly distinguishable to the case on hand. As already pointed out, it is admitted by both parties that the Insolvency proceedings in I.P.No.43 of 2019 is pending on the file of the Subordinate Court, Karur, wherein the validity and the legality of the sale deed dated 04.03.2019 is under challenge. At this juncture, it is necessary to refer the judgment of ***L.K. Prabhu @ L. Krishna Prabhu (Died) Through Lrs. Versus K.T. Mathew @ Thampan Thomas & Others*** reported in ***2025 INSC 1364***, wherein it has been specifically



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held that an order of attachment before judgment under Order 38 Rule 5 C.P.C., cannot fasten liability upon a transferee in respect of a property that stood transferred prior to the institution of the suit and that the allegations of fraudulent transfer must be adjudicated only under Section 53 of the Transfer of Property Act and the relevant passages are extracted hereunder:

“12. Applying the above legal framework to the facts of the present case, it is apparent that the registered sale deed in favour of the original applicant was executed on 28.06.2004 i.e., several months prior to the institution of the suit in O.S. No. 684 of 2004. Consequently, at the time of filing of the suit, the property stood transferred and was no longer in the possession or ownership of Defendant No. 3. In such circumstances, the essential condition for invoking attachment before judgment under Order XXXVIII Rule 5 CPC – that the property belongs to the defendant on the date of institution of the suit – is absent. The plaintiff’s remedy, if any, lies exclusively under Section 53 of the T.P. Act, which provides for setting aside a transfer made with intent to defraud creditors.

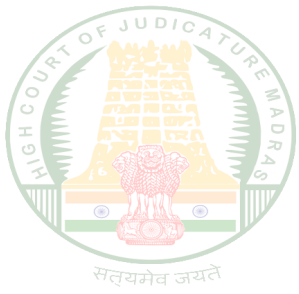


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13. While the trial Court and High Court examined the claim petition under Order XXXVIII Rule 8 CPC read with Order XXI Rule 58 CPC, the adjudication of the sale deed's validity as a fraudulent transfer necessarily required determination under Section 53 of the T.P. Act. The mechanism under Rule 8, being a protective procedure designed for third-party claimants asserting independent rights in the property attached before judgment, cannot be expanded to transform the attachment procedure into a substantive enquiry under Section 53 of the T.P. Act. Therefore, the attachment before judgment ordered on 13.02.2005 could not extend to the property already transferred to the original applicant on 28.06.2004."

16. The above decision squarely applies to the facts of the present case. Though the petitioner/plaintiff has alleged that the sale deed dated 04.03.2019 is sham, bogus and fraudulent, as observed by the Hon'ble Supreme Court, such allegations cannot be adjudicated in proceedings under Order XXXVIII Rule 5 C.P.C. The validity of the transfer can be examined only in appropriate proceedings under Section 53 of the Transfer of Property Act, 1882.

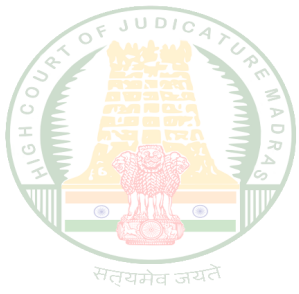


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17. Admittedly, the first respondent was not the owner of the 'B' Schedule property on the date of institution of the suit, as the property had already been conveyed to the second respondent under the registered sale deed dated 04.03.2019. Order XXXVIII Rule 10 C.P.C. specifically provides that an attachment before judgment shall not affect the rights of persons who are not parties to the suit and whose rights had accrued prior to such attachment. If a third party had acquired a valid legal right or interest in the property prior to the attachment, such right remains fully protected. Therefore, the subsequent order of attachment before judgment cannot affect the rights of the second respondent in respect of the 'B' Schedule property.

18. In view of the above discussion, this Court is of the considered view that the order of the trial Court dismissing the application for attachment before judgment insofar as the second respondent is concerned and consequently raising the attachment over the 'B' Schedule property is perfectly justified and does not warrant interference. Consequently, this Court holds that the Civil Miscellaneous Appeal is devoid of merits and is liable to be dismissed.



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19. In the result, the Civil Miscellaneous Appeal is dismissed.

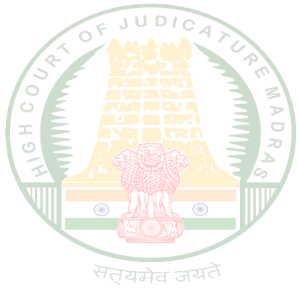
Consequently, the connected Civil Miscellaneous Petition is also dismissed. The parties are directed to bear their own costs.

10.07.2026

NCC : Yes : No
Index : Yes : No
Internet : Yes : No

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To

1. The Principal District Court, Karur.
2. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court, Madurai.



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K.MURALI SHANKAR,J.

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PRE-DELIVERY JUDGMENT MADE IN

C.M.A(MD)No.20 of 2024

10.07.2026