

THE HON'BLE SRI JUSTICE G. CHANDRAIAH

AND

THE HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

APPEAL SUIT No. 187 of 2016

JUDGMENT: (per Hon'ble Sri Justice A. Shankar Narayana)

The instant appeal is preferred by the plaintiff in O.S.No.4 of 2013 on the file of the V Additional District Judge, Nellore, aggrieved by the order and decree dated 08.02.2016 in I.A.No.280 of 2015 in I.A.No.4 of 2013 in the said suit raising attachment under Order 38 Rule 8 r/w Section 151 CPC, mainly on the ground that possession of the property alleged to have been purchased by the 1st respondent herein under Exs.P2 and P3 has been delivered to the appellant herein, prior to the alleged purchases; and the Court below went wrong in appreciating the stand taken by the plaintiff.

2. For the sake of convenience, we refer to the status of parties as they stand in O.S.No.4 of 2013.

3. The plaintiff filed the suit in O.S.No.4 of 2013 for recovery of a sum of Rs.62,73,000/- with interest at 18% per annum on Rs.60,00,000/- from the defendant based on a document said to have entered between the plaintiff and defendant on 21.05.2012, in the presence of mediators and also acknowledgement dated 25.09.2012, said to have been executed by the defendant. Along with the suit, the plaintiff also filed I.A.No.4 of 2013 under Order 38 Rule 5 r/w Section 151 of CPC, seeking conditional attachment of the petition

schedule property consisting of 96.05 ankanams or 768.4 Sq.yards, of vacant site situated in Survey Nos.649, 648 - C.A.S.No.603, 604/1 - Layout L.P.No.82/93 – Revised L.P.No.101/95 - Layout Plot No.724 within specified boundaries situate in Nellore Municipal Corporation, Nellore town municipality; for attachment in case the security as required was not furnished within the time fixed by the Court.

4. We would like to make it clear that the order passed by the Court below in I.A.No.4 of 2013 was not filed, instead, a copy of the Warrant was filed which was issued on 08.01.2013 to the bailiff requiring him to effect the same and take security for a sum of Rs.63,38,396/- by fixing the time frame of 48 hours and attach the property in case the defendant fails to furnish security. Since the defendant failed to furnish security as required, within the time frame, the Warrant was effected and report to that effect was filed before the Court below.

5. Subsequent thereto, the petitioner in I.A.No.280 of 2015 has come up with the said application objecting to the attachment effected by making an application under Order 38 Rule 8 r/w Section 151 of CPC. We would like to refer to petitioner in I.A.No.280 of 2015 as third party, who is the 1st respondent in the instant appeal.

6. The appellant filed his counter, and even the 2nd respondent-defendant has filed his counter. During enquiry, on behalf of the parties, no oral evidence was adduced, but however, on behalf of the

petitioner Exs.P1 to P4 were marked. Exs.P1 to P3 are registered sale deeds dated 28.07.2012, 01.11.2012 and 27.01.2014, respectively, and Ex.P4 is approved plan attested by a notary.

7. The Court below, having considered the material on record, found that a major chunk of the property to an extent of 85.77 ankanams was purchased by the 1st respondent herein even prior to issuance of order of attachment and effecting the same on 01.11.2012 under Ex.P2, though, the balance extent of 10.28 ankanams was purchased subsequent to effecting attachment. Placing reliance on a decision of this Court in **K. Mallesh Mudiraj v. C. Sudhakar**¹, wherein it was held that as a mandatory requirement before passing the judgment, the Court has to satisfy that the defendant is intending to obstruct or delay the decree that may be passed and also the decision in **Sripathi Panditarajula Venkanna Baba v. Varalakshmi Finance Corporation, Rajahmundry**², observing that no satisfactory reasons were put-forth to believe that the 2nd respondent alienated the petition schedule property in favour of the petitioner to delay or defeat the decree that would be passed in O.S.No.4/2013 against him, raised attachment made in I.A.No.4 of 2013 by allowing the said application in I.A.No.280 of 2015.

8. The said order is under challenge in the instant appeal raising various grounds. One of them relates to the sale transaction under

¹. 2007 (4) ALD 369

². 1996 (4) ALD 453 (DB)

Ex.P3, a registered sale deed, dated 27.01.2014, which transpired subsequent to effecting the attachment, and, therefore, the Court below was not right in raising the attachment. Collusion between the respondents 1 and 2 in the instant appeal, is also attributed by the appellant stating that the Court below, somehow, overlooked the said aspect. It is further stated that the Court below, somehow, overlooked the fact that the transactions under Exs.P1 and P3 were created and they are fraudulent and, therefore, sought to set aside the order and decree passed by the Court below.

9. Learned counsel for the appellant would submit that the Court below was not right in raising the attachment as, part of the property was sold subsequent to attachment. He would also submit that in I.A.No.280 of 2015, the 1st respondent herein has not affirmed the ground that the proposed alienation or alienation was intended to delay or defeat the decree that would be passed and, therefore, that ground was not available and the Court below, somehow, still, laid emphasis on the said ground while adjudicating upon the controversy in the interlocutory application. He would further submit that the very sale under Ex.P3 is void, and, therefore, the Court below was not right in raising attachment by allowing I.A.No.280 of 2015. It is also his submission that the proceedings in I.A.No.280 of 2015 ought to have been conducted treating it as if it was a suit proceeding as it was a Claim Petition laid by a third party and provisions of Order XXI Rule

58 *mutatis mutandis* will apply and, therefore, the procedure adopted by the Court below was wrong.

10. On the other hand, learned counsel for the 1st respondent would submit that the basic requirement for recording satisfaction by the Court below in issuing order of attachment was not complied with, as the affidavit filed in I.A.No.4 of 2013, by the appellant herein does not spell out the same. It is his further submission that out of 96.05 ankanams, the 1st respondent purchased 85.77 ankanams much prior to the filing of the suit and, therefore, the attachment order cannot affect the rights of the 1st respondent. He would also submit that since the other extent of 10.28 ankanams was acquired for construction of complex where the municipal authority has mandated a minimum extent that was required to raise the complex, the 1st respondent was compelled to go for the balance extent of 10.28 ankanams which was purchased on 27.01.2014 under Ex.P3. According to him, the 1st respondent was not aware of the filing of suit and making application in I.A.No.4 of 2013 and obtaining attachment order and effecting attachment for that part of the property.

11. Firstly, we would like to advert to the submission of the learned counsel for the appellant that the Court below has not adhered to the procedure for disposal of I.A.No.280 of 2015 by treating it as a suit proceeding. As could be gathered from the grounds agitated, such a plea was not put-forth in the grounds of appeal and even otherwise, we are not convinced with the submission of the learned counsel for

the appellant that the appellant was prohibited from leading any evidence, either oral or documentary, but, surprisingly, no piece of document was filed on his behalf to substantiate the stand he has taken.

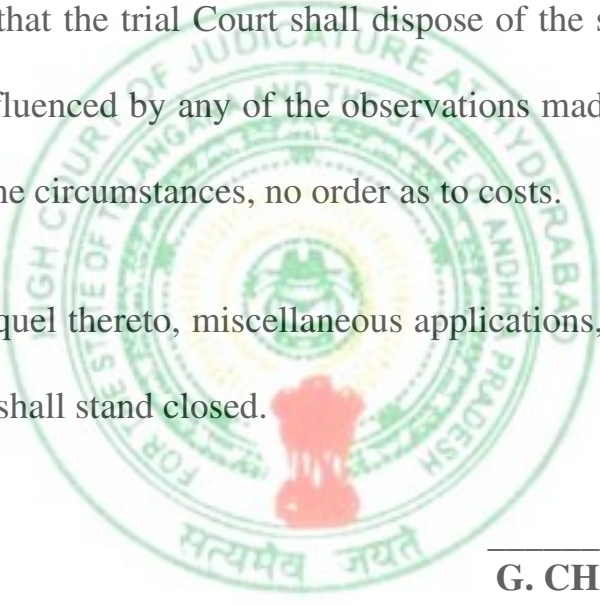
12. Concerning the second ground that the 1st respondent could not have taken the stand that was open to the 2nd respondent herein as to the mandatory requirement before passing an order of attachment before judgment that the Court should satisfy that the defendant is intending to obstruct or delay the decree, we are of the view, that the said submission is without any substance, for the reason that when the rights of a party, who is not a party to the suit proceedings, despite having got registered sale deeds in his favour for major portion of land, sought to be attached shown in the petition schedule, certainly, it is open for him to agitate the same, though, he is not the defendant in the suit. Even otherwise, the Court cannot be precluded from raising attachment on non-incorporation of mandatory requirement which is the basic ingredient to seek attachment before judgment. In that view of the matter, we are not convinced with the said submission.

13. Even in regard to the submission, that there has been collusion between the 1st and 2nd respondents herein and documents Exs.P2 and P3 are fraudulent ones, it is difficult at this stage, to decide the alleged fraud or collusion which requires a detailed probe which can be done during trial of the suit which is pending before the Court below. We would like to observe that, though, the record makes it clear that not

only respondents 1 and 2 are related, but even the petitioner is related to respondents 1 and 2, and, thus, the parties in the instant appeal are inter-related and, therefore, the ground of collusion attributed to respondents 1 and 2 herein can only be gone into in the suit which is pending adjudication before the Court below.

14. Thus, we find no merit in the instant appeal and, consequently, affirming the order and decree passed by the Court below in I.A.No.280 of 2015, we dismiss the instant appeal. We would also make it clear that the trial Court shall dispose of the suit in O.S.No.4 of 2013, uninfluenced by any of the observations made herein before. However, in the circumstances, no order as to costs.

As a sequel thereto, miscellaneous applications, if any, pending in the appeal, shall stand closed.



G. CHANDRAIAH, J

A. SHANKAR NARAYANA, J

16th March, 2016
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